

Opinion No. 87-15

May 18, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Katherine Zinn, Assistant Attorney General

TO: Ray Shollenbarger, Acting Director, Alcoholic Beverage Control, 224 E. Palace Ave., Santa Fe, New Mexico 87501

QUESTIONS

Whether a liquor license may be revoked where the licensee has, under Section 60-6C-1(3) NMSA 1978, allowed his premises to remain a public nuisance after written notice from the director.

CONCLUSIONS

Yes.

ANALYSIS

Pursuant to Section 60-6C-1 NMSA 1978, a liquor control hearing officer is given broad discretion regarding penalties that may be imposed for violations of the Liquor Control Act. Section 60-6C-1 NMSA 1978, states in pertinent part that:

A. A liquor control hearing officer may suspend or revoke the license or fine the licensee, or both when he finds that any licensee has:

(1) violated any provision of the Liquor Control Act or any regulation or order promulgated pursuant to that act;

(2) made any material false statement in his application for the license granted him under the provisions of the Liquor Control Act; or

(3) suffered or permitted his licensed premises to remain a public nuisance in the neighborhood where it is located after written notice from the director that investigation by the department has revealed that the establishment is a public nuisance in the neighborhood....

Allowing licensed premises to remain a public nuisance after written notice from the director is grounds for revocation of a liquor license under that section. A charge of this kind against a licensee subjects him to disciplinary action under Section 60-6C-1 and disciplinary proceedings brought pursuant to Section 60-6C-4 NMSA 1978, the section of the Liquor Control Act pertaining to hearings for violations of the Act. The director has

adopted regulations, however, that appear to limit the hearing officer's authority to revoke a license for such a violation. For example, ABC regulation 6C-4-3(K)(5) provides that revocation of a liquor license for remaining a public nuisance would be merited only in the case of a fifth or subsequent violation. For a first violation of this kind, the penalty is only a fine of \$250.00 pursuant to ABC regulation 6C-4-3(K)(1). It is our opinion that the director does not have authority to adopt regulations limiting a hearing officer's statutory authority to revoke a liquor license pursuant to Section 60-6C-1 NMSA 1978.

Administrative agencies and officers have only those powers that the statutes grant them. In re Proposed Revocation of Food and Drink Purveyor's Permit for House of Pancakes, 102 N.M. 63, 691 P.2d 64 (Ct. App. 1984). Administrative agencies and officers have no power to create rules or regulations that are not in harmony with their statutory authority. Rivas v. Board of Cosmologist, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984). Where there is a conflict or inconsistency between a statute and a regulation promulgated by an agency, the statutory language prevails. Jones v. Employment Services Division of New Mexico, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980).

Section 60-6C-4(O) requires the director to "adopt reasonable regulations setting forth uniform standards of penalties concerning **fin**es and **suspensions** imposed by the director and the liquor control hearing officer." (emphasis added) This section does not, however, empower the director to adopt uniform standards with regard to **revocation** of licenses. The legislature has allowed the hearing officer, at any time and for any violation brought pursuant to the provisions of Section 60-6C-4, to exercise discretion in determining whether revocation is merited. By confining the hearing officer's statutory power to revoke liquor licenses to only certain circumstances enumerated in the regulations, the director has acted beyond the specific power given him in Section 60-6C-4(O) NMSA 1978 to only set uniform fines and suspensions.

We note that Section 60-4B-5(A) NMSA 1978 empowers the director to "issue and file as required by law all regulations and orders necessary to implement and enforce the provisions of the Liquor Control Act." This is a general grant authorizing the director to adopt regulations necessary to enforce the Liquor Control Act. This section cannot be read, however, to authorize regulations regarding revocation of licenses, because "[a] specific provision [in a statute] relating to a particular subject will govern in respect to that subject as against a general provision [in a statute] although the latter standing alone would be broad enough to include the subject to which the more particular provision relates." Cromer v. J.W. Jones Construction Company, 79 N.M. 179, 184, 441 P.2d 219, 224 (Ct. App. 1968), overruled on other grounds, Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975). While Section 60-4B-5(A) NMSA 1978, standing alone, arguably might be broad enough to include adoption by the director of regulations regarding penalties for violations of the Liquor Control Act, Section 60-6C-4(O) specifically relates to the director's authority to adopt regulations relating to penalties and gives the director authority only to set uniform fines and

suspensions. It does not give the director authority to adopt regulations setting uniform standards for revocation.

It is therefore our opinion that a liquor license may be revoked by the hearing officer where a licensee permits his premises to remain a public nuisance after written notice from the director. The hearing officer is not constrained to impose only those fines or suspensions prescribed in the regulations. He may exercise his discretionary powers under Section 60-6C-1 and revoke the license if appropriate to protect the public health, safety, or morals.

ATTORNEY GENERAL

HAL STRATTON Attorney General