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THE NINETY-DAY PROVISION FOR THE INSTITUTION OF CIVIL ACTION FOR THE RECOVERY OF PUBLIC MONIES ILLEGALLY EXPENDED, IS DIRECTORY RATHER THAN MANDATORY—AN OFFICER RECEIVING A REPORT FROM THE BUREAU OF INSPECTION TO BRING CIVIL SUIT MAY REFRAIN FROM ACTION IF HE FEELS IT IS NOT WARRANTED—§§117.10, 117.13, R.C.

## SYLLABUS:

1. Where pursuant to Section 117.10, Revised Code, an officer receives a certified copy of a report of the bureau of inspection and supervision of public offices, which report sets forth that any public money has been illegally expended, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving said report may institute civil action for the recovery of such money or property under that section, even though more than ninety days has elapsed since receipt of such certified copy, the ninety-day provision of the section being directory rather than mandatory.

2. An officer receiving such a certified report does not have a mandatory duty to institute civil action thereon, but may refrain from bringing action if he feels that such is not warranted under the particular facts concerned.

Columbus, Ohio, June 13, 1962

Hon. Harry Friberg, Prosecuting Attorney  
Lucas County, Toledo 2, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“We have a situation wherein the Auditor, through the Bureau of Inspection and Supervision of Public Offices, has in one of its reports concerning a township in Lucas County, Ohio,

made a determination that a certain expenditure was illegal. It is our own opinion that the expenditure was not illegal. Must we, nevertheless, pursuant to Section 117.10 of the Ohio Revised Code, file suit within 90 days for the recovery of this money, and do you consider the 90 days limitation mentioned in the statute as directory or mandatory? This latter question is asked in view of the fact that our filing time under this statute will expire within the next 30 days and we would not want to lose the cause of action if this is considered as a statute of limitations."

Section 117.10, Revised Code, in referring to the report of examination made by the bureau of inspection and supervision of public offices, reads in pertinent part as follows:

"\* \* \*

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\* \* \*

"If the report relates to the expenditure of public money from the state treasury or to the disposition of property belonging to the state, a certified copy shall be filed with the attorney general; if it relates to the expenditure of public money belonging to the treasury of a city or city school district or to the disposition of public property belonging to such city or city school district, a certified copy shall be filed with the city solicitor of such city; if the report relates to the expenditure of public money belonging to the treasury of a village or to the disposition of public property belonging to such village, a certified copy shall be filed with the mayor of such village; if the report relates to the expenditure of public money belonging to the treasury of any other subdivision of the state or of a special taxing district or to any custodian of public funds other than the treasurer of state, the treasurer of a city, the treasurer of a city school district, or the treasurer of a village, or to the disposition of public property not otherwise mentioned in this section, a certified copy shall be filed with the prosecuting attorney of any county in which such political subdivision or special taxing district or part thereof is located, or in which such custodian of public money or public property resides. A copy of the report may be filed by expressing or mailing it to the office of the attorney general, city solicitor, mayor, or prosecuting attorney.

*"If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, shall within ninety days after the receipt of such certified copy of such report, institute civil actions in the proper court in the name of the political subdivision or taxing district to which such*

public money is due or such public property belongs for the recovery of such money or property and shall prosecute such actions to final determination. Any mayor of a village shall employ legal counsel for such purpose, who shall be paid out of the treasury of the village on voucher approved by the mayor and on warrant of the village clerk, and the amount of such compensation constitutes a charge against said village notwithstanding the failure of the legislative authority thereof to appropriate money or levy funds therefore.

“\* \* \* The attorney general may, when in his judgment it is proper or there is good reason for so doing, if requested to do so by the auditor of state, bring the action in all cases where the prosecuting attorney, city solicitor, or mayor fails to do so within ninety days after a report of an examination has been filed.

“\* \* \*

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\* \* \*”

(Emphasis added)

Also, Section 117.13, Revised Code, provides:

“No cause of action on any matter set forth in any report made under section 117.10 of the Revised Code shall accrue until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and no statutes of limitations otherwise applicable to such cause of action shall begin to run until the date of such filing.”

