



# Mary Taylor, CPA Auditor of State

## **Bulletin 2008-006**

**Date Issued:** June 2, 2008

**TO:** County Auditors  
County Commissioners  
County Boards, Offices and Commissions

**FROM:** Mary Taylor, CPA  
Ohio Auditor of State

**SUBJECT:** Strict Liability

### **Background and Overview**

The County Auditors Association has requested the AOS to issue this bulletin in order to reiterate the main principles regarding strict liability and any exceptions to the doctrine. This bulletin will focus on the duties of the county auditor in relation to the legal doctrine of strict liability, which is applicable to all public officials who supervise or authorize the expenditure of public funds.

Public officials are generally strictly liable to account for public funds entrusted to their care. Strict liability means a person may be found liable for the loss of public funds even though he or she may not have been personally at fault. The goal of the legal theory is to protect the public treasury. This is why the code requires that county auditors and fiscal officers obtain bonds conditioned on their faithful performance in office.

### **Legal Requirements for Public Officials**

Ohio Revised Code Section 9.39 states, "All public officials are liable for all public money received or collected by them or by their subordinates under color of office." The term "public official" is defined in Ohio Revised Code Section 117.01(E) as "any officer, employee, or duly authorized representative or agent of a public office." Additionally, Ohio Revised Code 117.01(C) defines "public money" as "any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office." Finally, the term "color of office," defined in Ohio Revised Code Section 117.01(A), "means actually, purportedly, or allegedly done under any law, ordinance, resolution, order or other pretension to official right, power, or authority."

Historically, public officials have generally been held strictly and individually liable for the loss or misuse of public money under their control:

It has been the general policy . . . with state officers, county officers, township officers, and all other public officials to hold the public official accountable for the moneys that come into his hands as such official, and his obligation has been held to be as broad as is the obligation of a common carrier of freight received for shipment; that is to say, that when he comes to account for the money received, it must be accounted for and paid over, unless payment is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason, have not been accepted by the courts as a defense against the claim for the lost money. 1993 Op. Att’y Gen. No. 93-004 (citing *Seward v. National Surety Co.* (1929), 120 Ohio St. 47, 49-50); *See also* 1980 Op. Att’y Gen. No. 80-074.

More recent court decisions have reiterated this proposition, in that “[t]he policy reasons behind making public officials accountable for the funds that they receive, *i.e.* the need to prevent frauds against the public, to protect public funds, and to place final responsibility for public funds on the shoulders of the officials charged with the collection and care of such funds -- are as valid today as when they first formed the basis for the rule of accountability set forth above.” *State ex rel. Village of Linndale v. Masten* (1985), 18 Ohio St.3d 228, 229.

Thus, county officials, county fiscal officers and county auditors must be aware of their role in the approval of expenditures and take steps to prevent mistakes, errors or omissions that result in the loss of public funds. In the context of a county audit by AOS, both the supervising/approving officer or employee and the county auditor may be liable for such losses.

### **Duties of a County Auditor**

The first duty required of a county auditor by Ohio Revised Code Section 319.02 is to obtain a bond conditioned on the auditor’s faithful performance of his/her duty:

Before entering upon the discharge of the duties of his office, the county auditor shall give a bond signed by a bonding or surety company authorized to do business in this state and to be approved by the board of county commissioners... in a sum of not less than five thousand nor more than twenty thousand dollars, as the board requires, conditioned for the faithful discharge of the duties of his office. The expense or premium for such bond shall be paid by the board and charged to the general fund of the county. Such bond, with the oath of office required by sections 3.22 and 3.23 of the General Code, and Section 7 of Article XV, Ohio Constitution, and the approval of the board indorsed upon it shall be deposited by such board with the county treasurer, who shall record and carefully preserve it.

If an auditor-elect fails to give bond and take the oath of office, as required by this section, on or before the day on which he is required to take possession of his office, such office shall become vacant.

We recommend county auditors and commissioners periodically review the bond amount, to guarantee that it is sufficient for the needs and operation of the county.

The bond is to insure the county against mistake, errors, omissions or fraud by third parties. The bond covers the primary duty of a county auditor, to issue warrants for payment from the county treasury. Ohio Revised Code Section 319.16 provides that:

The county auditor shall issue warrants . . . on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher and evidentiary matter for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal, including a county board of mental health or county board of mental retardation and developmental disabilities, so authorized by law.

Ohio Revised Code Section 319.16 goes on to describe how a county auditor should handle a request for payment which the auditor believes to be improper:

If the auditor questions the validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented, the auditor shall notify the board, officer, or tribunal who presented the voucher. If the board, officer, or tribunal determines that the expenditure is valid and the auditor continues to refuse to issue the appropriate warrant on the county treasury, a writ of mandamus may be sought.

Thus, when a county auditor questions an expenditure, officers and employees of the county need to understand that the county auditor has a statutory duty to ask such questions and verify amounts. If the board of county commissioners, tribunal or officer believes that the amount should be paid despite the county auditor's concerns, the county officers or employee should send the order to pay in writing. Upon receipt of the order to pay, the county auditor's duty is discharged and only the board, tribunal or officer authorizing the expenditure will be named in any Finding for Recovery for any loss of public money which results from their approval.

