



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 94

Tom Hanna, Director
Alcoholic Beverage Control
Department of Revenue
512 SW 6th St., 2nd Floor
Topeka, Kansas 66603

Re: Intoxicating Liquors and Beverages -- Bonded
Warehouses and Related Provisions -- Exclusive
Territorial Franchises; Termination or Modification
of Franchise

Synopsis: K.S.A. 1989 Supp. 41-410 does not require an
administrative proceeding to determine whether
reasonable cause exists for the termination of a
franchise agreement. However, should the director
of the division of alcoholic beverage control make
a finding that a termination was made without
reasonable cause, he is authorized to take
appropriate action against the licensee for
violation of the liquor control act. Cited
herein: K.S.A. 1989 Supp. 41-210; 41-320;
41-328; 41-328a; 41-410; K.A.R. 14-16-15.

* * *

Dear Director Hanna:

You request our opinion regarding your authority under K.S.A.
1989 Supp. 41-410 to review proposed franchise agreement
terminations, and to approve or disapprove such proposals.

K.S.A. 1989 Supp. 41-410 provides in pertinent part:

"(c) No supplier or distributor shall terminate or modify a franchise for the distribution of a brand of alcoholic liquor or cereal malt beverage or alter the geographic territory designated in a franchise agreement unless such supplier or distributor files written notice thereof with the director not less than 30 days prior to the termination, modification or alteration. In the case of an alteration in the franchise territory, such notice shall be accompanied by a map outlining the altered territory. Upon receipt of such notice, the director shall notify immediately, by certified mail, all affected parties of the impending termination, modification or alteration.

"(d) any notice filed by a supplier pursuant to subsection (c) shall be accompanied by an affidavit stating that the termination, modification or alteration is not caused by the failure of the distributor to violate any provision of the Kansas liquor control act or any rules and regulations adopted pursuant thereto.

"(e) Any supplier or distributor aggrieved by a termination, modification or alteration made under subsection (c) may file an appropriate action in any district court of this state having venue, alleging that the termination, modification or alternation violates the franchise agreement between the supplier and distributor involved.

"(f) No franchise agreement for the distribution of a brand of alcoholic liquor or cereal malt beverage shall be terminated or modified nor shall the territory designated in such an agreement be altered, except for reasonable cause.

"(g) This section shall be part of and supplemental to the Kansas liquor control act." (Emphasis added).

The statute clearly requires that the director be notified of a proposed termination, but does not specify any action on the part of the director other than to notify all affected parties of the impending termination.

K.S.A. 1989 Supp. 41-410 was first enacted in 1979. L. 1979, ch. 153, § 3, 1979 House Bill No. 2020. As originally conceived by the Committee of the Whole Senate, it provided in part as follows:

"(2) Except for good cause, no franchise for the distribution of a brand shall be terminated or modified nor shall the designated territory be altered without the written consent of the distributor and the manufacturer, importer or other supplier involved. If a manufacturer, importer or other supplier wishes to terminate or modify a franchise or to alter the designated territory without the consent of the distributor, such manufacturer, importer or supplier shall give written notice to the distributor and the director by certified mail. Such notice shall set out in detail the reasons for wishing to terminate or modify the franchise or to alter the designated territory. The director, upon receipt of the notice, shall immediately advise, by certified mail, the supplier and the distributor of the date that the director received such notice. If no objection is filed with the director by the distributor within thirty (30) days of the mailing of such advice by the director, the supplier may terminate or modify the franchise to alter the territory, as specified in the notice, not less than sixty (60) days after the date the advice was mailed to the distributor by the director. If, within thirty (30) days after the mailing of the advice by the director, the distributor files written objection with the director by certified mail and sends a

copy thereof by certified mail to the supplier, the director shall fix a date for a hearing, which date shall be not more than thirty (30) days after receipt by the director of the objection from the distributor. The director shall notify the distributor and the supplier to appear and present evidence to support their positions at the time and place of the hearing. At the hearing, the director shall consider the reasons given by the supplier to justify the proposed termination, modification or alteration and the distributor's reasons against such termination, modification or alteration. If the director determines that the termination, modification or alteration is being proposed in good faith and that good cause exists, the director shall enter an order authorizing the supplier to proceed with the proposed termination, modification or alteration not less than thirty (30) days after the entry of the order or at such earlier date as specified in the order. If the director finds that the termination, modification or alteration is not being proposed in good faith or that good cause does not exist, the director shall enter an order prohibiting the proposed termination, modification or alteration.

