



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OFFICE OF THE COMMISSIONER, :  
DELAWARE ALCOHOLIC BEVERAGE :  
CONTROL, :  
: :  
Appellant Below, : No. 101, 2014  
Appellant, :  
: :  
v. : On Appeal from Decision  
: of the Superior Court of the  
: State of Delaware, in and for  
APPEALS COMMISSION, : New Castle County  
DELAWARE ALCOHOLIC BEVERAGE : C.A. No. N11A-09-008 JRJ  
CONTROL, and LEX-PAC, INC. :  
d/b/a HAK'S SPORTS BAR & :  
RESTAURANT, :  
: :  
Appellees Below, :  
Appellees. :

**CORRECTED ANSWERING BRIEF OF APPELLEE BELOW,  
APPELLEE LEX-PAC, INC. d/b/a HAK'S SPORTS BAR & RESTAURANT**

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## NATURE AND STAGE OF PROCEEDINGS

As noted by the Superior Court, “[t]he procedural history for this case is disconcertingly long.” (A-15). This case began when appellee Lex-Pac, Inc. d/b/a Hak’s Sports Bar & Restaurant (“Hak’s”) attempted to convert its liquor license from a taproom license to a restaurant license by filing an application with the Office of Delaware Alcoholic Beverage Control (the “DABC”) in June 2008. The Commissioner of the DABC (the “DABC Commissioner”) denied Hak’s application on January 15, 2010.

Hak’s appealed the DABC Commissioner’s decision to the Appeals Commission of the DABC (the “Appeals Commission”). The Appeals Commission reversed the DABC Commissioner’s decision on May 3, 2010. Following an appeal to the Superior Court and a remand, the Appeals Commission issued an amended decision on August 24, 2011. While the amended decision provided additional support for the Appeals Commission’s decision, the result remained the same.

The DABC Commissioner appealed that decision to the Superior Court.

On March 2, 2012, the Superior Court ordered the parties to complete arbitration before a Superior Court Commissioner. At that time 4 *Del. C.* §541(c) required that Superior Court appeals from the Appeals

Commissioner be heard in the first instance by a Superior Court Commissioner. That statute has since been amended.

The parties submitted briefs and provided the Superior Court Commissioner supplemental fact submissions. However, before the Superior Court Commissioner conducted an arbitration hearing, or made any findings or decisions on the merits, Hak's filed a motion to dismiss on the grounds that the DABC Commissioner lacked standing to appeal his own agency's decision.

The parties briefed the motion to dismiss and the Superior Court Commissioner issued an Opinion and Order on July 17, 2013, dismissing the appeal based on lack of standing. The DABC Commissioner sought a *de novo* review of that decision by the Superior Court judge. The Superior Court issues its decision and order affirming the Superior Court Commissioner's decision on January 31, 2014.

The DABC Commissioner appealed that order to this Court by filing a Notice of Appeal on February 25, 2014. Despite the fact that neither the Superior Court nor the Superior Court Commissioner addressed the merits of the Appeals Commission's 2011 Order, the DABC Commissioner has also asked this Court to consider the merits of the Appeals Commission's 2011 Order. (Notice of Appeal at 1 and Ex. C).

The DABC Commissioner filed his Opening Brief in this Court on June 2, 2014. In addition to arguing that the Superior Court erred in dismissing the appeal for lack of standing, the DABC Commissioner also improperly seeks to have this Court review the Appeals Commission's 2011 Order. (Op. Br. at Argument II).

This is Hak's Answering Brief.



## **SUMMARY OF ARGUMENT**

1. Denied. The Superior Court properly dismissed the DABC Commissioner's appeal for lack of standing. The General Assembly enacted a two tier review process for liquor licensing matters. Under this process, the DABC Commissioner is empowered to conduct hearings and to make factual and legal determinations. His function is quasi-judicial. His decisions are subject to review by the Appeals Commission, which the General Assembly empowered to affirm or reverse the DABC Commissioner's decisions. The Appeals Commission issues the final decision of the agency that regulates alcoholic beverage control licensing matters

The DABC Commissioner is not a party to the appeals from his agency's decisions. State law does not empower the DABC Commissioner to take such appeals.

Accordingly, the Superior Court was correct when it dismissed this appeal for lack of standing.

