

Opinion No. 62-114

September 5, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Louis E. DePauli, District Attorney, Eleventh Judicial District, P.O. Drawer 38, Gallup, New Mexico

QUESTION

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May a liquor license located in an incorporated municipality be transferred to a location beyond the five mile zone surrounding the municipality when the new location will be closer than ten miles to existing licensed premises?

CONCLUSION

No, not unless the population in the unincorporated area permits another license.

OPINION

ANALYSIS

Section 46-5-24, N.M.S.A., 1953 Compilation, makes provision for one liquor license per 2,000 population in each incorporated municipality. It also makes provision for one license per 2,000 population in the county's unincorporated area. In determining the population in the county's unincorporated area, the total population of the county's incorporated municipalities is subtracted from the county's total population.

This same Section provides that transfers will not be approved for locations within five miles of the corporate limits of any municipality except that licenses already in the five mile zone can be transferred to other locations within the zone and that licenses within the corporate limits can be transferred to the five mile zone. There is no specific provision covering a situation where a person wishes to transfer from the corporate limits to a location in the county's unincorporated area which is beyond the five mile zone.

In order to see what the effect of such a transfer would be, let us take a hypothetical situation where the number of licenses based on population is exactly correct. Total county population is 30,000. Total population of the incorporated municipalities in that county is 20,000. Thus the total population in the county's unincorporated area is 10,000. Under our hypothetical example we have ten licenses in the incorporated municipalities and five licenses in the county's unincorporated area.

If we transfer one license from an incorporated municipality to an unincorporated area of the county beyond the five mile zone (the anomalous situation **in** the zone is dealt with in Opinions 61-41 and 61-48, the effect has been to indirectly defeat the population limitation. We now have six licenses in the county's unincorporated area even though the population of 10,00 calls for a maximum of five, and we now have nine licenses in the incorporated municipalities even though the population of 20,000 calls for a maximum of ten. Presumably then, if the transfer is permitted, another license is available in the incorporated municipality. So we have not only granted (even though it is a transfer) an unwarranted license to the unincorporated area, we have allowed too many licenses in the county as a whole.

Based on its 30,000 population it should have only fifteen licenses, but if the proposed transfer is permitted it will have sixteen.

It is true that there is no population limitation in a "rural" area, but a rural area is simply a location somewhere in the county which is ten miles or more from any licensed premises. See Opinion 61-48. Since the location in question would be closer than ten miles to an existing licensed establishment, by statutory definition the location would not be in a rural area. It would be in an unincorporated area of the county where the population limitation applies.

Had the legislature intended the result which would follow from the proposed transfer, we do not believe it would have treated the incorporated municipalities and unincorporated area of the county separately. It would simply have based the maximum number of licenses that could be issued on the total county population.