

Approved _____

Date

2/12/85

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Senator Edward F. Reilly, Jr. at _____
Chairperson

11:00 a.m./~~p.m.~~^{XX} on February 8, 1985 in room 254-E of the Capitol.

All members were present ~~XXXXXX~~

Committee staff present: Fred Carman, Assistant Revisor of Statutes
Emalene Correll, Legislative Research
June Windscheffel, Committee Secretary

Conferees appearing before the committee:

Dorothy Shoup, Scranton, Kansas
The Reverend Richard Taylor, Kansans for Life at Its Best
Paul Bennett, K.U. Student, Lawrence, Kansas
Harley T. Duncan, Secretary, Revenue Department
John Lamb, Director, Alcoholic Beverage Control Division

SCR1612 - a proposition to amend section 10 of article 15 of the constitution of the state of Kansas, relating to intoxicating liquors.

The Chairman called the Committee's attention to SCR1612 and the hearing on it today.

The first conferee was Dorothy Shoup. Mrs. Shoup presented her testimony asking the committee to (1) make its own honest effort to assess the trend of public opinion toward drug use (primarily alcohol), and its financial effect on government budgets; and (2) then to assess current state (as well as national and local) laws in light of how best to bring about expressed long-term public goals. Her remarks are Attachment #1.

The Reverend Richard Taylor was the next conferee. He distributed two attachments which are part of these Minutes. Attachment #2 and Attachment #3. The first is a chart and statistics dealing with cirrhosis deaths. The second attachment included his statement concerning "Hypocrisy is written into Kansas law with section (d) of KSA 65-4102. By definition, alcohol is a controlled substance but is exempt from control under that statute. This committee should repeal section (d) and erase hypocrisy from Kansas law." He then asked Paul Bennett, a K.U. student, to read from an editorial dated Tuesday, May 31, 1977, from The Salina Journal, concerning the Rev. Taylor and the sale of liquor. It is part of Attachment #3.

There was discussion by the Committee, and the Chairman said this would conclude the hearing on SCR1612.

Senator Morris moved that SCR1612 be recommended favorably for adoption. 2d by Senator Strick. Motion carried.

The Chairman then stated that Mr. Harley Duncan, from the Department of Revenue and Mr. John Lamb, Director of the Alcoholic Beverage Control Division were both present. He introduced Mr. Duncan who presented a copy of a letter to Representative Stephen Cloud concerning Post Audit Recommendations on Liquor Excise Tax, dated January 16, 1984. The letter discusses audits which have been made, and is Attachment #4. Senator Anderson requested the latest EEO Report from the Department, and Mr. Duncan said he would supply it. Senator Morris complimented Mr. Duncan on the report which he had given.

The Chairman stated that John Lamb would then present five legislative proposals for committee review and comment. The packet is Attachment #5.

The first proposal concerned a change in the law dealing with the gallonage tax. A proposal to allow private citizens to pay gallonage tax on alcoholic liquor purchased in foreign countries and brought back to Kansas. Senator Morris moved that the proposal be introduced. 2d by Senator Arasmith. Motion carried.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS,
room 254-E, Statehouse, at 11:00 a.m./~~a~~p.m. on February 8, 1985.

The next proposal concerned stiffer penalties for minors who purchase or consume alcoholic liquor, but Mr. Lamb stated that this had been taken care of in SB126.

The next proposal dealt with law enforcement authority for ABC Agents. The attached Memorandum is to acquaint the Committee with certain questions or problems concerning Liquor Control Investigators, along with proposed legislation to correct the problem. Senator Vidricksen moved that the proposed legislation be introduced. 2d by Senator Martin. Motion carried.

Mr. Lamb than presented the proposal placing certain employees of the Alcoholic Beverage Control Division, Department of Revenue under the Kansas Police and Fireman's Retirement System. Senator Vidricksen moved that the legislation be introduced. 2d by Senator Hoferer. Motion carried.

The next proposal concerned the change in residency requirements for retail liquor store applicants. It would change the residence requirements for an applicant to one year of residence in the county and five years in the state. Senator Walker moved that the proposed legislation be introduced. 2d by Senator Strick. Motion carried.

Mr. Lamb then presented a proposal concerning diversion under the DUI statute, FSA 1984 Supp. 8-1567, as it relates to convictions under that statute as distinguished from other liquor statutes. Senator Martin moved that the proposal be introduced as legislation. 2d by Senator Strick. Discussion indicated that the Committee did not feel there was a legislative problem that needed to be dealt with. Motion failed.

Senator Martin moved that the Minutes of February 7, 1985, be approved. 2d by Senator Walker. Motion carried.

The meeting adjourned at noon.

A. Hochment #1
2/8/85

Since this is the Committee given authority by the Senate, I come to ask you
(1) to make your own honest effort to assess the trend of public opinion towards drug use (primarily alcohol), and its financial effect on government budgets; &
(2) then to assess current state (as well as national and local) laws in light of how best to bring about expressed long-term public goals.

To the Senate Committee on Federal & State Affairs: 2/8/85

I would ask, Mr. Chairman, how the people will realize that you are getting tougher in the legislature, on the drinking driver. Legislators write and pass laws. And legislators act under public scrutiny. But as example is the strongest teacher, so laws are pieces of paper until they are enforced. Still, we can, together, rise above our individual weaknesses. It was men, many of them drinkers, who tried seriously--a century ago here in Kansas, and nationally, about the time I was born--to prevent the alcohol addiction syndrome from crippling our young people. Perhaps people were not well-informed, and since emotion cannot entirely replace reason and wisdom, the national Constitutional amendment especially, was not enforced.

But in the history of humankind, one failure has not prevented us from trying again. Laws against murder are not taken off the books because murders are still committed. Following the well-meant attempts mentioned above, and as further encouragement towards public, legislative, and law-enforcement action, scientists have helped us to know much more about the effects of drugs on the human body. We are told that children of alcoholics, like children of other heavy drug users, are often born addicts. Not a very welcome gift from parents, and to an extent, society--us.

In addition to AA, have come Alanon and Alateens, and now NACA (the National Association of Children of Alcoholics). I cite these groups, as well as the newer mothers' (MADD) and 'teens' (SADD--a teen-ager is killed every hour in a drink-and-drive wreck) groups, and the even more recent SMART (Stop Marketing Alcohol on Radio and TV) as evidence of changing national attitudes. These are mostly non-tax-funded citizen action groups, but ASAP, ADSAP, etc. are channeling many tax dollars into evaluation and treatment of the drinking driver (apparently up to 40% of DUI arrestees do not pay for their own "schooling," treatment, or incarceration costs).

