

OPINION NO. 2012-023**Syllabus:**

2012-023

1. Pursuant to R.C. 3501.17(A), a county board of elections may not encumber money that has not been appropriated to the board. (1928 Op. Att’y Gen. No. 2629, vol. III, p. 2190 (syllabus, paragraph 2), overruled, in part, on the basis of statutory amendment.)
2. Members of a county board of elections that violate R.C. 3501.17(A) by encumbering money that has not been appropriated to the board may incur personal liability when a loss of public money occurs.

To: Sherri Bevan Walsh, Summit County Prosecuting Attorney, Akron, Ohio

By: Michael DeWine, Ohio Attorney General, July 9, 2012

You have requested an opinion concerning the authority of a county board of elections to expend money. Specifically, you ask:

1. May a county board of elections encumber money that has not been appropriated to the board?
2. If a county board of elections has the authority to encumber money that has not been appropriated to the board, are there particular procedures the board must follow when doing so?
3. If a county board of elections does not have the authority to encumber money that has not been appropriated to the board, are members of the board personally liable when they encumber money that they know has not been appropriated to the board?

Summit County’s Powers as a Charter County

The Ohio Constitution requires the General Assembly to “provide by general law for the organization and government of counties,” Ohio Const. art. X, § 1,

and authorizes counties to adopt a charter form of government, Ohio Const. art. X, §§ 3, 4.¹ A county charter “may vary the system established by general law for the organization and operation of county government.” 2011 Op. Att’y Gen. No. 2011-013 at 2-113. However, a county charter must “provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.” Ohio Const. art. X, § 3. Thus, a county charter “provides for the ‘form’ as well as the ‘exercise’ and ‘performance’ of” the powers and duties imposed by statute on counties and county officers. *State ex rel. O’Connor v. Davis*, 139 Ohio App. 3d 701, 705, 745 N.E.2d 494 (Summit County 2000); *accord* 1985 Op. Att’y Gen. No. 85-039 at 2-140 and 2-141.

Summit County has adopted a charter form of government in accordance with Article X, §§ 3, 4 of the Ohio Constitution. Under its charter, the county board of elections exercises the powers granted to, and performs the duties imposed upon, county boards of election by Ohio law. *See* Charter of Summit County, art. I, § 1.01. The county board of elections also is required to exercise its powers in the manner prescribed by statute unless the county charter or an ordinance or resolution provides otherwise:

The County is responsible for the exercise within its boundaries of all powers vested in and the performance of all duties imposed upon counties and county officers by law. In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers which the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising

All powers shall be exercised and enforced in the manner prescribed by this Charter, or, when not prescribed herein, in such manner as may be provided by ordinance or resolution of the County Council, and, when not prescribed by the Charter or amendments thereto or by ordinance or resolution, then such power shall be exercised in the manner prescribed by general law.

Id.; *see also* R.C. 1.62(A) (“[r]eferences to particular county officers, boards, commissions, and authorities mean, in the case of a county that has adopted a charter under Article X, Ohio Constitution, the officer, board, commission, or authority of that county designated by or pursuant to the charter to exercise the same powers or perform the same acts, duties, or functions that are to be exercised or performed under the applicable section of the Revised Code by officers, boards, commissions, or authorities of counties that have not adopted a charter”).

The Charter of Summit County does not prescribe the manner in which its board of elections is to exercise its powers. Nor are we aware of a local ordinance or

¹ As used in the context of the laws governing county charters, the term “general law” means the “statutes enacted by the General Assembly that have application to the organization and operation of county government throughout the entire state.” 2011 Op. Att’y Gen. No. 2011-013 at 2-113 n.2.

resolution governing the board's spending authority. Accordingly, the board of elections of Summit County is required to follow Ohio law when expending money. *See* Charter of Summit County, art. I, § 1.01; *see also* R.C. 1.62(A).

Authority of a County Board of Elections to Expend Money

Your first question asks whether a county board of elections may encumber money that has not been appropriated to the board.² The Charter of Summit County requires the county executive to prepare an annual operating budget for each county department, office, agency, authority, board, and commission. *See* Charter of Summit County, art. II, § 2.03(8), (10), and (12). The operating budget must contain the following:

- (a) A statement of estimated revenues from all sources, including fund balances from the preceding year;
- (b) A statement of proposed expenditures, shown by department, office, agency, authority, board and commission, and by activity, character and object and not exceeding estimated revenues for such year;
- (c) A schedule of estimated revenues and proposed expenditures, for each County department, office, agency, authority, board and commission, on a quarterly or more frequent basis; and
- (d) A summary of the contents of the proposed operating budget.

Charter of Summit County, art. II, § 2.03(8).

