



ALAN WILSON
ATTORNEY GENERAL

July 16, 2020

The Honorable Gregory Hembree
Member
South Carolina Senate
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Hembree:

We received your letter requesting an opinion of this Office concerning licensure of a beer retailer. From your letter, you describe a situation in which a South Carolina citizen filed an application for a beer and wine license for a restaurant with the South Carolina Department of Revenue (the "DOR"). You explained the DOR denied the person's license based on the fact that his wife owns a majority interest in a licensed wholesale beer distribution business. However, the applicant ultimately received a license based on stipulations in an agreement with the DOR. Now the applicant would like to modify one stipulation that prohibits him from purchasing beer products from his wife's wholesale beer distribution business. You state "Husband believes this item to be excessive and punitive because approximately 65% of all retailer's beer sales come from products sold by his wife's company."

Based on these facts you request an opinion on the following two questions:

1. Whether a person who operates a retail beer business (Tier III) possesses a "financial interest" in his spouse's wholesale beer business (Tier II) when the person maintains financially separate lives from his spouse and the person purchases beer products from his spouse's wholesale beer business at standard prices? And,
2. Whether the S.C. Department of Revenue properly uses its regulatory power to prohibit a person who operates a retail beer business from purchasing beer products from his spouse's wholesale beer business?

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I. Financial Interest

From your letter, we understand your question centers around section 61-4-940 of the South Carolina Code (Supp. 2019). Section 61-4-940, titled "Practices between manufacturer, wholesaler, and retailer," is commonly referred to as the "Three-Tier Law." This statute addresses the relationship between beer and wine manufacturers, wholesalers, and retailers. Section 61-7-940(D) specifically states:

A manufacturer, brewer, and importer of beer are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. A person or an entity in the beer business on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in the beer business operation on another tier. This limitation does not apply to the interest held on July 1, 1980, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business.

S.C. Code Ann. § 61-4-940(D) (emphasis added).

This provision prohibits one person from maintaining ownership in more than one tier in the three-tiered system. Whether this statute prohibits the scenario you present depends on what the Legislature meant by the term "financial interest" and whether that includes a spouse's ownership in another tier. Neither section 61-4-940, nor any other provision in chapter 4 of title 61, appear to define "financial interest." Thus, your constituent asserts that because he and his wife maintain separate financial lives, he does not have a financial interest in her wholesale beer business.

To our knowledge, neither this Office nor the courts have interpreted the meaning of "financial interest" with respect to section 61-4-940(D). However, in a 2006 opinion, this Office considered the meaning of "financial interest" as used in section 38-53-190 of the South Carolina Code prohibiting law enforcement officers from having "an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as a bondsman." Op. Att'y Gen., 2006 WL 1207270 (S.C.A.G. Apr. 6, 2006) (quoting S.C. Code Ann. § 38-53-190). The opinion dealt with the question of whether someone could be appointed as a State Forestry Commission officer if their wife held a bail bondsman license and operated a bail bond

business. Id. We cited to a decision by the Administrative Law Division, Blackmon v. State Department of Insurance (Docket No. 95-ALJ-09-0696-CC), addressing the similar question of whether a bondsman's wife, who was an attorney, held a financial interest in husband's bail bond business. Id. In Blackmon, the Administrative Law Judge determined because the wife did not obtain any right, title, or share in any activity associated with the bail bondsman's financial affairs, she did not hold a financial interest in husband's bail bonding business. Id. (citing Blackmon, (Docket No. 95-ALJ-09-0696-CC)).

We also considered a prior opinion of this Office addressing whether ownership of stock in an insurance company by a wife would bar a husband from employment with the Department of Insurance based on a law prohibiting employees of the department from having direct or indirect interest in a business of an insurer. Id. (citing Op. Att'y Gen., 1975 WL 28888 (S.C.A.G. June 5, 1975)). "[T]he ownership by a wife of stock in an insurance company does not per se have any effect upon the husband's employment by the Department of Insurance unless there are some extrinsic circumstances, of which I am unaware, which would have the effect of vesting some interest in the husband." Id. (quoting Op. Att'y Gen., 1975 WL 28888 (S.C.A.G. June 5, 1975)).

We cited to a 1990 opinion addressing whether a law enforcement officer's wife could be a bail bondsman. Id. (citing Op. Att'y Gen., 1990 WL 599354 (S.C.A.G. Nov. 19, 1990)). In that opinion, we interpreted Rule 604 of the South Carolina Appellate Court Rules, which prohibited attorneys from being directly or indirectly involved in a surety business. Id. Rule 604 specified that it applies not just to the attorney, but to the members of their immediate family. Id. As such, the opinion determined that the rule "forbids acceptance of a bail bond or surety bond where a member of the immediate family, which would include a spouse, of a 'court officer' acted as bail or surety." Id. (quoting Op. Att'y Gen., 1990 WL 599354 (S.C.A.G. Nov. 19, 1990)). We noted since that opinion, Rule 604 was amended to remove the reference to the member's immediate family. Id. As such, we considered cases in other jurisdictions finding shared financial interests between husbands and wives based on the legal duty of the husband to provide for his wife. Id. (citing n Haislip v. White, 22 S.E.2d 361 (W.Va. 1942)). We rejected this theory based on our Supreme Court's holding in Hardee v. Hardee, 355 S.C. 382, 388, 585 S.E.2d 501, 504 (2003), finding such an argument "represents an outdated and unwarranted generalization of the sexes which is no longer warranted in today's society." Id.

