



COMMONWEALTH OF VIRGINIA

Office of the Attorney General

William C. Mims
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

July 13, 2009

The Honorable R. Lee Ware
Member, House of Delegates
P.O. Box 689
Powhatan, Virginia 23139

Dear Delegate Ware:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You request guidance concerning interpretation of the 2008 amendments to § 18.2-308 that became effective on July 1, 2008¹ (“2008 Amendments”). Specifically, you inquire whether the 2008 Amendments to § 18.2-308(B)(9) authorize Commonwealth’s attorneys and assistant Commonwealth’s attorneys: (1) to carry concealed handguns in certain restaurants and clubs, generally prohibited by § 18.2-308(J3); (2) to consume alcohol while carrying concealed handguns in such settings; and (3) to possess a handgun on school property as prohibited by § 18.2-308.1.

Response

It is my opinion that the 2008 Amendments clearly exempt Commonwealth’s attorneys and assistant Commonwealth’s attorneys from the general prohibitions on carrying concealed handguns, subject only to the restrictions in § 18.2-308(J1). Therefore, pursuant to state law such individuals may carry concealed handguns on school property. Further, it is my opinion that the 2008 Amendments do not specifically prohibit such individuals from consuming alcohol while carrying concealed handguns; however, they are restricted by existing statute from being “under the influence” of alcohol or illegal drugs.² I also note that Virginia does not rely upon a legislative record to determine legislative intent. I do not presume that the General Assembly specifically considered the issues analyzed in this opinion when it enacted the 2008 Amendments. However, the General Assembly is presumed to be aware of opinions of the Attorney General and is capable of amending the statute to supersede this opinion.³

¹See 2008 Va. Acts ch. 464, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0464+pdf> (amending § 18.2-308 related to concealed weapons by adding § 18.2-308(B)(9) and amending § 18.2-308(C)).

²See VA. CODE ANN. § 18.2-308(J1) (Interim Supp. 2009) (creating rebuttable presumption based on convictions for other offenses to define “under the influence”).

³The General Assembly is presumed to have knowledge of and acquiesce in the Attorney General’s interpretation of a statute when no corrective amendments are thereafter enacted. See *Lee Gardens Arlington Ltd. P’ship v. Arlington County Bd.*, 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995); 1996 Op. Va. Att’y Gen.123, 124 n.4.

Applicable Law and Discussion

The authority of the General Assembly to prohibit the carrying of concealed handguns and the privilege of granting exceptions to that prohibition have long been recognized.⁴ Therefore, the issues you present are limited to interpretation of the 2008 Amendments.

The 2008 Amendments⁵ are clear and unambiguous. “[W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.”⁶ Section 18.2-308(B) provides that “[e]xcept as provided in subsection J1, *this section* shall not apply to” the listed classes. (Emphasis added.) Therefore, the only limitations imposed by § 18.2-308 on individuals exempt under § 18.2-308(B) are those contained in § 18.2-308(J1). Use of the phrase, “this section,” clearly indicates a legislative intent to exclude from § 18.2-308 the persons within the classes enumerated in § 18.2-308(B). The clear language of § 18.2-308(B)(9) makes the exemption applicable to any Commonwealth’s or assistant Commonwealth’s attorney.

Accordingly, it is my opinion that a Commonwealth’s attorney or assistant Commonwealth’s attorney is not prohibited from carrying a concealed handgun into a restaurant or club licensed to sell and serve alcoholic beverages as prohibited by § 18.2-308(J3).⁷

Likewise, Commonwealth’s attorneys and assistant Commonwealth’s attorneys are exempt from the general prohibitions related to concealed handguns on school property by virtue of § 18.2-308.1.⁸ Section 18.2-308.1(B) provides that “[t]he exemptions set out in § 18.2-308 shall apply, *mutatis mutandis*, to the provisions of *this section*.” (Emphasis added.) Therefore, the exemptions in § 18.2-308(B)-(C) are included by reference as exemptions under § 18.2-308.1.⁹ Because the 2008 Amendments, which added § 18.2-308(B)(9), created a new exception for Commonwealth’s attorneys, such individuals are not subject to the restrictions generally imposed by § 18.2-308.1.¹⁰

⁴ See 1838 Va. Acts ch. 101, at 76-77 (enacting act to prevent carrying of concealed weapon); *see also* Withers v. Commonwealth, 109 Va. 837, 65 S.E. 16 (1909) (interpreting *Code* section regarding carrying of concealed weapons by conservators of the peace).

