

**OPINION NO. 85-043****Syllabus:**

1. R.C. 5705.41(D) does not necessarily preclude payment of vouchers submitted by a county department of human services for services that were performed two or three years prior to the submission of the vouchers to the county auditor. A county auditor may issue a warrant on such a voucher, provided that the voucher is proper in other respects, if there is attached thereto a certificate from a prior year indicating that the amount required to meet the obligation was lawfully appropriated for such purpose and was in the treasury or in process of collection, free from any previous encumbrances. If no such certificate is

attached, the county auditor may nevertheless pay such voucher if he can execute a certificate stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for such purpose and free of any previous encumbrance; if the amount involved is one hundred dollars or greater the county auditor must present such certificate to the board of county commissioners for its approval.

2. A county auditor may issue warrants only as authorized by law and, where lawfully permitted, may issue warrants which exceed the actual cash balance of a particular fund. A county treasurer may not, however, redeem a warrant which has been drawn upon a fund having an insufficient balance.

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**To: Lynn A. Grimshaw, Scioto County Prosecuting Attorney, Portsmouth, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, August 8, 1985**

I have before me your request for an opinion on certain matters which are of interest to the auditor of your county. The first matter involves situations in which the auditor is presented with vouchers submitted by the county department of human services covering services that were performed two or three years prior to their submission. The auditor's question is whether R.C. 5705.41(D) precludes payment of such vouchers. I will, therefore, assume that your question pertains only to expenditures to which the certificate requirement of R.C. 5705.41(D) applies.<sup>1</sup> I will also assume that such vouchers are in all other respects proper. See R.C. 319.16 ("[t]he 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 for the moneys").

R.C. 5705.41 provides in relevant part as follows:

No subdivision or taxing unit shall:

. . . .

(D) Except as otherwise provided in section 5705.413 of the Revised Code, make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the drawing of a warrant in payment of amounts due upon

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<sup>1</sup> There are, of course, certain instances in which a certificate need not be provided pursuant to R.C. 5705.41(D). See, e.g., R.C. 5705.41 and R.C. 5705.44 (no certificate required for years following first year of continuing contract); R.C. 5705.44 (contracts on which payments will be made from public utility earnings); R.C. 5705.41 and R.C. 5705.46 (current payrolls).

such contract, but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided, that if the amount involved is less than one hundred dollars, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

. . . .

Any certificate of the fiscal officer attached to a contract shall be binding upon the political subdivision as to the facts set forth therein. . . . "Contract" as used in this section excludes current payrolls of regular employees and officers. (Emphasis added.)

"Subdivision" is defined in R.C. 5705.01(A) to include a county, and "[f]iscal officer" is defined in R.C. 5705.01(D), in the case of a county, to mean the county auditor. Moneys of a county department of human services are held within the county treasury and paid out upon warrant of the county auditor. See R.C. 319.16; R.C. 321.15; R.C. 329.02; R.C. 5705.05. Pursuant to R.C. 5705.41, such moneys may not be expended unless the required certificate has been provided. See, e.g., 1969 Op. Att'y Gen. No. 69-076. Compliance with R.C. 5705.41 has been held to be mandatory, though it may work a hardship. See Pincelli v. Ohio Bridge Corp., 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966); State v. Kuhner & King, 107 Ohio St. 406, 140 N.E. 344 (1923); Thomas v. Board of Commissioners, 28 Ohio App. 8, 162 N.E. 430 (Butler County 1923).

R.C. 5705.41(D) sets forth two manners in which the availability of funds may be certified. The first is that, prior to the making of a contract or giving of an order involving the expenditure of money, the fiscal officer is to certify "that the amount required to meet the obligation. . . has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances." If this procedure is followed prior to the making of the contract or order on which a particular voucher is based, the auditor may issue a warrant for payment of the voucher, even though the voucher is not submitted until two or three years after the services are rendered. When the availability of funds is certified under R.C. 5705.41(D) prior to the making of a contract or order for the expenditure of funds, the funds so certified are considered to be encumbered and remain available in subsequent years for the expenditure for which they have been certified. See generally City of Findlay v. Pendleton, 62 Ohio St. 80, 88, 56 N.E. 649, 650 (1900) ("[t]he filing of the proper certificate would have tied up the money in the treasury to be used only for the payment of those fees"); 1933 Op. Att'y Gen. No. 1041, vol. II, p. 1063 at 1064-65 ("the amount so certified becomes at once encumbered for the purpose of meeting the contract and cannot be spent or certified again: t for any other purpose"); 1928 Op. Att'y Gen. No. 2465, vol. III, p. 1964 at 1967 ("w nere a certificate has once been issued, the mere expiration of the fiscal year does not remove the encumbrance so as to make the funds so certified available for other purposes").