The county executive submits the operating budget to the county council. *Id.* The county council may “adopt and amend . . . the operating budget” and “make appropriations for the County.” Charter of Summit County, art. III, § 3.03(5). Thus, under the Charter of Summit County, the county executive and county council annually establish the amount of money that is to be appropriated to each county department, office, agency, authority, board, and commission.

For purposes of appropriating money from the county treasury, a county board of elections is a county board. *See* R.C. 1.62(A); R.C. 3501.17(A); Charter of Summit County, art. I, § 1.01; *see also* *Union County Comm'rs v. Brunner*, 146 Ohio Misc. 2d 40, 2008-Ohio-2833, 889 N.E.2d 589, ¶45 (C.P. Franklin County 2008) (“[b]y statute, a board of county commissioners possesses the authority initially to review and pass upon the budgetary request of a board of elections”); 2012 Op. Att’y Gen. No. 2012-011, slip op. at 6 (“the expenses of a board of elections are paid from appropriations by a board of county commissioners from the

² The term “encumber” means “to burden with a legal claim.” *Merriam-Webster’s Collegiate Dictionary* 411 (11th ed. 2005). Your question thus concerns the authority of a county board of elections to grant a legal claim to public money that has not been appropriated to the board.

county treasury’). This means that the county executive and county council establish the amount of money that is annually appropriated to the county board of elections.

When moneys are appropriated to a county board of elections, the board has the authority to expend the moneys to pay the expenses of the board:

- (A) The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners,³ in the same manner as other county expenses are paid⁴ Payments shall be made upon vouchers of the board of elections certified to by its chairperson or acting chairperson and the director or deputy director, upon warrants of the county auditor. . . .
- (B) Except as otherwise provided in division (F) of this section,⁵ the compensation of the members of the board of elections and of the director, deputy director, and regular employees in the board’s offices, other than compensation for overtime worked; the expenditures for the rental, furnishing, and equipping of the office of the board and for the necessary office supplies for the use of the board; the expenditures for the acquisition, repair, care, and custody of the polling places, booths,

³ In Summit County the county executive and county council exercise the powers vested in, and perform the duties imposed upon, a board of county commissioners. *See* Charter of Summit County, art. II, § 2.03; Charter of Summit County, art. III, § 3.03; 1986 Op. Att’y Gen. No. 86-010 at 2-42 n.1.

⁴ If a board of county commissioners fails to appropriate an amount sufficient to provide for the necessary and proper expenses of the county board of elections “pertaining to the conduct of elections, the board of elections may apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and the amount shall be appropriated.” R.C. 3501.17(A). *See generally State ex rel. Ruggles v. Howser*, Case No. CA87-11-017, 1988 Ohio App. LEXIS 1678, at *5 (Brown County May 2, 1988) (“[i]f the board of county commissioners does not appropriate the amount the common pleas court has determined to be the election [board’s] necessary and proper expenses, then the election board may bring a mandamus action to compel the board of county commissioners to make an appropriation equal to the amount the common pleas court has previously determined to be the election board’s necessary and proper expenses”).

⁵ R.C. 3501.17(F) states that “[w]hen a precinct is open during a general, primary, or special election solely for the purpose of submitting to the voters a statewide ballot issue, the state shall bear the entire cost of the election in that precinct and shall reimburse the county for all expenses incurred in opening the precinct.”

guardrails, and other equipment for polling places; the cost of tally sheets, maps, flags, ballot boxes, and all other permanent records and equipment; the cost of all elections held in and for the state and county; and all other expenses of the board which are not chargeable to a political subdivision in accordance with this section shall be paid in the same manner as other county expenses are paid. (Footnotes added.)

R.C. 3501.17. *See generally State ex rel. Ruggles v. Howser*, Case No. CA87-11-017, 1988 Ohio App. LEXIS 1678, at **7-8 (Brown County May 2, 1988) (“it was the Ohio General Assembly’s intention that county boards of election be given independent authority over their own accounts and budget following the completion of the appropriation process [set out in R.C. 3501.17]. By this we mean that once the board of county commissioners has appropriated what has finally been determined to be the board of elections’ necessary and proper expenses, the actual expenditure of those monies lies exclusively within the domain of the board of elections and is not subject to any form of oversight by the board of county commissioners”); 1984 Op. Att’y Gen. No. 84-091 at 2-313 (“once the board of county commissioners has appropriated a sufficient amount to meet the necessary expenses of the board of elections, the commissioners have no further control over the expenditures of the board of elections. Further, a board of county commissioners has no authority to change arbitrarily the amounts requested by the board of elections for its necessary and proper expenses” (citations omitted)).

