OPINION NO. 2009-033

Syllabus:

2009-033

1. In the performance of her duties under R.C. 319.16 to issue warrants in payment of claims against the county, a county auditor is not subject to the doctrine of strict liability set forth in *Seward v. National Surety Co.* and codified in R.C. 9.39.

2. A county auditor who issues a warrant in violation of R.C. Chapter 5705—including but not limited to situations where either the funds have not been appropriated or there is no proper warrant drawn against an appropriate fund—may be held personally liable under R.C. 5705.45 for the full amount paid.

3. A county auditor also may incur personal liability where he acts in bad faith or with a corrupt motive, such as where he converts public funds to his own or another's personal use or commits fraud.

4. A civil action may be filed under R.C. 117.28, 309.12, or 309.13 against a county auditor for issuing a warrant in payment of an expenditure if the expenditure violates an existing constitutional, statutory, or administrative provision.

5. A county auditor may be held personally liable for the loss of public funds if she fails to exercise her statutory duties under R.C. 319.16 by acting reasonably and prudently in issuing a warrant in payment of an expenditure that violates an existing constitutional, statutory, or administrative provision.

To: Joseph R. Burkard, Paulding County Prosecuting Attorney, Paulding, Ohio
By: Richard Cordray, Ohio Attorney General, September 9, 2009

You have requested an opinion about the liability of the county auditor for issuing a warrant to pay an expenditure authorized by the board of county commissioners or other duly empowered official or entity where the auditor questions the propriety of the expenditure. Your questions are occasioned by a bulletin issued by the Auditor of State, which we will discuss below. To provide a context for the bulletin's provisions and your questions, however, we will begin with an examination of R.C. 319.16, which defines the responsibility of the county auditor to issue warrants against the county treasury.

Nature of County Auditor's Duties

Under R.C. 319.16, the county auditor is responsible for issuing warrants "on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher and evidentiary matter for the moneys." The auditor "shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal . . . so authorized by law." *Id. See also* R.C. 307.55(A) ("[n]o claims against the county shall be paid otherwise than upon the allowance of the board of county commissioners, upon the warrant . . . of the county auditor, except in those cases in which the amount due is fixed by law or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the auditor upon the proper certificate of the person or tribunal allowing the claim"); R.C. 5705.41(C) (no subdivision, such as a county, may "[m]ake any expenditure of money except by a proper warrant drawn against an appropriate fund").

Although a county auditor is considered generally to be a ministerial officer who performs ministerial duties,[1] R.C. 319.16 supplies a county auditor with the authority to exercise discretion, within certain limited parameters, in issuing warrants for the payment of claims against the county. *See Kloeb v. Mercer County Commissioners,* 4 Ohio C.C. (n.s.) 565, 569 (App. Mercer County 1903) (a county auditor "does not act as a mere machine, without consciousness, duty, or responsibility, only to place his signature to warrants which will cause public moneys to leave the public treasury; he is not a mere automaton, there for the purpose of writing his signature to warrants on the public treasury when the button is touched"); 2003 Op. Att'y Gen. No. 2003-029; 1937 Op. Att'y Gen. No. 930, vol. II, p. 1652. *See also State ex rel. Ms. Parsons Construction, Inc. v. Moyer,* 72 Ohio St. 3d 404, 650 N.E.2d 472 (1995); 1985 Op. Att'y Gen. No. 85-084 at 2-337 (a county auditor may exercise discretion in the performance of his duties "only if such discretion may be found in an express or implied grant of statutory authority").

[1] *See State ex rel. Taraloca Land Co. v. Fawley,* 70 Ohio St. 3d 441, 639 N.E.2d 98 (1994); *State ex rel. Donahey v. Roose,* 90 Ohio St. 345, 107 N.E. 760 (1914); 1985 Op. Att'y Gen. No. 85-084.