2. Denied. There is no basis for asking this Court to decide the merits of the appeal from the DABC Appeals Commission's 2011 Order. At the time the DABC Commissioner filed the appeal in the Superior Court, 4 Del. C. §541(c) required appeals from the Appeals Commission to be

decided by the Superior Court, after first being heard by a Superior Court Commissioner. The Superior Court Commissioner dismissed the appeal before reaching the merits.

The DABC Commissioner appealed that decision to the Superior Court trial judge assigned to the case. In fact, the DABC Commissioner specifically asked the trial judge to consider the merits of the Appeals Commission's 2011 Order, and the Superior Court explicitly declined to do so.

In the present appeal, the DABC Commissioner has not, and cannot, articulate an argument that would allow this court to address the merits of the appeal from the DABC Appeals Commission, when Delaware law specifically requires the Superior Court to hear and decide such appeals in the first instance.

This argument should not be considered by this Court.

## **STATEMENT OF FACTS**

### **I. Statutory Background**

Prior to 2001, pursuant to 4 *Del. C.* §101 *et seq.* (hereinafter, the “Liquor Control Act”), the Delaware Alcoholic Beverage Control Commission (“DABC”) was comprised of five commissioners. 4 *Del. C.* §301 *et seq.* (prior to 2001). Those five commissioners considered all applications for liquor licenses. *Id.* The decisions of those five commissioners became the final decisions of the agency, which were appealable to the Superior Court. 4 *Del. C.* §544 (prior to 2001).

In 2001, the General Assembly revised the alcoholic beverage control regulatory structure and scheme. Instead of five commissioners, acting together, the new scheme created a single DABC Commissioner, appointed by the Governor, and an Appeals Commission, made up of three members, also appointed by the Governor.

The duties and powers of the DABC Commissioner and of the Appeals Commission are enumerated in Section 304 of the Liquor Control Act. Section 304(a) lists the powers and duties of the DABC Commissioner. 4 *Del. C.* §304(a). They include the power to adopt rules and regulations, conduct hearings on petition from members of the public, and the power to grant, refuse or cancel licenses.

The duties and powers of the Appeals Commission are explained in subsection (b), which provides:

The Commissioner's decision shall be final and conclusive unless, within 30 days after notice thereof has been mailed by the Commissioner's office, a party to such hearing files an appeal in the office of the Commissioner. Upon receipt of the appeal, the Commissioner shall cause the Chairperson of the Appeals Commission to be advised of the pending appeal and the Chairperson shall cause the Commission to be convened with at least 20 days notice to all parties. The appeal shall be heard by the Appeals Commission, who shall, in accordance with the Administrative Procedures Act, Title 29 of the Delaware Code, review the matter on the record and affirm, reverse or modify the decision of the Commissioner.

*4 Del. C. §304(b)*

Under the new structure, the decisions of the Appeals Commission are the final agency decisions and are appealable to the Superior Court. *4 Del. C. §541(d)*.

## **II. Factual Background**

This action truly began on January 15, 2010 when the DABC Commissioner denied the Hak's application to change from a tap room liquor license to a restaurant license. Hak's appealed the DABC Commissioner's decision to the Appeals Commission pursuant to §544 of the Liquor Control Act. The Appeals Commission reversed the DABC Commissioner's decision and ordered that Hak's be granted a restaurant license, conditioned on Hak's providing evidence within six months that at

least 60% of its gross revenues came from the sale of food. Following an appeal by the DABC Commissioner to the Superior Court, and the Superior's Court's remand for a more detailed statement of the basis for its decision, the Appeals Commission issued an Amended Decision and Order on August 8, 2011 (the "Appeals Commission's 2011 Order") once again reversing the DABC Commissioner's decision and granting Hak's the restaurant license.

The DABC Commissioner appealed the Appeals Commission's 2011 Order to the Superior Court, naming as appellees both Hak's and the Appeals Commission. Pursuant to 4 *Del. C.* §541(c), the matter was referred to a Superior Court Commissioner. The parties filed briefs on the merits. However, before the Superior Court Commissioner held a hearing or issued a decision, Hak's filed a motion to dismiss on the grounds that the DABC Commissioner lacked standing to bring an appeal of his own agency's order.

Following briefing and oral argument, the Superior Court Commissioner granted the motion to dismiss. The Superior Court Commissioner did *not* address the underlying merits of the Appeals Commission's 2011 Order.