Section 117.13, *supra*, while referring to statutes of limitations, does not set a time limitation within which suit under Section 117.10, *supra*, must be brought. As to the latter section, it does state that the officer concerned *shall* within ninety days institute civil action. On reading all parts of Section 117.10, *supra*, together, however, it appears that the ninety day provision should be construed to be directory rather than mandatory. In this regard, the third paragraph of the syllabus of *Cleveland v. Legal News Co.*, 110 Ohio St., 360, reads:

“3. A city is not barred from instituting an action for the recovery of money illegally expended, by the 90-day provision of Section 286, General Code.”

Starting on page 365 of *Cleveland v. Legal News*, *supra*, in referring to Section 286, General Code, which was the predecessor of Section 117.10, Revised Code, the opinion by Jones, J., states:

“This statute does not fix a time limitation within which suit must be brought. It simply imposes a legal and directory duty

upon the officer requiring him to institute an action within the period of 90 days. This section does not forestall, nor was it intended to, the right of the political subdivision to bring an action after the time, provided such action is brought within the limitation named by other sections of the Code. This is clearly apparent from the succeeding provisions of the same section, whereby the attorney general, if requested by the auditor of state, may 'bring the action in all cases where the prosecuting attorney, city solicitor or mayor fails or neglects to do so within ninety days after a report of an examination has been so filed.'

"Our conclusion is that the city was not barred from bringing this action because of any limitation found in Section 286. The judgment of the lower courts are reversed, and the cause remanded to the trial court for further proceedings in accordance with this opinion."

Although *Cleveland v. Legal News*, dealt with the filing of an action by a city, the reasoning therein also applies where the report is filed with the attorney general or with a prosecuting attorney. Thus, answering your second question first, a civil action under Section 117.10, *supra*, may be instituted later than ninety days after receipt of the certified copy, the ninety day provision being directory rather than mandatory.

Your first question asks whether the prosecuting attorney has a duty to institute action under Section 117.10, *supra*, when a report is filed with him, even though he might feel that, under the facts presented, a valid cause of action does not exist.

Section 117.10, *supra*, provides that "the officer receiving such certified copy of such report \* \* \* shall within ninety days after the receipt of such certified copy of such report, institute civil actions \* \* \*." Although the word "shall" is used, this is the same language which, as to the ninety day provision, was deemed directory by the Supreme Court in *Cleveland v. Legal News, supra*; and I believe that the same reasoning may again be applied.

That the word "shall" is not always held mandatory is demonstrated by 50 Ohio Jurisprudence 2d, Section 22, page 33, reading:

"The word 'shall' is not always held mandatory. Under some circumstances, it is interpreted to mean 'may.' This is true where the connection in which it is used or the relation into which it is put with other parts of the same statute indicates that the legislature intended that it should receive such a construction."

It will be noted that under said Section 117.10, the attorney general, if requested by the auditor of state, may, when in his judgment it is proper or there is good reason for so doing, bring the action where the prosecuting attorney, city solicitor, or mayor fails to do so within the ninety day period. Thus, it appears to be recognized that the officers involved may not always institute action where reports are filed, and the ultimate decision as to whether actions should be brought in such cases is left to the discretion of the auditor of state and the attorney general. And here, the fact that the attorney general, in the final instance, has the discretion to proceed or not proceed, indicates the intention of the legislature that court action in every case is not expected.

Further, it would appear that the attorney general, prosecuting attorneys and solicitors, as attorneys, are in the best position to determine whether a certain set of facts allows for a valid cause of action in court, and that the legislature did not intend to bind these officers to take court actions which they feel would be fruitless and which would needlessly take up the time of the courts, the officers involved, and others. Remembering, of course, that if the auditor of state and the attorney general feel that an action should be brought in a case where the local officer has not proceeded within ninety days, the attorney general may bring the action.

I thus conclude that the word "shall," as above considered, is not mandatory, and that where a report is filed with an officer pursuant to Section 117.10, *supra*, the officer involved is not required to institute civil action under that section where he feels that such action is not warranted under the particular facts concerned.

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

1. Where pursuant to Section 117.10, Revised Code, an officer receives a certified copy of a report of the bureau of inspection and supervision of public offices, which report sets forth that any public money has been illegally expended, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving said report may institute civil action for the recovery of such money or property under that section, even though more than ninety days has elapsed since receipt of such certified copy, the ninety-day provision of the section being directory rather than mandatory.

2. An officer receiving such a certified report does not have a mandatory duty to institute civil action thereon, but may refrain from bringing action if he feels that such is not warranted under the particular facts concerned.

Respectfully,  
MARK McELROY  
Attorney General