Alcoholic Beverages, Law Enforcement Officer

Number: INFORMAL

Date: January 09, 2009

The Honorable Nick Thompson
Representative, District 73
2120 Main Street, Suite 208
Fort Myers, Florida 33901

Dear Representative Thompson:

You have asked for this office's comment on the ability of Mr. John Ebling, a certified law enforcement officer, to serve as the post commander of his local American Legion post which holds a state alcoholic beverage license and operates a canteen dispensing alcoholic beverages. You state that the by-laws of the American Legion treat the post and the canteen as separate elements, with the post under the control of the commander and the canteen under the control of a bar manager. You question, however, whether section 561.25, Florida Statutes, would preclude Mr. Ebling's serving as post commander.

While this office is limited in its ability to render formal opinions only to public officials on questions of law relating to their own official powers and duties, the following general comments are offered.

Section 561.25, Florida Statutes, provides:

"(1) No officer or employee of the division, 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."

The plain language of section 561.25, Florida Statutes, prohibits the employment of a law enforcement officer[1] in 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 are employment by an establishment selling only beer and wine for consumption off premises and the employment of an off-duty officer as an entertainer or for the provision of security services. Where the Legislature has set forth exceptions to the operation of a statute, no others may be implied to be intended.[2] Thus, clearly an officer with state police power is precluded 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 prohibited from engaging in the sale of alcohol.

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. Inasmuch as the statute is penal in nature,[3] it must be strictly construed.[4]

This office has previously stated in Attorney General Opinion 58-16 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. 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 the 1958 opinion. The underlying purpose of preventing biased or prejudiced enforcement of the beverage law, however, appears to be intact.

The factual determination to be made is whether Mr. Ebling is engaging in the sale of alcoholic beverages or may be considered an employee, directly or indirectly of the American Legion post. Regrettably, this office does not resolve mixed questions of law and fact, as that would be more appropriately presented to a court of competent jurisdiction. However, assuming Mr. Ebling is not an employee of the post, there remains the question of whether he is engaging in the sale of alcohol by his being the commander of the post. Again, it remains a mixed question of law and fact that may not be resolved definitively by this office.

While you have stated that the canteen is operated by a bar manager, separate and apart from the commander of the post, the license is held by the American Legion post and as post commander, Mr. Ebling would apparently have specific duties and responsibilities regarding the operation of the post. The canteen would appear to be an integral part of the overall operation of the post; however, this office has not been supplied a copy of the post's by-laws or any other documents reflecting the commander's responsibilities. It would not appear that the mere fact that a bar manager oversees the operation of the canteen would sufficiently separate the post from its interest in the beverage license.

In light of the fact that the beverage license is held by the American Legion post, 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. It may be advisable to consult with Mr. Ebling's employing agency and the Criminal Justice Standards and Training Commission, due to the potential for the suspension or removal from office for violation of section 561.25, Florida Statutes.

I trust that these informal comments will be of assistance to you in resolving this matter.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tsh

cc: Mr. John Ebling

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[1] Section 943.10(1), Fla. Stat. (1993), defines "[l]aw enforcement officer" as

"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."

[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), Florida Statutes, 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).