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OHIO NATIONAL GUARD—JURY SERVICE—SECTION 11419-43  
G. C., AMENDED BY H. B. 52, 98 G. A., DOES NOT REPEAL  
SECTION 5195 G. C.

SYLLABUS:

Section 11419-43, General Code, as amended by H. B. 52, 98th General Assembly, does not repeal Section 5195 of the General Code, or any part thereof.

Columbus, Ohio, March 6, 1950

Hon. Leo M. Kreber, Adjutant General  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion is respectfully requested upon the following matters:

1. Is G. C. 5195 reading in part as follows:

‘\* \* \* such 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. \* \* \*’

repealed or amended by implication by G. C. 11419-43, as amended, reading in part as follows:

'\* \* \* No person shall be exempted from jury service by reason of any financial contribution to any organization, public or private.'

2. If the answer to question No. 1 above is 'Yes', then what is the date upon which the exemption from jury duty ceases?

In connection with your consideration of the above issues, I desire to make the following observations which may be of some help to you in reaching your conclusions. The Ohio National Guard is supported financially from three sources: (1) the Federal Government, (2) appropriations by the State of Ohio, and (3) payments received from contributing members. Payments received from contributing members amount to an average of approximately \$50,000.00 annually. The Ohio National Guard cannot operate successfully without such an income. An important incentive for citizens of Ohio to become contributing members of the National Guard is the exemption privilege accorded by G. C. 5195. It is my belief that the legislature did not intend to repeal or amend G. C. 5195 by a recent amendment of G. C. 11419-43 because no funds were appropriated to replace those lost if G. C. 5195 were repealed. I am unable to believe that the Legislature intended to cripple its National Guard by the withdrawal of this very sizeable source of operating revenue. Further, the jury exemption is based upon membership in the National Guard rather than upon any contribution paid by the member.

In the event that you should find that G. C. 11419-43 repealed G. C. 5195 by implication, then and in that event it becomes important to determine the date upon which the exemption of contributing from jury service ceases. In this connection, it should be pointed out that the amendment to G. C. 11419-43 became effective on October 18, 1949. However, all contributing membership payments had already been collected for the year August 1, 1949, to July 31, 1950, lists filed with the respective Clerks of Courts, etc. If the jury exemption should be held to be terminated prior to July 31, 1950, then and in that event the Ohio National Guard is, I believe, legally and morally obligated to return all or at least a part of such contributing member payments to such members. This would create an untenable situation because the bulk of such funds were expended in connection with the field training period, 1949, and activities subsequent thereto."

The sections of the General Code of Ohio providing for contributing members in the Ohio National Guard, and touching on those matters

pertinent to the question propounded, are Sections 5193, 5194 and 5195, and read as follows:

Section 5193. "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 made 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.'"

Section 5194. "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."

Section 5195. "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.” (Emphasis added.)

For the mere purpose of historical background and clarification and assistance it may give in the study of your problem, I will state here that the question of constitutionality of the exemption from jury duty arose over former analogous sections in the case of Hamann, Sheriff v. Heekin, 88 O. S., 207, where the syllabus reads as follows :

“Because of the unequal terms upon which Section 5210, General Code, authorizes persons to become contributing members of the military organizations of the state the provision of Section 5211 to exempt such members from service as jurors is void.”

That case was decided in 1913. Section 5195, General Code, in its present form, supra, became effective April 28, 1941. Its present form is a result of amendments to correct the unconstitutional features found by the Supreme Court in the Heekins case. In so far as the provisions relative to contributing members and their exemption from jury service are concerned, there have been no changes which can affect the findings in the case of The State, ex rel. Cutler, et al. v. Miles, Clerk of Courts, 8 O. App., 301, decided May 17, 1917, wherein the syllabus reads as follows :

“Section 5211, General Code, providing that contributing members to the Ohio National Guard shall be exempt from service as jurors, is constitutional and valid.”

This brief outline of the background of legislation and the gamut has run through the courts is deemed by me sufficient, as far as the prerogative of my office is concerned, to establish the constitutionality of Section 5195, supra, in its present form.

The last paragraph of Section 11419-43, General Code, reads as follows :

*“No person shall be exempted from jury service by reason of any financial contribution to any organization, public or private.”*  
(Emphasis added.)

It will be noted that it does not require a too careful reading of Sections 5193, 5194 and 5195 to perceive clearly that those persons who contribute to the Ohio National Guard under the provisions therein

contained are members; financial contributing members. They are members who are sworn to perform certain duties and are amenable to order. They undoubtedly would be ordered to duty in case of fire, flood, or any other grave emergency or calamity threatening the people's welfare and their service would be as important as jury service. The statute provides for the exemption from jury service not because the members are financial contributors to an organization but because of their membership in the Ohio National Guard. That part of Section 11419-43 above quoted uses the language "financial contribution to any organization, public or private." It states no more than that a person contributing money to an organization shall not be exempt from jury service by reason thereof. Nothing is contained therein which indicates that said section is in any respect dependent upon membership in any organization. In other words, the prohibition against exemption from jury service contained in said section contemplates financial contributions to organizations which are made by individuals for other reasons than in consideration of membership in such organization. If the legislature had intended to affect the status of contributing members of the Ohio National Guard with respect to their obligation to serve as jurors, explicit language could have been employed to express that intent. In the absence of such language I can only conclude that it was not the intention of the legislature to affect the exemption from jury service of contributing members of the Ohio National Guard.

In view of the foregoing, I am compelled to the conclusion that the language of the last paragraph of Section 11419-43 does not include membership in an organization within its purview and, therefore, it is my opinion that Section 11419-43, General Code, as amended by the 98th General Assembly, does not repeal, either expressly or by implication, Section 5195 of the General Code, or any part thereof.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.