

Opinion No. 63-131

September 30, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Jack Love Assistant District Attorney Box 1617 Hobbs, New Mexico

QUESTION

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1. In view of Chapter 255, Laws 1963 (photographers' licensing act) has there been an implied repeal of the Itinerant Vendors Act insofar as it relates to photographers?
2. Is the imposition of a \$ 250 annual county occupation license fee for transient photographers under the Itinerant Vendors Act so confiscatory, unreasonable or prohibitive as to violate the State or Federal Constitution?

CONCLUSION

1. Only insofar as the requirement for a **State** license for photographers under the Itinerant Vendors Act is concerned.
2. No, but see analysis.

OPINION

{*292} ANALYSIS

For many years we have had a number of statutes on the books relating to itinerant vendors in general. Section 60-2-1 et seq., N.M.S.A., 1953 Compilation. In Opinion No. 57-148 this office held {*293} that the sale of a photograph is the sale of a manufactured article, and that any person, either principal or agent, who engages in either a temporary or transient business in this State for the purpose of photographic sales is an itinerant vendor.

The Itinerant Vendors Act requires that such persons obtain a **State** license annually (§ 60-2-5) as well as a county license in each county where they do business (§ 60-2-9).

In 1963 the legislature enacted the Photographers' Licensing Act which requires that **every** photographer, temporary or permanent, must obtain a State certificate annually. (§ 67-32-1, N.M.S.A., 1953 Compilation (P.S.)). In our opinion, this enactment did amend by implication the provision in § 60-2-5 insofar as it relates to **State** licenses for itinerant **photographers**. The 1963 enactment did not, however, affect the provisions in

the Itinerant Vendors Act requiring that itinerant vendors (which includes transient photographers) also obtain a county license in each county where they do business.

In answer to your second question, we first desire to point out that it was held in Opinion No. 57-148 that the operation of the transient photographer whereby he sent the negatives to the home office of the studio in another state for developing and the making of prints therefrom did not make the transaction one of interstate commerce. There are a few cases to the contrary, but we believe the view expressed in Opinion No. 57-148 is supported by the better authority. **Lucas v. Charlotte**, 86 F.2d 394; **Craig v. Mills**, Miss., 33 So.2d 801; **Pierce v. City of Stephenville**, 206 S.W.2d 848.

Of course, an ordinance or statute can be held unconstitutional as being confiscatory, unreasonable or prohibitive even though interstate commerce is not involved. Again the authorities are not entirely in agreement as to what amounts to confiscation, unreasonableness or prohibition. For example, in the case of **Caldwell v. Prunelle**, Kan. 46 Pac. 949, a considerably larger license fee was levied on transient photographers than on resident photographers, the resident fee being \$ 10 per **year** and the transient fee being \$ 5.00 per **day** ; yet the legislation was upheld. In **Pierce v. City of Stephenville**, supra, the license fee placed on resident photographers was granted on the basis of gross receipts, while the fee for transient photographers was \$ 5 per week. This ordinance was also upheld.

However, in the case of **Graves v. State**, 62 So.2d 446, where the fee imposed on resident photographers was \$ 25 yearly while the fee imposed on transient photographers was \$ 50 per week, the legislation was held to be palpably discriminatory and unreasonable, if not prohibitive. A similar result was reached in **McGriff v. State**, Ark., 204 S.W.2d 885, the court noting that the statute imposed a prohibitory tax under the guise of regulation.

Taking into consideration the presumption of constitutionality and the fact that the particular amount of the fee is often deemed the critical factor, we are not prepared to say that the county license fee required for itinerant vendors is unconstitutional as being confiscatory, unreasonable or prohibitive. It must be remembered that the burden of establishing unconstitutionality is upon the one who challenges the constitutionality of a statute.

By: Oliver E. Payne

Assistant Attorney General