

January 8, 2021

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870

SYLLABUS:

2021-001

1. An elected county official may not spend more on employee salaries than the board of county commissioners appropriates for that purpose. The only exception is an excess salary expenditure ordered by a court of common pleas, which must be honored, unless the board of commissioners can prove that the expenditure is unreasonable and unnecessary.
2. A county auditor has a duty to question all doubtful claims. In addition, a county auditor has a duty to deny or withhold payment of invalid warrants when money has not been properly appropriated in the county treasury. This duty applies to warrants involving payroll transmittal amounts for employee compensation presented by a county appointing authority.
3. Should a county auditor process a payroll transmittal amount in excess of the set appropriation amount, the county auditor may be subject to potential liability for issuing a warrant in violation of R.C. 5705.45 and for failing to perform duties under R.C. 319.16.
4. Elected county officials must comply with the FLSA in all cases where it applies, even if its requirements contradict the requirements of state law.



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OPINION NO. 2021-001

The Honorable Kevin J. Baxter
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247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870

Dear Prosecutor Baxter:

You have requested an opinion regarding the responsibility of a county auditor (“Auditor”) relative to a line item appropriation (“appropriation amount”) for county employee salaries. I have framed your questions in the following manner:

1. May an expenditure for county employee salaries exceed the appropriation amount set by a county board of commissioners (“Commissioners”)?
2. What is the Auditor’s role in determining whether a county appointing authority has exceeded its salaries appropriation amount?
3. What is the Auditor’s responsibility and potential liability under R.C. 5705.45 or other provisions if processing a payroll transmittal would result in an exceeded appropriation amount?

4. Does the federal Fair Labor Standards Act (“FLSA”) require timely “prompt payment” of an employee who worked hours when the elected county official has overspent the appropriation amount?

I

You first ask if an elected county official may make an expenditure for employee salaries that exceeds the appropriation amount set by the Commissioners. The term “elected county officials” commonly includes the following officers: county commissioners, county prosecuting attorneys, county sheriffs, county coroners, county engineers, county recorders, county auditors, county treasurers, and common pleas court judges. R.C. 305.01; R.C. 309.01; R.C. 311.01; R.C. 313.01; R.C. 315.01; R.C. 317.01; R.C. 319.01; R.C. 321.01; R.C. 2301.01; R.C. 2303.01; 2003 Op. Att’y Gen. No. 2003-027, at 2-222, fn. 1. The answer, at least as a general matter, is “no.”

I begin with a caveat. Various statutory provisions govern the budgeting and expenditures of particular elected county officials. In order to accurately address the appropriation for a particular elected county official, it would be necessary to thoroughly examine all statutes relevant to that official. That task requires a detailed analysis that exceeds the scope of this opinion. *See, e.g.*, R.C. 309.06 (the compensation of certain employees of the county prosecutor is fixed in the aggregate by the judges of the court of common pleas); R.C. 325.071 (furtherance of justice funds); R.C. 5577.13 (duty of boards of county commissioners to appropriate from county road fund money to equip and compensate deputy sheriffs for enforcement of motor vehicle weight and size limits). *See generally* 2006 Op. Att’y Gen. No. 2006-013, at 2-109 to 2-110 (citing numerous statutes that affect particular appropriations). Thus, this opinion addresses principles applicable to elected county officials generally. It considers only the operations of counties that, like Erie County, have not adopted a charter.

Elected county officials lack authority to pay employee salaries in excess of the amount set by the Commissioners. Every year, the Commissioners must adopt budgets and appropriate funds for various county bodies and officials. 2009 Op. Att’y Gen. No. 2009-044, at 2-315. Elected county officials are required to request funding from the Commissioners. *Id.* Once requested, the Commissioners determine when to appropriate amounts to the elected county officials for various uses. *Id.* Commissioners must provide each elected county official their own appropriation, and, within that appropriation, a specific amount, or line item, to be used for employee compensation. *Id.* The elected county officials mentioned in R.C. 325.27 may appoint and employ necessary employees and fix their compensation. *Id.* However, “[t]he employees’ compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for that office.” R.C. 325.17 and 325.27; 2009 Op. Att’y Gen. No. 2009-044, at 2-315 to 2-316. Because Commissioners adopt budgets and appropriate funds, and because elected county officials are barred by state law from paying more in salary than the Commissioners appropriate for that purpose, elected county officials may not pay aggregate salary costs that exceed what the Commissioners appropriated for that purpose.