Our 2006 opinion concluded

there is no absolute basis to conclude that a husband is necessarily financially interested in a wife's separate business. Such interest could be assumed if there was the continued obligation of the husband to provide monetarily for his wife. As noted in the decision by the Administrative Law Division in Blackmon, the word "interest" for purposes of Section 38-53-190 may be construed as "a right, title, or share which may be shown by demonstrating the party has obtained an advantage, profit or responsibility." Consistent with

these findings, it is my opinion that it could be determined in a given situation that a law enforcement officer does not have an interest, directly or indirectly, in the financial affairs of his wife's bail bond business for purposes of Section 38-53-190. Likewise, it could be determined that this officer is not directly or indirectly involved in his wife's surety business for purposes of Rule 604, SCACR.

Id. However, we ultimately concluded that whether or not a Forestry Commission officer has an interest in his wife's bail bond business involves a determination of fact. Id.

Prior opinions of this office have stated that the investigation and determination of facts "are beyond the scope of an opinion of this office." See: Ops. Atty. Gen. dated January 26, 2006 and November 28, 2005. As referenced previously, the individual in question has indicated that he has "no right, title, or share in the bondsman's (wife's) financial affairs" and that his occupational, business, and property interests are totally separate from those of his wife.

Id. Thus, we declined to make a factual determination on this issue. Id.

Here, similar to the amended Rule 604, section 61-4-940(D) does not specify the prohibition on holding a financial interest in another tier extends to family members. In addition, as you describe it, your constituent does not have a right, title, or share in his wife's beer distribution business. As such in accordance with our prior opinions, a court could find the "financial interest" referred to in section 61-4-940 does not extend to him. However, like our 2006 opinion, the determination as to whether the husband you describe has a financial interest in his wife's beer distribution business is a question of fact that can ultimately only be decided by a court. See Op. Att'y Gen., 2004 WL 736920 (S.C.A.G. Mar. 17, 2004) ("This office has repeatedly indicated that an opinion of this office cannot determine facts.").

Additionally, while our past opinions recognize instances in which a financial interest of one spouse does not necessarily translate to a financial interest of the other spouse, it is important to note the DOR came to a different conclusion in these circumstances. From your letter, we understand the DOR initially viewed your constituent's wife's ownership in a beer distribution business as a financial interest. First,

[i]t is the policy of this Office not to issue an opinion if another agency which has jurisdiction over the matter has already ruled or advised on the matter. In cases such as this, where an administrative citation has been issued by an agency and there is an administrative procedure and remedy available, this Office will not attempt by issuing an opinion to supersede the administrative authority or discretion of any officer, agency, or public body.

Op. Att’y Gen., 1999 WL 1425994 (S.C.A.G. Oct. 27, 1999)(citing Griggs v. Hodge, 229 S.C. 245, 92 S.E.2d 654 (1956)). We must also acknowledge courts generally give “deference to an administrative agency’s interpretation of an applicable statute or its own regulation.” Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). In addition, our Supreme Court instructs “[i]f the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’tl. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (citations omitted) (quotations omitted). Because the section 61-4-940(D) is silent as to what constitutes a “financial interest” for purposes of section 61-4-940(D), a court is likely to give great deference to the DOR’s interpretation.

II. Regulatory Power Of the Department of Revenue

You also inquire as to the ability of the DOR to use its regulatory power to prohibit a person operating a retail business from purchasing products from his or her spouse. Section 61-4-500 of the South Carolina Code (2009) requires applicants submit requests for permits to sell beer to the DOR and section 61-4-540 of the South Carolina Code (2009) gives authority to the DOR to issue permits for sales. As we noted in 2012, these two provisions charge the DOR “with the authority to regulate and enforce provisions of the South Carolina Code dealing with beer and wine.” Op. Att’y Gen., 2012 WL 469994 (S.C.A.G. Jan. 6, 2012). Furthermore, section 61-2-80 of the South Carolina Code (2009) provides:

The State, through the department, is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit, and occupies the entire field of beer, wine, and liquor regulation except as it relates to hours of operation more restrictive than those set forth in this title.

This statute gives the DOR discretion in establishing conditions for retail permits. Accordingly, the Legislature has given the DOR wide latitude in determining to who and under what conditions it issues permits to sell beer and wine.

Conclusion

Section 61-4-940(D) does not define “financial interest” for purposes of this provision. Prior opinions of this Office opined a spouse’s financial interest does not necessarily translate to a financial interest of the other spouse in circumstances outside the three-tier system. Nonetheless, whether or not a financial interest exist under section 61-4-940(D) involves a question of fact. Therefore, we recommend a court, who can resolve any questions of fact, make the

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determination of whether a particular spouse in fact holds a financial interest in another spouse's ownership interest in a beer distributorship.

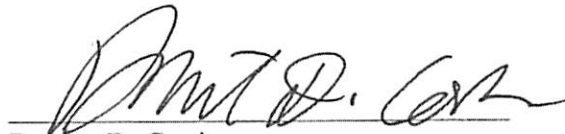
Furthermore, the DOR has authority to regulate the permitting of retail beer sales through the statutory authority given to it by the Legislature. We believe this authority includes the ability to impose conditions or restrictions on permit holders.

Sincerely,

A handwritten signature in blue ink that reads "Cydney Milling" followed by a stylized "MDH".

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in black ink that appears to read "Robert D. Cook".

Robert D. Cook
Solicitor General