

OPINION NO. 93-004**Syllabus:**

Public officials are not strictly and personally liable for public monies that are properly due public agencies but that remain uncollected by those public officials.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Lee Fisher, Attorney General, February 26, 1993

You have requested an opinion on the following question: Are public officials strictly liable and personally liable for public monies which are properly due public agencies but which go uncollected during their tenure in office?

Public Officials Are Generally Liable for Public Money Received or Collected by Them or Their Subordinates

Historically, public officials have generally been held strictly and personally liable for the loss or misuse of public money under their control:

It has been the general policy...with state officers, county officers, township officers, and all other public officials, to hold the public official accountable for the moneys that come into his hands as such official, and his obligation has been held to be as broad as is the obligation of a common carrier of freight received for shipment; that is to say, that when he comes to account for the money received, it must be accounted for and paid over, unless payment is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason, have not been accepted by the courts as a defense against the claim for the lost money.

Seward v. National Sur. Co., 120 Ohio St. 47, 49-50, 165 N.E. 537, 538 (1929). The nature of this liability has been described as that of an insurer of the safety of the public funds. *State ex rel. Bolsinger v. Swing*, 54 Ohio App. 251, 6 N.E.2d 999 (Hamilton County 1936); see, e.g., *State v. Herbert*, 49 Ohio St. 2d 88, 96, 358 N.E.2d 1090, 1095 (1976) ("[o]ver the years, this court has held public officials liable for the loss of public funds, even though illegal or otherwise blameworthy acts on their parts were not the proximate cause of the loss of public funds").¹

¹ The harshness of this rule and the injustice that may result from its application has been recognized. See, e.g., *State ex rel. Bolsinger v. Swing*, 54 Ohio App. 251, 6 N.E.2d 999 (Hamilton County 1936). The General Assembly has mitigated the injustice with respect to certain public officials by enacting a statute, R.C. 131.18, that permits the release and discharge of such public officials from strict liability under particular circumstances where they have not acted improperly or negligently:

When a loss of public funds, entrusted to a county or municipal corporation treasurer or to a clerk of the court of common pleas, clerk of the court of appeals, clerk of the municipal court, clerk of the county court, judge of the probate court as clerk of such court, judge of the juvenile court as clerk of such court, or to a township or school district treasurer, or a clerk of the board of trustees of a public library by virtue of his office, results from fire, robbery,

Public Officials Are Not Liable for Money Due Public Agencies that Remains Uncollected

The strict and personal liability of public officials for public money has been codified in R.C. 9.39, which provides in relevant part as follows:

All public officials² are liable for all public money *received or collected* by them or by their subordinates under color of office. All money received or collected by a public official under color of office and not otherwise paid out according to law shall be paid into the treasury of the public office with which he is connected to the credit of a trust fund and shall be retained there until claimed by its lawful owner. (Footnote and emphasis added.)

The language of R.C. 9.39 with respect to the liability of public officials is plain and unambiguous. Public officials are held liable, pursuant to R.C. 9.39, only for public money that they or their subordinates *receive or collect*. R.C. 9.39 establishes no liability on the part of public officials for money that is due but not collected. *See, e.g., Youngstown v. The Youngstown Mun. Ry. Co.*, 134 Ohio St. 308, 310, 16 N.E.2d 541, 542 (1938) (holding that the definition of public money found in G.C. 286, that is, "the term 'public money' as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise" was not comprehensive enough to encompass unreceived, uncollected money).

Although the plain and unambiguous language of R.C. 9.39 requires no further statutory construction, *see generally State ex rel. Stanton v. Zangerle*, 117 Ohio St. 436, 159 N.E. 823 (1927), legislative history indicates that the General Assembly did not intend, by the enactment of R.C. 9.39, to hold public officials liable for money due but not collected. R.C. 9.39 was enacted in 1985-1986 Ohio Laws, Part I, 1760 (Sub. H.B. 201, eff. July 1, 1985). Sub. H.B. 201, *inter alia*, enacted comprehensive amendments to the laws governing the supervision of public funds and substantially restructured R.C. Chapter 117. Prior to Sub. H.B. 201, R.C.

burglary, flood, or inability of a bank to refund public money lawfully in its possession belonging to such public funds, the board of county commissioners, board of township trustees, the legislative authority of the municipal corporation, the board of education, or the board of library trustees, respectively, may release and discharge such treasurer, clerk, or judge from all personal liability to or demands of such county, township, municipal corporation, school district, or public library, for the loss so created unless the loss resulted from his negligence or other wrongful act.

