

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Office of the Commissioner,)
Delaware Alcoholic Beverage Control,)
)
Appellant,)
)
v.)
)
Appeals Commission, Delaware Alcoholic)
Beverage Control, and Lex-Pac, Inc., d/b/a)
Hak's Sports Bar & Restaurant,)
)
Appellees.)

C.A. No.: 11A-09-008 JRJ

ORDER

Upon Appellant's Appeal from Superior Court Commissioner's
Opinion and Order: **AFFIRMED**

AND NOW TO WIT, this 31st day of January, 2014, the Court having duly considered Appellant's timely appeal of the Superior Court Commissioner's Opinion and Order, the opposition and supplements thereto, and the record below,

IT IS HEREBY DETERMINED THAT:

1. The procedural history for this case is disconcertingly long. Appellee, Hak's Sports Bar & Restaurant ("Hak's"), attempted to convert its liquor license

classification from a taproom to a restaurant in June 2008.¹ On January 15, 2010, the Delaware Alcoholic Beverage Control Commissioner (“ABC Commissioner”), denied Hak’s application.²

2. Hak’s appealed to the Delaware Alcoholic Beverage Control Appeals Commission (“the Commission”), which reversed the ABC Commissioner on May 3, 2010. The Commission issued an amended decision on August 24, 2011.³ The ABC Commissioner timely appealed the amended decision to the Superior Court.⁴

3. On March 2, 2012, this Court suspended its briefing schedule and ordered the parties to complete arbitration before a Superior Court Commissioner pursuant to the then-applicable 4 *Del. C.* § 541(c).⁵ Ultimately, on July 8, 2013, the Superior Court Commissioner heard oral argument on Hak’s Motion to Dismiss,⁶ thereby canceling the scheduled July 2013 arbitration hearing.⁷

4. The Superior Court Commissioner issued an Opinion and Order on July 17, 2013, dismissing the appeal based on lack of standing.⁸ The Commissioner

¹ Commissioner’s Opinion and Order (“Order”), July 17, 2013, 11A-09-008, Trans. ID 53275679, at 2.

² *Id.* The Order does not discuss the reasons for the delay between Hak’s June 2008 application and the ABC Commissioner’s January 2010 ruling.

³ *Id.* at 3; *see also*, Notice of Appeal, Sep. 12, 2011, Trans. ID 39756592, at 2.

⁴ Order at 3;

⁵ Trans. ID 49181884.

⁶ Hak’s Ltr Br. in Support of Mtn. to Dism., May 21, 2013, Trans. ID 52401724.

⁷ Trans. ID 53153247.

⁸ Order at 1.

determined that the ABC Commissioner lacked statutory authority to appeal his own agency's ruling.⁹ The ABC Commissioner timely filed an appeal.¹⁰

5. The Court reviews a motion to dismiss ruling *de novo*.¹¹ Statutory construction rulings are also reviewed *de novo* to determine whether the Commissioner erred as a matter of law in formulating or applying legal concepts.¹²

6. The Delaware Alcoholic Beverage Control Commission is an administrative body ("ABC agency") created by statute.¹³ As such, the Commission is limited to the powers expressly authorized.¹⁴ In 2000, the State Legislature restructured the ABC agency, creating two tiers of review: the ABC Commissioner and the Commission.¹⁵ While this case has slowly progressed, the State Legislature has continued to fine-tune the new ABC agency structure.¹⁶

7. During this time, the Legislature amended the Delaware Administrative Procedures Act ("APA") to clarify, among other things, that the ABC Commission

⁹ *Id.* at 6-8 ("Absent express statutory authority, the court cannot sanction the practice of an agency seeking judicial review from its own decision.") (finding the ABC Commissioner's reliance on *Cebrick v. Peake*, 426 A.2d 319 (Del. 1981), misplaced because it involved the agency's prior structure).

¹⁰ Trans. ID 53356023. The Court informed the parties that, absent good cause, it was willing to conduct *de novo* review based upon the record. *See* Trans. ID 54407234. The ABC Commissioner requested full briefing and a hearing in order to present several additional arguments. *See* Trans. ID 54481543. Because the Court can only determine issues within its jurisdiction, for efficiency, the Court will review the sole issue of jurisdiction. *See Dover Historical Soc. v. Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003); *O'Neill v. Town of Middletown*, 2006 WL 205071, at *7 (Del. Ch. Jan. 19, 2006) ("Before turning to the merits of the Plaintiffs' claims, the Court must first answer the threshold question of whether the Plaintiffs have the right to maintain this litigation.").

¹¹ *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007).

¹² *Id.*

¹³ Order 6 (citing *Diamond State Liquors, Inc. v. Delaware Liquor Comm'n*, 75 A.2d 248, 253 (Del. Gen. Sess. 1950)).

¹⁴ Order 6 (citing *Retail Liquor Dealers Ass'n v. Delaware Alcoholic Bev. Control Comm'n*, 1980 WL 273545, at *3 (Del. Ch. Apr. 23, 1980)).

¹⁵ 4 *Del. C.* § 301 (2013).

¹⁶ *See* 2012 Delaware Laws Ch. 384 (S.B. 277).

is subject to the provisions set forth in the APA.¹⁷ The ABC Commissioner, not subject to the APA's restrictions, has broader power in order to fulfill his duties to the ABC agency.¹⁸ Yet, neither the APA nor the ABC statutes grant the ABC Commissioner the right to appeal a final decision of his own agency. The fact that the Legislature did not provide the ABC Commissioner that right is "indicative of legislative intent – especially because it is clear that the legislature knows how to provide for such [right of appeal] when it so desires."¹⁹

8. While constitutional due process protections authorize the Court to permit review of an agency's decision where the rights of a private party are affected,²⁰ the Court agrees with the Commissioner and will not extend a right to appeal in an agency with a two-tier review in place and the Legislature has not otherwise acted. The Court's unwillingness to extend the ABC Commissioner a right to appeal is reinforced by the Legislature's recent amendments to the ABC statutes clarifying the agency's processes, but not including a carve-out for appeals instituted by the ABC Commissioner.

¹⁷ See 29 Del. C. § 10161(a) (2012); See *Nischay v. Alcoholic Bev. Control Appeals Comm'n*, 2011 WL 1743976 (Del. Super. Mar. 16, 2011) (Herlihy, J.); *O'Neill*, 2006 WL 205071, at *11.

¹⁸ See 4 Del. C. § 304(a).

¹⁹ *O'Neill*, 2006 WL 205071, at *10. See also 19 Del. C. § 3320 ("Appeals to the [Unemployment Insurance Appeal Board] may be made by the parties ... as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.").

²⁰ See *O'Neill*, 2006 WL 205071, at *12; See also, *In re Halifax Paper Co.*, 131 S.E.2d 441 (N.C. 1963) ("Cases from other jurisdictions respecting the rights of public officials and administrative bodies to appeal from decisions of administrative agencies are in irreconcilable conflict. This is due to the great variety of statutory and constitutional provisions or lack of statutory authority. Usually no appeal is permitted in the absence of some statutory authority therefor. But where statutes exist permitting appeals by persons aggrieved, appeals by public officials and governmental units are usually allowed in cases involving questions of law[....]").

WHEREFORE, the Court finds that the Commissioner's well-reasoned Opinion and Order granting Appellees' Motion to Dismiss is free from legal error and is, therefore, **AFFIRMED**.

IT IS SO ORDERED.

Judge Jan R. Jurden