That rule comes with an exception, however, applicable only to funding of the court of common pleas. Ohio courts have the inherent authority to order funding that is reasonable and necessary for the administration of court business. 2000 Op. Att’y Gen. No. 2000-009, at 2-45; 2009 Op. Att’y Gen. No. 2009-044, at 2-320, fn. 9; 1998 Op. Att’y Gen. No. 98-005, at 2-29. Court funding requests may include, but are not limited to, an appropriation amount for increased salaries. 2000 Op. Att’y Gen. No. 2000-009, at 2-47. Moreover, it is presumed that a court’s request for

funding is reasonable and necessary for the proper administration of the court. *Id.*, at 2-45 to 2-46.

While courts have an inherent authority to order funding that is reasonable and necessary for business administration, courts are directed to cooperate with their legislative body in the budget process. 2009 Op. Att'y Gen. No. 2009-044, at 2-320, fn. 9; *State ex rel. Mahoning County Commrs. v. Maloney*, 100 Ohio St.3d 248, 2003-Ohio-5770, 797 N.E.2d 1284, at ¶ 17-18; 2000 Op. Att'y Gen. No. 2000-009, at 2-46. A court does not have unfettered discretion to act without reason in creating its budget. 1998 Op. Att'y Gen. No. 98-005, at 2-30; see *State ex rel. Britt v. Bd. of Cty. Commrs.*, 18 Ohio St.3d 1, 3, 480 N.E.2d 77, 79, (1985). Rather, courts are limited to requests that are reasonable and necessary. 1998 Op. Att'y Gen. No. 98-005, at 2-30. Nevertheless, funding requests from a court for increased salary appropriation amount *must be honored*, unless the Commissioners can overcome the burden to prove the request is unreasonable and unnecessary. (Emphasis added.) 2000 Op. Att'y Gen. No. 2000-009, at 2-45. This principle does not apply to other elected county officials. *Id.*

In sum, expenditures for employee salaries by an elected county official may not exceed the appropriation amount set by the Commissioners. The only exception is an excess expenditure by the court of common pleas, which must be honored, unless the Commissioners can prove that the expenditure is unreasonable and unnecessary. 2009 Op. Att'y Gen. No. 2009-044, at 2-315 to 2-316, 2-320; 2000 Op. Att'y Gen. No. 2000-009, at 2-45.

Further, please note that this conclusion does not apply to accrued vacation, sick, or other leave payment that a county employee may be entitled to receive pursuant to applicable Ohio law, collective bargaining agreements, or county policies. 2009 Op. Att'y Gen. No. 2009-009, at 2-61 to 2-62, 2-74; see *Ebert v. Stark*

Cty. Bd. of Mental Retardation, 63 Ohio St.2d 31, 406 N.E.2d 1098 (1980).

II

You next ask what role the Auditor plays in determining whether a county appointing authority has exceeded its salary appropriation amount. An “appointing authority” means “the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution.” R.C. 124.01(D). The term “appointing authority” includes elected county officers who possess these same powers. *See generally* 2013 Op. Att’y Gen. No. 2013-013, at 2-115, fn. 1.

A

It is important to begin with a review of the statutory authority that governs the Auditor’s responsibility and allowance of claims, which are outlined in R.C. 319.16 and R.C. 307.55.

The 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.” R.C. 319.16. Warrants (in other words, money or fund payments), which are also known as “payment of claims,” are paid out of the county treasury for obligations owed by the county. 2009 Op. Att’y Gen. No. 2009-033, at 2-218.

While the Auditor is generally considered to be a ministerial officer who performs ministerial duties, R.C. 319.16 grants the Auditor with authority to exercise discretion, within certain limited parameters, to issue warrants for payment of claims against the county. *Id.*

The Auditor also has the responsibility under R.C. 319.16 to ensure that all statutory requirements have been met and the claim is proper in purpose and amount, before issuing a warrant for payment of the claim. 2009 Op. Att’y Gen. No. 2009-033, at 2-219; 2003 Op. Att’y Gen. No. 2003-029, at 2-249; R.C. 319.16. That duty includes a responsibility to ensure that the claim was allowed by the Commissioners, fixed by law, or allowed by an authorized officer or tribunal; and there was a proper order or voucher and evidentiary matter for the moneys presented. 2009 Op. Att’y Gen. No. 2009-033, at 2-219; 2003 Op. Att’y Gen. No. 2003-029, at 2-249; R.C. 319.16. Moreover, the Auditor has a duty to deny issuance of a warrant if standards are not met. 2009 Op. Att’y Gen. No. 2009-033, at 2-219; 2003 Op. Att’y Gen. No. 2003-029, at 2-249.

