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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

July 14, 1998

Sergeant Thad Turner
Training Office
Orangeburg Department of Public Safety
P. O. Box 1425
Orangeburg, South Carolina 29116-1425

Re: Informal Opinion

Dear Sergeant Turner:

You state that Chief Wendell Davis has requested that a policy be written and implemented which restricts the consumption of alcoholic beverages at nightclubs and bars within the City of Orangeburg by officers employed in his department. You indicate that your Department has had "several problems stemming from officers being involved in incidents at these type establishments." You have included a draft of the policy in question and seek an opinion concerning the constitutionality of the policy. Your specific concern is the following provision which provides in pertinent part:

> 20.07.4 PROCEDURE
>
> Alcoholic Beverage
>
> No member of the Department will use or be under the influence of an alcoholic beverage or any intoxicating substance while in an on-duty status.
>
> No member of the Department will at any time purchase or consume any alcoholic beverage while wearing any piece of clothing, badge, ID card, or other

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Request Form.

> symbol depicting or representing the Orangeburg Department of Public Safety.
>
> **No member of the Department will purchase, possess, or consume an alcoholic beverage from a business licensed for "on premise consumption" within the city of Orangeburg**. The only exception to this requirement will be in the event of special operations or functions that permit or require such actions and only with the approval of the Director. In such events, no member of the Department will consume alcoholic beverages while wearing the Department uniform. (emphasis added).

Law / Analysis

With respect to the regulation of a police officer's off-duty conduct, it is well-recognized that

> [o]ff-duty conduct is a proper subject to be covered by departmental rules and regulations. A rule regulating off-duty conduct must be reasonably necessary for the continued efficiency of the public service being rendered by the particular department in order to be a valid basis for disciplinary action. It must bear a real and substantial relationship to the public service offered. Rules or regulations prohibiting drug use or intoxication from alcoholic beverages have a real and substantial relationship to the public service of providing adequate fire and police emergency personnel.

16A McQuillin, Municipal Corporations, § 45.34. See also, § 45.35.50 ["... a police officer may be disciplined for becoming intoxicated while off-duty where such conduct violates a police department rule prohibiting a member of the department from drinking alcoholic beverages when off-duty to an extent which would render him or her unfit for immediate duty."]

Moreover, 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, 88 A.L.R.2d 1227 (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 from working off-duty in any establishment licensed to sell alcohol has been upheld.

Other cases in other jurisdictions since Rhodes have approved regulations similar to that upheld in that case. 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." 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". 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).

I have been unable to locate any case or decision which specifically addresses the constitutionality of a regulation or policy such as you are contemplating, in other words, one which seeks to prohibit members of the police department from frequenting bars or taverns within the city limits. The rationale for upholding such a rule or policy would, however, undoubtedly be the same as that of regulations which prohibit the off-duty employment of officers in establishments licensed to sell alcoholic beverages - to avoid appearances of conflicts of interest, potential liability and protect the public image and integrity of the police department. Since police officers are required to enforce the laws relating to alcohol and to patrol such establishments while on duty, the city would undoubtedly possess a legitimate interest in having its officers not seen as frequenting or patronizing such establishments when they are off-duty. While as yet no case appears to have addressed this type of regulation, in my judgment, sound constitutional arguments can be made in its defense. However, while I am of the view that such a regulation is constitutionally valid, in that it promotes the integrity of the police department, I cannot say this with absolute certainty inasmuch as no court as yet appears to have addressed the question, Cf., Timmons v. Munic. Fire and Police Civil Service Bd., 395 So.2d 1372 (La. 1981) [departmental order prohibiting police officer from drinking in bar while on sick leave "bears a real and substantial relationship to the appropriate governmental objective of maintaining public confidence in the police force."] Id. at 1375. You thus may wish to consult with your town attorney regarding this matter to determine whether a declaratory judgment to test the validity of the policy is a possibility.[1]

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[1] I would note that our Supreme Court has opined on the issue of employee handbooks in Marr v. City of Cola., 307 S.C. 545, 416 S.Ed.2d 615 (1992). There, the Court emphasized the need for a disclaimer by the employer if such are intended as "purely advisory statements ... ." In addition, in an Opinion of March 24, 1980, we concluded that "any agency may promulgate its only 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,

(continued...)

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

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[1](...continued)
1975. Again, I would suggest you consult with your town attorney regarding the wording and scope of any regulation or rule as well as any existing rules or regulations governing town employees.