



IN THE SUPREME COURT OF THE STATE OF DELAWARE

OFFICE OF THE COMMISSIONER,)	
DELAWARE ALCOHOLIC BEVERAGE)	
CONTROL,)	
Appellant Below,)	
Appellant,)	No. 101, 2014
)	
v.)	On Appeal from the
)	Superior Court of the
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.)	

**ANSWERING BRIEF OF APPELLEE, APPEALS COMMISSION,
DELAWARE ALCOHOLIC BEVERAGE CONTROL**

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew G. Kerber
Andrew G. Kerber, ID 2369
Deputy Attorney General
820 N. French Street
Wilmington, DE 19801
(302) 577-8400
andrew.kerber@state.de.us
Attorney for Appellee, Appeals Commission,
Delaware Alcoholic Beverage Control

Dated: October 2, 2014

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	3
NATURE OF PROCEEDINGS	4
SUMMARY OF ARGUMENT	6
COUNTERSTATEMENT OF FACTS	7
I. Objection to Statement of Facts in the Opening Brief under Supreme Court Rule 14(b)(v).	7
II. Adoption of Statement of Facts from Answering Brief of Appellee, Lex-Pac.	9
 ARGUMENT	
Adoption of Arguments from Answering Brief of Appellee, Lex-Pac.	10
 CONCLUSION.	11

TABLE OF CITATIONS

For the sake of judicial economy and to avoid unnecessary duplication, Appellee, Appeals Commission, Delaware Alcoholic Beverage Control respectfully submits that it incorporates the table of citations set forth by Co-Appellee, Lex-Pac, in its Answering Brief dated October 2, 2014 and filed with this Honorable Court on October 2, 2014.

NATURE OF PROCEEDINGS

Appellee, Lex-Pac, Inc. (“Lex-Pac”) filed an application with Appellant, the Delaware Alcoholic Beverage Control Commissioner (“ABC Commissioner”), to convert its liquor license classification from a taproom to a restaurant in June 2008. On January 15, 2010, the ABC Commissioner denied Lex-Pac’s application.

Lex-Pac appealed to the Delaware Alcoholic Beverage Control Appeals Commission (“Commission”), which reversed the ABC Commissioner on May 3, 2010. The Commission issued an amended decision on August 24, 2011. The ABC Commissioner timely appealed the amended decision to the Superior Court.

On March 2, 2012, the Superior Court ordered the parties to complete arbitration before a Superior Court Commissioner pursuant to the then applicable provisions of 4 *Del. C.* § 541(c). On July 8, 2013, the Superior Court Commissioner heard oral argument on Lex-Pac’s Motion to Dismiss, thereby canceling the scheduled July 2013 arbitration hearing.

The Superior Court Commissioner issued an Opinion and Order on July 17, 2013, dismissing the appeal based on lack of standing. The ABC Commissioner timely filed an appeal of the Superior Court Commissioner’s Opinion and Order with the Superior Court.

The Superior Court affirmed the dismissal of the appeal based on lack of standing in an order dated January 31, 2014. The Superior Court did not hear

argument on the merits of the underlying appeal and the merits of the underlying appeal were not fully briefed or considered by the Superior Court.

The ABC Commissioner timely filed an appeal of the Superior Court's January 31, 2014 Order with this Court. The ABC Commissioner then filed an Opening Brief for this appeal on June 2, 2014. This is the Answering Brief of the Commission.

SUMMARY OF ARGUMENT

1. Denied. The duties and powers of the ABC Commissioner are established by statute at 4 Del. C. §304(a) and do not include the power to appeal from a decision of the Commission.

2. Denied. The Superior Court's decision in this case was to dismiss based upon the ABC Commissioner not having standing to file an appeal from the decision of the Commission. The merits of the underlying appeal were not fully briefed, argued or considered by the Superior Court.

COUNTERSTATEMENT OF FACTS

I. Objection to Statement of Facts in the Opening Brief under Supreme Court Rule 14(b)(v).

The Commission notes that under Supreme Court Rule 14(b)(v), the opening brief of appellant and the answering brief of appellee shall contain a “concise statement of **facts, with supporting references to appendices or record**, presenting succinctly the background of the questions involved. The statement shall include a concise statement of all facts which should be known in order to determine the points in controversy and shall describe in particular the judgment or order sought to be reviewed.” [Emphasis added.]

The Statement of Facts included in the Opening Brief filed by the ABC Commissioner does not meet the requirements of Supreme Court Rule 14(b)(v) because it is not a concise statement of facts, but rather an amalgam of argument, law and facts some of which lack supporting references to appendices or record. Accordingly, the Commission objects generally to the Statement of Facts included in the Opening Brief filed by the ABC Commissioner based upon its failure meet the requirements of Supreme Court Rule 14(b)(v) and also raises the following specific objections:

1) Opening Brief, Page 4, first paragraph: The Commission notes that the final sentence of this paragraph states as fact the legal argument or conclusion that the ABC Commissioner has distinct regulatory and quasi-judicial roles without supporting legal or record citation. The Commission believes that the final sentence of the first paragraph of the ABC Commissioner's Statement of Facts should be stricken from the record.

2) Opening Brief, Page 7, last sentence of carryover paragraph from page 6. In the first sentences of this paragraph on page 6, the ABC Commissioner sets out the process that is followed when a license for a liquor license is not protested – reciting specifically that the application is to be decided on the record submitted by the applicant. In the final sentence of this paragraph on page 7, the ABC Commissioner asserts that “This process was followed in the present case.” This assertion is not borne out by the record. Rather, the record confirms that the ABC Commissioner went outside the record and did his own research, including reviewing and relying upon Lex-Pac's tap room website (A-74). The ABC Commissioner's counsel acknowledged on the record that he would not have advised the ABC Commissioner to look at the website. (A-77). The Commission believes that the final sentence of the carryover paragraph on page 7 of the ABC Commissioner's Statement of Facts should be stricken from the record.

3) Opening Brief, Page 7, first full paragraph to Page 12, first full paragraph. The facts and law that the ABC Commissioner recites in these paragraphs involve the merits of the appeal before the Superior Court. As the merits of the appeal were never reached by the Superior Court and this appeal is before this Court on the appeal of the Superior Court's approval of a case dispositive motion to dismiss for lack of standing, none of the information in these paragraphs addresses the points in controversy before this Court. The Commission believes that the first full paragraph on page 7 to the first full paragraph on page 12 of the ABC Commissioner's Statement of Facts should be stricken from the record.

II. Adoption of Statement of Facts from Answering Brief of Appellee, Lex-Pac.

For the sake of judicial economy and to avoid unnecessary duplication, Appellee, the Commission respectfully submits that it joins in and adopts the Statement of Facts included by Co-Appellee, Lex-Pac, in its Answering Brief dated October 2, 2014 and filed with this Honorable Court on October 2, 2014.

ARGUMENT

For the sake of judicial economy and to avoid unnecessary duplication, Appellee, the Commission respectfully submits that it joins in and adopts the well reasoned arguments raised by Co-Appellee, LEX-PAC, in its Answering Brief dated October 2, 2014 and filed with this Honorable Court on October 2, 2014.

CONCLUSION

For the reasons provided above, the appeal should be denied and the judgment of the Superior Court should be affirmed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew G. Kerber

Andrew G. Kerber, ID 2369

Deputy Attorney General

820 N. French Street

Wilmington, DE 19801

(302) 577-8400

Attorney for Appellee, Appeals Commission, Delaware Alcoholic
Beverage Control

Dated: October 2, 2014