

ward and could not have been contemplated by said constitutional provision; and said positions are probably not offices.

Your question is answered as follows. Because judges of industrial claims occupy no fixed geographical jurisdiction and their duties are assignable by the commission, §440.45(5), F. S., there are strictly speaking no successors in office or employment. When a judge of industrial claims resigns before the expiration of the term of 4 years for which he was appointed and employed, the industrial commission may appoint and employ another such judge for a term of 4 years as per §440.45(2), F. S.

AS TO QUESTION 4:

Chapter 440, F. S., provides no authority for commission promulgation of a body of personnel rules and regulations applicable to judges of industrial claims. In fact, §440.44(4), F. S., explicitly excludes said judges from any classificatory schedules, standards, rules or regulations so promulgated by the commission for its employees.

068-103—September 23, 1968

CRIMES

TEAR GAS GUN, TEAR GAS PEN OR CHEMICAL; CARRYING CONCEALED—CONSTRUCTION OF §790.01, F. S.

To: *Marvin U. Mounts, Jr., County Solicitor, West Palm Beach*

QUESTION:

Do the Florida Statutes prohibit the carrying of concealed tear gas pens and other devices which spray a chemical that upon contact renders a person temporarily helpless or incapacitated without great bodily harm?

Section 790.01, F. S., pertaining to the carrying of concealed weapons provides in part as follows: "Whoever shall secretly carry arms of any kind on or about his person, or whoever shall have concealed on or about his person any dirk, pistol, metallic knuckles, sling shot, billie or other weapon, except a common pocket knife, shall be guilty of a misdemeanor. . ." The prohibition against secretly carrying "arms" of any kind on or about the person appears to have reference to those weapons usually employed in civilized warfare such as guns, swords, bayonets, etc. The "or other weapon" following the prohibited enumerated items of dirk, pistol, metallic knuckles, sling shot, and billie would appear to be governed by the ejusdem generis rule which means of the same kind, class, or nature.

Section 790.03, F. S., provides for indictments and informations against those persons carrying any pistol, razor, dirk or other deadly weapon. Section 784.04, F. S., provides that whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of aggravated assault. It would appear that "deadly weapon" as used in these statutes is a weapon that is likely to produce death or great bodily injury. See *Goswick v. State*, 143 So.2d 817; *Dey v. State*, 182 So.2d 266; and *Blitch v. State*, 194 So.2d 1.

Attorney General's Opinion 68-022 Ohio, of Jan. 25, 1968, has ruled in a similar case that a tear gas gun or other device that sprays a chemical which upon contact renders a person temporarily helpless or incapacitated for a short period of time without causing great bodily harm is not a dangerous weapon within the meaning of §2923.01

of the Ohio Revised Code which provides that "no person shall carry a pistol, Bowie knife, dirk or other dangerous weapon concealed on or about his person . . ."

It therefore appears, after a careful study of the aforesaid statutes that a small tear gas fountain pen, chemical mace and other tear gas dispensing device cannot be considered "arms" as recognized in civilized warfare, neither are they within the enumerated prohibited items nor of the same kind, class and nature. However, if the tear gas fountain pen or other chemical dispensing device is so constructed as being capable of, or adaptable to, firing projectiles in a solid form that are likely to cause death or great bodily injury, it would be prohibited as a deadly weapon. If on the other hand it is designed in such a fashion as to only accommodate the emission of gaseous substances that do not produce death or great bodily harm, it would not come within the statutory prohibitions of §§790.01 and 784.04, F. S. Your question is answered in the negative on the condition that chemicals used in the devices under consideration are nonlethal and do not produce great bodily harm. Any informal or formal opinions of this office inconsistent herewith are to the extent of any inconsistency superseded and withdrawn.

068-104—October 22, 1968

BEVERAGE DEPARTMENT

OFFICERS—ARREST POWERS, CONSTRUCTION OF §901.15, F. S., RELATIVE TO ARREST BY PEACE OFFICER WITHOUT WARRANT

To: Paul Antinori, Jr., State Attorney, Tampa

QUESTION:

Does a State Beverage Department officer have the lawful authority to arrest a patron of licensed premises for any misdemeanor committed by such patron on such premises in the presence of such officer even though such misdemeanor does not involve a violation of any beverage law?

In *Boynton v. State*, 64 So.2d 536, text 549, the Sup. Ct. of Fla. said:

. . . There can be no denial of the right and authority of the Beverage officers to enter the licensed premises during business hours for the purpose of inspecting and searching the premises to determine whether or not the Beverage Laws are being violated. It is also true that while in such place of business the officers have the right and authority to arrest any person in such place of business violating any law in their presence and as an incident to such arrest or in connection therewith, they may lawfully search the person of such individual.

And in the same case, text 551:

. . . When the place of business is open during the business hours, any person, except minors, may lawfully enter, and a Beverage Department officer may arrest and search the person of an individual in the place of business if he is violating any law in the presence of such officer. *Sec. 901.15, F.S.* (Emphasis supplied.)