



Albany County Department of Audit & Control

Michael F. Conners, II

Comptroller

Review of the State and Federal Forfeiture Funds

of the

Office of the Albany County Sheriff

September 08, 2011

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SUMMARY OF EXAMINATION

- State and Federal accounts must be maintained in compliance with state and federal law. (CPLR 1349) This includes remitting these accounts into the custody of the County Comptroller by creating a subaccount in the General Fund.
- Due to new leadership in the department, The Comptroller will review changes implemented by the new organization and will be working in conjunction with the Sheriff's Department to transition both forfeiture accounts into the General Fund as per CPLR 1349.
- The DIU Unit adequately maintains their accounting records for the State and federal accounts
- The DIU Unit adequately maintains their buy money and evidence in their possession
- The Department made excessive purchases of vehicles (\$118,583.88) and did not use state contracts for all vehicles purchased.
- The Department did not maintain proper accounting records of the vehicles seized and used for trade ins
- There are some purchases that were unallowable under state and federal guidelines. These include a gas grill, Kurig coffee maker, and coffee purchases.
- There are items that were considered unallowable under state guidelines that should have been purchased under federal guidelines. (playground equipment)
- The Sheriff's Department must create an inventory log of items purchased with seizure funds.

AUTHORITY

Article 4 of the Albany County Charter establishes the Department of Audit & Control and an elected Comptroller as the chief fiscal and auditing officer of the County who shall have all the powers and perform all the duties conferred or imposed upon a Comptroller under the County Law.

SCOPE OF AUDIT

The Sheriff requested the audit in response to a Times Union story criticizing the purchases of vehicles using forfeiture funds.

The Albany County Comptroller's Office audited the Federal and New York State forfeiture and seized asset accounts and the procedural operations for oversight of these funds.

OBJECTIVES

The objective of this audit is to protect the County taxpayer's money, analyze the seized asset income and expenditures, provide guidance and recommend administrative and fiscal procedures to the Albany County Sheriff regarding the proper use of forfeited seized funds. To accomplish this task, auditors reviewed Federal and State legislation, guidelines for use of funds, the OSC Opinion Letter 95-08.

Fiscal records were provided by the Sheriff's Office for the years 2009, 2010 and through April of 2011. These years are the basis of the analysis and provide the information and data necessary to determine whether the asset forfeiture/seized funds were properly managed, documented and expended.

The analysis concentrated on monies received in each fiscal year. Additionally, a review was conducted of funds expended by specific categories as outlined in the U.S. Department of Justice guidelines (Salaries, Overtime, Buy Money, Travel and Food, Training, Communications and Computers, Weapons, Protective Gear, Surveillance Equipment, Office Improvements, Drug Education and Other Law Enforcement Expenses, which include vehicles, supplies and funds to other agencies).

Included in this audit is a description of allowable and unallowable expenses, unsupported documentation of expenses, the Permissible Use Policy and the basic principles of the forfeiture program as outlined by Federal and State law. Any interpretations of specific types of uses for seized monies are derived from Federal and New York State guidelines as well as County regulations concerning the proper use of such funds.

The report is not intended to cover all accounting requirements for all expenditures. It is to be used as a guide on proper procedures and present recommendations for future revenue and expenditure accountability.

FISCAL COMPLIANCE WITH STATE AND FEDERAL GUIDELINES. (NY STATE CPLR 1349)

The New York State Comptroller's Opinion 95-8 specifically addresses the placement of seizure funds. It states:

*CIVIL PRACTICE LAW AND RULES, §1349; COUNTY LAW, §§550, 700: Forfeiture moneys distributed to a **claiming authority or claiming agent** under section 1349(2)(e) and (f) of the Civil Practice Law and Rules (CPLR) must be remitted to the custody of the county treasurer. These moneys constitute dedicated general fund revenues for use only for purposes of the **claiming authority or claiming agent**. Distributions of forfeiture*

moneys under section 1349(2)(h)(i) and (ii) of the CPLR must be deposited, respectively, in a "law enforcement purposes" or "prosecution services" subaccount of the general fund, and used only for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses.

Opinion 95-8 further states:

*Among these fiscal controls is County Law, §550(2) which provides that the county treasurer shall receive and be the custodian of all moneys "belonging to the county or in which the county has an interest". County Law, §700(2), which generally prescribes the fiscal powers and duties of the district attorney or sheriff, similarly requires that moneys "belonging to the county" be paid by the **district attorney or sheriff** to the county treasurer. Further, although County Law, §705 provides for the establishment of a prosecution fund for the district attorney's office and sheriff, this fund consists of an appropriation within the county budget and is held in the custody of the county treasurer (*County of Putnam v State*, 17 Misc 2d 541, 186 NYS2d 944; 25 Opns St Comp, 1969, pps 9 and 212). Thus, absent express statutory direction to the contrary, all moneys of the county received by the district attorney or sheriff must be remitted to the county treasurer as custodian.*

The desire to place additional resources in the hands of the agencies in the fight against crime and the legal responsibility that the funds are not to be a supplantation of budgetary support does not mean that these goals are in conflict with the requirement that the funds be remitted to the County Treasurer. These funds are not meant to **replace** budgetary support but **enhance** budgetary support. However, these funds are not to be used to circumvent budgetary processes or replace normal budgetary oversight. Nor are these funds to be used in any manner not compliant with Federal or State laws.

