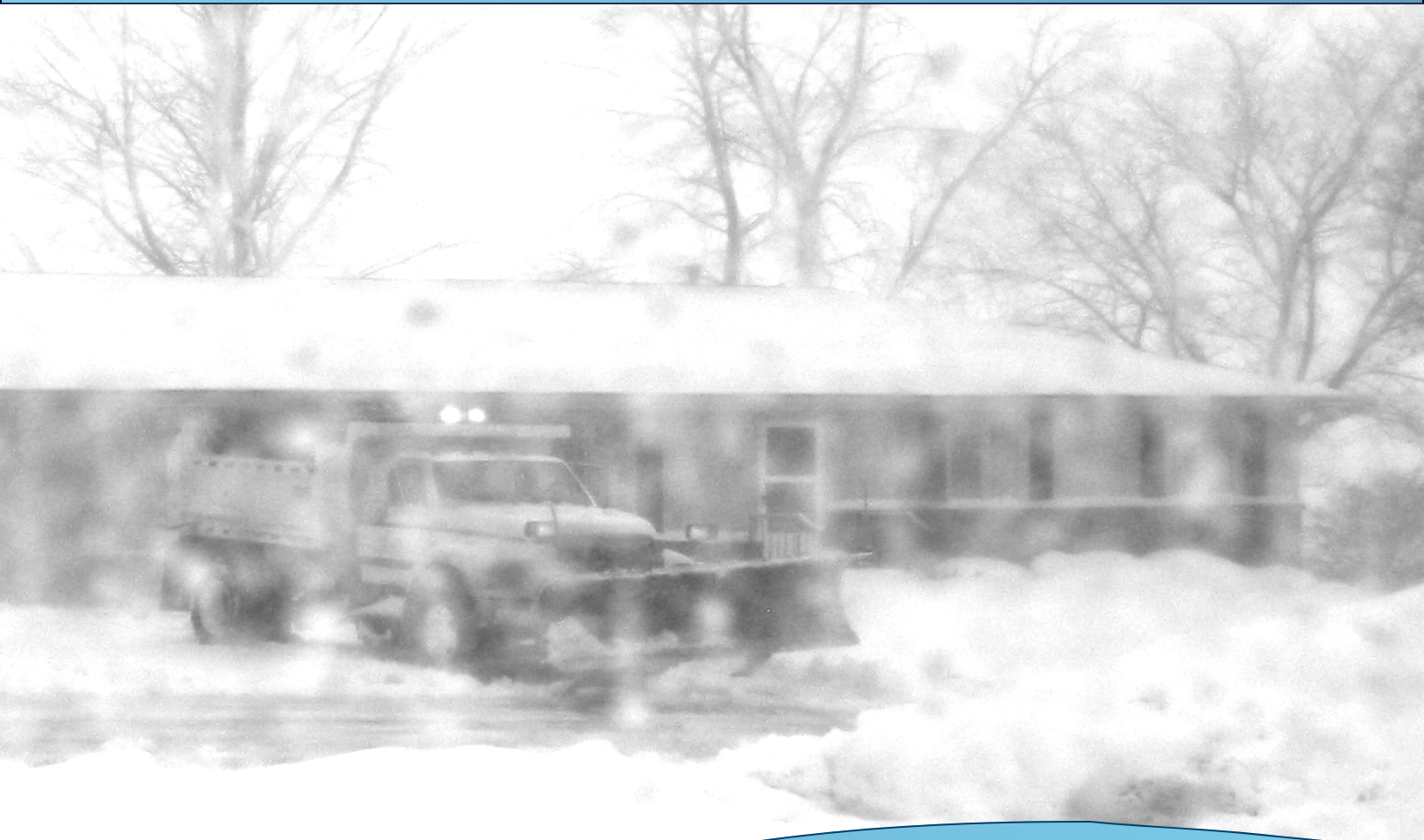


Turning A Blind Eye

An Investigation Into Misconduct by the City of Stuart's Street Superintendent,
and How City Leaders Responded to It



Iowa Citizens' Aide/Ombudsman
William P. Angrick II

Issued: November 6, 2009
Released: December 28, 2009

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Investigative Report

STATE OF IOWA
CITIZENS' AIDE/OMBUDSMAN

TURNING A BLIND EYE

**AN INVESTIGATION INTO MISCONDUCT BY
THE CITY OF STUART'S STREET SUPERINTENDENT,
AND HOW CITY LEADERS RESPONDED TO IT**

to:

Bob Airhart, Street Superintendent
Ashraf Ashour, City Administrator

&

Cheryl Marks, Mayor

&

Mick Askren, Councilman
Bryan Belden, Councilman
Neal Crawford, Councilman
Jeff Sherman, Councilman
Cory Waddell, Councilman

from:

William P. Angrick II
Citizens' Aide/Ombudsman

Case File 0700685

Issued: November 6, 2009
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Role of the Ombudsman

The Office of Citizens' Aide/Ombudsman (Ombudsman) is an independent and impartial investigative agency within the legislative branch of Iowa state government. Its powers and duties are defined in Iowa Code Chapter 2C.

The Ombudsman investigates complaints against most Iowa state and local government agencies. The Ombudsman can investigate to determine whether an agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive or otherwise objectionable, among other things. The Ombudsman may also decide to publish a report of findings and conclusions, and issue recommendations for improving agency law, policy or practices. If the report is critical of the agency, the agency is given the opportunity to reply to the report, and the reply is attached to the published report.

