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LEAVE OF ABSENCE WITH PAY — SECTION 5201-4a G.C., AMENDED SENATE BILL 247, 94TH GENERAL ASSEMBLY, DOES NOT PROHIBIT EMPLOYERS, WHO HAVE EMPLOYEES UNDER CONTRACTS OF HIRE, FROM GRANTING SUCH LEAVE — ATTENDANCE, WEEKLY DRILLS, ENCAMPMENTS, TRAINING PERIODS — OHIO STATE GUARD — OHIO STATE NAVAL MILITIA — “CONTRIBUTION OR GIFT.”

SYLLABUS:

The provisions of Section 5201-4a, General Code (Am. S.B. No. 247; Effective 4-28-41), do not prohibit employers, whether persons, firms, associations or corporations, from granting employes with whom they have contracts of hire, leaves of absence with pay, to the end that such employes may attend weekly drills, yearly encampments or other training periods duly prescribed by law or regulation for the Ohio State Guard or Ohio State Naval Militia, of which such employes may be members. Such a leave of absence is not a “contribution or gift” within the meaning of such section.

Columbus, Ohio, June 30, 1941.

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

My dear General Bird:

Your letter of June 20th, requesting my opinion as to the meaning of Section 5201-4a, General Code, as enacted by the 94th General Assembly in the act providing for the organization and maintenance of the Ohio State Guard, duly received. With your request you transmit the following letter, addressed to you:

“Now that employees of * * * firms are enlisting in the State Guard and plan to go to camp as well as spend time each week in training, a problem concerning possible violation of the Act presents itself.

Section 5201-4a of the General Code, being a new enactment in Amended Senate Bill 247, provides in part that 'No * * * corporation shall make any contribution or gift to the Ohio State Guard * * * or any member thereof *by reason of such membership.*' (Underscoring mine.)

The question I should like to present to you is whether or not the above quoted subsection would prohibit a corporation from paying to an employee who is a member of the Ohio State Guard the difference between his pay as a Guard while in camp or on drill nights and his regular earnings with the company. For example, an employee is an hourly worker for the X Corporation earning \$1.00 an hour. His average earnings therefore for a 2 weeks period would be \$80.00. If, while he is in camp for a two week period his State Guard pay would be \$15.00 he would lose \$65.00 by reason of his membership in the Guard. Could his employer, from a desire to see that the employee is not penalized 'by reason of such membership,' pay the employee the \$65.00 while in camp without being subject to the penalties provided by section 5201-4a?

In a lesser degree the same situation arises if a salaried worker working on a night shift is absent to attend weekly drills but is paid his regular salary nevertheless.

If you do not have any interpretation of the meaning of section 5201-4a would it not be advisable to ask Attorney General Herbert for an opinion?"

Amended Senate Bill No. 247, referred to in the enclosure, was passed as an emergency measure and became effective on April 28, 1941.

Section 5201-4a, General Code, provides as follows:

"No person, firm, association or corporation shall make any contribution or gift to the Ohio guard or the Ohio state naval militia or any member thereof by reason of such membership. No contribution or gift shall be accepted by the Ohio state guard or the Ohio state naval militia or any member thereof by reason of such membership from any person, firm, association or corporation. Whoever shall violate the provisions of this subsection shall be deemed guilty of a misdemeanor and shall be fined not less than twenty-five dollars or more than one hundred dollars or be sentenced to not less than ten days or more than thirty days imprisonment or both."

The cardinal canon of the construction and interpretation of statutes "is to ascertain, declare, and give effect to the intention of the legislature, *as gathered from the provisions enacted*, by the application of well settled canons of interpretation," to the end that the will of the law-making body

may be enforced. See 37 O. Jur. 504; Black on Interpretation of Laws, p. 11. With this premise, I have no difficulty in reaching the conclusion that neither of the acts or doings described in the above quoted letter constitute a violation of Section 5201-4a, supra, for two reasons: *First*, "as gathered from the provisions" of the section under consideration, it seems manifest that it was not intended by the Legislature that Section 5201-4a should apply to facts of the kind here under discussion, and, *Second*, the statute in question, being highly penal in its character, must be strictly construed as against the State and liberally interpreted in favor of any person charged, or sought to be charged, thereunder.

In so far as the first of the above reasons is concerned, the purpose of Section 5201-4a, supra, is patent, and that purpose is to prevent any person, firm, association or corporation from using, or attempting to use, the Ohio State Guard or the Ohio State Naval Militia, or any member thereof, to his or its own selfish ends. That is to say, the Legislature has said, in plain and unmistakable language, that no person, natural or artificial, may, by making gifts or contributions, attempt to curry the favor of the Ohio State Guard or the Ohio State Naval Militia, or any member of either, to the end that they might be used for personal profit or advantage rather than serving as impartial servants of the State and the general public as a whole. Not only is this purpose and intention clearly inferable from the language of the section itself, but the fact, that while the General Assembly amended some forty odd sections relating to the Ohio National Guard so as to make them applicable to the newly created Ohio State Guard and Ohio State Naval Militia, Sections 5193, 5194 and 5195, General Code, making provision for the so-called "contributing members" of the Ohio National Guard (the effect of which is to exempt such members from jury duty), were not amended or changed so as to make such sections applicable either to the newly created Guard or Naval Militia, is more than significant. However, it is unnecessary to ground my conclusions upon this reasoning alone. And what is herein stated with reference to the second reason for my determination applies for the most part with equal force to what has already been said.

