

4162.

VETERAN—NOT REQUIRED TO PAY LICENSE FEE FOR PEDDLER'S LICENSE WHEN.

SYLLABUS:

1. *The Mayor of a village may not require that a non-resident honorably discharged World War veteran who is the holder of a peddler's license pursuant to the provisions of Sections 6347 et seq., General Code, pay a license fee under a duly enacted ordinance of such village requiring any person who engages in peddling or hawking merchandise on the streets of such village to secure a license and pay a fee for such license.*

2. *The exemption granted pursuant to the provisions of Section 6351, General Code, is a personal exemption applicable only to the veteran himself and does not extend to non-veteran partners who may be engaged in business with such honorably discharged soldier.*

3. *A veteran or a non-veteran who goes from house to house and takes orders for merchandise but who makes delivery at a later date is not required to secure a license under an ordinance of a village requiring persons who engage in hawking or peddling merchandise on the streets of such village to secure a license before engaging in such practice.*

COLUMBUS, OHIO, April 17, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion upon various questions presented by the Village Solicitor of New Lexington. The letter of the Village Solicitor reads as follows:

"The Council of the Village of New Lexington, Ohio, would like the opinion of the office of the Attorney General of the State of Ohio on the following questions:

1. Can the Mayor of the Village of New Lexington, Ohio, refuse to issue a license to a non-resident World War veteran without the payment of the fee called for in a duly passed ordinance of said Village?
2. If there is a partnership composed of two persons, one of whom is a World War veteran and the other partner is not a World War veteran can the non-veteran be required to pay for a license as called for in a duly passed ordinance of said Village?
3. Can a non-veteran or non-veterans take order for meats one day and deliver meat next day without paying any license?
4. If there is a partnership composed of two persons, one of whom is a World War veteran and the other partner is not a World War veteran can the non-veteran do the butchering and the World War veteran do all of the delivering of the meat and under this set of facts can either one or both of said partners be required to pay for a license as called for in a duly passed ordinance of said village?"

Section I of the Ordinance in question reads as follows:

"Section 1. That it shall be unlawful for any person or persons to hawk, peddle or huckster in any of the public streets, alleys, highways or markets of said Village, any goods, wares or merchandise or other article or articles of value or so to vend or sell the same, except products of his own raising or article or articles manufactured by him without first having obtained a license to do so as hereinafter provided."

The right of a municipality to license peddlers and itinerant vendors is specifically given by the legislature. See Sections 3672 et seq., General Code. In reference to your first question I call your attention to Section 6351, General Code. This section reads as follows:

"An applicant for the license, provided in Section 6347, proving to the auditor to whom such application is made that he has served as a soldier or sailor in the service of the United States during the late rebellion, the Spanish-American war, or the world war and has been honorably discharged therefrom, shall pay to such auditor as his fee for such license the sum of fifty cents, and shall not be required to make any other or further payment. He shall be exempted from paying any fee for a municipal or other license, as required by law or ordinance, during the period covered by the license issued to him by such auditor."

By virtue of Section 6347, mentioned in Section 6351, General Code, supra, a peddler is required to take out a license in only one county, and this license permits him to peddle his stock in trade over the entire state, subject to the right of municipalities to require an additional license. Your first question seems to be answered by the case of *Conrad vs. Lengel*, 110 O. S. 532. The first branch of the syllabus of that case reads as follows:

"1. While by the provisions of Sections 6351, General Code, an honorably discharged soldier procuring a peddler's license as therein provided is exempt from the payment of 'any fee for a municipal or other license,' he is subject to the police regulation of the municipality, including a requirement that before he peddles or hawks merchandise therein he must obtain a license, and such license, under the express provisions of Section 6352, General Code, may be revoked and cancelled for causes therein stated."

It would seem in answer to your first question that the Mayor may not require an honorably discharged soldier to pay a fee for a peddler's license even though such person is a non-resident.

I come now to your second question of whether or not a partner of a World War veteran may be required to pay a fee for the license in question. It is quite obvious that such a license is a personal privilege and it may not be transferred unless expressly authorized by the municipality. The mere fact that an honorably discharged soldier may secure the license in question without the payment of any fee does not give his partner, who is a non-veteran, the same privilege. In other words, the license in question is a personal license and not a partnership license.

Your third question refers to whether or not a non-veteran may take orders for meat one day and deliver the meat at a subsequent date without taking out the license required in the ordinance quoted supra and paying for the same. It should be noticed that the ordinance uses the words "to hawk, peddle or huckster". For the purposes of

this opinion no distinction is made as to the meaning of these three expressions. In other words, you inquire whether or not under the circumstances presented in your third question the non-veteran is a hawker, peddler or huckster within the meaning of the present ordinance. The following quotation to be found in 12 R. C. L. 184 is particularly pertinent:

"It is another necessary requisite of peddling that the delivery must be made at the time of sale; the sale and delivery must be one transaction. The authorities are almost unanimous in holding that a person who solicits and obtains orders for goods by the display of samples, and delivers none of the goods at the time of sale, is not a peddler. It must follow a fortiori that one who takes orders without samples is not a peddler; and so it is generally held. There has grown up a drummer or commercial traveler class which is entirely different from the peddler class, and the distinction has been recognized and respected. The difference between the two classes is easy to state in terms of the mischievous situation to be remedied by legislative regulations of peddlers. Those soliciting orders for future delivery almost universally do so for reliable solvent principals and, furthermore, the buyer has a period of time before delivery and payment within which to discover and rescind for fraud. These cases cannot be explained on the theory that the drummer is held not to be a peddler because acting for another, for it is clear that an agent may be a peddler. They must be based on the principle that the manner of making the sale, namely by order excludes the existence of peddling. In a few states, however, it is held that one who goes about from house to house taking orders for consumers for goods to be delivered in the future is a peddler. In accordance with the weight of authority it is further held that one is not a peddler although, in addition to securing the order for the goods, he subsequently delivers them. Then, of course, one who merely delivers goods previously ordered of another is not a peddler."