R.C. 5705.40 states, in part:

Any appropriation ordinance or measure may be amended or supplemented, provided that such amendment or supplement shall comply with all provisions of law governing the taxing authority in making an original appropriation and that no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation. Transfers may be made by resolution or ordinance from one appropriation item to another. At the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations; provided that funds unexpended at the end of such fiscal year previously appropriated for the payment of obligations unliquidated and outstanding need not be reappropriated, but such unexpended funds shall not be included by any budget making body or board or any county budget commission in

estimating the balance available for the purpose of the next or any succeeding fiscal year. (Emphasis added.)

It is clear from this provision that, once an obligation has been certified against an appropriation, that appropriation may not be reduced below an amount sufficient to cover such obligation. At the close of a fiscal year, the unencumbered balance of each appropriation shall revert to the fund from which it was appropriated and shall be available for future appropriations. Encumbered funds do not so revert. They remain available for the obligations for which they have been certified. See 1951 Op. Att'y Gen. No. 640, p. 379 (syllabus, paragraph 2) ("[t]he unencumbered and unexpended balance remaining in the annual operating fund of a village fire department at the end of the fiscal year may not be retained in such fund but must revert to the general fund from which it was appropriated"); 1950 Op. Att'y Gen. No. 1554, p. 148; 1949 Op. Att'y Gen. No. 290, p. 67; 1928 Op. No. 2465.

Thus, if the county auditor receives a county department of human services voucher to which there is attached a certificate from a prior year indicating that the amount required to meet the obligation was lawfully appropriated for such purpose and was in the treasury or in process of collection, free from any previous encumbrances, the county auditor may issue a warrant on such voucher, provided that the voucher is proper in other respects.<sup>2</sup>

It is my understanding, however, that your particular concern is whether the county auditor may issue a warrant on a voucher if the voucher does not have attached thereto a certificate of the availability of funds issued under R.C. 5705.41(D) prior to the making of the contract or order on which the voucher is based. The foregoing analysis is, of course, inapplicable where no certificate was issued in the prior year and a warrant drawn in payment of any such voucher must be drawn against current year appropriations.

R.C. 5705.41(D) sets forth an alternate procedure which may be used if a certificate was not provided prior to the making of a contract or giving of an order, as outlined above. It states that, if there is no such certificate, the taxing authority may authorize the drawing of a warrant if the fiscal officer provides a certificate:

stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

R.C. 5705.41(D) provides that, upon receipt of such a certificate, the taxing authority may authorize the drawing of a warrant in payment of amounts due upon

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<sup>2</sup> In the case of a continuing contract, such a certificate would indicate that the amount required to meet the same in the fiscal year in which the contract was made had been appropriated and was in the treasury or in process of collection. Amounts required to meet the contract in subsequent years would be included in the annual appropriation measures for those years as fixed charges, pursuant to R.C. 5705.44. See 1965 Op. Att'y Gen. No. 65-126, p. 2-283; 1964 Op. Att'y Gen. No. 1524, p. 2-428; 1958 Op. Att'y Gen. No. 1604, p. 22. R.C. 5705.44 states, in part:

When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge.

such contract by adopting a resolution or ordinance to that effect within thirty days from the receipt of the certificate. It permits the fiscal officer to authorize payments of amounts less than one hundred dollars without affirmation of the taxing authority, if the expenditures are otherwise valid.