Under R.C. 319.16, a county auditor has the duty "to ensure that all statutory requirements have been met and the claim is proper in purpose and amount, before issuing a warrant in payment of the claim," including that the claim has been allowed by an authorized "officer or tribunal" that has presented a "proper order or voucher and evidentiary matter for the moneys." *Id. See* 2003 Op. Att'y Gen. No. 2003-029 (syllabus, paragraph 1).[2] Although the auditor does not have the responsibilities of a legal officer such as the county prosecutor, the auditor does have "a duty to deny issuance of a warrant if these standards are not met." *Id. See State ex rel. Krabach v. Ferguson,* 46 Ohio St. 2d 168, 171-72, 346 N.E.2d 681 (1976) (the auditor's "duty is simply to draw warrants for valid claims, and to refuse to draw warrants for invalid or illegal ones, or those for which there is no money appropriated in the treasury"); *State ex rel. S. Monroe & Son Co. v. Tracy*, 129 Ohio St. 550, 568, 196 N.E. 650 (1935) (if a voucher does not constitute a valid claim, the state auditor has a "duty to refuse the warrant," and "[w]here a claim is questionable, the dictates of good sense and good business judgment impliedly at least demand that [the auditor] refer it to the law department of the state for opinion, and be governed thereby");[3] *Kloeb v. Mercer County Commissioners.* Instances in which the courts have upheld the decision of a county auditor to withhold payment "include those where the auditor found that the officer authorizing or making the expenditure or creating the claim exceeded his constitutional or statutory authority or the legal bounds of his discretion, the amount claimed was in excess of what was due, and where the claim had not been allowed by the board of commissioners or other appropriate authority, or other statutory prerequisites for processing the claim had not been followed."[4] 2003 Op. Att'y Gen. No. 2003-029 at 2-241.

In order to facilitate this responsibility to determine the propriety of an expenditure, the General Assembly has granted a county auditor the authority to require "evidentiary matters" supporting and documenting a request for payment.[5] R.C. 319.16. The auditor may "require factual proof which is appropriate to demonstrate with a high degree of certainty that each claim is legal and that all requirements of law have been complied with." *State ex rel. Krabach v. Ferguson,* 46 Ohio St. 2d at 173. Although an auditor "has no discretion to refuse payment of

[2] The authority of the county auditor to ascertain that an expenditure has been lawfully allowed by an authorized officer or tribunal must be distinguished from his lack of authority to dispute the *advisability* of an expenditure as a matter of policy or prudence. "[M]ere disagreement with the advisability of an expenditure or concern over the manner in which an obligation to the county was performed is insufficient to justify an auditor's refusal to issue a warrant." 2003 Op. Att'y Gen. No. 2003-029 at 2-243 to 2-244 (*see* citation of cases).

[3] *See* 2003 Op. Att'y Gen. No. 2003-029 at 2-242 n. 3.

[4] Cases upholding a county auditor's refusal to issue a warrant are set forth in 2003 Op. Att'y Gen. No. 2003-029 at 2-241 to 2-243.

[5] An "evidentiary matter" is defined to include, among other possible items, "original invoices, receipts, bills and checks, and legible copies of contracts." R.C. 319.16.

valid and legal claims," he does have the discretion "to require proof of the legality of claims submitted to him." *Id.*, 46 Ohio St. 2d at 171-72. *See also State ex rel. Ms. Parsons Construction, Inc. v. Moyer*; 2003 Op. Att'y Gen. No. 2003-029 (syllabus, paragraph 3) (the county auditor has the authority "to determine what constitutes sufficient 'evidentiary matter' for purposes of R.C. 319.16, and to require that requests for reimbursement of travel expenses be accompanied by itemized receipts rather than credit card statements where necessary to satisfy her that an expense is eligible for reimbursement under an agency's travel policy").

R.C. 319.16 also includes procedures whereby a county auditor may refuse to issue warrants on doubtful claims. If the county auditor "questions the validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented, the auditor shall notify the board, officer, or tribunal who presented the voucher," and request that they reconsider the grounds on which the expenditure has been approved. R.C. 319.16. The Ohio Supreme Court has also instructed that if the lawfulness of the expenditure is at issue, then "the dictates of good sense and good business judgment impliedly at least demand that [the auditor] refer it to the law department . . . for opinion, and be governed thereby." *State ex rel. S. Monroe & Son Co. v. Tracy*, 129 Ohio St. 550, 568, 196 N.E. 650 (1935). In most instances, these discussions among the various officials involved should lead to a mutual resolution of the issues at stake. Yet if the result of these efforts to determine the propriety of the expenditure is instead a complete impasse among the officials concerned, even after more specific legal guidance has been secured from the county prosecutor, and the situation remains unresolved such that "the board, officer, or tribunal determines that the expenditure is valid and the auditor continues to refuse to issue the appropriate warrant on the county treasury, then a writ of mandamus may be sought," thereby presenting the matter to the courts for an ultimate decision. R.C. 319.16. If a court determines that the claim is valid, it "shall issue a writ of mandamus for issuance of the warrant." *Id.*