When the Ombudsman believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, he is required to refer the matter to the appropriate authorities.

Allegations

On February 26, 2007, we received a complaint from a citizen, Dr. Christian Sebrasse, who alleged that the City of Stuart's street superintendent, Bob Airhart, repeatedly used City equipment for private purposes. The citizen added that Stuart City Administrator Ashraf Ashour, Mayor Cheryl Marks, and the Stuart City Council failed to adequately address the issue despite numerous complaints lodged by him and other citizens.

During the course of our investigation, it was learned that Airhart later issued a citation to Sebrasse for failing to clear snow from the sidewalk in front of his dental office. Sebrasse told us he believed the citation was issued as retribution for reporting Airhart's personal use of City equipment.

We issued a formal notice of investigation to Mayor Marks, City Administrator Ashour, and Street Superintendent Airhart on April 30, 2007. Airhart's actions were at that point alleged to be contrary to law and policy, unfair, and improperly motivated.

Investigation

The investigation was conducted by Assistant Ombudsman Bert Dalmer.

To the extent possible, we investigated several purported instances where Airhart was alleged to have used public equipment for private purposes. We attended a City Council meeting and reviewed past meeting minutes, personnel records, employee timesheets, invoices and other correspondence and notes. Audiotapes of City meetings and photographs made by private citizens were reviewed. In addition, we checked records of

the National Weather Service and surveyed the scene where the alleged incidents took place.

We asked questions of 19 individuals and conducted sworn interviews of two City officials, two City employees, and two private citizens. Records from a private business were subpoenaed and a sworn statement attesting to the meaning of those records was provided.

We also reviewed a written legal opinion from the Stuart City Attorney and conducted our own legal analysis of the Iowa Code, Iowa Attorney General opinions, City ordinances, City policies, policy drafts and case law, as well as guidelines from the Iowa League of Cities.

Relevant laws and policies

Iowa law generally prohibits the private use of public equipment when it fails to serve a public purpose.

Article III, Section 31 of the Iowa Constitution mandates that:

[N]o public money or property shall be appropriated for local, or private purposes, unless such an appropriation, compensation, or claim, be allowed by two thirds of the members elected to each branch of the general assembly. (Emphasis added.)

The Iowa Attorney General has concluded that this constitutional provision prohibits cities from authorizing the use of their property by city employees for private use, absent the express permission of the Iowa Legislature.¹

When a private use of public property is motivated by private gain, it may constitute the state crime of official misconduct:

721.2 NONFELONIOUS MISCONDUCT IN OFFICE.

(5) Any public officer or employee, or any person acting under color of such office or employment, who knowingly ... uses or permits any other person to use the property owned by the state or any subdivision or agency of the state for any private purpose and for personal gain, to the detriment of the state or any subdivision thereof ... commits a serious misdemeanor.

At first glance, it would appear that the use of public property for private gain is per se illegal. However, the Iowa courts have declined to construct a hard-and-fast test to determine when and under what circumstances the private use of public property might also simultaneously serve the *public's* interest. One example of a case where a public

¹ 1980 Iowa Op. Atty. Gen. 720, 80-6-10 (citing *Love v. City of Des Moines*, 210 Iowa 90, 101, 230 N.W. 373, 378 (1930)).

employee could use public property for private benefit without breaking the law is when he drives to and from work in a government vehicle while on 24-hour call.² In such a case, the Iowa Attorney General has recommended that a government agency document its determination that the use served the public benefit; otherwise, it should require reimbursement from the employee in question.³

The Iowa Supreme Court has held that a public officer is “bound to the most meticulous care in the administration of his office and in the handling of any public property that might come into his possession. There can be no condonement of willful misconduct or corruption in office, even though the amount may appear to be inconsequential and trivial.”⁴

The courts have declared that the term “public purpose” in the context of misconduct must be construed broadly. In the words of the Iowa Supreme Court, an absence of public purpose must be “so clear as to be perceptible by every mind at first blush.”⁵

The Iowa Attorney General has more recently said “it was important ... to restrict rather than enlarge the private use of publicly owned vehicles in questionable cases.”⁶

In order to prove that official misconduct has taken place, it generally must be shown that a public employee’s wrongful conduct was willful; that is, it came with criminal intent.⁷

The statute of limitations for official misconduct does not begin to toll until that official terminates his employment with the agency.⁸

Separately from state law, Stuart’s City Council addressed the use of City equipment by policy. An employee handbook, adopted in 1994, imposed restrictions similar to state law. The policy that was in force at the time we began our investigation stated:

There will be no use of city owned equipment for personnel (sic) use unless approved by the Superintendent of the Utilities or Council.

That City policy is followed two paragraphs later with this:

Refusing to follow the orders of the Board of Utilities or Council is regarded as a serious enough offense to warrant immediate dismissal.

² 1979 Iowa Op. Atty. Gen. 160, 79-5-9.

³ 1995 Iowa Op. Atty. Gen. 95-5-1.

⁴ *State v. Canning*, 206 Iowa 1349, 1353, 221 N.W. 923, 924 (1928).

⁵ *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 93 (1977).

⁶ 1995 Iowa Op. Atty. Gen. 95-5-1.

⁷ 4 McQuillin Municipal Corporations, 12.237 (3rd Ed. 2002).

