

Note from the Attorney General's Office:

1920 Op. Att'y Gen. No. 20-1073 was overruled in part by 1985 Op. Att'y Gen. No. 85-051.

1072.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN HENRY COUNTY, OHIO.

COLUMBUS, OHIO, March 12, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

1073.

COLLEGES AND UNIVERSITIES—BOARD OF TRUSTEES PROPER CUSTODIAN OF MONEYS COLLECTED FOR DORMITORY ROOM RENT AND BOARD FROM STUDENTS ATTENDING STATE EDUCATIONAL INSTITUTIONS—HOW SUCH MONEYS USED AND DISBURSED.

1. *In the absence of a statute particularly designating a custodian for moneys collected for dormitory room rent and board from students attending the state educational institutions located at Athens, Bowling Green, Columbus, Kent, Oxford and Wilberforce, the boards of trustees of such institutions are the proper custodians thereof. In the interest of administrative convenience, however, said boards may designate some proper person custodian of such moneys.*

2. *Such moneys should be disbursed upon the approval of such boards of trustees, and not otherwise.*

3. *Such moneys should be used for the maintenance of the dormitory room rent and board service, and in this connection the term "maintenance" includes, among other things, the cost of light, heat, water, repairs, upkeep of equipment and insurance. Said term does not, however, in this connection include interest on investment.*

4. *The words "shall fix rates of tuition," found in paragraph 3, section 4, H. B. No. 44, 101 O. L. 321, are permissive, merely and not mandatory.*

5. *The boards of trustees of the several state normal schools mentioned in section 7654-7 G. C. are the proper custodians of the moneys paid by the state for model rural schools, pursuant to said section. Said moneys should be disbursed upon the approval of said boards of trustees, and not otherwise. Primarily such moneys should be applied to the maintenance of said model schools, but any excess remaining after such purpose is satisfied may be disposed of for such other school purposes as the boards of trustees at said state normal schools think proper.*

COLUMBUS, OHIO, March 13, 1920.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date reads in part as follows:

"We are making an examination of the Kent normal school and find that there are no statutory laws governing the dormitories, established by legislative appropriations for the state educational institutions located at Athens, Bowling Green, Columbus, Kent, Oxford and Wilberforce, nor for the disposition of the moneys collected from students, at such institutions, for room rent and board.

We are familiar with the opinions of Attorney-General Turner, relative to the same, found in Vol. I, p. 35, and Vol. II, pp. 1149-1151 and 1193, for the year 1915, but are in some doubt as to just what items of expense should properly come within the terms 'self sustaining basis' and 'maintenance of

dormitories and dining rooms,' as used by him in the first opinion, above cited on page 36.

In order that this department, and the institutions involved, may be perfectly clear in regard to the proper handling and disposition of such funds, will you kindly give us your opinion on the following points?

1st. Who is the proper custodian of such funds?

2nd. On whose approval should they be disbursed?

3rd. For what specific purposes should they be used?

By this question we mean—may the following items of expense be paid out of such funds, in addition to the cost of dormitory and food supplies, and the freight, expressage and drayage on same, and the wages of the employes of said dormitories and dining rooms, viz.:

Light, heat and water.

Repairs and upkeep of equipment. Insurance and interest on original investment."

The opinion of the Attorney-General, to which you first refer (1915 Opinions of Attorney-General, Vol. I, p. 35) construed section 24 G. C. (104 O. L. 178), which says:

"Sec. 24. On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school 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, college, normal school 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. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

It was held in said opinion that receipts from dining service and room rent in dormitories are not, within the meaning of section 24 G. C., moneys for the use of any university, college or normal school as such, or for the use of the state, but are for the use and maintenance of the dormitory, and are, therefore, not to be paid weekly into the state treasury.

The following is quoted from said opinion (p. 36):

"A more difficult question is suggested by your mention of receipts from dining room services 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 inten-

tion 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. Of course, in this case, the question becomes even clearer if, in administration, students are charged in advance for board and room, subject to refund in the event of withdrawal before the end of the term. In either event, I am of the opinion that receipts from dining room service and room rent in dormitories should not be paid into the state treasury, weekly."

I find myself in agreement with the views of said former opinion touching the matter just referred to.

(1) We are now to consider your first question, which is:

"Who is the proper custodian of such fund?"

By "such funds" is meant, of course, receipts from dining room service and room rent in dormitories. No statute has been found which undertakes to provide by express language for the custody of such funds. However, the statutes do provide for a board of trustees for each of the six institutions named in your letter.

