

PENAL INSTITUTIONS! Right of the secretary to use interest fund of prisoners to liquidate thefts within the prison.

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Mr. Dan M. Carr, Secretary
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

Your request for an opinion was in the following form:

"Some years ago, the Secretary of the Board of Penal Commissioners undertook the care of funds belonging to inmates of the State Penitentiary, depositing same in a banking institution which paid a low rate of interest.

Under new banking regulations, this interest has ceased and several interesting and perplexing questions in connection therewith arise.

In order that you may have the fullest possible information relative thereto, may I say that during the years the Secretary has had charge of the fund, hundreds--thousands--of convicts have come and gone; at intervals he has added to their accounts and upon discharge paid them amounts due.

During this same period--up until now--it has been the practice to use this interest fund to protect the Secretary against losses arising through no fault of his own, such as forgeries, counterfeiting or prison money, thefts, etc.

At another time, when funds of the institution ran low, undesignated salaries were paid from the interest fund, without replacement.

Losses-----\$1,548.32
Salaries----- 1,330.39

These figures represent losses and salaries paid in a previous administration.

When I became Secretary of the Department April 1, it was known that petty thefts had been the rule in the mail room for several years and I undertook to catch the thief.

Eventually I did so, and have affidavits in which a convict admits his guilt and charges a former "square" employe with complicity.

I have also established that \$61.50 in money orders were stolen under my immediate predecessor, as well as other thefts totaling approximately \$500. Part of this has been recovered from the convict but there is no further hope of recovery from him.

It was the opinion of my immediate predecessor, and the practice of former boards to pay these losses from the interest fund. Records of the institution support this statement.

Therefore, I would like to have your opinion on these points:-

1. May this interest be rightfully so used?

2. Who now is entitled to this interest?

Obviously, it cannot be distributed over convict accounts as they have numbered thousands and shifted too rapidly.

The fund is not a state fund and it would seem the state is not entitled to the money.

It is not a Commission fund and it would seem the board is not entitled to the use of the money, its position being merely that of agent for the state.

The Secretary, it would seem from the general practice in connection with trust offices, is entitled to the use and protection of the interest on the fund, as he is charged with responsibility therefore and does all the work in connection with administration of the fund aside from his regular duties.

3. If the Secretary is properly entitled to the use of this interest, may he draw his check therefor to adjust the losses occurring in the preceding and his own administrations."

There is no provision in the law whereby the Department of Penal Institutions is required to establish and maintain a convict fund as described in your letter. Neither is it prohibited in the law.

You have explained this fund as a trust fund, where the prisoner adds to his account in said fund from time to time and upon the prisoner's discharge his savings in said fund are accounted for and given to him, less all accumulative interest. The prisoners who participate understand that they are to receive no interest, but that accumulated interest is to be used to replace losses suffered through no fault of the trustee (secretary) such as losses resulting from forgeries, counterfeiting of prison money, etc., and that accumulated interest is to be used for the further purpose of paying salaries for prison employees not provided for by statutes.

This trust is just as sacred as any other trust. The mere fact that thefts from the Department will total \$500.00 does not entitle you to apply the interest from this prisoners' fund to cover the loss, unless it be the understanding with the contributing prisoners that said fund is held for that purpose. The fact that the practice of former boards was to pay these losses from the interest fund, would not justify of itself the payment. Former boards may have committed a breach of trust. The right to pay as you desire can best be justified if the trust existed for that purpose. You cannot legally execute said trust without being authorized by the trust agreement or arrangement, and the fact that it was the practice of former boards to pay these losses from the interest fund would indicate that they were acting in good faith in the execution of the trust which you presume to exist. Statements of participating convicts would tend to clarify the objects of the trust, further evidencing your right to cover the loss from the interest fund. If the original trust agreement be in writing it would throw some light on the purposes of the trust. It is for you to determine the existence of the trust.

Answering your first question.

It is the opinion of this office that the interest fund may be rightfully used, to cover the described losses, if such was the object of the trust creating the interest fund

Answering your second question

Only intended beneficiaries are entitled to this ac-

Mr. Dan M. Carr, Secretary -4- October 30, 1933.

cumulated interest. Assuming the interest fund is a trust fund to be used for the purpose of paying losses, the said fund may be used for such a purpose and the penal department when suffering losses would be entitled to cover said loss with the proceeds of the interest fund. Therefore, it follows that individuals who have advanced departmental losses would be entitled to received from the fund their advancements, if the trust existed for the purpose of covering losses. An advancement under such circumstances is a loss to the party advancing.

Answering your third question.

The secretary to the board should not be an insurer against other peoples thefts unless it was understood that you were to be such when taking the job, and you assumed the responsibility with that understanding. The office without such an understanding does not carry such liability. Assuming that you and Mr. Smith are personally responsible for losses occurring by reason of thefts of money order and other thefts, if you as secretary be properly entitled to this interest fund in the execution of the trust which you claim exists, then it would be legal for you to draw a check therefore and adjust the losses occurring, as you say they did occur, in the preceding and in your administration.

Respectfully submitted

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APPROVED:

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