

1993.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENTS, CHAMPAIGN COUNTY, OHIO.

COLUMBUS, OHIO, April 11, 1921.

HON. LEON C. HERRICK, *State Highway Commissioner, Columbus, Ohio.*

1994.

OHIO BOARD OF ADMINISTRATION—PENITENTIARY—ENTERTAINMENT AND AMUSEMENT FUND IS A TRUST FUND—HOW EXPENDITURES ARE TO BE MADE FROM SUCH FUND.

1. *The entertainment and amusement fund, created by authority of the board of administration out of the interest accruing on other funds of the penitentiary and added to by funds obtained otherwise, but being the property of the institution, is a trust fund and must be strictly accounted for as such by the warden in his official capacity.*

2. *Proper expenditures from a fund created by the board of administration are those made for the beneficiary thereof in the furtherance of the purpose and intent expressed in creating the same. The beneficiary in the instant case is the penitentiary, and in the absence of specific directions by the board of administration in creating the fund, any expenditure that may with reason and justice be said to come within the purposes of the fund are legal expenditures.*

COLUMBUS, OHIO, April 12, 1921.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter, which reads thus:

“Accompanying this letter is a history of the entertainment and amusement fund of the Ohio penitentiary.

We ask an opinion from you on the status of this fund during the period from February 2, 1916, to September 1, 1920, covering the following points:

First: Were said funds a trust?

Second: If a trust, were they a trust in charge of the state, the warden, or P. E. Thomas as an individual, or in whose charge were the said funds?

Third: In any case, should any accounting have been made of the fund?

Fourth: For what purposes could disbursements from this fund be legally made?”

The statement of facts attached to this letter reads as follows:

“The Ohio board of administration in its minutes under date of September 12, 1913, directed the fiscal supervisor to authorize the warden of the Ohio penitentiary to credit \$1,453.33 interest on the convict fund, parole and

advance parole and probation accounts to the shortage in the convict fund until the shortage in said fund is made up; after which, all interest on said fund to be credited to a fund known as 'Entertainment and Amusement Fund.'

On the books in the office of the chief clerk of the Ohio penitentiary there is an entry under date of November 29, 1913, which shows a credit to the said entertainment and amusement fund in the sum of \$180.20. This is the first entry in this fund, and the money came from a Thanksgiving minstrel show given by the prisoners. Following this were entries as follows:

1913.		
Nov. 29—Donation.....		\$3 50
Dec. 1.....		25
Dec. 2—L. T. C., check warden.....		2 00
1914.		
Feb. 4—J. B. S., Q. M.....		50 00
Mch. 2—Old convict fund.....		66 59
Mch. 2—Currency found in safe unclaimed.....		39 58
Apr. 6—Cash, J. C. W.....		63

From this time on until February 2, 1916, the payments were made into this fund from various sources, and the accounting kept in the office of the chief clerk, both the receipts and expenditures. On February 2, 1916, the warden took the accounting away from the office of the chief clerk, except the accounting of interest from convict funds, and took entire control of the commissary store, and from that time until September 1, 1920, there were no books kept showing receipts and expenditures from the said commissary. Profits from the sale of goods in the commissary were all paid to the warden.

On September 1, 1920, an order was issued by the board of administration as follows:

'THE OHIO BOARD OF ADMINISTRATION

Sale of tobacco, candies, etc.

August 30, 1920.

Mr. P. E. Thomas, Warden, The Ohio Penitentiary, Columbus, Ohio.

Dear Sir:—The following resolution was adopted by this board on August 27th, and you will please be governed accordingly:

WHEREAS, It has come to the attention of the board that at some institutions cigars, tobacco, candies, etc., are being sold to inmates, employes and others from stock owned by some officer or employe of the institution; and

WHEREAS, This board deems it for the best interest of all concerned to have such items handled through the industrial and entertainment fund; therefore, be it

RESOLVED, That the managing officer of each institution over which this board has supervision be instructed that if in his opinion the sale of cigars, tobacco, candies, etc., to the inmates and employes (either or both) is a benefit to the institution, said sales may be made, but effective as of September 1, 1920, arrangements shall be made to handle all of said business through the industrial and entertainment fund, placing requisitions in the regular way for all purchases, and receipts from sales shall be placed to the credit of the industrial and entertainment fund, and the stock purchased paid for from said fund.'