This alternate procedure permits payment on contracts or orders for which funds were not properly certified in advance, provided that funds were available when the contract or order was made and are available when the certificate is issued. See generally State ex rel. Lozier v. Deibel, 13 Ohio L. Abs. 449, 450 (App. Medina County 1933) ("[w]hen [the certificate] is made after the contract has been executed and for the purpose of receiving pay under the contract, the certificate is required to state, not only that the money is in the treasury, etc., but that it was in the treasury, etc., unappropriated for any other purpose, at the time the contract was made"); 1957 Op. Att'y Gen. No. 1310, p. 676. R.C. 5705.41(D) does not expressly provide that this procedure may be used to make payments in one fiscal year on contracts or orders made during the previous fiscal year, and I am unaware of any decision or opinion which has turned directly upon this issue. I note, however, that the authority to rely upon a so-called "now for then" certificate is not expressly conditioned upon the issuance of such certificate in the same fiscal year in which the contract or order is made. I note, further, that the Deibel court sanctioned the use of this alternate procedure in a situation in which the contract had been executed and fully performed during the prior fiscal year.

I conclude, therefore, that if the county auditor receives a voucher from the county department of human services for services rendered in a prior fiscal year and such voucher is not accompanied by a certificate of availability of funds issued prior to the making of the contract or order, the county auditor may nevertheless pay such voucher if he can execute a certificate stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances. If the amount involved is one hundred dollars or greater, however, the county auditor must present the certificate to the board of county commissioners. The board of county commissioners may authorize payment of the amount due by an ordinance or resolution, which must be passed within thirty days from the receipt of such certificate.

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<sup>3</sup> I am aware that opinions of my predecessors have concluded that subdivisions have no authority to pay from current appropriations claims arising from the procurement of services, supplies, or materials during a previous fiscal year. See, e.g., 1949 Op. Att'y Gen. No. 290, p. 67; 1939 Op. Att'y Gen. No. 798, vol. II, p. 1007; 1937 Op. Att'y Gen. No. 1650, vol. III, p. 2681; 1933 Op. Att'y Gen. No. 956, vol. II, p. 893; 1928 Op. Att'y Gen. No. 2016, vol. II, p. 1005; 1927 Op. Att'y Gen. No. 76, vol. I, p. 104. It appears, however, that such opinions were either rendered prior to the effective date of the alternate procedure for the certification of funds, see 1927 Ohio Laws 406 (H.B. 80, eff. July 12, 1927), or that they concerned factual situations to which the alternate procedure was not applicable.

<sup>4</sup> In responding to your first question, I am mindful of the fact that, in certain instances, the procedure of making payment of a moral claim has been used to provide payment for services where no certificate of availability of funds was executed. See State ex rel. Tejan v. Milby, 95 Ohio App. 285, 119 N.E.2d 97 (Montgomery County 1953); Arnold v. City of Akron, 54 Ohio App. 382, 7 N.E.2d 660 (Summit County 1936); 1940 Op. Att'y Gen. No. 3199, vol. II, p. 1177; 1931 Op. Att'y Gen. No. 3467, p. 1024. I am, however, reluctant to propose such a procedure as a general solution to a problem of the sort with which you are concerned because of the uncertain state of the law regarding such matters. In Pincelli v. Ohio Bridge Corp., 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966), the Ohio Supreme Court held that a contract made without compliance with the applicable requirements for competitive bidding was void. The validity of the contract at issue was also challenged for the failure to attach a certificate of availability of funds as required by R.C. 5705.41 and, on this point, the court stated:

The second matter of concern to your county auditor involves the cash balance of the public assistance fund. That fund receives moneys from state and federal grants and reimbursements and other public grants, county participation, and private sources (such as child support, return of overpayments, and gifts and grants). See R.C. 5101.16; R.C. 5101.161; R.C. 5107.28. Reimbursement and allocations by the state are made on the basis of quarterly expenditures, see R.C. 5101.161, resulting in a possibility of cash flow problems. See 1984 Op. Att'y Gen. No. 84-033. Your question is whether expenditures may be made from this fund regardless of the cash balance.

As outlined in response to your first question, the county auditor's authority to issue warrants is limited by the provisions of R.C. 319.16 and R.C. 5705.41(D). Except as otherwise provided, the auditor may not issue a warrant upon presentation of a voucher of the county department of human services unless the availability of funds has been certified under R.C. 5705.41(D).

Even in instances in which no certificate is required, the county auditor is limited by the provisions of R.C. 5705.41(B) and (C), which state:

No subdivision or taxing unit shall:

. . . .