ASSET FORFEITURE/SEIZURE GOALS, GUIDELINES, AND PRINCIPALS

The primary purpose of both the Federal and New York State asset forfeiture program is to help deter crime by depriving criminals of the profits from their illegal activities. The U.S. Department of Justice manual titled, *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, provides specific guidance for law enforcement and prosecutorial agencies. Prosecuting agencies eligible to receive federally seized asset monies are required to follow the standards of accountability and fiscal integrity set forth in the manual. The New York State law allows for sharing with police, prosecutors, Office of Alcohol Substance Abuses Services (OASAS) and victims (when applicable). In both the Federal and State programs, law enforcement is the principle objective of forfeiture. ***Seized revenues are to be used exclusively to enforce the law, investigate crimes and prosecute criminal offenses.*** The monies are to be used to enhance not supplant County revenues.

USES OF FORFEITURE/SEIZURE FUNDS

Law enforcement agencies shall retain forfeited assets specifically for official use and must be maintained in two separate Federal and State accounts. These funds must be used to *increase* the resources of the agency. The U.S. Department of Justice *Guide* and NYS CPLR 13A specifically state that resources shall not be used to replace or supplant the resources of the receiving agency.¹

In other words, the receiving agency must benefit directly from these funds. The U.S. Department of Justice *Guide* states, “*If, for example, a police department receives \$100,000 in sharing money only to have their budget cut by \$100,000 by the city council, the police department has received no direct benefit. Rather the city as a whole, has received the benefit. The Department of Justice may terminate sharing with the law enforcement agencies that are not permitted by their governing authority to benefit directly from the sharing.*”²

Additionally, New York State CPLR 1349 (h) 3 states that “*all monies distributed to the “claiming agent” (police) and the “claiming authority” (District Attorney) pursuant to paragraph (h) of subdivision 2 of this section shall be used to enhance law enforcement efforts and not in supplantation of ordinary budgetary costs including salaries of personnel and expenses of the claiming authority or claiming agent during the fiscal year in which this section takes effect.*”

Federal Forfeiture Program

The Albany County Sheriff’s Office did not expend any moneys from the Federal forfeiture account (DEA account) during the time period audited. When interviewed regarding this, staff from the Drug Interdiction Unit explained that as the amount of cases prosecuted federally have decreased significantly over the last several years. According to the bank records, \$8,385.36 was wired into the DEA account since 1/1/2009 through 4/30/11 from federal investigations.

The Federal Comprehensive Crime Control Act of 1984 instituted the national asset forfeiture program. This program authorizes the sharing of Federal forfeiture proceeds with cooperating State and Local law enforcement agencies. Proceeds are distributed to the office based upon the level of direct participation of the Sheriff’s Office in the investigation. In accordance with Federal policies, proceeds from Federal forfeitures can only be used for law enforcement expenditures. Priority must be given to programs such as law enforcement operations that will result in further seizures and forfeitures.

¹ NY State CPLR 1349 (h) 3 and *A Guide to Equitable Sharing of Federally Forfeited Property for State and local Law Enforcement Agencies, 2009, p.22.*

² *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies, 2009, p.22.*

Additionally, the Federal Comprehensive Crime Control Act of 1984 has withstood hundreds of challenges in court to its rules, regulations and procedures of the federal asset forfeiture program.

According to the U.S. Department of Justice, “*law enforcement agencies are permitted to use up to 15 percent of shared funds received during the last two fiscal years to support drug abuse treatment, drug and crime prevention education, housing and job skills programs, or other nonprofit community-based programs or activities, which are formally approved by the chief law enforcement officer – e.g., chief, sheriff, or prosecutor – as being supportive of and consistent with a law enforcement effort, policy, and/or initiative. Law enforcement agencies may not transfer cash to non-law enforcement agencies or private nonprofit organizations. Law enforcement agencies may either 1) directly pay specific expenses on behalf of the recipient agency/organization or 2) reimburse the agency/organization by check for itemized expenditures.*”

State Forfeiture Program

Under NY State CPLR 1349, the use of forfeiture funds is restricted. Section 1349(2)(e), as noted, provides that the distribution under that provision is “*in satisfaction of actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action*”. Similarly, section 1349(2)(f) provides that the distribution under that provision is “*in satisfaction of actual costs incurred for protecting, maintaining and forfeiting the property ...*”.³

The Office of the State Comptroller rendered an opinion on problems arising in Suffolk County regarding the placement and use of State forfeiture funds. Specifically, the uses of seizure funds for programs such as youth programs were addressed. The New York State Comptroller states, “*The statute expressly provides that these moneys are to be used for law enforcement purposes in the investigation of penal law offenses (CPLR, §1349[2][h][i]) or for the prosecution of penal law offenses (CPLR, §1349[2][h][ii]). Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion, relate to the investigation or prosecution of penal law offenses. Therefore, it is our opinion that section 1349(2)(h) moneys may not be used for those purposes.*”⁴

The following analysis of revenues and expenditures was conducted for the period January 1, 2009 – April 30, 2011. All data was provided to the Albany County Comptroller’s Office by the Albany County Sheriff’s Office and the Office of the State Comptroller.

The following categories, adopted by the Federal Forfeiture Program, were used by our office to determine the proper use of both Federal and State funds.

³ NYS Comptroller opinion (95-8)

⁴ Ibid.

- ❖ Unallowable Expenses
- ❖ Undocumented Expenses
 - Extravagant Expenses

SAFE AND EVIDENCE REVIEW

As with previous audits of forfeiture accounts, Comptroller's staff audited the evidence safe located at the Cohoes DIU (Drug Interdiction Unit) location.

