

OPINION NO. 80-074**Syllabus:**

A public official who has received public funds or public property under color of office will be held personally liable for losses sustained by the public through theft of money or property from his office, unless such official is released and discharged pursuant to R.C. 131.18 or other legislative action.

To: Ronald L. Collins, Tuscarawas County Pros. Atty., New Philadelphia, Ohio
By: William J. Brown, Attorney General, November 12, 1980

I have before me your request for an opinion regarding personal liability of public officeholders for stolen public funds and property. You stated your question as follows:

Are county officeholders and the members of various boards such as the Tuscarawas County Health Board personally liable for losses sustained by the public through theft of money or property from their offices in unsolved crimes?

The court in Seward v. National Surety Co., 120 Ohio St. 47, 49-51, 165 N.E. 537, 538 (1929), stated the general policy of liability as follows:

It has been the general policy, not only with government employees and appointees, but with state officers, county officers, township officers, and other public officials, to hold the public official accountable for the moneys that come into his hands as such official. . . unless payment by the official 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 a claim for the lost money. . . . [I]t is said by practically all the cases that it would be distinctly against public policy not to require a public officer to account for. . . moneys that have come into his hands by virtue of his being such public officer; that it would open the door very wide for the accomplishment of the grossest frauds if public officers were permitted to present as the defense, when called upon to disburse the money according to law, that it has been purloined or destroyed. . . . (Emphasis added.)

Accord, State v. Herbert, 49 Ohio St. 2d 88, 96-97, 358 N.E. 2d 1090, 1095 (1976); 1976 Op. Atty Gen. No. 76-017 at 2-53 (public officials are, essentially, "in a position of strict liability"); see Crane Township ex rel. Stalter v. Secoy, 103 Ohio St. 258, 132 N.E. 851 (1921); R.C. 117.10. Thus, a public officeholder or employee will be held personally liable if public funds that have come into his custody in his official capacity are lost or stolen, unless the loss is a result of an act of God or an act of a public enemy. As was recognized by the court in State ex rel. Bolsinger v. Swing, 54 Ohio App. 251, 258, 6 N.E. 2d 999, 1003 (Hamilton County 1936): "It is

apparent that this rule is a harsh one and under certain circumstances might work great injustice." However, a legislative body may pass laws that exonerate certain public officers where a loss occurs without their fault or negligence, and allow for the payment of the losses by a tax levied in the territory where the loss is sustained. State v. Board of Education, 38 Ohio St. 3 (1882); Board of Education v. McLandsborough, 36 Ohio St. 227 (1880).

Because your question specifically concerns members of the Tuscarawas County Board of Health, I will address that body in particular. The Board informed me that the money in question was stolen from its petty cash fund, which it received from a federal grant. It is my understanding, confirmed by the State Auditor's Office, that this fund consists of public funds. On this point, R.C. 117.10 provides in pertinent part:

"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. All money received under color of office and not otherwise paid out according to law is due to the political subdivision or taxing district with which the officer is connected and shall be paid into the treasury thereof to the credit of a trust fund, and there retained until claimed by the lawful owner. If not claimed within a period of five years, such money shall revert to the general fund of the political subdivision where collected.
(Emphasis added.)

Since the money that was stolen consists of public funds, the members of the Board are liable for the loss, if recovery or restitution is not made.

I note, further, that in City of Youngstown v. Hindman, 66 Ohio App. 337, 38 N.E. 2d 319 (Mahoning County 1939), appeal dismissed, 135 Ohio St. 579 (1939), the court held that the head of a department cannot escape liability by putting the blame for missing public funds on a subordinate. In so holding, the court made reference to the duties of the department head in finding him liable. These duties include "the keeping and supervising of all accounts, and collection and custody of all public money." 66 Ohio App. at 337, 38 N.E. 2d at 319 (paragraph one of the syllabus) (emphasis added). Under this rationale, those public officers and employees who, in their official capacities, have control over public funds will be held personally liable for missing public funds. This reasoning thus follows the rule laid down in Seward v. National Surety Co. That is, when public funds have come into the public officer's or employee's "hands as such official," i.e., under color of office, the public officer or employee will be held personally liable for the missing funds, even if the loss occurred while the funds were, at the direction of the official, in the custody of another individual. More specifically, since health board members receive the public funds under color of office, see R.C. 3709.28, they will be personally liable for the missing funds. Therefore, under the Seward v. National Surety Co. analysis, board of health members will be held accountable for public funds entrusted to them as such officials, unless they are exonerated by legislation.