As to the normal school located at Athens, Ohio, in connection with Ohio University, and as to the normal school located at Oxford, Ohio, in connection with Miami University, sections 7897 and 7898 G. C. provide:

"Sec. 7897. There are hereby created and established two state normal schools to be located as follows: One in connection with the Ohio University, at Athens, and one in connection with the Miami University, at Oxford."

"Sec. 7898. Boards of trustees of such universities shall maintain at their respective institutions a normal school which shall be co-ordinate with existing courses of instruction, and be maintained in such a state of efficiency as to provide proper theoretical and practical training for all students desiring to prepare themselves for the work of teaching. Such normal schools, in each case shall be under the general charge and management of the respective boards of trustees of such universities."

As to the normal college located at Kent, Ohio, and as to the normal college located at Bowling Green, Ohio, sections 3 and 4 of H. B. No. 44, passed May 10, 1910, (101 O. L. 320) provide in part:

"Section 3. As soon thereafter as the general assembly shall appropriate a sufficient amount of money for the purchase of said sites and the erection of suitable buildings thereon the governor shall appoint by and with the advice and consent of the senate five competent persons who shall constitute a board of trustees for the proposed normal school in the northeastern portion of Ohio and five other competent persons who shall constitute a board of trustees for the proposed normal school in the northwestern portion of Ohio.

Section 4. Each board of trustees shall organize immediately after its appointment by the election from its members of a president, a secretary and a treasurer. * * *

* * * * *

The boards of trustees in connection with the presidents of the normal

schools shall select and appoint an able and efficient corps of instructors for the said schools, provide a suitable course of study for the theoretical and practical training of students who desire to prepare themselves for the work of teaching, fix rates of tuition and provide proper equipment.

* * * And said board of trustees shall do any and all things necessary for the proper maintenance and successful and continuous operation of said normal schools and may receive donations of lands and moneys for the purpose of said normal schools."

* * * * *

As to the management of Ohio State University, section 7950 G. C. says:

"The board of trustees shall have general supervision of all lands, buildings, and other property belonging to the university, and the control of all expenses therefor, but shall not contract a debt not previously authorized by the general assembly of the state."

As to the combined normal and industrial department at Wilberforce University section 7981 G. C. says:

"The board of trustees shall take, keep and maintain exclusive authority, direction, supervision and control over the operations and conduct of such normal and industrial department, so as to assure for it the best attainable results with the aid secured to it from the state. The board shall determine the branches of industry to be pursued, purchase through a suitable and disinterested agent, the necessary means and appliances, select a superintendent for the industrial branch of the department, fix his salary and prescribe his duties and authority. The expenditures of all moneys appropriated for carrying out the purposes and provisions of this subdivision of this chapter, shall be made only under such regulations and for such specific purposes not therein provided for, as the board of trustees of such department establish. No money appropriated by the state shall be used for any purpose not in direct furtherance and promotion of the objects of the department."

It is apparent that as to each of the six institutions in question, provision is made by statute for a board of trustees, and that said boards have been given the general supervision and management of said institutions. It would seem that such supervision and management would extend to the proper care and expenditure of all moneys collected by such institutions from students in attendance. In other words, in the absence of any particular statutory directions as to who should have custody of the moneys in question, I am of the opinion that the boards of trustees of the institutions mentioned, in the exercise of their broad general powers, have the right to the custody of such moneys, and further that said boards, in the interest of administrative convenience, have the right to designate a suitable person to act as custodian thereof. While it is not necessary that the treasurer of the institution be designated, yet under most circumstances we presume that the board of trustees would regard that officer as the proper person to act as custodian.

(2). In reply to your second question, which is:

"On whose approval should they be disbursed?"

you are advised that such moneys should be disbursed on the approval of the boards of trustees of the several institutions, and not otherwise, the disbursement of such moneys being a matter also coming within the broad general powers of the trustees.

(3). Your third question is:

"For what specific purposes should they be used?"

Recognizing as was pointed out in the opinion of the Attorney-General above referred to, that said question is not susceptible of an answer laying down a rule for universal application, you say:

"By this question we mean—may the following items of expense be paid out of such funds, in addition to the cost of dormitory and food supplies, and the freight, expressage and drayage on same, and the wages of the employes of said dormitories and dining rooms, viz.: light, heat and water; repairs and upkeep of equipment; insurance and interest on original investment."

Upon inquiry, we learn that in at least several of the institutions in question the practice has been to include all of the items last mentioned by you under the head of "maintenance," the charges for dormitory room rent and board being made sufficient to cover all of the same. In at least one institution, the item of replacement of equipment is covered by a kind of sinking fund created for this special purpose from part of the moneys received for dormitory and dining room service.