Some of you laughed the other day when I cited my poll results. But I now repeat: In an issue like this, much depends upon how the question is phrased. Those voters I asked said there is plenty of the stuff around now, and that they would not feel deprived of their freedom if they did not get to vote on liquor-by-the-drink. The hearing today was referred to as "fun and games." I did not see SCR 1612 before I wrote this testimony, so could not comment on its intent. But the effects of that multiplied "glass of wine" on the human system can be expensive and deadly.

Out there in the grasslands of local government, a newly-elected county attorney said (this week) that he had expected alcohol involvement in criminal cases brought to him; but that he was surprised at the extent of such involvement. A local Alcohol and Drug Service director at a Mental Health Center attributes this state's comparatively low alcoholic rate partly to groups of Kansans who use almost no drugs. Members of such groups provide "moral support" for each other, and consequently are healthier and more prosperous as a group. As an example, he said "the Mennonite communities make us (the state of Kansas) look good." Having taught at Tabor College years ago, I can concur.

The prevailing public attitude towards the use of prescription drugs--"uppers" like amphetamines--seems to be changing. Is the same change in attitude coming about towards the two most common "downers"--marijuana and alcohol? We have learned that marijuana causes tunnel vision and a distorted sense of time, serious for automobile drivers. Alcohol also affects driving competence. But the big difference between the two is that society has not (yet!) legally accepted "lacing" foods or beverages with marijuana. I would ask your help in keeping local government costs down by keeping such drivers off the highway.

Dorothy Shoup
Dorothy Shoup (793-2347)
RR 1, Box 165
Scranton, Ks. 66537

Home

Attachment 1

Will this driver be limited to "a glass of wine"? If not,

how will car-driver get home?

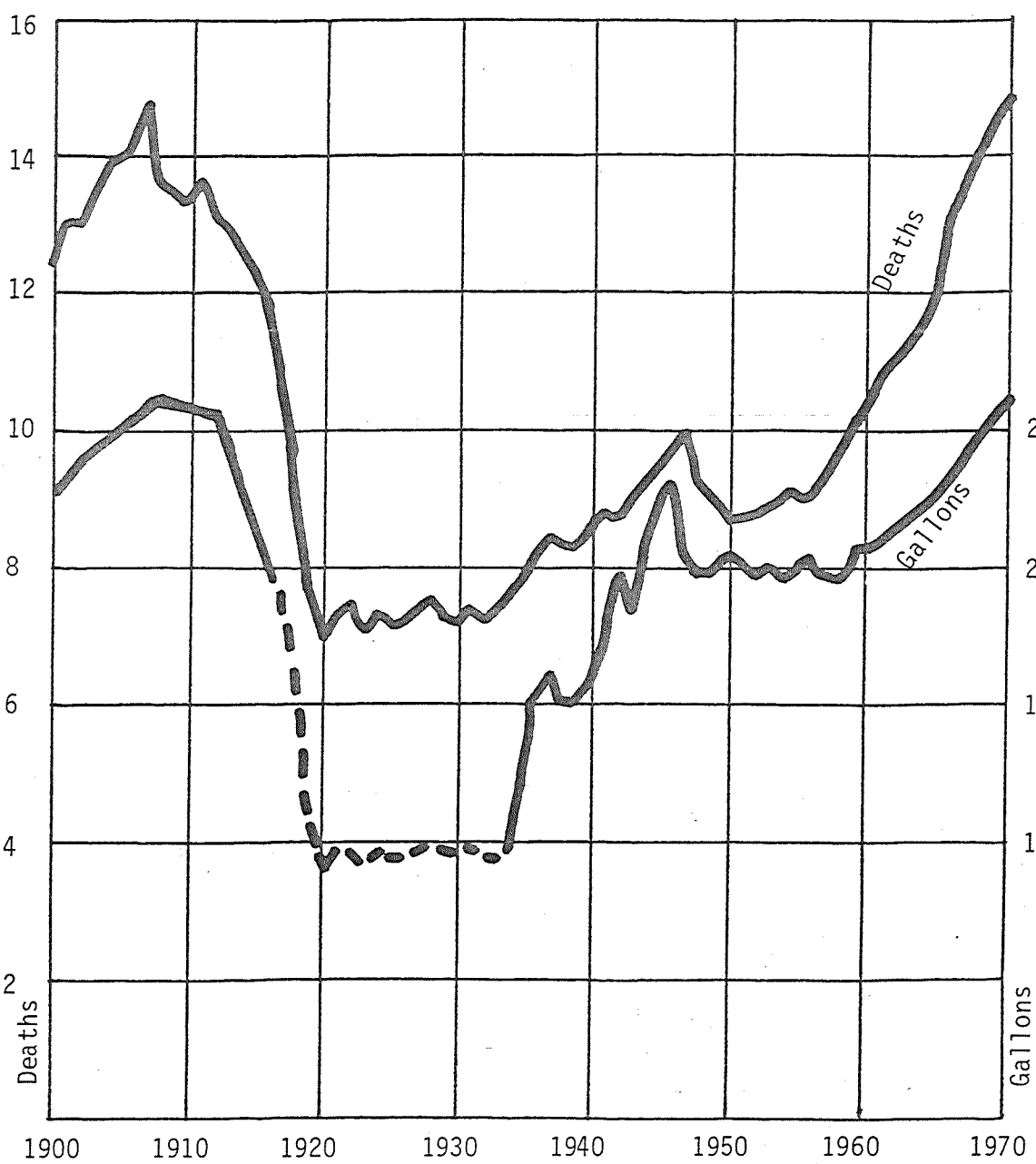


Cirrhosis Deaths per 100,000 population. (Age Adjusted)
National Center for Health Statistics.

The Jellinek Estimation Formula bases cases of alcoholism in direct proportion to deaths from cirrhosis.

Note the close relationship of consumption to deaths.

Cirrhosis deaths reached a high of 14.8 in 1907, dropped to an all time low of 7.1 in 1920 and 1923. During 1970 cirrhosis deaths were 14.7 and in 1973 reached an all time high in our nation's history.



Annual Consumption of Absolute Alcohol from Beer, Wine, & Spirits.
Gallons per person Age 15 and older.

2.50 ALCOHOL & HEALTH HEW Report to Congress

(Relative to cirrhosis deaths, dashed line indicates apparent consumption during Prohibition years)

1.00 Consumption reached a high of 2.60 during 1906-10. It was at an all time low of .97 following national Prohibition. In 1970 it hit 2.61, a new high in our nation's history.

