Law Enforcement Officers -- Alcoholic Beverages

Number: INFORMAL

Date: September 18, 2013

Ms. Patricia Gross
General Counsel
Lake County Sheriff's Office
360 West Ruby Street
Tavares, Florida 32778

Dear Ms. Gross:

As General Counsel for Sheriff Gary Borders of Lake County, you have asked for my opinion on a number of factually specific questions. According to your letter, the following is the factual background against which your questions should be considered. A male Deputy Sheriff is married. During the marriage and while he is employed full-time for the Sheriff's Office, his wife becomes owner of at least 50% of a wine and cigar bar. The Deputy Sheriff invests money in the business. The business is licensed to sell wine for consumption on the premises. The income of the business is derived primarily from the sale of wine rather than from the sale of cigars. The Deputy Sheriff does not work at or for the business in any capacity and you have not indicated that the Deputy Sheriff has any independent ownership interest in the business. You ask:

1. If a wife's interest in the wine and cigar bar is truly non-marital property and there is no commingling of the business with marital property, does Florida law including section 561.25, Florida Statutes, prohibit her husband from becoming or remaining a Deputy Sheriff upon his wife obtaining that interest?

2. If a wife's interest in the wine and cigar bar is truly non-marital property and there is no commingling of the business with marital property but the wife gains income from the business such as by receipt of a monthly salary or check from the profits of the business, does Florida law including section 561.15, Florida Statutes, prohibit her husband from becoming or remaining a Deputy Sheriff upon his wife obtaining that interest?

3. If a wife's interest in the wine and cigar bar was initially obtained as her non-marital property, but the assets of the bar (all or some) were in some way later commingled with marital property, does Florida law including section 561.25, Florida Statutes, prohibit her husband from becoming or remaining a Deputy Sheriff?

4. If a wife's interest in the wine and cigar bar was initially obtained as her non-marital property but the assets of the bar (some or all) were in some way later commingled with marital property, and the wife gains income from the business such as by receipt of a monthly salary or check from the profits of the business, does Florida law including section 561.25, Florida Statutes, prohibit her husband from becoming or remaining a Deputy Sheriff?

5. If a wife's interest in the wine and cigar bar was initially obtained with all or some marital

assets, does Florida law including section 561.25, Florida Statutes, prohibit her husband from becoming or remaining a Deputy Sheriff?

6. If a wife's interest in the wine and cigar bar was initially obtained with all or some marital assets and the wife gains income from the business such as by receipt of a monthly salary or check from the profits of the business, does Florida law including section 561.25, Florida Statutes, prohibit her husband from becoming or remaining a Deputy Sheriff?

7. Would any answers to the above questions be different if the husband/Deputy Sheriff volunteered during his off-duty hours to work (unpaid) at the business in some capacity unrelated to wine sales or consumption such as cleaning the floor, painting, or loading boxes?

Initially, I must advise you that this office cannot resolve mixed questions of law and fact, that is the province of the judiciary. A general discussion of the application of section 561.25, Florida Statutes, follows, provided in an effort to be of assistance to you in addressing future Sheriff's department personnel matters.

Section 561.25(1), Florida Statutes, provides that:

"No officer or employee of the division [Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation], and no sheriff or other state, county, or municipal officer with state police power granted by the Legislature, shall be permitted to engage in the sale of alcoholic beverages under the Beverage Law; or shall be employed, directly or indirectly, in connection with the operation of any business licensed under the Beverage Law; or shall be permitted to own any stock or interest in any firm, partnership, or corporation dealing wholly or partly in the sale or distribution of alcoholic beverages, except as provided in this section. The provisions of this subsection shall not be construed to prevent any certified law enforcement officer, except members of the Florida Highway Patrol or its auxiliary, or employees of the division, from being employed in businesses which have obtained licenses only to sell beer or beer and wine for consumption off the premises. However, the written approval of the chief of police, sheriff, or other appropriate department head must be obtained for any such employment."

Violations of section 561.25, Florida Statutes, are second degree misdemeanors and require the automatic removal or suspension of the officer.

