1974 S.C. Op. Atty. Gen. 241 (S.C.A.G.), 1974 S.C. Op. Atty. Gen. No. 3835, 1974 WL 21339

Office of the Attorney General

State of South Carolina
Opinion No. 3835
August 6, 1974

***1 In Re: Driver Licenses, Suspension for Out-of-State DUI Convictions**

Honorable S. N. Pearman
Chief Highway Commissioner
South Carolina Highway
Department
Post Office Box 191
Columbia, South Carolina 29202

Dear Mr. Pearman:
Mr. E. P. Austin, Jr., of the State Highway Department, Motor Vehicle Division, has referred to this Office a letter dated July 30, 1974, from James B. Stephen, Esquire, Attorney at Law, Spartanburg, South Carolina, inquiring as to the position of the Department relative to the exercise of its discretion in choosing to suspend or to withhold suspension of a South Carolina driver license upon notice of the conviction of the South Carolina driver for DUI in another state.

Section 46–179, 1962 Code of Laws of South Carolina, reads:
'The Department may suspend or revoke the license of any resident of this State or the privilege of a nonresident to drive a motor vehicle in this State upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this State, would be grounds for the suspension or revocation of the South Carolina license.'

Upon inquiry from the State Highway Department, this Office issued an opinion dated October 1, 1973, to the effect that the word 'may' in Section 46–179 should be construed as 'must', because, unless it was so construed, and applied, the Section would probably be unconstitutional as an unauthorized grant of discretion to an administrative agency of state government. In accordance with the advice contained in that opinion, the Department has since followed the practice of suspending all such licenses.

By Concurrent Resolution S–767, adopted March 26, 1974, the General Assembly, referring to driver license statutes generally, and to Section 46–179 specifically, expressed its intention that the word 'may' as used in Section 46–179 should be construed as meaning discretion or permission, and that the word was not intended to be construed as 'must'.

Although a concurrent resolution, unlike a joint resolution, does not have the force and effect of law, but is, instead, an expression of the sense of the two Houses concurrently, it does, nevertheless, carry great weight. Had it not been for serious constitutional problems foreseen, this Office would not have hesitated to advise the Department immediately to begin administration of Section 46–179 within its discretionary authority, i.e., suspending driver licenses when it saw fit to do so and withholding suspension in other cases.

Notwithstanding the great weight that must be accorded a concurrent resolution of the General Assembly, however, it is the duty of the Attorney General of the State to render opinions on the construction of statutes in accordance with constitutional principles. One of those basic principles is contained in both the Constitution of the United States

[Amendment XIV, Sec. 1] and the Constitution of South Carolina [Art. 1, Sec. 5] wherein it is stated that no person shall be denied 'the equal protection of the laws'.

***2** As the South Carolina Supreme Court has held many times, and as you know, of course, the 'equal protection' clauses mean that laws passed by Congress or the legislative bodies of the states must apply to all citizens equally - - - unless the law in question provides a national classification. Section 46–179 provides no classification at all, and, if 'may' as used therein is construed as permissive, gives to the Department the unbridled discretion, without any standard by which to be guided, to suspend the driver licenses of some citizens in the same circumstances as the licenses of other citizens are left unaffected. Such a situation can in no wise be reasonably construed as an even-handed application of state law.

The general rule is stated in an annotation in 12 A.L.R. 1435, p. 1436:
'- - - a statute or ordinance which vests arbitrary discretion - - - in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals - - - according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform - - - is unconstitutional and void.'

In light of the foregoing constitutional principle, which, in effect, means that all citizens must be fed from the same legislative and administrative spoons unless they are properly differentiated by class, rather than as individuals, this Office then, after careful thought and study, affirmed the position taken in its opinion of October 1, 1973, viz., that the Department may not suspend the licenses of some under the provisions of Section 46–179 and leave the licenses of others in the same circumstances in full force and effect.

Under normal rules of statutory construction, which is within the province of the judicial, rather than the legislative, branch of government, permissive wording in statutes will be read as mandatory in order to preserve the constitutionality of statutes. Sutherland Statutory Construction, Sec. 25.04, Mandatory and Permissive Statutes, cites Collins v. State, 213 A. 2d 835, 838, as follows:
'The word 'may' in a statute will be construed to mean 'shall' or 'must' whenever the rights of the public or of third persons depend upon the exercise of the power to perform the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or where a public duty is imposed upon public officers, and the public or third persons have a claim de jure that the power shall be exercised. Or, as the rule is sometimes expressed, whenever a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' will be read 'shall'.'

As expressed in Anthony A. Blanco, Inc. v. Hess, et al., 86 Ariz. 14, 339 P. 2d 1038, [10, 11] 1045 (1959):
***3** "It is a general principle of statutory construction that, when the word 'may' is used in conferring power upon any officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative, * * *'.'

In view of the foregoing, this Office was compelled to advise the Department that it did not have discretionary authority under the provisions of Section 46–179, and that it had a duty to enforce the provisions of the Section as mandatory rather than permissive, notwithstanding the Concurrent Resolution of March 26.

The only reasonable alternative, as I viewed the situation at that time, was for the Department to take the position that Section 46–179 was invalid as violative of the 'equal protection' clauses and suspend or revoke no South Carolina driver license or out-of-State privilege under its provisions. It was suggested that the latter course would be less desirable, however, for several reasons:

1. It is an accepted rule that a court will not find a statute invalid if it can be construed as constitutional by the application of recognized rules of statutory construction. In this case, as is stated herein, one of such rules is that permissive language will be construed as mandatory when necessary to preserve the validity of a statute.

2. Section 46–179 was enacted in 1959 - - - fifteen years ago - - - and it can be assumed that many South Carolina driver licenses have been suspended under its provisions since that time. If the Section is invalid now, under a construction of 'may' as permissive, it was invalid when it was enacted, and the Department would be faced with the almost impossible task of correcting those past unlawful suspensions.

Subsequently, effective July 18, 1974, the General Assembly enacted a joint resolution [R. No. 1421], which has the force and effect of law, directing the Highway Department to construe the word 'may' as used in Section 46–179 and other statutes relating to revocation of driver licenses as permissive and that the word 'may' as used therein 'shall in no wise be construed as the mandatory 'shall".

Assuming, without advising, that the Joint Resolution 1421 is a proper exercise of legislative authority, the Department is now prohibited from enforcing the provisions of Section 46–179 as mandatory.

In view of the foregoing, this Office reluctantly, but necessarily, concludes, in the light of Joint Resolution 1421, that the provisions of Section 46–179 are unconstitutional as violative of the 'equal protection' clauses of Section 1 of the Fourteenth Amendment and Article 1, Section 5,

Constitution of South Carolina, and that the Department may not suspend or revoke a South Carolina Driver license or out-of-State privilege pursuant to such Section.
Yours very truly,

Joseph C. Coleman
Deputy Attorney General

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