

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-15

Date Issued: December 24, 1997

Requested by: Charlie Whitman, Bismarck City Attorney

- QUESTION PRESENTED -

Whether a North Dakota city's ordinance permitting Sunday alcoholic beverage on-sale while prohibiting Sunday alcoholic beverage off-sale violates equal protection rights of retail alcoholic beverage license holders.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a North Dakota city may permit Sunday on-sale of alcoholic beverages while not permitting Sunday off-sale of alcoholic beverages without violating equal protection rights of retail alcoholic beverages license holders.

- ANALYSIS -

Equal protection analysis should be considered when a law classifies individuals into different groups and grants something to one group but not to the other. Bouchard v. Johnson, 555 N.W.2d 81, 887 (N.D. 1996). North Dakota's equal protection clause is found at Article I, Section 21 of the North Dakota Constitution. Id. That provision states:

No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizen be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

Further, "[a]ll laws of a general nature shall have a uniform operation." North Dakota Const. Art. I, § 22. The United States Constitution prohibits states from denying equal protection of the laws. U.S. Const. Amend. 14, § 1. The equal protection clause does not prohibit classifications, but prevents the government from treating persons differently who are in all relevant respects alike.

Baldock v. N.D. Workers Comp. Bureau, 554 N.W.2d 441, 444 (N.D. 1996). These classifications are subject to different levels of scrutiny depending upon the nature of the right claimed to be infringed by the classification. Id.

The North Dakota Supreme Court has upheld the general Sunday business closing law found at N.D.C.C. ch. 12.1-30 against an equal protection challenge under the following standard:

Generally, a statute that regulates social or economic matters without using suspect classifications or involving fundamental rights and which is challenged on federal equal protection grounds is reviewed under the rational-basis standard. . . . Under this rational basis standard, we uphold legislation unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. . . . Stated otherwise, we sustain a statute if any set of facts reasonably may be conceived to justify it. . . .

The United States Supreme Court has treated Sunday closing laws as social and economic legislation to be upheld on a demonstration of rational basis. . . . Challengers have not alleged that the current Sunday closing law uses suspect classifications or touches on fundamental rights; we conclude that the appropriate standard of review for Challengers' federal equal protection claims is that of a rational basis.

Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 96 (N.D. 1990) (citations omitted). In order to find that the North Dakota Sunday closing law violated federal equal protection, the court would have had to determine that the classifications were patently arbitrary and bore no relationship to a legitimate government purpose. However, the Court found reasons to support the Sunday closing law. Id. at 97. The purpose of the Sunday closing law is to set a day of rest and recreation. Id. To accomplish this purpose, the Legislature began with a general prohibition against conducting business or labor on Sunday, with exceptions for necessary businesses, businesses that further rest or recreation, and various enterprises of limited commerce which would not unduly disrupt the intended atmosphere of rest. Id. at 97-98. The court added that the legislation does not have to achieve a perfect equality, and the Legislature may choose to achieve its goal in part or in stages by applying a remedy to one part of a field while neglecting others. Id.

Therefore, if a properly enacted city ordinance within a city's statutory powers prohibited or restricted certain business operations on Sundays while permitting other businesses to be open, that ordinance would be constitutional within the equal protection clause if the distinction made by the ordinance was rationally related to furthering the purpose of setting aside Sunday as a day of rest and recreation, or if it is within the exceptions for necessary businesses, businesses that further rest or relaxation, or for businesses engaged in limited commerce which do not unduly disrupt the intended restful atmosphere.

Restricting the sale of alcoholic beverages on Sundays is consistent with the concept of setting aside Sunday as a day of rest and recreation. Flyken v. City of Minot, 264 N.W. 728, 733 (N.D. 1936). However, it may be argued that there is insufficient difference between the prohibited off-sale of alcoholic beverages and the permitted on-sale of alcoholic beverages for such a distinction to be rationally related to this purpose. Laws permitting on-sale during hours that off-sale is prohibited on Sunday have been upheld under equal protection analysis. Historic Warehouse, Inc. v. Alabama Alcoholic Beverage Control Board, 423 So.2d 211 (Ala. 1982); Dinkler v. Jenkins, 163 S.E.2d 443 (Ga. App. 1968), rev'd on other grounds, Hawes v. Dinkler, 164 S.E.2d 799 (Ga. 1968). Perversely, a law prohibiting Sunday on-sale during hours that Sunday off-sale is permitted has also been upheld against equal protection challenge. Florentine Ristorante, Inc. v. city of Orandville, 278 N.W.2d 694 (Mich. 1979).