The DABC Commissioner sought *de novo review* of that decision by the Superior Court judge pursuant to the then-existing 4 *Del. C.* §541(c).

The Superior Court held a teleconference on October 18, 2013.

Notwithstanding that the Superior Court Commissioner's decision did not address the underlying merits of the appeal or the Appeals Commission's 2011 Order, the DABC Commissioner requested the Superior Court allow full briefing on the merits of the appeal, as well as the motion to dismiss. The Superior Court declined, stating "But I'm satisfied it makes the most sense for judicial economy and just to move this matter along for me to rule on *only the issue presented right now, which is the dispositive issue.*" (A-24) (emphasis added).

The Superior Court affirmed the Superior Court Commissioner's decision by Order dated January 31, 2014.

The DABC Commissioner filed his Notice of Appeal in this Court on February 25, 2014. Despite the fact that neither the Superior Court nor the Superior Court Commissioner had addressed the underlying merits of the Appeals Commission's 2011 Order, the DABC Commissioner's Notice of Appeal attempted to include that Order in this appeal. (Notice of Appeal at 1 and Ex. C). The DABC Commissioner's Opening Brief also addressed the merits of the underlying appeal, arguing that this Court should hear it "in the interests of justice." (Op. Br. at 27).

## ARGUMENT

### **I. THE SUPERIOR COURT WAS CORRECT WHEN IT RULED THAT THE DABC COMMISSIONER LACKS STANDING TO APPEAL FROM AN ORDER OF HIS OWN AGENCY.**

#### **A. Question Presented**

Whether the Superior Court properly dismissed the DABC Commissioner's appeal on the basis that the DABC Commissioner did not have standing to appeal a decision of the Appeals Commission. This question was preserved below. (A-12, 13).

#### **B. Scope of Review**

The Superior Court's determination that the DABC Commissioner lacked standing to pursue an appeal is a question of law, which this Court reviews *de novo*. *Broadmeadow Inv., LLC v. Delaware Health Res. Bd., et al.*, 56 A.3d 1057, 1059 (Del. 2012) (citations omitted); *Mitchell v. Board of Adjustment of Sussex County*, 706 A.2d 1027, 1029 (Del. 1998).

#### **C. Merits of Argument**

The Superior Court properly applied the law when it determined that “neither the [Administrative Procedures Act] nor the [Alcoholic Beverage Control] statutes grant the ABC Commissioner the right to appeal a final decision of his own agency.” (A-18). This determination should be affirmed because: (1) The DABC Commissioner is not a “party” within the

meaning of the statute; (2) the DABC Commissioner’s “regulatory” function does not make him an aggrieved or interested party with authority to appeal; and (3) the DABC Commissioner and the Appeals Commission are not separate agencies.

**1. The DABC Commissioner Was Not A Party to the Administrative Action Below and Therefore Lacked Standing to Appeal to the Superior Court**

A person does not have a right to appeal from an administrative decision “unless the statute governing the matter has conferred a right to do so.” *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994). The statute governing appeals from the Appeals Commission provides, in relevant part:

A *party* who is aggrieved by a final decision of the Appeals Commission may file a written appeal with the Superior Court within 30 days of the date that the Appeals Commission’s decision was mailed.

4 *Del. C.* §541(d) (emphasis added).

The DABC Commissioner was not a “party who is aggrieved” within the meaning of the statute. Section 541(d) tracks the language of the preceding section of the Act that governs appeals from the DABC Commissioner to the Appeals Commission:

The Commissioner’s decision must be in writing and shall be final and conclusive unless, within 30 days from the date of the



postmark on the Commissioner's decision, a *party* to the hearing files a written appeal in the office of the Commissioner.

4 *Del. C.* §541(c) (emphasis added).

Thus, the General Assembly contemplated that the parties to the hearing before the DABC Commissioner would also be parties to the hearing before the Appeals Commission.

The DABC Commissioner is not a party to his own hearing. The Liquor Control Act empowers the DABC Commissioner to make and keep a record of the hearing, to set forth findings of fact, and to articulate a brief statement of the reasons for issuing or denying an application. 4 *Del. C.* §541(b).

The DABC Commissioner's role in conducting a hearing and issuing a decision is quasi-judicial. Undoubtedly, boards (and judges) on occasion disagree with the decisions of the courts that have been empowered to overturn their decisions. However, the desire to see their determinations vindicated does not create the standing to appeal. "Under Delaware law, a judicial officer has no cognizable interest in seeking to have his rulings sustained..." *K&K Screw Prod., L.L.C. v. Emerick Capital Inv.*, 2011 WL 3505354, at \*8.