Since, in this particular instance, the original stock was not purchased

by the warden or any other officer or officers of the institution but by money taken from the entertainment and amusement fund, nor the maintenance of the stock kept up by any other fund, no account was made or remuneration asked by the warden in regard to said stock, and the commissary was given up by the warden on September 1, 1920.

From September 1, 1920, up to the present time the commissary has been conducted in accordance with the provisions given in the foregoing letter from the board of administration."

The statement of facts shows that an entertainment and amusement fund was created by the board of administration from the interest on certain other funds belonging to the Ohio penitentiary. This is recorded in the minutes of the board of date September 12, 1913. The fund began by a credit entered on November 29, 1913, in the sum of \$180.20, being the receipts obtained from a minstrel show given by the inmates of the institution. The brief statement of credits which you transcribe shows that other items were originally brought into this fund which clearly belonged to the institution.

Up to February 2, 1916, a period of two years and two months, this fund was handled and accounted for by the chief clerk, who kept accurately a record of the receipts and expenditures. A determination of the profits or loss accruing in this fund during this period is a mere matter of subtraction.

Subsequent to February 2, 1916, and until September 1, 1920, a period of four years and seven months, no record of receipts and expenditures seems to have been kept. This is the period during which the fund and the commissary supported by it were in the hands of the warden.

The statement does not show by what authority, if any, the warden assumed control and management of this fund and the commissary, nor for what reason the management of the same was taken from the hands of the chief clerk. No reason appears therein for such action.

From a conversation had with the examiner of this fund it is learned that he was unable to find any record of an order made by the board of administration directing such action on the part of the warden.

The last paragraph of your statement shows that the fund and the commissary supported by it were regarded by the warden as belonging to the institution and under the control of the board of administration; and that the stock of goods was restored by him to the original custodian, following and in compliance with the resolution of the board passed August 30, 1920, effective on September 1, 1920.

The statement of facts says that during the time the commissary was managed and controlled by the warden no book accounts were kept showing the receipts and expenditures had in such fund. In the conversation referred to above it was stated that invoices, showing the purchases of stock during the time the warden controlled the fund and commissary, were produced for the examiner's inspection.

No pay was asked for the management of the commissary by the warden, and the stock on hand on September 1, 1920, was turned over by him as the original stock was received by him on February 2, 1916, in bulk, with no charge for the same and no claim for payment in either transaction.

The fact that this commissary has been continued since September 1, 1920, may be taken as indicating that in the judgment of the warden its continuance is a benefit to the institution, as recited in the resolution of August 30, 1920; otherwise, it would have been discontinued, in compliance with that resolution, for the resolution so directs.

It is noted that the resolution of August 30, 1920 refers to the manner in which purchases for the commissary are to be made, requiring requisitions to be kept in

the regular way for all such purchases. Perhaps this calls attention to the rules and regulations of the board of administration passed in compliance with the provisions of section 1842 G. C., which authorizes and requires the promulgation of such rules and regulations for the management of the institutions under control of the board of administration. Again, it may refer to section 1849 G. C., which requires purchases to be made upon competitive bidding in all cases except for perishable goods and supplies. In any case, it is implied that there exist rules and regulations or statutory directions for making purchases, and requires a proper record of the same, which record is expected to be kept and the purchases made in compliance with the law governing the management of the institutions under the control of the board.

The establishment of this fund, or other fund having the same purpose for which this fund and the commissary are maintained, finds legal sanction under the broad power assigned for the creation of the board of administration in section 1832 G. C., which declares the intent of the legislature, and reads:

“The intent and purpose of this act are to provide humane and scientific treatment and care and the highest attainable degree of individual development for the dependent wards of the state;

To provide for the delinquent such wise conditions of modern education and training as will restore the largest possible portion of them to useful citizenship;

To promote the study of the causes of dependency and delinquency, and of mental, moral and physical defects, with a view to cure and ultimate prevention;

To secure, by uniform and systematic management, the highest attainable degree of economy in the administration of the state institutions consistent with the objects in view;

This act (G. C. sections 1832 et seq.) shall be liberally construed to these ends.”