Material enclosed with the request for this opinion implies that this point was raised in a Nebraska district court decision which held that there is not a rational regulatory justification for treating off-sale alcoholic beverage retailers differently from on-sale alcoholic beverage retailers on Sunday. Hughes Corp. v. City of Lincoln, Docket No. 549, Order of Judgment 190 (Lancaster County, Nebraska District Court, August 21, 1997). The Nebraska District Court relied on Nebraska Supreme Court cases holding that there was no rational basis for treating on-sale different from off-sale because the only distinction is that the alcoholic beverages purchased for off-sale will be drunk off the premises and this difference "presents no distinctive corollary to furthering temperance, as an individual may drink as much in a private restaurant as he may at home or elsewhere." Casey's General Stores v. Neb. Liq. Control, 369 N.W.2d 85, 88 (Neb. 1985); see also Hy-Vee Food Stores v. Neb. Liq. Control, 497 N.W.2d 647, 653 (Neb. 1993).

While the statement that there is no reason to distinguish between on-sale and off-sale of alcoholic beverages because an individual may drink as much in a bar or restaurant as he or she may at home or elsewhere is precedent in Nebraska, that is not a true statement regarding North Dakota law.

North Dakota law establishes significant third party controls over how much an individual may drink in a restaurant or a bar, while there are no legal prohibitions governing how much alcohol an individual may drink in the privacy of his or her home. It is a class A misdemeanor for any person knowingly to deliver alcoholic beverages to an obviously intoxicated person. N.D.C.C. § 5-01-09. Further, North Dakota's Dram Shop Act provides for civil liability against any person who knowingly disposes, sells, barter, or gives away alcoholic beverages to an obviously intoxicated person. N.D.C.C. § 5-01-06.1. Therefore, an on-sale retailer is encouraged to limit the amount a patron may consume because of the penal and civil liabilities placed upon the retailer if that retailer continues to sell after the individual has become obviously intoxicated. However, a person may purchase any amount of alcoholic beverages for off-sale consumption and have no legal limitation upon that person's consumption at home, barring the appearance of facts other than mere intoxication. N.D.C.C. § 5-01-05.1. Within this context, prohibiting off-sales on Sunday promotes Sunday as a day of peaceful rest and relaxation while permitting on-sale alcoholic beverage retailers to remain open on Sunday does not unduly disrupt the intended atmosphere of rest and recreation.¹

¹ In Florentine Ristorante, the Michigan Supreme court reached the conclusion that a law prohibiting Sunday on-sale while permitting off-sale was rationally based because it reduced the need for police patrol of on-sale establishments and reduced the risk that patrons would drive home intoxicated. 278 N.W.2d at 698-99. Different minds may reach different, but equally rational, conclusions. See generally Gale v. N.D. Bd. of Podiatric Medicine, 562 N.W.2d 878, 881 (N.D. 1997); Jacobs v. N.D. State Personnel Bd., 551 N.W.2d 779, 781 (N.D. 1996); Lamplighter Lounge, Inc. v. Heitkamp, 523 N.W.2d 73, 75 (N.D. 1994); Beeson v. Wyndmere Pub. Sch. Dist. 43, 427 N.W.2d 346, 347 (N.D. 1988); Midgarden v. City of Grand Forks, 54 N.W.2d 659, 663 (N.D. 1952). A holding that one approach to addressing a problem is rationally based does not logically require the conclusion that a different approach, perhaps addressing a different aspect of the problem, is not also rationally based.

It may be argued that this ordinance is under-inclusive and does not effectively meet this goal because an individual may purchase alcoholic beverages on six other days of the week and consume them at home on Sunday without limitation. However, the North Dakota Supreme Court has determined that a statute need not be perfect or all inclusive to be constitutionally permissible under the equal protection clause. Best Products, 461 N.W.2d at 97 & 98. "If a reviewing court can conceive of a reason justifying the choice made by the [governing body] in service of a legitimate end, that court must sustain the statute against constitutional challenge." Id. at 97. "The Legislature may select one phase of one field and apply a remedy there, neglecting the others." Id. at 98 (quoting Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955)).

Although an individual may purchase ahead of time and have on hand enough alcoholic beverage to become intoxicated on Sunday when the off-sale of alcoholic beverages is prohibited by ordinance, this activity requires some degree of foresight. Legislation prohibiting Sunday off-sale may deter some individuals from becoming intoxicated on Sunday by a whim, just as the criminal and civil liabilities placed on retail on-sale locations are intended to prevent on-sale patrons from becoming intoxicated. There does not appear to be a reasonable way to prevent an individual from purchasing a sufficient supply of alcoholic beverages ahead of time to prevent intoxication on Sundays if the off-sale of alcoholic beverages is generally permitted by law. A law should not be considered under-inclusive when it is impractical to cure the under-inclusiveness.

The above analysis identifies one rational basis for upholding the classification in question. The classification may also serve other legitimate governmental purposes. Because at least one rational basis for the classification has been identified, it is my opinion that a North Dakota city may permit Sunday on-sale of alcoholic beverages while not permitting Sunday off-sale of alcoholic beverages without violating equal protection rights of retail alcoholic beverages license holders.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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