Although the legislature has not spoken on the matter, we believe that principles of a sound business policy warrant the conclusion that the items mentioned by you, to-wit, light, heat, water, repairs and upkeep of equipment and insurance, properly come within the term "maintenance" and that charges for room rent and board at the institutions in question should be figured with these things in mind.

It is not thought proper, however, to include in the term "maintenance", as the same refers to dormitory room rent and board, the item of "interest on investment." The word "interest" carries with it the idea of profit, and there is no evidence that the legislature in appropriating moneys for these dormitories intended that the same should be operated for revenue-producing purposes.

In connection with your question as to the specific purposes for which the funds accruing from dormitory room rent and board may be used, your statement is noted, that the president of the Kent normal school is paying out such funds for (a) rent for his dwelling house; (b) upkeep of his private car; (c) upkeep of school bus; (d) supplies for school farm; (e) extra wages and overtime of general employes; (f) cost of grading campus; (g) orchestras for entertainments; (h) engrossing diplomas; (i) deficiencies caused by overdraft of salary appropriations.

Under what authority the president of the Kent normal school is handling these moneys, that is, whether he has been named by the board of trustees as custodian thereof, or has been duly directed by the board to expend such moneys on its behalf, does not appear from your letter. A mere reference at this point to what has already been said in this opinion in answer to your first and second questions, is however, sufficient to indicate that the president of the institution in question is not, merely because he is president, the custodian of such moneys, nor is he authorized by the mere nature of his official position to expend the same. On the contrary, he is the custodian of the moneys if, and only if, the board of trustees has made him custodian, and he may expend the moneys for such purpose and such only as the board may designate.

Your question then comes to this: Has the board of trustees of the Kent normal college the power to authorize the president of that institution to expend dormitory room rent and board moneys for the purposes stated in your letter, or any of them?

We do not understand that any of said expenditures have anything to do with the maintenance and conduct of dormitory or dining room. In fact your letter expressly says as to all the items that the same "have no connection with the dormitory or dining room."

With that assumption, I have no difficulty in reaching the conclusion that expen-

ditures for such purposes are unauthorized. If the fact be that the receipts from dormitory room rent and board are in excess of the cost of maintenance, the surplus should be covered into the state treasury. Then if the legislature desires that expenditures be made in the way of rent for the president's dwelling house, or for the upkeep of his private car, or for any of the other things your letter mentions, appropriations therefor can be made by that body in the regular way. Otherwise, we must ascribe to the legislature the intention to permit what seems to me to be a very undesirable practice, to wit., the use of moneys derived from the operation of state-owned facilities for purposes with which it can not be said the legislature is familiar or sympathetic.

Referring to the above mentioned expenditures, your letter asks: "What findings should be made?" This question can perhaps be best answered by a somewhat general discussion of the law as to findings.

In *State ex rel. vs. Maharry*, 97 O. S. 272, 277, the court, speaking of section 286 G. C., says:

"It should be noted that the statute covers 'any public money * * * illegally expended * * * or any public property * * * converted or misappropriated.'

When either of these two facts appear, this is (a) illegal expenditures of public money or (b) any public money converted or misappropriated, then there is warrant and authority in law for bringing the action under these statutes.

But it is claimed that such actions can only be brought when the 'public money' has been unlawfully paid to some officer, or when the 'public property' has been unlawfully misappropriated by some public officer.

These statutes do not place any such limitations upon actions brought under them. They are manifestly in the interest of conserving 'public money' and 'public property,' and he who wrongfully takes such 'public money' or 'public property' may be, and should be, sued under these statutes."

The above cited case is authority, then, for the proposition that findings for recovery of public moneys illegally expended may be made not only against the public officer or officers having custody thereof, but likewise against private persons wrongfully taking or receiving such moneys.

(4) Your fourth question is:

"Is the language of the statute relative to the rates of tuition mandatory or directory?"

You refer to paragraph 3, section 4 of H. B. No. 44 (101 O. L. 321) which says:

"The boards of trustees in connection with the presidents of the normal schools shall select and appoint an able and efficient corps of instructors for the said schools, provide a suitable course of study for the theoretical and practical training of students who desire to prepare themselves for the work of teaching, *fix rates of tuition* and provide proper equipment."

Mr. Black in his work on Interpretation of Laws, at p. 338, says:

"Many different tests have been proposed for determining whether a statutory provision is to be regarded as mandatory or merely directory. But none of them is entirely satisfactory as a fixed rule, or adequate to the solution of all possible cases. Of course the language of the act is first to be

resorted to, as a clue to the intention of the legislature. But it is not always conclusive. For instance, the use of the word 'may' does not always show that the act to which it relates is left to the discretion of the officer who is to perform it; and the use of the term 'shall' does not necessarily make the provision imperative. As we have already seen, these two words, as used in a statute, may be read interchangeably, as the one or the other reading will best express the legislative meaning. The word 'may' will be construed to mean 'shall' or 'must' when the public interests and rights are concerned, and when the public or third persons have a claim de jure that the power shall be exercised. And conversely, the word 'shall' may be understood as equivalent to 'may' when no right or benefit to any one depends upon the imperative use of the term."

