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February 7, 2013

ATTORNEY GENERAL OPINION NO. 2013-4

Larry Markle
Chautauqua County Attorney
215 N. Chautauqua
Sedan, KS 67361

Re: Counties and County Officers—Sheriff—Qualifications for Office;
Conviction of Possession or Consumption of Cereal Malt Beverage by a
Person Under 21 Years of Age; Effect of Conviction

Synopsis: K.S.A. 2012 Supp. 19-801b(a)(3) provides that a person who was convicted of any violation of federal or state laws or city ordinances relating to liquor is not eligible to serve as sheriff. A person who was convicted under K.S.A. 2012 Supp. 41-727(a) of possessing or consuming either an alcoholic liquor or cereal malt beverage when over 18 years of age but under 21 years of age is disqualified from serving as sheriff pursuant to K.S.A. 2012 Supp. 19-801b(a)(3). Cited herein: K.S.A. 2012 Supp. 19-801b; K.S.A. 41-101; K.S.A. 2012 Supp. 41-102; K.S.A. 41-311 (Weeks); K.S.A. 41-330; K.S.A. 2012 Supp. 41-727; 41-2701.

* * *

Dear Mr. Markle:

As Chautauqua County Attorney, you ask whether K.S.A. 2012 Supp. 19-801b prohibits a person from serving as a county sheriff if that person was convicted under K.S.A. 2012 Supp. 41-727 of possessing or consuming a cereal malt beverage when under 21 years of age.

The pertinent part of K.S.A. 2012 Supp. 19-801b provides:

(a) No person shall be eligible for nomination, election or appointment to the office of sheriff unless such person:

. . .

(3) has never been convicted of or pleaded guilty or entered a plea of *nolo contendere* . . . to any violation of federal or state laws or city ordinances relating to gambling, liquor or narcotics.

The language in paragraph (3) of subsection (a) has not changed since the enactment of the statute.¹

K.S.A. 2012 Supp. 41-727(a) states in relevant part: "[N]o person under 21 years of age shall possess, consume, obtain, purchase or attempt to obtain or purchase alcoholic liquor or cereal malt beverage except as authorized by law." The penalties for this offense distinguish an adult conviction for persons over 18 years of age and less than 21 years of age from a juvenile adjudication for persons less than 18 years of age.² Because your request letter uses the term "conviction," we deem your inquiry to concern only adult convictions.³

As you note, the Kansas Legislature differentiated between alcoholic liquor and cereal malt beverage in K.S.A. 2012 Supp. 41-727(a). Based on that difference, you ask whether the disqualification in K.S.A. 2012 Supp. 19-801b(a)(3) applies only to a person convicted under K.S.A. 2012 Supp. 41-727(a) of possessing or consuming alcoholic liquor. Under this interpretation, K.S.A. 2012 Supp. 19-801b(a)(3) would not disqualify a person convicted of possessing or consuming cereal malt beverage under K.S.A. 2012 Supp. 41-727(a) from serving as a sheriff.

The provisions for the office of sheriff do not include a definition of "liquor." Under the Kansas Liquor Control Act,⁴ the definition of "alcoholic liquor" excludes "any cereal malt beverage."⁵ However, the Kansas Liquor Control Act also adopts the definition of "cereal malt beverage" found in K.S.A. 2012 Supp. 41-2701.⁶ That statute defines "cereal malt beverage" as "any fermented but undistilled *liquor* brewed or made from malt or from a mixture of malt or malt substitute or any flavored malt beverage . . . but does not include any such liquor which is more than 3.2% alcohol by weight."⁷ By its definition, cereal malt beverage is liquor.

Based upon the above definitions, we conclude that a person convicted under K.S.A. 2012 Supp. 41-727(a) of possessing or consuming cereal malt beverage when over 18 years of age but less than 21 years of age has been convicted of violating a law relating

¹ L. 1972, Ch. 75, § 2(a)(4).

² K.S.A. 2012 Supp. 41-727(b) and (c).

³ See *State v. Boyer*, 289 Kan. 108 (2009) (a juvenile adjudication is not an adult conviction unless expressly provided by the legislature).

⁴ K.S.A. 41-101 *et seq.*

⁵ K.S.A. 2012 Supp. 41-102(b).

⁶ K.S.A. 2012 Supp. 41-102(e).

⁷ K.S.A. 2012 Supp. 41-2701(a) *emphasis added.*

to liquor. Thus, K.S.A. 2012 Supp. 19-801b(a)(3) disqualifies such person from serving as a sheriff.

Our conclusion is also based upon *Keck v. Cheney*.⁸ In *Keck*, the Court considered whether a retail liquor license was lawfully revoked pursuant to statutory language in the Kansas Liquor Control Act⁹ prohibiting the issuance of a license to a person if that person, or that person's spouse, had been convicted of "a violation of intoxicating liquor laws of any state." In rejecting the licensee's argument that her spouse's conviction in Texas of driving while intoxicated or under the influence of intoxicating liquor (DUI) was a violation of a traffic law and thereby not included in the "intoxicating liquor laws," the Court said:

We cannot agree with appellant for to do so would do violence to the clear intent and purpose of the legislature when it enacted 41-311, *supra*, prohibiting the granting of a license to any person or the spouse of any person who had been convicted or plead[ed] guilty to a violation of any intoxicating liquor law. It matters not where the law is classified in the statutes if it deals with intoxicating liquors.

The legislature could, reasonably, have had but one thing in mind, it did not want anyone who was prone to abuse the use of intoxicating liquors to have anything to do with a retail liquor store.¹⁰

Prior opinions issued by this office have relied upon the rationale in *Keck*. In Attorney General Opinion No. 82-269, we concluded that a DUI conviction fell within the statutory language "any violation of the intoxicating liquor law," thus prohibiting the issuance of a cereal malt beverage retailer's license. In Attorney General Opinion No. 84-120, we concluded that a DUI conviction fell within the statutory language "violation . . . of laws . . . relating to liquor," thus disqualifying a person from serving as a sheriff. In Attorney General Opinion No. 87-180, we concluded that a violation of the Cereal Malt Beverage Act fell within the statutory language "violation of any other intoxicating liquor law of any state or the United States," thus prohibiting the issuance of a retail cereal malt beverage license. In Opinion No. 87-180, we stated:

Though the legislature has seemingly drawn a distinction between intoxicating liquor laws and cereal malt beverage laws in this and other provisions . . ., we believe that the legislature intentionally used this broadened term to include violations of any law involving intoxicating beverages. Though cereal malt beverages are specifically excluded from the statutory definition of alcoholic liquor, K.S.A. 41-102(b), as amended by L. 1987, Ch. 182, § 2, they are still intoxicating beverages and the provisions regulating them are found in the intoxicating liquors and beverages chapter of the Kansas statutes.

⁸ 196 Kan. 535 (1966).

⁹ The language at issue was in K.S.A. 41-311(1)(c) and (n) (Weeks); it is now in K.S.A. 41-330(a).

¹⁰ 196 Kan. at 537.

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In summary, we conclude that a person who was convicted under K.S.A. 2012 Supp. 41-727(a) of possessing or consuming either an alcoholic liquor or cereal malt beverage while under the age of 21 years is disqualified from serving as sheriff pursuant to the prohibition in K.S.A. 2012 Supp. 19-801b(a)(3).

Sincerely,

Derek Schmidt
Attorney General

Janet L. Arndt
Assistant Attorney General

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