

Opinion No. 73-41

May 2, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Carlos L. Jaramillo, Director Department of Alcoholic Beverage Control
Lew Wallace Building Santa Fe, New Mexico 87501

QUESTIONS

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1. May this office legally compel liquor license holding clubs to discontinue their practices of proscribing membership in the various Elk's Clubs because of a person's ethnic background?
2. May I suspend or revoke a New Mexico Club license of a licensee who practices racial discrimination with regard to membership?

CONCLUSIONS

1. No
2. Yes

OPINION

{*80} ANALYSIS

There is no statutory authorization for the Director of the Department of Alcoholic Beverage Control to compel discontinuance of racially discriminatory practices by the Elks Lodges in New Mexico, even though such admittedly occurs. Therefore, the answer to your first inquiry is in the negative. I would think, however, that in view of our answer to question 2, this may be insignificant and a mere academic victory for those practicing racial discrimination in the bars of this state.

Section 46-10-13.1, N.M.S.A., 1953 Compilation, as amended, is dispositive of the issue in no uncertain terms, and I quote:

"Discrimination Prohibited. -- It is a violation of the Liquor Control Act (46-1-1 to 46-11-4) for any licensee or his agent or employees, or both, to refuse to serve, sell or deliver alcoholic beverages to any person on account of race, creed, color or national origin."

By the very nature of a club license, service can be made only to members and their bona fide guests. See Section 46-5-11(2), N.M.S.A., 1953 Compilation. If no one but

caucasians are allowed membership, as is the admitted practice of the Elks Lodges in this nation, as well as some other fraternal organizations, non-whites are discriminated against within the purview of Section 46-10-13.1, supra. Such as the opinion of the Supreme Court of Maine in **Elks Lodge No. 2043 v. Ingraham**, 41 Law Week 2344, 1/9/73, which was upheld on appeal to the U.S. Supreme Court by a 6-2 vote on April 16 of this year.

In **Elks**, supra, the court sustained the decision of the liquor commission in refusing renewal of fraternal organization liquor licensees who violated an anti-discrimination statute in Maine's Liquor Code very similar to our Section 46-10-13.1, N.M.S.A., supra.

The court rejected the Elks' argument that such statutes violate their first amendment right to freedom of association. In rejecting such contention, the court pointed out that the denial of a liquor license does not deny the Elks the opportunity to continue an associational structure in which non-whites are arbitrarily excluded as members. The lodge may continue to exist and arbitrarily discriminate; however, they will be unable to sell alcoholic beverages.

Although the U.S. Supreme Court in **Moose Lodge No. 107 v. Irvis**, 407 U.S. 163 (1972), held the Equal Protection Clause of the Fourteenth Amendment does not **compel** a state to require the termination of a private club's practice of racial discrimination in its sale of alcoholic beverages, the issue here and in Maine is different.

Here and in **Elks**, supra, the crucial question is whether the Fourteenth Amendment **prohibits** the state from exercising its police power to control the sale of liquors within its borders, to deny licensure or revoke licensure when the effect of licensure would be to sanction invidious discrimination on the basis of race. Obviously the Fourteenth Amendment does not prohibit such exercise of a state's police power and Maine and New Mexico have legitimately and wisely exercised their respective police powers by enactment of 17 M.R.S.A., Sec. 1301-A in Maine and 46-10-13.1, N.M.S.A., supra, in New Mexico.

Insofar as any restrictions exist in membership to a fraternal organization on the arbitrary basis of race, some non-white New Mexicans are arbitrarily excluded from an opportunity to purchase alcoholic beverages. There can be little disagreement that a rational state objective exists to insure that in the merchandising of any commodity, over which state licensure is a prerequisite, every dollar shall have a potential for purchase unaffected by the arbitrary factor of the skin color of the person in whose hands the dollar reposes. By exercising its police power, New Mexico has an opportunity to insure the elimination of the type of arbitrary discrimination on the basis of race practiced by the Elks Lodges in this state.

As Director of the Department of Alcoholic Beverage Control, you are {81} charged with the responsibility of enforcing all laws under the Liquor Control Act. See 46-2-11, N.M.S.A., 1953 Compilation.

Assuming the Elks Lodges in New Mexico are in violation of Section 46-10-13.1, supra, you may suspend or revoke the license of such licensee, after hearing, by virtue of the provisions of Section 46-6-2(g), N.M.S.A., 1953 Compilation. It should be made clear that this applies not only to Elks Lodges but to any licensee practicing racial discrimination.

It should be your decided purpose to enforce the Liquor Control Act and to formulate a public policy geared to avoid the image, appearance, acquiescence, or encouragement or practices which discriminate arbitrarily and invidiously on the basis of racial origin and your course of action is clear and compelling. I encourage you to move with dispatch.