In my opinion the words "shall * * * fix rates of tuition" are permissive and not mandatory. Several reasons impel me to this belief—in the first place the connection in which the words themselves occur. Paragraphs three and four of section 4 describe the authority of the board of trustees, first by mention of particular things, e. g., the selecting of a corps of instructors, providing equipment and fixing rates of tuition; and secondly, by general language, to wit.:

"And said board of trustees shall do any and all things necessary for the proper maintenance and successful and continuous operation of said normal schools
* * *"

There is a clear intention to vest the board of trustees with a responsibility for the management of the institution and to give said board a wide discretion in the exercise of its duties. A fair construction of the whole act, so far as the subject of tuition is concerned, is that if tuition is charged, it shall be charged in accordance with rates fixed by the board of trustees. Whether any tuition at all shall be charged is discretionary with the board.

A second reason for the view just expressed is that the same is in accord with the contemporaneous and practical construction given the words in question by the board of trustees themselves, it appearing that no tuition has in fact been charged at either the Kent or Bowling Green institution. It must be presumed that the legislature, which has been frequently in session since said institutions were placed in operation, has been cognizant of the situation obtaining with reference to the charging of tuition, and has acquiesced in the interpretation given by the officials of said institutions touching the words in question. The propriety of having regard to contemporaneous and practical construction given a statute by administrative officers, where the language of that statute is ambiguous, is well established.

36 Cyc. 1140.

26 Am. & Eng. Enc. of Law, 635.

(5). Your fifth question is:

"Who is the proper custodian of the money received from the state for 'model rural schools,' under the provisions of Sec. 7654-7 G. C., and for what purposes and upon whose approval should it be disbursed?"

Section 7654-7 G. C. (107 O. L. 627) reads as follows:

"Each of the state normal schools at Athens, Oxford, Bowling Green, and Kent shall be authorized to arrange with the boards of education of rural

districts to assume the management of one-teacher rural schools, or of rural schools having two or more teachers, or both types of rural schools and to maintain such schools as model rural schools. In no case shall there be more than one of each type of such rural schools established in a rural school district nor more than six model rural schools established by any state normal school. Each state normal school which complies with the provisions of this section subject to the approval of the superintendent of public instruction shall receive five hundred dollars annually from the state for each class room of such model schools when vouchers therefor have been approved by the superintendent of public instruction and each of said normal schools shall also be authorized to arrange with the boards of education of village and city school districts to assume the management of all the schools of the district or districts or such part of them as may be necessary to provide adequate facilities for practice teaching by the students of said normal school, and providing the number of rooms for which such appropriation is made does not exceed six for each state normal school."

According to the above section "each state normal school * * * shall receive five hundred dollars annually from the state for each class room of such model schools." Practically of course, the school can not receive the money. Some person must receive it, must have custody of it for and on behalf of the school. Your question is, who is that custodian?

In connection with the answer to your first question it was pointed out that as to each of the state normal schools mentioned in section 7654-7 G. C. provision is made by statute for a board of trustees. Without repeating what was said in that connection touching the powers of said boards of trustees, we think it sufficient to say that custody of the moneys received under favor of section 7654-7 G. C. is properly in the boards of trustees of the several state normal schools, and that such moneys should be disbursed upon the approval of said boards of trustees, and not otherwise.

A word now as to the purposes for which such moneys should be disbursed. While section 7654-7 G. C. does not in so many words say what the money received from the state shall be used for, it is a fair inference, we think, that the legislature intended that the same should be applied primarily to the maintenance of the model schools, rather than that the same should go for indiscriminate uses. Should it happen that all of such moneys are not needed for the maintenance of model schools, the excess can then be disposed of for such other school purposes as the boards of trustees think proper.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1074.

MUNICIPAL CORPORATION—HOW TO COMPUTE WATER RATES FOR SCHOOL DISTRICT UNDER SECTION 3963 G. C. WHERE PART OF PROPERTY OF SCHOOL DISTRICT OUTSIDE OF CITY.

The tax valuation of all property within a certain school district which includes territory not within the boundary of the city is \$12,000,000, and the tax valuation of the property outside of the city is \$2,000,000. Held, that under section 3963 G. C. which provides that in such cases a proportionate charge for water service shall be made in the ratio which the tax valuation of the property outside the city bears to the tax valuation of all the prop-