Evidence (cash, drugs, etc) is logged on an index card by investigators. The index card is filed in alphabetical order and evidence is stored in cabinets by first letter of last name. Cash seized is counted and sealed in evidence bags and secured in the safe. After one year, it is sent to be deposited into the DIU account. An inventory of the evidence bags was conducted and there were no bags in the safe older than one year. All evidence bags in the safe were pulled, and counted and all money matched what was logged on the index cards. Staff also conducted a random sample of evidence cards. Three buy sheets were pulled and staff asked to see the evidence on the cards. The cards were produced and all evidence matched what was logged on the cards.

FINDINGS

Findings: State Bank Statements

Examination of the records for the State seizure account revealed the following:

The State seizure account is reconciled on a monthly basis. The account balance on 12/31/2008 was \$185,200.30. The balance on the bank statement was \$70,918.63 as of 4/26/2011 as was the balance of the checkbook. All interest (\$904.42) was accounted for in the register through 4/26/2011. Inflows to the account for the time-period reviewed totaled \$167,881.11. Outflows from the account totaled \$282,444.39. This is 114,563.28 more than inflows to the account.

Findings: Federal Bank Statements The Federal account was reconciled monthly. As of April 30, 2011 the balance was \$15,750.37 with no outstanding checks. All interest was accounted for and recorded appropriately.

Recommendations: The Department adequately maintains proper accounting records of both the state and federal checking accounts.

Findings: Money disbursement to DIU unit: The DIU unit maintains cash similar to a petty cash account that the unit utilizes for expenditures. Investigators prefer this method since the majority of transactions through this account are cash drug buys or payments to informants.

The office accounting staff disburses a check to the unit of \$1,000.00 made to "petty cash". It is distributed to the unit once the balance is deemed to be low by the DIU

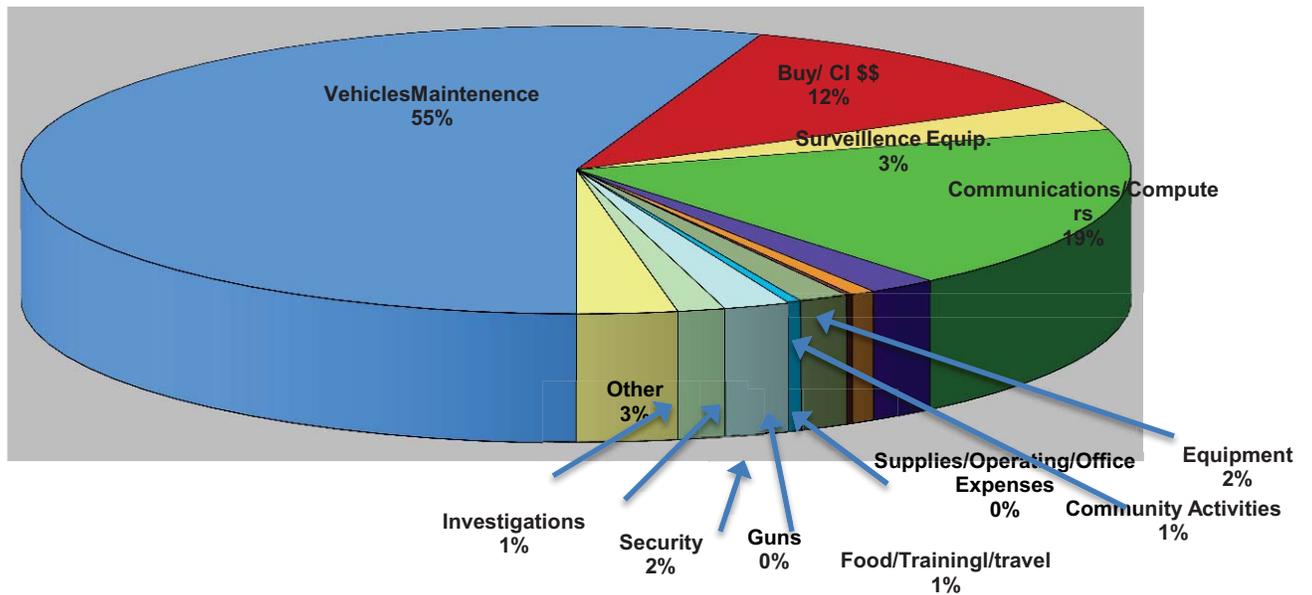
officer in charge of the account. The accounting staff references a case number on the check to account for why the money is being used, however, this reference number usually only refers to a small portion of what the check is used for.

Once the investigators receive this check they cash it at the bank and deposit it into the cash box. On the date of the review, comptroller's staff reconciled the contents of the cash box. The cash ledger indicated that \$553.63 was on hand and when the safe was counted, \$553.63 was in the safe.

Recommendations: According to the Asset Forfeiture Unit of the Department of Justice, a second cash box should be kept if at any time money is going to be expended to the DIU unit from Federal Funds. Although the intermingling of funds has not occurred, money from this account should never be mixed with state funds.