In R.C. 131.18 the legislature has provided for the exoneration of certain treasurers and clerks from liability for losses resulting from fire, robbery, burglary, flood, or inability of a bank to refund public money. R.C. 131.18 provides:

When a loss of public funds, entrusted to a county or municipal corporation treasurer or to a clerk of the court of common pleas, clerk of the court of appeals, clerk of the municipal court, clerk of the county court, judge of the probate court as clerk of such court, judge of the juvenile court as clerk of such court, or to a township or school district treasurer, or a clerk of the board of trustees of a public library by virtue of his office, results from fire, robbery, burglary, flood, or inability of a bank to refund public money lawfully in its possession belonging to such public funds, the board of county commissioners, board of township trustees, the legislative authority of the municipal corporation, the board of education, or the board of

library trustees, respectively, may release and discharge such treasurer, clerk, or judge from all personal liability to or demands of such county, township, municipal corporation, school district, or public library, for the loss so created unless the loss resulted from his negligence or other wrongful act. (Emphasis added.)

Under this section, the bodies named therein may release and discharge the persons named therein when a loss results from one of the specified causes. However, as was noted in *State ex rel. Bolsinger v. Swing*, construing G.C. 2303, predecessor to R.C. 131.18, such a provision applies only to the persons and circumstances named therein. It cannot be extended to other individuals or situations.

Looking at the list of public officials that may be exonerated, I think it is quite clear that members of a county board of health are not included within this list. Also, the losses do not cover all theft, but only robbery and burglary. See *State ex rel. Bolsinger v. Swing*. Therefore, even if the theft of petty cash would be considered burglary, see R.C. 2911.12, since board of health members are not included in the bodies named in R.C. 131.18 they may not be released and discharged of personal liability for the stolen public funds pursuant to that section. In addition, "it is manifest that it was the purpose of the Legislature in enacting Section 2303, et seq., General Code [now R.C. 131.18], not to change the rule of liability, but to place it in the power of the county commissioners to relieve from such liability in certain specific cases where the treasurer could demonstrate that he was without fault or negligence." *State ex rel. Bolsinger v. Swing*, 54 Ohio App. at 258, 6 N.E. 2d at 1003.

Because the members of a county board of health are not covered by R.C. 131.18, and because I am aware of no other legislation which would relieve them of liability for the loss of the funds in question, it is my opinion that the State Auditor's finding for recovery against the Tuscarawas County Board of Health members for the stolen funds is correct. To hold otherwise would thwart the public policy as expressed in *Seward v. National Surety Co.*

You also inquire whether board of health members would be personally liable for losses sustained by the public through theft of property from their offices in unsolved crimes. In *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 276, 119 N.E. 822, 823 (1918), the court stated that "we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril. . . ." Accord, *Crane Township ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 132 N.E. 851 (1921). This statement supports the conclusion that a public official or employee is liable for stolen public property to the same extent that he is liable for stolen public funds. R.C. 117.10, which deals with public funds that are not accounted for, also makes reference to public property. It provides in pertinent part:

If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report, other than the auditing department of the taxing district, shall within ninety days after the receipt of the certified copy of such report, institute civil actions in the proper court in the name of the political subdivision or taxing district to which the public money is due or the public property belongs for the recovery of the money or property and shall prosecute such actions to final determination. Any mayor of a village shall employ legal counsel for such purpose, who shall be paid out of the treasury of the village on voucher approved by the mayor and on warrant of the village clerk, and the amount of the compensation constitutes a charge against said village notwithstanding the failure of the legislative authority thereof to appropriate money or levy funds therefor. (Emphasis added.)

As for who is liable for converted or misappropriated public property, the preceding analysis of public funds is applicable. Clearly, the persons who converted or misappropriated the property are liable therefor. If, however, recovery or restitution is not obtained from such persons, those public officials and employees who, in their official capacities, have control over public property will be held personally liable for stolen public property. This reasoning also complies with the public policy as expressed in Seward v. National Surety Co.

In sum, the petty cash fund of the Tuscarawas County Board of Health consists of public funds that have come into the Health Board members' hands as such officials; thus, under the rationale of Seward v. National Surety Co., the Board members must be held personally liable for the stolen public funds. Moreover, since health board members are not included within the scope of R.C. 131.18, they may not be exonerated of personal liability therefor pursuant to such statute. Furthermore, under the rationale of State ex rel. Smith v. Maharry and Seward v. National Surety Co., the Health Board members will also be personally liable for any loss of public property that has come into their hands as such officials.

It is, therefore, my opinion, and you are hereby advised, that a public official who has received public funds or public property under color of office will be held personally liable for losses sustained by the public through a theft of money or property from his offices, unless such official is released and discharged pursuant to R.C. 131.18 or other legislative action.