Social drinkers who hate hypocrisy will not be offended with this simple statement of fact. Prohibition of heroin and marijuana is opposed by those who like the way it makes them feel and by those who profit from pushing the drug. Prohibition of alcohol is opposed by those who like the way it makes them feel and by those who profit from pushing the drug, but there is little doubt that from 1920 to 1933, per person consumption and alcoholism was at the lowest level in our nation's history.

Persons who say prohibition does not work must be in favor of legal cocaine, legal heroin, and legal marijuana. We are living under prohibition of those recreational drugs and if prohibition does not work, they should be legalized.

Hypocrisy is written into Kansas law with section (d) of KSA 65-4102. By definition, alcohol is a controlled substance but is exempt from control under that statute. This committee should repeal section (d) and erase hypocrisy from Kansas law.

One of the biggest surprises of my life came when a friend sent me this editorial. The editor explained my position better than I have been able to state it myself.

The Salina Journal, Tuesday, May 31, 1977

The Salina Journal frequently is critical of the activities of prohibitionists who would impose, by any means possible, their standards of morality upon everyone else.

The legalized sale of liquor is far better than the hypocrisy of prohibition, we believe. And we support legalized sale of liquor by the drink instead of the present hypocrisy of "private clubs".

Having said that, let us add that we have considerable admiration and affection for Rev. Richard E. Taylor jr.

Rev. Taylor, a former Salina pastor, is president of the Kansas United Dry Forces, but that's something of a misnomer. The name of the organization almost inevitably calls to mind visions of zealots, Carrie Nation-type fanatics, bar mirror smashing and the like. That may be one reason why Rev. Taylor would prefer his group be called "Kansans for Life at its Best!".

He's no fanatic. He would like to see the day when nobody takes a drink of an alcoholic concoction. But he is a practical man and he knows that day isn't going to dawn soon, if ever, so he does what he can.

Try not to drink, he says, but if you do, try to hold it to 2 drinks a day.

He lobbies the legislators energetically, seeking higher prices on booze and beer and more controls,

and he reels off a long list of the evils of alcohol, but many drinking legislators remain his friends.

He isn't fooled by legislative tricks. When a pro-liquor-by-the-drink legislator, in an attempt to force a favorable vote on the issue, introduced a bill calling for total prohibition, he, no doubt, expected Rev. Taylor to jump on the bandwagon.

Rev. Taylor didn't. He saw the trick and he knew prohibition isn't a viable prospect now.

For the present, his main goal is "reducing alcoholism by reducing total social consumption".

That's a practical and achievable goal.

The paradise of total abstinence may be attained some day. In the meantime, Rev. Taylor, in his earnest but charming fashion, is doing what he can to pave the way to that golden gate.

He's a good man doing his work effectively.

Next week we may print another editorial favoring liquor by the drink, but that won't mean that we like him less.

The Journal's Page of Opinion

The booze battler

The Editor's Opinion

Rev Taylor 2/8/85
Attachment # 3



Kansas
DEPARTMENT OF REVENUE

2/8/85
Attachment #4

State Office Building
Topeka, KS 66625

January 16, 1984

The Honorable Stephen R. Cloud, Chairman
House Governmental Organization Committee
Statehouse
Topeka, Kansas

Re: Post Audit Recommendations
on Liquor Excise Tax

Dear Representative Cloud:

This letter responds to the Legislative Post Audit recommendations concerning administration and estimation of liquor excise tax revenue as requested in your letter of March 31, 1983. The letter consists of three parts: (1) an analysis of the results of liquor excise tax audits conducted from July 1, 1982 through December 31, 1983; (2) a comparison of estimated to actual liquor excise tax receipts based on results of those audits; and (3) a review of measures taken by the Department of Revenue to aid taxpayers in understanding and complying with the tax.

Liquor Excise Tax Audit Results

From July 1, 1982 through December 31, 1983, the Department has conducted a total of 617 private club liquor excise tax audits. There are currently 1,234 private clubs licensed in the state, meaning 50 percent of the clubs have been audited by the Department.

Of the 617 audits, 419 or 68 percent of the audits resulted in no assessments by the auditor, and the remaining 32 percent (198 audits) resulted in assessments being made. Total assessments were \$684,658. The average assessment was \$1,110 per club audited. The table below shows the current status of these assessments:

Revenue received by the state from audits	\$217,331
Assessments abated	88,011
Assessments still in the collection process	181,359
Assessments currently being appealed	<u>197,957</u>
TOTAL Assessments	\$684,658

It should be noted that the results of these audits are quite similar to those found in 31 audits conducted by the Legislative Division of Post Audit. Twenty-two (61 percent) of those audits revealed no additional tax liability, and the total tax liability disclosed was approximately \$38,500. This is an average of \$1,242 per club audited even though one auditee accounted for over \$30,000 of the total additional tax disclosed.

In viewing the collections from departmental audits, the Committee should be aware that our auditors have encountered difficulties similar to those encountered by Post Audit. Namely, club records are often inadequate for determining actual tax liability. Therefore, certain standards and tests must be utilized, and assessments are sometimes made on less than complete information. This accounts, in large part, for the volume of assessments in appeal or still in the collection process.

To provide some perspective to the audit results, the Committee may wish to consider the following.

A total of 14,296 hours, or 1,787 man days, was spent conducting private club audits. The estimated cost to the state for a Revenue Auditor I, transportation, lodging and meals is estimated at \$30 per hour, for a total cost of \$428,880 (14,296 x \$30).

As indicated above, the audits performed in the 18 months have generated \$217,331 in actual additional revenues. The total cost to the state for the audits performed is estimated at \$429,000. If the state receives no more revenue from the pending assessments, the state will have actually lost about \$212,000. Another scenario would be to assume all of the pending assessments will be collected by the state, bringing the total revenue received to about \$596,000, leaving net collections after costs of \$167,000.

If all pending assessments are collected, the benefit to cost ratio of these audits would be about 1.40 to 1, or for each \$1 spent by the state \$1.40 in revenue is generated. Of the \$1.40, the state receives 25 percent or \$.35, while spending \$1, and local governments receive the remaining 75 percent, or \$1.05. The state has actually lost about \$.65 on each dollar spent conducting audits. For the state to break even the benefit to cost ratio would have to be 4 to 1, instead of the current 1.4 to 1.

As an example the cost to assessment ratio in FY 1983 for corporate income tax audits exceeded 100 to 1, and for sales tax audits, it exceeded 10 to 1.

