

Opinion No. 67-140

November 28, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Turner W. Branch, Chief Division of Liquor Control Bureau of Revenue Santa Fe, New Mexico

QUESTION

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Is Section 46-6-1, N.M.S.A., 1953 Compilation permissive or mandatory?

CONCLUSION

Mandatory.

OPINION

{*226} **ANALYSIS**

Section 46-6-1, N.M.S.A., 1953 Compilation provides in part that:

A. Any license or renewal thereof hereinafter issued under the provisions of the Liquor Control Act **shall be canceled** if the holder thereof fails to commence operation of the licensed business in a commercial establishment, within one hundred twenty [120] days after the license is issued, and to continuously operate thereafter, during customary hours and days of operation for that type of business.

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D. The license of any person failing to comply with any provision of this section **shall be canceled**. (Emphasis supplied)

A fundamental rule of statutory construction is that the words "shall" and "may" should not be used interchangeably but should be given their ordinary meaning. **Application of Sedillo**, 66 N.M. 267, 272, 347 P.2d 162 (1959). As used in statutes, the word "shall" is generally imperative or mandatory. Black, **Law Dictionary** (4th ed. 1951). When "shall" is used as an auxiliary verb, followed by the infinitive without **to**, it generally means "must". Webster, **New International Dictionary** (2nd ed. 1955). Thus, the word "shall" is generally mandatory.

There is authority, however, under which the courts on occasion in interpreting statutes, have construed a mandatory word such as "shall" to be used as "may". **Application of**

Sedillo, supra at 272. Generally, in considering whether a requirement of a statute is mandatory or directive, the courts look to the subject matter, the importance of the requirement and its relation to the general object intended to be secured by the act. **State v. Vigil**, 74 N.M. 766, 733, 398 P.2d 987 (1965); **Ross v. State Racing Commission**, 64 N.M. 478, 481, 330 P.2d 701 (1958).

As between the state and the licensee, a liquor license is a mere grant of the privilege to engage in the licensed business. **Nelson v. Naranjo**, 74 N.M. 502, 507, 395 P.2d 228 (1964); **Yarbrough v. Montoya**, 154 N.M. 91, 95, 214 P.2d 769 (1950). Section 46-6-1, supra indicates that the privilege is granted upon the condition that the licensee commence the operation of the licensed business within a certain period of time. The legislature has limited the number of licenses which may be issued. Section 46-5-24, N.M.S.A., 1953 Compilation. It is obvious from the foregoing that the legislature intended that if a licensee does not commence operation of the licensed business within the prescribed period of time, the privilege to engage in the licensed business should be revoked and given to another person who will actively engage in the licensed business.

It is, therefore, our opinion that Section 46-6-1, supra is mandatory and that, therefore, the license of any person failing to comply with Section 46-6-1, supra must be cancelled.

By: Edward R. Pearson

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