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September 1, 1987

ATTORNEY GENERAL OPINION NO. 87- 128

The Honorable Alicia L. Salisbury
Senator, 20th District
1455 S.W. Lakeside Drive
Topeka, KS 66604-2556

Re: Crimes and Punishments, General Provisions -- Preliminary -- Defendant Presumed Innocent

Re: Amendments to the Constitution of the United States -- Amendment 14; Rights and Immunities of Citizens -- Arrest Without Conviction as Bar to Right of Immunity

Synopsis: Topeka Code Section 34-193(6), which does not permit persons who have been previously arrested, but not convicted on drug charges, to obtain a license to carry a firearm while employed as a security guard, is violative of both state law and the Constitution of the United States. Cited herein: K.S.A. 21-3109; U.S. Const., 14th Amendment.

* * *

Dear Senator Salisbury:

You have asked for an opinion regarding the constitutionality of Topeka Code Section 34-193(6).

Topeka Code Section 34-193(6) provides for the mandatory denial of a license to carry a firearm to an individual seeking employment as a security guard if that person "has a record of arrest for controlled substance abuse or a record of violent acts against persons or property, within 10 years

immediately preceding the date of application." You question whether an ordinance may constitutionally deny a license to a person on the basis of an arrest when no charges were ever filed against the person.

A city has broad police power to enact laws for the health, safety and welfare of its citizens. Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99 (1969). Clearly, mandating the licensing of persons to carry firearms as security guards involves the public safety and is, therefore, within the police power of a city. However, the Kansas Supreme Court stated in State v. Pendarris, 181 Kan. 560, 566 (1957):

> "The fixed rule and basic standard by which the validity of all exercises of the police power is tested is that the police power of the state extends only to such measures as are reasonable and that all police regulation must be reasonable under all circumstances."

Further, the police power of a city is limited as follows:

> "While the police power is wide in its scope and gives a governmental body broad power to enact laws to promote the health, morals, security and welfare of the people, and further, a large discretion is vested in it to determine for itself what is deleterious to health, morals or is inimical to public welfare, it cannot under the guise of the police power enact unreasonable and oppressive legislation or that which is in violation of the fundamental law." Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99, Syl. §4 (1969). See also Gilbert V. Mathews, 186 Kan. 672, 677, (1960), and Little v. Smith, 124 Kan. 237, (1927).

The city ordinance in question prohibits anyone arrested, rather than convicted, from obtaining the license needed for employment as a security guard. Written in this manner, the ordinance denies an individual the presumption of innocence which is provided by both state law and the United States Constitution. K.S.A. 21-3109; U.S. Const., 14th Amend.

Almost 93 years ago the United States Supreme Court said:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1864).

More importantly, in Schware v. Board of Bar Examiners, 353 U.S. 232, 241, 77 S.Ct. 752, 757, 1 L.Ed.2d 796, 803 (1957), the court stated:

> The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.

Finally, in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 6 L.Ed.2d 447 (1979) the Supreme Court reaffirmed the doctrine in stating:

> "Presumption of innocence is doctrine . . . and may also serve as an admonishment to judge accused's guilt or innocence solely on basis of evidence adduced at trial and not on basis of suspicions that arise from arrest, indictment, or custody . . ."

The ordinance in question applies to persons arrested rather than convicted, thereby associating an individual's arrest with guilt absent proof of guilt. It denies an individual the presumption of innocence provided by law and hence, is an invalid exercise of the police power of the city.

In conclusion, Topeka Code Section 34-193(6), which does not permit persons who have been previously arrested but not convicted, on drug charges to obtain a license to carry a

firearm while employed as a security guard, is violative of both state law and the U.S. Constitution.

Very truly yours,

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