

VOLUME NO. 44

OPINION NO. 2

ALCOHOLIC BEVERAGES - Dance band as "lawful business" under section 16-3-305;

ALCOHOLIC BEVERAGES - Members of band as employees under bar closure statute;

MONTANA CODE ANNOTATED - Sections 16-3-304, 16-3-305;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 10 (1987).

- HELD: 1. Members of a band hired to perform at a bar are "employees" of the bar within the meaning of section 16-3-304, MCA, and thus may remain on the premises after closing time.
2. Under section 16-3-305, MCA, as long as the owner of the licensed premises is engaged in a lawful business, nonemployees may remain on the premises after closing time but may not consume any alcoholic beverages even if the beverages were purchased prior to closing time.

January 7, 1991

Gary R. Thomas
Red Lodge City Attorney
210 South Broadway, Suite D
Red Lodge MT 59068

Dear Mr. Thomas:

You have requested my opinion on a question which I have rephrased as follows:

Are band members hired to play music in a bar allowed on the bar premises between the hours of 2 a.m. and 8 a.m., either as "employees" within the meaning of section 16-3-304, MCA, or as an "other lawful business" within the meaning of section 16-3-305, MCA?

You have asked several other related questions which will be addressed in the discussion answering the main question.

Section 16-3-304, MCA, generally requires that all establishments licensed by the state to sell alcoholic beverages must be closed between the hours of 2 a.m. and 8 a.m. each day. The statute further provides:

During such hours all persons except the alcoholic beverage licensee and employees of such licensed establishment shall be excluded from the licensed premises.

You state that the word "employees" in the aforementioned statute has been interpreted by various law enforcement agencies to include only those individuals who are salaried workers, and for whom the licensee pays unemployment insurance and workers' compensation, and withholds taxes. If this interpretation is applied, a liquor licensee could be cited with a violation of section 16-3-304, MCA, if members of a band who are hired to play at a licensed establishment are not excluded from the bar after 2 a.m.

The definition of "employee" relied upon by the law enforcement agencies mentioned above is derived from the distinction drawn between an "employee" and "independent contractor" for the purposes of unemployment insurance, workers' compensation, and income tax withholding. See §§ 39-51-203(4), 39-51-201(14), MCA (definition of employment and independent contractor for purposes of unemployment insurance coverage); §§ 39-71-118, 39-71-120, MCA (definition of employee and independent contractor for purposes of workers' compensation coverage). Here, however, such distinctions are inapplicable because the issue is not whether a particular class of workers is meant to be protected by the unemployment insurance or

workers' compensation laws. There is no question concerning the benefits and rights accorded to employees as opposed to independent contractors. It is necessary to look instead to the purposes of the bar closure statute and the class of persons intended to be affected by the bar closure.

While there are no Montana Supreme Court cases defining who is affected by the bar closure statutes, cases from other jurisdictions do provide guidance. In Hansmeyer v. Illinois Liquor Control Commission, 33 Ill. Dec. 908, 397 N.E.2d 241 (1979), a friend of the bar owner was seen by the local police entering the bar at a few minutes before 2 a.m. and leaving with a package about 2:15 a.m. There was evidence, however, that the friend was helping the owner clean up the bar after closing. The Court, in interpreting an ordinance requiring closure, stated:

The requirement that patrons and customers leave the premises within 10 minutes of closing was, of course, designed to enforce the restriction of the ordinance against the sale of liquor after specified hours. We conclude that the ordinance is inapplicable to persons performing services for the licensee either gratuitously or for compensation as the evidence shows was the case with Sudano.

397 N.E.2d at 244. Similarly, the Supreme Court of Wisconsin in State v. Wachsmuth, 73 Wis. 2d 318, 243 N.W.2d 410 (1976), interpreted the closure statute as requiring exclusion of all patrons and customers, but the court expressly stated:

[I]t is apparent that it would be unreasonable to hold that bona fide employees or workmen performing work on the premises are not permitted to be thereon during the period when the tavern is closed for purposes relating to the dispensing or the drinking of alcoholic beverages. Patrons or customers must leave the premises by 1 a.m. or by whatever time is statutorily set as a closing hour. Internal operations of the business, counting of cash, tallying of receipts, bookkeeping, cleaning of the premises, and renovation or repair obviously were not intended to be within the prohibition of the statute, and such activities need not be confined to such times as the licensed premises are permitted to be open under the fermented malt beverage and intoxicating liquor laws.