Auditor of State Bulletin No. 2008-006

You have asked on behalf of the county auditor whether she is subject to personal liability if she issues a warrant to pay for an expenditure that was authorized by a board, officer, or tribunal—where she questioned the validity of the expenditure prior to issuing the warrant, but the board, officer, or tribunal maintained its request that the payment be made despite her concerns—and the expenditure is later deemed to be illegal in an audit report issued by the Auditor of State. Your question about a county auditor's liability under R.C. 319.16 concerns two matters discussed in the Auditor of State's Bulletin No. 2008-006: (1) whether a county auditor is strictly and individually liable for the loss or misuse of public money expended pursuant to a warrant the auditor has issued; and (2) whether a county auditor may avoid such liability if, prior to issuing the warrant, he disputes the

legality of an expense by documenting his concerns in writing.[6] We will examine each in turn.

Standards of Liability—Strict Liability

Bulletin No. 2008-006 advises that county auditors are subject to strict personal liability in the performance of their duty to issue warrants on the county treasury. The authorities cited in the Bulletin for the proposition that public officers may be held strictly and personally liable for the loss of public funds are not applicable, however, to an auditor in the performance of her duty under R.C. 319.16 to issue warrants. The Bulletin is correct in stating that "[p]ublic officials are generally strictly liable to account for public funds entrusted to their care," and in citing *Seward v. National Surety Co.,* 120 Ohio St. 47, 165 N.E. 537 (1929) and *State ex rel. Village of Linndale v. Masten,* 18 Ohio St. 3d 228, 480 N.E.2d 777 (1985) for this proposition. At issue in *Seward* and *Masten*, however, was the loss of money that disappeared while entrusted for safekeeping to the physical care and control of a public official. Even in these instances, R.C. 131.18 provides for the release and discharge of the public official from personal liability if the pertinent legislative authority so directs. [7] *See* 1980 Op. Att'y Gen. No. 80-074 (where property and petty cash were stolen from the offices of various county officials, those officials who were thereby exposed to personal liability can be "released and discharged pursuant to R.C. 131.18") (syllabus). By its terms, however, R.C. 131.18 does not even apply to a county auditor. *See* 1980 Op. Att'y Gen. No. 80-074 at 2-296 (R.C. 131.18 "applies only to the persons and circumstances named therein," and it "cannot be extended to other individuals or situations"). This omission is arguably significant because public funds are not "entrusted" to county auditors in the same sense that they are "entrusted" to other officials—in other words, it is precisely because county auditors are not strictly liable under *Seward* for issuing warrants that they are in no need of exoneration under this statute.

The other authorities cited in the Bulletin do not address a public official's liability for the unlawful expenditure of funds. *See Board of Stark County Commissioners v. Halsy,* 1977 Ohio App. LEXIS 9109 (Stark County Dec. 1, 1977) (distinguishing between liability for the payment of excess compensation to a

[6] R.C. 117.20(C) authorizes the Auditor of State to prepare and disseminate advisory bulletins. They "shall be of an advisory nature only," and provide guidance about the manner in which the Auditor's office will perform its auditing functions, including the kinds of procedures, controls, and constructions of legal matters that will guide it in performing its responsibilities. *Id.*

[7] R.C. 131.18 provides for the exoneration of certain treasurers, clerks, judges, and fiscal officers for the loss of funds entrusted to their care as a result of "fire, robbery, burglary, flood, or inability of a bank to refund public money lawfully in its possession" where the pertinent legislative authority makes the determination to "release and discharge" from personal liability such official who is found not to have caused the loss by her "negligence or wrongful act." *Id. See also* R.C. 131.19 (describing the manner of making such release).

county employee under a mistake of law and the strict liability applied to custodians of public funds under the "*Seward* doctrine"); 1989 Op. Att'y Gen. No. 89-077 at 2-360 ("[d]uties of holding securities for safekeeping are readily distinguishable from making investments of public funds"); *State v. Herbert,* 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976). [8] *See generally Crane Township ex rel. Stalter v. Secoy,* 103 Ohio St. 258, 260, 132 N.E. 851 (1921) ("matters in general that are committed to the pure discretion of a public officer, and loss to the public in funds or character of service, could not be availed of in a suit against the public officer or his bondsmen"). They have no bearing on the liability of a county auditor in the performance of her duties under R.C. 319.16 to issue warrants.

