



STATE OF OHIO
OFFICE OF THE AUDITOR
JIM PETRO, AUDITOR OF STATE

Date: August 18, 1995
Bulletin: 95-004

AUDITOR OF STATE BULLETIN

TO: ALL PUBLIC OFFICES

SUBJECT: CITATIONS AND FINDINGS FOR RECOVERY UNDER OHIO REV. CODE
5705.41(D)

Recently, the question arose as to whether failure to comply with Ohio Rev. Code Section 5705.41(D) should result in a noncompliance citation or a finding for recovery. This bulletin addresses the issue of when such failure to comply should result in a finding for recovery rather than a noncompliance citation. This issue is important as Section 5705.41(D) is the most frequently cited section for most entities.

Section 5705.41(D) of the Ohio Revised Code requires that no subdivision make any contract or order any expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet such a commitment has been lawfully appropriated and is in the treasury or in the process of collection to the credit of the appropriate fund, free from any previous encumbrance. Section 5705.41(D) further provides that every such contract without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon.

Section 5705.41(D) also provides two exceptions to the above requirements:

1. "Then and Now Certificate" - If no certificate is furnished as required, upon receipt of the fiscal officer's certificate that a sufficient sum was at the time of making the contract or order and at the time of the certificate, appropriated and free of any previous encumbrances, the taxing authority may authorize the issuance of a warrant in payment of the amount due upon such contract or order by resolution within thirty days from the receipt of such certificate, if such expenditure/s otherwise valid.
2. If the amount involved is less than \$100, the fiscal officer may authorize it to be paid without the affirmation of the taxing authority (please note that this amount was changed to \$1,000 for all entities except counties, effective August 19, 1994).

The previous procedure of the Auditor of State's Office was to issue noncompliance citations for any failure to comply with Section 5705.41(D). However, Ohio Rev. Code Section 5705.45 appears to make any person who fails to comply with the requirements of Section 5705.41(D) personally liable to the extent of any improper payment.

Ohio Rev. Code Section 117.28 states: "The auditor of state shall notify the attorney general in

writing of every audit report which sets forth that any public money has been illegally expended...." Based upon Ohio Rev. Code Section 117.28 and Section 5705.45, the Auditor of State has the authority to issue findings for recovery against persons who fail to comply with Section 5705.41(D). However, the unique nature of most Section 5705.41(D) violations would require a finding for recovery only in certain narrow circumstances.

The vast majority of violations of Section 5705.41(D) are due to the entity's inadvertent failure to carefully follow appropriate purchasing procedures, and not due to any willful or malicious intent on the part of the person authorizing the purchase. In addition, in most cases the entity does receive the value of items purchased or services performed as a result of the expenditure. This is unlike most situations where findings for recovery are issued for illegal expenditures, in which the entity has expended public funds and has not received goods or services of the same value in return or the expenditure does not serve a proper public purpose.

Based on the above, it is the Auditor of State's position that findings for recovery for violations of Section 5705.41(D) should be issued only in certain, narrow circumstances. A finding for recovery would be appropriate where the purchased goods or services are not received or where the service rendered or purchase made serves no proper purpose for the entity in question. These determinations should be made on the facts of each individual case.

If you have any questions, please contact O'Neal Saunders, Assistant Chief Legal Counsel, Legal Division, at 1-800-282-0370.

Jim Petro, Auditor of State