NEW YORK STATE FORFEITURE REVENUES AND EXPENDITURES

**Total Expenditures by Category
State Forfeiture Funds
1/1/09-4/31/11**



Findings: Vehicles

Vehicles purchased include:

- 2009 Jeep Cherokee Laredo (Dark Blue) (Purchased under State Contract for \$21,169.84)
- 2009 Jeep Cherokee Laredo (Silver) (purchased under State Contract for \$21,169.84)
- 2010 Toyota Sequoia (purchased for \$28,903 using trade-ins)
- 2010 Toyota Highlander (trade in 2002 Land Rover)
- 2009 Jeep Chevrolet Trailblazer (State Contract - \$21,986.60)
- 2010 Toyota Tundra (purchased for \$15,590.50 using trade ins)

State Contract Vehicles

The 2009 dark blue Jeep and the 2009 silver Jeep are assigned to individual Investigators. These vehicles were purchased on the New York State contract on March 25th 2009 from Colonie Motors. The price for each of these vehicles was \$21,169.84. By purchasing on the state contract, the department saved taxpayers approximately \$8,000 - \$11,000 per vehicle.

The dark blue Jeep is assigned to an investigator who is assigned to the unit from the Albany Police Department. As with all these vehicles, the investigators take the vehicles home at night. It is unclear why an Albany Police officer is allowed exclusive use of a vehicle that is owned and insured by Albany County.

The 2009 Jeep Trailblazer is assigned to an individual investigator. This vehicle was purchased under state contract for \$21,986.20 through Hoselton Auto Mall in East Rochester, NY. The list price for the vehicle was approximately \$29,155.00-\$39,330.00 saving the County at least \$7,100.00 to \$17,000.00 depending on the features of the vehicle.

Non- Contract Vehicles

Under the state contract for purchasing cars, there is no ability to accept vehicles for trade in value. As a result, the Sheriff's Department chose to trade seven vehicles for the purchase of three new vehicles through Northway Toyota. A 2010 Toyota Sequoia, 2010 Toyota Highlander and a 2010 Toyota Tundra were all purchased in March of 2010. From the paperwork provided by Northway Toyota and the Sheriff's Department, the following seized vehicles from were used as trades towards the purchase of these vehicles. They were:

- 1998 Plymouth Voyager (trade in value \$1,200)
- 1998 Honda Four Wheel TRX400FW Quad (Federal Seizure in 1999) (Trade in value \$1,500)
- 2002 Land Rover Range Rover (Trade in value \$3,000)
- 2007 Chevy Tahoe (trade in value \$21,500)
- 2005 Chevy Silverado (trade in value \$13,700)
- 1997 BMW 328 (auctioned for \$2,810)
- 2004 Chevy Trailblazer (Trade in value \$7,750.00)

The Department received \$51,460.00 in credits towards the purchase of the three vehicles. The actual price of the vehicles were:

- 2010 Toyota Tundra \$38,453 less \$13,700 trade for 2005 Chevy Silverado, less \$7,750 for 2004 Chevy Trailblazer and a \$1,500 rebate. **Actual cost \$15,503.00 (plus misc. fees)**
- 2010 Toyota Sequoia \$40,235 less \$2,810 from auction of BMW, \$21,500 credit from 2007 Chevy Silverado. \$1,200 for Plymouth Van and \$1,500 for Honda Quad. **Actual cost \$13,322.50 (plus misc. fees)**
- 2010 Toyota Highlander less \$3,000 trade from 2002 Land Rover. Actual cost **\$25,354.50**
- In May of 2011, the 2010 Toyota was traded in for a 2011 Toyota Highlander. The vehicle was traded in for a credit of \$36,500. And the value of the 2011 Highlander was 28965.00 A check was issued to the department for \$7,512.50

Seized Vehicles Recommendations:

- Sheriff's Investigators in the DIU unit raised a question as to the proper procedure to deal with seized vehicles. Comptroller's staff contacted the Albany County Department of General Services. According to the Commissioner, the purchasing division has a procedure for declaring property surplus. In the case of vehicles, the purchasing division must deem the property unnecessary for County purposes. A resolution is submitted to the County Legislature requesting that the property be declared surplus. Once this is done, the vehicle should be handled the way other surplus cars are handled in the county. They are delivered to the Department of Public Works location where they will be auctioned by the auction house that is under contact with Albany County. Once the vehicle is auctioned, all moneys from the sale of the vehicles would be remitted to the Albany County Sheriff for deposit into the applicable forfeiture account. A written procedures manual should be crafted between Purchasing, Law, Audit and Control and the Sheriff's Department that outlines the steps that should be taken to allow for the most profit from the sale of the vehicles.
- All vehicles should be purchased under state contract.
- It was very difficult to decipher what seized vehicles were traded in for the purchase of new vehicles. Additional paperwork was needed from the dealer and the Sheriff's Department. Not all vehicles were listed on the dealer's paperwork that was given to Comptroller's staff and the dealer's paperwork from the quote of the sale of the Tundra does not show any trade of a 2004 Trailblazer. When dealing with state or federally seized vehicles, the Department must keep in mind that meticulous detail must be adhered to as this is still considered taxpayer money.
- There is no agreement between the Albany Police Department and The County outlining various responsibilities and duties under the shared services arrangement. The Dark blue Jeep driven by the Albany Police Officer should be taken away from this individual as he is not a county employee and is not covered by the County insurance plan. An agreement should be crafted with the Albany

Police Department to provide for insurance and indemnification regarding the use of County equipment including any vehicles for County purposes.

Findings: Equipment Logs

The DIU unit keeps a log of all purchases of equipment made from that office out of their funds. Investigators provided logs for 2009 to the present. One item was not listed on the log (Apple Computer \$1,294.92).

