

4705

1. CIVIL DEFENSE—SEVERAL ORGANIZATIONS ARE CIVIL AGENCIES RATHER THAN MILITARY ORGANIZATIONS—SUCH AGENCIES DO NOT CONSTITUTE PART OF STATE MILITIA—CHAPTER 5915. RC.
2. OATH PRESCRIBED RELATES TO EXTENT IT BINDS MEMBER TO SERVE IN CIVIL DEFENSE ORGANIZATION—FUNCTIONS OF CIVIL DEFENSE—EMERGENCY, ESTABLISHMENT OF A CIVIL DEFENSE ORGANIZATION FOR THE STATE—REGULATIONS BY GOVERNOR—SECTIONS 5915.01, 5915.05, 5915.14 RC.
3. OATH PRESCRIBED—TEST OF QUALIFICATION FOR MEMBERSHIP IN CIVIL AGENCY—MEMBERS SERVE AS “CIVIL DEFENSE VOLUNTEERS”—MEMBERS NOT BOUND TO SERVE FOR ANY DESIGNATED PERIOD OF TIME.
4. MEMBERSHIP IN ORGANIZATION AS A CIVIL DEFENSE VOLUNTEER IS IN NATURE OF PUBLIC OFFICE—MAY TERMINATE ANY TIME BY RESIGNATION, ABANDONMENT OR NON-USER—MEMBERSHIP SO TERMINATED—NO OBLIGATION TO PERFORM FURTHER SERVICE—CALL TO DUTY AS MILITIAMAN.

SYLLABUS:

1. The several organizations for civil defense for which provision is made in Chapter 5915., Revised Code, are civil agencies rather than military organizations, and such agencies do not constitute a part of the state militia.

2. The oath prescribed in Section 5915.14, Revised Code, relates to the extent that it binds a member to serve in a civil defense organization, to functions of “civil defense” in an “emergency,” as such terms are defined in Section 5915.01, Revised Code, and to the “establishment of a civil defense organization for the state” under regulations promulgated by the governor as authorized in Section 5915.05, Revised Code.

3. The oath prescribed in Section 5915.14, Revised Code, is primarily a test of qualification for membership in a civil agency. The members of such agencies enter and serve therein as “civil defense volunteers” and neither such oath nor any other provision of law binds such members to serve as such for any designated period of time.

4. Membership in a civil defense organization as a “civil defense volunteer” is in the nature of a public office and may be terminated at any time by resignation, or

by abandonment or non-user. Where such membership is so terminated there is no obligation under the law to perform further service as a member of such organization even though the individual concerned might be subject to call to duty as a militiaman under the provisions of Section 4, Article IX, Ohio Constitution.

Columbus, Ohio, January 6, 1955

Hon. Leo M. Kreber, Major General
The Adjutant General, Director of Civil Defense
Fort Hayes, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"With further reference to our discussion of the Civil Defense Loyalty Oath, a number of questions have been raised recently and I would like to request a formal opinion relative to certain of these as set forth below.

"The statutory form of the Ohio Oath carries phraseology as follows: '. . . I will obey the orders of the Governor of the State of Ohio . . .'

"Some attorneys are now advising prospective Civil Defense volunteers not to sign this oath as doing so makes them 'liable for service in the Ohio National Guard or in any kind of situation if the Governor so orders.'

"Question No. 1. Does phraseology mentioned apply at any time, under any circumstances, or does it apply strictly to Civil Defense functions or emergencies alone?

"Question No. 2. After a Civil Defense volunteer has taken the oath and subsequently resigns from membership, in writing or constructively, is the oath binding upon such a volunteer in the post-membership period?

"Question No. 3. After the volunteer has submitted his resignation, in writing, is he subject to the 'orders of the Governor' except as a member of the militia is subject to service under the inherent powers of the Governor?

"I would appreciate receiving a formal opinion as to the legal interpretation of these questions at your early convenience in order to relieve a situation that is daily increasing in intensity."

The first basic question presented in your inquiry is whether the several organizations for civil defense for which provision is made in

Chapter 5915., Revised Code, are military or civil agencies. In this connection we may begin with the observation that the constitutional basis for the organization of military forces by the state is set out in Article IX, Sections 1, 3, 4 and 5, Ohio Constitution.

These sections are as follows:

Section 1:

“All male citizens, residents of this state, being eighteen years of age, and under the age of forty-five years, shall be enrolled in the militia, and perform military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law.”

Section 3:

“The governor shall appoint the adjutant general, quartermaster general, and such other staff officers, as may be provided for by law. Majors general, brigadiers general, colonels, or commandants of regiments, battalions, or squadrons, shall, severally, appoint their staff, and captains shall appoint their non-commissioned officers and musicians.”

