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

OFFICE OF THE COMMISSIONER,	)
DELAWARE ALCOHOLIC BEVERAGE	)
CONTROL,	)
	) C.A. No. 11A-09-008 JRJ
Appellant,	)
	)
V.	)
	)
APPEALS COMMISSION,	)
DELAWARE ALCOHOLIC BEVERAGE	)
CONTROL, and LEX-PAC, INC.	)
d/b/a HAK'S SPORTS BAR &	)
RESTAURANT,	)
	)
Appellees.	)

## **OPINION AND ORDER**

In June 2008, Lex-Pac, Inc. d/b/a Hak's Sports Bar & Restaurant ("Hak's") applied for a change of its liquor license classification from a taproom to a restaurant. The application for the change of liquor license classification was made to Delaware Alcoholic Beverage Control Commissioner ("DABCC").

The DABCC is an administrative agency which has a two tier administrative process in place. The application for the change of liquor license classification first goes to the Commissioner of the DABCC who makes the decision whether to grant or deny the application. The Commissioner's decision is final unless the Commissioner's decision is appealed to the Appeals Commission of the DABCC.

In this case, the Commissioner of the DABCC denied Hak's application for the change of liquor license classification. Hak's appealed the Commissioner's decision to the Appeals Commission. The Appeals Commission reversed the Commissioner and granted Hak's a restaurant license.

The Commissioner of the DABCC has appealed the decision of the Appeals Commission of the DABCC to the Superior Court. Hak's filed a motion to dismiss, which the Appeals Commission joined, on the grounds that the Commissioner of the DABCC does not have standing to appeal the decision of the Appeals Commission of the DABCC.

For the reasons addressed herein, the court concludes that the Commissioner of the DABCC does not have standing to appeal its own agency's final decision, the decision of the Appeals Commission of the DABCC, to the Superior Court. Since the Commissioner does not have standing to appeal the Appeals Commission's decision to the Superior Court, Hak's motion to dismiss the Commissioner's appeal is granted.

#### **PROCEDURAL HISTORY**

In June 2008, Hak's submitted an application with the Commissioner of the DABCC seeking a change of its liquor license classification from a taproom to a restaurant. The Commissioner denied Hak's application for a change of license classification from taproom to a restaurant and issued his case decision on January 15, 2010.

Hak's appealed the Commissioner's decision to the Appeals Commission. By Order dated May 3, 2010, the Appeals Commission reversed the Commissioner's decision denying the restaurant license and granted Hak's a conditional restaurant license.

The Commissioner appealed the Appeals Commission's 2010 Order to the Superior Court. The Superior Court remanded the matter to the Appeals Commission to provide "further explanation" for the Appeals Commission's decision. On August 8, 2011, the Appeals Commission issued an Amended Decision and Order providing "further explanation" as requested by the Superior Court. The Appeals Commission by its August 2011 Order again reversed the Commissioner's decision denying the restaurant license and again granted Hak's a conditional restaurant license.

The Commissioner appealed the Appeals Commission's August 2011 Order to the Superior Court. The appeal was taken on February 10, 2012.

At the time the appeal was taken, the governing statute required that the appeal be first decided by an arbitration conducted by a Superior Court Commissioner unless all the parties to the appeal agreed to bypass the arbitration.<sup>2</sup> The statute was amended, effective August 2012, eliminating the arbitration procedure.<sup>3</sup> Arbitration was requested on the present appeal on March 2, 2012, prior to the legislative changes having taken effect. Since the legislative changes had not yet taken effect at the time arbitration was requested in the present appeal, it was decided that this appeal would proceed through arbitration.

During the course of the arbitration proceeding, Hak's filed the subject motion to dismiss seeking the dismissal of the Commissioner's appeal on the grounds that the Commissioner lacked standing to appeal its own agency's final decision.

\_

<sup>&</sup>lt;sup>1</sup> See, Office of the Commissioner, Delaware Alcoholic Beverage Control v. Appeals Commission et al., 2011 WL 285597 (Del. Super. 2011).

<sup>&</sup>lt;sup>2</sup> 4 *Del. C.* § 541(c)(prior to amendment of August 2012 as per 2012 Delaware Laws Ch. 384 (S.B. 277)).

<sup>&</sup>lt;sup>3</sup> See, 2012 Delaware Laws Ch. 384 (S.B. 277).

## **COMMISSIONER LACKS STANDING TO APPEAL**

The issue presented herein is whether the Commissioner has standing to appeal the Appeals Commission's decision to the Superior Court. Without standing, the appeal is improper and the appeal should be dismissed.<sup>4</sup> The Superior Court must have express statutory authority to assume jurisdiction over an appeal from an administrative agency.<sup>5</sup>

Understanding the structure of the DABCC is essential to the determination of this issue. The DABCC is the agency tasked by the General Assembly with ensuring the health, safety and welfare of the public by regulating the activities of the alcoholic beverage industry, pursuant to Title 4 of the Delaware Code.<sup>6</sup>

Prior to 2001, the DABCC was comprised of five commissioners.<sup>7</sup> The Commission (comprised of the five commissioners) considered all applications for liquor licenses.<sup>8</sup> The Commission's decision was final and conclusive unless a party to the hearing filed an appeal in the Superior Court.<sup>9</sup>

Beginning in July 2001, the General Assembly changed the structure of the DABCC. The DABCC is now comprised of one Commissioner and three members of the Appeals Commission. After July 2001, the Commissioner, together with the Appeals Commission, form the entirety of the DABCC. By creating an Appeals Commission, the General Assembly created oversight within the agency on the authority

<sup>7</sup> See, 4 *Del. C.* § 301 (prior to 2001).

