

Eight Hour Law.—Prison Guards.

The eight hour law, known as Chapter 50, Laws of 1905, does not apply to prison guards employed at the State Penitentiary.

It was not the intention that such law should apply to officers vested with governmental functions, nor could such a law be so applied.

Helena, Montana, May 28th, 1906.

Board of State Prison Commissioners, Helena, Montana.

Gentlemen: In response to your request, we give you the following opinion upon the question you present, viz:

"Does the eight hour law apply to guards employed at the State Prison?"

Sec. 1 of Chapter 50, Laws of 1905, provides:

"A period of eight hours shall constitute a day's work on all works or undertakings carried on or aided by any municipal, county or state government, and on all contracts let by them, and in mills and smelters for the treatment of ores, and in underground mines."

Sec. 2 of the Act prescribes a penalty of fine and imprisonment for violation of any of its provisions. Section 1 is a verbatim copy of the constitutional amendment submitted to the voters of the state at the general election in 1904 and adopted as an amendment to Article 18 of the Constitution of Montana. (Chapter 49, Laws 1903.)

The State Prison is a State Penal Institution recognized by the Constitution (Art. 8, Sec. 1; Art. 7, Sec. 20, State Const.) and provided for by the Statute, (Sec. 2950 et seq., Penal Code), and is at all times, under the absolute control of the state.

The Governor, Secretary of State, and Attorney General, are by constitutional provision, (Art. 7, Sec. 20) and statutory enactment (Sec. 2950 supra) constituted a Board of State Prison Commissioners, and it is made a part of the official duty of these state officers as such Board, to superintend and control all matters pertaining to the management and conduct of this institution, and authority is conferred upon them to make all necessary rules therefor, and for "the conduct of the guards and all persons connected with the prison" (Sec. 2981, Penal Code). But though the Board may, under the provisions of Sec. 2982 of the Penal Code, provide by contract for the custody and maintenance of all prisoners, it cannot divorce itself from its official duty, nor contract away the authority necessary to the performance of that duty for such duty is enjoined by both the constitution and the statute. The contractor named in said Sec. 2982 cannot be vested with any greater authority with reference to the conduct of the institution than is vested in the Warden provided for in Sec. 2954 of the Penal Code.

The law relating to the institution and the rules adopted by the Board are a part of the contract. The contractor is, in effect, the Warden, except that he guarantees that "the proper custody, care and maintenance of all persons sentenced to imprisonment in the State Prison" shall be a fixed sum.

The guarding of the prisoners is, therefore, necessarily a governmental function, and it is a duty that is incessant, continuous, perpetual. It cannot at any time be held in abeyance. And the proper discharge of this duty may, at times, require the co-operation of all the guards at the same time, and for a longer period than eight hours.

"The Board has power to make all needful rules and regulations in regard to the management of the prison, the discipline of the convicts,

and the conduct and compensation of the guards and assistants." (Sec. 2951 Penal Code.)

This brings the case clearly within the decision in *State v. Martindale*, 47 Kas. 147, wherein it is held that the provisions of a similar eight hour law do not apply to the officers and employes of the Penitentiary named in the Act, among whom are included watchmen or guards. This Kansas law is, in part, as follows:

"That eight hours shall constitute a days work for all laborers, workmen, mechanics, or othe persons now employed or who may hereafter be employed by or on behalf of the State of Kansas, or by or on behalf of any county, city ,township or other municipality of said State, etc."

"The word 'work' may comprehend all labor, whether corporeal or mental, and in its public sense it is applied solely to bodily labor, or that in which such labor is the principal ingredient."

People v. Flagg, 5 Abb. Prac. 232, 8 Words & Phrases, 7517.

The word "undertaking" is defined in Webster's Dictionary as "that which is undertaken; a business, work or project which a person engages in or attempts to perform; an enterprise."

The definition of neither word is broad enough in its acception to include the duties enjoined by law upon executive officers in the proper exercise of the police power of the state. In fact, the two terms as used in the law are synonomous in meaning.

Words and Phrases must be construed according to the context and approved usage of the language, and when used in a criminal complaint they must be construed "in their usual acceptance in common language."

Sub-Div. 16, Sec. 7, and Sec. 1839, Penal Code.

This statute is highly penal and the meaning of the terms employed cannot be extended beyond their usual signification.

The pharse "on all works or undetakings" precludes any idea that the law is intended to apply to public officers in the discharge of official duty, but does convey the meaning that the law is intended to apply only to work of a constructive character requiring corporeal and manual labor, as those terms are commonly understood.