Section 4:

“The governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.”

Section 5:

“The general assembly shall provide, by law, for the protection and safe keeping of the public arms.”

The extent and purpose of the power thus vested in the governor by Section 4, *supra*, was the subject of consideration in Opinion No. 3175, Opinions of the Attorney General for 1931, page 572, wherein the writer said, pp. 574, 575:

“* * * It is thus seen that by Article IX, section 4 of the Constitution, the governor is given the express ‘power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.’ On its face, this provision is susceptible to two interpretations. First, it might be said that the intention is to enumerate four independent powers which the governor shall have—i.e.—the power to call forth the militia, the power to execute the laws of the state, the power to suppress insurrection and the power to repel invasion. On the other hand, it may be argued that said provision is intended to enumerate just one power—the power to call forth the militia—and that it is

intended, by the phrases which follow, merely to enumerate the purposes for which the governor may call forth the militia, so that the real meaning would best be expressed in the following words:

‘The governor * * * shall have power to call forth the militia in order to execute the laws of the state, in order to suppress insurrection and in order to repel invasion.’

“I am inclined to favor the latter interpretation. * * *

“In 12 Corpus Juris 707, it is stated:

‘The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose * * *.’

“See also 8 Ohio Jurisprudence 131-132. Additional support accrues to the second interpretation from the fact that article IX, in which the ambiguous provision is found, is entitled ‘Militia,’ and that all of its sections relate to the military. From this, one naturally deduces that section four thereof, in dealing with the execution of laws, pertains to the part which the militia may have in their execution. In view of these reasons I believe that article IX, section 4, expressly empowers the governor to call forth the militia in order to execute the laws of the state.”

We may next observe that the legislature, acting under the authorization set out in Section 1, *supra*, has classified the militia in four distinct categories, such classification and certain definitions, being set out in Section 5923.01, Revised Code, as follows:

“The militia of the state shall consist of all able-bodied male citizens of the state, who are more than eighteen years of age, and not more than forty-five years of age except as provided in section 5923.03 of the Revised Code. The militia shall be divided into four classes:

“(A) The Ohio national guard;

“(B) The Ohio naval militia;

“(C) The Ohio defense corps;

“(D) The unorganized militia.

“The Ohio national guard, the Ohio naval militia, and the Ohio defense corps shall be known collectively as the organized militia.

“‘Military forces’ includes the Ohio national guard, the Ohio naval militia, the Ohio defense corps, and the unorganized militia. * * *.”

From these provisions two propositions become immediately apparent, i.e., first, that organizations for civil defense are not included in the statutory definition of "military forces," and second, that a great many of the members of civil defense organizations will presumably be members, individually, of the militia.

From this we may conclude that although such individual militiamen might be subject to call by the governor in a military capacity as pointed out in the 1931 opinion, *supra*, they would not be collectively subject to a call for military service as a civil defense organization.

Further support for the notion that the several organizations for civil defense are purely civil, rather than military, in nature will be found in certain legislative language set out in Chapter 5915., *supra*. In Section 5915.02, Revised Code, we find this provision:

"There is hereby created within the adjutant general's department a civil defense section which shall be governed under regulations promulgated by the governor. The adjutant general shall be the state director of civil defense *in addition to his other duties* and he may appoint a chief executive assistant, executive assistants, and administrative and technical personnel within such civil defense section as may be necessary to plan, organize, and maintain a civil defense organization adequate to the needs of the state. * * *"

(Emphasis added.)

The language emphasized above is indicative of the notion that when the adjutant general acts as state director of civil defense he is performing duties separate and apart from his purely military duties, for if civil defense activities were deemed to be military in nature the provision thus pointed out would have been wholly unnecessary since it is elsewhere provided that he shall be the "chief of staff to the commander in chief and *administrative head of the organized militia.*" (Emphasis added.) See Section 5913.01, Revised Code.

The term "civil defense" is defined in Section 5915.01, Revised Code, as follows:

"* * * (C) 'Civil defense' includes all those activities and measures designed or undertaken to minimize the effects upon the civilian population caused or which would be caused by an attack, or other disaster, to deal with the immediate emergency conditions which would be created by any such attack, or other disaster, and to effectuate emergency repairs to, or the emer-

gency restoration of, vital utilities and facilities destroyed or damaged by any such attack, or other disaster. Such term shall include, but shall not be limited to: measures to be taken in preparation for anticipated attack, including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stock piling of necessary materials, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the non-military evacuation of civil population; measures to be taken during attack, or other disaster, including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications; and measures to be taken following attack, or other disaster, including activities for fire fighting, rescue, emergency, medical, health, and sanitation services, monitoring for specific hazards of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities. * * *."

