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ATTORNEY GENERAL OPINION NO. 82- 80

Mr. Jack Mendenhall
Rush County Sheriff
La Crosse, Kansas 67548

Re: Intoxicating Liquors and Beverages -- Cereal Malt
Beverages -- Qualifications of Manager of Licensed
Premises

Synopsis: Although K.S.A. 41-2708(j) requires the suspension or revocation of a cereal malt beverage retailer's license because of the licensee's employment of a person convicted of a felony, K.S.A. 41-2703 permits a place of business to be conducted under such license by a manager or agent who has been convicted of a felony, if the conviction occurred more than two years preceding the application for such license. When these provisions are considered in conjunction with the legal distinction between a manager or agent and an employee, it is apparent the legislature intended to prescribe qualifications for a manager or agent that are different from those of other employees of such place of business. Thus, a person convicted of a felony may be the manager of a place of business licensed to sell cereal malt beverages at retail, if such person's conviction occurred more than two years prior to the date of application for the cereal malt beverage retailer's license applicable to such place of business. Cited herein: K.S.A. 41-2703, 41-2708.

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Dear Sheriff Mendenhall:

You have inquired whether a license for the retail sale of cereal malt beverages should be suspended or revoked, if the manager of the licensed premises has been convicted of a felony, but such conviction occurred more than two years prior to the date of the application for such license.

In relating the factual circumstances prompting your request, you note that the Board of County Commissioners of Rush County has issued a cereal malt beverage retailer's license to an individual, whose license application stated that the place of business covered by the license was to be conducted by a manager. You indicate that the person identified in the application as the manager has been convicted of a felony, and even though such conviction occurred more than two years prior to the date of said application, you have asked whether such conviction requires the suspension or revocation of the license for said place of business pursuant to K.S.A. 41-2708.

The pertinent portion of K.S.A. 41-2708 reads as follows:

"The board of county commissioners . . . shall revoke or suspend such license for any one of the following reasons: . . .

. . . .

"(j) for the employment of persons who have been adjudged guilty of felony or of any violation of the intoxicating liquor law"

Considered in isolation, the foregoing statutory provisions evidence an apparent legislative intent that persons convicted of a felony are ineligible for employment in a place of business licensed to sell cereal malt beverages at retail, irrespective of the time elapsed between such conviction and the person's employment in such place of business. Thus, the above statute would appear to compel the suspension or revocation of the cereal malt beverage retailer's license in question. However, "[i]n order to ascertain legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia." Brown v. Keill, 224 Kan. 195, 200 (1978).

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In pursuance of this principle, we have considered the other statutes pertaining to the licensing and regulation of the retail sale of cereal malt beverages, and we believe the following portions of K.S.A. 41-2703 are pertinent to your inquiry:

"(b) No retailer's license shall be issued to:

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"(4) A person who within two (2) years immediately preceding the date of making application has been convicted of a felony, any crime involving a moral turpitude, drunkenness, driving a motor vehicle while under the influence of intoxicating liquor or violation of any other intoxicating liquor law of any state or of the United States.

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"(7) A person whose place of business is conducted by a manager or agent unless the manager or agent possesses all the qualifications of a licensee."

Therefore, in seeming contradiction to the previously-quoted provisions of K.S.A. 41-2708, the portions of K.S.A. 41-2703 set forth above would appear to sanction a licensee employing as a manager or agent a person convicted of a felony, as long as the conviction occurred more than two years prior to the date the licensee made application for the license. At first blush, then, a consideration of the previously-quoted provisions of both K.S.A. 41-2703 and 41-2708 reveals a conflict. That is, it raises the possibility that, pursuant to 41-2703, a license may be issued to an applicant who proposes to have the licensed place of business conducted by a manager or agent who has been convicted of a felony, if such conviction occurred more than two years prior to the license application; yet, once the license has been issued, the same conviction compels its suspension or revocation under 41-2708. Thus, by this interpretation, the pertinent provisions of the latter statute effectively nullify the relevant provisions of the former.

