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OHIO NATIONAL GUARD — MAY NOT ENLIST CONTRIBUTING MEMBERS WHILE IN ACTIVE SERVICE OF UNITED STATES, PURSUANT TO LAWFUL CALL AND ORDER OF PRESIDENT.

SYLLABUS:

*While in the active service of the United States, pursuant to lawful call and order of the President, a company, troop, battery or other unit of the Ohio National Guard may not enlist contributing members.*

Columbus, Ohio, July 31, 1941.

Brigadier General W. S. Bird, Adjutant General of Ohio,
Columbus, Ohio.

My dear General Bird:

I have your letter requesting my opinion which reads as follows:

> "We are enclosing herewith, some correspondence of the 145th Infantry, which is self-explanatory.
>
> It is requested that this office be furnished with an opinion as to the legality of units of the Ohio National Guard selling contributing memberships while these units are in federal service."

Among others, is a letter addressed to you, from the Commanding Officer of the 145th Infantry, stationed at Camp Claiborne, La., reading:

> "It is requested that you obtain an official ruling from the Attorney General of Ohio as to the legality of units of the Ohio National Guard selling contributing memberships when they are in Federal Service."

The sections of the General Code making provision for contributing members of the Ohio National Guard are Sections 5193, 5194, 5195 and 5196, of which Sections 5193 and 5195 were amended by the 94th General Assembly in Amended Senate Bill No. 247, creating the Ohio State

Guard and the Ohio State Naval Militia, passed as an emergency act and approved by the Governor on April 28, 1941.

Section 5193, supra, as amended, provides as follows:

> "In time of peace, each commanding officer of a company, troop, battery or * * * *other unit of the Ohio national guard,* may enlist contributing members not to exceed one hundred and fifty. All such enlistments shall be for the period of one year, and shall be made by signing papers in such form as shall be prescribed by the adjutant general, and as soon as practicable after his enlistment, the following oath shall be administered to such contributing member by a commissioned officer: 'I, ..... do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and to the state of Ohio, that I will serve them honestly and faithfully, and that I will pay such contributions and dues as are prescribed by the statutes of Ohio, and will perform such service as may be prescribed from time to time by the commander-in-chief of the Ohio national guard by general orders in accordance with the statutes of the state of Ohio'."
>
> (Asterisks and words emphasized indicating amendments.)

Section 5194, supra, reads:

> "Each contributing member shall be subject to contributions and dues in the sum of five dollars per annum, and shall be subject to such services as shall be prescribed from time to time by the commander-in-chief of the Ohio national guard in general orders. The commander-in-chief of the national guard shall from time to time prescribe in general orders the services to be required of contributing members provided, however, that contributing members shall never be required to perform field service at any point or any service outside of the county where enlisted, and provided further, that all such general orders shall apply equally to all contributing members of the national guard."

And Section 5195, supra, as amended, provides that:

> "A certified list of officers, enlisted men and contributing members shall be filed by the commanding officer of each company, troop, battery * * * *or other unit of the Ohio national guard,* with the clerk of the court of common pleas of the county in which such organization is located. Such list shall set forth the officers, enlisted men and contributing members in separate rosters with the names alphabetically arranged, and shall be filed during the month of July of each year, and such officers, enlisted men and contributing members shall, for the year commencing on the first day of August following such filing, or until sooner discharged, be exempt from labor on the public highways and service as jurors.

*A certified list of officers and enlisted men shall be filed by the commanding officer of each company, troop, battery or other unit of the Ohio state guard and of the Ohio state naval militia with the clerk of the court of common pleas of the county in which such organization is located. Such list shall be filed during the month of July of each year."*

(Asterisks and words emphasized indicate amendments.)

Section 5196, supra, provides in substance that the clerk of courts shall file such certified list without charge "and shall upon demand furnish a certified copy of any such certified list on file in his office to the commanding officer of the organization named in such list, and shall certify without charge further copies of such lists in a number not to exceed the total number of officers, enlisted men and contributing members."

Thus, the Legislature has made provision for the enlistment of what are denominated "contributing members," who are subject to limited service and "to contributions and dues in the sum of five dollars per annum." When you ask as to the legality of "selling" contributing memberships, I assume, of course, that you refer to the enlistment of such contributing members. The question to be determined, therefore, is: May a person enlist as a contributing member of a unit of the Ohio National Guard, under the laws of the State of Ohio, when such unit is in the active Federal service pursuant to the laws of the United States?