Here it will be observed that the primary object of civil defense is to minimize the effect of an enemy attack as to the "civilian population," and while this is a proper objective also of the military forces such forces usually seek to achieve it by combatant defensive measures and by offensive action directed at such enemy. It would seem, therefore, that the legislature intended in the civil defense act to provide for a purely civil agency to supplement the efforts of the military in this regard and to free the latter as much as possible for purely combatant measures. This notion is fully in harmony with the use of the expression "non-military evacuation of civil population" in the definition above and with the use of the descriptive term "civil" in the designation of the several agencies provided for civil defense purposes.

For all of these reasons it may be concluded that a civil defense organization is a purely civil agency rather than a military agency. This brings us to a consideration of the effect of the oath for which provision is found in Section 5915.14, Revised Code, as follows:

"No person shall be employed or associated in any capacity in any civil defense organization established under sections 5915.01 to 5915.143, inclusive, of the Revised Code, who advocates or has advocated a change by force or violence in the constitutional form of the government of the United States or of this state, or who

has been convicted of or is under indictment or information charging any subversive act against the United States or this state. Each person who is appointed to serve in an organization for civil defense shall, before entering upon his duties, take an oath, in writing, before a person authorized to administer oaths in this state, which oath shall be as follows:

“Ido solemnly swear (or affirm) that I will support and defend the constitution of the United States and the constitution of the state of Ohio, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the governor of the state of Ohio, that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will faithfully discharge the duties upon which I am about to enter.

“And I do further swear (or affirm) that I do not advocate, nor am I a member of any political party or organization that advocates the overthrow of the government of the United States or of this state by force or violence; and that during such time as I am a member of the (name of civil defense organization), I will not advocate nor become a member of any political party or organization that advocates the overthrow of the government of the United States or of this state by force or violence.”

This provision must be related to the provisions of Section 5915.08, Revised Code, which are as follows:

“In carrying out sections 5915.01 to 5915.143, inclusive, of the Revised Code, the governor shall utilize the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the state and of the political subdivisions thereof to the maximum extent practicable, and the officers and personnel of all such departments, offices, and agencies shall co-operate with and extend such services and facilities to the governor and to the state director of civil defense upon request.

“Every organization for civil defense established pursuant to sections 5915.01 to 5915.143 (5915.14.3), inclusive, of the Revised Code, and the officers thereof shall execute and enforce orders, rules and regulations made by the governor.”

Nowhere in the statutes do I find any clear statement that the governor is constituted the “commander-in-chief” of the civil defense organizations established under the provisions of Chapter 5915., Revised Code, or of the personnel therein, nor any express provision directly authorizing

him to issue any "orders" of any kind. There is, however, the following provision in Section 5915.05, Revised Code:

"The governor shall promulgate and enforce, and when necessary he may amend or rescind the regulations with respect to the establishment of a civil defense organization for the state for the purpose of providing a defense for its people against enemy action, or other disaster. Such regulations shall become effective upon being filed in the office of the secretary of state and thereupon shall have the effect of law until amended or rescinded. They shall be made available for public inspection at the headquarters of the state and at each local organization for civil defense, and at such other places and during such reasonable hours as fixed by the governor."

Since the governor may "enforce" the regulations he has promulgated it is fair to infer that the legislature intended that he should do so by the issuance of "orders" which civil defense officers and organizations are required, as we have noted above, to obey.

These regulations pertain, however, only "to the establishment of a civil defense organization for the state for the purpose of providing a defense for its people against enemy action, or other disaster." It is quite clear, therefore, that the governor would be wholly without authority to issue any orders of a military nature and most certainly would be without authority to require civil defense personnel to serve in the National Guard as you indicate has been suggested.

As to your first specific question, it is by no means so clear that the governor's authority in the enforcement of the regulations promulgated by him would be limited to instances of emergencies, although it is obviously limited to civil defense functions. This is so for the reason that he is authorized to enforce regulations with respect to the establishment of a civil defense organization, and the whole purpose of the statute seems to be to create and perfect an organization in advance of an emergency. Accordingly, it would seem that civil defense personnel would be bound, by their oaths, to obey such orders as were issued by the governor not only in the performance of civil defense functions, as defined by the statute, in emergencies, but such orders also as are issued at other times, under regulations promulgated by him, relating to the "establishment of a civil defense organization."

The second specific question you have presented concerns the duration of the membership of members of civil defense organizations. Such "mem-

bers” are variously referred to in the statute. Section 5915.141, Revised Code, refers to the “powers, duties, immunities and privilege (s)” of “members of civil defense forces in this state.” Section 5915.14, *supra*, requires an oath of “each person appointed to serve in an organization for civil defense.”