Estimating Liquor Excise Tax Revenue

To estimate the potential amount of liquor excise taxes available, the Department, since July 1, 1982, has required retail liquor stores to report their monthly sales to private clubs. In FY 1983 retail stores reported sales of about \$25.3 million to private clubs. This sales figure multiplied by a mark-up factor will produce an estimate of total taxable sales of alcoholic beverages by private clubs.

The Department estimates the appropriate mark-up factor at approximately 3.5, i.e., \$1 in liquor purchases should, on average, produce roughly \$3.50 in taxable drink sales. This is based on a random sample of 30 private club audits in which the mark-up ranged from a low of 1.8 to a high of 8.4, with a weighted average of 3.41. Using a mark-up factor of 3.5 and the \$25.3 million in reported sales to clubs, the estimate of total potential liquor excise tax revenues in FY 1983 is computed as follows:

Retail Liquor Store Sales to Private Clubs	\$25.3 million
Mark-up factor	3.5
Gross Private Club Sales	<u>\$88.55 million</u>
Liquor Excise Tax @ 10%	.10
Total Liquor Excise Tax Collections	<u>\$ 8.86 million</u>

Actual liquor excise tax collections in FY 1983 were about \$8.43 million. If potential collections are estimated to be \$8.86 million, the underreported taxes would have been about \$430,000 in FY 1983. This equates to an average of roughly \$350 per club. If, however, the actual mark-up from the 30 club sample of 3.41 is used, the potentially unreported tax drops to roughly \$200,000 or less than 50 percent of the figure with a mark-up of 3.5.

An estimate of \$200,000 to \$500,000 annually in underreported tax seems reasonable in light of the results obtained during the Department's audits. Assuming that the 617 clubs audited are representative of the 1,234 clubs licensed, an audit of all clubs would yield assessments of approximately \$1.37 million. Of this amount, approximately 18 percent could be abated (based on past results) due to the taxpayer presenting more complete information at the time of appeal, leaving final assessments of roughly \$1.1 million. Given that the Department's audits commonly covered from 2-3 tax years (generally 3 years if the club had been in business that long), this equates to an unreported tax liability of \$375,000 - \$562,000 annually. Using an average audit period of 2.5 years would yield a point estimate of \$440,000 annually in unreported liability.

The salient points of this review can be summarized as follows:

- Over two-thirds of the audits conducted resulted in no change in liability.
- The average assessment for each audit was \$1,110 for a 2-3 year period.
- At best, potential collections exceed the costs of the audit by only 40 percent.
- The State receives only 25 percent of the tax collected, and to date, state costs have exceeded state collections.
- In total, it appears that the estimated underreporting of tax approximates \$200,000 - \$500,000 annually.

These data indicate to me that there are other areas where state audit resources can be used in a more cost-effective manner. Liquor excise tax audits must and will continue to be conducted. However, to place an extremely heavy emphasis on this area seems to be a misallocation of resources.

This approach has, in effect, been implemented. Seven auditors were assigned to the Department to conduct liquor excise tax audits in FY 1983. However, in April 1983, five of these positions were reallocated by the Legislature to assist in implementing accelerated withholding legislation. This leaves the Department with two auditors for liquor excise tax purposes. The Department considers this to be an adequate level of coverage.

Tax Compliance and Understanding Measures

As recommended by the Division of Legislative Post Audit, the Department has taken steps to improve compliance with and understanding of the tax.

Effective July 1, 1982, all retail liquor stores holding a federal wholesaler's basic permit are required to submit to the Division of Alcoholic Beverage Control a monthly summary of all sales to private clubs.

On October 25, 1982, new retail liquor excise tax regulations were promulgated to assist private clubs in complying with the requirements of the liquor excise tax. Included in these regulations were instructions regarding the calculation of sales and liquor excise taxes. Further, on November 22, 1982, various members of the private club industry met with representatives of the Department in an effort to resolve questions about recordkeeping requirements and possible alternatives in computing the applicable retail liquor excise tax due--i.e. complimentary drinks, overage, spillage, theft, and two or more drinks for the price of one. Also, on November 1, 1982, an informational letter, a copy of the retail liquor excise tax regulations, and a printed sign indicating that the retail liquor excise tax is included in the price of a drink, was sent to all private club licensees.

Finally, the Department continues to refer liquor excise tax accounts delinquent for more than 60 days to the Division of Alcoholic Beverage Control for collection.

The Director of Alcoholic Beverage Control, upon receiving the name of the club and the months they are delinquent, issues a citation to the club ordering them to appear and show cause, if any, why their license as a class A or class B club should not be suspended or revoked as provided by law or why a monetary fine should not be levied as penalty.


The Director of Alcoholic Beverage Control will dismiss the first citation if the club presents proof that the taxes and penalties have been paid. The licensee is admonished that if he is delinquent again, a three day suspension of the license will be imposed. If it is repeated again, additional days will be added until such time as the licensee stops the delinquency or surrenders the license.

If the taxes and penalty have not been paid by the time of the hearing, the Director of Alcoholic Beverage Control will give the licensee approximately two weeks to get the taxes and penalty paid. If it is not paid within this period, then the licensee is placed on an indefinite suspension until such time as the taxes and penalty are paid and proof of payment is presented to the Director. When proof is received, the Director of ABC will set aside the indefinite suspension and the club is permitted to resume operations.

In FY 1983, approximately 225 delinquent liquor excise tax citations were issued.

I trust this information responds to your questions. Please feel free to contact me if you require further information.

Sincerely,



Harley T. Duncan
Secretary of Revenue

HTD:b/1/S363



Kansas

SN
2/8/85

DEPARTMENT OF REVENUE
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
Topeka, Kansas 66625
(913) 296-3946

Attachment #5

TO: Honorable Edward Reilly, Chairperson
Senate Federal and State Affairs Committee

FROM: JOHN A. LAMB, Director, ABC Division

RE: Agency Legislative Proposals

DATE: February 7, 1985

I have attached five (5) legislative proposals for committee review and comment. Your serious consideration of these matters will be appreciated.

A handwritten signature in cursive script, appearing to read "John A. Lamb", is written over a horizontal line.

JOHN A. LAMB, DIRECTOR

JAL:cjk
Attachments

Attachment 5

Morris — 4
Arasmith 2
Carried
2/8/85

PROPOSAL: Change in Law--Gallongage Tax

A proposal to allow private citizens to pay gallongage tax on alcoholic liquor purchased in foreign countries and brought back to Kansas.

