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1. DEPARTMENT OF MENTAL HYGIENE AND CORRECTION—MONEY COLLECTED IN OPERATION OF CAFETERIAS — PUBLIC FUNDS — SECTION 131.01 R. C. — PAID OVER TO TREASURER OF STATE—DIRECTOR—NO AUTHORITY TO EXPEND FUNDS—EXCEPT PURSUANT TO APPROPRIATIONS.
2. DIRECTOR — NO AUTHORITY TO PURCHASE INSURANCE AGAINST THEFT—OF FUNDS FROM CAFETERIA.

SYLLABUS:

1. The moneys collected in the operation of cafeterias established by the department of mental hygiene and correction are public funds and must, under the provisions of Section 131.01 Revised Code, be paid over to the treasurer of state, and the director of such department has no authority to expend any of such funds, except pursuant to appropriations duly made by the general assembly.

2. In the absence of any authority granted by statute, the director of the department of mental hygiene and correction is without authority to purchase insurance against burglary or theft of funds in hand or in transit to the state treasury, arising from the operation of cafeterias established pursuant to his order.

Columbus, Ohio, September 19, 1956

Dr. John D. Porterfield, Director of Mental Hygiene and Correction
State Office Building, Columbus 16, Ohio

Dear Sir:

I have before me your letter submitting for my opinion the following question:

> "Can the Department of Mental Hygiene and Correction expend money from the receipts of the pay cafeterias it operates in State institutions to pay the premiums on an insurance policy to protect such receipts from burglary or theft?"

I quote further from your letter:

> "It seems that the question involved in this case is whether or not the receipts collected from these pay cafeterias are public funds. Since October 1, 1955, when the cafeterias were established, the average cash receipts have been approximately $12,000.00 per week or around $600,000.00 per year.
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> "These cafeterias were established on that date by Executive Order #5 which became effective October 1, 1955, a copy of which is attached. As a departmental policy, we decided that instead of the institutions retaining their receipts and depositing them in a local bank that they would use the State Treasury as the depository. For this purpose the Controlling Board established, on September 21, 1955, a Rotary Fund for accounting purposes. Were it not for the fact that the money was being deposited in the State Treasury, I do not believe there would be the question of whether these were public funds. I understand that the University has similar cafeterias but they do not deposit their funds in the State Treasury.
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> "These cafeterias are self-sustaining and there are no State appropriated funds used in their operation. In the first instance

the salaries and expenses for their operation are paid from State appropriated funds, then the State appropriated funds are reimbursed from the receipts.

"The premium on the policy that we are attempting to negotiate for a three year period is only $1,389.36, or a yearly average of $463.12. This premium will be paid from the receipts of the pay cafeteria."

Several questions appear to me to arise: (1) whether the funds arising from the operation of these cafeterias are public funds; (2) if they are public funds what disposition must be made of them; (3) is there any authority in law for the purchase out of these funds or out of appropriated funds, of burglary or theft insurance on the receipts from the cafeteria while in the hands of the employes of your department?

Section 131.01 of the Revised Code, reads as follows:

"On or before Monday of each week, *every state officer, state institution, department,* board, commission, and every college or university receiving state aid shall pay to the treasurer of state *all moneys,* checks, and drafts received for the state, *or for the use of any such state officer, state institution, department,* board, commission, or college or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, *or otherwise,* and file with the auditor of state a detailed, verified statement of such receipts. If tuitions and fees are paid to the officers of any college or university receiving state aid, said officers shall retain a sufficient amount of such tuitions and fees to enable them to make refunds of tuitions and fees incident to the administration of the tuition fund and fees. At the end of each term of any college or university receiving state aid the officers in charge of the tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and the disposition of them." (Emphasis added.)

While this section does not expressly define "public funds," yet it is very comprehensive and appears to require the deposit in the state treasury of "all moneys" received from any source, by every state institution and department. It appears from Section 131.04, Revised Code, that the legislature recognized the fact that some moneys belonging to the state may be charged with a contingency and possibly be subject to refund, and it is therefore provided:

"For the purpose of providing a method to properly collect, deposit, and audit contingent receipts received by various state

departments, there is hereby created the 'state depository trust fund' of which the treasurer of state shall be the custodian."

Sections 131.05 and 131.06, Revised Code, are designed to implement the procedure as to the handling of such contingent receipts, but none of the sections relating to such receipts would appear to have any bearing on the moneys referred to in your letter.

Section 131.01 supra, is the successor to Section 24 of the General Code which contained quite similar language to that of the present law. In 1915 several opinions were rendered bearing on the construction of Section 24, and in Opinion No. 23, Opinions of the Attorney General for 1915, at page 35, it was held:

"Receipts from dining service and room rent in dormitories are not for the use of any university, college or normal school as such, or for the use of the state, but for the use and maintenance of the dormitory, and are, therefore, not to be paid weekly into the state treasury."