By its terms, section 561.25, Florida Statutes, prohibits the direct or indirect employment of a law enforcement officer[1] by a business that holds a license to sell alcoholic beverages and prohibits a law enforcement officer from engaging in the sale of alcohol. The only exceptions to this general prohibition are employment by an establishment selling only beer and wine for consumption off the licensed premises and the employment of an off-duty officer as an entertainer or for the provision of security services. Where the Legislature has provided exceptions to the operation of a statute, no others may be implied to be intended.[2] It is clear, therefore, that an officer exercising the police powers of the state, such as a deputy sheriff, is precluded by this state from employment directly or indirectly by an establishment licensed under the state beverage laws, except as expressly provided otherwise in section 561.25, Florida Statutes, and is prohibited from engaging in the sale of alcohol. Your letter states that "[t]he

Deputy Sheriff does not work at or for the business in any capacity." Thus, your questions deal with an officer who is not employed by a licensed beverage business or paid for his services.

In Attorney General Opinion 86-29, this office was asked whether the prohibition in section 561.25, Florida Statutes, would apply to an investigator with the office of a state attorney when the investigator's wife owned a restaurant holding a beverage license. While the investigator had been an officer of the corporation owning the restaurant, he had resigned from the board of directors and as an officer of the corporation shortly after its formation. The wife remained the sole shareholder in the corporation and the investigator had no ownership interest in the corporation, nor was he employed by the corporation, either directly or indirectly. Based upon these facts, it was concluded that the prohibition contained in section 561.25, Florida Statutes, did not apply. The opinion noted that the statute does not prohibit law enforcement officers from being related in any degree of consanguinity or affinity to any person who may have an ownership interest in a business licensed under the beverage law. Nor does the statute address the financial arrangements of married couples. Inasmuch as the statute is penal in nature,[3] it must be strictly construed.[4]

Your letter states that the Deputy Sheriff "invested" financially in the business, but there is no suggestion that he is a stockholder or otherwise holds an ownership interest in the business. Rather, it appears that it is the Deputy's wife who is a part owner of this business. Thus, in the absence of any suggestion that the Deputy Sheriff himself owns stock or is possessed of some ownership interest in the alcoholic beverage business, a strict construction of the statute would not support a violation of section 561.25, Florida Statutes, on the facts you have presented.

This office has previously stated that the underlying purpose of section 561.25, Florida Statutes, is to prohibit law enforcement officers from being licensed as dispensers of alcoholic beverages or from being connected with licensed premises in such a way as to interfere with or prevent them from enforcing the beverage law in an unbiased and unprejudiced manner.[5] While provisions allowing law enforcement officers to provide security and entertainment services as well as allowing employment by an establishment selling only beer and wine for off-premises consumption were added after the issuance of a 1958 Attorney General Opinion, the underlying intent of preventing biased or prejudiced enforcement of the beverage law does not appear to have changed.[6]

The statute also independently prohibits a law enforcement officer from engaging in the sale of alcoholic beverages.[7] The statute does not define the term and no case law provides direction. However, in the absence of a statutory definition, the plain and ordinary meaning of words can be ascertained, if necessary, by reference to a dictionary.[8]

The word "engage" means "to secure for aid, employment, use, etc.;" "to occupy oneself; become involved"[9] and also "[t]o participate or cause to participate; involve[.]"[10] Thus, a law enforcement officer may not be involved in or be used in the sale of alcoholic beverages. This prohibition is independent of the employment prohibition and appears to reach beyond mere employment.

In an informal opinion issued in 2009, this office reviewed the prohibition against a law enforcement officer being "engaged" in the sale of alcoholic beverages in a situation in which the

officer wanted to serve as the commander of his local American Legion post.[11] The post held a state alcoholic beverage license and operated a canteen dispensing alcoholic beverages. According to information submitted with the opinion request, the American Legion treated the post and the canteen as separate elements: the post was under the control of the commander and the canteen under the control of a bar manager. The question presented was whether section 561.25, Florida Statutes, would preclude the law enforcement officer serving as post commander.

After reviewing the language and legislative intent of section 561.25, Florida Statutes, the opinion concluded that "it does not appear that the fact that a bar manager operates a canteen within the post would sufficiently separate the commander of the post from the prohibition contained in section 561.25, Florida Statutes." Thus, this office suggested consultation by the law enforcement officer with his employing agency and the Criminal Justice Standards and Training Commission due to the potential for the suspension or removal from office for violations of section 561.25, Florida Statutes.