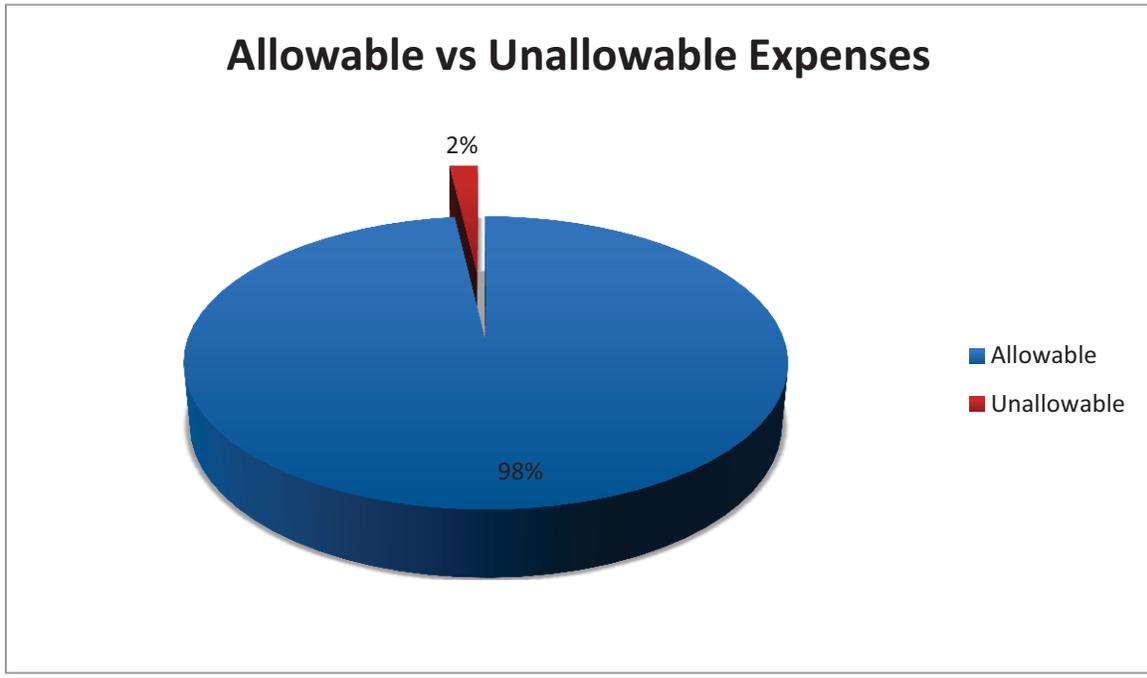
The Sheriff's Department does not maintain a log of equipment purchased from state and federal funds. Items such as the steel container purchased from The Port of Coeymans for \$3,400.00 and the gas grill that is housed at the Courthouse should be listed on this log.

Recommendation: Only one item that was purchased at the DIU unit was not listed on the log, however, this item was a computer valued at over \$1,000.00. Priority must be given to items that are of high value and portable such as laptop computers. The Sheriff's Office should create a log of items purchased through seizure funds.

Findings Tax: In certain circumstances it is unavoidable for the unit to be charged tax. For instance, it may be charged during an investigation. However, in some circumstances, items were purchased where tax was collected. (Apple Computer \$95.92 Kurig Coffee maker \$10.88). A tax-exempt certificate should have been used to avoid tax

Recommendation: The unit must provide a tax-exempt certificate where applicable

Summary of Unallowable, Undocumented and Extravagant State Expenses



Unallowable Expenses

- NYS Sheriff's Association Institute, Inc - \$1,498.75 (approved by Sheriff)
- Home Depot – Gas grill and accessories \$375.73 (approved by Undersheriff)
- Kurig Coffee Maker \$146.87 (approved by DIU Unit)
- Shirts with DIU unit Logo \$644.80 (approved by DIU Unit)
- Various Kurig purchases 291.04 (approved by DIU unit)
- Times Union 766.00
- Cleaning person/Cleaning supplies \$73.15
- Carpeting \$270.00

It is important to note that there are expenses, that had they been spent with federal funds, would have been considered allowable. For instance, if the Department actually purchased the playground equipment *for* the NYS Sheriff's Association out of the federal account it would have been permissible. However, under these guidelines, it is only permissible to *actually purchase* the equipment for youth programs. It is not allowable to give cash donations. Under state guidelines, the funding of youth programs are not considered an allowable expense.

Since the use of state funds is restricted to the “*actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action*”, ads to the Times Union, could have been purchased using federal funds and it would have been allowable.

The purchase of the coffee maker and K-Kups should not be paid for with county funds. Exceptions were made by comptroller’s staff when investigators needed to conduct 24 hour wire taps. However, normal day-to-day coffee purchases are not allowed.

Extravagant Expenses

The Federal forfeiture guidelines outline extravagant expenses as “*Receiving agencies should use federal sharing monies prudently and in such a manner as to avoid any appearance of extravagance, waste, or impropriety*”. Over the last three years, 55% of the expenditures from the DIU from the state account were for vehicles and maintenance. This totals over \$119,000.00 since 2009. While the purchase of automobiles for the unit is allowable under the state guidelines, it however appears on the surface as an extravagance.

The gas grill purchase was not only unallowable but also extravagant. The grill, extra tank and cover cost the department \$375.73.

SHERIFF RESPONSE

JAMES L. CAMPBELL
SHERIFF

WILLIAM C. COX
CHIEF DEPUTY



CRAIG D. APPLE
UNDERSHERIFF

MATTHEW J. CAMPBELL
CHIEF DEPUTY

ALBANY COUNTY SHERIFF'S OFFICE

COUNTY COURT HOUSE ALBANY, NEW YORK 12207 (518) 487-5400 FAX: (518) 487-5037 WWW.ALBANYCOUNTYSHERIFF.COM

July 26, 2011

Honorable Michael Connors
Office of the Comptroller
Albany County Office Bldg.
112 State St.
Albany, NY 12207

Dear Mr. Connors,

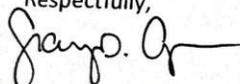
I would like to thank you and your staff for your time and effort in completing this requested audit of the State and Federal Forfeiture Funds handled by the Albany County Sheriff's Office.

