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March 5, 1984

ATTORNEY GENERAL OPINION NO. 84- 21

David W. Andreas
Assistant City Attorney
State Bank Building
Winfield, Kansas 67156

Re: Intoxicating Liquors and Beverages--Cereal Malt
Beverages--Qualifications for Retailer's License;
Conviction of Driving Under the Influence of
Alcohol Includes Participation in Diversion
Program

Synopsis: K.S.A. 41-2703 sets forth the requirements of a
retailer's license to sell cereal malt beverages,
as that term is defined by K.S.A. 41-2701. Among
the requirements [at subsection (b)(4)] is a
provision that renders a person ineligible for a
license if, in the proceeding two years, he or she
has been "convicted" of the offense of driving a
motor vehicle under the influence of alcohol. In
that the statute proscribing DUI (K.S.A. 1983 Supp.
8-1567) defines conviction as including partici-
pation in a diversion program, the same meaning
should be given to the term whenever it appears in
the cereal malt beverage laws. Accordingly, a
person who has participated in a diversion program
from the offense of DUI within the past two years
is ineligible for a retailer's license under K.S.A.
41-2703, and if currently licensed, may have the
license suspended or revoked upon such participation.
While the employment by a licensee of a person
who is participating in a diversion program is
permissible, given the more restrictive language

David W. Andreas
Page Two

of K.S.A. 41-2708, the non-uniform application of the act it is contained within renders it subject to a city's home rule power. Cited herein: K.S.A. 1983 Supp. 8-1567, K.S.A. 12-4416, K.S.A. 1983 Supp. 22-2909, K.S.A. 41-2701, 41-2703, 41-2708, Kan. Const., Art. 12, Sec. 5.

* * *

Dear Mr. Andreas:

On behalf of the City Attorney of Winfield, Kansas, you request our opinion on a question involving the granting of retailer's licenses under K.S.A. 41-2701 et seq., which act concerns the sale of cereal malt beverages. Specifically, you inquire whether a person who has participated in a diversion program for the offense of driving while under the influence of alcohol (K.S.A. 1983 Supp. 8-1567) has been "convicted" of the offense for the purposes of K.S.A. 41-2703, and so is ineligible to obtain a retailer's license. You also inquire as to the effect of participation in a diversion program by the employee of a license holder.

The relevant statutes in the cereal malt beverage act, K.S.A. 41-2701 et seq. state as follows:

41-2703.

"(a) After examination of an application for a retailer's license, the board of county commissioners of the director shall, if they approve the same, issue a license to the applicant. The governing body of the city shall, if the applicant is qualified as provided by law, issue a license to said applicant.

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

. . .

"(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." (Emphasis added.)

41-2708.

"The board of county commissioners or the governing body of any city, upon five (5) days' notice to the persons holding such license, shall revoke or suspend such license for any one of the following reasons:

. . .

"(c) if the licensee has become ineligible to obtain a license in this act;

. . .

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

The effect of the above statutes has been construed in several prior opinions of this office, most recently No. 82-269. There, it was concluded that a conviction for the offense of driving under the influence (DUI) of alcohol was grounds for denial of a retailer's license or, if an employee was involved, for suspension or revocation of license if the employment continued. This was not a new conclusion, and reaffirmed prior opinions of this office. See, e.g., Attorney General Opinion No. 73-394.

However, given the changes made to the DUI statute (K.S.A. 1983 Supp. 8-1567), a new question has arisen. In that statute, the term "conviction" is defined as including both an actual conviction before a court and participation in a diversion program. [K.S.A. 1983 Supp. 8-1567(i)]. Diversion is an option which prosecuting attorneys may extend to first-time violators, and involves payment of the prescribed fine, participation in a education or treatment program for alcohol abuse, and other requirements as the prosecutor may deem appropriate. K.S.A. 12-4416, K.S.A. 1983 Supp. 22-2909. In that no appearance before a court is involved, diversion is not generally considered as involving a plea or finding of guilty. State v. Greenlee, 228 Kan. 712 (1981). However, for the purposes

of the amended DUI statute, it now is deemed to have that effect, and accordingly counts on the defendant's records as a conviction for the required 5 year period. K.S.A. 1983 Supp. 8-1567(i).

