



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

September 18, 1985

ATTORNEY GENERAL OPINION NO. 85- 125

Gregory J. McDonald
City Attorney
City Administrative Center
301 N. 8th, P.O. Box 499
Garden City, Kansas 67846

Re: Cities and Municipalities--Ordinances of Cities--
Validity of Ordinance Imposing Discriminatory
License Fee

Synopsis: An ordinance which imposes a license fee of \$25
per day (with a maximum of \$100 per year) upon
"itinerant solicitors," but which imposes no such
fee upon solicitation by resident photographers,
is void as applied to an employee of a Tennessee
corporation who solicits orders for taking and
processing photographs in interstate commerce.
Cited herein: U.S. Const., Art. I, §8.

* * *

Dear Mr. McDonald:

You request our opinion as to whether Ordinance No. 1530 of the
City of Garden City, which imposes a license fee of \$25 per day
(with a maximum of \$100 per year) upon "itinerant solicitors," is
valid as applied to solicitors employed by a nationwide portrait
photography company. A copy of Ordinance No. 1530 is attached
hereto as Exhibit "A."

The operations of the photography company have been summarized as follows:

"The corporation's principal office and manufacturing plant are located in Chattanooga, Tennessee. At this plant, photographic film is developed, proofs are prepared, and the finished portraits are manufactured and mailed to customers.

"As the first step in the Olan Mills' sales plan, telephone solicitors, under the supervision of a traveling Olan Mills' supervisor, operating out of a motel, call local residents of the town and make an advertising offer. This offer constitutes the Olan Mills' Club Plan which is sold for about \$12-\$15 depending upon the area involved. The Club Plan entitles the purchaser to have three sittings within the next twelve months and receive an 8x10 natural color portrait of each sitting at no extra charge. When a resident purchases a Club Plan, the telephone solicitor also schedules their first sitting, usually several weeks later.

"As the second step, a traveling photographer takes the pictures at a local motel according to a previously arranged sitting schedule and ships the exposed film to Chattanooga to be developed. From these negatives, proofs are printed and mailed to our temporary location in a particular area.

"As the third step, these proofs are mailed from Tennessee to a traveling portrait salesperson who has established a temporary office in a motel. The customers have been notified by mail that they may view their proofs at a designated time and place. The salesperson presents them to customers for them to make a selection for their advertising offer, and order additional portraits if desired.

"After viewing proofs, orders for finished portraits are solicited and portrait selections are made. Orders for finished portraits are sent to Tennessee, and the .

finished portraits are manufactured and mailed to the customers' homes."

While a state or municipality has police power to regulate soliciting and similar activities [Breard v. Alexandria, 441 U.S. 622, 95 L.Ed. 1233 (1951)], such power is subject to limitations imposed by the Commerce Clause (Article I, Section 8) of the United States Constitution. Specifically, a state statute or municipal regulation which places an undue burden on or discriminates against interstate commerce violates the Commerce Clause. See Nippert v. Richmond, 327 U.S. 416, 90 L.Ed. 760 (1946); Emert v. Missouri, 156 U.S. 296, 39 L.Ed. 430 (1895).

In this regard, an ordinance imposing a license fee upon itinerant photographers was held discriminatory and void in Olan Mills, Inc. of Ohio v. City of Barre, 194 A.2d 385 (Vt. 1963). The court noted the following constitutional defects in the ordinance:

"The ordinance also requires that the plaintiff, as an itinerant photographer pay a license fee of \$10 for one week, \$20 for a period of more than one week and less than four weeks, and \$75 for a period of more than four weeks. No license fee of any kind is required from resident photographers of Barre, nor are such photographers required to file a performance bond.

'While interstate commerce may be required to pay its way, it must be placed on a plane of equality with local trade and commerce.'" Warren Kay Vantine Studios, Inc. v. City of Portsmouth et al., 95 N.H. 171, 59 A.2d 475.

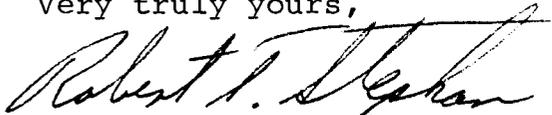
"Such a plane of equality does not exist under the Barre ordinance between the resident photographer, who pays no license fees or regulatory costs, and the itinerant photographer, engaged in interstate commerce, subject to the various fees and costs stated above. The existing ordinance is both unfair and discriminatory." 194 A.2d at 390.

The Garden City ordinance attached hereto is very similar in effect to the ordinance struck down in the Olan Mills case, i.e. a license fee of \$25 to \$100 is imposed upon itinerant solicitors for out-of-state photography companies, but no such fee is

imposed upon solicitation by resident photographers. Accordingly, we are compelled to conclude that Ordinance No. 1530 is void as applied to an employee of an out-of-state company who solicits orders for taking and processing photographs in interstate commerce.

In passing, we would note that a non-discriminatory license tax imposed against transient photographers was upheld in Dunbar-Stanley Studios v. Alabama, 393 U.S. 537, 21 L.Ed.2d 759 (1969).

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:JSS:TRH:jm