As discussed with you and your staff, the overall findings of the audit were of a positive nature. However, there are areas that need to be improved upon and with the help of your office I am sure we will be within the necessary standards of the asset forfeiture expenditures and revenue policy.

At the present time, we are in the process of revising our department policy and procedures with respect to the handling of forfeiture funds and also taking your recommendations into consideration. I believe that the result of these revisions and changes will produce complete compliance within a short period of time, considering the ambiguity of the guidelines.

Once again, thank you for your efforts and we look forward to continually working with your office to better serve the citizens of Albany County.

As the leader of a new administration I welcome the chance to better serve the citizens of Albany County. Furthermore, it is my goal to become a more efficient Sheriff's Office, and better utilize the asset seizure program to enhance public safety within Albany County. Lastly, I will keep you updated as to the status of our changes, for your records.

Respectfully,

Craig D. Apple, Acting Sheriff

Legal Opinion of Attorney (From DA Forfeiture Audit)

August 14, 2008

Honorable Michael Conners
Albany County Comptroller
112 State Street
Room 930
Albany, New York 12207

Re: Custody/Use of Forfeiture Proceeds

Dear Mr. Conners:

This opinion letter is respectfully submitted per your request. **Questions:** (1) May the District Attorney or police agencies/County Sheriff retain forfeiture monies without remitting these funds to the County Department of Management and Budget?

(2) May forfeiture monies be expended for purposes other than the investigation and/or prosecution of Penal Law offenses?

Synopsis: (1) Forfeiture monies distributed to a claiming authority (i.e., District Attorney) or a claiming agent (i.e., police agency/County Sheriff) under CPLR §§1349(2)(e) & 1349(2)(f) must be remitted to the custody of the County Department of Management and Budget. Such funds are part of the dedicated general fund revenues of the County and may only be used for the investigation or prosecution of Penal Law offenses (see 1995 Opinion of State Comptroller #95-8 - - Exhibit "A" annexed).

(2) Forfeiture proceeds under CPLR §§1349(2)(h)(i) & 1349(2)(h)(ii) must be deposited, respectively, in "law enforcement purposes" or "prosecution services" subaccounts of the County's general fund and may only be used for investigation (by a claiming agent) or prosecution (by a claiming authority) of Penal Law offenses (see 1995 Opinion of State Comptroller #95-8 - - Exhibit "A" annexed).

Discussion: CPLR §1349 provides detailed instructions for disposition of property recovered by a claiming authority or claiming agent through forfeiture. Under Article 13-A of the CPLR, a District Attorney is a "claiming authority" and **municipal police/County Sheriff are "claiming agents"** (CPLR §1310[11]&[12]; see also, CPL§1.20[34][a]-[v]). The Office of District Attorney is an administrative unit within the County (County Law §351[1]) and therefore subject to the general fiscal and budgetary controls prescribed for such administrative units (see, 1979 Attorney General [Informal

Opinions] at 134 and 149 - - Exhibits "B" and "C" annexed). Pursuant to Albany County Charter §502(e), the Commissioner of the Department of Management and Budget shall "(c) receive and have custody of **all** public funds belonging to or handled by the County. . ." and County Law §700(2) mandates that monies "belonging to the County" be paid by the District Attorney to the County. Albany County Charter §403 establishes the office of Department of Audit and Control headed by the Albany County Comptroller who "shall ... have all the powers and perform all the duties conferred or imposed upon a Comptroller under the CountyLaw". County Law §577(1)(j) mandates that the Comptroller shall "... (j) at least once a year review **all** books and records, vouchers and other papers pertaining to the money, funds and property of the County and render a report thereon . . . as to whether proper books and records have been kept and **all** monies and property of the County accounted for..."

With respect to forfeiture distributions pursuant to CPLR §1349(2)(h)(i) &(ii), the statute mandates that forfeiture monies must be deposited, respectively, to a "law enforcement purposes" and/or a "prosecution services" subaccount of the County's general fund. A plain reading of CPLR §1349 reveals that there are no provisions permitting a claiming authority or claiming agent to retain custody and control of these forfeiture proceeds to expend as they see fit pursuant to their discretion. Simply put, forfeiture funds are not to be held by the District Attorney or police agency/County Sheriff but must be turned over to the custody of the Commissioner of the Department of Management and Budget as general fund revenue so that appropriate fiscal audit and accountability can be assured.

Finally, CPLR §1349(3) requires that "all monies distributed to the claiming agent and the claiming authority pursuant to paragraph (h) of subdivision two of this section shall be used to enhance law enforcement efforts **and not in supplantation of ordinary budgetary costs including salaries of personnel, and expenses of the claiming authority or claiming agent during the fiscal year** ...". No provision is made which allows forfeiture monies to be expended other than for the investigation/prosecution of Penal Law offenses (CPLR §1349[2][h][i]&§1349[2][h][ii]).

Conclusion: All forfeiture monies must be remitted to the County Department of Management and Budget. No forfeiture funds may be utilized for any purpose (no matter how laudable) other than for investigation/prosecution of Penal Law offenses. Accordingly, the posited questions must both be answered in the negative.

