PUBLIC EMPLOYEES—CORRECTIONAL INSTITUTIONS—Disposition of profits from sales in vending machines.

Opinion Requested by Mr. Anthony S. Kuharich, Commissioner, Department of Correction.

“1) May the Warden or Superintendent of a penal or correctional institution legally allow the employees of the institution to place vending machines on institution premises and retain the profits from such machines for the benefit of an Employees Welfare Fund which will not be subject to the control of the institution?

“2) Will the answer to question one (1) above differ if the machines are placed in a staff lounge where there is no access to institution visitors or inmates?”

First, it should be noted that the Warden of the Indiana State Prison and the Superintendents of the other penal and correctional institutions are statutory officers. See Burns IND. STAT. ANN. § 13-1638 (Acts 1961, ch. 343, § 37). As such, they are creatures of delegated and limited powers, that is, they have no power other than that found in the statutes plus such additional incidental powers as are impliedly necessary to the performance of their express powers.

In State ex rel. Young v. Niblack, 229 Ind. 596, 99 N.E.2d 839 (1951), the Supreme Court held:

“When a public officer derives his power and authority solely from the statute, ‘unless a grant of power and authority can be found in the statute it must be concluded that there is none.’” (p. 602 of 229 Ind.)
Acts 1961, ch. 343, § 37, the same being Burns § 13-1638, in addition to continuing the offices of warden and superintendent, provides:

"The warden . . . of the Indiana State Prison and the superintendents . . . of the other correctional institutions listed above, shall have the duties and authority now provided by law for such officials except as herein expressly provided otherwise: Provided, however, that they shall be subject to the supervision of the commissioner."

The general authority of the Warden of the Indiana State Prison is set forth by Acts 1850, ch. 56, § 13, Burns § 13-214:

"[The warden] shall have charge of the whole operation of the institution, and shall be its executive officer."

Superintendents of the other correctional and penal institutions are similarly granted the charge and custody of the buildings and inmates. See, for example, Burns § 13-406 [Indiana Reformatory]; § 13-506 [Indiana State Farm]; § 13-611 [Women’s Prison].

Despite the general control which the warden and superintendents possess over their particular institution, however, disposition of profits from the type of operation about which you inquire appears to have been specifically designated by the General Assembly.

Acts 1957, ch. 242, § 6, as amended, the same being Burns § 22-522 provides for the establishment of an "Inmates’ Recreation Fund“:

"There is hereby established in each . . . penal and correctional institution a fund to be known . . . as the . . . ‘Inmates’ Recreation Fund.’ These funds shall be used, at the discretion of the superintendent or warden subject to the approval of the chief administrative officer of the department, division or state agency having administrative control and supervision over the institution, for the direct benefit of persons who are inmates . . . in such institutions, and shall not be used.
for any purposes which are covered by state appropriations. . . .”

Acts 1957, ch. 242, § 8, the same being Burns § 22-523 then provides that the Inmates’ Recreation Fund shall be funded from the following sources:

“(1) Gifts to the fund;
“(2) Profits from the operation of a commissary or canteen;
“(3) Interest earned by deposit of trust funds in public depositories, or income derived from trust funds invested in United States Government securities as provided in section 2 of this act;
“(4) Sale of items produced in occupational therapy;
“(5) Income derived from any kind of benefit entertainment for the inmates or patients;
“(6) Any other money derived from any source that is not legally prohibited; and
“(7) Any money derived from the income of any trust fund which has been deposited in any special fund of the institution.”

Although vending machines might not be encompassed within a literal definition of “commissary or canteen,” they are a modern means of selling food and refreshments, and as such appear to represent the type of income with which the Legislature intended to fund the Inmates’ Recreation Fund. Such an interpretation is strengthened by the absence of any statute authorizing some other disposition of such income.

It is also significant that there is no statutory authorization for creation of any fund such as an “Employees’ Welfare Fund.” In fact, Burns § 22-524 provides that “[a]ny money in any recreational or activities fund in any institution, at the time the act becomes effective, shall be transferred to the ‘Recreation Fund’ established under the provisions of this act.” Such provision would seem to exclude the existence of other activities funds, whether they be for the benefit of inmates or employees.
In summary, a careful examination of the statutes discloses none which expressly authorizes the warden or superintendents to institute or permit such an operation as that suggested by your inquiry. To the contrary, specific provision is made for the distribution of profits from such type of enterprise.

It is, therefore, my opinion that the wardens and superintendents have no authority to permit employees to place vending machines anywhere on institution premises with the view of retaining the profits from such machines for their own benefit. The profits from such machines must of necessity be placed in the "Inmates’ Recreation Fund."

OFFICIAL OPINION NO. 46
November 27, 1968

CITY OFFICERS—POLICEMEN AND FIREMEN—Body other than common council as authorized to determine salaries.

Opinion Requested by Hon. Adam Benjamin, Jr., State Representative.

I am in receipt of your inquiry concerning the salaries of firemen and policemen in second class cities.

The salary of most municipal employees is regulated in Acts 1933, ch. 233, § 20a, as amended by Acts 1965, ch. 437, § 1, the same being Burns IND. STAT. ANN. § 48-1233, which statute provides that the salaries shall be fixed by the mayor subject to the approval of the common council. The statute, however, contains a specific exception: "Provided, That the provisions of this subsection shall not apply to the manner of fixing and