<sup>&</sup>lt;sup>4</sup> Christian v. Delaware Alcoholic Beverage Control Appeals Commission, 2003 WL 21733139, at \*2 (Del.Super. 2003), aff'd, 2003 WL 22697649 (Del. 2003).

<sup>&</sup>lt;sup>5</sup> IFIDA v. Division of Social Services, 1994 WL 45346, at \*1 (Del. Super. 1994).

<sup>&</sup>lt;sup>6</sup> See, 4 *Del.C.* § 301 et seq.

<sup>&</sup>lt;sup>8</sup> See, 4 *Del. C.* § 301(i); 4 *Del. C.* § 541 (prior to 2001)

<sup>&</sup>lt;sup>9</sup> 4 Del. C. § 541(c); 4 Del. C. § 544 (prior to 2001).

<sup>&</sup>lt;sup>10</sup> 4 Del. C. § 301 (73 Del. Laws, c. 135, effective July 9, 2001).

of a single individual, the Commissioner, to issue or deny alcoholic licenses.

Now the licensure process begins with the submission of an application to the Commissioner. 11 The application may proceed either protested or unprotested. Whether or not the application is protested, the Commissioner can still approve or deny the application.<sup>12</sup>

The Commissioner's decision is final and conclusive unless a party files a written appeal. 13 In the event of an appeal, the Appeals Commission is convened to hear the appeal. 14 The Appeals Commission performs the limited duty of reviewing the Commissioner's licensure decisions upon appeal by an aggrieved party. 15

The Appeals Commission has no staff. Accordingly, the Commissioner's office has issued notices of hearings, arranged for court reporters and performed other administrative functions necessary to facilitate the process of the appeal being heard before the Appeals Commission.

The decision of the Appeals Commission becomes final and conclusive unless a party to a hearing before the Appeals Commission files an appeal to the Superior Court. 16 The appeal to the Superior Court is from the Appeals Commission's decision, the final agency decision of the DABCC.

5

<sup>&</sup>lt;sup>11</sup> 4 *Del. C.* § 541(a). <sup>12</sup> 4 *Del. C.* § 544. <sup>13</sup> 4 *Del. C.* § 304(b); 541(b)(c); 544. <sup>14</sup> 4 *Del. C.* § 304(b).

<sup>15 4</sup> Del. C. § 301, 541. 16 4 Del. C. § 541.

The DABCC is an administrative body and has no powers other than those conferred upon it by statute by which it was created. Administrative agencies derive their powers and authority solely from the statute creating them and defining their powers.

The General Assembly did not confer any right (or power) upon the Commissioner of the DABCC to appeal a decision from the Appeals Commission of the DABCC to the Superior Court. 19

The Commissioner, in support of his position that he has standing to appeal the Appeals Commission's decision to the Superior Court, relies on *Cebrick v. Peake*, 426 A.2d 319 (Del. 1981). In *Cebrick*, the Delaware Supreme Court held that the Delaware Alcoholic Beverage Control Commission had standing to appeal the Superior Court's reversal of its agency's order.<sup>20</sup>

The *Cebrick* case was decided in 1981, before the statutory structure of the Delaware Alcoholic Beverage Control Commission changed. At the time the *Cebrick* case was decided, the Commission made the final agency decision and any appeal from the final agency decision went to the Superior Court. At the time *Cebrick* was decided there was no two-tier internal agency system in place. The present system is a post-*Cebrick* legislative creation.

<sup>20</sup> Cebrick v. Peake, 426 A.2d 319, 320 (Del. 1981)

\_

<sup>&</sup>lt;sup>17</sup> See, Diamond State Liquors, Inc. v. Delaware Liquor Commission, 75 A.2d 248, 253 (Del. Gen. Sess., 1950); Retail Liquor Dealers Ass' Delaware v. Delaware Alcoholic Beverage Control Commission, 1980 WL 273545, at \*3 (Del.Super. 1980).

<sup>&</sup>lt;sup>18</sup> Retail Liquor Dealers Ass' Delaware v. Delaware Alcoholic Beverage Control Commission, 1980 WL 273545, at \*3 (Del.Super. 1980).

<sup>&</sup>lt;sup>19</sup> See, for example, 19 *Del. C.* § 3320 (Appeals to the UIAB [Unemployment Insurance Appeal Board] may be made by the parties to a disputed unemployment insurance claim, as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.)

At the time *Cebrick* was decided, the decision by the Commission was the final agency decision. Therefore, when the Superior Court reversed the final agency decision of the DABCC, which was the decision of the Commission, the Commission was determined to have standing to appeal the Superior Court's adverse ruling.