B

I now turn to the process through which the Auditor should review payroll transmittal claims and deny payment of certain warrants.

The Auditor is a creature of statute who may exercise only those powers conferred expressly by statute, or necessarily implied therein. 2017 Op. Att’y Gen. No. 2017-013, Slip Op. at 3; 2-112; 2012 Op. Att’y Gen. 2012-018, at 2-154; R.C. 319.16. The Auditor has no authority to issue a warrant for payment for any amount of compensation that differs from the amount specified, in a valid or legal voucher or order. 2017 Op. Att’y Gen. No. 2017-013, Slip Op. at 4; 2-113. It is clear the Auditor is statutorily required to issue warrants for the specific amount of compensation that is set forth in the voucher or order as presented. 2003 Op. Att’y Gen. No. 2003-027, at 2-225. The Auditor has no power to change the amount of compensation set forth in a voucher or order. *Id.*; 2017 Op. Att’y Gen. No. 2017-013, Slip Op. at 5; 2-114.

When presented with a payroll transmittal for employee compensation that seems questionable, R.C. 319.16 outlines the process by which the Auditor should challenge its validity and withhold payment.

“If the 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 board, officer, or tribunal who presented the voucher. If 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, a writ of mandamus may be sought.”

R.C. 319.16; *see* 2003 Op. Att’y Gen. No. 2003-029, at 2-241; 2009 Op. Att’y Gen. No. 2009-033, at 2-220.

Courts will issue a writ of mandamus compelling the Auditor to issue the warrant for payment to claimant, such as a county appointing authority, where the claim is deemed valid. 2003 Op. Att’y Gen. No. 2003-029, at 2-241. However, courts will also decline to issue a writ of mandamus, where the claimant’s right to payment is not clear, or the act to be enforced is not one of legal obligation. *Id.*; *State ex rel. McKey v. Cooper*, 99 Ohio St. 258, 124 N.E. 192 (1919). Notably, courts have upheld the Auditor’s decision to dispute the validity of a doubtful claim and withhold warrants for payment, when no legal right to enforce payment could be found. *See* 2009 Op. Att’y Gen. No. 2009-033, at 2-219; 2003 Op. Att’y Gen. No. 2003-029, at 2-241 to 2-242; *State ex rel. Baen v. Yeatman*, 22 Ohio St. 546 (1872).

Therefore, the Auditor has a duty to question all doubtful claims. In addition, the Auditor has a duty to deny or withhold payment of invalid and illegal

warrants, when money has not been properly appropriated in the county treasury. *State ex rel. Krabach v. Ferguson*, 46 Ohio St.2d 168, 171-72, 346 N.E.2d 681 (1976); 2009 Op. Att’y Gen. No. 2009-033, at 2-219. This duty applies to warrants for payroll transmittal amounts for employee compensation, presented by a county appointing authority. 2017 Op. Att’y Gen. No. 2017-013, Slip Op. at 4; 2-113; 2003 Op. Att’y Gen. No. 2003-027, at 2-225.

III

You next ask about the Auditor’s potential liability under R.C. 5705.45 and other provisions should the Auditor process a payroll transmittal in excess of the appropriation amount. Questions of liability are dependent upon the facts of a particular circumstance and cannot be determined by opinion of the Attorney General. *See* 1994 Op. Att’y Gen. No. 94-028, at 2-127; 1999 Op. Att’y Gen. No. 99-047, at 2-297. However, it is possible to discuss general principles regarding liability which may be applicable to the circumstance you have described.

A

The Auditor may face statutory liability for issuing a warrant in violation of R.C. Chapter 5705, which describes procedures for expenditure of treasury funds.

R.C. 5705.41(C) forbids the expenditure of county money “except by a proper warrant drawn against an appropriate fund,” and R.C. 5705.41(D) requires the Auditor to attach a certificate to any order involving an expenditure of money showing that the amount required to meet the obligation has been appropriated for that purpose and is available in treasury or in the process of collection. R.C. 5705.41; 2003 Op. Att’y Gen. No. 2003-029, at 2-244 to 2-445, fn. 6; 2009 Op. Att’y Gen. No. 2009-033, at 2-223 to 2-224. The Auditor is required to certify that expenditures are drawn against

an appropriated fund and supported by a proper warrant.

