

Personal liability of public officials

Public officials may be personally liable for an unlawful expenditure of public funds. Under Oregon law, for example, ORS 294.100(1) states that “[i]t is unlawful for any public official to expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law.” This principle is not limited to Oregon; nearly every state has a similar statute or rule. The specter of personal liability should raise red flags for all employees and directors of municipal utilities and PUDs. This article will discuss the legal underpinnings of potential personal liability and offer advice on how it may be mitigated.

The majority of the cases discussing the potential personal liability of public officials involve the unlawful expenditure of public funds for campaign purposes. For example, in *Burt v. Blumenauer* the Oregon Supreme Court has affirmed that public officials may be personally obligated to repay any public funds spent in promoting a policy in favor of water fluoridation. The court analyzed the distinction between providing information promoting public health and advocating in favor of a specific government action. The court found that the defendants had crossed the line by paying the salaries of persons and hiring advertising firms to promote fluoridation.

The same rule has been applied directly to public officials of consumer-owned utilities. In *Porter v. Tiffany*, for example, the Oregon Court of Appeals considered whether the commissioners of a municipal utility could be held personally liable for funds spent in connection with two election measures. The funds were spent advocating in favor of a public vote authorizing the issuance and sale of \$225 million in bonds to allow the utility to participate in a nuclear power program. First, the court affirmed that utility ratepayer money qualifies as “public funds” for purposes of the statute. Second, the court concluded that the campaign expenditures were not authorized by statute or charter.

Public officials should be aware that this rule applies to any unlawful use of public funds, and impermissible campaigning is but one example of that. In *Thompson v. Clatskanie PUD*, for example, the Oregon Court of Appeals considered whether the directors of a PUD unlawfully expended public funds by paying a salary to a director who was simultaneously receiving pay as a county commissioner. The court’s decision implies, without expressly holding, that if the director had been double-paid in violation of state law, then the PUD commissioners may be personally liable for the unlawful expenditure.

Public officials should also be aware that this rule is not limited to elected directors or commissioners, but includes all employees of the public body. ORS 244.020(14) defines “public official” to include:

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[A]ny person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 (Public body defined) as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

This means that all employees of a consumer-owned utility that are responsible for making decisions about an expenditure of public funds should be aware of their responsibility and potential personal liability.

In construing the personal liability laws, the courts have been clear that acting in “good faith” is not a defense. In *Bear Creek Valley Sanitary Authority v. Hopkins*, certain taxpayers asserted that the directors of a sanitary authority were personally liable for spending bond funds issued to finance a sewer construction project for purposes other than what was authorized by the bond measure. The directors argued that they should not be found personally liable because there was no harm done to the public body and because they acted in good faith. The court rejected this as a potential defense:

It also appears that there was no dishonesty or self-dealing by the directors, and there is no allegation by plaintiffs that defendants personally profited by the expenditures made. We conclude, however, that ORS 294.100 and ORS 450.920, when read together, provide that defendants could be held liable for expenditures of bond proceeds for purposes other than those indicated in the order calling for the election on the issuance of the bonds.

In other words, the plaintiffs do not have to prove “intent” in order to establish personal liability.

The best defense against a claim of unlawful expenditure of public funds is that the public official in question

was following the advice of qualified legal counsel. In Bear Creek, the directors also argued that there could be no personal liability because they were acting upon the advice of legal counsel. The court agreed, saying “[w]e do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk.” The court further explained that “[i]n order to establish the defense of advice of counsel defendants must show that they relied in good faith and without personal benefit upon the advice that was given by their attorney.”

It is not enough to seek and receive the advice of counsel — public officials must also follow such advice. In the *Porter v. Tiffany* case discussed above, the commissioners tried to assert that they had relied on advice of their legal counsel. The court noted that “the trial court found that defendants had relied upon the advice of counsel. That finding is not supported by the record. Defendants offered no testimony or

exhibits which tend to show either reliance upon the advice of counsel, or the nature of that advice.” The court continued: “Even if we assume that this was the advice of counsel, it is clear from the exhibits and the testimony that such advice was not followed.”

Beyond establishing a defense against personal liability, good legal advice can help prevent a violation of law in the first place. Obviously a public official cannot be found personally liable for an expenditure that is, in fact, authorized by law. As the Bear Creek court noted, the determination of what expenditures may or may not be permitted by law can be “complex.” Seeking and relying on the advice of well-qualified legal counsel can help to avoid such claims of unauthorized expenditures in the first place. **NWPPA**

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