The authority of a county board of elections to expend money under R.C. 3501.17 is not unlimited, however. Pursuant to R.C. 3501.17(A), “[t]he board of elections shall not incur any obligation involving the expenditure of money unless there are moneys sufficient in the funds appropriated therefor to meet the obligation.” *See also* R.C. 3.12 (“[a]n officer or agent of . . . any county . . . who is charged or entrusted with the construction, improvement, or keeping in repair of a building or work of any kind, or with the management of or providing for a public institution, shall make no contract binding or purporting to bind . . . such county . . . to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been authorized to make such contract”). The plain language of R.C. 3501.17(A) thus mandates that a county board of elections not purchase goods or services when money to pay for the goods and services is not available. *See generally State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994) (“[w]here the wording of a statute is clear and unambiguous, [the] only task is to give effect to the words used”). Accordingly, pursuant to R.C. 3501.17(A), a county board of elections may not encumber money that has not been appropriated to the board.⁶ *See State ex rel. Ruggles v. Howser*, Case No. CA87-11-017, 1988 Ohio App. LEXIS 1678, at *9 (“under R.C. 3501.17, a county board of elections

⁶ The second syllabus paragraph of 1928 Op. Att’y Gen. No. 2629, vol. III, p. 2190 states, in part, that “[a] board of deputy state supervisors of elections [(now

may not spend money it does not have”); *Union County Comm’rs v. Brunner*, 146 Ohio Misc. 2d at ¶49 (“R.C. 3501.17(A) precludes a board of elections from expending funds that it does not have”).

Method for Encumbering Money that Has Not Been Appropriated

Your second question asks, if a county board of elections has the authority to encumber money that has not been appropriated to the board, whether there are particular procedures the board must follow when doing so. We have determined that, pursuant to R.C. 3501.17(A), a county board of elections may not encumber money that has not been appropriated to the board. It is thus unnecessary for us to consider your second question.

Personal Liability of a Public Officer for Expending Money that Has Not Been Appropriated

Your final question asks, if a county board of elections does not have the authority to encumber money that has not been appropriated to the board, whether members of the board are personally liable when they encumber money that they know has not been appropriated to the board.⁷ It is a well-established common law principle in Ohio that “where any public officer orders or participates in the ordering of the expenditure of public funds, which expenditure is not authorized by law, such officer is personally liable for the amount of the funds so expended.” 1952 Op. Att’y Gen. No. 1713, p. 559, at 566; *accord State v. Herbert*, 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976); *Crane Township ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 132

county boards of elections] . . . is authorized to make contracts and give orders involving the expenditure of money to cover the necessary expenses of conducting [elections], notwithstanding the fact that sufficient funds are not now in the county treasury to pay such obligations so incurred, and it is the duty of the county commissioners to pay such obligations when funds shall have become available.” After the issuance of this opinion, the General Assembly amended G.C. 4785-20 (now R.C. 3501.17) to prohibit a county board of elections from incurring “any obligation involving the expenditure of money unless there are monies sufficient in the funds appropriated therefor to meet such obligations.” 1931 Ohio Laws 679, 683 (Am. S.B. 320, filed July 2, 1931). On the basis of Am. S.B. 320, 1928 Op. Att’y Gen. No. 2629, vol. III, p. 2190 (syllabus, paragraph 2), is overruled, in part, on the basis of statutory amendment.

⁷ Your question does not involve a situation in which a county board of elections complies with R.C. 3501.17 when paying an expense of the board and the county fails to collect sufficient revenue to redeem a warrant for payment of the expense. *See generally* 1933 Op. Att’y Gen. No. 974, vol. II, p. 938, at 941 (“[w]hen appropriations are made according to law, and obligations against the funds created by these appropriations are incurred strictly according to law, moneys will always be available to meet the obligations unless there is a failure of anticipated revenues against which the appropriation is made or exists”). *See generally also* R.C. 321.17-.19 (setting forth the procedures for redeeming a warrant when insufficient moneys are available).

N.E. 851 (1921); *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918); 2009 Op. Att’y Gen. No. 2009-033 at 2-225 through 2-229; 1994 Op. Att’y Gen. No. 94-048 at 2-244; 1984 Op. Att’y Gen. No. 84-080 at 2-274.

In addition, several statutes authorize a county prosecuting attorney to institute a civil action to recover public moneys that are alleged to have been expended illegally.⁸ R.C. 309.12 states that a county prosecuting attorney may bring a civil action “to recover, for the use of the county, all public moneys . . . illegally drawn . . . from the county treasury.” *See* 2009 Op. Att’y Gen. No. 2009-033 at 2-228; *see also* R.C. 309.13 (authorizing a taxpayer suit if the county prosecuting attorney does not file a civil action under R.C. 309.12). R.C. 117.28 also expressly authorizes a county prosecuting attorney to institute a civil action when the Auditor of State conducts an audit of a county office under R.C. 117.10-.27 and determines, as a result of the audit, that public money has been illegally expended:⁹

Where an audit report sets forth that any public money has been illegally expended . . . , the officer receiving the certified copy of the report pursuant to [R.C. 117.27]¹⁰ may, within one hundred twenty days after receiving the report, institute civil action in the proper court in the name of the public office to which the public money is due . . . for the recovery of the money . . . and prosecute the action to final determination. (Footnote added.)