In this connection, I am informed by your department that all units, and all officers and enlisted men of the Ohio National Guard, with the exception of two or three officers, are now serving in the Army of the United States pursuant to call and order of the President, as authorized in the Act of August 27, 1940, C. 689, 54 Stat. 858.

Sections 1 and 2 of the above Act, read:

"Section 1. During the period ending June 30, 1942, the President be, and is hereby, authorized from time to time to order into the active military service of the United States for a period of twelve consecutive months each, any or all members and units of any or all reserve components of the Army of the United States (except that any person in the National Guard of the United States under the age of 18 years so ordered into the active military service shall be immediately issued an honorable discharge from the National Guard of the United States), and retired personnel of the Regular Army, with or without their

consent, to such extent and in such manner as he may deem necessary for the strengthening of the national defense: Provided, That the members and units of the reserve components of the Army of the United States ordered into active Federal service under this authority shall not be employed beyond the limits of the Western Hemisphere except in the territories and possessions of the United States, including the Philippine Islands.

Section 2. All National Guard, Reserve, and retired personnel ordered into the active military service of the United States under the foregoing special authority, shall from the dates on which they are respectively required by such order to report for duty in such service, be subject to the respective laws and regulations relating to enlistments, reenlistments, employment, conduct, rights, and privileges, and discharge of such personnel in such service to the same extent in all particulars as if they had been ordered into such service under existing general statutory authorizations."

The words "existing general statutory authorizations" as used in Section 2 of the Act of August 27, 1940, supra, undoubtedly refer to the National Defense Act of 1916, as since amended.

In the National Defense Act, as amended, the Congress has provided:

"The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided, and of such other officers and warrant officers as may be appointed therein as provided in section 111 hereof: Provided, That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, *and, in time of peace,* they shall be administered, armed, uniformed, equipped, and trained *in their status as the National Guard of the several States, Territories, and the District of Columbia, as provided in this Act:* * * * (June 3, 1916, c. 134, § 58, 39 Stat. 197; June 15, 1933, c. 87, § 5, 48 Stat. 155; June 19, 1935, c. 277, § 2, 49 Stat. 391.)" (Emphasis mine.)

In Section 71 of the Act of June 3, 1916, as amended on June 15, 1933, c. 87, § 9, 48 Stat. 157, it is provided:

"In this Act, unless the context or subject-matter otherwise requires —

(a) 'National Guard' or 'National Guard of the several States, Territories, and the District of Columbia,' means that portion of the Organized Militia of the several States, Territories, and the District of Columbia, active and inactive, federally recognized as provided in this Act and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, section 8, Article I of the Constitution.

(b) 'National Guard of the United States' means a reserve component of the Army of the United States composed of those federally recognized units and organizations and persons duly appointed and commissioned in the active and inactive National Guard of the several States, Territories, and the District of Columbia, who have taken and subscribed to the oath of office prescribed in section 73 of this Act, and who have been duly appointed by the President in the National Guard of the United States, as provided in this Act, and of those officers and warrant officers appointed as prescribed in sections 75 and 111 of this Act, and of those persons duly enlisted in the National Guard of the United States and of the several States, Territories, and the District of Columbia who have taken and subscribed to the oath of enlistment prescribed in section 70 of this Act."

Section 101 of the Act of June 3, 1916, 39 Stat. 208, reads:

"The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regluations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law."

Your attention is also invited to paragraphs 129 and 130 of Army Regulations No. 130-10, promulgated under date of March 27, 1940, which read in part as follows:

"129. When any or all parts of the National Guard are called as such into the service of the United States, they become a component of the Army of the United States but their units and members retain their State status as Federally recognized units and members of the National Guard in a state of temporary suspension. * * * "

"130. The National Guard of the United States is at all times a component of the Army of the United States. When any or all of its units and members are ordered into the active military service of the United States, they are subject to such laws and regulations governing the Army of the United States as are applicable to members of the Army whose permanent retention in the active military service is not contemplated. Members of

> the National Guard of the United States ordered into the active military service of the United States *stand relieved from duty in the National Guard of their respective States,* Territories, or the District of Columbia, and may be retained in the active military service of the United States for the period of the war or emergency and until six months after the termination of the war or emergency, unless sooner relieved, irrespective of the term of their existing commissions or enlistments. * * * Units and members of the National Guard of the United States in the active military service of the United States under an order merge with units and members of the other components into one active Army of the United States without unnecessary distinction between individuals or units based on their component or origin, and their prior status as a part of an inactive reserve component of the Army of the United States meanwhile continues to exist as an underlying and *temporarily suspended status of origin to* which they may and do return upon relief from the active military service of the United States. See secs. 38, 69, and 111, National Defense Act, as amended." (Emphasis mine.)

