

July 7, 1999

OPINION NO. 99-038

Wallace E. Edwards, Chairman  
Liquor Control Commission  
77 South High Street, 18th Floor  
Columbus, Ohio 43266-0565

Dear Chairman Edwards:

You have requested an opinion concerning the authority of the Liquor Control Commission (Commission) to administer and enforce the liquor laws of this state. Specifically, you wish to know whether the Commission is required to suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 or impose a forfeiture in lieu of suspension when the Commission issues an order indicating that the holder of the permit has violated a provision of the state liquor laws.

R.C. 4301.04(A) authorizes the Commission to suspend, revoke, and cancel a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303. *See* R.C. 4301.26; R.C. 4301.27. The specific circumstances under which such a permit may be suspended or revoked by the Commission are set forth in R.C. 4301.25. This statute provides, in part:

(A) The liquor control commission may suspend or revoke any permit issued pursuant to Chapters 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule of the commission or for other sufficient cause, and for the following causes:

(1) Conviction of the holder or the holder's agent or employee for violating a section of Chapters 4301. and 4303. of the Revised Code or for a felony;

(2) The entry of a judgment pursuant to division (D) or (E) of section 3767.05 of the Revised Code against a permit holder or the holder's agent or employee finding the existence of a nuisance at a liquor permit premises or finding the existence of a nuisance as a result of the operation of a liquor permit premises;

(3) Making any false material statement in an application for a permit;

(4) Assigning, transferring, or pledging a permit contrary to the rules of the commission;

(5) Selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise;

(6) Failure of the holder of a permit to pay an excise tax together with any penalties imposed by the law relating thereto and for violation of any rule of the department of taxation in pursuance thereof.

(B) The liquor control commission shall revoke a permit issued pursuant to a provision of Chapter 4301. or 4303. of the Revised Code upon the conviction of the holder of the permit of a violation of division (C)(1) of section 2913.46 of the Revised Code.

Accordingly, pursuant to R.C. 4301.25(A), the Commission may suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 when the holder of the permit violates a provision of the state liquor laws or any lawful rule of the Commission, or for other sufficient cause.

In lieu of suspending a permit holder's permit, the Commission may impose a forfeiture upon the permit holder. In this regard, R.C. 4301.252(A)(1) states:

Except as provided in divisions (B) and (C) of this section,<sup>1</sup> when the liquor control commission determines that the permit of any permit holder is to be suspended under Title XLIII [43] of the Revised Code or any rule of the commission, the commission may issue an order allowing a permit holder to elect to pay a forfeiture for each day of the suspension in accordance with division (A)(2) of this section, rather than to suspend operations under the permit holder's permit issued for the premises at which the violation occurred. (Footnote added.)

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<sup>1</sup> R.C. 4301.252(B) provides that a permit holder may not pay a forfeiture in lieu of suspension of his permit if the suspension is for the reasons stated in R.C. 4301.25(A)(6), which authorizes the Commission to suspend a permit for failure of the permit holder "to pay an excise tax together with any penalties imposed by the law relating thereto and for violation of any rule of the department of taxation in pursuance thereof." In addition, R.C. 4301.252(C) states that a permit holder is not allowed to pay a forfeiture in lieu of suspension of his permit when the evidence and the nature of any violation of R.C. Title 43 show that continued operation of the permit premises presents a clear and present danger to public health and safety, or if the Commission finds, upon reliable, probative, and substantial evidence, that the statutory elements of a felony committed in connection with the operation of the permit premises are present in the action for which the permit holder is being disciplined.

Thus, when the holder of a beer or liquor permit violates a provision of the state liquor laws, the Commission may impose a forfeiture in lieu of suspending the permit holder's permit.

The Commission is also authorized by R.C. 4301.26 to cancel beer and liquor permits issued pursuant to R.C. Chapters 4301 and 4303. *See* R.C. 4301.04(A). Pursuant to this section, the Commission is required to cancel a permit in the event of death or bankruptcy of the permit holder, the making of an assignment for the benefit of the creditors of the permit holder, or the appointment of a receiver of the property of the permit holder.

With respect to your specific question, it is well settled that the use of the word "may" in a statute should be given its common, ordinary meaning, unless the context of the statute clearly conveys a contrary intention. *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978); *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 (1971); *State ex rel. Dworken v. Court of Common Pleas of Cuyahoga County*, 131 Ohio St. 23, 25, 1 N.E.2d 138, 139 (1936). *See generally* 1.42 (words and phrases shall be construed according to the rules of grammar and common usage). As stated in *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d at 107-08, 271 N.E.2d at 837-38:

The statutory use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary, at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation.

The word "shall" is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated.

Ordinarily, the words "shall" and "may," when used in statutes, are not used interchangeably or synonymously.

However, in order to serve the basic aim of construction of a statute—to arrive at and give effect to the intent of the General Assembly—it is sometimes necessary to give to the words "may" and "shall" as used in a statute, meanings different from those given them in ordinary usage, and one may be construed to have the meaning of the other.

But when this construction is necessary, the intention of the General Assembly that they shall be so construed must clearly appear from a general view of the statute under consideration, as where the manifest sense and intent of the statute require the one to be substituted for the other. (Citations omitted.)

Nothing in R.C. 4301.25, R.C. 4301.252, or elsewhere in the Revised Code discloses an intention by the General Assembly to compel the Commission to suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 or impose a forfeiture in lieu of suspension when the Commission determines that the holder of the permit has violated a provision of the state liquor laws. To the contrary, it appears that the General Assembly

intended the term “may,” as used in R.C. 4301.25 and R.C. 4301.252, to be accorded its common meaning.

