

OPINION NO. 76-017**Syllabus:**

1. Neither R.C. 121.17 nor any other provision of the Revised Code authorizes the expenditure of public funds by state departments as compensation for departmental employees assigned to perform services, unrelated to their job assignments and the responsibilities of the departments, for and under the direction of the Lieutenant Governor-elect;

2. After the Auditor of State makes a finding under R.C. 117.10 that state funds have been illegally expended, civil actions may be initiated to recover such funds. These civil actions may be initiated against state officers, such as department directors who were responsible for illegal expenditure, and against state employees and others who received benefits from the expenditure;

3. In making findings under R.C. 117.10, the Auditor of State should determine whether and to what extent the value of benefits received by the state, if any, was less than the amount of the illegally expended state funds.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio

By: William J. Brown, Attorney General, March 15, 1976

I have before me your request for my opinion, which reads in part:

"From mid-November, 1974, to mid-January, 1975, the State of Ohio employed in various departments five persons whose Directors assigned them to assist Lieutenant Governor-elect Richard Celeste in the transition of responsibilities from the administration

of the Honorable John W. Brown to himself. Among the activities of these five persons were the following, most of which took place in and around the transition headquarters of Mr. Celeste:

- A) review of budget data and development of budget proposals for the office of the lieutenant governor for the 1976-77 biennium;
- B) review of reports of various state agencies for the purpose of briefing the incoming lieutenant governor on the state of the state;
- C) research and response to inquiries from constituents on the broad range of state government topics which typically confronts all elected state officials;
- D) review of pending legislative proposals which concerned the incoming lieutenant governor;
- E) planning of inaugural ceremonies, in conjunction with representatives of the governor and other re-elected or newly elected officials; and
- F) clerical work, such as typing and filing, which centers around the activities noted in (A)-(F) above.

In your request you have asked for a resolution of the following questions in light of R.C. 121.17 and other provisions relating to cooperation among state departments and between the state and its citizens:

- 1) May the State of Ohio lawfully expend public moneys to provide executive, administrative and clerical assistance to an elected officer of the state, other than the Governor, during the weeks immediately preceding the term of said officer?
- 2) If the answer to the first question is affirmative, for what purposes may such expenditures be made? More specifically, do the activities listed in items (A) through (F) above, and in the written statements of the subject employees, serve a public purpose sufficient to warrant a conclusion that the necessary cost of such activities may be borne by the State of Ohio?
- 3) If the aforementioned activities may be lawfully financed by state funds, from which specific funds may such expenses be paid? In other words, may R.C. 121.17 or any other principle of law justify the assignment of employees of a state department to assist an incoming elected officer in his preparations to assume office, notwithstanding the fact that the duties performed by such

employees may be unrelated to their regular job assignment within their department?

- 4) If any of the aforementioned activities does not serve a public purpose for which state funds may be expended, can the cost of such activities be recovered by the state from the subject employees, if the services of such employees were performed at the direction of their appointing authorities?
- 5) If any of the aforementioned activities does not serve a public purpose for which state funds may be expended, can the cost of such activities be recovered by the state from the officer-elect whom they served, or in the alternative from the department heads whom they were originally hired to serve?

Along with your request you provided written statements made by the five employees who provided assistance to the Lieutenant Governor-elect after the November 1974 general election but prior to the time he officially assumed the duties of that public office. On the basis of those written statements and the factual descriptions in your request letter, it appears that these five individuals had worked for the Lieutenant Governor-elect during his campaign for office, and after the election these individuals performed similar duties for the Lieutenant Governor-elect as state employees, paid by the following departments:

Administrative Services
Agriculture
Highway Safety
Industrial Relations
Workmen's Compensation.

The statements of these five individuals also show that, generally, their duties were performed at the Lieutenant Governor's campaign headquarters. A state office did not serve as their office or physical place of employment. Further, with but one exception, there is no indication that these state employees performed what would clearly have been the type of work performed by the various departments which employed and paid them. From the statements, there is no question that they did receive state pay checks for their work for the Lieutenant Governor-elect.

In light of this material, as described above and in your request, you have first asked whether it is lawful to expend public monies in the form of assigning departmental employees to perform work at the direction of the Lieutenant Governor-elect. R.C. 121.17, mentioned in your request, relates to the cooperative assignment of state employees between departments, providing in pertinent part:

"The director of any department may empower or require an employee of another department, subject to the consent of the superior officer of the employee, to perform any duty which he might require of his own subordinates."

It must be noted that this statutory provision does not authorize the assignment of employees as apparently took place in the situation you have described. The five employees (the "transition staff") were not assigned by the various employing departments to other state departments, as R.C. 121.17 would allow. Rather, the "transition staff" was assigned to provide direct assistance to an individual who at the time was not a department director. R.C. 121.17 only allows for cooperative assignment of employees between one "department" and another and the availability of R.C. 121.17 must be limited to assignment of employees between those departments identified and listed as such in R.C. 121.02. See R.C. 121.01(A).

Aside from R.C. 121.17 it might be argued that, as a matter of public policy, assistance should be provided to the Lieutenant Governor-elect in order to ease economic inconvenience in preparing to assume the duties of office and thereby facilitate orderly transition of officers - especially in light of the close constitutional relationship between the offices of Lieutenant Governor and Governor. See Ohio Constitution, Article III, Section 15. However, there is no statutory authorization for the state departments providing assistance to the Lieutenant Governor-elect. On the other hand, R.C. 107.30 specifically requires that certain monies be made available for the salaries of the Governor-elect's immediate staff. Other statutory provisions require that assistance of other sorts be provided the Governor-elect. See R.C. 107.12, 123.022, 126.041 and 126.042.

In the presence of specific statutes authorizing a transition staff for the Governor-elect and in the absence of such authority relative to the Lieutenant Governor-elect serious doubt exists as to the legality of department directors providing staff assistance to the Lieutenant Governor-elect - especially where, as here, the work performed by the state employees bore little or no relationship to the duties and responsibilities of the departments which paid them. Doubts as to the legality of public expenditures are to be resolved against the expenditure because measures which provide for spending public funds are to be strictly construed. State, ex rel. Leis v. Ferguson, 149 Ohio St. 555 (1948). The Ohio Supreme Court has stated: "[I]n case of doubt that doubt is to be resolved not in favor of the grant but against it." State, ex rel. Bentley and Sons Co. v. Pierce, 96 Ohio St. 44 (1917). See also 1975 Op. Att'y Gen. No. 75-008. The basis for this strict approach was outlined in 1971 Op. Att'y Gen. No. 71-058:

"All public moneys constitute a public trust fund, State ex rel. Smith v. Maharry, 97 O.S. 272 (1918), and the expenditure of such funds is limited to a public purpose, Kohler v. Powell, 115 O.S. 418 (1926)."

Neither R.C. 121.17 nor any other provisions of the Revised Code authorizes the payments made to the "transition staff" under the circumstances described in your request and the accompanying statements. It is, therefore, my opinion that the assignment of departmental employees to provide assistance to the Lieutenant Governor-elect was, in the situation presented here, unauthorized. It must be noted, however, that it would be a different case had the then incumbent Lieutenant Governor authorized the expenditure of funds appropriated to his office to hire employees to aid the Lieutenant

Governor-elect or to pay existing members of his staff to assist his successor.

Having thus concluded the expenditures involved in payment of the "transition staff" were improper as you have described them, it is unnecessary to address your second and third questions, and the focus of my analysis is then shifted to the availability of remedies for recovering the funds which were improperly spent.

In your fourth and fifth questions you have asked whether recovery of the "transition staff's" salaries may be sought against the department directors who were involved, against the employees themselves and against the now Lieutenant Governor. R.C. 117.10 authorizes a civil action to recover illegally expended public funds after the Auditor of State, through its bureau of inspection and supervision of public affairs, makes a finding that public funds have been illegally expended. Accordingly, it is your duty, as Auditor of State, to determine whether an illegal expenditure has occurred after the facts and the circumstances of the expenditure have been fully and thoroughly developed by the bureau of inspection and supervision.