If this fund may not be said to get a proper legal status from the general intention expressed in the creation of the board of administration, it is certainly sufficiently authorized under the provisions of the statute as found in sections 1838 and 1840 G. C., which read:

“Sec. 1838. The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions.”

“Sec. 1840. The board shall accept and hold on behalf of the state, if deemed for the public interest, any grant, gift, devise or bequest of money or property made to or for the use or benefit of said institutions or any of them, whether directly or in trust, or for any pupil or inmate thereof. The board shall cause each such gift, grant, devise or bequest to be kept as a distinct property or fund, and shall invest the same, if in money, in the manner provided by law; but the board may, in its discretion, deposit in a proper trust company or savings bank any fund so left in trust during a specified life or lives, and shall adopt rules and regulations governing the deposit, transfer or withdrawal of such funds and the income thereof. The board shall, upon the expiration of any trust according to its terms dispose of the funds or property held thereunder in the manner provided in the instrument creating the trust.

The board shall include in the annual report a statement of all such

funds and property and the terms and conditions relating thereto; provided that moneys or property deposited with officers of institutions by relatives, guardians, conservators and friends for the special benefit of any pupil or inmate, shall remain in the hands of such officers for use accordingly; but each such officer shall keep an itemized book account of the receipt and disposition thereof, which book shall be open at all times to the inspection of any member of the board of administration or of the board of state charities."

It will be seen that section 1840 G .C. vests all money or property, real and personal, held for the benefit of the several institutions under control of the board of administration, in trust for their use. This entertainment and amusement fund of the Ohio penitentiary, created by order of the board out of funds belonging to this institution, and the stock of goods purchased by the fund are in the custody of the board of administration by authority of law, and such fund and stock are thus a part of the property held in trust for the state.

The money earned by the prisoners by giving a minstrel show, permitted in furtherance of their betterment and that of the institution of which they are a part by authority of the warden, so long as the money thus earned is not paid pro rata to those engaged in giving the show, is a fund belonging to the institution as a whole. This is a self-evident statement which requires no proof. It is possible to earn such a fund in such a manner only by sufferance of those in authority. It comes into the possession of those managing the institution because of their official positions as public officers, and they are thereby only custodians of it, as distinguished from the owners thereof. Without the express declaration of the statute that such money is held in trust for the state, such funds become trust funds, or funds held for others, the possession of which is the result of official position, and for that reason a strict accounting should be had of such funds. In *State vs. Maharry*, 97 O. S. 272, the first syllabus reads:

"All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law."

From this plain statement the conclusion that this fund is a trust fund, or is public money, is freed from doubt and unavoidable.

In the creation of this fund it is reasonable to conclude that it was done to benefit the institution and not for the benefit of any official or employe. In fact, this is plainly the judgment of the board of administration, as gathered from the matter recited in the "whereas clauses" of its resolution of August 30, 1920. This resolution was intended to apply to all of the nineteen state institutions under the control of the board of administration. The resolution makes it plain that funds of this character are known in some of these institutions as an industrial fund, and in others as an entertainment fund. That the board had the amusement and entertainment fund of the penitentiary before it when the resolution was adopted is also to be implied, even though the action of the former board recorded in the minutes of September 12, 1913, may have been out of mind at the time this later resolution was passed.

In obedience to the order of the board of administration passed in 1913, the placing of the accounting of the fund in the hands of the chief clerk, by whomsoever done, was in compliance with the law as found in section 2192 G. C., which, in part, says:

"The clerk shall keep the accounts of the penitentiary in such a manner as to accurately exhibit the financial transactions relating to it. * * *"

The purchases and other transactions made by use of the entertainment and amusement fund are some of the financial transactions relating to the penitentiary, and so they should be accurately accounted for as are other such transactions, if the plain mandate of the statute is to be observed. With this statement of the law before one, it is difficult to imagine a circumstance that would impel an official to do otherwise. Certainly the change of the custody of the fund and of the management of the commissary could not be said to operate to release one of the necessity of keeping an accurate account of the transactions made under such fund.