Respectfully submitted,

Ray Kelly, Esq.

Acting County Attorney's Email

From: Denning, Craig
Sent: Friday, October 10, 2008 1:47 PM
To: Devoe, Kristin
Cc: Conners, Michael
Subject: RE: Forfeiture Funds

That's correct, Opn St Comp 95-8 observes that CPLR Secs.1349(2)(h)(i) and (ii) expressly provide that forfeiture funds "are to be used for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses." The opinion interprets those sections stating: "Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion relate to the investigation or prosecution of penal law offenses."

Agency opinions, although not binding on courts, are considered highly persuasive for purposes of statutory interpretation.

Craig A Denning
Deputy County Attorney
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112 State Street, RM 900
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-----Original Message-----

From: Devoe, Kristin
Sent: Friday, October 10, 2008 11:49 AM
To: Denning, Craig
Cc: Conners, Michael
Subject: RE: Forfeiture Funds

Mike would like to have an email clarifying the discussion we had yesterday regarding our position that state forfeiture moneys under CPLR1349 are to be only used for the prosecution, enforcement and litigation of penal law. In addition, the opinion (95-8) further interprets that the moneys are not to be used for youth programming. How much weight does the state Comptroller's Opinion hold?

State Comptroller's Opinion (95-8)

Applies to Sheriff as "claiming agent"

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

COUNTIES -- Powers and Duties (use of forfeiture moneys)

COUNTY TREASURER -- Powers and Duties (custody of forfeiture moneys)

DISTRICT ATTORNEY -- Powers and Duties (remittance of forfeiture moneys)

MUNICIPAL FUNDS -- Forfeiture Moneys (use of)

POLICE AND POLICE PROTECTION -- Police Department (remittance of forfeiture moneys)

CIVIL PRACTICE LAW AND RULES, §1349; COUNTY LAW, §§550, 700: Forfeiture moneys distributed to a claiming authority or **claiming agent** under section 1349(2)(e) and (f) of the Civil Practice Law and Rules (CPLR) must be remitted to the custody of the county treasurer. These moneys constitute dedicated general fund revenues for use only for purposes of the claiming authority or **claiming agent**. Distributions of forfeiture moneys under section 1349(2)(h)(i) and (ii) of the CPLR must be deposited, respectively, in a "law enforcement purposes" or "prosecution services" subaccount of the general fund, and used only for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses. Moneys distributed pursuant to section 1349(2)(h) may not be used for youth programs.

You have requested our opinion concerning certain provisions of section 1349 of Article 13-A of the Civil Practice Law and Rules (CPLR), as added by L 1990, ch 655, which provide for the disposition of property obtained from successful civil forfeiture actions.

Specifically, you ask whether moneys realized through forfeiture and paid pursuant to sections 1349(2)(e) and (f) are distributable to and held in the custody of the district attorney as the "claiming authority" and **police department as the "claiming agent"**, or whether the funds are to be treated as a county general fund revenue. You also ask whether the moneys distributed pursuant to section 1349(2)(h)(i) and (ii) may be used for purposes not directly related to law enforcement investigation and prosecution, such as youth programs. Finally, you ask for clarification of the phrase " ... all costs and disbursements taxable under the provisions of this chapter", as used in section 1349(e).

Subdivision (1) of section 1349 requires that a judgment or order of forfeiture issued pursuant to Article 13-A include provisions for the disposal of the property found to have

been forfeited. Subdivision (2) of section 1349 provides, in pertinent part, that when the judgment or order of forfeiture directs that the "claiming authority" sell the forfeited property, the proceeds of the sale and any other moneys realized as a consequence of any forfeiture pursuant to article 13-A be "apportioned and paid" in a descending order of priority as prescribed in paragraphs (a) through (h) of subdivision (2). Paragraphs (e) and (f) of subdivision 2 provide that the moneys be "apportioned and paid" as follows:

(e) In addition to amounts, if any, distributed pursuant to paragraph (d) of this subdivision, fifteen percent of all moneys realized through forfeiture to the claiming authority in satisfaction of actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action, including that proportion of the salaries of the attorneys, clerical and investigative personnel devoted thereto, plus all costs and disbursements taxable under the provisions of this chapter;

(f) In addition to amounts, if any, distributed pursuant to paragraph (d) of this subdivision, five percent of all moneys realized through forfeiture to the claiming agent in satisfaction of actual costs incurred for protecting, maintaining and forfeiting the property including that proportion of the salaries of attorneys, clerical and investigative personnel devoted thereto; [emphasis added].

Paragraph (h) provides that:

(h) All moneys remaining after distributions pursuant to paragraphs (a) through (g) of this subdivision shall be distributed as follows:

(i) seventy-five percent of such moneys shall be deposited to a law enforcement purposes subaccount of the general fund of the state where the claiming agent is an agency of the state or the political subdivision or public authority of which the claiming agent is a part, to be used for law enforcement use in the investigation of penal law offenses;

(ii) the remaining twenty-five percent of such moneys shall be deposited to a prosecution services subaccount of the general fund of the state where the claiming authority is the attorney general or the political subdivision of which the claiming authority is a part, to be used for the prosecution of penal law offenses. [emphasis added].

For purposes of section 1349, a district attorney is a "claiming authority" and county police officers are "claiming agents" (CPLR, §1310[11], [12]; see also Criminal Procedure Law, §1.20[34][c]).