Any person who authorizes the expenditure of public funds contrary to 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; 2003 Op. Att’y Gen. No. 2003-029, at 2-244 to 2-445, fn. 6. *See State ex rel. Justice v. Thomas*, 35 Ohio App. 250, 258, 172 N.E. 397 (3d Dist. 1930) (the “county auditor is the distributing official of funds of the county...[and] is strictly limited in issuing warrants by [R.C. 5705.45], and penalized for the misplayment of moneys of the county by [R.C. 5705.45]”); *see also* 1940 Op. Att’y Gen. No. 3199, vol. II, p. 1177 (syllabus, paragraph three) (the Auditor “who pays a claims contrary to law is...liable for all damages and loss sustained by the county to the extent of such payment.”) 2003 Op. Att’y Gen. No. 2003-029, at 2-244 to 2-445, fn. 6. Where the Auditor has violated the Auditor’s official duties by permitting the unauthorized expenditure of public funds, an audit finding may be made against the Auditor. *See* 1937 Op. Att’y Gen. No. 930, vol. II, p. 1652 at syllabus, ¶ 2; 2003 Op. Att’y Gen. No. 2003-029, at 2-244 to 2-445, fn. 6.

In this circumstance, the proposed warrants involve payroll transmittal amounts for employee compensation in excess of the established appropriation amount set by the Commissioners.

Therefore, pursuant to R.C. 5705.45, the Auditor may incur personal liability as a result of issuing excessive payroll transmittal funds for the full amount paid, where funds have not been appropriated or lack a properly drawn warrant. 2009 Op. Att’y Gen. No. 2009-033, at 2-229.

B

In addition, the Auditor may face common-law liability for failing to perform duties under R.C. 319.16.

Auditors may be liable for the loss of public funds resulting from the payment of an expenditure should they fail to act reasonably and prudently in issuing a warrant that is unauthorized or prohibited by law. 2009 Op. Att’y Gen. No. 2009-033, at 2-226; *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”). This is because the Auditor has a duty under R.C. 319.16 to ensure that all statutory requirements have been met and the claim is proper in purpose and amount, before issuing a warrant for payment. If the Auditor fails to perform this duty and issues a warrant for payment of an illegal expenditure, he or she may be personally liable for the loss of funds. *Id.*; *see* 1937 Op. Att’y Gen. No. 930, vol. II, p. 1652, 1660; 2003 Op. Att’y Gen. No. 2003-029, at 2-244 to 2-445, fn. 6.

IV

Finally, you inquire whether the FLSA requires “prompt payment” of an employee who worked hours when the elected county official has overspent the appropriation amount.

Questions of federal law interpretation must be addressed by local officials or the courts. The Attorney General is not empowered to offer authoritative interpretations of federal law. 2011 Op. Att’y Gen. No. 2011-008, at 2-69; 1999 Op. Att’y Gen. No. 99-007, at

2-55; 1983 Op. Att’y Gen. No. 83-057, at 2-232 (the Attorney General does not serve as a fact-finding body). For specific guidance, the county may contact the U.S. Department of Labor. *See* 2012 Op. Att’y Gen. No. 2012-018, at 2-159, fn. 5. However, it is again possible to discuss general principles regarding this federal law which may be applicable to your circumstances.

One general principle resolves your question: because federal law is “the Supreme Law of the Land,” U.S. Constitution, Article VI, Section 2, federal law preempts state law in cases where both apply. *See Armstrong v. Exceptional Child Ctr, Inc.*, 575 U.S. 320, 324–25 (2015). Thus, if the FLSA requires payment, that requirement prevails over any state law forbidding payment. *See* 2017 Op. Att’y Gen. No. 2017-013, Slip Op. at 11; 2-120; 2012 Op. Att’y Gen. No. 2012-018, at 2-159.

Conclusion

Accordingly, it is my opinion, and you are hereby advised as follows:

1. An elected county official may not spend more on employee salaries than the board of commissioners appropriates for that purpose. The only exception is an excess salary expenditure ordered by a court of common pleas, which must be honored, unless the board of commissioners can prove that the expenditure is unreasonable and unnecessary.
2. A county auditor has a duty to question all doubtful claims. In addition, a county auditor has a duty to deny or withhold payment of invalid warrants when money has not been properly

appropriated in the treasury. This duty applies to warrants involving payroll transmittal amounts for employee compensation presented by a county appointing authority.

3. Should a county auditor process a payroll transmittal amount in excess of the set appropriation amount, the county auditor may be subject to potential liability for issuing a warrant in violation of R.C. 5705.45 and for failing to perform duties under R.C. 319.16.
4. Elected county officials must comply with the FLSA in all cases where it applies, even if its requirements contradict the requirements of state law.

Respectfully,



DAVE YOST
Ohio Attorney General