The Bulletin also cites R.C. 9.39, which likewise has no application to the liability of a county auditor in the performance of her duty to issue warrants in payment of claims against the county. R.C. 9.39 states in pertinent part: "All public officials are liable for all public money *received or collected by them* or by their subordinates under color of office." (Emphasis added.) R.C. 9.39 (or its predecessor, former R.C. 117.10) has been described as a codification of the "strict and personal liability of public officials for public money." 1993 Op. Att'y Gen. No. 93-004 at 2-26. *See also State v. Gaul,* 117 Ohio App. 3d 839, 851, 691 N.E.2d 760 (Cuyahoga County 1997). In issuing a warrant for the payment of a claim, a county auditor does not *receive* or *collect* public funds, and thus is not liable under R.C. 9.39 for public funds paid from the county treasury upon her warrant.

An interpretation of R.C. 9.39 as inapplicable to a county auditor in the performance of her duties to issue warrants is supported by comparing R.C. 9.39 to other statutes that expressly impose liability on various public officials for the issuance of warrants in certain circumstances. For example, R.C. 9.41, which prohibits the payment of compensation to persons in the classified service without certification by the appointing authority, states that "[a]ny sum paid contrary to this section may be recovered from any officer making such payment in contravention of law

[8] We recognize that, in *State v. Herbert,* the court purported to apply *Seward*'s doctrine of strict liability to investment losses even though the deputy's investment was clearly a discretionary act made in violation of state statute. At the time the events in *Herbert* transpired, however, the Office of State Treasurer had only recently acquired the statutory authority to *invest* public funds in commercial paper with the concomitant higher risk of loss. *See* Corrigan, J., dissenting, 49 Ohio St. 2d at 100, 108-109. The court held that this new authority did not "evidence legislative intent to change the traditional common-law standard of liability for loss of public funds by public officials." 49 Ohio St. 2d at 95. The majority thus appears to have viewed the authority of the treasurer to invest, like his authority to deposit funds with banks and similar institutions, as part of his custodial responsibilities to safeguard public funds that had been entrusted to his care. Because the court treated the treasurer as a custodian of the funds that were lost, we do not read *Herbert* as implicitly overturning previous cases such as *Crane Township, supra,* which declined to hold public officials strictly liable for losses that resulted from the performance of their discretionary duties.

and of the rules made in pursuance of law, or *from any officer signing, countersigning, or authorizing the signing or countersigning of any warrant* for the payment of the same, or from the sureties on the officer's official bond, in an action in the courts of the state, maintained by a citizen resident therein." (Emphasis added.) *See also, e.g.*, R.C. 733.14 (requiring a municipal auditor or clerk to countersign each receipt given by the municipality's treasurer, and if the auditor or clerk "approves any voucher contrary to Title VII of the Revised Code, he and his sureties shall be individually liable for the amount thereof"). It is a well-established principle of statutory construction that, if the legislature had intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections. *Lake Shore Electric Railway Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926). Thus, if the General Assembly had intended to impose strict liability on county auditors in the performance of their duties under R.C. 319.16 to issue warrants, it could have included similar language in R.C. 9.39, R.C. 319.16, or elsewhere expressly creating such liability.

We conclude, therefore, that because a county auditor, in the issuance of warrants, does not collect or receive public funds or act as a custodian who is responsible for the physical safekeeping of public funds, she is not subject to the doctrine of strict liability set forth in *Seward* and codified in R.C. 9.39 for the performance of her duties under R.C. 319.16.[9]

Our conclusion that the county auditor is not subject to strict liability in the performance of her responsibilities under R.C. 319.16 does not mean, however, that a county auditor may never be personally liable if public funds are unlawfully paid from the county treasury on her warrant. An auditor may indeed face liability pursuant to statute or under the common law.

Liability under R.C. Chapter 5705

We turn first to liability that may be imposed on a county auditor under R.C. Chapter 5705, which dictates the procedure that counties (and other subdivisions) must follow in order to expend funds from their treasuries. The county may expend no money unless it has been appropriated pursuant to R.C. Chapter 5705, and any expenditure of money must be "by a proper warrant drawn against an appropriate fund."[10] R.C. 5705.41(B) & (C). *See also* R.C. 5705.39 ("[a]ppropriations shall be made from each fund only for the purposes for which such fund is established"). A certificate must be attached by the county auditor (as the county's fiscal officer) to any contract or order involving an expenditure of money showing that the amount

[9] Of course a county auditor, like any other officer, may be held strictly liable under R.C. 9.39 and *Seward* if funds physically kept in her office, such as in a petty cash fund, cannot be accounted for.

[10] Each fiscal year the board of commissioners must pass an appropriation measure setting "forth separately the amounts appropriated for each office, department, and division, and, within each, the amount appropriated for personal services." R.C. 5705.38(A) and (C).

required to meet the obligation has been appropriated for that purpose and is in the treasury or in the process of collection. R.C. 5705.41(D).

