February 26, 1993

OPINION NO. 93-004

The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street
P.O. Box 1140
Columbus, Ohio 43266-0040

Dear Auditor Ferguson:

You have requested an opinion on the following question: Are public officials strictly liable and personally liable for public monies which are properly due public agencies but which go uncollected during their tenure in office?

Public Officials Are Generally Liable for Public Money Received or Collected by Them or Their Subordinates

Historically, public officials have generally been held strictly and personally 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.

Seward v. National Sur. Co., 120 Ohio St. 47, 49-50, 165 N.E. 537, 538 (1929). The nature of this liability has been described as that of an insurer of the safety of the public funds. State

ex rel. Bolsinger v. Swing, 54 Ohio App. 251, 6 N.E.2d 999 (Hamilton County 1936); see, e.g., State v. Herbert, 49 Ohio St. 2d 88, 96, 358 N.E.2d 1090, 1095 (1976) ("[o]ver the years, this court has held public officials liable for the loss of public funds, even though illegal or otherwise blameworthy acts on their parts were not the proximate cause of the loss of public funds").

Public Officials Are Not Liable for Money Due Public Agencies that Remains Uncollected

The strict and personal liability of public officials for public money has been codified in R.C. 9.39, which provides in relevant part as follows:

> All public officials are liable for all public money received or collected by them or by their subordinates under color of office. All money received or collected by a public official under color of office and not otherwise paid out according to law shall be paid into the treasury of the public office with which he is connected to the credit of a trust fund and shall be retained there until claimed by its lawful owner. (Footnote and emphasis added.)

The language of R.C. 9.39 with respect to the liability of public officials is plain and unambiguous. Public officials are held liable, pursuant to R.C. 9.39, only for public money that they or their subordinates receive or collect. R.C. 9.39 establishes no liability on the part of public officials for money that is due but not collected. See, e.g., Youngstown v. The Youngstown Mun. Ry. Co., 134 Ohio St. 308, 310, 16 N.E.2d 541, 542 (1938) (holding that the definition of public money found in G.C. 286, that is, "the term 'public money' as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise" was not comprehensive enough to encompass unreceived, uncollected money).

Although the plain and unambiguous language of R.C. 9.39 requires no further statutory construction, see generally State ex rel. Stanton v. Zangerle, 117 Ohio St. 436, 159 N.E. 823 (1927), legislative history indicates that the General Assembly did not intend, by the enactment of R.C. 9.39, to hold public officials liable for money due but not collected. R.C. 9.39 was enacted in 1985-1986 Ohio Laws, Part I, 1760 (Sub. H.B. 201, eff. July 1, 1985). Sub. H.B. 201, inter alia, enacted comprehensive amendments to the laws governing the supervision of public funds and substantially restructured R.C. Chapter 117. Prior to Sub. H.B. 201, R.C.

117.10 provided that "'public money,' as used in this section...includes all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise, and all public officials are liable therefor." Sub. H.B. 201 moved the definition of public money for purposes of R.C. Chapter 117 from R.C. 117.10 to R.C. 117.01 and amended that definition, as follows: "'Public money' means any money received, collected by, or due a public officer 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." R.C. 117.01(C) (emphasis added).

Sub. H.B. 201 simultaneously enacted R.C. 9.39, which holds public officials liable for "all public money received or collected by them or by their subordinates under color of office." Thus, the General Assembly recognized money due a public official but not yet collected as "public money" for purposes of R.C. Chapter 117, and concurrently determined that the liability of a public official under R.C. 9.39 for public money extends only to public money that has been received or collected under color of office by that official or his or her subordinates. Clearly, if the General Assembly had intended to hold public officials liable for money due but not collected it would have included that language in R.C. 9.39.

On the basis of the analysis above, it is my opinion, and you are hereby advised, that public officials are not strictly and personally liable for public monies that are properly due public agencies but that remain uncollected by those public officials.

Respectfully,

LEE FISHER
Attorney General

February 26, 1993

The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street
P.O. Box 1140
Columbus, Ohio 43266-0040

SYLLABUS: 93-004

Public officials are not strictly and personally liable for public monies that are
properly due public agencies but that remain uncollected by those public officials.