An examination of R.C. 4301.25 reveals that division (A) of that statute sets forth the circumstances in which the Commission “may” suspend or revoke a beer or liquor permit, while division (B) of the same statute sets forth the circumstances in which the Commission “shall” revoke such a permit. The juxtaposition of the terms “shall” and “may” thus raises a presumption that these terms be accorded their ordinary meaning. *See generally Siegel v. Thoman*, 156 U.S. 353, 360 (1895) (“[i]n the first the word ‘shall’ and in the latter provision the word ‘may’ is used, indicating command in the one and permission in the other”); *Federal Land Bank of Springfield v. Hansen*, 113 F.2d 82, 84 (2nd Cir. 1940) (“‘[m]ay’ will ordinarily be interpreted as discretionary when the word ‘shall’ appears in close juxtaposition in other parts of the same statute”).

Moreover, R.C. 4301.25-.27, which confer authority upon the Commission to suspend, revoke, or cancel beer or liquor permits issued under R.C. Chapters 4301 and 4303, use the word “may” in some instances and the word “shall” in others. As stated above, R.C. 4301.25(A) and R.C. 4301.252(A)(1) use the word “may” when addressing the authority of the Commission to suspend or revoke a permit or impose a forfeiture in lieu of suspension. Similarly, R.C. 4301.27 provides that the Commission “may revoke or cancel any permit on its own initiative or on complaint of the division of liquor control or of any person.”

In contrast, R.C. 4301.25(B) and R.C. 4301.26 use the word “shall.” Pursuant to R.C. 4301.25(B), the Commission “shall” revoke a beer or liquor permit upon the conviction of the holder of the permit of a violation of R.C. 2913.46(C)(1).<sup>2</sup> Likewise, R.C. 4301.26 reads as follows:

The liquor control commission *shall* cancel permits issued pursuant to Chapters 4301. and 4303. of the Revised Code in the event of death or bankruptcy of the holder, the making of an assignment for the benefit of the creditors of the holder, or the appointment of a receiver of the property of the holder, except as otherwise provided in the rules of the division of liquor control relative to the transfer of permits. (Emphasis added.)

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<sup>2</sup> R.C. 2913.46(C)(1) prohibits an organization, as defined in R.C. 2901.23(D), from knowingly allowing an employee or agent to sell, transfer, or trade items or services, which a person is prohibited from purchasing by the “Food Stamp Act of 1977,” 91 Stat. 958, 7 U.S.C.A. 2011, as amended, or section 17 of the “Child Nutrition Act of 1966,” 80 Stat. 885, 42 U.S.C.A. 1786, as amended, in exchange for food stamp coupons, WIC program benefits, or any electronically transferred benefit.

R.C. 4301.25-.27 thus use both “may” and “shall” when describing the Commission’s authority to suspend or revoke a beer or liquor permit, or impose a forfeiture in lieu of suspension. Because it is presumed that the General Assembly uses words in a statutory scheme advisedly, *see Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370, 374 (1948), it reasonably follows that the General Assembly intended for the words “may” and “shall,” as used in R.C. 4301.25-.27, to be accorded their common, ordinary meaning.

As explained previously, the word “may” is “construed to render optional, permissive, or discretionary the provision in which it is embodied.” *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d at 34, 372 N.E.2d at 341. Accordingly, R.C. 4301.25(A) and R.C. 4301.252(A)(1) do not require the Commission to suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 or impose a forfeiture in lieu of suspension when the Commission issues an order indicating that the holder of the permit has violated a provision of the state liquor laws. Instead, the powers conferred upon the Commission in this respect are permissive or discretionary, not mandatory. *See generally Papatheodoro v. Department of Liquor Control*, 69 Ohio Law Abs. 556, 560, 118 N.E.2d 713, 716-17 (C.P. Franklin County 1954) (dictum) (the provisions of R.C. 4301.25(A) are discretionary). In other words, the Commission is permitted, but not required, to suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 or impose a forfeiture in lieu of suspension when the Commission issues an order indicating that the holder of the permit has violated a provision of the state liquor laws.<sup>3</sup>

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 4301.25(A) and R.C. 4301.252(A)(1) grant the Liquor Control Commission discretionary authority to suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 or impose a forfeiture in lieu of suspension when the Commission issues an order indicating that the holder of the permit has violated a provision of the state liquor laws. In such

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<sup>3</sup> When imposing a penalty for a violation of the state liquor laws, the members of the Liquor Control Commission are required to exercise an intelligent discretion in the performance of their official duties. *See State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918).

Wallace E. Edwards, Chairman

-6-

circumstance, R.C. 4301.25(A) and R.C. 4301.252(A)(1) do not require the Liquor Control Commission to suspend or revoke the permit or impose a forfeiture in lieu of suspension.

Respectfully,

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July 7, 1999

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SYLLABUS:

99-038

R.C. 4301.25(A) and R.C. 4301.252(A)(1) grant the Liquor Control Commission discretionary authority to suspend or revoke a beer or liquor permit issued pursuant to R.C. Chapter 4301 or 4303 or impose a forfeiture in lieu of suspension when the Commission issues an order indicating that the holder of the permit has violated a provision of the state liquor laws. In such circumstance, R.C. 4301.25(A) and R.C. 4301.252(A)(1) do not require the Liquor Control Commission to suspend or revoke the permit or impose a forfeiture in lieu of suspension.