⁸ Iowa Code section 802.6 (2) (2009).

Findings and analysis

1. The use of City equipment

A history of complaints

Bob Airhart has been the City of Stuart's street superintendent since 1998. As part of his official duties, Airhart and a small staff are expected to keep snow and ice off city streets, alleys and sidewalks that border public property. Additionally, Stuart's street superintendent was, until recently, empowered to monitor the condition of public sidewalks for which private landowners are responsible.

Airhart also is a member of the City's volunteer fire-rescue unit. He does not keep any City vehicles at his home.

Airhart's direct supervisor is City Administrator Ashraf Ashour, who himself works at the pleasure of the City Council. Among the City Administrator's official duties is supervising and investigating the performance and conduct of City employees and recommending disciplinary action to the City Council.⁹

During his tenure as street superintendent, Airhart has been the subject of a number of complaints by citizens and City Council members for his personal use of public equipment. This fact was publicly disclosed in a Council meeting we attended, and in local blogs and media reports, and was confirmed through interviews with current and former City officials and employees, private citizens, and Airhart himself. In a conversation we had March 14, 2007, with City Administrator Ashour about Airhart's alleged personal use of City equipment, Ashour told us:

You're the only one who doesn't know anything about it ... That subject has been brought up 500 million times.

We talked to three private citizens and three current or former City Council members who said they voiced complaints about Airhart dating back to 2001.

Dr. Christian Sebrasse, whose dental office faces Airhart's home from across the street, provided six specific dates where he or other citizens had seen Airhart using various pieces of City equipment to plow his driveway of snow, work on his grounds, or haul tree branches from his property. Sebrasse said he had communicated his observations to City Council members, individually or jointly, on at least four occasions. Twice, he presented photographs of the incidents to City officials. Sebrasse even wrote a letter to the editor that was published in the *Stuart Herald* on February 19, 2004, to bring his observations to greater light.

⁹ City of Stuart Ordinances 21.04 (10), 21.04 (13), 21.04 (22).

Two former City Council members, Dick Cook and Marnie Wells, told us they conveyed their concerns about Airhart's activities to City Administrator Ashour several times. Wells told us in 2007 that she delivered a stern warning to the City Administrator in 2004 after she had fielded repeated complaints about Airhart:

My exact comment [to Ashour] was, 'Bob's doing it again. This is his last warning. If he does it again, I want him terminated.'

Ashour acknowledged receiving Wells' and Cook's complaints. The issue continued to receive considerable public attention.

On at least five separate occasions, once in 2003, twice in 2004, and twice in 2007, the City Council had public discussions about employees' use of public equipment, including Airhart's. Airhart was present during three of those discussions, according to meeting minutes and testimony from current or former City officials. On March 12, 2007, a City councilman, Jeff Sherman, publicly rebuked Airhart for defying a 2004 Council directive to cease the practice of using City equipment at his home.

Yet we could find no evidence that Airhart had ever been formally investigated, counseled, or disciplined by the City in connection with any of the complaints. We later learned, through interviews, that Ashour had initiated some discussions with Airhart to clarify the City's policy on employees' use of City equipment. But it is apparent that City leaders did little to require Airhart's compliance.

Was the use of City equipment justified?

In a sworn interview, Airhart admitted to us that he had for years cleared snow from his driveway and those of his colleagues on the City's volunteer fire-rescue unit. He said he also used City equipment at his residence on a number of occasions to remove tree branches and deliver gravel and firewood. He could not say how many times he had used the equipment, nor could he provide specific dates. However, Airhart said he had received the express permission of the City Council to use the City's equipment. This could not be verified by City meeting minutes or the testimony of City officials.

We did corroborate that Airhart had paid the City the standard fee to deliver gravel to his home during a garage construction project in 2001.¹⁰ We separately found that City officials excused Airhart's use of a City truck in 2006 to pick up tree branches in front of his home after it was determined the tree was on a public right-of-way.

But Airhart's repeated use of the City's snow-moving equipment at his home and elsewhere could not be adequately justified.

¹⁰ However, we found that Airhart, then doubling as the City's acting zoning administrator, signed off on three aspects of his own building permit on the same day he applied for it.

Under oath, Airhart confirmed that a photograph taken by Sebrasse showed him using a City truck to push snow off his driveway.¹¹ A time stamp indicates that the photograph was taken at 5:48 p.m. on March 1, 2007.¹² Airhart's timesheet indicates that he worked continuously on that date from 7 a.m. to midnight and that he had plowed snow. Airhart gave no indication on the timesheet that he had plowed his driveway during his work shift.

Airhart vouched for the authenticity of his signature on a May 29, 2001, document attesting that he had read the City's employee handbook and was familiar with its contents. The provision of the handbook that prohibited the personal use of City equipment was in force during the period of time when citizens were reporting Airhart's use of equipment at his home.

Airhart told us he was certain the City Council had granted him authority to clear snow from the private driveways of fire-rescue members, including his own. Meeting minutes and other draft policy documents indicate only that the Council *considered* such measures in 2004, after former Council Member Wells learned that a utility employee had used a City boom truck to trim trees in his yard. Wells had crafted a proposal that would have allowed for the clearing of snow for emergency personnel as part of a larger rewrite of employee policies.

