

2927.

HATCH ACT — AMENDED JULY 19, 1940, 76 CONGRESS — INHIBITIONS AND PENALTIES FIXED BY CONGRESS, APPLY TO TEACHING STAFF, OFFICERS AND EMPLOYEES, OHIO STATE UNIVERSITY — WHEN CONNECTED WITH PARTICULAR DEPARTMENT OR DIVISION — “ACTIVITIES” FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM UNITED STATES OR ANY FEDERAL AGENCY.

SYLLABUS:

The inhibitions and penalties fixed by Congress in the so-called Hatch Act, as amended July 19, 1940, (76 Congress, 3rd Session, Public Act Number 753), apply to only those members of the teaching staff, officers and employees of the Ohio State University whose principal employment is in connection with a particular department or division thereof, the activities of which are financed in whole or in part by loans or grants made by the United States or by any Federal agency.

Columbus, Ohio, October 23, 1940.

Doctor Howard L. Bevis, President, The Ohio State University,
Columbus, Ohio.

Dear Doctor Bevis:

I am in receipt of your recent communication wherein you direct my attention to what is commonly referred to as the “Hatch Act”, enacted by Congress, entitled: “An Act to prevent pernicious political activities”, enacted by the 76th Congress, 1st Session and approved August 2, 1939, (c. 410-53 Stat. 1147). The said act consisting of twelve sections, was codified as Title 18, Sections 61 to 61k, inclusive, of the U. S. C. A. This act was amended and supplemented by a later act of Congress, being Public Act Number 753, of the 76th Congress, 3d Session, approved July 19, 1940.

As originally enacted, in 1939, no specific reference is made in the act in question, to state and municipal officers and employees, as such. It is with the amended and supplementary provisions, as contained in the act of July 19, 1940 that we are here concerned. In the latter act, Section 2 of the original act was amended. As amended, its pertinent provisions are as follows:

"Section 2. It shall be unlawful for * * * (2) any person employed in any administrative position by any State, by any political subdivision or municipality of any State, or by any agency of any State or any of its political subdivisions or municipalities (including any corporation controlled by any State or by any political subdivision, municipality, or agency, and any corporation all of the capital stock of which is owned by any State or by any such political subdivision, municipality, or agency) in connection with any activity, which is financed in whole or in part by loans or grants made by the United States, or by any such department, independent agency, or other agency of the United States, to use his official authority for the purpose of interfering with, or affecting, the election or the nomination of any candidate for the office of President, Vice President, Presidential Elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or insular possession."

Said Act of 1939 was further amended in the Act of 1940, by the addition at the end thereof of Sections 12, 13, 14, 15, 16, 17, 18, 19 and 20. The pertinent provisions of these added sections read as follows:

"Section 12 (a). No officer or employe of any state or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or any political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term 'officer or employe' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the Mayor of any City; (2) duly elected heads of executive departments of any State or municipality who are not classified under a state or municipal merit or civil service system; (3) officers holding elective offices."

* * * * *

"(e) The provisions of the first two sentences of subsection (2) of this section shall not apply to any officer or employe who exercises no functions in connection with any activity of a state or local agency which is financed in whole or in part by loans or grants made by the United States or by any Federal agency.

(f) For the purposes of this section -- (1) the term 'State or local agency' means the executive branch of any State, or of any municipality or other political subdivision of such State, or any

agency or department thereof. (2) The term 'Federal agency' includes any executive department, independent establishment, or other agency of the United States (except a member bank of the Federal Reserve System)."

Certain exceptions are made to the applicability of the act in Sections 14, 15, 16, 17 and 18 of the amended act. I do not deem these exceptions to be of any particular force so far as the present inquiry is concerned, and will therefore make no further comment with reference thereto.

The enforcement of the act is by the terms thereof, as amended in 1940, vested in the United States Civil Service Commission, and throughout the act certain penalties are provided for the violation of its provisions, consisting of fines, forfeitures and, in some instances, removal from office.

Inasmuch as the United States Civil Service Commission is by the terms of the act charged with its administration and enforcement, the interpretation placed thereon by that body or its legal advisers would, of course, be carefully considered by me. While such an interpretation may exist, the same has not come to my attention.

In an inquiry as to whether or not the inhibitions and penal provisions of the act apply to the teaching staff and the officers and employees of the Ohio State University, two questions are presented: First, are the members of the teaching staff and the officers and employees of the Ohio State University employed in an administrative position by the State of Ohio, or an agency of the state, within the meaning of those terms as used in subsection 2, of section 2, of the Hatch Act as quoted above, or, are they officers and employees of any state or local agency whose principal employment is in connection with any activity as spoken of in subsection (a) of section 12 of the Act. Second, if it is determined that the members of the teaching staff and the officers and employees of the Ohio State University are employed in an administrative position, so as to be included within the personnel described in subsection (2) of section 2 of the Hatch Act or are officers or employees spoken of in subsection (a) of section 12 of the Act, the next question is whether or not the activity with which they are connected is financed in whole or in part by loans or grants made by the United States or any federal agency.