An officer, employee, or other person who, *inter alia,* issues an order contrary to R.C. 5705.41, or expends, or authorizes the expenditure of, public funds contrary to the provisions of R.C. Chapter 5705 "shall be liable to the political subdivision for the full amount paid from the funds of the subdivision on any such order, contract, or obligation." R.C. 5705.45.[11] "The responsibility and liability of public officers and employes, as fixed by [what is now R.C. 5705.45], is personal to the officer, employe or other person coming within its terms, and ignorance of the law or action taken upon the advice of someone else, be he the lawfully constituted legal adviser of such officer, employe or other person, or not, does not exonerate him from such responsibility or liability." 1933 Op. Att'y Gen. No. 974, vol. II, p. 938, 948. "[T]he liability therein fixed upon a public officer or employe is not predicated upon knowledge or lack of knowledge of his duties," because "[h]e is presumed to know his duties and the limitations thereof under the law." *Id. See State ex rel. Justice v. Thomas,* 35 Ohio App. 250, 258, 172 N.E. 397 (Marion County 1930) ("as the distributing official of the funds of the county," a county auditor "is strictly limited in issuing warrants by [R.C. 5705.41], and penalized for the mispayment of moneys of the county by [R.C. 5705.45]"); 1940 Op. Att'y Gen. No. 3199, vol. II, p. 1177 (syllabus, paragraph 3) ("[a] county auditor who pays a claim contrary to law is, under the provisions of the Uniform Tax Levy Law [R.C. Chapter 5705], liable for all damages and loss sustained by the county to the extent of such payment"); 1927 Op. Att'y Gen. No. 1001, vol. III, p. 1747, 1755 (prior to the enactment of the language in [R.C. 5705.45], and "in the absence of bad faith or a corrupt motive, public officials were not personally responsible when acting within

[11] R.C. 5705.45 reads in full:

Any officer, employee, or other person who issues any order contrary to [R.C. 5705.41], or who expends or authorizes the expenditure of any public funds, or who authorizes or executes any contract contrary to [R.C. 5705.01] to [R.C. 5705.47], unless payments thereon are subsequently ordered as provided in [R.C. 5705.41], or expends or authorizes the expenditure of any public funds on any such void contract, obligation, or order, unless subsequently approved as provided in that section, or issues a certificate under the provisions thereof which contains any false statements, shall be liable to the political subdivision for the full amount paid from the funds of the subdivision on any such order, contract, or obligation. Such officer, employee, or other person shall be jointly and severally liable in person and upon any official bond that he has given to such subdivision, to the extent of any payments of such void claim. The prosecuting attorney of the county, the city director of law, or other chief law officer of the subdivision shall enforce this liability by civil action brought in any court of appropriate jurisdiction in the name of and on behalf of the municipal corporation, county, or subdivision. If the prosecuting attorney, city director of law, or other chief law officer of the subdivision fails upon the written request of any taxpayer, to institute action for the enforcement of the liability, the taxpayer may institute suit in his own name in behalf of the subdivision.

the scope of their powers even though in so doing they did not comply with the requirements of law and loss or damage resulted therefrom''). Thus, the county auditor may face personal liability for the payment of funds if she acts contrary to R.C. Chapter 5705.

Common Law Liability

A county auditor is also subject to common law liability in the performance of his duties under R.C. 319.16.[12] Of course, a public official may incur liability where he acts in bad faith or with a corrupt motive, such as where he converts public funds to his own or another's personal use or commits fraud. *See Crane Township ex rel. Stalter v. Secoy,* 103 Ohio St. at 261 (township trustees held personally liable where they ''knowingly and openly permitted and aided the township clerk in thus misappropriating public moneys of the township''); *City of Greenville v. Anderson,* 58 Ohio St. 463, 51 N.E. 41 (1898) (syllabus, paragraph 1) (''[i]t is a violation of the official duties of a city clerk to draw his warrant on the treasury for the payment of any claim that has not been allowed by the council, or for a larger amount than has been so allowed, obtain the money thereon and appropriate it, or part of it, to his own use; or to draw his warrant for a valid claim that has been allowed, payable to the creditor or bearer, and then, instead of delivering it to the creditor, present it himself for payment, obtain the money and convert it to his own use; and for any loss sustained by the city in consequence of such malfeasance of the clerk, the sureties on his official bond are liable''); *Jones v. Commissioners of Lucas County,* 57 Ohio St. 189, 219-220, 48 N.E. 882 (1897) (the county auditor ''has acted from the inception of the transaction on his own volition in a matter which on its face concerns his own official pay, and the warrant therefor, drawn in his official capacity by force of the statute which defines the powers and duties of his office, is unauthorized at best, and in defiance of a statute which says it shall be unlawful for him to charge or receive any compensation for such alleged service,''