This case presents a different scenario. Unlike the one tier internal agency structure that was in place at the time *Cebrick* was decided, there is now a two-tier internal agency system in place. The first tier, the Commissioner, denied the license application. The second tier, the Appeals Commission, reversed that decision and granted the license application. The final agency decision from the DABCC is now, under the present two tier agency structure, the Appeals Commission's decision.

The *Cebrick* case holds that the DABCC has standing to appeal an adverse decision by the Superior Court from its agency's final decision. Thus, if the Superior Court were to reverse the DABCC's final decision, that of the Appeals Commission, under the holding of *Cebrick*, the Appeals Commission (as the final agency decision) would have standing to appeal the Superior Court's adverse ruling.

The *Cebrick* case did not address, and did not hold, that the Commissioner of the DABCC has standing to appeal its own agency's final decision *to the Superior Court*.

The Commissioner contends that he and the Appeals Commission are not part of the same agency. The court does not agree. The fact that the Commissioner and the Appeals Commission are part of the same agency appears to be self-evident. The DABCC, as set forth at 4 *Del. C.* § 301 et seq., is expressly comprised of a two tier agency structure. The statutory scheme clearly indicates that the General Assembly

intended to create a two tier agency structure: a Commissioner and a three member Appeals Commission. The Commissioner and the Appeals Commission together comprise one agency.

The Delaware Superior Court has already recognized that the Commissioner and the Appeals Commission are part of the same agency, not separate agencies. The Superior Court in *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission,* 2011 WL 1743976, at \*4 (Del.Super. 2011) characterized an appeal of the Commissioner's Order to the Appeals Commission as an "internal appeal". The *Nischay* court recognized that the DABCC's final decision was the decision issued by the Appeals Commission. <sup>22</sup>

Because the Commissioner and the Appeals Commission are both part of the same agency, the Commissioner cannot be aggrieved, and cannot seek redress, from his own agency's final order. Absent express statutory authority, the court cannot sanction the practice of an agency seeking judicial review from its own decision.<sup>23</sup> The General Assembly has, in fact, conferred the right of a lower tier in an agency to seek redress from a reversal of its order by a higher level agency decision.<sup>24</sup> Yet the General Assembly did not see fit to do so here.

The General Assembly did not confer in the Commissioner the right to file an appeal or to engage counsel to pursue an appeal from the Appeals Commission's decision. In this case, the Department of Justice has two deputy attorneys general

-

<sup>&</sup>lt;sup>21</sup> See, *Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission*, 2011 WL 1743976, at \*4 (Del.Super. 2011).

<sup>&</sup>lt;sup>22</sup> Nischay, Inc. v. Alcoholic Beverage Control Appeals Commission, 2011 WL 1743976, at \*4 (Del.Super. 2011).

<sup>&</sup>lt;sup>23</sup> See, Ropp v. King, 2007 WL 33113799, at \*5 (Del.Ch. 2007).

<sup>&</sup>lt;sup>24</sup> See, for example, 19 *Del. C.* § 3320 (Appeals to the UIAB [Unemployment Insurance Appeal Board] may be made by the parties to a disputed unemployment insurance claim, as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.)

representing the DABCC on opposite sides of this appeal. One attorney is representing the Commissioner of the DABCC and is advocating for the reversal of the agency's final decision. The other attorney is representing the Appeals Commission of the DABCC and is advocating for an affirmance of the agency's final decision. Their legal stances are in direct opposition to one another. They are, however, both representing the same agency.

The Commissioner justifies his right to appeal by contending that as Commissioner he is cloaked with various powers, including regulatory powers. The Commissioner contends that his right to appeal the Appeals Commission's decision is derived from his regulatory role to represent the public interest.

The General Assembly cloaked the Commissioner with various powers and, at the same time, created a two tier internal agency process for the consideration of liquor licenses. The Commissioner acts as investigator, prosecutor and judge in rendering its decision on a license application. The General Assembly placed an internal check on the Commissioner's powers by allowing the Appeals Commission to issue the final agency decision. If the General Assembly wanted to give the Commissioner the right to appeal the Appeals Commission's decision, it could have done so. It did not. Noticeably absent from the Commissioner's enumerated powers is the power to appeal the Appeal Commission's decision to the Superior Court.

There is no statutory authority to support an argument that the Commissioner may appeal a final decision issued by his own agency acting in any capacity. The General Assembly has not given the Commissioner of the DABCC the right to appeal the final order of the DABCC to the Superior Court. Lacking a statutory right to appeal, the Commissioner does not have standing to appeal its own agency's final decision, that of

the Appeals Commission, to the Superior Court.

For the foregoing reasons, Hak's motion to dismiss the Commissioner's appeal to the Superior Court is granted. The Commissioner's appeal is hereby dismissed.

# IT IS SO ORDERED this 17<sup>th</sup> day of July, 2013.

Lynne M. Parker Commissioner of the Superior Court

oc: Prothonotary (civil)

cc: Andrew G. Kerber, Deputy Attorney General Laura L. Gerard, Deputy Attorney General Adam Balick, Esquire