Opinion No. 58-15

January 20, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. George H. Franklin, (W. P. Kearns, Jr.), Chief, Division of Liquor Control, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

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1. Can a liquor retailer licensee operating in a municipality advertise by radio, newspaper, or other media, in another county or municipality and legally deliver alcoholic liquors to customers residing in another county or municipality;

a. Where sale is consummated on the premises of the licensee?

b. Where sale is consummated upon delivery of merchandise?

2. Is a state liquor retail licensee limited to making sales for delivery to the corporate limits of the municipality where premises are located?

3. Can a liquor retailer whose premises are located within the five mile zone or rural area of an incorporated city legally make sales for delivery to the consumer residing within the limits of the city without having a city liquor license?

CONCLUSIONS

1. a. Yes.

b. No.

2. No.

3 Yes.

OPINION

ANALYSIS

In response to your inquiries reference will be made to the questions in the order above stated.

First, the only restrictions, provided by the alcoholic beverage code, on advertising intoxicating liquors are found in § 46-9-1 which establishes the requirement giving statewide notice of fair trade prices. No prohibition is found for any type of statewide advertising on the part of either wholesale or retail licensees.

Next, you ask whether a municipal retail licensee may make deliveries of beverages to customers residing outside the municipal limits in which is located the licensed premises. We find assistance in answering this question by reference to the following § 46-10-9 (c) provides that:

"It shall be a violation of this act for any retailer:

(c) To sell any alcoholic liquors at any other place than his licensed premises."

A similar provision is made applicable to dispensers by § 46-10-10 (e). Accordingly, it must be concluded that no off premise sale is permitted. Such a practice, in other states, and as is prohibited by federal regulation is described as "huckstering".

A further search of the statutory provisions of the beverage code and existing regulations promulgated with reference thereto does not however, reveal prohibitions against making deliveries of beverages to locations desired by purchasers where the sale of such beverage was consummated at the licensee's place of business. In a discussion of the law of sales regarding the place of a sale, 46 Am. Jur. 587 points out the following:

". . . the view is taken that where a seller doing business in one place receives an order from a buyer residing in another place, and in pursuance of such order sets the goods apart for the buyer and charges them to him, the sale is then complete, and the seller's place of business is to be deemed the place of sale, although thereafter the seller without the intervention of a carrier delivers the goods to the buyer at his place of residence, since in the subsequent delivery the seller acts as the bailee of the buyer."

Thus, when a sale takes place on the licensed premises of a retailer or dispenser, it is our opinion that the beverage so purchased may be delivered by the retailer or independent carrier to any location designated by the purchaser.

The privileges included with the approval and issuance of a retailer's license by the Division of Liquor Control are established in part by the following: Permission to offer for sale packaged beverages for off premise consumption, § 46-1-1; to sell alcoholic liquors, § 46-5-3; to sell to persons over the age of 21 years, § 46-10-12, except to known drunkards and lunatics, § 46-10-13; and to sell alcoholic beverages during the hours provided by § 46-10-14. No restrictions are imposed upon the sales privileges with reference to a customer's residence.

§ 46-5-24 (P.S.) provides certain conditions precedent regarding population, for the issuance and transfer of licenses within county and municipal areas. These conditions however, do not restrict sales privilege subsequent to issuance of a license.

Giving consideration next to local, county or municipal governing authority over licensed premises, § 46-4-1 provides regulatory power over licenses located within municipal limits -- "in any manner consistent with, but not inconsistent with, the provisions of this act; --" In keeping with Attorney General's Opinion No. 3172, 1939:

"A careful reading of Sections 302 (d), 702 (c), 801, 802, 1101, 1102, 1103 and 1105 of the Act will disclose that the state, through its Bureau of Revenue and Chief of Division of Liquor Control, is the sole and only licensing authority under the Act. The state and not the municipality issues the license. All the municipality may do, in this respect, is to require the payment of an annual nonprohibitive municipal license tax in the nature of an occupation tax for the privilege of the licensee to operate within the municipality under his state license. The licensee obtains his right to sell alcoholic liquors not by virtue of any municipal license but rather by virtue of a state license plus the payment or tender to the municipality of the municipal license or occupation tax, according to the terms of the municipal ordinance imposing the same."

and in Sprunk v. Ward, 51 N.M. 403, 186 P. 2d 382, the Court held:

"Not only does the 1939 act fail to confer "full and complete" powers of regulation, as did the previous act, but it omits granting authority to towns and cities "to prescribe the terms" under which retail licenses shall be issued. Indeed, it makes no specific provision for exacting licenses by municipalities at all, although authorizing them "to impose an annual, nonprohibitive municipal license tax upon the privilege of persons holding state licenses * * * to operate within such municipalities, as retailers, dispensers or clubs." As said in Brackman's Inc., v. City of Huntington, infra: "The distinction may not be important but it exists."

Thus, it may be concluded that local regulatory authority does in no way authorize imposition of restrictions upon licensed premises within municipalities different from those imposed by statute on all licensees within the state. With reference to our aforestated conclusion, it is our opinion that municipal licensees may deliver beverages sold at the licensed premises to customers residing outside the municipal limits.

Since a license located within the five mile zone is of no different nature than those located elsewhere in the state, including municipalities, it follows, from the reasons hereinbefore stated, that municipal licenses similarly carry the privilege of deliveries outside this zone.

It should further be mentioned that even though municipalities may exercise certain planning jurisdiction over areas extending up to five miles from municipal boundaries, § 14-2-23, such jurisdiction does not include taxing power over liquor licenses located therein. Also, § 46-5-24 (P.S.) grants no taxing powers to municipalities over licensed

premises located outside established city limits. Accordingly, it is our opinion that no municipal license is required, by a non-municipal licensee, for the privilege of making deliveries within city limits of purchases made at his licensed premises.