With respect to the first question, there can be no doubt as to the status of the University in its relation to the state government of Ohio. Clearly,

it is a state institution, an agency of the State of Ohio, and an activity financed in part, at least, by the State of Ohio. *Neil v. Board of Trustees*, 31 O. S., 15; *Thomas v. Board of Trustees of Ohio State University*, 195 U. S., 207, 49 L. Ed. 160.

It follows that the teaching staff of the University and the employees of the University, if their duties are such as to constitute their services in connection with the University their principal employment, which of course is a question of fact in all cases, are included within the terms of the law as being officers or employees of a state or local agency. I do not attach any particular significance to the fact that in subsection (2) of section 2 of the Hatch Act, as amended, persons employed in "administrative" positions only, are included, as even the teaching staff performs administrative duties, and at least none of the duties of the teachers or other officers or employees of the University are judicial or legislative in character, hence, their duties in relation to the government and the public are executive or administrative, the terms being used interchangeably. Lexicographers, both general and legal, such as Webster and Bouvier, speak of the term "administrative" as being synonymous with "executive". See also, *Automobile Insurance Association v. Friedman*, 122 O. S., 334, 337; *People v. Salisbury*, 134 Mich. 537, 96 N. W., 936; *Sheely v. People*, 54 Colo., 136, and 129 Pac., 201. In my opinion, all the officers and employees of the Ohio State University, including the teaching staff, perform duties administrative in character, and are included within those spoken of as holding "administrative positions", as the term is used in subsection (2) of section 2 of the Hatch Act, as amended in 1940.

Section 12 of the act, applies to all officers and employees of any state or local agency, and does not limit its application to those holding administrative positions only. "State or local agency", as used in this section, is defined in clause (1) of subsection (f) of section 12, as "the executive branch of any state *** or any agency or department thereof." Without a doubt, the officers and employees and the teaching staff of Ohio State University would be held to be officers and employees of the executive branch of the State of Ohio, or an agency or department thereof, charged with the duty of enforcing and carrying out the laws in pursuance of which the University functions.

I come now to the question of whether or not the Ohio State University is an "activity" which is financed in whole or in part by loans or grants made by the Federal government or by any Federal agency.

The Ohio State University is supported in part, by grants of land made by the Federal Government. O. Jur., Vol. 40, page 706. In 1862, a grant of land was made by the Congress, by what is known as the Morrill Act (c. 130-12 Stat., 503, Title 7, Section 301, et seq. U. S. C. A.) to each of the states and territories, for the endowment, support, and maintenance of at least one college, where the leading object would be, without excluding other scientific studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanical arts, in such manner as the Legislature of the states might prescribe.

By the terms of this act, land scrip was given to each state in an amount equal to three thousand acres for each senator and representative in Congress, providing that state would establish a state college in which instruction would be given in such branches as are related to agriculture and the Mechanical arts, and including military tactics. Ohio accepted the proposition, and received land scrip in the amount of 630,000 acres. This was sold for \$342,450.80, which money was deposited in the state treasury, and draws interest at the rate of 6% which is annually placed to the credit of the Ohio Agricultural & Mechanical College, now the Ohio State University, the name having been changed in 1878.

As stated, the above trust was accepted by the State of Ohio and the terms thereof have been faithfully carried out. In such case, the United States has no further rights or interest in the trust res. With respect to the rights of a settlor in trust property after a trust has once been created, it is stated in 40 O. Jur., page 520:

“Assuming that the trust is properly created, the conveyance to the trustee divests the settlor of all rights, title, and interest in the trust property, and vests corresponding rights, title, and interest in the trustee and beneficiary. Hence, in the absence of the reservation of the power to revoke, alter, or amend the trust, the settlor has no rights in the property.”

It would therefore appear, and it is consequently my opinion, that the interest earned on the above sum is not a grant from the United States or any Federal agency within the meaning of the Hatch Act and the use thereof in financing any activity of the University would not bring the teaching staff and other officers and employees of the University within the provisions thereof.

The Ohio State University has also benefited by a grant of certain

lands in the Virginia Military District, of the State of Ohio, as made by Congress in 1871 (c. 41-16 Stat. 416); however, the lands which were the subject of this grant were ceded directly to the State of Ohio and were not limited to the uses of the University or to educational purposes generally. The State of Ohio, by acts of the Legislature in 1872 (69 O. L., 52 and 70 O. L., 107), accepted the said grant and made the University the beneficiary thereof. See Section 14779, et seq., General Code. So far as the benefits accruing to the University on account of this grant of lands, standing alone, are concerned, the circumstances of the grant to the State of Ohio, and the disposal of the same by the State, by vesting the title thereof in the trustees of the University for the uses and purposes of the University, in my opinion do not constitute the University, or any department thereof, "an activity financed in whole or in part by the United States or any Federal agency", as the expression is used in the Hatch Act.