However, it is clear from a review of the official record that the Council specifically declined to change its 1994 policy that barred any employee from using City equipment for private purposes. Minutes from a June 3, 2004, joint meeting of the City Council and Stuart Board of Utilities say:

The Council and Board Members discussed the situation related to the use of City or Utility equipment by the employees for personal use and the decision was made to *prohibit* the use of City or Utility equipment for personal use by the employees. (Emphasis added.)

The meeting minutes show that Airhart was in attendance.

Jim Henderson, a long-time employee of the City Utility Board who also works part-time as a streets employee under Airhart and as chief of the volunteer Fire Department, told us the City's policy directive in 2004 barring the personal use of City equipment was clear:

Ombudsman: Did they give any exceptions?

Henderson: No.

...

¹¹ See Exhibit A.

¹² Sebrasse entered notes into his personal digital assistant that put the time of the photo at 4:34 p.m.

Ombudsman: What was the justification or the reason you were given?

Henderson: I think the explanation we were given was that they just felt that, to the public eye, it didn't look right, you know, for us using it on our own time.

...

Ombudsman: Can you think of any reason why Bob [Airhart] would be able to use the equipment at home because he's a department head, but folks like you wouldn't?

Henderson: No, not really. I mean, I don't know. If there is, I'm not privy to that information, I guess.

City Administrator Ashour, in a sworn interview, agreed that the Council decided at the 2004 meeting not to exempt emergency workers from the City's equipment policy:

Ombudsman: There wasn't much of a gray area there? I mean, exceptions weren't to be made?

Ashour: No.

Ombudsman: Can you understand any way by which anybody would have misconstrued what happened at that meeting?

Ashour: No.

In a sworn interview, Airhart acknowledged that Ashour had talked to him "once, twice, three times" about the mounting citizen complaints. "He said, 'Yes, you're on the fire-rescue, but you work for the City, so it's probably not a good idea to do that. His explanation was, 'Well, you're in the public eye, you are the street superintendent, so you probably shouldn't use it and use the excuse that you're on the fire-rescue.'"

But, Airhart added:

Me being superintendent, I need to get in and out so people can get out. Like I said, I used City equipment. I probably shouldn't have, but I was under the understanding that we could do so because I was on the fire-rescue [team].

Ashour testified that, since the 2004 Council decision, Airhart had asked him for permission to use City equipment only once. "And the answer," Ashour told us, "was, 'No.'"

Councilman Jeff Sherman recalled that the Council's directive of 2004 was unambiguous, and he told Airhart so during the Council's March 12, 2007, meeting on Sebrasse's complaints:

Sherman: We did decide that City employees would not use equipment for their own purposes.

Airhart: We did?

Sherman: Yeah, we did. And you know that.

Practically speaking, it does not make sense to us that Airhart could have perceived that the City had given him blanket permission to use its equipment at his home, or at the homes of other fire-rescue volunteers.

As was stated earlier in this report, Airhart does not keep City equipment at his home; rather, he drives to the City's storage shed or firehouse to retrieve the equipment necessary to do his job. Therefore, when Airhart is engaged in the act of plowing streets, it is because he was able to leave his home unimpeded, without the necessity of a plow.¹³

Similarly, it cannot be claimed that an urgent need exists in most situations for members of the City's fire-rescue team to be dug out by the City from their driveways. Airhart told us that he often responds to emergency calls in the winter by driving the City's plow to emergency workers' homes, as well as the home of the person seeking help. Henderson, the City's fire chief, said that a minimum of five rescue personnel are dispatched on every fire call, with an average response time from home to firehouse of four minutes. Obviously, it is difficult to believe that these firefighters must delay their trips to the firehouse until Airhart can identify responding crews, dispatch the City plow to multiple addresses and clear their driveways.

Henderson, a 20-plus-year veteran of the Fire Department, testified that he has never required the assistance of a plow in order to be able to respond to a fire call.

Drawing the Mayor into the controversy

On the morning of February 25, 2007, Airhart called Mayor Cheryl Marks and asked for her permission to plow his driveway.¹⁴ Stuart was then in the midst of a snowfall that would total 5-7 inches by the next morning.¹⁵ According to Mayor Marks, Airhart explained that his wife needed to get to work. If he had to return home to clear his driveway without the plow, it would require two hours' time that would leave him temporarily unavailable to plow City streets, Airhart reportedly explained to the Mayor. The Mayor granted her permission for Airhart to plow his driveway.

"I guess my feeling at that time was, I was in a no-win situation," the Mayor testified.

Airhart's timesheet for February 25 indicates that he plowed snow for 16 consecutive hours – all on overtime. Airhart gave no indication on the timesheet that he had plowed his own driveway or that he had taken off work to do so. Therefore, it appears he was paid overtime wages by the City to plow his driveway so that his wife could go to work.

¹³ A contractor in Stuart, Gary Guisinger of Gus Automotive, told us Airhart hired him on a handful of occasions in 2005 and 2006 to plow his driveway.

¹⁴ This date was deduced by the Ombudsman based on a review of employee timesheets, weather reports, the testimony of Sebrasse and accounts from Mayor Marks and Airhart. Neither Mayor Marks nor Airhart could confirm or refute the date, as neither had logged the events of the day.

¹⁵ The National Weather Service does not measure snowfall in the City of Stuart. However, it does take readings at three nearby towns. Guthrie Center, to the northwest, received 7 inches of snowfall that day. Greenfield, to the southwest, received 5 inches. Winterset, to the southeast, received 4.5 inches.