The DABC Commissioner argues that the General Assembly's use of the word "party" instead of "applicant" in Section 541(d) indicates that the

General Assembly intended that “party” would include the DABC Commissioner himself. (Op. Br. at 17-18). A review of the language of the law undermines this argument.

Section 544 governs unprotested applications. The statute allows an “applicant” to appeal an unprotested denial to the Appeals Commission. It uses the word “applicant” because in the case of an unprotested license application, the applicant *is* the only party. Section 544 goes on to state, however: “The appeal shall follow the procedure outlines in §541 of this title.”

Section 541, on the other hand, governs more than just unprotested applications and contemplates situations where there are parties other than the applicant, such as a protester who objects to the issuance of a liquor license. The reason the General Assembly used the word “party” in Section 541 and not “applicant” is because in the case of a *protested* application, the protesters are interested parties.

The DABC Commissioner’s argument that the General Assembly’s choice of the word “party” was intended to empower the DABC Commissioner to appeal from Appeal Commission decisions asks too much of this Court. The statute is entitled to its plain meaning. This is particularly true where the General Assembly has provided other administrative officers

the explicit right to file appeals. For example, 19 *Del. C.* §3320 involving appeals from the Unemployment Insurance Appeal Board states that appeals “may be made by the parties...*as well as by the claims deputy whose decision is modified or reversed by an appeals tribunal.*”) (emphasis added).

If the General Assembly had wanted to provide the DABC Commissioner the power to appeal from Appeals Commission decisions, it would have done so explicitly.

**2. The General Assembly Did Not Confer Upon the DABC Commissioner the Authority to Appeal from Decisions of the Appeals Commission.**

The DABC Commissioner argues that he has standing to appeal his agency’s own order to the Superior Court by virtue of the fact that he has been granted “regulatory” powers by the General Assembly. He argues that “it defies logic and reason” to grant him the right to regulate the alcohol industry, yet not permit him to appeal decisions by the Appeals Commission that he disagrees with. (Op. Br. at 17-19) The Commissioner argues that in denying Hak’s licensure application, he was acting in a “regulatory role” based on the State’s police powers. The Commissioner states that this power is broad and argues that within these broad powers must be the right to appeal “regulatory decisions” of his own agency. (*Id.*)

The law is more circumspect when it comes to granting authority to State agencies. “Administrative agencies derive their powers and authority solely from the statute creating them and defining their powers ... [and] possess[] no powers other than those conferred upon it by statute.” *Retail Liquor Dealers Ass’n of Delaware v. Delaware Alcoholic Beverage Control Comm’n*, 1980 WL 273545, at \*3 (Del. Super. Apr. 23, 1980). There is nothing in the statute that gives the DABC Commissioner the power or authority to appeal decisions of the Appeals Commission. In the absence of such a provision, it must be assumed that the General Assembly did not intend to grant such a power.

The DABC Commissioner also argues that he should have standing to appeal the decision of the Appeals Commission because there is “no entity in the present case other than the DABC Commissioner to represent the public interest for ensuring compliance with the Act before the Appeals Commission and the Courts.” (Op. Br. at 21). This argument is unavailing because it ignores the statutory scheme that the General Assembly put in place to protect the public interest.

The General Assembly has provided the DABC Commissioner with rule-making authority. 4 *Del. C.* § 304. To the extent the Commissioner disagrees with the way the Appeals Commission is interpreting his rules,

subject of course to the Liquor Control Act, the DABC Commissioner is free to amend those rules.

It is hard to accept the DABC Commissioner's suggestion that granting a restaurant liquor license to an individual applicant could have such significant impact to the State's public interest that it necessitates the DABC Commissioner's intervention with unspecified, broad regulatory authority. However, to the extent the Commissioner feels compelled to restrict the circumstances in which an applicant can receive a liquor license, the appropriate way to exercise regulatory authority is with the rule-making authority that the General Assembly actually conferred.

