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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 26, 1996

Rob Evans, Acting Chief
Ridgeway Police Department
P. O. Box 24
Ridgeway, South Carolina 29130

Re: Informal Opinion

Dear Chief Evans:

You have raised the following question and requested an opinion thereupon:

> ... can a chief of police or head of a law enforcement agency enact and enforce a policy and procedure prohibiting a certified officer from working in an establishment that sells alcoholic beverages?

In Rhodes v. Smith, 273 S.C. 13, 254 S.E.2d 49 (1979), a deputy sheriff was employed in his off-duty hours at a local steak house which sold alcoholic beverages. Subsequently, the sheriff promulgated a regulation prohibiting employees of the sheriff's office from "moonlighting" in establishments licensed to sell alcoholic beverages. The Sheriff discharged the deputy when he failed to terminate his employment at the steak house. The deputy sued the sheriff for violation of his constitutional rights and specifically attacked the regulation as arbitrary and discriminatory.

Our Supreme Court upheld the trial judge's dismissal of the complaint and concluded that the regulation was valid. The Court noted that "[s]imilar regulations have withstood constitutional attack elsewhere." [citing cases]. Quoting Croft v. Lambert, 228 Or. 76, 357 P.2d 513, 515 (1960), the Court recognized that a sheriff [or police chief] "... must be on guard against conflicts of interest in law enforcement ...." Thus, a regulation

of the Spartanburg Sheriff's Department which forbade employees form working off-duty in any establishment licensed to sell alcohol has been upheld.

Other cases in other jurisdictions since Rhodes have sustained such regulations. In Puckett v. Miller, 821 S.W.2d 791 (Ky. 1992), it was determined by the Supreme Court of Kentucky that regulations prohibiting police officers from engaging in off-duty employment in establishments engaged primarily in the sale of alcoholic beverages did not violate state statutes setting forth the rights and duties of police officers. The Court noted that "[p]rohibition of certain types of employment is one means of preventing conflicts of interest and a decline in community respect for the police." 821 S.W.2d at 794. Since employment of police officers in establishments which primarily sell alcoholic beverages--such as bouncers or bartenders in bars--was the type of activity "which conflicts with their official duties", the Court concluded that the Legislature did not intend to preclude local governments and police departments from regulating this type of activity.

In Decker v. City of Hampton, Va. 741 F.Supp. 1223 (E.D.Va. 1990) a police detective challenged regulations which, among other things, prohibited officers from engaging in any employment or business involving the sale or distribution of alcoholic beverages. The Court upheld the regulations as constitutionally valid under both the Due Process and Equal Protection clauses. While in that instance, the particular officer was challenging other prohibitions in employment in the regulations (against working off-duty as a private investigator), it is clear the Court deemed the regulations as a whole to be valid. The Court noted, for example, that "courts in numerous other jurisdictions have upheld regulations prohibiting all outside employment by police officers." Therefore,

> [i]f a total prohibition of off duty work does not violate the due process clause, then Regulation 5.12, which only partially limits off duty work, would not be in violation of the plaintiff's assumed liberty interest under the due process clause.
>
> In light of all these considerations the Court finds that Regulation 5.12 bears a rational connection to the promotion of safety of persons and property and that it certainly cannot be considered arbitrary and irrational. Therefore, the Court finds no deprivation of any assumed liberty interest that the plaintiff may have in pursuing off duty employment as a private investigator.

> ... [T]he Police Division must consist of police officers who do not engage in any activities that will create a conflict of interest with their official duties, who are in optimal physical and mental condition. For the same reasons as stated in the due process portion of the opinion, The Court finds that Regulation 5.12 is rationally related to these interests.

741 F.Supp. at 1228.

In FOP, LOCAL LODGE 73, v. Evansville, 559 N.E.2d 607 (Ind. 1990), the Supreme Court of Indiana addressed the constitutionality of the following rule issued by the Chief of the Evansville Police Department:

> General
>
> 1. officers of the Department will not engage, either directly or indirectly, in any off-duty employment:
>
> A. Where alcoholic beverages are sold and consumed;

In the case below, the Court of Appeals had declared this provision invalid. The Appeals Court had found this regulation did not bear a reasonable relationship to the police officers' fitness or capacity as officers.