2. The infraction issued to Dr. Sebrasse

Sidewalk enforcement

On February 25, the day Mayor Marks gave Airhart permission to plow his driveway, Sebrasse witnessed the activity and believed it to be an improper use of City equipment. He then contacted former City Councilman Dick Cook. Cook, who had lodged frequent complaints about Airhart when he was in office, said he notified City Hall of Sebrasse's observations and was told that the Mayor had authorized Airhart to plow his driveway.

Three days later, on February 28, Airhart issued a citation¹⁶ to Sebrasse for violating a City ordinance that required him to keep snow and ice off the sidewalk in front of his dental office.¹⁷

Sebrasse became aware of the infraction March 1 when he received a letter in the mail from the City. The letter provided the language of the City's snow-removal ordinance and informed Sebrasse that he owed the City \$50 for the removal of snow from his business' sidewalk.

The City's letter to Sebrasse was rather ambiguous. The letter did not say when the alleged violation took place or when the City removed the snow. Although the letter instructed Sebrasse to pay the bill directly to the City, the language of the cited ordinance indicated that the costs would be assessed "in the same manner as a property tax." Airhart was listed as the person to contact in the event of any questions.

Sebrasse maintained that the City never performed the work for which he was billed. Sebrasse also complained that he received no warning that the City wanted the walk cleared, although he said he was issued such a warning once before, in January 2005.¹⁸

"I wasn't so much upset about being cited for not having the snow removed. It was just very selective enforcement of it," Sebrasse told us. "It was obvious retaliation in my eyes for having complained about the situation across the street."

Sebrasse and former Councilman Cook made arrangements to protest the City's handling of the matter, and to reiterate their concerns about Airhart at a City Council meeting on March 12, 2007.

At the meeting, it was revealed that Airhart had cited only one other property owner for a sidewalk violation during the recent storms.¹⁹ Several people at the meeting pointed out that there were many sidewalks around town still covered with snow.

¹⁶ See Exhibit B.

¹⁷ Sebrasse is president of an association that owns the plaza where his dental office is located.

¹⁸ Neither Sebrasse nor the City could provide evidence of this written warning.

¹⁹ The owner of a vacant lot formerly occupied by a Dell Oil gas station was cited for failing to clear snow from three sidewalks located a few doors down from Sebrasse's office. A Dell Oil representative, Billie Goff, who is not a resident of Stuart, told us she had been at odds with the City for years over the upkeep and use of the vacant property.

Later, in a sworn interview, Airhart recalled that he had issued citations “maybe two or three times” in his nine years as street superintendent. Neither he nor City Hall could provide records of those violations.

The Council voted 4-1 to forgive both of the citations issued by Airhart. Mayor Marks supported the Council’s decision, telling Airhart, “If we enforce it for one, we have to enforce it for all.”

Airhart had argued that the sidewalk at Sebrasse’s medical plaza required his special attention because it housed a pharmacy that served a nursing home next door, called the Community Care Center²⁰:

The sidewalk in between the pharmacy and the Care Center needs to be clean. The gals run drugs over there every day from the pharmacy and they're walking out in the road, and one of them about got hit one day. That's why I went out and cleaned them sidewalks.

But evidence gathered in our investigation strongly suggests that the Care Center’s sidewalk was not clear of snow at the moment Airhart felt compelled to clear Sebrasse’s sidewalk.

Sebrasse said the Care Center frequently leaves its sidewalk unshoveled, including on February 28, 2007 – the date he was cited by Airhart for not shoveling his sidewalk.

The Care Center’s administrator, Lisa Blair, agreed that maintaining the sidewalk is not a priority during the winter months because its residents and staff have little need for it. Blair told us she doubted the Care Center’s public sidewalk was clear at the time Sebrasse was cited for a sidewalk infraction. Blair said the Care Center’s snowblower was inoperable around this period of time.

A company hired to plow the Care Center’s parking lot in February 2004 was not then responsible for clearing the nursing home’s sidewalk. The company’s president, John Schwinger, told us his workers cleared the Care Center’s sidewalk as a courtesy following a heavy snowfall on March 2 of that year. He did not recall that being done in February.

When we shared this information with Airhart, he responded: “Well, like I said earlier, I thought it was clear, but it could have been it had snow on it.”

We asked Airhart whether he had practiced selective enforcement of the City’s sidewalk ordinance:

Ombudsman: If your job is to patrol the city sidewalks and make sure they're clear of snow after a snowstorm, why would you check some walks more closely than others?

²⁰ A photograph of the sidewalks straddling the two buildings is attached as Exhibit C.

Airhart: Because of the high traffic area.

Ombudsman: If Sebrasse's office is a high-traffic area, wouldn't it stand to reason that the Community Care Center would also be a high traffic area?

Airhart: Yes.

Ombudsman: These sidewalks along the busy road that runs north-south, that's probably a higher traffic area, isn't it?

Airhart: It's a main thoroughfare.

Ombudsman: Did you patrol those sidewalks, too?

...

Airhart: I don't patrol every sidewalk, every snowstorm. If I was to do that, I'd be sitting in the desk writing notices all day. It is a problem that people do not want to clean their sidewalks.

Henderson, the City employee who was directed by Airhart to help clean Sebrasse's sidewalk, said he thought Airhart's order to clear Sebrasse's sidewalk "was a poor decision" because "there was other sidewalks that hadn't been cleaned either."