This case is about a single establishment that received a restaurant liquor license. The regulatory scheme does, in fact, provide a mechanism for opposing a liquor license that is not in the public interest. The Liquor Control Act allows the *public* the right to intervene. When Hak's filed its initial application, members of the public had the opportunity to be heard by filing a protest. 4 *Del. C.* §541(b). When no protests were filed, the DABC Commissioner used his discretion to notice and hold a hearing, at which members of the community could have appeared and testified. *Id.* No one did. Had members of the community appeared and raised concerns, the DABC Commissioner would have been required to "recite any objections

presented by the community...[and] show how and the extent to which the Commissioner took community concerns into account [and] gave them due consideration when making the decision.” *Id.*

The DABC Commissioner’s argument that the law must give him the right not only to deny an application, but to appeal any decision by the Appeals Commission is not logical. The General Assembly created the Appeals Commission in 2001. Before that, there was no intermediate review. It is far more logical that the General Assembly created the Appeals Commission precisely to guard against aberrant decisions by the DABC Commissioner, rather than the other way around.

In arguing that the DABC Commissioner has standing to appeal decisions of the Appeals Commission because the DABC Commissioner is entrusted to protect the public interest, the DABC Commissioner mistakenly relies on *Broadmeadow Inv., LLC v. Delaware Health Res. Bd., et al.*, 56 A.3d 1057 (Del. 2012) and *Cebrick v. Peake*, 426 A.2d 319 (Del. 1981). (Op. Br. at 19-21).

The DABC Commissioner both misinterprets and misapplies the holding in *Broadmeadow*. The DABC Commissioner asserts that *Broadmeadow* applies here because the Court in *Broadmeadow* “rejected the Superior Court’s decision that allowed the ‘general public’s’ right to be

heard at the administrative level but denying the opportunity for judicial review.” (Op. Br. at 20) (citing *Broadmeadow*, 56 A.3d at 1061-2) . This is not the holding of *Broadmeadow*. Rather, this Court held that “it would be internally inconsistent to allow ‘any person’ the opportunity to participate before the Board in the administrative hearing process and then subsequently foreclose that person’s right to judicial review of the Board’s decision.” *Broadmeadow*, 56 A.3d at 1062.

In *Broadmeadow*, this Court reversed a decision of the Superior Court in which the Superior Court determined that a protester who appealed the decision of the Health Resources Board to grant a hospital certificate of public review did not have standing to appeal. The statute at issue in that case was silent as to who had standing to appeal, but allowed “any person” to participate in hearings before the Board. The Supreme Court thus held that any aggrieved party – in that case, the nursing home operator whose business interests were affected by the Board’s decision – could appeal the Board’s decision to the Superior Court.

This is not analogous to the situation in this case, because the party appealing in *Broadmeadow* was actually a member of the public and a party to the initial hearing, rather than an officer of an administrative agency purporting to represent the “public interest.” What is more, the nursing

home operator who appealed the Board's decision in *Broadmeadow* was an aggrieved party whose interest in the appeal went beyond even the general "public interest", because they operated a nursing home near the site where the new facility was to be constructed.

In this case, unlike the nursing home operator in *Broadmeadow*, the DABC Commissioner had no cognizable interest in the result of that hearing. He was a hearing officer and was required to be impartial.

The Court's holding in *Cebreck* is likewise inapplicable for a much simpler reason. *Cebreck* was decided in 1981, prior to the amendments to the Liquor Control Act that established the Appeals Commission. Unlike the situation in our case, in *Cebreck*, the former Alcoholic Beverage Control Commission (the "Commission") denied a license application, which the applicant appealed to the Superior Court. *Cebreck*, 426 A.2d at 319-20. The Superior Court concluded that the Commission's decision was not based on substantial evidence and reversed, which the Commission appealed. *Id.* at 320. The Delaware Supreme Court brought up the issue of the Commission's standing to appeal *the Superior Court's reversal*. *Id.* The Court held that where the Commission's decision is appealed to the courts, and where the Superior Court reverses the Commission, the Commission has standing to docket an appeal to the Supreme Court. *Id.* *Cebreck* did not hold



that the former Commission was empowered to appeal its own final decision.

Of course, after *Cebrick*, the Liquor Control Act was amended. The General Assembly did not provide the DABC Commissioner the same authority as the former Alcoholic Beverage Control Commission had, specifically the final say on licensure applications. The General Assembly limited the DABC Commissioner's authority and created an Appeals Commission. 4 *Del. C.* §304(b). It expressly granted authority to the Appeals Commission to review the initial decisions in an internal agency procedure. *Id.* at §§541(c) and 544.