Section 1842 G. C. reads, in part, as follows:

“Each of said institutions shall be under the executive control and management of a superintendent or other chief officer designated by the title peculiar to the institution, subject to the rules and regulations of the board and the provisions of this act. Such chief officer shall be appointed by the board to serve for the term of four years unless removed for want of moral character, incompetency, neglect of duty, or malfeasance, after opportunity to be heard.

The chief officer shall have entire executive charge of the institution, for which he is appointed, except as otherwise provided herein. * * *”

The warden is an executive officer or manager of the penitentiary, under the board of administration. He could for reasons that to him seemed adequate take over the management of this fund and the commissary, although he is bound to justify his action in this respect to the board of administration. Especially would it seem necessary that he should report his action to the board since it originally established the fund and knew that the clerk was the person accounting for the use of said fund. Yet in the event that the warden neglected to inform his superiors of his action until, as indicated by their resolution of August 30, 1920, they in a cursory manner became informed that supplies were being purchased by some officers or employes and sold to the inmates of the various institutions in their charge, an accounting for the use of the fund was to be kept by the warden. This would be true because the funds are trust funds, public moneys, and the warden, under the law governing such funds, is expected to keep an accurate account of such funds for the board of administration, to whom he is accountable.

The duties of the warden of the penitentiary, other than those imposed upon him by the rules and regulations enacted by the board of administration, are to be found in sections 2180 G. C. et seq.

In section 2187 G. C. it is provided that the warden shall balance his cash account each month and report it to the board of managers, i. e., the board of administration. In section 2188 G. C. it is provided that all moneys coming to the penitentiary shall be paid to the warden. And in section 2189 G. C. it is provided that all revenues of the penitentiary, except as otherwise provided by law, shall be paid to the warden. These sections, with the others cited herein, sufficiently show that the law intends that a strict accounting of all the moneys and property belonging to the institution over which the warden exercises authority shall be made by him. In the absence of any or all of the provisions of the statutes applying to the official duties of the warden in the care and custody of the funds of the institution over which he is the executive head, because the amusement and entertainment fund is a trust fund, he would be obliged to account for the same.

Therefore, in answer to your first three questions, this entertainment and amusement fund and the property purchased with it is public money and public property, held in trust for the use of the state by its agents or officers, who are the warden and the board of administration. The warden has, under the rules and

regulations of the board of administration, control of this fund and must account therefor. He, having assumed control and having kept no accurate account showing the receipts and expenditures of the same during the time he had the fund and property in hands, may be required to make an accounting of the management of this trust fund.

The board of administration in creating this fund should have enacted specific directions for the use to which it was to be put. Any expenditure consonant with the purpose for which the fund was created and with the directions given by the board would be a legal disbursement. In the absence of such directions by the board, the name or title of the fund affords or implies the purpose for which disbursements may be made, and any disbursements in accord with that purpose thus vaguely indicated, where the intent is to further the action of the board in promoting the betterment of the inmates of the institution, in an honest endeavor, may be taken as a proper disbursement of the fund.

The purpose, gathered from the resolution of August 30, 1920, seems to have been the securing of a stock of cigars, tobacco, candies, etc., which could be sold to the employes and inmates of the penitentiary, at the usual price for which such articles could be purchased elsewhere. The articles that are included in the "etc." following the three things mentioned admits of no accurate statement or enumeration but they are no doubt such other articles as are commonly found in such stock or in a commissary attached to an institution where the inmates are largely men. Some of these articles which are ventured to be enumerated are pipes, buttons, thread, needles, crackers of various kinds, tin products, sardines, etc. A great many other similar articles that persons restricted of their liberty would like, if permitted to acquire or use, might be mentioned, and it is believed that expenditures for stock of this character, for athletic goods, things to eat, and things with which to be amused or to be used for entertainment would be a legitimate expenditure of such fund.

Further than this no specific answer can well be made to your fourth question, in the absence of specific instructions for the use of this fund. However, it is fair to say that what has been said will be a guide in testing such disbursements, by means of which you may find your way. A better or a more specific answer to your fourth question does not seem to be possible.

Respectfully,
JOHN G. PRICE,
Attorney-General.