As a rule, the district attorney's office constitutes an administrative unit within the county (County Law, §351[1]; see also *Kelly v McGee*, 57 NY2d 522, 457 NYS2d 434) and is subject to the general fiscal and budgetary controls prescribed for such administrative units (see, e.g., 1979 Atty Gen [Inf Opns] 134, 149; see also *Caputo v Halpin*, 78 NY2d 117, 572 NYS2d 287). Although the County Law does not make specific reference to county police departments, we believe municipal police departments would similarly constitute administrative units within the municipality, subject to general fiscal and

budgetary controls (see, e.g., Town Law, §§103[1], 150; Village Law, §§5-500 [1], 8-800).

Among these fiscal controls is County Law, §550(2) which provides that the county treasurer shall receive and be the custodian of all moneys "belonging to the county or in which the county has an interest". County Law, §700(2), which generally prescribes the fiscal powers and duties of the district attorney, similarly requires that moneys "belonging to the county" be paid by the district attorney to the county treasurer. Further, although County Law, §705 provides for the establishment of a prosecution fund for the district attorney's office, this fund consists of an appropriation within the county budget and is held in the custody of the county treasurer (*County of Putnam v State*, 17 Misc 2d 541, 186 NYS2d 944; 25 Opns St Comp, 1969, pps 9 and 212). Thus, absent express statutory direction to the contrary, all moneys of the county received by the district attorney must be remitted to the county treasurer as custodian.

Section 1349(2)(e) and (f) provide that forfeiture funds are paid "in satisfaction of" certain actual costs and expenses originally financed with county moneys. There is no indication that these funds are received for the personal benefit of the claiming authority or agent, or any third party. Consequently, we believe it is clear that these funds are received for the benefit of the county, and constitute moneys "in which the county has an interest" and moneys "belonging to the county" within the meaning of County Law, §§550 and 700. While the claiming authority or claiming agent is the initial recipient of the distribution, there is no indication in these provisions that the claiming authority **or agent** is to retain custody and directly expend these moneys. Accordingly, it is our opinion that the district attorney as claiming authority and the police department as claiming agent are required to remit all moneys received under CPLR, §1349(2)(e) and (f) to the custody of the county treasurer in accordance with County Law, §§550(2) and 700 as a general fund revenue(1).

The use of these moneys, however, is restricted. Section 1349(2)(e), as noted, provides that the distribution under that provision is "in satisfaction of actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action". Similarly, section 1349(2)(f) provides that the distribution under that provision is "in satisfaction of actual costs incurred for protecting, maintaining and forfeiting the property ...". A primary purpose of these provisions, which superseded a prior statutory scheme, is to ensure that the claiming authority **and claiming agent** recover some of the costs and expenses incurred in connection with the forfeiture action, in order to provide an incentive to utilize the State forfeiture statute (see, e.g., Governor's Memorandum in Support of bill enacted as L 1990, ch 655, 1990 Legislative Annual, p 315; Memorandum of Attorney General to the Governor dated July 17, 1990 for L 1990, ch 655). In view of this purpose, we believe it is evident that these distributions are intended to be general fund revenues dedicated solely for the use of the claiming authority or claiming agent, which are to be appropriated for such purposes at the request of the claiming authority or claiming agent.

Therefore, it is our opinion, based on the language and legislative intent of the 1990 amendment, that the use of the moneys distributed under section 1349(2)(e) and (f) is intended to be restricted for the benefit of the claiming authority and claiming agent. We find no intent, however, to supersede the general statutory scheme that provides for custody of these county moneys with the county treasurer.

With respect to distributions pursuant to section 1349(2)(h)(i) and (ii), the statute expressly provides that these moneys must be deposited, respectively, to a "law enforcement purposes" and a "prosecution services" subaccount of the general fund. **Thus, these funds clearly are not held by the claiming authority or claiming agent, but rather are held in the custody of the county treasurer as a general fund revenue.** The statute expressly provides that these moneys are to be used for law enforcement purposes in the investigation of penal law offenses (CPLR, §1349[2][h][i]) or for the prosecution of penal law offenses (CPLR, §1349[2][h][ii]). Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion, relate to the investigation or prosecution of penal law offenses. Therefore, it is our opinion that section 1349(2)(h) moneys may not be used for those purposes.

Finally, it appears that the phrase "costs and disbursements taxable under this chapter", as used in CPLR, §1349(e), refers to the costs and disbursements allowable under various provisions of the CPLR (e.g. articles 81, 82, 83) in connection with the forfeiture action.

April 18, 1995
Joseph R. Caputo, County Comptroller
County of Suffolk

1. In reaching this conclusion, we recognize that proposed legislation, which would amend County Law, §700 and CPLR, §1349 to provide expressly that moneys realized as a consequence of any forfeiture must be deposited in an "asset forfeiture fund" in the custody of the chief fiscal officer, was passed by the Assembly in 1994 (see Assembly Bill No. 8338) and reintroduced in the Assembly in 1995 (see Assembly Bill No. 1582). We also note, however, that it is well established that "the failure of the Legislature to pass an amendment is at best a dubious foundation for drawing inferences of legislative intent" (General Building Contractors of New York State, Inc. v Roberts, 118 AD2d 173 at 176, 504 NYS2d 292 at 294, lv denied 68 NY2d 612, 510 NYS2d 1026; see also Clark v Cuomo, 66 NY2d 185, 495 NYS2d 936; Hospital Association of New York State v Axelrod, 113 AD2d 9, 494 NYS2d 905, appeal discontinued and withdrawn 68 NY2d 754, 506 NYS2d 1041). Therefore, we do not believe that these bills have significant probative value, and certainly are not dispositive of the current state of the law.