In the course of the opinion it was said:

"A more difficult question is suggested by your mention of receipts from dining room service and room rent in dormitories. I am, however, of the opinion, that while dormitories are a part of the educational plant and service, yet a distinct separation of such activities from the regular educational activities of the institution may be noted. I think that it is the intention of the legislature, in authorizing the maintenance of dormitories, that the same shall be conducted upon a self-sustaining basis. That is, I do not believe that, in the contemplation of the legislature, the general revenues or educational funds of the state are to be used to pay for the maintenance of dormitories or the food supplies consumed in such dining rooms; I think, on the contrary, that it is the intention that the revenues of the dormitories and the dining rooms, themselves, shall maintain them. In this view of the case, receipts from these sources being devoted to the maintenance of the dormitory and the dining room, respectively, as such, rather than to the general use of the institution or of the state, should not be regarded as moneys received for the use of the state or of the college normal school or university, within the meaning of section 24. * * *."

In Opinion No. 116, Opinions of the Attorney General for 1915, page 228, it was held:

"Under section 24, G. C., (104 O. L., 178), receipts from the sale of manufactured articles under section 1866, G. C., must be turned into the state treasury, and an appropriation by the legislature must be made to make said receipts available."

This opinion turned on the provision of Section 1866, General Code, which provided in part:

> "For the purchase of material and machinery used in manufacturing industries, * * * a special appropriation shall be made to be known as the manufacturing fund. Receipts from the sales of manufactured articles shall not be turned into the state treasury, but shall be credited to said fund, to be used for the purchase of further materials, machinery and supplies for such industries * * * and the board of administration shall make a full monthly report of the products, sales, receipts, disbursements and payments to and from said fund to the state auditor * * *."

In Opinion No. 124, Opinions of the Attorney General for 1915, page 241, the Attorney General had under consideration the provisions of Section 2072 of the General Code, relating to the authority of the Ohio Board of Administration, which had general oversight over the Ohio State Sanatorium, and which statute provided that the board may "receive and expend all moneys paid to it by patients, for treatment therein." It was stated in the opinion that it was clearly in contemplation of the legislature at the time of the enactment of that section, that moneys so received should be received and expended by the board without the same being paid into the state treasury, but it was held that the later enactment of Section 24 supra, operated to change such use of funds and required them to be paid into the state treasury.

In a still later decision in the same year, to-wit, Opinion No. 583, Opinions of the Attorney General for 1915, page 1193, it was held:

> "Fees charged students by a university for special instruction, and upon which no refund is to be given, must under the provisions of section 24, G. C., as amended, be paid into the state treasury.
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> "A university is not authorized to permit the instructor to collect the fees himself and apply the same upon his salary as fixed."

This last opinion appears to me to have some bearing on the question you have submitted because there, as in your case, the moneys in question arose not from any source directly provided by law but rather from a practice instituted or permitted by the trustees of the university. In the present case the moneys in question arise from an institution established by executive order and not pursuant to any provision of the statute.

In Opinion No. 2899, Opinions of the Attorney General for 1938, page

1661, Opinion No. 23, of 1915, above referred to, was reviewed by the Attorney General and the following conclusion was announced:

> "Moneys received by universities in Ohio, receiving state aid, in connection with the operation of dormitories, as well as for the purpose of constructing dormitories, under Section 7923-1, General Code, and for the payment of indebtedness incurred for such purpose, are not required by Sections 24 and 24-4, General Code, to be paid into the state treasury."

In the course of the opinion, it was said:

> "With respect to receipts derived from the operation of dormitories, however, it is likewise apparent that Section 24-4, supra, has no application since such receipts are not 'subject to refund or return to the sender.' It is therefore my judgment that such Section 24-4, supra, has no application to the rule of law laid down in the last two paragraphs of the syllabus of the 1915 opinion, supra, and such opinion to that extent is still declarative of the law of Ohio."

The attorney general found the basis for his conclusion as to the right of the universities to retain custody of the receipts from dormitories, in Section 7923-1 General Code, then in force, which provided:

> "That the boards of trustees * * * are hereby authorized to construct, equip, maintain and operate upon sites within the campuses of the above universities respectively as their respective boards may designate therefor, buildings to be used as dormitories for students and members of the faculty and servants of said state universities, and to pay for same out of any *funds in their possession derived from the operation of any dormitories* under their control. * * *" (Emphasis added.)

Manifestly, since there is no similar provision in the law giving your department the right of custody of cafeteria receipts, the opinion last referred to cannot aid in sanctioning the course which you desire to follow.

I cannot resist the conclusion that the funds arising from the operation of your cafeteria are public funds; they are certainly not private funds. While we recognize the fact that these cafeterias are not established and operated pursuant to any statute but rather pursuant to an executive order, yet that order was issued by you, as a step deemed necessary in the proper performance of your public duty, and it becomes, therefore, a public function and is supported by funds appropriated to your use by the legislature.

Accordingly, I am of the opinion that the receipts from the cafeterias

are public funds within the purview of Section 131.01 of the Revised Code, and must be deposited in the treasury as therein provided. Such being the case there would appear to be no possible theory upon which you could use a part of such receipts to pay directly for burglary and theft insurance even if we find that the law authorizes you to obtain such insurance.