⁵ See *supra* note 1.

⁶ South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

⁷ See 1998 Op. Att’y Gen. Va. 55 (addressing scope of exemptions within § 18.2-308(B) in context of retired law-enforcement officers and reaching similar conclusion). The exemptions within § 18.2-308(B) provide a broader authority to carry concealed weapons and are subject to fewer restrictions than the ability to carry a concealed handgun by virtue of a permit. Prior opinions of the Attorney General have concluded that concealed carry permits are limited through § 18.2-308(O). See Op. Va. Att’y Gen.: 1995 at 123; *id.* at 118. Thus, a concealed handgun permit does not authorize a permit holder to conceal a handgun in a restaurant or bar as proscribed by § 18.2-308(J3).

⁸ See Frias v. Commonwealth, 34 Va. App. 193, 197; 538 S.E.2d 374, 376 (2000). Although the court determined that the individual was not a “conservator of the peace” for purposes of § 18.2-308; “‘conservators of the peace’ are exempt from the prohibition against carrying a gun on school grounds.” *Id.*

⁹ See 2000 Op. Va. Att’y Gen. 100, 102 n.6 (defining exemptions incorporated by reference as § 18.308.1(B)).

¹⁰ I note that this opinion addresses only state law and does not address whether a Commonwealth’s attorney is prohibited by federal law from possessing a loaded firearm on school property. See 18 U.S.C.S. § 922(q)(2) (2005). However, exclusion from the requirement of a permit under state law is not the equivalent of possessing a license under § 922(q)(2)(B)(ii). See § 18.2-308(B)(7)-(8) for examples of exemptions that are deemed equivalent to holding a permit for purposes of federal law and state reciprocity.

While specifically exempted from the operation of § 18.2-308(J3), the final question is whether Commonwealth's attorneys may consume alcohol while carrying a concealed handgun. Section 18.2-308(J1) provides that "any person permitted to carry a concealed handgun" is prohibited from being "*under the influence* of alcohol or illegal drugs while carrying such handgun in a public place." (Emphasis added.) The primary goal in construing a statute is to discern and give effect to the legislative intent.¹¹ "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."¹² "The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."¹³ If the General Assembly had intended to prohibit any consumption of alcohol while carrying a concealed handgun, it could have enacted a complete prohibition against such consumption. Instead, the General Assembly chose to use the phrase, "under the influence."¹⁴ An individual meeting the standards for "intoxicated" pursuant to § 4.1-100 would be prohibited from possessing a firearm, but determination of such a question of fact is for a court to decide.¹⁵

Conclusion

Accordingly, it is my opinion that the 2008 Amendments clearly exempt Commonwealth's attorneys and assistant Commonwealth's attorneys from the general prohibitions on carrying concealed handguns, subject only to the restrictions in § 18.2-308(J1). Therefore, pursuant to state law such individuals may carry concealed handguns on school property. Further, it is my opinion that the 2008 Amendments do not specifically prohibit such individuals from consuming alcohol while carrying concealed handguns; however, they are restricted by existing statute from being "under the influence" of alcohol or illegal drugs.¹⁶ I also note that Virginia does not rely upon a legislative record to determine legislative intent. I do not presume that the General Assembly specifically considered the issues analyzed in this opinion when it enacted the 2008 Amendments. However, the General Assembly is presumed to be aware of opinions of the Attorney General and is capable of amending the statute to supersede this opinion.¹⁷

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in dark ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

1:1089; 1:941/08-111

¹¹Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976).

¹²*Id.* at 679, 222 S.E.2d at 797.

¹³*Id.*

¹⁴Section 18.2-308(J1).

¹⁵For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. *See, e.g.*, 2003 Op. Va. Att'y Gen. 21, 24 and opinions cited therein.

¹⁶*See supra* note 2.

¹⁷*See supra* note 3.