The DABC Commissioner's contention that his regulatory authority includes the power to appeal from a decision of the Appeal Commission, that the General Assembly created to review his decisions, simply does not make sense.

### **3. The DABC Commissioner and the Appeals Commission Are Not Separate Administrative Agencies**

It is well established that a commissioner cannot be aggrieved by his own agency's order. *Ropp v. King*, 2007 WL 219771 (Del. Ch. July 25, 2007) (Discussed below.) This legal principle is problematic for the DABC Commissioner. While the DABC Commissioner never explicitly admits it

in his Opening Brief, his entire argument rests on the legal conclusion that the Appeals Commission and the DABC Commissioner are separate agencies. It is not surprising that the DABC Commissioner does not expressly address the fact that the DABC Commissioner and the Appeals Commission are part of the same agency. To claim otherwise flies in the face of the plain statutory language of the Liquor Control Act, and common sense.

As the Superior Court Commissioner found:

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 in 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.

(A-38-39) (emphasis added)(*See also* A-36)(“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.”) There is simply no basis to conclude that the General Assembly created two separate agencies when in the same bill, establishing amendments to the Liquor Control Act, it limited the DABC

Commissioner's decision-making authority by creating the Appeals Commissions to perform an intermediate review of the DABC Commissioner's decisions.

Instead, the DABC Commissioner argues that the Superior Court erroneously relied on the *Ropp v. King*, 2007 WL 219771 (Del. Ch. July 25, 2007). (Op. Br. at 24). In *Ropp*, the Division of Securities of the State's Department of Justice initiated an administrative complaint against the defendants alleging violations of the Securities Act. Pursuant to Section 103 of the Securities Rules and Regulations, the Securities Commissioner designated a hearing officer to adjudicate the matter. After an evidentiary hearing and an order dismissing the charges, the Securities Commissioner appealed the hearing officer's decision to the Court of Chancery.

The applicable statutory section in *Ropp* stated that "[a]ny person aggrieved by an order of the [Securities] Commissioner may obtain a review of the order in the Court of Chancery." *Id.* at \*3. The Securities Commissioner argued that he was aggrieved by the hearing officer's decision because while he had delegated his adjudicative role to the hearing officer, he assumed a prosecutorial role to seek enforcement of the securities laws. *Id.* at \*4. However, the Court of Chancery held that to adopt such an argument would require the invention of statutory authority. *Id.* The court

held that the Securities Commissioner could not be aggrieved by his own agency's order and noted that absent express statutory authority, it could not sanction the practice of agencies seeking judicial review of their own decisions. *Id.* at \*5.

As in *Ropp*, the DABC Commissioner here is attempting to appeal a decision of his own agency. He cannot be aggrieved by his own agency's order. The DABC Commissioner acted in an adjudicatory capacity and there is no statutory authority to support an argument that he may assume a prosecutorial role on appeal. Like in *Ropp*, to allow the DABC Commissioner to appeal his own agency's final decision would require the invention of statutory authority.

The DABC Commissioner attempts to avoid the holding in *Ropp* by arguing that the DABC Commissioner did not delegate any authority to the Appeals Commission, as the Securities Commissioner delegated authority to the hearing officer. (Op. Br. at 25). This is a distinction without a difference. The holding in *Ropp* was not based on the fact that the Securities Commissioner had delegated authority to the hearing officer. Instead, it was based on the fact that there was no statutory basis for the Securities Commissioner to appeal the decision of his own agency. *Ropp*, at \*4-5.

In this case, it is true that the DABC Commissioner did not delegate any of his statutory authority to the Appeals Commission. The General Assembly did that when it amended the Liquor Control Act to create the Appeals Commission and tasked it with reviewing decisions of the DABC Commissioner. The DABC Commissioner's attempt to distinguish *Ropp* is without merit.

**II. THERE IS NO BASIS FOR THIS COURT TO ADDRESS THE MERITS OF THE UNDERLYING APPEALS COMMISSION'S 2011 ORDER, WHEN THE COURT BELOW NEVER REACHED THE MERITS.**

**A. Question Presented**

Whether the this Court has a basis to address the merits of the appeal, when the Superior Court dismissed the appeal due to a lack of standing, and therefore never reached the merits of the appeal.