These funds, however, have been placed in a rotary fund established by the Controlling Board created by the general assembly in the act making general appropriations for the current biennium. That act (Amended House Bill No. 929) following the practice of former years, provides:

> "Money obtained from the function or activity for which a rotary fund is provided shall be turned in to the state treasury and such moneys so turned in to the treasury between July 1, 1955 and the period covered by this act, are hereby appropriated for the purpose for which such rotary fund is now maintained, * * *"

I find that the controlling board, on September 27, 1955, established a rotary fund for the moneys arising from the cafeterias established by your department, the resolution of the controlling board reading as follows:

> "Mental Hygiene and Correction—Division of Business Administration.
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> "The Board consents to and approves of, the establishment of a *ROTARY ACCOUNT,* for maintenance deductions and payment for lodging and pay cafeteria receipts . . . such receipts to be expended for the operation of the maintenance program, as outlined in Executive Order No. 5, issued August 30, 1955, by the Director of Mental Hygiene and Correction, and in accordance with the provisions of House Bill No. 929, to be known as: ROTARY M—EMPLOYEES SUBSISTENCE."

Upon examination of your Executive Order No. 5, referred to in the above resolution, I find that no attempt was made to authorize the use of such receipts in the purchase of burglary or theft insurance. Had there been such attempt, I should doubt the authority of the head of a department thus to enlarge his powers beyond those conferred by the law.

Accordingly, it is certain that you have authority to draw on the funds in your rotary fund in the custody of the state treasurer, for all legitimate expenditures in the operation of such cafeterias, falling within the scope of your executive order aforesaid.

Coming then to the question of the right of your department to buy such insurance, it must be stated at the outset that the general assembly

seems not to have considered that any department of the state is in need of such protection. At any rate, I find no provision in the law authorizing any department or institution of the state to obtain such insurance. It becomes necessary therefore to inquire whether there is any implied power to do so.

It is significant that the legislature has seen fit to authorize such insurance, in two instances, to-wit, Section 731.55 Revised Code, granting to cities, and Section 131.11 Revised Code, granting to counties authority to procure insurance on their funds while in the custody of an official, or in transit. Even there, there is no mention of burglary or theft, the authority being merely to "insure" moneys or securities. In Section 131.18 Revised Code, the legislature has seen fit to authorize commissioners of a county, the legislative authority of a municipality, township trustees and boards of education to relieve their respective treasurers from liability for loss of public funds in their custody, resulting from fire, robbery or burglary. No such provisions have been made as to funds in the custody of any state officer. It seems manifest from these omissions of legislation as to state offices and departments, that the state is considered strong enough to act as its own insurer, or sufficiently protected by the bonds which it may require of its officers and employees.

I find no rulings by the attorneys general as to the right of a state officer or department to obtain burglary or theft insurance on public funds. I do, however, note several opinions on the right of political subdivisions to procure such insurance.

In three opinions rendered in 1927, and found at pages 874, 916 and 2160, of the Attorney General's Reports, it was held that in the absence of any statute authorizing county commissioners to take out insurance against theft of county funds, they had no such authority. In the course of the opinion found at page 2160, it was said:

> "The legislature itself, by providing for the giving of bonds by the several county officers * * * has fixed the manner by which the county shall be secured with reference to its monies and has not authorized the commissioners or any other officials to provide any other or additional means of security for said funds. * * *"

In Opinion No. 5132, Opinions of the Attorney General for 1936, the same ruling was made as to township trustees. In that opinion attention was called to the fundamental rule that public officers have only such

powers as are expressly granted by statute, and such implied powers as are necessary to effectuate the express powers. Citing Peter v. Parkinson, 83 Ohio St., 36; Elder v. Smith, 103 Ohio St., 369.

The writer of that opinion, however, called attention to the fact that subsequent to the 1927 opinions above referred to, the legislature had enacted Section 2638-1 General Code, which gave explicit authority to county commissioners to procure such insurance. That section, in substance, now appears as Section 131.11 Revised Code, to which I have already made reference.

The theory of "implied powers" assumes that there is an express power conferred or duty imposed by the statute, for the execution of which some implied power is *necessary;* not merely convenient or desirable. The insurance of moneys arising from the operation of your cafeterias is doubtless highly desirable, but it certainly cannot be said to be necessary to their operation. The lack of authority to procure such insurance can only be overcome by action of the legislature.

Accordingly, it is my opinion:

1. The moneys collected in the operation of cafeterias established by the department of mental hygiene and correction are public funds and must, under the provisions of Section 131.01 Revised Code, be paid over to the treasurer of state, and the director of such department has no authority to expend any of such funds except pursuant to appropriations duly made by the general assembly.

2. In the absence of any authority granted by statute, the director of the department of mental hygiene and correction is without authority to purchase insurance against burglary or theft of funds in hand or in transit to the state treasury, arising from the operation of cafeterias established pursuant to his order.

Respectfully,
C. WILLIAM O'NEILL
Attorney General