

Opinion No. 66-95

August 1, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Phyllis McRee, Clerk, Village of Fort Sumner, Fort Sumner, New Mexico

QUESTION

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1. Are magazine salesmen regulated by interstate commerce and not subject to ordinances requiring an occupational license or permit?
2. Can magazine salesmen be prosecuted under Ordinance No. 160 of the Village of Fort Sumner, pertaining to uninvited peddlers?

CONCLUSIONS

1. See analysis.
2. Yes.

OPINION

{*129} ANALYSIS

1. It is a general rule that agents and solicitors are not subject to ordinances requiring occupational licenses or permits if they are engaged solely in interstate commerce. See 15 C.J.S., Commerce, § 115; **Nippert v. City of Richmond**, 327 U.S. 416, 66 S. Ct. 586, 90 L. Ed. 760; **Real Silk Hosiery Mills v. City of Portland**, 268 U.S. 325, 45 S. Ct. 525, 69 L. Ed. 982; **Village of Bel-Nor v. Barnett**, No. 358 S.W.2d 832. In the **Bel-Nor** case, supra, an ordinance requiring door-to-door salesmen to obtain a license before engaging in business within the Village was held invalid as applied to a nonresident soliciting subscriptions to magazines within the state. Such solicitation was held to constitute interstate commerce since the magazines were sent from points outside the state, and the ordinance was declared invalid as imposing undue burdens on interstate commerce in violation of the Federal Constitution, Art. I, Sec. 8, Clause 3.

However, in **Town of Farmington v. Miller**, 64 N.M. 330, 328 P.2d 589, the Supreme Court ruled on an ordinance levying an occupation tax as applied to a nonresident soliciting orders for clothes tailored outside the state and shipped to customers from California. In spite of the fact that the goods were shipped interstate after their sale in Farmington, the ordinance was held constitutional as applied to the solicitor. The court

distinguished the Farmington ordinance from those held to impose an undue burden on interstate commerce. The Farmington ordinance, unlike that in the **Bel-Nor** case, supra, did not apply to the business of soliciting orders as such. It applied to **all** occupations and trades. Quoting from the opinion: "Basically, it is the discriminatory features of license taxes on solicitors that calls for their constitutional invalidity". The court also cited the following from the **Nippert** case, supra: "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue and discriminatory ones are forbidden."

A further discriminatory feature of license taxes is to be avoided. The **Farmington** case noted that a fixed sum license tax -- a regulatory tax imposed on the business of soliciting orders for the purchase of goods to be shipped interstate -- may not be imposed on an interstate enterprise. See also: **West Point Wholesale Grocery Co. v. City of Opelika**, 354 U.S. 392, 77 S. Ct. 1096. Instead, the Farmington ordinance involved a tax based on gross business receipts, a tax which is not a regulatory measure but rather is a revenue-producing measure in nature.

It is our opinion that notwithstanding the fact that a magazine salesman may be engaged in interstate commerce, he may be subject to ordinances requiring an occupational license or permit if the license tax is not a fixed sum but is instead a non-discriminatory tax measured by gross receipts.

2. Ordinance No. 160 of the Village of Fort Sumner is to be distinguished from an ordinance requiring an occupational license. No license requirement is involved. It simply makes the practice by a solicitor, peddler, hawker, etc., of going upon property within the Village to solicit orders for the sale of goods a nuisance and punishable as a misdemeanor. It is a typical example of city ordinances known as "Green River Ordinances", a name originating from a series of cases challenging the validity of an ordinance passed in Green River, Wyoming. The ordinance in question here is very nearly identical with the Green River ordinance. The "Green River" cases began in the U.S. District Court, **Fuller Brush Co. v. Town of Green River**, 60 F.2d 613, which held the ordinance invalid. The Town of Green River appealed, **Town of Green River v. Fuller Brush Co.**, {*130} 65 F.2d 112. The ordinance was held valid. The court noted that it was a justifiable attempt to curb the nuisance caused by frequent ringing of doorbells of private residences by solicitors, that it did not affect a solicitor's constitutional rights and did not interfere with interstate commerce. In **Town of Green River v. Bunger**, 58 P.2d 456, the ordinance was again successfully enforced against an employee of the Fuller Brush Company. The court said that the town had the right to enact and enforce the ordinance in the exercise of its delegated police power pursuant to a Wyoming statute empowering the town council to prevent, abate and remove a nuisance. Section 14-21-30, N.M.S.A., 1953 Compilation, empowers cities and towns to declare what shall be a nuisance and abate the same, and frequent ringing of doorbells of private residences by solicitors may be considered a nuisance by a municipality in New Mexico. **Green v. Gallup**, 46 N.M. 71, 120 P.2d 619. The Green River Ordinance was again upheld in **Town of Green River v. Martin**, 254 P.2d 198. It was held valid and constitutional only as to transactions which are purely commercial. It was held not

to apply to a member of the Jehovah's Witnesses whose activities included free distribution of literature regarding his religion.

In **Allen v. McGovern**, 12 N.J.Misc. 12, 169 Atl. 345, a similar ordinance forbidding anyone from distributing newspapers, periodicals, books, magazines, circulars and the like unless previously invited by the home owner was upheld. In **Breard v. City of Alexandria**, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233, an ordinance of that city in Louisiana, and nearly identical with the Green River ordinances, was upheld by the United States Supreme Court. A conviction of a magazine subscription solicitor who had violated the ordinance was affirmed. It should be noted that the court limited the prohibitory nature of the ordinance as against solicitation of subscriptions to just what the ordinance said. The ordinance was held to leave open other usual methods of seeking and soliciting business, such as radio and newspapers.

There is ample authority then, that a magazine salesman who violates Fort Sumner Ordinance No. 160 may be prosecuted thereunder.