Since both K.S.A. 1983 Supp. 8-1567 and K.S.A. 41-2703 refer to the "conviction" of an individual for the offense of DUI, they should be read in pari materia, even though the changes made in the former statute came after the latter was already in effect. This is an accepted rule of statutory construction. Capital Services, Inc. v. Dahlinger Pontiac-Cadillac, Inc., 232 Kan. 419 1983), Clafin v. Walsh, 212 Kan. 1 (1973). In our opinion, the meaning ascribed to the term "conviction" by the DUI statute should be used as well in the retailer's licensing statute, with the result that participation in a diversion program would be sufficient to deny an application for such a license, provided the two year time period was met. An individual's election to participate in a diversion program would likewise constitute grounds under K.S.A. 41-2708(c) for a suspension or revocation of an existing license.

However, this conclusion does not apply to the participation in diversion of an employee of a retail license holder. Due to the more restrictive wording of K.S.A. 41-2708(j), which requires that an employee be "adjudged guilty" of a violation, the meaning given to the term "conviction" by K.S.A. 1983 Supp. 8-1567 is not a factor. Since there is no question that participation in diversion does not amount to being adjudged guilty, an employee in such an agreement would be able to continue in his or her employment without the licensee subject to the revocation or suspension of the retailer's license.

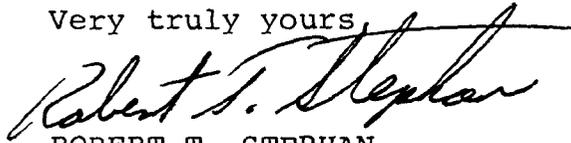
However, we are constrained to note that, due to the non-uniformity of the act containing K.S.A. 41-2708, the area is subject to the home rule authority of the City of Winfield under Article 12, Section 5 of the Kansas Constitution. The act in which the statute was adopted in its present form, L. 1976, ch. 145, contains numerous other sections which apply only to certain types of counties or cities. As a result, the fact that K.S.A. 41-2708 (section 195 in the 1976 act) is itself uniform is of no importance. City of Junction City v. Griffin, 227 Kan. 332 (1980). In that no express language appears in the cereal malt beverage act, K.S.A. 41-2701 et seq., which pre-empts the power of cities to enact their own legislation in the area of licensing, any argument that licensing is a matter of statewide concern does not change the underlying non-uniformity. Griffin, supra, 227 Kan. at 336-37. Accordingly,

David W. Andreas
Page Five

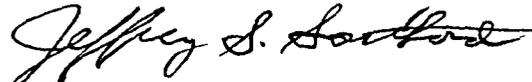
the city could, by charter ordinance, require that a licensee be subject to license revocation or suspension if he or she continues to employ a person who is participating in a DUI diversion program.

In conclusion, K.S.A. 41-2703 sets forth the requirements of a retailer's license to sell cereal malt beverages, as that term is defined by K.S.A. 41-2701. Among the requirements [at subsection (b)(4)] is a provision that renders a person ineligible for a license if, in the proceeding two years, he or she has been "convicted" of the offense of driving a motor vehicle under the influence of alcohol. In that the statute proscribing DUI (K.S.A. 1983 Supp. 8-1567) defines conviction as including participation in a diversion program, the same meaning should be given to the term whenever it appears in the cereal malt beverage laws. Accordingly, a person who has participated in a diversion program from the offense of DUI within the past two year is ineligible for a retailer's license under K.S.A. 41-2703, and if currently licensed, may have the license suspended or revoked upon such participation. While the employment by a licensee of a person who is participating in a diversion program is permissible, given the more restrictive language of K.S.A. 41-2708, the non-uniform application of the act it is contained within renders it subject to a city's home rule power.

Very truly yours,



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RTS:BJS:JSS:jm