Even a cursory reading of the Acts of the Congress and the Army Regulations above quoted discloses that, when in the active service of the United States, units of the Ohio National Guard cease to be state organizations. By the express provisions of Section 101 of the National Defense Act, supra, when called into the federal service, all units of the Ohio National Guards and all officers and men thereof are "subject to the laws and regulations governing the Regular Army" so far as applicable, as provided in such section. In paragraph 129, Army Regulations No. 130-10, supra, it is expressly provided that any part or any members of the National Guard called into Federal service become a component of the Army of the United States although the units and members thereof "retain their State status as Federally recognized units and members of the National Guard *in a state of temporary suspension.*" Paragraph 130 of the same Army Regulations provides that members of the National Guard called to serve the National Government "are subject to such laws and regulations governing the Army of the United States as are applicable to members of the Army whose permanent retention in the active military service is not contemplated," it being further provided that members of the National Guard of the United States "ordered into active military service of the United States *stand relieved from duty* in the National Guard of their respective states." It seems clear from these provisions that units of the Ohio National Guard serving under the Act of August 27, 1940, supra, and pursuant to the proclamation by the President of the existence of a limited national emergency and the order and call of the President, under authority of Congress, are not, so

long as they remain in active Federal service, either companies, troops, batteries or other units of the Ohio National Guard in so far as the State of Ohio is concerned. On the other hand, each and all of such units and the officers and men thereof are a part of the Army of the United States. It is not hard to understand the intention of the Congress in this respect when the history of our arms in the War of the Revolution; the War of 1812; the Civil War, and the Spanish-American War is reviewed. In all these conflicts there was more or less and almost continual wrangling between several of the States and the National Government with reference to control of troops raised in such States. See in this connection any standard history of the United States, and more especially the American Revolution by John Fiske; Rhoades' History of the Civil War; General Emery Upton's Military Policy of the United States, and the two recent works by General John McAuley Palmer, entitled "Three War Statesmen" and "America in Arms." One can not enlist as a contributing member, or otherwise, in a "company, troop, battery or other unit" of a State National Guard which does not exist, or which is in a condition of "temporary suspension." The mere statement of the proposition to the contrary furnishes its own refutation.

Moreover, it is not without significance that in both Section 5193 of the General Code of Ohio, and in Section 58 of the National Defense Act of 1916 (Ammended as above stated), supra, the words "in time of peace" are employed. True it is that by the express provisions of Article I, Section 8, Clause 11 of the Constitution of the United States, *only* the Congress may declare war. Yet, as above suggested, the President has proclaimed a state of limited emergency. While I do not wish to be understood as intimating in the slightest degree that we are in a state of war, yet I can not be unmindful of the fact that there must be some difference between a condition described by law as "in time of peace" and one proclaimed to be a "limited national emergency."

From the context of Section 5193 and cognate sections of the General Code, it seems to me quite clear that it was only intended by the Legislature that contributing members might be enlisted by units of the Ohio National Guard in time of peace and when such units were subject to the control of the Governor of Ohio, as well as the President of the United States, and this view is more than strengthened by the fact that the 94th General Assembly saw fit to create an Ohio State Guard and an Ohio State Naval Militia to serve in the stead of the Ohio National Guard

and the Naval Militia of Ohio whenever more than one-half of the National Guard should be in the active Federal Service. See Section 5201, General Code. If the required percentage of the Ohio National Guard were still in the service of the State of Ohio, the bringing into being of an Ohio State Guard would have been unnecessary, and could not have been done under existing law. And, in this connection, I deem it proper to point out that not only did the Legislature refuse to provide for contributing members to the Ohio State Guard or the Ohio State Naval Militia, but in addition, expressly and specifically provided that it should be unlawful for any contribution or gift to be made to, or received by, the Ohio State Guard or the Ohio State Naval Militia or any member thereof by reason of such membership. See Section 5201-4a, General Code.

I appreciate the fact that the conclusions herein reached may, perhaps, work some hardship on the units of the National Guard now in the active Federal service. It must be remembered, however, that this office does not make the law, but endeavors only to ascertain and give effect to the acts as passed by the duly constituted lawmaking bodies of the United States and the State of Ohio.

In view of the foregoing, and for the reasons given, it is my opinion that:

While in the active service of the United States, pursuant to lawful call and order of the President, a company, troop, battery or other unit of the Ohio National Guard may not enlist contributing members.

Respectfully,

THOMAS J. HERBERT,

Attorney General.