## **Exceptions to County Auditor Being Named in a FFR**

- Documented objection in writing by a county auditor or other fiscal officer to the official who made the decision, i.e. no receipt was provided and the decision maker asks the auditor to pay it anyway
- Findings For Recovery Repaid Under Audit - any amount paid after the Notices of Proposed Findings and/or the exit conference will name only the individual who improperly received public money and not the county auditor or fiscal officer

## **Audit Implications and Examples**

As stated above, any public official who either authorizes an illegal expenditure of public funds or supervises the accounts of a public office from which the illegal expenditure is made is strictly liable for the amount of the expenditure. Such an illegal expenditure, or a mere unidentified shortage of public money, provides a sufficient basis for issuing a Finding for Recovery against a public official.

An example of how such a scenario is handled can be found in the Introduction to the Auditor of State's Ohio Compliance Supplement.

### **Example 1**

The City of Anyplace contracted with Joe's Service Business, Inc., services. Joe's Service Business, Inc. improperly submitted invoices for, and had expenditures paid on its behalf, of \$125,000 in excess of the amounts authorized by the City. The City Finance Director paid these amounts on behalf of the City.

\$15,000 of the net expenditures of \$125,000 illegally paid to, or on behalf of, Joe's Service Business occurred when Jim Smith was the City Finance Director, and \$110,000 of these illegal expenditures occurred when Bill Wilson was the City Finance Director.

Under Ohio law, any public official who either authorizes an illegal expenditure of public funds or supervises the accounts of public office from which such illegal expenditure is made is strictly liable for the amount of the expenditure. *Seward v. National Surety Co.* (1929), 120 Ohio St. 47; 1980 Op. Att'y Gen. No. 80-074; Ohio Revised Code Section 9.39; *State ex rel. Village of Linndale v. Masten* (1985), 18 Ohio St. 3d 228. Public officials controlling public funds or property are secondarily liable for the loss incurred should such funds or property be fraudulently obtained by another, converted, misappropriated, lost or stolen. Public officials will be liable if and to the extent that recovery or restitution is not obtained from the persons who unlawfully obtained such funds or property, 1980 Op. Att'y Gen. No. 80-074.

### **Example 1 continued**

In accordance with the foregoing facts, and pursuant to Ohio Rev. Code Section 117.28, a Finding for Recovery for public money illegally expended is hereby issued against Joe's Service Business, Inc., Joe Smith, and Frank Jones, owners, jointly and severally, and in favor of the City of Anyplace, in the amount of \$125,000. Of this amount, Jim Smith, former City Finance Director, and Ace Insurance Corp., will be held jointly and severally liable in the amount of \$15,000 and in favor of the City of Anyplace. Additionally, Bill Wilson, City Finance Director, and Ace Insurance Corp., will be held jointly and severally liable in the amount of \$110,000 and in favor of the City of Anyplace.

Jim Smith and Bill Wilson shall be secondarily liable for such illegal expenditures to the extent that recovery or restitution is not obtained from Joe's Service Business, Inc., Joe Smith, or Frank Jones.

In this example, when payment by the fiscal officer exceeds the amount stated in the contract, a Finding For Recovery would be issued against Joe's Service Business, who has primary liability for the money the business received in error, and the finance director would be secondarily liable in the event Joe's Service Business did not repay the amount. This example assumes the city finance director approved the contract.

Another example of potential Findings For Recovery is in the area of payroll.

### **Example 2**

Bob Smith, Deputy Sheriff, is compensated at a rate of \$10/hour. There was a miscalculation in his payroll for the pay period ending January 15, 2008. As a result of this miscalculation, Deputy Smith was overpaid in the amount of \$300.00. Deputy Smith's payroll is approved by Harold Brown, Sheriff, and the warrants are signed by Jim Green, County Auditor.

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## **Example 2 continued**

In accordance with the forgoing facts, and pursuant to Ohio Revised Code § 117.28, a Finding for Recovery for public money illegally expended is hereby issued against Bob Smith, Deputy Sheriff, Harold Brown, Sheriff, Jim Green, County Auditor, and XYZ Bonding Company, Sheriff Brown's and Auditor Green's bonding company, jointly and severally, in the amount of \$300.00, and in favor of the County General Fund.

Harold Brown, Sheriff, and Jim Green, County Auditor, shall be secondarily liable for such illegal expenditures to the extent that recovery or restitution is not obtained from Bob Smith, Deputy Sheriff.

This example assumes the official approving the expenditure is other than the county auditor.

### **Questions**

Questions concerning this bulletin should be addressed to the Legal Division of the State Auditor's Office at (800) 282-0370.

A handwritten signature in black ink that reads "Mary Taylor". The signature is written in a cursive, flowing style.

Mary Taylor, CPA  
Auditor of State