K.S.A. 41-501(b)(2)

The tax imposed by this section shall be paid only once and shall be paid by the person in this state or federal area who first manufactures, uses, sells, stores, purchases or receives the alcoholic liquors. The tax shall be collected and paid to the director as provided in this act. If the alcoholic liquor is manufactured and sold in this state or federal area, the tax shall be paid by the manufacturer or farm winery producing it. If the alcoholic liquor is imported into this state by a distributor for the purpose of sale at wholesale in this state or a federal area, the tax shall be paid by the distributor. If the alcoholic liquor has been purchased by a private citizen outside the borders of the United States and is brought into this state by said private citizen for his or her own personal use and not for sale or resale, the tax shall be paid by said private citizen.

200 -
SB 126

PROPOSAL: Stiffer Penalties for Minors who Purchase or
Consume Alcoholic Liquor

A proposal to increase the penalties for minors who possess or purchase alcoholic liquor. Following are several suggestions for ways that this could be done:

K.S.A. 41-715. Unlawful acts by minors in connection with purchases or possession of alcoholic liquor; procurement of alcoholic liquor for incapacitated persons unlawful; penalties.
(a) No minor shall represent that he is of age for the purpose of asking for, purchasing or receiving alcoholic liquor from any person except in cases authorized by law. No minor shall attempt to purchase or purchase alcoholic liquor from any person. No minor shall possess alcoholic liquor. Any person violating any of the provisions of this subsection shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment of not more than ninety (90) days, or both such fine and imprisonment. (b) No person shall knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any person who is an incapacitated person, or any person who is physically or mentally incapacitated by the consumption of ~~such~~ alcoholic liquor. Any person violating any of the provisions of this ~~section~~ subsection shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars (\$200) or by imprisonment for not to exceed thirty (30) days, or both such fine and imprisonment in the discretion of the court.

SUGGESTION #2: K.S.A. 41-715.

No minor shall represent that he is of age for the purpose of asking for, purchasing or receiving alcoholic liquor from any person except in cases authorized by law. No minor shall attempt to purchase or purchase alcoholic liquor from any person. No minor shall possess alcoholic liquor. No person shall knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any person who is an incapacitated person, or any person who is physically or mentally incapacitated by ~~such~~ alcoholic liquor. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not ~~more than two hundred dollars-(\$200)~~ less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment for not to exceed ~~thirty-(30)~~ ninety (90) days, or both such fine and imprisonment in the discretion of the court.

SUGGESTION #3: K.S.A. 41-715.

Split the statute into two separate statutes, one dealing with minors, the other with incapacitated persons. Numbering could be along the lines of K.S.A. 41-715 and 41-715a.

In the interest of clarity, it would be our recommendation to split this one statute into two statutes. Clarity of subject is a problem because one part imposes a penalty on minors themselves for purchasing while the other part penalizes the person who sells or buys for an incapacitated person. It should also be noted in passing that furnishing liquor to a minor is made a misdemeanor offense under the criminal code (chapter 21, K.S.A.).

One other alternative may be worthy of consideration. A \$500 fine may not be a deterrent to a minor if his or her wealthy parents pay it and otherwise ignore the minor's actions. Perhaps if

required community service were to be offered as an alternative to the fine or jail, judges would be better equipped to fashion a penalty in such a way that it actually impacts on the minor regardless of his or her social status. This would also offer an alternative to children from truly poverty-stricken families that may not be able to pay a minimum \$100 fine.

2/8/85
Vidricksen
Martin
Carried

PROPOSAL: Law Enforcement Authority for ABC Agents

The purpose of this Memorandum is to acquaint you with a jurisdictional problem or question concerning Liquor Control Investigators, and to propose legislation to correct that problem.

K.S.A. 41-201 states, in pertinent part:

"The director of alcoholic beverage control and such agents and employees of the director as shall be designated by the director, with the approval of the secretary of revenue, are hereby vested with the power and authority of peace and police officers, in the execution of the duties imposed upon the director of alcoholic beverage control by this act and in enforcing the provisions of this act."

Attorney General Opinion No. 75-360, dated September 10, 1975, ruled that Alcoholic Beverage Control Agents do have authority to carry firearms as "peace and police officers." ABC Agents have routinely carried firearms since then. All ABC Agents are now required to complete law enforcement training including firearms training, to re-certify periodically in use of firearms, and in general to complete all required preparations for law enforcement duty.

K.S.A. 41-201 as cited above clearly authorizes ABC Agents as police officers in enforcing the Kansas liquor laws. However, it is not at all clear whether or not an ABC Agent would have authority to enforce other state laws during the performance of his routine duties. Due to the amount of time that our Agents spend in and around private clubs and retail liquor stores, it is inevitable that they will encounter illegal drugs, prostitution, armed robberies and other crimes that are often associated with those businesses. Only last week one of our Agents came very close to an armed robbery of a liquor store. If that agent had been in a proper position to attempt an arrest of the suspect, it would have been unclear whether or not he had any authority to do so. If a shooting had resulted, the potential legal liability for the Agent and for the state would have been very unclear.

With the above considerations in mind, the following new statute is proposed for your consideration.

K.S.A. 41-201a. Alcoholic Beverage Control Agents; law enforcement powers, training requirements.

The director, each agent or employee appointed by the director with the approval of the secretary of revenue pursuant to K.S.A. 41-201 and amendments thereto shall have the authority to make arrests, conduct searches and seizures and carry firearms while investigating violations of this act and during the routine conduct of their duties as determined by the director

K.S.A. 41-201a. (contd)

or his designee. In addition to the above, the director, such agents, or employees shall have the authority to make arrests, conduct searches and seizures and generally to enforce all the criminal laws of the state as violations of those laws are encountered by such employees or agents during the routine performance of their duties. No agent or employee of the director shall be certified to carry firearms under the provisions of this section without having first successfully completed the firearm training course or courses prescribed for law enforcement officers under K.S.A. 74-5604(a) and amendments thereto. The director may prescribe by rule and regulation such other training as will be required for these agents or employees.

This proposed legislation is modeled on similar recent statutes empowering fire marshals (K.S.A. 1984 Supp. 31-157) and livestock special investigators (K.S.A. 1984 Supp. 47-416a) to carry firearms and make arrests. The occurrence of the phrase "peace and police officers" in existing statutory language that has been on the statute books since 1949 clearly indicates that this proposal is largely a matter of clarifying existing policies rather than making major changes in current practices.