In our judgment, however, such interpretation produces an absurd result and ignores established rules of statutory construction. Of course, "[t]he fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs

when that intent can be ascertained from the statute" Brown v. Keill, *supra* at 199, 200. Moreover, "[i]t is a cardinal rule of statutory construction that the legislature intended a statute be given a reasonable construction so as to avoid unreasonable and absurd consequences." Williams v. Board of Education, 198 Kan. 115, 125 (1967), citing Equitable Life Assurance Society v. Hobbs, 154 Kan. 1 (1941) and Commerce Trust Co. v. Paulen, 126 Kan. 777 (1928). Furthermore, it is well established that statutes in pari materia should be construed together so as to harmonize their respective provisions, if reasonably possible to do so [Callaway v. City of Overland Park, 211 Kan. 646, 650 (1973)], and as noted in Marshall v. Marshall, 159 Kan. 602, 606 (1945):

"It is the function and duty of courts to reconcile apparent inconsistencies in laws to the end that all may be given full force and effect in their intended field and scope of operation. Whenever that reasonably can be done it never should be held that one law overturns or destroys another." (Citations omitted.)

Finally, we believe the following statement in Rogers v. Shanahan, 221 Kan. 221 (1977), to be of pertinence:

"When, as here, the resolution of a question requires construing a statute, the court is guided by certain presumptions. It is presumed the legislature understood the meaning of the words it used and intended to use them; that the legislature used the words in their ordinary and common meaning; and that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute. See 82 C.J.S. Statutes §316(b) (1953); See also, Rausch v. Hill, 164 Kan. 505, 190 P.2d 357." Id. at 223, 224.

Relying on these principles, we have considered in pari materia the seemingly conflicting statutory provisions referenced above, in order to ascertain the legislature's intent and purpose. From this we have concluded that the legislature intended to distinguish between a manager or agent and other employees of a place of business licensed to sell cereal malt beverages at retail. As is evident from the statutory provisions quoted above, in K.S.A. 41-2703 the legislature specifically identified the "manager or agent" of such place of business, while in

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K.S.A. 41-2708, the language used is broader, referring generally to "the employment of persons who have been adjudged guilty of felony." From the legislature's use of different terminology, we may presume that the legislature intended to distinguish between managerial and other types of employees of a licensed place of business. Rogers v. Shanahan, supra.

In this regard, it is relevant to review Attorney General Opinion No. 81-241, where we noted the substantial equivalency of the terms "manager" and "agent." We concluded that, "[w]ithin the context of subsection (b) (7) of 41-2703, . . . we find little or no difference between 'manager' and 'agent.'" In either case, the manager or agent must be a person who conducts a licensee's place of business." Id. at p. 4. Thus, we decided that, "whether determining if a person is a manager or agent, the principles of agency must be applied." Id. at p. 5. And in affirming a previous letter opinion of Attorney General Harold R. Fatzer, our Opinion No. 81-241 recognized the distinction between a mere employee of a place of business licensed to sell cereal malt beverages at retail, and the manager or agent of such place of business. Thus, the designation of a person who is in "actual control and management" of the licensed premises as an employee does not alter the fact that such person is the "manager or agent" of such premises.

The basis for distinguishing between a manager and an employee is provided in 2A C.J.S. Agency, §16:

"The distinction between agent and servant is one of degree only, the essential distinction being that the agent is employed to represent his principal in business dealings and to establish contractual relations between him and third persons, while the servant is not, and is not allowed the use of his discretion as to the means to accomplish the end for which he is employed."

Accordingly, we believe the legal distinction between a manager or agent and an employee, when considered in conjunction with the legislature's separate treatment of the qualifications of a manager or agent in K.S.A. 41-2703(b) (7), compels the conclusion that the legislature intended to distinguish between the qualifications of a manager or agent of a place of business licensed to sell cereal malt beverages at retail and those of the other employees of such place of business. Thus, it is our opinion that the provisions of K.S.A. 41-2708(j), which require

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the suspension or revocation of a cereal malt beverage retailer's license because of the employment of a person convicted of a felony, have no application to a license issued for a place of business conducted by a manager or agent who was convicted of a felony more than two years prior to the date of application for such license.

Very truly yours,



ROBERT T. STEPHAN
Attorney General



W. Robert Alderson
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