[12] A county auditor and his sureties are also liable for the ''acts and conduct of [the auditor's] deputies.'' R.C. 319.05. *See also* R.C. 3.06(A) (''[t]he principal [public officer] is answerable for the neglect or misconduct in office of his deputy or clerk,'' and ''[t]he principal may take from his deputy or clerk a bond''); R.C. 3.06(B) (a county may procure a blanket bond from a surety covering its officers, clerks, and employees other than officers, clerks, or employees ''required by law to execute or file an individual official bond to qualify for office or employment''); R.C. 325.17 (an elected county officer ''may require such of the officer's employees as the officer considers proper to give bond to the state, in an amount to be fixed by the officer, with sureties approved by the officer, conditioned for the faithful performance of their official duties''); *State v. Gaul*, 117 Ohio App. 3d 839, 852, 691 N.E.2d 760 (Cuyahoga County 1997) (R.C. 321.04, which holds a county treasurer liable for the misconduct of his deputies, ''appears to have codified the common law of *respondeat superior*''); *State v. Harland,* 94 Ohio App. 293, 296, 112 N.E.2d 682 (Geauga County 1952) (statutes like R.C. 3.06 ''contain merely restatements of the common law covering the civil liability of an official for the acts of his deputies'').

and ''[i]f this conclusion be correct, then an action is clearly maintainable against both the auditor and the bondsmen by the prosecuting attorney''); *Cricket v. State,* 18 Ohio St. 9 (1868) (syllabus, paragraph 4) (''the obtaining of money from the treasury as compensation to which [the county auditor] is not entitled, upon his own warrant, constitutes a misfeasance, for which to the extent the money obtained exceeds the amount due, his bond affords a remedy; and the fact that there had been a verbal allowance by the commissioners will be no defense'').

Even where a county auditor has not acted corruptly, however, he may be liable for the loss of public funds resulting from the payment of an expenditure if he fails to act reasonably and prudently in issuing a warrant that is unauthorized or prohibited by law. *See* 1984 Op. Att'y Gen. No. 84-080 at 2-274 (public officials who ''made payments of funds pursuant to the reasonable and prudent exercise of their statutory duties . . . would bear no personal liability, even if appropriate recovery could not be obtained from the provider,'' but if ''the officials exceeded their statutory authority in making particular payments, they might be found to have expended funds illegally and to be subject to personal liability''). As discussed above, a county auditor has the duty under R.C. 319.16 to take appropriate steps to ascertain the propriety of a claim before issuing a warrant in payment. If he fails to perform this duty and issues a warrant in payment of an illegal expenditure, he may be held personally liable for the loss of funds. *See* 1937 Op. Att'y Gen. No. 930, vol. II, p. 1652, 1660 (where ''an exercise of the discretion and care imposed by his office would have put the county auditor upon his guard as to the legality of the demand,'' ''[h]is failure to exercise such discretion and care is a clear violation of his duty,'' and subjects him to liability for the loss of public funds resulting from the illegal expenditure).[13]

The appropriate steps under R.C. 319.16 whereby a county auditor may refuse to issue warrants on doubtful claims should suffice to resolve most such matters. Again, that statute grants an auditor the authority to require factual proof—''evidentiary matters''—supporting and documenting the legality of a request for payment. *Crawford v. Madigan,* 13 Ohio Dec. 494, 498 (C.P. Cuyahoga County 1902) (a city auditor has an obligation to determine ''at his peril, whether, when a claim is presented to him and he is asked to issue a warrant upon the treasury,

[13] Bulletin No. 2008-006 states that a county auditor will not be named in an Finding for Recovery if, prior to issuing the warrant, she disputes the order to pay and her concerns are documented in writing. It further indicates that by doing so, her ''duty is discharged'' and ''only the board, tribunal or officer authorizing the expenditure will be named in any Finding for Recovery for any loss of public money which results from their approval.'' *Id.* This statement may reflect how the Auditor of State intends to handle matters in state audits, but it is not a definitive statement about a county auditor's exposure to personal liability. Documentation of any concerns in writing may bear on a court's determination of whether the auditor acted reasonably and prudently, but it would be unlikely to absolve the auditor from her statutory duties to pursue the various safeguards set forth in R.C. 319.16 for resolving disputed matters.