2/8/85

Vidricken
Hoferer
Carried

PROPOSAL: Placing of certain employees of the Alcoholic Beverage Control Division, Department of Revenue under the Kansas Police and Fireman's Retirement System.

Previously submitted as SB 158.

AN ACT relating to the Kansas police and firemen's retirement system; providing for participation by the department of revenue and certain of its officers and employees.

Be it enacted by the Legislature of the State of Kansas:

Section 1. On the effective date of this act, the department of revenue shall be an eligible employer as defined in K.S.A. 74-4952 and amendments thereto, and on July 1, 1983, the department of revenue shall become a participating employer as defined by reference in subsection (13) of K.S.A. 74-4952 and amendments thereto, by subsection (24) of K.S.A. 74-4902 and amendments thereto. The entry date into the Kansas police and firemen's retirement system of the department of revenue shall be July 1, 1983.

Sec. 2. "Alcoholic beverage control enforcement officer" means any alcoholic beverage control enforcement officer, agent, investigator or other employee of the division of alcoholic beverage control of the department of revenue who is vested with the power and authority of peace and police officers under K.S.A. 41-201 and amendments thereto, ~~but shall not include the director of alcoholic beverage control.~~ Wherever the word "policeman" is used in K.S.A. 74-4951 *et seq.*, and amendments thereto, it shall be construed to include the words "alcoholic beverage control enforcement officer" as defined by this section.

Sec. 3. (a) Each alcoholic beverage control enforcement officer employed by the department of revenue on July 1, 1983, may become a member of the Kansas police and firemen's retirement system on the first day of the payroll period of such alcoholic beverage control enforcement officer coinciding with or following the entry date of the department of revenue, only by filing with the board of trustees of the system, on or before the entry date of the department of revenue, a written election to become a member of the system. Failure to file such written election shall be presumed to be an election not to become a member of the system. Such election, whether to become a member or not to become a member, shall be irrevocable.

(b) Each alcoholic beverage control enforcement officer who is on an authorized leave of absence or is in the military service on the department of revenue's entry date, may become a member of the Kansas police and firemen's retirement system on the first day of the first payroll period of such alcoholic beverage control enforcement officer coinciding with such alcoholic beverage control enforcement officer's return to active employment and the department of revenue's payroll only by filing with the board of trustees of the system within 10 days after such return to active

employment, a written election to become a member of the system. Failure to file such written election shall be presumed to be an election not to become a member of the system. Such election, whether to become a member or not to become a member, shall be irrevocable.

(c) Every person who is employed as an alcoholic beverage control enforcement officer on or after the entry date of the department of revenue into the Kansas police and firemen's retirement system shall become a member of the Kansas police and firemen's retirement system on the first day of such employment.

Sec. 4. (a) Alcoholic beverage control enforcement officers who become members of the Kansas police and firemen's retirement system shall be subject to all the provisions of K.S.A. 74-4951 and 74-4970, inclusive, and any amendments thereto, except as otherwise provided in this act.

(b) Each alcoholic beverage control enforcement officer who is a member of the Kansas police and firemen's retirement system and has reached the age of 65 years must file an application for retirement with the board of trustees of the system and if that alcoholic beverage control enforcement officer refuses or neglects to do so, the board shall consider the application as having been

filed on the 65th birthday of that alcoholic beverage control enforcement officer. The provisions of subsection (2)(b) of K.S.A. 74-4956 and amendments thereto, shall not apply to alcoholic beverage control enforcement officers who retire pursuant to this provision. Each alcoholic beverage control enforcement officer who is so retired shall receive a retirement benefit in accordance with the provisions of subsection (1) of K.S.A. 74-4958 and amendments thereto, on the basis of that alcoholic beverage control enforcement officer's years of credited service.

(c) Beginning with the first payment of compensation for services of an alcoholic beverage control enforcement officer after becoming a member of the Kansas police and firemen's retirement system, the employer shall deduct from the compensation of such member 7% as employee contributions. Such deductions shall be remitted, deposited and credited as provided in K.S.A. 74-4965 and amendments thereto.

Sec. 5. The division of the budget and the governor shall include in the budget and in the budget request for appropriations for personal services the amount required to satisfy the employer's obligation under this act as certified by the board of trustees of the system in the manner prescribed in K.S.A. 74-4967 and amendments thereto, and shall present the same to the legislature for allowance and appropriation. The rate of employer contribution for the first year shall be as prescribed in subsection (6) of K.S.A. 74-4967 and amendments thereto.

Sec. 6. This act shall take effect and be in force from and after its publication in the Kansas register.

2/8/85
Walker - Motion
Strick - 2d
Motion carried.

PROPOSAL: Change Residency Requirements for Retail
Liquor Store Applicants

A proposal to change residency requirements for an applicant for a retail liquor store license to one year of residency in the county and five years in the state. Presently, the residency requirement for a retail liquor store applicant is 5 years in the county and 10 years in the state.

Previously submitted in 1983 as SB 305.

AN ACT concerning the Kansas liquor control act; persons not to receive retailer's license; amending K.S.A. 1982 Supp. 41-311 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1982 Supp. 41-311 is hereby amended to read as follows: 41-311. (a) No license of any kind shall be issued to a person:

(1) Who has not been a citizen of the United States for at least 10 years-;

(2) who has been convicted of or has pleaded guilty to a felony under the laws of this state, any other state or the United States-;

(3) who has been convicted of or has pleaded guilty to a violation of intoxicating liquor laws of any state or the alcoholic beverage control laws of the United States or has forfeited bond to appear in court to answer charges for any such violation, within the 10 years immediately prior to the date of the person's application for a license-;

(4) who has been convicted of or has pleaded guilty to a violation of any of the laws of any state relating to cereal malt beverages, within 10 years immediately prior to the date of the person's application for a license-;

(5) who has had a license revoked for cause under the provisions of this act or who has had any license issued under the cereal malt beverage laws of any state revoked for cause except that a license may be issued to a person whose license was revoked for the conviction of a misdemeanor at any time after the lapse of 10 years following the date of the revocation-;

(6) who has been convicted of or has pleaded guilty to being

the keeper or is keeping a house of prostitution or has forfeited bond to appear in court to answer charges of being a keeper of a house of prostitution;

(7) who has been convicted of or has pleaded guilty to being a proprietor of a gambling house, pandering or any other crime opposed to decency and morality or has forfeited bond to appear in court to answer charges for any of those crimes;

(8) who is not at least 21 years of age;

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

(10) who intends to carry on the business authorized by the license as agent of another;

(11) who at the time of application for renewal of any license issued under this act would not be eligible for the license upon a first application;

(12) who is the holder of a valid and existing license issued under the laws of this state relating to cereal malt beverages and malt products unless the person agrees to and does surrender the license to the officer issuing the same upon the issuance to the person of a license under this act, except that a holder of a cereal malt beverages wholesaler's license shall be eligible to receive a beer distributor's license under this act;

(13) who does not own the premises for which a license is sought, or does not have a written lease thereon for at least $\frac{3}{4}$ of the period for which the license is to be issued; *or*

(14) whose spouse would be ineligible to receive a license under this act for any reason other than citizenship and residence requirements or age.