It is also worth noting that large sections of the street on which Sebrasse's office is located have no sidewalks at all.²¹ Residents living to the west of the area who go east on foot to the City's main thoroughfare probably would walk mainly in the street.

Did the City actually clear Sebrasse's sidewalk?

Sebrasse and members of his staff told us that the City never cleared his sidewalk on the date it billed him for the work. We could not substantiate this allegation.

Both Airhart and Henderson testified that they had cleared the walk with heavy equipment and a snowblower, and both of their February 28, 2007 timesheets confirmed their accounts. A private citizen also claimed to have seen Airhart on that date clearing the walk around the noon hour, when Sebrasse's staff usually leaves for lunch.

Under oath, Sebrasse insisted that he had to clear his walk with a shovel after City officials had reportedly done the work.

Henderson acknowledged that "there was probably spots that was hard-packed snow that I couldn't peel off," but he stood by his statement that he had done the work. Sebrasse "can say anything he wants. I know what I did."

Personal history between Airhart and Sebrasse

Airhart privately told councilmen, and us, that he believed he was being unfairly targeted by Sebrasse due to what he characterized as a years-old personal grudge. Airhart explained that he had declared bankruptcy in the 1980s and was left unable to pay a dental bill from Sebrasse. Airhart felt this was the reason why Sebrasse continued to

²¹ Airhart, who lives across the street from Sebrasse's office, does not have a sidewalk bordering his home.

lodge complaints against him with Stuart City Hall. Airhart called our investigation “a headhunt” spurred by Sebrasse.

Several City officials gave credence to Airhart’s story when they considered how to handle Sebrasse’s complaints. City officials told us their judgment was also influenced by Sebrasse’s friendship with former Councilman Cook, who, according to the City Administrator and Mayor, complained daily about Airhart in sometimes petty ways.

Sebrasse did not volunteer information about the unpaid dental bill at the time of his complaint, nor in follow-up interviews when we asked him about his personal history with Airhart. When we later asked Sebrasse why he had omitted mention of the dispute, he immediately responded that he had considered it a matter of doctor-patient privilege.

Sebrasse objected to any implication that the unsettled dental bill prompted his complaints about Airhart: “The issue is, he’s using the town as his candy store when he shouldn’t be.”

After the Council forgave Sebrasse’s sidewalk infraction, Councilman Sherman privately discussed with some of his colleagues whether to further investigate Airhart’s actions. Sherman informed us on April 6, 2007, that the councilmen he talked with had no appetite for an internal investigation, primarily because of the perception that Sebrasse’s allegations were somehow tainted.

“It’s a dead issue,” he then said.

Even though the complaints about Airhart’s use of City equipment were well-known and Sebrasse’s accusations of retaliation were corroborated by other evidence, City officials continued to question Sebrasse’s motivations for pressing the issue.

In her sworn interview, Mayor Marks told us, “There’s definitely a personal vendetta” that drove Sebrasse’s complaints about Airhart. “It is a little bit extreme the way that Dr. Sebrasse watches Bob,” she added.

Yet, when presented with evidence that Airhart had likely ignored snow on the Community Care Center’s sidewalk on the day he issued an infraction to Sebrasse, Mayor Marks sympathized with Sebrasse’s allegation that Airhart had retaliated against him:

Ombudsman: Did Bob abuse his authority?

Marks: Yeah, I would suppose he did.

City Administrator Ashour held a similar view, even if Sebrasse had violated the City’s sidewalk ordinance:

Legally, the street guy is right, but considering the circumstances, you can have a doubt. It might look like retaliation.

Airhart was not persuasive in defending himself from the charge that his motivation was retaliation. At the March 12, 2007, meeting where Sebrasse talked to the City Council about Airhart, Airhart interjected several times.²²

Sitting with his arms folded across his chest, Airhart interrupted Sebrasse's address by loudly instructing him to "follow the rules." Later in the meeting, Airhart bristled at the idea that Sebrasse was paying such close attention to him. "So now you guys know I've got a watchdog watching me 24 hours a day," Airhart told the Council.

Airhart also challenged former Councilman Cook to "stay up every night and find out" whether he was using City equipment at his home.

Airhart was not asked by the Council to answer to the perception that he had ticketed Sebrasse as retribution for reporting his use of the City plow. According to Marks, Airhart was reportedly "very frustrated" that the Council had forgiven Sebrasse's bill.

3. The City's response to the controversy

Since we began our investigation of the controversies surrounding Airhart, the City has made some noteworthy changes to its practices and policies:

Removal of snow from sidewalks

On February 11, 2008, the City Council formally transferred the responsibility of monitoring sidewalks from the street superintendent to City police. The Council also hired a private firm to remove snow and ice from sidewalks as directed by City police. Police were instructed to take photographs of sidewalks to be cleared by the contractor for evidentiary purposes. The City decided it would provide written warnings to property owners before it initiated such action.

The City said it had taken these measures to ensure equitable enforcement and fairness. We acknowledge these goals.

Since these changes were enacted, we have received one complaint²³ about the failure of City police to provide adequate notice to a property owner before removing snow. The City responded favorably by admitting its misstep and waiving the fee imposed on that property owner. The City Administrator further promised to fine-tune the City's snow-removal procedures and to outline them in policy, which was accomplished in 2009.