Applying this reasoning to the fact situation you have presented, it would appear that so long as the law enforcement officer is not involved in any way in the sale of alcoholic beverages or employed in connection with the operation of any business licensed under the beverage law, he or she may volunteer to participate in activities at a licensed alcoholic beverage establishment without violating the provisions of section 561.25(1), Florida Statutes. In Attorney General Opinion 2010-13, this office concluded that a law enforcement officer could volunteer to tend bar at a fund raiser for charity or at a dinner honoring others so long as no sales of alcoholic beverages occurred.[12]

To summarize, the prohibition contained in section 561.25, Florida Statutes, does not prohibit law enforcement officers from being related in any degree of consanguinity or affinity to any person who may have an ownership interest in a business licensed under the beverage law. The statute is penal in nature and must be strictly construed. In the absence of any suggestion that the Deputy Sheriff himself owns stock or is possessed of some ownership interest in the alcoholic beverage business, it would appear that a strict construction of the statute would not support a violation of section 561.25, Florida Statutes. With regard to unpaid volunteer activities, it appears that a law enforcement officer may volunteer to participate in unpaid activities at a licensed alcoholic beverage establishment without violating the provisions of section 561.25(1), Florida Statutes.

I must caution, however, that any favoritism demonstrated by the Deputy Sheriff toward his spouse's business may constitute a violation of section 112.313(6), Florida Statutes, a provision of the Code of Ethics for Public Officers and Employees:

"MISUSE OF PUBLIC POSITION.(No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31."

I trust that these informal comments will assist you in advising your client, Sheriff Borders, in the

development of personnel policies.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] Section 943.10(1), Fla. Stat., defines the term "[l]aw enforcement officer" to mean:

"any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency."

And see Op. Att'y Gen. Fla. 53-311 (1953) (s. 561.25, Fla. Stat., applies to deputy sheriff).

[2] *See Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) (when statute enumerates the things upon which it operates or forbids certain things, it is ordinarily construed as excluding from its operation all things not expressly mentioned).

[3] Section 561.25(2), Fla. Stat., states: "Any person violating this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and shall be automatically removed or suspended from office."

[4] *See Baillie v. Town of Medley*, 262 So. 2d 693 (Fla. 3d DCA 1972) (anti-nepotism statute penal in character and therefore strictly construed); *State ex rel. Robinson v. Keefe*, 149 So. 638 (Fla. 1933). *Cf. Daniels v. Gillespie*, 335 So. 2d 353 (Fla. 2d DCA 1976).

[5] *See* Op. Att'y Gen. Fla. 58-16 (1958).

[6] *And see* Inf. Op. to Rep. Thompson, dated January 9, 2009, discussing the application of the statute to a certified law enforcement officer who was serving as the post commander of his local American Legion post.

[7] *See* Ops. Att'y Gen. Fla. 00-06 (2000) (the word "or" is generally construed in the disjunctive when used in a statute or rule and normally indicates that alternatives were intended); 96-52 (1996); 89-74 (1989); *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986); *Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers*, 334 So. 2d 563 (Fla. 1976); *Fort Walton Beach Medical Center, Inc. v. Dingler*, 697 So. 2d 575 (Fla. 1st DCA 1997).

[8] *See Green v. State*, 604 So. 2d 471, 473 (Fla. 1992); *Plante v. Department of Business and Professional Regulation*, 685 So. 2d 886, 888 (Fla. 4th DCA 1996), *WFTV, Inc. v. Wilken*, 675 So. 2d 678 (Fla. 4th DCA 1996); *State v. Cohen*, 696 So. 2d 435 (Fla. 4th DCA 1997).

[9] Webster's New Universal Unabridged Dictionary (2003), p. 644.

[10] The American Heritage Dictionary (Office Edition 1983), p. 234.

[11] Inf. Op. to the Honorable Nick Thompson, dated January 9, 2009.

[12] *See* Op. Att'y Gen. Fla. 10-13 (2010).