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

(1) Person who is not a resident of the county in which the premises sought to be licensed are located;

(2) person who has not been, for at least ~~five years~~ *one year* immediately preceding the date of application, a resident of the county in which the premises covered by the license are located or a person who has not been a resident of this state for a total of at least ~~10~~ *five* years preceding the date of application, except that, if the premises sought to be licensed are located in a city which is located in two or more counties and the applicant for license is a resident of either county, the applicant shall be deemed to be a resident of each county for the purpose of qualification;

(3) person who has beneficial interest in the manufacture, preparation or wholesaling of alcoholic beverages;

(4) person or copartnership or association who has beneficial interest in any other retail establishment licensed under this act;

(5) copartnership, unless all of the copartners are qualified to obtain a license; *or*

(6) corporation.

(c) No manufacturer's license shall be issued to:

(1) A corporation, if any officer, manager or director thereof,

or any stockholder owning in the aggregate more than 25% of the stock of the corporation would be ineligible to receive a manufacturer's license for any reason other than citizenship and residence requirements;

(2) a copartnership, unless all of the copartners shall have been residents of this state for at least five years immediately preceding the date of application and unless all the members of the copartnership would be eligible to receive a manufacturer's license under this act; *or*

(3) an individual who has not been a resident of this state for at least five years immediately preceding the date of application.

(d) No distributor's license shall be issued to:

(1) A corporation, if any officer, manager, director or stockholder of the corporation would be ineligible to receive a distributor's license for any reason. It shall be unlawful for any stockholder of a corporation licensed as a distributor to transfer any stock in the corporation to any person who would be ineligible to receive a distributor's license for any reason, and any such transfer shall be null and void, except that: (A) If any stockholder owning stock in the corporation dies and an heir or devisee to whom stock of the corporation descends by descent and distribution or by will is ineligible to receive a distributor's license, the legal representatives of the deceased stockholder's estate and the ineligible heir or devisee shall have 14 months from the date of the death of the stockholder within which to sell the stock to a person eligible to receive a distributor's license, any such sale by a legal representative to be made in accordance with the provisions of the probate code; or (B) if the stock in any such corporation is the subject of any trust and any trustee or beneficiary of the trust who is 21 years of age or older is ineligible to receive a distributor's license, the trustee, within 14 months after the effective date of the trust, shall sell the stock to a person eligible to receive a distributor's license and hold and disburse the proceeds in accordance with the terms of the trust. If any legal representatives, heirs, devisees or trustees fail, refuse or neglect to sell any stock as required by this subsection, the stock shall revert to and become the property of the corporation, and the corporation shall pay to the legal representatives, heirs, devisees or trustees the book value of the stock. During the period of 14 months prescribed by this subsection, the corporation shall not be denied a distributor's license or have its distributor's license revoked if the corporation meets all of the other requirements necessary to have a distributor's license;

(2) a copartnership, unless all of the copartners are eligible to receive a distributor's license; *or*

(3) an individual who has not been a resident of this state for at least 10 years immediately preceding the date of application, except that:

(A) A wholesaler of cereal malt beverages properly licensed on September 1, 1948, shall be eligible for a beer distributor's license; and

(B) a person who has been a resident of the state for at least five years immediately preceding the date of application shall be eligible for a beer distributor's license.

(e) No nonbeverage user's license shall be issued to a corporation, if any officer, manager or director of the corporation or any stockholder owning in the aggregate more than 25% of the stock of the corporation would be ineligible to receive a nonbeverage user's license for any reason other than citizenship and residence requirements.

Sec. 2. K.S.A. 1982 Supp. 41-311 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

2/8/85

PROPOSAL: Diversion on a DUI

Martin: Motion
Strick: 2d
Motion failed.

Various statutes and/or administrative regulations prohibit the issuing of a liquor license (except a private club license) to any person who has been convicted of a violation of the intoxicating liquor laws. Likewise such a person may not be employed in handling alcoholic liquor. In 1966, the Kansas Supreme Court held that a conviction for driving under the influence constituted a liquor law violation (Keck v. Cheney, 196 Ka. 535).

In 1982, the DUI statute (K.S.A. 1984 Supp. 8-1567) was amended to include progressively more severe penalties for repeat violators and to allow for a diversion for first time offenders. Due to the specific provisions of this statute, the Attorney General was asked how a diversion under the DUI statute would affect a person's ability to hold a license to sell cereal malt beverage at retail. The Attorney General concluded that, for purposes of license eligibility, a diversion under K.S.A. 8-1567 is a conviction (Attorney General Opinion No. 84-21, copy attached as Exhibit 1). Due to the similarities in language, this agency felt compelled to accept the conclusions in that Opinion as equally applicable to liquor licensees and employees (Memorandum 84-1, copy attached at Exhibit 2).

Memorandum 84-1 has not met with total approval within the industry or within the legal community. Earlier this year Stephen P. Weir, a Topeka attorney speaking on behalf of a client, submitted to this agency a fairly lengthy summary of his position in opposition to Memorandum 84-1 and Attorney General Opinion No. 84-21. The following statement from Mr. Weir's discussion is particularly appropriate to this matter.

"K.S.A. 8-1567(i) states:

'(i) For the purpose of determining whether a conviction is a first, second or third or subsequent conviction for the purpose of sentencing under this section, the term "conviction" includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section. For such purpose "conviction" also includes being convicted of a violation of a law of another state or an ordinance of any municipality which prohibits the acts that this section prohibits or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such a law or ordinance. For the purpose of this section, only convictions occurring in the immediately preceding five years, including prior to the effective date of this act, shall be taken into account.'

But, as you can see the definition of the term "conviction" is limited by the precise terms of this statute.

A diversion agreement may be considered a conviction "for the purpose of sentencing" upon a second or subsequent conviction.

Therefore, according to this statute a diversion agreement can only be considered a conviction after a person is convicted of a second or subsequent offense.