The term "peddling" is defined in 48 Corpus Juris, 778 as follows:

"Going around from house to house, or from customer to customer, and selling goods, to sell at retail from place to place, going from house to house, carrying the goods to be offered for sale, traveling about and selling small wares. A single sale, if there is nothing more, scarcely comes under the denomination of 'peddling.' The term 'peddling' refers to the manner in which the business is carried on, and not to the business itself. However, it has been defined as the occupation of an itinerant vendor of goods who sells and delivers the identical goods he carried with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for wholly or in part upon their subsequent delivery."

The above principles have been adopted by the courts of this state. The Supreme Court of Ohio in the case of *Great Atlantic and Pacific Tea Company vs. Village of Tipppecanoe*, 85 O. S. 120, held as disclosed by the syllabus:

"In view of the guaranties of the Bill of Rights, Section 3673 of the General Code, cannot be so interpreted as to authorize a municipal council to impose a license fee upon merchants who do not sell upon the public streets or

places, but only solicit orders and negotiate future sales at the residences of their customers.”

The following appears at page 126:

“It has a fixed place from which it does business; it does not carry about the merchandise which it offers for sale; it does not sell at the time it offers for sale, but enters into contracts for future sales; it does not carry on negotiations or any part of its business upon the streets, highways or public places, but at the residences of its customers. That these features broadly and substantially distinguish its business from that carried on by hawkers, peddlers and hucksters is made clear by the dictionaries and numerous cases cited in the briefs. The apparent attempt of the village council to exercise the power assumed to be conferred by Section 3673 of the statute to require license from those who at the residences of their customers bargain to sell or solicit orders for goods, wares, or merchandise by retail, and the attempt of its officers to enforce the ordinance with that interpretation seems to require that to the interpretation of the section there be applied a limitation which the constitution imposes.”

The above case was approved and followed in *City of Wooster vs. Evans* 92 O. S. 504.

In my Opinion No. 2873, rendered June 29, 1934, I held as disclosed by the syllabus:

“A person who goes from house to house and takes orders for merchandise but who makes delivery at a later date, at which time collection is made, is not required to secure a peddler’s license under the provisions of Sections 6347 et seq., General Code.”

Numerous authorities were quoted in support of the conclusion reached in the above opinion and I concluded that the weight of authority in this country clearly supports such a view. In view of the above it would appear that under the circumstances presented in your third question the persons would not be required to take out the licenses required by virtue of the ordinance in question.

As I read the fourth question it is substantially the same as the third question with the exception that the actual delivering of the meat is performed by a World War veteran. In other words, orders are taken before the time of delivery. There is no peddling in any of the public streets, alleys, highways or markets of the village. With this interpretation of your fourth question it is quite obvious that the answer to your fourth question is the same as the answer to your third question.

You do not ask and I express no opinion as to the reasonableness of the fee required from those persons who must secure licenses under the provisions of this ordinance.

In view of the above and without further extending this discussion it is in my opinion, in specific answer to your inquiries, that:

1. The Mayor of a village may not require that a non-resident honorably discharged World War veteran who is the holder of a peddler’s license issued pursuant to the provisions of Sections 6347, et seq., General Code, pay a license fee under a duly enacted ordinance of such village requiring any person who engages in peddling or hawking merchandise on the streets of such village to secure a license and pay a fee for such license.

2. The exemption granted pursuant to the provisions of Section 6351, General Code, is a personal exemption applicable only to the veteran himself and does not extend to non-veteran partners who may be engaged in business with such honorably discharged soldier.

3. A veteran or a non-veteran who goes from house to house and takes orders for merchandise but who makes delivery at a later date is not required to secure a license under an ordinance of a Village requiring persons who engage in hawking or peddling merchandise on the streets of such Village to secure a license before engaging in such practice.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4163.

CITY—MAY NOT CONTRACT WITH COUNTY COMMISSIONERS FOR LEASE OF OFFICE SPACE TO COUNTY IN CITY OFFICE BUILDING WHEN.

SYLLABUS:

A city, which is the county seat of the county in which it is situated, and the county commissioners of such county, may not enter into a contract for the leasing of office space for ten years to the said county, in a city office building proposed to be erected by such city.

COLUMBUS, OHIO, April 17, 1935.

HON. PAUL D. MICHEL, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

“Will you kindly give me your opinion on the following question:

The City of Marion is contemplating building a new city office building and expect to rent a part of it to the County Commissioners of this county. (I might say that in connection with this the Court House is too small and it is now necessary for the County Commissioners to rent outside space) Have the County Commissioners the right to enter into a ten year lease with the City of Marion for office space in the proposed new city building?”

Section 2419, General Code, reads as follows:

“A court house, jail, public comfort station, offices for county officers and an infirmary shall be provided by the commissioners when in their judgment they or any of them are needed. Such buildings and offices shall be of such style, dimensions and expense as the commissioners determine. They shall also provide all the equipment, stationery and postage, as the county commissioners may deem necessary for the proper and convenient conduct of such offices, and such facilities as will result in expeditious and economical administration of the said county offices. They shall provide all rooms, fire