⁸ Under Article IV, § 4.01(1) of the Charter of Summit County, the county prosecuting attorney is required to perform the duties imposed by statute unless the “County Council changes those duties by ordinance or resolution.” We are not aware of a local ordinance or resolution prohibiting the Summit County Prosecuting Attorney from instituting a civil action to recover public money that is alleged to have been expended illegally. For this reason, the Summit County Prosecuting Attorney has the same authority as a prosecuting attorney of a county that has not adopted a charter to institute a civil action to recover public money that is alleged to have been expended illegally. *See* Charter of Summit County, art. IV, § 4.01(1); *see also* R.C. 1.62(A); Charter of Summit County, art. I, § 1.01.

⁹ When conducting an audit of a county office under R.C. 117.10, the Auditor of State is required to determine “whether any public money has been illegally expended.” R.C. 117.24. *See generally* R.C. 117.10 (authorizing the Auditor of State to audit county offices). Once the Auditor of State determines that public money has been illegally expended, the Auditor of State incorporates that finding in an audit report. R.C. 117.25. A completed audit report is filed with various county officials, including the county prosecuting attorney when she serves as legal counsel to the officers of the audited county office. R.C. 117.26-.27.

¹⁰ R.C. 117.27 states that “[a] certified copy of the audit report referred to in [R.C. 117.26] shall be filed with the officer required by . . . county charter . . . to act as legal counsel to the officers of the public office.” In Summit County, the prosecuting attorney is legal counsel for the county board of elections. *See* R.C. 1.62(A); R.C. 309.09(A); Charter of Summit County, art. I, § 1.01; Charter of Summit County, art. IV, § 4.01(1).

See also R.C. 3.12 (a county officer is personally liable when he makes or participates in making a contract for the “construction, improvement, or keeping in repair of a building or work of any kind, or with the management of or providing for a public institution” without an appropriation).

As explained in 2009 Op. Att’y Gen. No. 2009-033 at 2-228:

In order for an expenditure to be “illegal” under R.C. 117.28, “it must violate an identifiable existing law”—use of the term “illegal” does not suggest “the vague and far broader standard of impropriety.” [*Mahoning Valley Sanitary Dist. ex rel. Montgomery v. Gilbane Bldg. Co.*, Case No. C-2-98-785, 2001 U.S. Dist. LEXIS 25772, at **15, 20 (S.D. Ohio, Oct. 17, 2001), *aff’d*, 86 Fed. Appx. 856, 2004 U.S. App. LEXIS 1099 (6th Cir. 2004)]. It is not “a term of art for the [State] Auditor to develop, as he sees fit, on a case-by-case basis, for “[w]ithout a preexisting law or regulation” to be violated, an expenditure, “by definition, cannot be illegal.” *Id.* at **19-20, 23. A constitutional, statutory or administrative provision must be violated by an expenditure in order for the expenditure to be illegal under R.C. 117.28. *Id.* at **22-23.

Under R.C. 309.12, R.C. 117.28, and the common law, members of a county board of elections may incur personal liability for the loss of public money resulting from the payment of an expenditure if they violate a constitutional, statutory, or administrative provision when making the expenditure. Accordingly, members of a county board of elections that violate R.C. 3501.17(A) by encumbering money that has not been appropriated to the board may incur personal liability when a loss of public money occurs.

As a final matter, “the Attorney General cannot definitively predict the approach that the courts may take in deciding whether or not to impose personal liability in any particular case, as that is a matter solely for the judiciary.” 2009 Op. Att’y Gen. No. 2009-033 at 2-229; *see* 2003 Op. Att’y Gen. No. 2003-037 at 2-311 (“[q]uestions of liability are decided by the courts, in particular contexts and with consideration of specific facts”); 2000 Op. Att’y Gen. No. 2000-021 at 2-136 (“[q]uestions of liability are resolved by the courts and cannot be determined by means of an opinion of the Attorney General”). Consequently, whether members of a county board of elections may in a particular case be held personally liable for encumbering money that has not been appropriated to the board cannot be determined by means of an Attorney General opinion.

Conclusions

On the basis of the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 3501.17(A), a county board of elections may not encumber money that has not been appropriated to the board. (1928 Op. Att’y Gen. No. 2629, vol. III, p. 2190 (syllabus, paragraph 2), overruled, in part, on the basis of statutory amendment.)

2. Members of a county board of elections that violate R.C. 3501.17(A) by encumbering money that has not been appropriated to the board may incur personal liability when a loss of public money occurs.