"(3) Any party aggrieved by an order of the director entered pursuant to subsection (2) may appeal such order to the board, and any party aggrieved by an order of the board on such appeal may appeal such order to the district court of Shawnee county. Such appeals shall be conducted in the manner provided for appeals under K.S.A. 41-321 and 41-323 and K.S.A. 41-322 insofar as applicable. The board shall adopt such rules and regulations as necessary to govern the procedure in such appeals and to provide a fair hearing of all appeals.

"(4) In the event the supplier fails to comply with any order of the director, the board or district court which has become final, the director may prohibit the sale in this state of all brands of alcoholic liquor of such supplier." H.B. 2020, Journal of the Senate 404, 405 (1979).

The portions of this version dealing with the administrative procedure for determining whether good cause existed for termination of a franchise agreement were deleted by conference committee prior to enactment of 1979 House Bill No. 2020. H.B. 2020, Journal of the Senate 645, 646 (1970); H.B. 2020, Journal of the House 854, 855 (1970). Although there is no record documenting legislative intent behind these deletions (the amendments having been made in conference committee), we believe the fact of the deletion is indicative of an intent to not require a hearing in every instance to determine the existence of good cause or reasonable cause for a termination. See Hulme v. Woleslagel, 208 Kan. 385, 392 (1972); Hand v. State Farm Mut. Auto. Ins. Co., 2 Kan.App.2d 253, 256 (1978) (changes made in a proposed law during the course of its enactment may be considered in determining legislative intent). Thus, in our opinion, K.S.A. 1989 Supp. 41-410 does not require an administrative hearing to determine the existence of reasonable cause before a termination may become effective.

Having said this, we should also point out that, upon finding that a licensee under the Kansas liquor control act has violated any provision of that act, the director may take appropriate action against the licensee. See K.S.A. 1989 Supp. 41-328; 41-328a; 41-320 et seq; 41-410; K.A.R. 14-16-15. K.S.A. 1989 Supp. 41-410(f) provides that no franchise agreement for the distribution of a brand of alcoholic liquor or cereal malt beverage shall be terminated except for reasonable cause. The provision is a part of the liquor control act. K.S.A. 1989 Supp. 41-410(g). Thus, should the director make a finding that a termination was made without reasonable cause, he would have authority to take appropriate action pursuant to statutorily or regulatorily prescribed procedures. Any such action would be independent of any action taken in district court by an aggrieved party to the franchise agreement pursuant to K.S.A. 1989 Supp. 41-410(e), but as a matter of administrative policy, when there is threatened or pending litigation as a result of a notice of termination, the director should consider giving deference to and awaiting a decision of the court on the issue

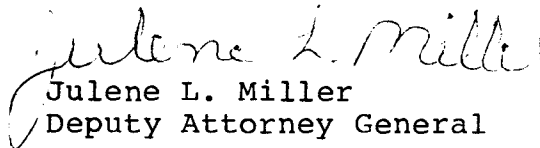
of whether reasonable cause exists before initiating an agency administrative proceeding.

In conclusion, K.S.A. 1989 Supp. 41-410 does not require an administrative proceeding to determine whether reasonable cause exists for the termination of a franchise agreement. However, should the director of the division of alcoholic beverage control make a finding that a termination was made without reasonable cause, he is authorized to take appropriate action against the licensee for violation of the liquor control act.

Very truly yours,



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Julene L. Miller
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