The law requires public offices to be kept open continuously from 9 o'clock A. M., until 5 o'clock P. M., each day, and at other times when public business requires, (Sec. 1134 Pol. Code). If this law applies to public officers, every officer who transacts official business before nine o'clock in the morning, or after five o'clock in the evening, violates the law, and is, himself, to that extent, a criminal.

Our constitution provides for the election of but one Governor, but, if this law applies to public officers, the State is without a Governor who could legally transact any business for sixteen hours out of every twenty-four hours, and the same is true of all other officials. Under this law, if it applies, the sheriff could not transact any official business after five o'clock in the evening, not until nine o'clock the next morning, no matter what the exigencies of the case might oe. It is very apparent that the law cannot apply to all branches of the public service, for no provision

has been made by the statute, nor authorized by the constitution, by which it can apply. A line must be drawn somewhere.

The entire executive department of the state government is an entity, for it is the contemplation of law that all penal statutes shall be enforced. If the law applies to one executive official it applies to all such officials, for the statute makes no exception.

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The State in its several departments may be likened to the employer. The several departments necessary to the administration of the State Government form an entirety, and every person engaged in the administration of necessary governmental functions constitutes a part of the whole. And the whole is the State—the employer. In its entirety the State as an entity, may be further and more effectually likened to a corporation. No one would seriously contend that this law does or should apply to the officers or stockholders of a corporation who are engaged in the conduct of the business and administration of affairs generally.

The “work or undertaking” intended to be covered by the law, clearly refers only to such as is not necessary as a governmental function. The care of prisoners is an exercise of the police power and authority of the State, and a necessary governmental function.

The control of the Montana State Prison is a part of the duty of the executive department of the state government; it is a “division of official duties or functions.” The convicts, there confined, are prisoners of the State, not prisoners of the Contractor. The Prison Guards are, within their sphere, Executive Officers of the State, clothed with an executive authority that, in extreme cases, will justify them in taking human life. This authority can be granted only by the State, for the contractor, as such, possesses no such power.

Thirty-six States and Territories have adopted eight hour laws, and in no case has such law been made applicable to persons charged with the execution of the Penal Laws when in the discharge of such duties.

Compiled Labor Laws of the U. S., by Carrol D. Wright. (1904.)

The enforcement of the penal laws is necessary to the continued existence of the State Government, and the existence of that government is not an “undertaking” or a “work” any more than is the life of a man an undertaking or a work. As was said by the Supreme Court of Illinois in *Philips v. Christian County*, supra:

“This law cannot apply to those ‘whose duty it is to enforce the observance of law, and preserve the peace, and protect property, a service involving in no proper significance any element of work or labor in the common acceptance of these words, but involves the idea of vigilance and discretion, fortitude and courage.’ And Prison Guards come within this class of official and employes.”

Again, the title of an Act may always be looked to to aid in ascertaining the true intent and meaning of the Act.

1 Lewis' Sutherland Stat. Const. Sec. 135.

Especially is this true by force of our constitutional provision requir-

ing the object of every law to be expressed in its title, for the title limits the sphere within which the enacting clause can operate.

Sec. 23, Art. 5, Montana Constitution.

The title of the Act submitting this constitutional amendment to the voters of the State, so far as it relates to this question, reads: An Act, etc.,

"Making a period of eight hours a days labor on public works, and in mills, smelters and underground mines."

The term "public works" has a definite meaning.

"The term 'public works' is defined as 'all fixed works constructed for public use, as railways, docks, canals, waterworks, roads, etc.'"

Cent. Dict.

* * * * It seems clear that the legislature did not understand that 'public works' meant the same as 'public department.' The provisions of this act are penal in their character and must be strictly construed.

"Public Department" is defined as the "Division of Official Duties of Functions; a Branch of Government; a Distinct part of the Governmental Organization."

Ellis v. Grand Rapids, 82 N. W. Rep. 244.

From the above reasoning and authorities, we think it is very apparent that the eight hour law cannot and was not intended to include public officials and employees engaged in carrying on the necessary and usual functions of our Government, but that it applies and was intended to apply, to "all works and undertakings carried on or aided by any Municipal, County, or State Government", such as are not Governmental Functions, as for instance, the construction of public buildings or improvements thereto, the building or improving of public highways, bridges, streets, alleys, canals, reservoirs, light plants, water works, sewer systems, and all other public works of a similar character.

You are, therefore, advised that the eight hour law is not violated by employing prison guards who remain on active duty for more than eight hours consecutively.

Very truly yours,

ALBERT J. GALEN,

Attorney General.