City policy on use of equipment

The City Council also decided on April 9, 2007, to revisit its policy on the personal use of City equipment. In short, the City Council authorized the Mayor, City Administrator, or Mayor Pro Tem to determine when an "emergency situation" exists, and to authorize

²² We attended this meeting and made these observations first hand.

²³ Investigated separately as Ombudsman Case File 0801712.

the use of City equipment “as they deem necessary under the circumstances.” Any such use of public property, the policy says, “is hereby found to be of public benefit and not a detriment.”

We agree that it makes more sense to empower the Mayor or City Administrator to decide this issue rather than the entire City Council, as the prior policy required.

Nevertheless, this new policy is problematic because it presumes that a City official’s declaration of an emergency automatically deems the private use of public equipment beneficial to the public. This would not necessarily be the case. The Stuart City official who authorizes the use of City equipment should first make a determination that a specific proposed use will benefit the public, to avert further scrutiny and censure.

One opinion from the Iowa Attorney General is instructive on this point: “The fact that a city council feels that certain private use of city property is not detrimental to the city is not binding on a trier of fact at a criminal trial.”²⁴

The decision not to act

Ultimately, the City did little to investigate or reprimand Airhart for disregarding its orders or for using his authority in a retaliatory manner. Seen in its most favorable light, the City’s resolution of the complaints about Airhart might be viewed as an attempt to mediate what was taken to be primarily a private dispute between him and Sebrasse.

But that position ignores the long pattern of complaints lodged against Airhart by a number of other citizens. It also disregards the City’s 1994 policy on the use of City equipment and its well-publicized policy directive of 2004.

“I don't know that he got away with anything,” Mayor Marks said of Airhart. “We've refunded the money. We made it very clear at the meeting that night not to do that again.”

“As for taking it the next step further, no, we did not do that. We probably should have done that.”

Summary and conclusions

1. The street superintendent

We conclude that Airhart knowingly and repeatedly used the public’s equipment on public time to benefit himself, contrary to City policy and Iowa Code section 721.2(5).

Because Airhart continued to use City property despite frequent complaints and warnings, we believe his misconduct was willful. This was specifically true on February 25, 2007, when he issued an ultimatum to the Mayor to plow his driveway for his wife,

²⁴ 1980 Iowa Op. Atty. Gen. Opinion 80-6-10.

and on March 1, 2007, when he was caught on camera using the plow without City officials' permission. In neither instance did Airhart's use of City equipment provide a direct benefit to the public. The fact he was paid by the City for both jobs constitutes a measurable detriment to the public.

Any suggestion by Airhart that his use of the City's snowplow served the public's interest was a pretext. Airhart long knew of the City's policy against the personal use of City equipment, and he was reminded of it time and again by City officials and citizens alike. Nonetheless, he continued to defy these directives – for simple personal gain.

On Airhart's issuance of a citation to Sebrasse, we similarly conclude that his main motivation was a personal one. The evidence shows that Airhart ignored a snowy section of sidewalk directly connected to the one that prompted his attention. So, too, for years, did Airhart overlook snowy sidewalks in Stuart, including in places where his vigilance would have been better placed than at Sebrasse's medical plaza. In light of this evidence, we believe that Airhart abused his authority and violated the public trust.

For all of these reasons, we substantiate Sebrasse's allegations that Airhart's personal use of City equipment was contrary to law and City policy. In addition, we have determined that Airhart's ticketing of Sebrasse was unfair and improperly motivated.

2. City leaders

That Airhart decided to single out the citizen who reported his improprieties says as much about Stuart's City leaders as it says about him. Airhart expected them to have his back. And, to a large extent, they did.

The City Administrator, Ashour, failed not in his attempts to admonish Airhart, but in investigating and rectifying the repeated reports of problems. Although he spoke to Airhart several times about his misuse of City equipment, he failed to hold Airhart accountable for his repeated transgressions. This occurred despite clear signals from the City Council that Airhart's violations were grounds for dismissal.

Mayor Marks' acquiescence to Airhart's misuse of City equipment on February 25, 2007, is also notable. Although we believe her decision was made under pressure, her consent to his private use of the City snowplow was problematic for a number of reasons. Airhart's wife, for whom the snowplowing was requested, was not a City employee; therefore, the Mayor approved of a public expenditure for reasons that did not serve the public. Secondly, only the City Council was then authorized by City policy to make exceptions to the prohibition on the personal use of City property. Lastly, the nature of Airhart's job necessarily requires him to work long hours during snowfalls, meaning he should have made arrangements to have his driveway cleared through other means. If Airhart's personal use of City equipment could be justified, why should that not be the case for City police? City clerks? The City Council?

The City Council asked many good questions in its public examination of Airhart's actions on March 12, 2007, but inexplicably let the matter end there. Indeed, Stuart's leaders lost sight of the bigger picture when they redressed Sebrasse's complaints. Forgiving a bill that was imposed unfairly did not cure the underlying problem. Airhart was not called to account for his misdeeds.

Instead, City officials who knew and in some cases disapproved of Airhart's actions allowed themselves to be distracted by a purported personal dispute that had no bearing on the facts. In our view, Sebrasse's motivations for complaining about Airhart were irrelevant if Airhart indeed acted improperly or illegally. Regardless of his reasons, Sebrasse's complaints should have been taken seriously because they were corroborated by other evidence.