**B. Scope of Review**

This Court may only review questions that were properly before the court below. Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”) The interest of justice exception applies only where “the issue is outcome-determinative and may have significant implications for future cases” and consideration of the issue will promote judicial economy. *Sandt v. Del. Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994).

**C. Merits of Argument**

This Court should refuse to consider the merits of the Appeals Commission's 2011 Order. The Superior Court explicitly declined to consider the merits of the DABC Commissioner's Appeal of the Appeals

Commission's 2011 Order. Accordingly, the merits are not before this Court. What is more, the interests of justice exception does not apply because the DABC Commissioner is essentially seeking to by-pass the Superior Court and the Superior Court Commissioner's review of the merits of the Appeals Commission's 2011 Order.

**1. The Superior Court Declined To Consider the Merits of the Appeals Commission's 2011 Order When It Decided the Motion to Dismiss**

Following the Appeals Commission's 2011 Order, the DABC Commissioner appealed the decision to the Superior Court. Pursuant to the provisions of the Liquor Control Act existing at the time (which have since been amended), the matter was first referred to a Superior Court Commissioner. The parties submitted briefing on the merits to the Superior Court Commissioner but before the Superior Court Commissioner could conduct a hearing or receive additional evidence, Hak's raised the issue now before this Court – whether the DABC Commissioner had standing to pursue the appeal in the first place. Thereafter, the Superior Court Commissioner ordered briefing on the motion to dismiss and deferred her consideration of the merits until that motion was decided.

The Superior Court Commissioner granted the motion to dismiss. The DABC Commissioner then appealed that decision to the Superior Court

judge. During a teleconference, the DABC Commissioner’s counsel asked that the Superior Court allow full briefing “not just on the standing issue but also on the merits as well.” (A-23).<sup>1</sup> The Superior Court declined to allow briefing on the merits, stating: “I’m satisfied it makes the most sense for judicial economy and just to move this matter along for me to rule on *only the issue presented right now, which is a dispositive issue*...right now I’m just going to issue a decision on what’s before me, and we’ll proceed from there.” (A-24-25) (emphasis added). In the order affirming the Superior Court Commissioner’s dismissal of the appeal for lack of standing, the Superior Court made it clear that it was reviewing “the sole issue of jurisdiction”. (A-17 at n.10).

Thus the Superior Court not only did not decide the underlying merits of the DABC Commissioner’s appeal, it never even considered them. There is therefore no basis for the DABC Commissioner to ask this Court to address the Appeals Commission’s 2011 Order.

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<sup>1</sup> When before the Superior Court, the Commissioner took the position that additional briefing on the merits was required. (A-23). When before this Court, the Commissioner now takes the contradictory position that the “merits were fully briefed below in 2012.” (Op. Br. at 27).



## 2. The “Interests of Justice” Exception to Rule 8 Does Not Apply

The DABC Commissioner makes a conclusory statement that “the merits of the appeal are outcome determinative” and “would have significant implications for future cases, and this Court’s consideration of the merits will promote judicial economy.” (Op. Br. at 27). The DABC Commissioner utterly fails to explain how having this Court review the merits of the Appeals Commission’s 2011 decision would have any implications for future cases, or how it would promote judicial economy. For this failure alone, the argument should be ignored.

But even if the DABC Commissioner had attempted to explain why the interests of justice require this Court to consider the Appeals Commission’s 2011 Order, no possible explanation could suffice. The interests of justice exception applies to situations where a party raises an *argument* for the first time on appeal. *See, e.g., Sandt*, 640 A.2d 1030 (considering the argument of waiver on appeal, notwithstanding it was not raised below, because it met the requirements of Rule 8’s interests of justice exception); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 679 (Del. 2013) (considering an argument that was not presented to the court below because appellant raised contradictory case law concerning the issue). The interests of justice

exception does not allow a party to circumvent the statutory review process entirely, which is what the DABC Commissioner seeks to do here. The DABC Commissioner would have this Court address the merits of the Appeals Commission's 2011 Order before the Superior Court and the Superior Court Commissioner have done so in accordance with the statute. The interests of justice would never be served by allowing such a review.

## **CONCLUSION**

For all of the foregoing reasons, and the reasons that may be explained at oral argument in this matter, Appellee Lex-Pac, Inc. respectfully requests this Court affirm the Superior Court's decision below dismissing the action.

### **BALICK & BALICK, LLC**

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