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October 12, 1981

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ATTORNEY GENERAL OPINION NO. 81-241

Thomas L. McCurdy
Mayor
City of Bentley
Bentley, Kansas 67016

Re: Intoxicating Liquors and Beverages -- Cereal Malt
Beverages -- Qualifications for Retailer's License

Synopsis: In order to be qualified for a cereal malt beverage retailer's license, an applicant therefor must be a resident of the county in which the place of business covered by the license is located, and shall have been such a resident for at least six months. Also, if an applicant's place of business is to be conducted by a manager or agent, the applicant is not qualified to receive a retailer's license unless such manager or agent possesses all the qualifications of a licensee, except that where the applicant is a corporation, such manager or agent need not be a resident of the county in which the place of business is located.

Whether a person is a manager or agent conducting a licensee's place of business is a question of agency and depends upon the relationship between such person and the licensee. However, even though agency is a question of law, absent the licensing authority's consideration of all relevant facts pertaining to such relationship, it cannot be said, as a matter of law, whether a licensee's place of business is conducted by a manager or agent.
Cited herein: K.S.A. 1980 Supp. 41-2703, 41-2708.

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Dear Mr. McCurdy:

You have requested our response to several questions concerning the issuance of licenses for the retail sale of cereal malt beverages.

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First, you have asked whether the applicant for a cereal malt beverage retailer's license must be a resident of the county in which the place of business covered by the license is located. Second, you inquire whether a license may be issued to an applicant whose place of business is to be conducted by a manager or agent of the owner, if such manager or agent does not possess all of the qualifications of a licensee. Finally, you have asked our opinion as to whether a person who orders and pays for inventory of a place of business covered by a cereal malt beverage retailer's license, and who assists in the hiring of other employees working at such place of business, is to be considered a manager or agent of the licensee.

Your first two questions are answered directly by the provisions of K.S.A. 1980 Supp. 41-2703, which prescribes the qualifications of an applicant for a cereal malt beverage retailer's license. Paragraphs (1) and (7) of subsection (b) of that statute provide as follows:

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

"(1) A person who is not a resident of the county in which the place of business covered by the license is located, has not been a resident of such county for at least six (6) months or has not been a resident in good faith of the state of Kansas for at least one year prior to application for a retailer's license.

. . . .

"(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."

From the foregoing it is clear that, in order to be qualified for a cereal malt beverage retailer's license, an applicant therefor must be a resident of the county in which the place of business covered by the license is located, and shall have been such a resident for at least six months. Also, by virtue of subsection (b)(7) quoted above, if an applicant's place of business is to be conducted by a manager or agent, the applicant is not qualified to receive a retailer's license unless such manager or agent possesses all the qualifications of a licensee.

Considering in concert our responses to your first two questions would lead to the conclusion that, where the applicant's place of business is to be conducted by a manager or agent, such manager or agent must be a resident of the county where

such place of business is located in order for the license to issue. However, such conclusion is not without exception. K.S.A. 1980 Supp. 41-2703(b) also provides that a retailer's license shall not be issued to:

"(6) A corporation, if any manager, officer or director thereof or any stockholder owning in the aggregate more than twenty-five percent (25%) of the stock of such corporation would be ineligible to receive a license hereunder for any reason other than the citizenship and residency requirements." (Emphasis added.)

In a letter opinion dated April 27, 1960, Attorney General William M. Ferguson considered provisions substantially the same as those quoted above and concluded as follows:

"Section 41-2703 appears to recognize different classes of applicants. Stringent requirements as to residence and conduct are imposed upon 'persons' which evidently means individuals. Less rigid are the requirements of co-operating individuals known as partnerships. The third class of applicants are corporations and as to them the requirement as to residence is expressly excluded. Except as to residence the requirements for individuals must be met by the corporate managers, officers, directors and stockholders owning more than 25% of the stock. These conditions being complied with, a license may issue to a corporation regardless of its residence.

"Subsection (g) [now subsection (b)(7)], section 41-2703, relates to licenses [sic] whose places of business are operated by managers, as the business of a corporation must be. Such manager must possess the same requirements as the licensee. But since the corporate licensee need not be a resident, residence is not required of its manager." II Att'y Gen. Op. 184 (1960).

We concur in the foregoing conclusion, and it is our opinion that, where a corporate applicant's place of business is to be conducted by a manager or agent, such manager or agent need not be a resident of the county in which such place of business is located.

Before proceeding to your final question, we also believe it appropriate to note that the requirements prescribed by K.S.A.

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1980 Supp. 41-2703 for an applicant for a retailer's license are continuing requirements. Pursuant to K.S.A. 1980 Supp. 41-2708(c), a retailer's license may be suspended or revoked "if the licensee has become ineligible to obtain a license." Thus, for example, where the place of business of a licensee (other than a corporate licensee) is conducted by a manager of agent who is not a resident of the county in which the licensed premises are located, such fact constitutes grounds for suspension or revocation of the retailer's license.

Your final question cannot be answered as precisely as the others, because it requires a factual determination. In effect, you have asked whether an individual's conduct is sufficient to deem such individual a manager of a licensee's place of business, so as to place such individual within the purview of K.S.A. 1980 Supp. 41-2703(b)(7). Of necessity, our opinion must be confined to questions of law, since it is the prerogative and responsibility of the city's governing body to make the factual determinations prerequisite to granting, denying, suspending or revoking a retailer's license. However, we will attempt to set forth the relevant legal considerations and principles of law that should be applied to any given set of facts in making these decisions.