No corresponding statute for state officials exists, however.

² Pursuant to R.C. 9.38, the definition of "public official" found in R.C. 117.01 is applicable to R.C. 9.39. "Public official" is defined in R.C. 117.01(E) as "any officer, employee, or duly authorized representative or agent of a public office." In turn, "public office" is defined as "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 117.01(D).

117.10 provided that "'public money,' as used in this section...includes all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise, and all public officials are liable therefor." Sub. H.B. 201 moved the definition of public money for purposes of R.C. Chapter 117 from R.C. 117.10 to R.C. 117.01 and amended that definition, as follows: "'Public money' means any money received, collected by, or *due a public officer* under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office." R.C. 117.01(C) (emphasis added).³

Sub. H.B. 201 simultaneously enacted R.C. 9.39, which holds public officials liable for "all public money received or collected by them or by their subordinates under color of office." Thus, the General Assembly recognized money due a public official but not yet collected as "public money" for purposes of R.C. Chapter 117, and concurrently determined that the liability of a public official under R.C. 9.39 for public money extends only to public money that has been received or collected under color of office by that official or his or her subordinates.⁴

³ The amended definition of "public money" for purposes of R.C. Chapter 117 reflects the language of R.C. 117.28 (formerly R.C. 117.10):

Where an audit 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 the certified copy of the report pursuant to section 117.27 of the Revised Code may...institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property.

R.C. 117.28 (emphasis added). 1955 Op. Att'y Gen. No. 5964, p. 580, determined that former R.C. 117.10 (now R.C. 117.28) authorized actions to collect sums due the state directly from the persons from whom those sums are due. The opinion concerned the recoupment of the cost of maintenance (for instance, room, board, and laundry services) furnished to certain employees where the employee was not charged for the full cost of the maintenance. With respect to this issue, the opinion concluded as follows:

Where it has been determined that such recoupment has not been effected, or has been made in a wholly inadequate amount, there is evident, not a case of illegal expenditure of public money nor a case of conversion or misappropriation of public money, but rather a case of failure to collect sums due the state. It follows, therefore, that the findings should be made against the recipients of maintenance who have failed to pay the state the reasonable costs thereof.

1955 Op. No. 5964 at 592. Thus, the opinion drew a distinction between an illegal expenditure of public money and a case involving the failure to collect sums due the state.

⁴ "Public money" is not specifically defined for purposes of R.C. 9.39. In contrast, "color of office," "public office," and "public official," for purposes of R.C. 9.38 and R.C. 9.39, are all assigned the same meaning as in R.C. 117.01. R.C. 9.38. Prior Attorney General opinions have also adopted the definition of "public money" found in R.C. 117.01(C) for

Clearly, if the General Assembly had intended to hold public officials liable for money due but not collected it would have included that language in R.C. 9.39.

On the basis of the analysis above, it is my opinion, and you are hereby advised, that public officials are not strictly and personally liable for public monies that are properly due public agencies but that remain uncollected by those public officials.

purposes of R.C. 9.38: "'Public money' means any money received, collected by, or due a public official under color of office, as well as any money collected by an individual on behalf of a public office or as a purported representative or agent of the public office." *See, e.g.*, 1992 Op. Att'y Gen. No. 92-030; 1992 Op. Att'y Gen. No. 92-025; 1987 Op. Att'y Gen. No. 87-027. However, R.C. 9.38 concerns only the disposition of money received by public officials, and R.C. 9.39 concerns only money received or collected. Thus, that portion of R.C. 117.01(C) that defines public money as "any money...due a public official" is not germane to the operation of R.C. 9.38 and R.C. 9.39.