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The State of South Carolina



Office of the Attorney General

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May 20, 1991

The Honorable John Drummond
Senator, District No. 10
Suite 213
Gressette Senate Office Bldg.
Columbia, South Carolina 29202

Re: ABC Ruling 91-12

Dear Senator Drummond:

You advise that the Alcoholic Beverage Control Commission has recently issued an advisory ruling (ABC Ruling 91-12) wherein the Commission determined that the Alcoholic Beverage Control Act (South Carolina Code Section 61-1-10, et seq.) prohibits a holder of various retail beer and wine permits from transferring beer from one permitted location to another location even where a sale of beer between the singularly owned outlets is not involved. You raise the question whether this policy should have been promulgated in accordance with the notice and review procedures of the Administrative Procedures Act (South Carolina Code Section 1-23-10, et seq.). You further advise that the ABC Act does not expressly prohibit the inter-retail transfer of beer among various outlets owned by the same permittee. The Commission has also asked for our advice upon its ruling. I agree with your assessment that if the Commission desires to prohibit the inter-retail transfer of beer, this prohibition should be promulgated pursuant to the Administrative Procedures Act.

ALCOHOLIC BEVERAGE CONTROL ACT

As you suggest, it appears that the Alcoholic Beverage Control Act does not expressly prohibit the transfer of beer from one permitted location to another where the sale of beer between the singularly owned outlets is not involved. Nonetheless, there are several statutory and regulatory provisions that relate to the question. These related provisions suggest that such a prohibition against inter-retail transfers would be consistent with the overall

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statutory scheme regulating beer and wine distributions in South Carolina. Section 61-9-1100, among other things, restricts the distribution of beer by wholesalers to designated territories. This Office has earlier concluded that Section 61-9-1100 does not proscribe the transfer of beer between retailers.

While it is clear, and you have so recognized, that the General Assembly was concerned with promoting the fair and efficient distribution of beer throughout the state in the enactment of § 61-9-1100, and in providing for the regulation of that distribution, it is equally clear that the General Assembly did not choose to accomplish this identified purpose by regulating the transfer or sale of beer by retail outlets. Nothing in the identified legislation provides a regulatory scheme that restricts the distribution of beer by retailers or, in particular, prohibits a retailer from selling or transferring beer or wine to another retail location. Thus, if there exists a proscription upon such activity, it must be found elsewhere.

Op. Atty. Gen., September 12, 1985.

Section 61-9-310 expressly prescribes that a separate permit is required for each discrete place of business. The Commission has interpreted this provision as requiring a separate permit for each beer and wine outlet, even where several outlets are owned by the same person or entity. Nonetheless, there is nothing contained within Section 61-9-310 that speaks to the transfer of beer from one retail location to another.

Alcoholic Beverage Control Commission Regulation 7-92 provides in part:

It shall be unlawful for a person who holds a retail beer and wine permit or a retail beer permit to sell to any other holder of a retail beer and wine permit or retail beer permit for the purpose of resale of beer and/or wine unless such a retail permit holder also has a wholesale permit to sell beer and/or wine for wholesale purposes.

[Emphasis added.] This Office has previously advised that, the language of R7-92 supports the agency's position that R7-92 is inapplicable to transfers of

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beer between retail locations owned by the same person. [Footnote omitted.] First, we recognize that the regulation is limited in its proscriptive scope to the 'sale' of beer and wine by a retail dealer. The word 'sale' or 'sell' as used in enactments involving alcoholic beverages ordinarily means 'the transfer of title to the liquor from one person to another.' Anno. 89 ALR 3rd 551 'What constitutes 'sale of liquor.' And ordinarily there must be a distinct 'seller' and a distinct 'purchaser.' Scoggin v. Morrilton, 124 Ark. 585, 187 S.W. 445 (1916); see also, 48 C.J.S. 'Intoxicating Liquor' § 244. Thus, an application of R7-92 consistent with the use of the word 'sale' in its ordinary significance would not proscribe transfers of beer between retail locations owned by the same person. By comparison, the Commission in R7-35 uses the broader term 'transfer' in prohibiting transfers from one retail liquor outlet to another. But, however, the Commission provides that a transfer between distinct outlets is not prohibited if the outlets are owned by the same person. Surely, the Commission would have drafted R7-92 in similar language if it intended to make it applicable to all transfers of beer and wine and not just sales.

Op. Atty. Gen., supra. Thus, we have previously advised that R7-92, when applied in its literal or ordinary significance, would not prohibit the transfer of beer from one outlet to another if the transaction does not constitute a sale.

This analysis of the ABC Act does not suggest that the prohibition of such inter-retail transfers is not consistent with the regulatory scheme prescribed by the General Assembly and the Commission or that such a prohibition would not serve a legitimate purpose; but, however, the analysis does show that neither the Legislature nor the Commission, through a duly promulgated regulation, has chosen to prohibit such transfers.