The Supreme Court of Indiana reversed and concluded:

> [i]n McAtee v. Mentzer (1984), W.Va., 321 S.E.2d 699, the Supreme Court of Appeals of West Virginia upheld reasons similar to those of the City of Evansville in a nearly identical case. The rule in McAtee prohibited police officers from engaging "either directly or indirectly as a vendor of intoxicating liquors." The court found the City's interests in avoiding liability and in preventing conflicts of interest were sound public policy. Id. at 702. That court's ruling is in accordance with the views of the U.S. Supreme Court and appellate courts of this State. In Kelley [v. Johnson (1976), 425 U.S. 238, 247, 96 S.Ct. 1440, 1446, 47 L.Ed.2d 708, 715-16] ... the Supreme Court upheld a county regulation limiting

> police officers' hair length despite claims it violated the officers' first amendment freedom of expression and fourteenth amendment guarantees of due process and equal protection .... In addition, the Indiana Court of Appeals has recognized "[f]rom the very nature of a policeman's duties, his conduct in the community on and off duty must be above reproach." Pope v. Marion County Sheriff's Merit Bd. (1973), 157 Ind.App. 636, 646-647, 301 N.E.2d 386, 391. All of these cases directly support the City of Evansville's rationales for its rule. FOP and the officers have failed to show that there is no rational connection between SOP 313.00 and the City's interest in protecting its citizens.
>
> Because the City's justifications for SOP show a rational connection between the rule and the City's objective in promoting the safety of persons and property, we find that the trial court correctly ruled in favor of the City of Evansville.

599 N.E.2d at 609-610.

Pursuant to Section 5-7-110, "[a]ny municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties." As I understand it, The Town of Ridgeway has the mayor-council form of government, codified at S.C. Code Ann. 5-9-10 et seq. Pursuant to § 5-9-30 (1), the mayor is empowered to suspend or remove all municipal employees "for the good of the municipality ...".

In Bunting v. City of Columbia, 639 F.2d 1090 (4th Cir. 1981), the Fourth Circuit Court of Appeals addressed the question of the rights of police officers in South Carolina under the Due Process Clause of the Fourteenth Amendment. In that case, the Fourth Circuit interpreted § 5-13-90 which authorized the city manager under the council-manager form of government to dismiss any city employee "for the good of the municipality", language similar to that employed in § 5-9-30 (1). The Court concluded that such language created no expectancy of continuation in employment. Noting that the City of Columbia had also adopted an ordinance permitting the city manager to dismiss employees for the good of the city, the Court concluded:

> [s]uch provisions indicate that city employees do not have a property interest in their employment but rather that they hold

> their positions at the will and pleasure of the city. Accord, Bane v. City of Columbia, 480 F.Supp. 34 (D.S.C. 1979); Gambrell v. City of Columbia, No. 77-CP-40-1312 (Court of Common Pleas of Richland County, South Carolina, December 19, 1979).
>
> No other state statute or constitutional provision mandates any other conclusion. Cf. Rhodes v. Smith, 273 S.C. 43, 254 S.E.2d 49, 50 (1979) (South Carolina statute allowing sheriff to dismiss his deputy sheriff at the sheriff's pleasure was not affected by the County and Municipal Employees Grievance Act. S.C. Code § 8-17-110 (1976). Furthermore, nothing in the city's personnel policy manual can be read as granting a city employee a property interest in his job. Although the policy manual accords permanent employees certain procedural protections when they are dismissed by a department head rather than by the city manager, such protections do not negate the fact that a city employee holds his position at the will of the city and can be dismissed by the city manager without any procedural protections. See Bane v. City of Columbia, 480 F.Supp. 34 (D.S.C. 1979).

The Court went on to conclude that while the police officers "did not have any constitutional rights implicated in their dismissal, ... they are entitled to a grievance hearing under the County and Municipal Employees Grievance Procedure Act ... S.C. Code § 8-17-110 (1976)."

Moreover, our Supreme Court recently opined on the issue of employee handbooks as related to municipal employees in Marr v. City of Columbia, 307 S.C. 545, 416 S.E.2d 615 (1992). There, the front cover of the City of Columbia's employee handbook disclaimed on the front cover and elsewhere that the handbook intended to constitute a contract. Furthermore, the handbook specifically stated that employees of the city "are employees-at-will who may quit at anytime for any reason and who may be terminated at anytime for any or no reason." The Court noted that "[t]he record is devoid of any evidence that either the City or Marr treated the employee handbook as a contract notwithstanding the disclaimer." Accordingly, the Court held that

> [i]f an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound

> by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document. Small v. Springs Indus., Inc. 292 S.C. 481, 485, 357 S.E.2d 452, 455, 485 (1987) ... Where, as here, the employer conspicuously disclaims the handbook as a contract and the parties have not waived the disclaimer, summary judgment for the employer on the issue of whether the handbook forms an employment contract is appropriate. We affirm.

307 S.C. at 547.

In an Opinion of March 24, 1980, we concluded that "any agency may promulgate its own rules and regulations which govern persons within that agency" and, therefore, if a police department or a Town has promulgated regulations prohibiting certain activity by employees" these guidelines would control an employee of that agency." See also, Op. Atty. Gen., April 26, 1976; April 15, 1975. Thus, I suggest you consult with your town attorney regarding the wording and scope of such regulation or rule as you might desire, as well as any existing rules or regulations or handbooks governing Town employees which the Town of Ridgeway may have adopted. However, as to the constitutional validity of rules or regulations prohibiting police officers being employed, working for or being affiliated with establishments licensed to sell alcoholic beverages, based upon the foregoing authorities, I advise that courts have generally upheld such rules and regulations as valid.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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 am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an