whether it is valid, . . . and he is given full power and ample means to protect himself against an unwarranted payment''). If the county auditor thereafter still ''questions the validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented, the auditor shall notify the board, officer, or tribunal who presented the voucher,'' and request that they reconsider the grounds on which the expenditure has been approved. R.C. 319.16. The Ohio Supreme Court has also instructed that if the lawfulness of the expenditure is at issue, then ''the dictates of good sense and good business judgment impliedly at least demand that [the auditor] refer it to the law department . . . for opinion, and be governed thereby.'' *State ex rel. S. Monroe & Son Co. v. Tracy*, 129 Ohio St. 550, 568, 196 N.E. 650 (1935). Although reliance upon the advice of legal counsel is not a defense, as a matter of law, to the allegation that an official has paid an illegal expenditure, the court's guidance at least suggests, though with no explicit guarantee, that if the county auditor does refer the issue of the lawfulness of the expenditure to the county prosecutor for opinion, and defers to the county's chief legal officer to ''be governed thereby,'' this procedure, along with the other steps that an auditor can take to ascertain the propriety of an expenditure under R.C. 319.16, may well be regarded as demonstrating the kind of ''reasonable and prudent exercise of [her] statutory duties'' that may absolve her of bearing personal liability if a court later determines the expenditure to have been unlawful. 1984 Op. Att'y Gen. No. 84-080 at 2-274.[14]

If the auditor's efforts to obtain a more adequate factual basis or more intelligible legal guidance about the propriety of the expenditure prove unavailing, and an impasse is reached whereby ''the board, officer, or tribunal determines that the expenditure is valid and the auditor continues to refuse to issue the appropriate warrant on the county treasury, then a writ of mandamus may be sought,'' thereby presenting the matter to the courts for an ultimate decision. R.C. 319.16. If a court determines that the claim is valid, it ''shall issue a writ of mandamus for issuance of the warrant.'' *Id.* This resort to a judicial forum is likely to be a cumbersome, protracted, and expensive means of resolving most such controversies, however, and every effort should be made to resolve the matter short of invoking this last-ditch procedure.

Furthermore, the courts have delineated the types of expenditures that may be deemed ''illegal'' within the context of an audit report issued by the Auditor of State. R.C. 117.28 provides that a civil action for recovery of funds or property may be filed ''[w]here an audit report sets forth that any public money has been *illegally*

[14] This standard for personal liability may be applicable even though the courts have otherwise made clear that an auditor, like any other public official, ''is not bound by determinations of legality made by other . . . officers.'' *State ex rel. Krabach v. Ferguson*, 46 Ohio St. 2d at 172. *See also State ex rel. Commissioners v. Guilbert,* 77 Ohio St. 333, 342, 83 N.E. 80 (1907) (statutory schemes under which multiple officials are required to examine the correctness of a request for payment are ''cumulative safeguards,'' and thus the auditor ''is not concluded by the determination'' of the other officers).

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'' (emphasis added). *See Mahoning Valley Sanitary District ex rel. Montgomery v. Gilbane Building Co.,* 2001 U.S. Dist. LEXIS 25772 (S.D. Ohio, Oct. 17, 2001), at *10, *aff'd,* 2004 U.S. App. LEXIS 1099 (6th Cir. Jan. 21, 2004) (''an illegal expenditure of public money is a prerequisite for recovery'' under R.C. 117.28); *Police and Firemen's Disability and Pension Fund v. City of Akron,* 149 Ohio App. 3d 497, 2002-Ohio-4863, 778 N.E.2d 68, at ¶ 17 (''before a civil action may be instituted under [R.C. 117.28] for the recovery of funds, the report must set forth that public money has been illegally expended''). *See also* 1987 Op. Att'y Gen. No. 87-074 at 2-482 (''it is the responsibility of the office of Auditor of State to determine, in the first instance, whether an illegal expenditure has occurred after the facts and circumstances of the expenditure have been fully and thoroughly investigated'' (citing 1976 Op. Att'y Gen. No. 76-017 at 2-52 and quoted with approval in *Police and Firemen's Disability and Pension Fund v. City of Akron,* at ¶ 19)). 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 District ex rel. Montgomery v. Gilbane Building Co.*, at **15, 20. 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. Likewise, a county prosecutor may bring a civil action under R.C. 309.12 ''to restrain such contemplated misapplication of funds . . . or to recover, for the use of the county, all public moneys so misapplied or illegally drawn or withheld from the county treasury.'' *See State ex rel. Smith v. Maharry,* 97 Ohio St. 272, 279, 119 N.E. 822 (1918) (neither G.C. 2921 [R.C. 309.12] nor G.C. 286 [R.C. 117.28] are exclusive—''[p]ublic authorities have their option as to which sections they will utilize in protecting public money and public property''). *See also* R.C. 309.13 (authorizing a taxpayer suit if the prosecutor does not file a civil action under R.C. 309.12); *White v. Columbus Bd. of Education,* 2 Ohio App. 3d 178, 180, 441 N.E.2d 303 (Franklin County 1982) (board of education was not precluded by R.C. Chapter 117 and the lack of an audit report from ''attempting to secure the return of funds [the board] itself found to have been illegally expended''; R.C. Chapter 117 ''does not prohibit self-help by the pertinent board or officer'').[15]