ADMINISTRATIVE PROCEDURES ACT

The South Carolina courts have recognized that there are two distinct types of rules. An interpretative rule is a rule or policy promulgated by an administrative agency to interpret, clarify or explain the statutes or regulations under which the agency

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operates. Young v. South Carolina Department of Highways and Public Transportation, 287 S. C. 108, 336 S.E.2d 879 (S.C. App. 1985). Interpretive rules are entitled to great respect by the courts, but they are not binding upon them. Id. Further, it is said that an interpretive rule effects no change in law or policy but merely explains or clarifies existing law or regulations. Allen v. Bergland, 661 F.2d 1001 (4th Cir. 1981). On the other hand, a legislative rule has the force and effect of law. Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1979). Although the distinction between interpretive and legislative rules is well recognized at law, it is often easier to articulate these differences than to apply them.

The legislative regulation is an exercise of a permissive authority to make a law to supplement or make effective the law passed by the [General Assembly]. The interpretive regulation is not new law, but rather construction of a disputed item in a statute. In practice this distinction becomes blurred and may be difficult to administer. . . .

Davis, Administrative Law Treatise (2d ed.), § 7.9, at 49.

Courts have applied various tests or standards to assist in determining whether a particular rule or regulation is legislative or interpretive. It is said that when a rule purports to change the law or effects a substantial change, generally the rule will be characterized as legislative. Davis, supra, § 7.8. Similarly, if a rule purports to create a law or standard rather than interpret existing laws or standards, it will generally be considered a legislative rule. Id. Moreover, if a rule has a substantial impact, some courts have found that the rule is legislative in nature. Stein, Mitchell, Mezines, Administrative Law, § 15.06; but see, Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (T.E.C.A. 1978). Thus, I advise that ordinarily rules or regulations that add to existing statutes or regulations are legislative and those that merely offer the opinion of the administrator as to what the terms of existing statutes or regulations mean are interpretive. I caveat this advice with my recognition that the courts of this state have neither adopted any of these identified tests nor have the courts provided much guidance upon the question whether a particular rule is legislative or interpretive.

Similarly, the courts of this state have not resolved whether interpretive rules must be promulgated pursuant to the APA. Nonetheless, the commentators have generally assumed that agencies need not follow any specific procedure in adopting interpretive

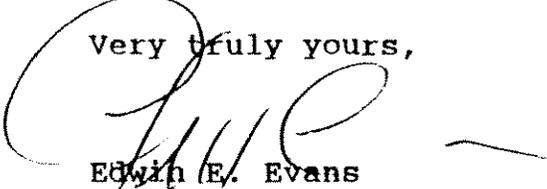
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rules. See, Shipley, South Carolina Administrative Law (2d ed.), at 4.4; South Carolina Code Section 1-23-10 (4) ["Regulation," as that term is used in the APA, does not include 'advisory opinions of any agencies.']; Allen v. Bergland, supra. Thus, I advise that an agency rule or policy that merely interprets the terms of existing statutes or duly promulgated regulations probably does not have to be promulgated pursuant to the APA.

ANALYSIS

I believe that ABC Ruling 91-12, Part II, creates a discrete regulatory standard or proscription that is not found in existing statutes or promulgated regulations. Neither Section 61-9-310 nor 61-9-1100 can be reasonably construed as prohibiting the transfer of beer from one retail outlet to another. Whether ABC Commission Regulation 7-92 may be so construed is certainly a very close question and a court may ultimately determine that applying R7-92 to prohibit all inter-retail transfers of beer constitutes a reasonable interpretation of the regulation. But again, this Office has previously advised that the regulation "is limited in its proscriptive scope to the 'sale of beer by a retail dealer.'" Op. Atty. Gen., supra. We recognized in our prior opinion that the terms "sell" or "sale" as used in the ABC Act probably constitute terms of art that are intended to be more limited in scope than the more general term "transfer." Again, I believe that a prohibition upon the transfer of beer between retailers would be entirely consistent with the ABC Act's regulatory scheme, and the Commission could, if it so chooses, promulgate a regulation prohibiting such transfers. Nonetheless, such a prohibition would constitute an additional standard or prohibition intended to have the force and effect of law. Accordingly, I advise that should the Commission choose to prohibit all transfers of beer between retail outlets, even those owned by the same permittee, the Commission would probably be required to promulgate, pursuant to the APA, a regulation expressly prohibiting such transfers. I caveat, however, that this is a very close question that has not been definitively resolved by the courts of this state.

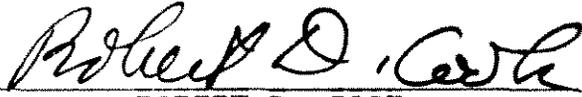
Very truly yours,


Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:



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