Initially, we note you have asked whether an individual should be considered the "manager" of a licensed premises. "A manager is defined as one who has control of a business or business establishment. Webster's New International Dictionary." Williams v. Corbett, 205 Or. 69, 286 P.2d 115, 118 (1955). Within the context of subsection (b)(7) of 41-2703, however, 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.

Moreover, in Lumber Co. v. Osborn, 40 Kan. 168 (1888), the Kansas Supreme Court considered a mechanics' lien statement which had been verified by the claimants' manager. In recognizing that a certification by a claimant's agent satisfies the statutory requirement, the Court cited Delahay v. Goldie, 17 Kan. 263 (1876), in concluding that "the word 'manager' denotes agency as clearly as if the term 'agent' had been used." 40 Kan. at 172. Further support for the equivalency of "manager" and "agent" is found in Commissioner of Internal Revenue v. N.B. Whitcomb, Etc., 95 F.2d 596 (5th Cir. 1938), where it was held that "[t]he name 'manager' appropriately describes an agent with broad powers." Id. at 598. See, also, In Re 543 Bar, Incorporated, 188 A.2d 813 (Penn. Super. 1963), where it was held that, under the then existing Liquor Code of Pennsylvania, the terms "manager" and "agent" were synonymous. Id. at 815.

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Thus, we believe that, whether determining if a person is a manager or agent, the principles of agency must be applied. "Agency is a fiduciary relationship whereby one person is authorized to represent or act for another, generally or in particular matters." United Packinghouse Workers v. Mauer-Neuer, Inc., 272 F.2d 647, 648 (10th Cir. 1959), cert. den. 362 U.S. 904, 4 L.Ed.2d 555, 80 S.Ct. 611 (1960). In Kansas, agency is a question of law. Washington v. Houston Lumber Company, 310 F.2d 881, 883 (10th Cir. 1962). In order to establish an agency relationship,

"express appointment and acceptance are not necessary but the relationship may be implied from statements of the parties, their conduct, and other relevant circumstances." (Footnote omitted.) Id.

As noted in Kunz v. Lowden, 124 F.2d 911 (10th Cir. 1942), a case arising under Kansas law:

"'Agency' is a comprehensive term. It embraces an almost limitless number of relations between two or more persons or entities. It has been defined as 'a relation between two or more persons, by which one party, usually called the agent or attorney, is authorized to do certain acts for, or in relation to the rights or property of, the other, who is denominated the principal, constituent, or employer. Prof. Joel Parker, M.S. Lect. 1851.' . . . The relationship may be expressly created, arise by inference from the relation of the parties without proof of any express agreement, or it may be created by law. Whether one is the agent of another for a specific purpose depends upon whether he has power to act with reference to the subject matter." (Citations omitted.) Id. at 913.

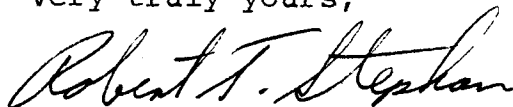
Applying these principles to your inquiry, it is clear that whether a person is a manager or agent of a licensee depends upon the relationship between such person and the licensee. It must be determined whether such person is authorized to act on behalf of the licensee so as to create an agency relationship, which relationship may be inferred from the statements and conduct of the licensee and such person. In this regard, we believe the appropriate considerations were identified in a letter opinion of Attorney General Harold R. Fatzer, dated January 4, 1950, as follows:

"We concur with your opinion that the legislature intended to deny a cereal malt beverage licensee the privilege of employing managers or agents who could not meet the requirements required by law for cereal malt beverage licenses. The mere fact that the licensee designates such a person as an employee is not sufficient so as to circumvent the above quoted provision of the law. If said employee is in fact vested with the authority and assumes the responsibility of manager or agent of the licensed premises, he must possess the same qualifications as required of the licensee. The question which will confront you appears to be: 'Who is in actual control and management of the premises?'"

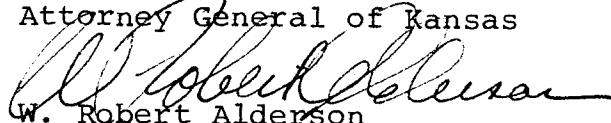
Therefore, in the situation you pose, the city governing body must determine whether the person in question is in "actual control and management" of the licensed premises. Although ordering and purchasing of inventory and assisting in hiring other employees are facts which would tend to support a finding that such person is the manager of the licensed premises, we would hesitate to reach such conclusion without further investigation. There may be other statements and activities of such person that would be relevant in establishing the scope of such person's authority with respect to the licensed premises. Moreover, it would seem necessary that, in reaching your conclusion, consideration also is given to the licensee's conduct and activities regarding the licensed premises, as well as any statements made by the licensee as to the licensee's or such other person's authority to control and manage said premises.

Thus, even though agency is a question of law, absent all such relevant factual considerations, it cannot be said, as a matter of law, whether a licensee's place of business is conducted by a manager or agent. As previously noted, it is the prerogative and responsibility of the city's governing body to make these requisite factual determinations.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General