Not only does K.S.A. 8-1567 limit consideration of a diversion agreement to sentencing, K.S.A. 22-2910 specifically prohibits evidence of a diversion agreement from being admitted in any proceedings other than for sentencing.

K.S.A. 22-2911(d) states "A record of the fact that an individual has participated in diversion in lieu of further criminal proceedings...shall be forwarded to the division of vehicles of the department of revenue...for use in proceedings conducted under K.S.A. 8-285 or 8-1567 and amendments to these sections or any alcohol related offense as defined in K.S.A. 12-4413."

This statute does not authorize the state to use the information in any other proceedings besides those listed."

(Letter from Stephen P. Weir to Richard Hodson, dated January 2, 1985.)

The discussion that has been generated by the Opinion and Memorandum has now centered largely on what the Legislature intended. For that reason, it seems appropriate for this agency to bring this matter to the Legislature for clarification. If it is your intention that a diversion under the provisions of K.S.A. 1984 Supp. 8-1567 not prohibit a person from getting a liquor license or from being employed in handling alcoholic liquor or cereal malt beverages, the following statutes would need to be amended to exclude DUI diversions.

1. K.S.A. 1984 Supp. 41-311(a)(3)
2. K.S.A. 41-2610(c)
3. K.S.A. 41-2703(b)(4)
4. K.S.A. 41-2708(j)

In considering this matter, it should also be pointed out that a diversion on any other criminal offense, to include a felony or any other intoxicating liquor law, will not prevent a person from getting a liquor license or from being employed in a liquor business.

We are seeking a clarification of what the legislative intent is regarding this issue.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE (913) 296-2215
CONSUMER PROTECTION. 296-3751
ANTITRUST: 296-5299

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 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 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

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.

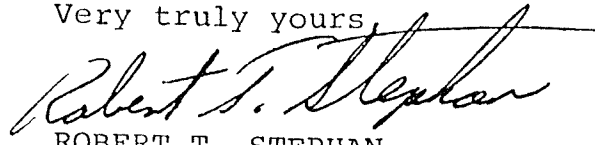
However, we are constrained to note that, due to the non-uniformity of the act containing K.S.A. 41-2708, the area is subject to the home rule authority of the City of Winfield under Article 12, Section 5 of the Kansas Constitution. The act in which the statute was adopted in its present form, L. 1976, 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

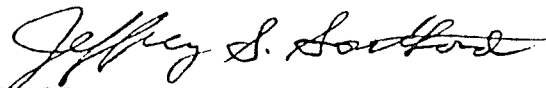
the city could, by charter ordinance, require that a licensee be subject to license revocation or suspension if he or she continues to employ a person who is participating in a DUI diversion program.

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,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:jm

MEMORANDUM 84-1

TO: All Retail Liquor Store Licensees
All Alcoholic Liquor Distributors
All Cereal Malt Beverage and Strong Beer Distributors
All Farm Winery Licensees
All Alcoholic Liquor Importers doing business in Kansas

FROM: THOMAS J. KENNEDY, Director, ABC Division

RE: Diversion on a DUI is a Conviction

DATE: April 10, 1984

K.S.A. 1983 Supp. 41-311(a)(3) prohibits the issuing of a license of any kind to any person "Who has been convicted of a violation of intoxicating liquor laws of any state..." The Kansas Supreme Court in Keck v Cheney, 196 Kan. 535 (1966) expressly held that a conviction on a charge of DUI under K.S.A. 8-1567 is a conviction of a violation of the intoxicating liquor law for purposes of K.S.A. 41-311. The Kansas Legislature seems to have implicitly recognized this when in 1983 it added K.S.A. 1983 Supp. 41-311(a)(14), which states that a license shall not be issued to a person whose spouse is ineligible for a license for any reason except citizenship, residence requirements, age, or conviction of DUI.

K.S.A. 8-1567 prohibits the operation of a motor vehicle while under the influence of intoxicating liquor or drugs; specifies the penalties for first, second, third or subsequent convictions; and allows an accused first-time offender to enter into a diversion under certain circumstances and with certain conditions. It has long been the understanding of this agency, and we have so advised licensees that a diversion is not the same as a conviction and therefore, it will not disqualify a licenseholder under K.S.A. 41-311.

On March 5, 1984, Attorney General Robert T. Stephan issued Attorney General Opinion No. 84-21, which deals with diversions under K.S.A. 8-1567 (the DUI statute) as they would affect cereal malt beverage licensees. That Opinion concludes as follows:

"In conclusion, K.S.A. 41-2703 sets forth the requirement of a retailer's license to sell cereal malt beverages, as that term is defined by K.S.A. 51-2701. Among the requirements [at subsection (b)(4)] is a provision that renders a person ineligible for a license if, in the preceding two years, he or she has been 'convicted' of the offense of driving a motor vehicle while 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."

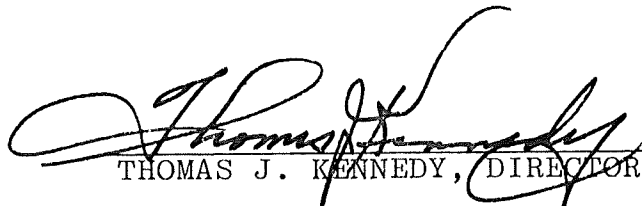
MEMORANDUM 84-1
April 9, 1984

Because the term "conviction" occurs in K.S.A. 1983 Supp. 41-311(a)(3), the same as in K.S.A. 41-2703, the principles and conclusions expressed in Attorney General's Opinion No. 84-21 are equally applicable to alcoholic liquor licensees. Consequently, the Alcoholic Beverage Control Division may no longer except diversions on charges of DUI from the provisions of K.S.A. 41-311. A diversion on a charge of DUI will now disqualify an applicant or licensee under K.S.A. 1983 Supp. 41-311(a)(3). This change will not affect any current license holders or applicants who have already entered into a diversion program in reliance upon this agency's former policy concerning DUI diversions. This change will go into full force and effect ten days after the date of this Memorandum.

It should be emphasized that Attorney General's Opinion No. 84-21 is based on the unique nature of diversions under K.S.A. 8-1567. Therefore, it is not applicable to diversions on other liquor law violations.

In summary, based on this new Attorney General's Opinion, a diversion on a DUI will be considered a conviction for the purposes of qualifying for a license under K.S.A. 41-311, while a diversion on other than DUI remains unchanged.

Furnished for your information and guidance.


THOMAS J. KENNEDY, DIRECTOR

TJK:cjk