In Section 5915.10, Revised Code, we find this provision :

“(A) The state, any political subdivision, municipal agency, *civil defense volunteer*, or another state or a civil defense force thereof or of the federal government or of another country or province or subdivision thereof performing civil defense services in this state pursuant to an arrangement, agreement or compact for mutual aid and assistance, or any agency, member, agent or representative of any of them, or any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, in good faith carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to sections 5915.01 to 5915.43, inclusive, of the Revised Code, any federal law, or any arrangement, agreement or compact for mutual aid and assistance or any order issued by federal or state military authorities relating to civil defense, shall not be liable for any injury or death to persons, or damage to property as the result thereof during training periods, test periods, practice periods or other civil defense operations, or false alerts, as well as during enemy attack, actual or imminent, and subsequent to the same except in cases of willful misconduct.

* * *.”

(Emphasis added.)

It is wholly unlikely and bordering on the absurd to suppose that the legislature would intend that the immunity thus provided should not apply to all “members of civil defense organizations,” or should not apply to each person required to execute the oath prescribed in Section 5915.14, *supra*. We may readily conclude, therefore, that each of such “members” and each such “person appointed” is included in the designation “civil defense volunteer,” and that each is in fact a volunteer in the usually accepted meaning of that term.

It is true that in the military service the term “volunteer” is used merely to indicate the method of entry into the service, his term of service being determined by his contract of enlistment or by law. In the instant case, however, it must be pointed out (1) that we are concerned with a purely civil agency, (2) there is no contract of “enlistment” for a definite term included in the oath either expressly or by reference, and (3) the

law is wholly silent on the subject of the term of service for which a volunteer becomes obligated.

In this situation there seems to be a complete lack of any indication of a legislative intent as to the duration of a volunteer's obligation unless it be found in the use of the term "volunteer" itself. Where, as here, there is such uncertainty, indefiniteness, and vagueness that it is difficult to ascertain an intelligible meaning no operable effect can be given the statute in the matter of fixing the term during which a volunteer's obligation will be binding on him. See Crawford on Statutory Construction, p. 340, Section 198. Moreover, statutes in derogation of natural or common right, or "tending to interfere grossly with a cherished personal liberty," should be strictly construed and not extended beyond their literal meaning. Sutherland on Statutory Construction, Horock's 3rd Edition, Vol. 3, pp. 181, 183, Section 6206. Both of these rules, in my opinion, are applicable to the statute here involved to the extent that the term of service of a volunteer is concerned, and I do not consider that the statutory provision as to the oath required of such volunteer can be so extended as to require a lifetime of service as such.

Rather it seems that such provision is literally intended as a qualification for membership since Section 5915.14, supra, forbids membership in civil defense organizations to certain individuals who would obviously be unable in good faith to execute the oath required of members. This object of the oath being plain and definite and the statute being silent as to any required term of service, it would not seem possible to find therein any indication of a legislative intent that it should be forever binding on the volunteers who execute it.

In this situation I am impelled to conclude that the oath here involved is prescribed solely as a condition of membership in civil defense organizations, that it has no legal effect in establishing a continuing obligation of membership and service, and that such persons as become members of such organizations are volunteers not only when they execute such oath but throughout the whole period of their membership.

From this it follows that a member may resign his membership at any time; and because such membership is in the nature of a public office it may be terminated as well by abandonment or non-user. See 43 American Jurisprudence, 26, Section 172. In this view of the matter it will be seen that a member is bound to "obey the orders of the Governor" only

so long as his status as a volunteer is maintained; and that when his membership is terminated either by resignation or abandonment he is no longer bound by it.

Accordingly, in specific answer to your inquiry it is my opinion that:

1. The several organizations for civil defense for which provision is made in Chapter 5915., Revised Code, are civil agencies rather than military organizations, and such agencies do not constitute a part of the state militia.

2. The oath prescribed in Section 5915.14, Revised Code, relates, to the extent that it binds a member to serve in a civil defense organization, to functions of "civil defense" in an "emergency," as such terms are defined in 5915.01, Revised Code, and to the "establishment of a civil defense organization for the state" under regulations promulgated by the governor as authorized in Section 5915.05, Revised Code.

3. The oath prescribed in Section 5915.14, Revised Code, is primarily a test of qualification for membership in a civil agency. The members of such agencies enter and serve therein as "civil defense volunteers" and neither such oath nor any other provision of law binds such members to serve as such for any designated period of time.

4. Membership in a civil defense organization as a "civil defense volunteer" is in the nature of a public office and may be terminated at any time by resignation, or by abandonment or non-user. Where such membership is so terminated there is no obligation under the law to perform further service as a member of such organization even though the individual concerned might be subject to call to duty as a militiaman under the provisions of Section 4, Article IX, Ohio Constitution.

Respectfully,

C. WILLIAM O'NEILL
Attorney General