



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Dan W. Jackson
District Attorney
Harris County
Houston, Texas

Dear Sir:

Opinion No. 0-3808

Re: Is a unit of the Texas Defense Guard required to obtain a beer license in connection with the sale of beer solely to, and for the sole use of, the members of such unit?

We have for attention and answer your letter of August 19, 1941, wherein you submit for the opinion of this department the following question and factual statement, which we quote:

"Mr. J. S. Bailey, Jr., who is supply sergeant for one of the legally organized State Defense Guard units, being Company B, Second Battalion, Texas Defense Guard, has asked, at the suggestion of the commanding officer of such unit, to wit, Captain Ed Kenken, that I submit to you the following question:

"Does such unit of the Defense Guard need a beer license in connection with the handling of beer for the sole use of the members of such unit?"

"(I understand that this means the handling of beer on social occasions only, after drill periods, etc. In connection with this question I understand further that the beer will be handled solely by members of the unit and will never be handled off of the premises occupied by the unit at the time of such handling; and that, of course, there will be

Honorable Dan W. Jackson, Page 2

no individual profit of any kind in connection with the handling of such beer, and all amounts over and above the actual cost of the commodity will go into a fund for the benefit of the entire unit.)"

We also have a letter from Mr. J. S. Bailey, Jr. of Houston, dated August 19, 1941, on the same question, in which he states that the sale of beer would be made through the Post Exchange in the armory in Houston, Texas.

The Texas Liquor Control Act (Penal Code, Article 667, Section 3) provides:

"It shall be unlawful for any person to manufacture or brew for the purpose of sale, or to import into this State, or to distribute, or sell any beer, or to possess any beer for the purpose of sale within this State without having first obtained appropriate license as herein provided, which license shall at all times be displayed in some conspicuous place within the licensed place of business."

There being no statutory exceptions to this provision of the Texas Liquor Control Act, a unit of the Texas Defense Guard or a member or members of such unit, selling beer to members of the unit for consumption on the premises, will be required to obtain a beer license in connection with such sales, regardless of the non-profit character of the transaction; unless such Texas Defense Guard unit is immune, under the Constitution of the United States, from State regulation by virtue of being a department, agency or instrumentality of the Federal Government, created to discharge the constitutional functions of government; or unless there is an absence of constitutional and legislative jurisdiction on the part of the State over the territory within which the sale of beer occurs.

Section 61, National Defense Act of June 3, 1916, as amended and approved by the President, October 21, 1940, provides in part:

"Provided, further, that under such regulations as the Secretary of War may prescribe

Honorable Dan W. Jackson, Page 3

for discipline and training, the organization by and maintenance within any State of such military forces other than National Guard as may be provided by the laws of such State is hereby authorized while any part of the National Guard of the State concerned is in active Federal service; provided further, that such forces shall not be called, ordered or in any manner drafted, as such, into the military services of the United States; . . ."

The Texas Defense Guard exists at the discretion of the Governor of Texas under the authorization conferred upon him by the Texas Defense Guard Act of 1941 (Article 5391a) which provides in part as follows:

"Section 1. Whenever any part of the National Guard of this State is in active Federal service, the Governor is hereby authorized to organize and maintain within this State during such period, under such regulations as the Secretary of War of the United States may prescribe for discipline in training, such military forces as the Governor may deem necessary to defend this State. . . . Such forces shall be additional to and distinct from the National Guard and shall be known as the Texas Defense Guard.

". . . .

"Sec. 7. Nothing in this Act shall be construed as authorizing such forces, or any part thereof, to be called, ordered, or in any manner drafted, as such, into the military service of the United States, but no person shall by reason of his enlistment or commission in any such forces be exempted from military service under any law of the United States."

The Texas Defense Guard being organized and existing under the statutes above quoted, it cannot be classed as a department, agency or instrumentality of the Federal Government, created to discharge the constitutional functions of government.

Honorable Dan W. Jackson, Page 4

Although Mr. Bailey's letter does not so state, it is assumed that the armory in Houston, in which beer is to be sold to the members of such Defense Guard, is not Federal territory outside the constitutional and legislative jurisdiction of the State, since Section 4 of the Defense Guard Act of 1941 (cited above), authorizes the use by the Defense Guard of State armories, other state premises and property, and armories provided by county commissioners' courts, city authorities, communities and civic and patriotic organizations, but does not authorize the use of Federal property. And even if this armory were Federal territory, the State would still retain constitutional and legislative jurisdiction over such territory, in the absence of a cession of jurisdiction by the State to the Federal government, in accordance with the provisions of Article 5247, Revised Civil Statutes, 1925. (See Standard Oil Company of California v. California, 291 U. S. 242, 78 L. Ed. 975.)

It is therefore our opinion that a unit of the Texas Defense Guard selling beer in Texas for the sole use of the members of such unit, is required to obtain a State beer license authorizing such sale.

Yours very truly

APPROVED SEP 13, 1941

Tom Miller

FIRST ASSISTANT
ATTORNEY GENERAL

ATTORNEY GENERAL OF TEXAS

W. R. Allen

By

W. R. Allen
Assistant

WRA:CO

