

Surcharge: Accountability of Officials for Misuse of Public Funds

Pennsylvania law provides a system by which the actions of municipal officers and employees, in the context of expenditure or use of public funds, may be “checked” or questioned by other elected officials, taxpayers and the courts. While there are limitations on this system, it serves as a powerful tool to ensure the accountability of elected or appointed municipal personnel.

“The term ‘surcharge’ generally refers to the imposition of personal liability on a fiduciary¹ for willful or negligent misconduct in the administration of his or her fiduciary duties. As used in [municipal codes], the word ‘surcharge’ usually refers to charges assessed against municipal officers, officials, employees, or other persons who have access to or control over [municipal funds].”²

As inferred by the court in the quote above, most municipal codes³ contain provisions whereby those in control of municipal funds may be forced to reimburse the municipality for the mismanagement, misappropriation, or otherwise wrongful or unlawful use or expenditure of public monies.⁴ Typically, whether the official or employee in question willfully or intentionally caused an unlawful loss to the municipality is not determinative.⁵ The chief inquiry is whether the municipality suffered a “financial loss” as a result of the conduct of the official or employee. Also, the financial loss suffered by the municipality need not have been one that benefited the official(s), such as a board of supervisors authorizing “double” payments to themselves. For a surcharge based on a violation of law or an act beyond the official’s authority, a surcharge is often limited to the municipality’s financial loss to the extent that it exceeds the cost that would have been incurred had the proper procedure been followed.⁶

¹ “One who owes to another the duties of good faith, loyalty, due care, and disclosure.” Bryan A. Garner (ed.), *Black’s Law Dictionary*, 11th ed., West Group, St. Paul, Minn., 2019.

² *In re Bethlehem Township Annual Audit and Financial Report 1982*, 8 Pa.D.&C.4th 601, 604 (1990), *aff’d and opinion adopted by* 585 A.2d 586 (Pa. Cmwlth. 1991).

³ The Third Class City Code, 11 Pa.C.S. § 10101 et seq., apparently has no specific provisions that empower the controller to impose surcharges on city officials or employees. Many home rule and optional plan municipalities have audit and surcharge provisions similar to those in the various codes.

⁴ The County Code, Act 130 of 1955, § 1730; Borough Code, 8 Pa.C.S. § 1059.3; The First Class Township Code, Act 331 of 1931, § 1003; The Second Class Township Code, Act 69 of 1933, § 907.

⁵ *Dougherty v. Borough of Meshoppen*, 612 A.2d 595 (Pa. Cmwlth. 1992), *citing Mascara Appeal*, 529 Pa. 81 (1992); *Likovich Appeal*, 347 Pa. 40 (1943) (“Surcharges have been imposed upon public officials . . . despite their reliance on the advice of legal counsel or good faith beliefs that they were acting properly.” *Id.*).

⁶ There exist other “surcharge” provisions of municipal codes that specifically set the liability of municipal officials. *See* The Third Class City Code, 11 Pa. C.S. § 11902; Borough Code, § 1403; and The First Class Township Code, § 1802.1, setting joint and several surcharge liability at 10 percent of contract price for deliberate evasion of contract advertising requirements in third class cities, boroughs and first class townships, respectively.

Auditors and Controllers. Surcharges are usually raised and levied through the final annual audit of municipal elected or appointed auditors and controllers. Absent fraud or criminal activity on the part of a municipal official, this is the exclusive method by which mismanagement of municipal funds may be remedied.⁷ After the appeal period for the annual report has passed, the surcharge contained within the report may be reduced to a civil judgment against the public official or employee in favor of the municipality.⁸ Should a report reflect a surcharge on a public employee or official, that person may appeal the report to the county court of common pleas. The audit has a presumption of validity, and the burden is on the public official to show that the surcharge is invalid. In establishing the record in the appeal, the account(s) of the official are examined anew. *Any challenge to an audit must be brought within a specified period of time after it is filed⁹ or the audit may not later be challenged, barring extraordinary circumstances.*

Role of the Citizen. Taxpayers may ask their auditors or controllers to investigate or impose a surcharge on a public official. Should the annual audit fail to reflect the requested surcharge, the taxpayer may appeal the audit as would a public official.¹⁰ The taxpayer in most cases is required to post a bond to cover costs in the event that a decision is reached that is not more favorable than that proposed by the auditors.¹¹ At this juncture, the burden is on the taxpayer to prove the municipality suffered financial loss or that the audit is otherwise inaccurate.¹² Should the court find that the surcharge is warranted, it may impose such on an official or employee. Surcharge may not be used to reach otherwise “private” parties who may have been appropriated public monies, but only public officials and employees who have control or regular access to those funds.¹³ The appropriate statutory deadline for challenging the report is applicable to taxpayers and will foreclose any remedy to the alleged mismanagement of funds if missed. *Challenging the annual report of the auditors or controller is the primary means by which a citizen may attempt to unilaterally remedy the mismanagement or illegal use of municipal funds.*

Because of the mechanism of surcharge and the ability of the taxpayer to actively participate as a “watchdog” in municipal spending, the annual audit is a crucial event in municipal government. The various municipal codes require publication of the audit in newspapers of general circulation,

⁷ *Bennett v. Mountain View School Board*, 693 A.2d 651, 654 (Pa. Cmwlth. 1997) (citing cases that support this principle involving various municipalities). *See also Watts Tp. Board of Auditors v. Raudensky*, 200 A.3d 129 (Pa.Cmwlth.2018) (holding that surcharge imposed by board of auditors against supervisor, but not connected with audit, was not authorized by statute).

⁸ Borough Code, § 1059.9; The First Class Township Code, § 1008; The Second Class Township Code, § 913.

⁹ The County Code, § 1731 (60 days for parties other than the Commonwealth); Borough Code, § 1059.4 (40 days); The First Class Township Code, § 1009 (45 days); The Second Class Township Code, § 909 (45 days).

¹⁰ In counties, 10 or more taxpayers must jointly challenge the audit. *See* The County Code, § 1731.

¹¹ Third Class City Code, § 11705; Borough Code, § 1059.5; The First Class Township Code, § 1010; The Second Class Township Code, § 910. There is no specific requirement in the County Code that taxpayers who file an appeal must post a bond.

¹² *In re 1980 Auditors' Report for New Castle Tp.*, 482 A.2d 287, 290 (Pa. Cmwlth. 1984).

¹³ *In re Bethlehem Tp. Annual Audit and Financial Report*, 585 A.2d 586 (Pa. Cmwlth. 1991).

and a derivative statement is filed with the Pennsylvania Department of Community and Economic Development. Although the “window” for the remedy of surcharge is narrow and citizens must generally rely on the diligence of their auditors and controllers to protect the public coffers, the extensive publication of municipal finances and the possibility that municipal officials and employees may have to “go into their pocket” whenever they are responsible for financial loss suffered by a municipality, adds an essential level of accountability to local government.