It has long been the law of English speaking people (those who developed and have followed the Common Law) that laws "creating, defining, or punishing crimes, and those imposing penalties and forfeitures, are to be construed strictly against the state or the party seeking to enforce them, and favorably to the party sought to be charged. They

are not to be enlarged by implication, *nor* (sic) extended to persons or cases not plainly within the meaning of the language employed." Black on Interpretation of Laws, p. 451. See also Section 10214, General Code; 37 O. Jur. 744, et seq., and the unlimited number of Ohio cases cited.

I have nowhere found this rule of interpretation more well expressed than in Potter's Dwaris on Statutes and Constitutions (1875). After stating in the text at page 245 that penal statutes "receive a strict interpretation. The general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted," the learned author cites in Note 35 the case of *United States v. Ragsdale*, *Hampstead Reports*, 497 (U.S.C.C., 1847), as holding that "a further rule is, that an offender who is protected by its letter, cannot be deprived of its benefit on the ground that his case is not within its spirit." At page 247 of the same authority it is said:

" * * * while if the law be, that for a certain offense a man shall lose his right hand, and the offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended.

A penal law then, shall not be extended by equity; that is, things which do not come within the words, shall not be brought within it, by construction. * * * No man incurs a penalty unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty. 'If these rules are violated,' said Best, C. J., in the case of *Fletcher v. Lord Sondes*, b 'the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws'."

Applying the rule of "strict construction" of penal statutes above set forth, the answer to your questions must have already become apparent.

In the first place, the prohibition contained in the statute is against making "any contribution or gift." While there is a shade of difference in the meaning of the word "contribution" and the word "gift," generally speaking they are synonymous and are used interchangeably. In discussing gifts and words of like meaning, at page 292 of *Rogets Theaurus* the words in question are linked together as follows: "(Thing given) gift, donation, present * * * allowance, contribution * * * subsidy * * * ." At page 2313, Vol. II, of the *New Century Dictionary*, the words

“present, donation, contribution,” among others, are given as synonyms of the word “gift.” Indeed, the very context of Section 5201-4a, *supra*, indicates that the words involved are used in the same sense.

With reference to the meaning of the word “gift,” it is said in Fernald’s English Synonyms, Antonyms and Prepositions, at page 263:

“A *gift* is in the popular, and also in the legal sense that which is voluntarily bestowed without expectation of return or compensation. *Gift* is now almost always used in the good sense, *bribe* always in the evil sense to signify payment for a dishonorable service under the semblance of a *gift*. In Scriptural language *gift* is often used for *bribe*. ‘The king by judgment establisheth the land; but he that receiveth *gifts* overthroweth it.’ Prov. xxix, 4. * * * ”

With the above definitions of “contribution or gift” in mind, I am constrained to hold that granting a leave of absence with pay to an employe in order that he may perform the patriotic service of receiving military training to prepare him, at least to some extent, to defend his state and country, does not constitute a violation of Section 5201-4a, General Code. Such a leave of absence may be regarded as part of the contract of hire, the leave with pay being a part of the employe’s compensation. In fact, it is not difficult to envisage cases where skilled employes, essential to the operation of the employer’s business, would leave their employment and engage in some other work in order that they might join the Guard or Naval Militia and attend weekly drills and yearly training encampments without financial loss. Certainly in such a case the granting of a leave of absence with pay in order to induce the employe to remain would not be a “contribution or gift,” but would constitute a part of the consideration of the contract of employment.

Moreover, the “contribution or gift” prohibited by the law must be made “by reason of such membership,” i.e., membership in the Guard or Naval Militia. In the cases described in your letter no bonus, gratuity, honorarium, gift, contribution or present of any kind is made by reason of membership in the Guard or Naval Militia. On the other hand, the employer simply says in effect to his employe: “If you perform the duty enjoined upon you by law and attend the weekly drills and yearly training period provided by law for the Ohio State Guard or Ohio State Naval Militia, of which you are a member (and here may it be said that unexcused absence from either is a military offense), there shall be no

financial loss suffered by you because of your absence from my place of business." Clearly this is not a case of making a "contribution or gift" to a stranger who is a member of either of the two organizations here involved. It is simply only permitting employes to serve the public in the method provided by the lawmaking body of Ohio, without penalizing such employes and their families by causing such employes to suffer pecuniary loss in addition to their other sacrifices in serving the State at large. The arrangement is contractual in the strict sense of that word, and the question of a "contribution or gift" made "by reason of * * * membership" in the Guard or Naval Militia is not involved.

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

The provisions of Section 5201-4a, General Code (Am. S.B. No. 247; Effective 4-28-41), do not prohibit employers whether persons, firms, associations or corporations, from granting employes with whom they have contracts of hire, leaves of absence with pay, to the end that such employes may attend weekly drills, yearly encampments or other training periods duly prescribed by law or regulation for the Ohio State Guard or Ohio State Naval Militia, of which such employes may be members. Such a leave of absence is not a "contribution or gift" within the meaning of such section.

Respectfully,

THOMAS J. HERBERT,

Attorney General.