The University, however, has been the recipient of other grants or gifts made by the United States for certain specific purposes, such as the annual appropriation made by Congress for colleges established under and by authority of the Merrill Act, for providing courses for the special preparation of instructors for teaching the elements of agriculture and the mechanical arts, as provided by the Act of Congress of August 30, 1890 (c. 841-26 Stat., 417, as amended in 1907; c. 2907-34 Stat., 1281; Title 7, Section 322, et seq., U. S. C. A.). Also by the provisions of the successive Acts of Congress providing for and making appropriations for the establishment and maintenance of agricultural experiment stations under the direction and in connection with universities, such as Ohio State University, (Section 362 et seq., U. S. C. A.), and by provisions made by Act of Congress of May 18, 1914 (c. 79-38 Stat., 373—popularly known as the Smith-Lever Act), and a number of later acts relating to the same subject, for cooperative agricultural extension work, consisting of the giving of instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in a college, and imparting to such persons information on such subjects through field demonstrations and otherwise. See Sections 341, et seq., U. S. C. A.

Section 12 of the Act prohibits officers and employees whose principal employment is in connection with any *activity* which is financed in whole or in part by loans or grants made by the United States or in part by loans or grants made by the United States or by any Federal agency, from engaging in political activity. The question now arises as to the meaning of the word

“activity”. In regard thereto, it must be borne in mind that in the instant case we are dealing with a penal statute. It is a well settled rule that a strict construction is to be given to all penal statutes. In other words, such laws are to be interpreted strictly against the state or government. In this connection, it is stated in 37 O. Jur., page 747:

“It has been declared to be a well established rule of construction that a statute should, if possible, be so construed as to avoid a penalty. Moreover, penal statutes are not to be extended in their operation by inference, implication, or construction beyond the manifest intention of the legislature. They are not to be extended by implication or construction to persons or things not within their descriptive terms, even though such cases appear to be of equal atrocity, or within the reason and spirit of the statute, or within the mischief intended to be avoided.”

The above rule clearly prohibits a construction of the word “activity” which will broaden its meaning or enlarge its scope beyond that manifestly intended by the Congress. On this point, your attention is again invited to the provisions of Section 12, paragraph (e) of the Act. Said paragraph reads in part as follows:

“The provisions of the first two sentences of subsection (a) of this section shall not apply to any officer or employe who exercises no functions in connection with any activity of a state ***.”

In view of this language, it appears to me that any intent to extend the meaning of the word “activity” beyond the department or division thereof which is financed in whole or in part by loans or grants made by the United States would clearly do violence to the above express intent of the Congress.

In an address delivered by the Honorable Harry B. Mitchell, President of the United States Civil Service Commission, before the Thirty-fourth Annual Meeting of the National Association of Attorneys General in Philadelphia, on September 9, 1940, it was stated:

“Interpretation of the word ‘activity’ is also difficult. For instance, should all the work of the Highway Commission be interpreted as an ‘activity’; or should there be segregation of the work of the Highway Department into sections or divisions, some of which are financed in whole or in part by loans or grants made by the United States, and some of which are not? Put in a more direct form, should construction of roads be regarded as an activity that is supported by the Federal government, and maintenance of roads be not so regarded? It is quite possible that this question will have to be decided by the courts before we finally know how the word

'activity' should be construed, but meantime it is the conclusion of the Commission that the employes of a Highway Commission who are employed on the general work of the Commission including road construction or reconstruction are to be considered as engaged in an activity to the provisions of the law, but those who are wholly employed on road maintenance will not be so considered."

The Ohio State University consists of several colleges and departments and is engaged in many and diverse activities, some of which receive no Federal aid. If one of such activities carried on solely in one department is financed in whole or in part by the United States, could it be said that all the work carried on at the University is an activity within the meaning of the Act, or that the University itself should be construed as an activity? I think not. To say that professors engaged in one department which receives no aid from the Federal government are engaged in an activity which is financed by the United States, because some activities carried on in another department are financed in part by the United States, would be to say that the employees of the Governor's office are subject to the Act because certain activities in the Highway Department or Bureau of Unemployment Compensation may be financed in whole or in part by the United States. In other words, if the Ohio State University comprising all of its departments, can be declared an "activity" within the meaning of the Act, by the same reasoning the State of Ohio and all of its departments would likewise be an activity. This conclusion of course is untenable.

In view of the foregoing, and in specific answer to your inquiry, I am of the opinion that the inhibitions and penalties fixed by Congress in the so-called Hatch Act, as amended July 19, 1940 (76 Congress, 3d Session, Public Act Number 753), apply to only those members of the teaching staff, officers and employees of the Ohio State University whose principal employment is in connection with a particular department or division thereof, the activities of which are financed in whole or in part by loans or grants made by the United States or by any Federal agency.

Respectfully,

THOMAS J. HERBERT,
Attorney General.