In sum, a county auditor is not subject to strict liability in the performance

[15] It should be noted that in seeking to recover public funds that are alleged to have been expended illegally, any party bringing a civil action would have available other defendants aside from the county auditor, including not only the officials who exercised their authority to present the illegal voucher but also the bonding or surety company that issued a bond for any or all of the public officials involved in the matter, ''conditioned for the faithful discharge of the duties of his office.'' R.C. 319.02 (bond required for county auditor); *see also* R.C. 305.04 (bond required for county

of her duties under R.C. 319.16 to issue warrants on the county treasury, but may be held personally liable in an action filed under R.C. 117.28, 309.12, or 309.13 where she fails to exercise her statutory duties by acting reasonably and prudently in issuing a warrant in payment of an expenditure that violates an existing constitutional, statutory, or administrative provision.

The imposition of personal liability for monetary damages upon public officials in the exercise of their legal duties is a grave matter. Because of the importance of these issues, and in light of the somewhat tangled legal precedents, a further word is in order here. It bears emphasis that 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. 1987 Op. Att'y Gen. No. 87-074. As discussed at more length above, there are competing bodies of precedent that the courts could draw upon that lead to quite different results. I have indicated in this opinion my best judgment that if a county auditor faithfully applies the procedures available under R.C. 319.16, as well as seeking guidance by referring the issue of the lawfulness of the expenditure to the county prosecutor for opinion, then this approach may well be regarded by the courts as demonstrating the "reasonable and prudent exercise of [her] statutory duties" and to absolve her of bearing personal liability if a court later determines the expenditure to have been unlawful. 1984 Op. Att'y Gen. No. 84-080 at 2-274. But it is certainly to be expected that this determination will depend, in particular cases, on the court's assessment of such matters as the seriousness of the violation and how clear the unlawfulness of the expenditure appears to have been at the time it occurred, and it will depend also on whether the courts decide that a "reasonable and prudent" standard is even applicable in the first instance for determining the personal liability of public officials in these circumstances. If more clarity is desired on this point, of course, then specific treatment of the personal liability issue can also be pursued in the General Assembly, which has the ability to examine the issues and legislate more authoritatively on the matter.

Conclusions

In conclusion, it is my opinion, and you are hereby advised that:

1. In the performance of her duties under R.C. 319.16 to issue warrants in payment of claims against the county, a county auditor is not subject to the doctrine of strict liability set forth in *Seward v. National Surety Co.* and codified in R.C. 9.39.

2. A county auditor who issues a warrant in violation of R.C. Chapter 5705—including but not limited to situations where either the funds have not been appropriated or there is no proper warrant drawn against an appropriate fund—may be held personally liable under R.C. 5705.45 for the full amount paid.

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commissioners); R.C. 309.03 (bond required for county prosecutor). The "liability of surety companies for loss resulting from the illegal acts of a public officer is well established in Ohio." *State v. Herbert*, 49 Ohio St. 2d at 97.

3. A county auditor also may incur personal liability where he acts in bad faith or with a corrupt motive, such as where he converts public funds to his own or another's personal use or commits fraud.

4. A civil action may be filed under R.C. 117.28, 309.12, or 309.13 against a county auditor for issuing a warrant in payment of an expenditure if the expenditure violates an existing constitutional, statutory, or administrative provision.

5. A county auditor may be held personally liable for the loss of public funds if she fails to exercise her statutory duties under R.C. 319.16 by acting reasonably and prudently in issuing a warrant in payment of an expenditure that violates an existing constitutional, statutory, or administrative provision.