For all of these reasons, we substantiate that Ashour acted unreasonably and contrary to City policies when he failed to investigate Airhart and recommend discipline. Once Airhart's actions became widely known, we conclude that the Stuart City Council and Mayor Marks acted unreasonably and contrary to City policies when they failed to order further investigation or, in the case of the Council, to discipline Airhart appropriately. Lastly, we substantiate that Mayor Marks acted unreasonably and violated City policy when she granted Airhart permission to use the snowplow on his driveway.

Recommendations

We recommend that:

1. The City Council direct the City Administrator to fulfill his duties under City ordinances and investigate any City employee when a plausible allegation is made that the employee may have violated any law or policy, and to forward his findings and any recommendations for disciplinary action to the Council.
2. The City Administrator recommend to the City Council any appropriate disciplinary action, up to and including termination, for any City employee who is found to have violated City policies or directives on the personal use of City equipment.
3. The City Council amend its April 9, 2007, policy on the personal use of City equipment to require that designated City officials make a specific, written determination of public benefit before authorizing the use of City equipment for private purposes.
4. The City Administrator and City Council enact a policy requiring employees to document on their timesheets any use of City equipment for private purposes.
5. The City Administrator create a form letter for property owners who are cited for violating the City's snow-removal ordinance. The letter should indicate the date, time and address of the violation, and the date and time of the City's removal of

the snow or ice. The letter should also indicate how the bill may be paid, provide a due date, and inform the property owner how he or she may appeal.

6. The City Administrator and City Council enact a policy requiring documentation of any complaints about City employees' misuse of City equipment, and the resolutions of those complaints, in those employees' personnel files.

Ombudsman's referral

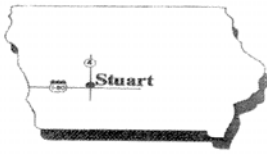
Pursuant to Iowa Code section 2C.19, we will refer this report to the Adair County Attorney for consideration of criminal charges against Airhart for his personal use of public equipment.

Exhibit A



Dr. Christian Sebrasse took this photograph through a window at his dental office on the afternoon of March 1, 2007. Stuart Street Superintendent Bob Airhart did not dispute that the photograph shows him using a City plow to clear the driveway at his home.

Exhibit B



COPY
CITY OF STUART

119 E. Front Street
P.O. Box 370
Stuart, Iowa 50250-0370
Phone 515-523-1455
Fax 515-523-2578

Mayor
Cheryl Marks

City Administrator
Ashraf Ashour

February 28, 2007

Dr. Christian Siebrasse
Medical Plaza
P. O. Box 398
Stuart, Iowa 50250

CITY OF STUART CODE FOR SNOW REMOVAL

136.03 REMOVAL OF SNOW, ICE AND ACCUMULATIONS. It is the responsibility of the abutting property owners to remove snow, ice and accumulations promptly from sidewalks. If a property owner does not remove snow, ice or accumulations within a reasonable time, the City may do so and assess the costs against the property owner for collection in the same manner as a property tax.

The snow should be removed from sidewalks within 48 hours after a snowfall.

The charge for removing snow from the sidewalk in front of the Medical Plaza is \$50.00 payable to the City of Stuart.

Thank you for your cooperation. If you have any questions, please call Street Superintendent Bob Airhart at 523-2910.

Exhibit C



The sidewalk in the foreground, aside the fire hydrant, is the responsibility of Dr. Sebrasse and the medical plaza. The sidewalk in the background, just before the driveway and beyond, is the responsibility of the Community Care Center. This view of Southwest 7th Street looks west.

NICHOLAS CRITELLI, P.C.
BARRISTERS & TRIAL LAWYERS
IOWA / LONDON / NEW YORK

N. (TRÉ) CRITELLI, JD

December 15, 2009

William Angrick
Citizens' Aide/Ombudsman
Ola Babcock Miller Building
1112 East Grand Ave.
Des Moines, IA 50319

3:30 P.M.
Via mail and fax (515-242-6007)

RE: City of Stuart 11/6/09 Report

Our File: 3929

Dear Mr. Angrick:

Thank you for providing me with additional time to meet with representatives of the City of Stuart about this matter. My retention should be taken as a sign that the City is taking this matter seriously and mindful of its obligations to its citizens.

While the City understandably takes exception to your final conclusion that the City Administrator, City Council and Mayor acted unreasonably, there are no material factual errors or omissions in the report that need to be addressed. Nor does any information appear to be considered confidential, and, thus, required to be redacted. The only request the City would make for a change is the deletion of "Turning a Blind Eye" from the title of your report so that it is both in accordance with what actually occurred and in the same format of all but one of your prior reports.

With regard to your six recommendations, this letter will confirm that they are all accepted by the City and either have been or will shortly be implemented. I am in the process of finalizing the requested changes to the April 9, 2007 policy and the City handbook. I am also preparing a form letter for use regarding violations of the City's snow-removal ordinance. As per your request I will provide you with an update once these matters are completed.

If you or your investigators need anything else from the City, please contact me directly.

Regards,



N. Tre' Critelli

NTC/mjg

cc via e-mail: Ashraf M. Ashour, City Administrator
Cheryl Marks, Mayor of the City of Stuart
Bryan Beiden, Councilman

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Mr. Critelli's London Chambers: 9 Stone Buildings, Lincoln's Inn, London WC2A 3NN
Telephone: 020-7404-5055 / FAX: 020-7405-1551 / E-Mail: Clerks@9Stonebuildings.com