Once your determination has been made, and the report of your finding is filed with the appropriate public office (that of the Attorney General in the case of an illegal expenditure of state funds), a civil action may be initiated against public officials as well as private individuals, under the procedural authority of R.C. 117.10, to determine personal liability. State ex rel. Smith v. Maharry, 97 Ohio St. 272 (1919). See generally State v. McKelvey, 12 Ohio St. 2d 92 (1967).

It is also appropriate to point out that recovery of illegally expended public funds has been unsuccessful where the state has voluntarily paid out monies in exchange for benefits received and the state is not in a position to return the recipients to their status quo held prior to payment. See Dickman v. Defenbacher, 151 Ohio St. 391 (1949); State, ex rel. Hunt v. Fronzier, 77 Ohio St. 7 (1907); Vindicator Printing Co. v. Ohio, 68 Ohio St. 362 (1903); Hamilton County v. Noyes, 35 Ohio St. 201 (1878). On the other hand, recovery of public funds has been successful where outlay of public funds has resulted in an unjustified private gain to the person receiving the payments or has resulted in a payment which exceeds the public benefit received. See State, ex rel. McKelvey, supra; State, ex rel. Smith v. Maharry, supra. See generally, Koch v. Rhodes, 117 Ohio St. 763 (1964); Village of Hicksville v. Blakeslee, 103 Ohio St. 508 (1921).

The clear thrust of R.C. 117.10 is to provide a mechanism for recovery of illegally expended public funds and results reached in the cases cited above indicate that recovery of public funds is to be net of state benefits received and retained.

Therefore, it is apparent that you as the Auditor of State must determine from the facts of the case whether the work efforts of the five employees resulted in a public benefit. To the extent that those employee work efforts did not, a finding may be made for the amount of compensation paid for services not resulting in public benefit. Whether, as a factual conclusion, there was public benefit received from any or all of the work of the "transition staff" is a matter not readily determined from the materials you have provided.

In addition to the procedural issues raised by your fourth and fifth questions you have also raised a question concerning the possible assertion by the five employees of a good faith defense, in that they may have carried out assigned duties under the good faith understanding that working for the Lieutenant Governor-elect was entirely proper. The materials you have supplied are not fully developed along this line so that whether the employees may develop such a good faith defense is not readily determined. However, I am unable to conclude that such a defense could be successfully asserted as a matter of law. Ohio case law on this point is not dispositive of the issue.

In your fifth question you have additionally asked whether the public monies can be recovered from the now Lieutenant Governor or from the directors whose departments hired and paid the five "transition staff" employees.

The department directors were public officials. R.C. 117.10 establishes public officials as, essentially, being in a position of strict liability.

Further, one of my predecessors concluded in 1952 Op. Att'y Gen. No. 1713 (at p. 559), in a situation where no benefits were retained by the governmental agency:

"[T]hat 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 as expended."

See Grant Township, ex rel. Stalter v. Secoy, 103 Ohio St. 258 (1921); 1937 Op. Att'y Gen. No. 87.

Ohio case law does not indicate that the then Lieutenant Governor-elect would have any higher duty of repayment than the employees who directly received the payments, even though the employees worked under his control. He was a recipient of benefits flowing from the payments and had no authoritative control over release of the payments. However, insofar as you may develop facts and conclude that the state did not receive benefits equal in value to the monies which were paid, you may also wish to consider, in the development of your findings, whether a more persuasive case might be developed against the then Lieutenant Governor-elect than against the employees. The statements you have provided suggest that the employees for the most part followed orders, but arrangements for employment of the "transition staff" were made at the apparent direction of the Lieutenant Governor-elect.

As a result of the foregoing it is, then, my opinion, and you are so advised that:

1. Neither R.C. 121.17 nor any other provision of the Revised Code authorizes the expenditure of public funds by state departments as compensation for departmental employees assigned to perform services, unrelated to their job assignments and the responsibilities of the departments, for and under the direction of the Lieutenant Governor-elect;

2. After the Auditor of State makes a finding under R.C. 117.10 that state funds have been illegally expended, civil actions may be initiated to recover such funds. These civil actions may be initiated against state officers, such as department directors who were responsible for illegal expenditure, and against state employees and others who received benefits from the expenditure;

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