243 N.W.2d at 418.

While band members do not necessarily contribute to the internal operations of the bar, clearly the band was performing a service for the bar. Under section 39-3-201(5), MCA, an "employee" includes any person who works for

another for hire. This broad definition of employee under the Montana Wage Payment Act is more applicable than the definition utilized for unemployment insurance or workers' compensation purposes. As long as an individual is performing a service for the bar and is not a patron or customer of the bar, that individual need not be excluded from the bar premises.

You also ask whether under section 16-3-305, MCA, the bar could permit nonemployees to remain on its premises. Section 16-3-305, MCA, provides:

During the hours when the licensed establishments where alcoholic beverages are sold at retail are required by this code to be closed, it shall be unlawful to sell, offer for sale, give away, consume, or allow the consumption of alcoholic beverages. When an establishment licensed to sell alcoholic beverages is operated in conjunction with a hotel, restaurant, bus depot, railway terminal, grocery store, pharmacy, or other lawful business other than that of the sale of alcoholic beverages, then such other lawful business need not be closed.

The Montana Supreme Court interpreted the predecessor of this section in State v. Perez, 126 Mont. 15, 243 P.2d 309 (1952). In Perez, the Court held that the statute was violated when a licensee, who had a restaurant in conjunction with the liquor establishment, allowed patrons to dine and dance in the barroom after 2 a.m., even if no liquor was sold. The Court concluded that the statutory terms "closed" and "excluded" required the licensee to prevent admission to the room where liquor was sold, even if the restaurant business could be conducted without using the barroom. However, the precedential value of Perez is minimal in light of amendments to sections 16-3-304 and 16-3-305, MCA. In 1985, the Montana Legislature amended those sections in Senate Bill 357, entitled, "An Act Removing The Requirement That A Business Operated On The Same Premises As An Establishment Licensed To Sell Alcoholic Beverages Close Off From 2 A.M. To 8 A.M. The Part Where Alcoholic Beverages Are Sold." The legislation specifically removed from section 16-3-305, MCA, a provision that required closure of that part of a licensed establishment where alcoholic beverages are sold whenever some other lawful business that was operated in conjunction with the licensed establishment remained open after 2 a.m. According to 42 Op. Att'y Gen. No. 10 (1987), this amendment superseded Perez and it is no longer necessary to close off the premises where alcoholic beverages are sold when the licensee is operating some other lawful business in conjunction with the liquor license. The opinion, which preceded adoption of amendments to Title 23, chapter 5, MCA, permitting local governments to place restrictions on hours during which gambling operations may be conducted, held that the owner of a licensed establishment could conduct a poker game after 2 a.m. and did not need to close off the licensed premises. Persons on the licensed premises

could not, however, consume alcoholic beverages during hours of closure, even if the beverages were purchased prior to closing time.

You suggest that section 16-3-305, MCA, requires that the "other lawful business" be distinct from the regular business of bars. 42 Op. Att'y Gen. No. 10 did not draw such a distinction. As long as the business is lawful, section 16-3-305, MCA, allows nonemployees to remain on the licensed premises without requiring the owner of the establishment to close off the licensed premises. Presumably then, the offering of musical entertainment and the selling of nonalcoholic beverages and snacks could be considered a lawful business under section 16-3-305, MCA. The caveat still applies that the persons on the licensed premises may not consume alcoholic beverages during hours of closure, even if the beverages were purchased prior to closing time.

THEREFORE, IT IS MY OPINION:

1. Members of a band hired to perform at a bar are "employees" of the bar within the meaning of section 16-3-304, MCA, and thus may remain on the premises after closing time.
2. Under section 16-3-305, MCA, as long as the owner of the licensed premises is engaged in a lawful business, nonemployees may remain on the premises after closing time but may not consume any alcoholic beverages even if the beverages were purchased prior to closing time.

Sincerely,

MARC RACICOT
Attorney General