(B) Make any expenditure of money unless it has been appropriated as provided in [R.C. Chapter 5705];

(C) Make any expenditure of money except by a proper warrant drawn against an appropriate fund;

. . . .

It is clear that a county auditor may not issue a warrant for a particular expenditure unless funds have been appropriated in an amount sufficient to cover

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Section 5705.41, Revised Code, declares void every contract or order involving the expenditure of money by a subdivision or taxing unit unless there is an attached certificate that the amount appropriated is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances.

If the language of that statute needed construction, it has been construed in State v. Kuhner, 107 Ohio St. 406.

Section 309.13, Revised Code, authorizes the injunction issued in this case and under these circumstances by the courts below. . . . This statute which specifically directs action to prevent payment on illegal public contracts makes untenable the position taken by the defendants that payment can be made on a basis of a moral obligation.

5 Ohio St. 2d at 45-46, 213 N.E.2d at 360 (emphasis added). See Lathrop Co. v. City of Toledo, 5 Ohio St. 2d 165, 214 N.E.2d 408 (1966); McMichael v. Van Ho, 8 Ohio Misc. 281, 219 N.E.2d 831 (C.P. Paulding County 1966). But cf. Board of County Commissioners v. Board of Township Trustees, 3 Ohio App. 3d 336, 445 N.E.2d 664 (Jefferson County 1981) (a board of township trustees may not escape its obligation to pay another political subdivision for public utility services rendered on the basis that funds had not been certified as available pursuant to R.C. 5705.41(D)). Pincelli thus suggests that no moral obligation may be recognized where there has been a failure to comply with the statutory requirements for certification of funds. The extent to which this case operates to restrict the recognition of moral obligations has, however, not been clearly established. See, e.g., Brownfield, Bowen, Bally and Sturtz v. Board of Education, 56 Ohio App. 2d 10, 381 N.E.2d 207 (Jackson County 1977) (setting forth the general rule on moral obligations adopted in State ex rel. Caton v. Anderson, 159 Ohio St. 159, 111 N.E.2d 248 (1953), and suggesting that such rule would permit recognition of a moral obligation when certification of availability of funds was not provided, but finding that on facts presented no moral obligation was recognized).

that expenditure. See R.C. 5705.41; State ex rel. Giuliani v. Perk, 14 Ohio St. 2d 235, 237 N.E.2d 397 (1968); State ex rel. Dacek v. Cleveland Trinidad Faving Co., 35 Ohio App. 118, 171 N.E. 837 (Franklin County 1929); 1962 Op. Att'y Gen. No. 3489, p. 986.

R.C. 5705.41 does, however, expressly permit the auditor to certify that funds are available when they have been appropriated but are not yet in the treasury, provided that they are in the process of collection. R.C. 5705.41 states:

Taxes and other revenue in process of collection, or the proceeds to be derived from authorized bonds, notes, or certificates of indebtedness sold and in process of delivery, shall for the purpose of this section be deemed in the treasury or in process of collection and in the appropriate fund.

As a result, it is possible for an order or contract for which funds have been certified<sup>5</sup> to be presented for payment before the funds are actually in the treasury.

In determining whether to issue a warrant under R.C. 319.16 on a voucher from the county department of human services, the county auditor must determine whether such voucher is proper. A voucher for which a certificate is required under R.C. 5705.41 will not be proper unless such certificate is provided. In considering whether funds may be certified as available under R.C. 5705.41, the auditor looks not at the actual cash balance of a particular fund, but at the amounts lawfully appropriated in the treasury, or in process of collection, and free from any previous encumbrances. In these matters, the auditor is a ministerial officer, and he must issue certificates and warrants when statutory requirements are satisfied. See State ex rel. Manix v. Auditor of Darke County, 43 Ohio St. 311, 1 N.E. 209 (1885).

In response to your auditor's concern, therefore, I conclude that he must provide certificates under R.C. 5705.41 and issue warrants under R.C. 319.16 as required by law. It is his responsibility to make certain that funds are certified as available only if they are lawfully appropriated, in the treasury or in process of collection, and free from any previous encumbrances, and to make certain that warrants are issued only when funds have been appropriated therefor. See State ex rel. Justice v. Thomas, 35 Ohio App. 250, 172 N.E. 397 (Marion County 1930).

