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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 19, 1995

Jeffrey M. McWhorter, Director of Public Safety
Berkeley County School District
P. O. Box 608
Moncks Corner, South Carolina 29461

Re: Informal Opinion

Dear Mr. McWhorter:

Attorney General Condon has referred your letter to us for reply. You have asked whether a manufactured canister of pepper spray, which is commonly marketed for self defense could be considered a "weapon" pursuant to S.C. Code Ann. Section 16-23-430. It is my opinion that it can be.

Section 16-23-430 provides in pertinent part:

> [i]t shall be unlawful for any person, except State, county, or municipal law enforcement officers or personnel authorized by school officials, to carry on his person, while on elementary or secondary school property, a knife, with a blade over two inches long, a blackjack, a metal pipe or pole, firearms or any other type of weapon, device or object which may be used to inflict bodily injury or death.

Primary among considerations in interpreting a statute is discerning the Legislature's intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Where words in a statute are plainly expressive of the General Assembly's intent, the interpretation must carry out that intent. Independence Ins. v. Independent Life and Acc. Ins. Co., 218 S.C. 22, 61 S.E.2d 399 (1950). A plain and ordinary meaning must be given to the words employed without resort to a forced or subtle construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). While a penal statute is to be strictly construed, this rule should not be used to defeat the intent of the

General Assembly. State v. Johnson, 16 S.C. 187 (S.C. 1881). The rule of strict construction of a penal statute is not violated where the court gives the statute a sensible meaning in conformity with the sense intended. State v. Firemen's Ins. Co. of Newark, N.J., 164 S.C. 313, 162 S.E. 334 (1931).

Enacted in 1971, Section 16-23-430 has been amended at least twice in response to school violence. First, the statute was amended as part of the "Safe Schools Act of 1990" and then again in 1993 for the very same reason -- the problem of weapons on school grounds. Subsection (1) of Section 16-23-430 is broadly written and all-inclusive. Not only does the Subsection specify certain obvious weapons which are prohibited, such as knife, blackjack and firearms, but the provision also mandates that "any other type of weapon, device or object which may be used to inflict bodily injury or death ..." is proscribed on any elementary or secondary school property. (emphasis added). Therefore, the legislative intent is clear and unambiguous.

Without question, substances such a pepper spray are viewed as "weapons" irrespective of whether they are "commonly marketed for self-defense." A "weapon" is defined as an instrument of either offensive or defensive combat -- something to fight with. Highsaw v. Creech, 17 Tenn. App. 573, 69 S.W.2d 249, 252 (1933). Thus, devices used for similar purposes, such as a tear gas pen-gun which utilizes air to release tear gas, was deemed a "weapon" in State v. Seng, 189 N.J. Super., 213 A.2d 515, 516 (1965). While there, the court held that the pen-gun was not the type of "weapon", such as a firearm, deemed regulated by the Legislature in the particular statute at issue, the Court, without question, also found that "[t]he gun at issue here is for defensive use in deterring and defeating a would-be assailant, and thus clearly a 'weapon' under the" commonly understood definition, referenced above. Moreover, this Office has previously described the "paralyzer", a tear gas chemical defense device, as a "weapon". Op. Atty. Gen., February 28, 1973. As well, we have so referred to chemical mace. Op. Atty. Gen. , February 14, 1968. Thus, I am of the opinion that a pepper spray canister easily is the type of "weapon" which the Legislature sought to keep off school property.

In addition, the statute not only prohibits "weapons" on school property, but forbids "... any other type of weapon, device or object which may be used to inflict bodily injury ..." (emphasis added). Clearly, in my view, pepper spray meets this test.

The term "bodily injury" includes physical pain, illness or impairment of the physical condition. In re Harvey, 141 B.R. 164, 169 (E.D. Dis. 1992). Further, a minor injury can constitute a "bodily injury". Reining v. State, 606 S.W.2d 1098, 1103 (Miss. 1992); compare, State v Heek, 304 S.C. 345, 404 S.E.2d 514 (1991) [a "deadly weapon" is any article, instrument or substance likely to produce death or great bodily harm.] So

may physical pain. State v. Melton, 239 Neb. 576, 477 N.W.2d 154, 155 (1991); Woods v. State, 460 N.E.2d 503, 505 (Ind. 1984). Under South Carolina insurance law, even emotional distress may be included. Allstate Ins. Co. v. Biggerstaff, 703 F.Supp. 23, 25 (D. S. C. 1989), citing, State Farm v. Ramsey, 295 S.C. 349, 368 S.E.2d 477 (Ct. App. 1988), affd, 374 S.E.2d 896 (S.C. 1988). "Pepper spray" or "oleoresin capsicum" causes physical discomfort when discharged upon a sensitive part of the body such as the face, eyes, nose or mouth, when sprayed in a person's face, it is capable of producing temporary physical discomfort such that it renders an attacker harmless. People v. Autterson, 68 Cal. App. 2d 627, 68 Cal. Reptr. 113 (1968). See also, Op. Atty. Gen. , October 3, 1969 [when sprayed on humans, disables them in the manner of tear gas]; U.S. v. Harris, 44 F.3d 1206 (3d Cir. 1995) [depending upon facts, mace may cause "bodily injury"].

Thus, while the effects of pepper spray are only temporary, the substance is marketed for self-defense and a violation of the statute is ultimately a question for the jury, it is my opinion that this product is a "... weapon, device or object which may be used to inflict bodily injury ....", as envisioned by the Legislature, and thus the carrying of such on elementary or secondary school property is proscribed by Section 16-23-430. Although the purpose for which such substance is marketed may be defensive, its use is not so limited. It is not difficult to imagine a student employing such substance, just like any other weapon to threaten or harm a fellow student or teacher. Any weapon, such as a pistol, may be called "defensive", but can still be used to inflict bodily injury. Accordingly, for purposes of the referenced statute, I see no distinction between a canister of this substance and any other "weapon, device or object ... used to inflict bodily injury ...."

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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