



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider.
Attorney General

August 23, 1976

ATTORNEY GENERAL OPINION NO. 76- 265

Mr. E. V. D. Murphy
Director
Alcoholic Beverage Control Division
Kansas Department of Revenue
State Office Building
Topeka, Kansas 66612

Re: Alcoholic Beverages--Licenses--Eligibility

Synopsis: A member of the city council of a city of the second class, operating under K.S.A. 14-201 or comparable charter ordinance, who as a member of the council votes only to approve or disapprove the mayoral appointments of law enforcement officers, is not a "person who appoints . . . a law enforcement official," who is disqualified under K.S.A. 41-311(1)(i) from holding a license issued under chapter 41, K.S.A.

* * *

Dear Mr. Murphy:

You write that you have under advisement applications for liquor and beer distributor's licenses which have been submitted by a corporation in Johnson County, Kansas. Eligibility of the applicant has been questioned because an officer of the corporation, who is a spouse of the majority stockholder, is a member of the city council of the City of Roeland Park, Kansas, a city of the second class.

K.S.A. 41-311 provides in pertinent part thus:

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"(1) No license of any kind shall be issued to:

* * *

(i) A person who appoints or is a law enforcement official or who is an employee of the director or the board;

* * *

(n) Any person if the spouse of such person would be ineligible to receive such a license hereunder for any reason other than citizenship and residence requirements.

* * *

(4) No distributors' license shall be issued to: (a) A corporation, if any officer, manager, or director thereof, or any stockholder would be ineligible to receive a distributor's license hereunder for any reason"

The appointment of law enforcement officers in cities of the second class is governed by K.S.A. 14-201:

"The mayor shall appoint, by and with the consent of the council, a municipal judge of the municipal court, a city marshal-chief of police, city clerk, city attorney, and may appoint policemen and such other officers as they may deem necessary."

I understand that the City of Roeland Park may have adopted a charter ordinance in lieu of the foregoing, but which contains substantially provisions on the point in question here.

The question that arises is whether a member of the city council of a city of the second class is a person who appoints law enforcement officers.

In an opinion dated October 21, 1971, to Halley C. Parrish, Attorney General Vern Miller stated thus:

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"No appointment by the mayor is effective without the consent of the council. . . . The council's power over positions of law enforcement officers is substantial. Although its power with regard to their designation is not strictly appointive, no appointment by the mayor is of legal effect unless confirmed by the council. In our opinion, the power of confirmation which the council must exercise regarding the employment of law enforcement officers is an integral part of the appointive process, and that members of the council fall within the prohibition of K.S.A. 41-311(1) (i)."

That opinion reflected the long-standing construction given this provision by the office of the Director of Alcoholic Beverage Control. In reviewing that opinion, I find it necessary to distinguish between the power of appointment and the power of confirmation. In *Leek v. Theis*, 217 Kan. 784, 539 P.2d 304 (1975), the court observed that "the confirmation of an appointment of a public officer to a public office is to be distinguished from the appointment itself, for [the body] . . . confirming the appointment does not in any sense choose the appointee." 217 Kan. at 808. In *State Police Board v. Moore*, 244 Ind. 388, 193 N.E.2d 131 (1963), the court stated thus:

"The fact that the board has the power to approve the appointments made by the superintendent does not in any sense give the board the right of appointment." 193 N.E.2d at 133.

An apparent purpose of the provision is to assure that no licensee, through the power to appoint law enforcement personnel, may exercise undue influence to impair the vigorous, impartial and objective enforcement of liquor and other laws in his or her jurisdiction. Obviously, members of the council in their official capacities may make decisions affecting law enforcement in the jurisdiction. In addition to approving or disapproving appointments by the mayor, the council by ordinance must prescribe the compensation of city officers, and may abolish any position when it deems it expedient. In exercising these powers, members of the council might in some instances substantially affect the law enforcement posture of the municipality and a licensee with malign intent might be able to exploit his official councilmanic position so as to restrict or discourage properly vigilant enforcement of state liquor laws affecting his business operation. It is obviously the opportunity for abuse, rather than the likelihood of it, that the legislature sought to prevent.

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Nonetheless, the statutory disqualification is not so broad as its salutary purposes might justify. Only persons who appoint law enforcement officers are ineligible for licenses. In cities of the second class operating under K.S.A. 14-201, or under charter ordinances with comparable provisions, only the mayor exercises the power of appointment of law enforcement personnel. The council makes no such appointments, and votes only to approve or disapprove the mayoral appointments.

Accordingly, I cannot but conclude that members of the city council of cities of the second class, operating under K.S.A. 14-201 or under comparable provisions, who do not vote to appoint police officers but vote only to confirm or disapprove appointments made by the mayor, are not by reason of their office disqualified by K.S.A. 41-311(1)(i) for a license issued under chapter 41, K.S.A. Accordingly, the opinion of October 12, 1971, to Mr. Parrish, is hereby withdrawn.

I am advised that the individual in question intends to resign membership on the police commission, thus mootng that question.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj