

OPINION NO. 85-027**Syllabus:**

If the Department of Liquor Control denies an application for a liquor permit on the basis that the issuance of the permit would cause the number of that type of permit issued to exceed the quota set by statute or by administrative rule, the Ohio Liquor Control Commission may not order the permit to be issued, unless the Commission, in considering an appeal from such denial pursuant to R.C. 4301.28(A), finds that the Department's denial is incorrect as a matter of fact or law.

To: Richard E. Carey, Director, Department of Liquor Control, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 19, 1985

I have before me your request for my opinion on whether the Liquor Control Commission has any equitable powers to overrule a decision by the Department of Liquor Control denying a liquor permit application on the basis of quota restrictions. Specifically, you ask the following questions:

1. Does the Ohio Liquor Control Commission have any equitable powers?
2. If so can the Ohio Liquor Control Commission make a determination and issue an order to cause the number of [liquor] permits already issued to exceed the total number set by statute or administrative rule?

R.C. 4301.10 imposes upon the Department of Liquor Control certain duties with respect to the issuance of permits for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor and the sale of alcohol. In your letter you state that the Department of Liquor Control considers several criteria in making a determination as to whether to issue or deny a liquor permit. Your letter states that chief among these criteria is whether a particular type of permit is available under the population-based statutory quota system. The quota system limits the number of each type of permit which may be issued in a county, municipal corporation, or in the unincorporated area of a township, based upon the population of such county, municipal corporation, or township. R.C. 4303.29; 5 Ohio Admin. Code 4301:1-1-64. You question whether the Commission may, upon the Department's denial of an application for a liquor permit on the basis that the issuance of the permit would cause the number of that type of permit issued to exceed the quota set by statute or administrative rule, order the permit to be issued.

Before addressing your specific question, I will briefly outline the statutory powers of the Department of Liquor Control and the Liquor Control Commission in relation to the issuance of liquor permits.

The Department of Liquor Control consists of the Director of Liquor Control, the Liquor Control Commission, and such deputies, agents, and employees as the Director may appoint. R.C. 4301.02. Pursuant to R.C. 4301.021, the Director of Liquor Control "shall exercise all powers and perform all duties created and

enjoined by [R.C. Chapters 4301 and 4303] except the powers and duties vested in and enjoined upon the liquor control commission by [R.C. 4301.022] and all chapters and sections of the Revised Code referred to therein." See generally R.C. 4301.05 (explaining limitations on the power of the Liquor Control Commission); Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975).

R.C. 4301.10 sets forth the powers and duties of the Department of Liquor Control. Your question specifically concerns the issuance of liquor permits. As set forth above, pursuant to R.C. 4301.10(A)(2), the Department shall "[g]rant or refuse permits for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor and the sale of alcohol, as authorized or required by Chapters 4301. and 4303. of the Revised Code." The power of the Department to issue such permits is not without limitation. See, e.g., R.C. 4303.29 (setting forth restrictions, including the population-based quota restriction mentioned above, upon the authority of the Department to issue permits); R.C. 4303.292 (setting forth restrictions on the issuance, transfer, or renewal of permits).

The Liquor Control Commission is established pursuant to R.C. 4301.022 and pursuant to R.C. 4301.02, is part of the Department of Liquor Control. Its powers are set forth principally in R.C. 4301.04. Pursuant to R.C. 4301.04(A), the Commission has the power to suspend, revoke, and cancel permits. See R.C. 4301.25-27 (setting forth when the Commission may suspend, revoke or cancel permits). The Commission also has broad rule-making authority which is specified in R.C. 4301.03. R.C. 4301.03 provides that the Commission may promulgate, inter alia:

(A) Rules with reference to applications for and the issuance of permits for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor, and the sale of alcohol; and rules governing the procedure of the department of liquor control in the suspension, revocation, and cancellation of such permits;

. . . .

(F) Rules restricting and placing conditions upon the transfer of permits;

(G) Rules and orders limiting the number of permits of any class within the state or within any political subdivision of the state; and for such purpose adopting reasonable classifications of persons or establishments to which any authorized class of permits may be issued within any such political subdivision.

See generally Stouffer Corp. v. Board of Liquor Control, 165 Ohio St. 96, 133 N.E.2d 325 (1956).

In sum, the Liquor Control Commission has the authority to promulgate rules with regard to the issuance of permits and with regard to the limitation on the number of permits of any class which may be issued within the state or any political subdivision. See Stouffer Corp. v. Board of Liquor Control (although R.C. 4303.29 provides for the maximum number of permits which may be issued in any county or municipal corporation, it does not limit the authority of the Board [now Commission] pursuant to R.C. 4301.03 to reasonably limit by rule the number of permits of any class within any political subdivision). It is the Department of Liquor Control, however, which has the authority to issue permits, subject to the restrictions of R.C. 4303.29, R.C. 4303.291, and any rules promulgated by the Commission.

I turn now to your questions as to whether the Liquor Control Commission has any equitable powers and, if so, whether the Commission may make a determination and issue an order to cause a liquor permit to be issued, when the Department of Liquor Control denies the application for the permit on the basis that the issuance of the permit would cause the number of that type of permit to exceed the quota set by statute or administrative rule. With regard to your reference to "equitable powers," I understand your question to be whether the Commission may make such an order based on what it determines to be fair or just, rather than on any statutory authority to make the order.

In Leiphart Lincoln-Mercury, Inc. v. Bowers, 107 Ohio App. 259, 158 N.E.2d 740 (Lucas County 1958), the court of appeals, in analyzing the powers of the Department of Taxation, stated:

The Department of Taxation is an administrative agency and is a tribunal of limited jurisdiction. Administrative officers and agencies have no common-law or inherent powers other than have been granted to or conferred on them by law. As a creature of statute, it is without power to exercise any jurisdiction beyond that conferred by statute. . . . The jurisdiction of such officials and tribunals must be invoked in the manner prescribed by statute, and their proceedings must be in accordance with valid statutory requirements. They are authorized to act only in the mode prescribed by statute and can not dispense with the essential forms of procedure which condition their statutory powers, or have been prescribed for the purpose of investing them with power to act. (Emphasis added and citations omitted.)

107 Ohio App. at 265, 158 N.E.2d at 745. See Penn Central Transportation Co. v. Public Utilities Commission, 35 Ohio St. 2d 97, 298 N.E.2d 587 (1973) (syllabus, paragraph one) ("[t]he Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute"); State ex rel. Funtash v. Industrial Commission, 154 Ohio St. 497, 96 N.E.2d 593 (1951) (the Industrial Commission, as an administrative agency, possesses only those powers and duties conferred upon it by the Constitution and statutes of Ohio); Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 294 N.E.2d 676 (Cuyahoga County 1973). Thus, an administrative agency has no inherent or equitable powers, but only those powers and duties which are conferred by statute.

It is well settled that the Ohio Liquor Control Commission and the Ohio Department of Liquor Control, of which the Commission is a part, R.C. 4301.02, are administrative agencies. See Burger Brewing Co. v. Thomas; State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); Detelich v. Department of Liquor Control, 62 Ohio L. Abs. 195, 107 N.E.2d 415 (App. Franklin County 1950); 1953 Op. Att'y Gen. No. 2422, p. 118. Because the Liquor Control Commission is an administrative agency created by statute, it has only those powers which are expressly granted by statute, or which may be implied therefrom. Burger Brewing Co. v. Thomas.

R.C. 4301.10(A)(2) imposes upon the Department of Liquor Control the power to issue liquor permits. There is no corresponding grant of authority to the Liquor Control Commission. The Liquor Control Commission has the power to promulgate rules "necessary to carry out Chapters 4301. and 4303. of the Revised Code," R.C. 4301.03, including rules "limiting the number of permits of any class within the state or within any political subdivision of the state; and for such purpose adopting reasonable classifications of persons or establishments to which any authorized class of permits may be issued within any such political subdivision," R.C. 4301.03(G). See rule 4301:1-1-64. Thus, the Commission may, within the parameters of R.C. 4303.29, which restricts the Department with regard to the maximum number of each class of permit which may be issued in a political subdivision according to the size of its population, establish by rule limitations on the number of permits of any class within the state or any political subdivision. See Stouffer Corp. v. Board of Liquor Control. The Commission has no power, however, to issue permits, or to override the Department's denial of a permit based on the quota limitations. If the Commission is dissatisfied with the number of permits which may be issued within the state or a political subdivision, it may, within the limitations of R.C. 4303.29, provide by rule for an increase in the number of new permits which may be issued. This is the only way in which the Commission may act in order to increase the number of permits which may be issued.

I note that an administrative agency may not extend its statutory jurisdiction through its rule-making authority. See Burger Brewing Co. v. Thomas; Davis v. State ex rel. Kennedy, 127 Ohio St. 261, 187 N.E. 867 (1933). As discussed above, an administrative agency has only those powers granted by statute and may promulgate only those rules which it is statutorily authorized to promulgate. Because the Liquor Control Commission has no statutory authority to issue liquor

permits, or to vary the number of permits which may be issued pursuant to statute or rule, except by rule promulgated pursuant to R.C. 4301.03(G), it may not confer such authority upon itself by rule. Id.

I note as a final matter that R.C. 4301.04(B) empowers the Commission to "consider, hear, and determine all appeals authorized by Chapters 4301. and 4303. of the Revised Code, to be taken from any decision, determination, or order of the department, and all complaints for the revocation of permits. . . ." Pursuant to R.C. 4301.28(A), "[a]ny person aggrieved may appeal to the liquor control commission from the action of the department of liquor control in refusing to issue a permit." These provisions do not vest equitable powers in the Commission. Rather, it is well settled that in appeals to the Commission, the sole question before the Commission is the propriety of the Department's order as a matter of fact and law. East Toledo Social Club v. Board of Liquor Control, 71 Ohio L. Abs. 193, 130 N.E.2d 238 (App. Franklin County 1955). See Khoury v. Board of Liquor Control, 74 Ohio L. Abs. 492, 141 N.E.2d 792 (C.P. Franklin County 1957). In an appeal to the Commission from the Department's denial of a liquor permit on the basis of quota restrictions, the Commission's scope of review is limited to the determination of whether the Department's findings in the particular case are correct in fact and as a matter of law. See State ex rel. Makro Self-Service Wholesale Corp. v. Department of Liquor Control, No. 84CV-07-4153 (C.P. Franklin County Jan. 30, 1985) (in upholding the action of the Liquor Control Commission which had reversed the decision of the Department of Liquor Control denying a liquor permit on the basis of quota restrictions, the court stated that, "[t]he issue of whether [the city] had or had not met its quota was a factual matter which should be, and was, resolved by the Commission through its statutory appellate procedure," and that, "[a]bsent proof to the contrary, the action of the commission [finding that the city had not reached its quota] will be presumed to be lawful, done in good faith and in the exercise of sound judgment"). In reviewing the Department's actions in denying a liquor permit on the basis of statutory quota restrictions, the Commission is not free to disregard such restrictions and fashion an equitable remedy.

Accordingly, it is my opinion, and you are so advised, that if the Department of Liquor Control denies an application for a liquor permit on the basis that the issuance of the permit would cause the number of that type of permit issued to exceed the quota set by statute or by administrative rule, the Ohio Liquor Control Commission may not order the permit to be issued, unless the Commission, in considering an appeal from such denial pursuant to R.C. 4301.28(A), finds that the Department's denial is incorrect as a matter of fact or law.