In the event that warrants should properly be issued which exceed the actual cash balance of a particular fund, there are statutory safeguards against the payment of amounts in excess of the balance of the fund. R.C. 321.16 provides that, "[w]hen a warrant drawn on him as county treasurer by the county auditor is presented for payment, if there is money in the county treasury or depository to the credit of the fund on which it is drawn" and the warrant is properly endorsed, the treasurer shall redeem it. R.C. 321.17, conversely, provides that, "[w]hen a

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<sup>5</sup> R.C. 329.09 provides:

All moneys received by each county from the state, or from the federal government under the "Social Security Act," or any act of the congress amendatory of or in substitution for such act, for aid to dependent children or for any other welfare activity, shall be considered appropriated for the purposes for which such moneys were received.

Thus, amounts received from the state and federal governments for welfare purposes are considered appropriated for the purposes for which they are received. R.C. 329.09 does not, however, provide for such amounts to be considered appropriated until they have been received. See generally R.C. 5705.42; 1940 Op. Att'y Gen. No. 1897, vol. I, p. 31 (the fact that governmental funds are expected does not excuse compliance with requirement for certification of available funds).

warrant is presented to the county treasurer for payment, and is not paid, for want of money belonging to the particular fund on which it is drawn," the treasurer shall endorse it as not paid for want of funds, with the date of its presentation, and shall sign it. The warrant will then bear interest. The treasurer has, however, no authority to redeem such a warrant until "sufficient funds are in the county treasury." R.C. 321.18. As my predecessor stated in 1980 Op. Att'y Gen. No. 80-077 (syllabus): "The treasurer of a county has no authority to redeem a warrant which has been drawn upon a fund having a zero or insufficient balance; rather, the treasurer must refuse to redeem such a warrant and must follow the procedure for refusal set forth in R.C. 321.17." See generally 1982 Op. Att'y Gen. No. 82-034.

I note, however, that there are procedures for transferring moneys from one fund to another if a particular fund should be exhausted. See R.C. 319.18, 5705.14-.17; 1950 Op. No. 1554. Alternatively, in an appropriate situation, moneys may be advanced from the general fund for particular expenses and repaid when they become available from other sources. See 1964 Op. Att'y Gen. No. 1209, p. 2-265 (money may be advanced from general fund of county to pay for costs of constructing a county hospital for which a special tax levy has been approved, and repaid from the county hospital fund); 1954 Op. Att'y Gen. No. 4342, p. 508 (money appropriated from the general fund of a school district to lunchroom rotary fund as an advancement may be repaid from the lunchroom fund to the general fund); 1951 Op. Att'y Gen. No. 857, p. 648 (funds may be advanced from county general fund to pay preliminary costs and expenses involved in establishing a garbage disposal district and constructing disposal plants, and proceeds from the sale of revenue bonds may be used to reimburse the general fund for moneys so advanced).

In response to your second question, I conclude, therefore, that a county auditor may issue warrants only as authorized by law and, where lawfully permitted, may issue warrants which exceed the actual cash balance of a particular fund. A county treasurer may not, however, redeem a warrant which has been drawn upon a fund having an insufficient balance.

It is, therefore, my opinion, and you are hereby advised that:

1. R.C. 5705.41(D) does not necessarily preclude payment of vouchers submitted by a county department of human services for services that were performed two or three years prior to the submission of the vouchers to the county auditor. A county auditor may issue a warrant on such a voucher, provided that the voucher is proper in other respects, if there is attached thereto a certificate from a prior year indicating that the amount required to meet the obligation was lawfully appropriated for such purpose and was in the treasury or in process of collection, free from any previous encumbrances. If no such certificate is attached, the county auditor may nevertheless pay such voucher if he can execute a certificate stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for such purpose and free of any previous encumbrance; if the amount involved is one hundred dollars or greater the county auditor must present such certificate to the board of county commissioners for its approval.
2. A county auditor may issue warrants only as authorized by law and, where lawfully permitted, may issue warrants which exceed the actual cash balance of a particular fund. A county treasurer may not, however, redeem a warrant which has been drawn upon a fund having an insufficient balance.