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SYLLABUS:

1. The Board of Liquor Control has authority under Sections 4301.04 (C) and 4301.04 (H), Revised Code, to enter an order in a case where no order has previously been entered, providing said order is based on a review of the record of the hearing and providing said record was caused to be made by one or more members of the board, in accordance with Regulation No. 65 of the Board of Liquor Control.

2. The Board of Liquor Control is without authority to reopen a case where an order has previously been entered in which the board found the permit holder in violation but was unable to agree as to penalty and concluded said order with a statement that the board considers the case closed.

Columbus, Ohio, May 7, 1963

Honorable Kenneth E. Thomas
Chairman
Board of Liquor Control
219 South High Street
Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“There are a number of cases pending before the Board of Liquor Control which were heard prior to February 5, 1963. On some of the cases the previous membership of the Board of Liquor Control, after a full hearing of the case, failed to reach a decision and no order was entered.

“On other of these cases, the previous membership of the Board, after hearing the case entered a decision of the following type decision :

‘And said permit holder, appearing before the Board of Liquor Control to answer the charge set out in Violation No. 1 above, denied the same, and thereupon the matter was submitted to the Board of Liquor Control on the evidence; and said Board, in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence and finds the above permit holder in violation as charged.

‘And the Board coming on to consider the penalty, if any, which should be imposed by reason of the aforesaid violations, finds that it is unable to conclude a judgement thereon and therefore considers the case closed.’

“The first question the Board of Liquor Control desires an opinion on is whether the present membership of the Board of Liquor Control may, after reviewing the record, but without rehearing the case, make an order in the cases where no order has heretofore been entered.

“The second question on which the Board of Liquor Control desires a ruling is whether the present membership of the Board of Liquor Control may after a review of the record of a case, and without rehearing the same, issue a new order or any order in cases which the following type of order has been entered :

‘And said permit holder, appearing before the Board of Liquor Control to answer the charge set out in Violation No. 1 above, denied the same, and thereupon the matter was submitted to the Board of Liquor Control on the evidence; and said Board, in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence and finds the above permit holder in violation as charged.’

‘And the Board coming on to consider the

penalty, if any, which should be imposed by reason of the aforesaid violations, finds that it is unable to conclude a judgement thereon and therefore considers the case closed.'

"The present members of the Board of Liquor Control understand that any case not heard or on the continued list may be called up and set for hearing and decided by the present Board."

The underlying question involved in each of the foregoing questions is whether the board of liquor control has a continuous authority to act under the sanction of Section 4301.04, Revised Code, irrespective of periodic personnel changes in the board's membership. Stated another way, has the board constancy apart from its members?

Section 4301.04, Revised Code, reads in part as follows:

"The board of liquor control has the following powers:

"(A) *The Board* may suspend, revoke, and cancel permits.

"(B) *The Board* may 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. *The board* shall accord a hearing to any person appealing or complained against, at which such person has the right to be present, to be represented by counsel, to offer evidence, and to require the attendance of witnesses.

"(C) *The board* may adopt, repeal, and amend by-laws in relation to its meetings and the transaction of its business and regulating its procedure on appeal."

(Emphasis added)

It can readily be noted from the foregoing excerpt that the powers referred to are those of the board and equally conspicuous by omission is any reference to the number of board members required to constitute a quorum or limitation on the power of the board to act in the absence of one or more of its membership.

The inference is therefore fairly drawn that the board of liquor control does have continuous authority to act in cases even though during the pendency of said cases a partial change in the identity of the board's membership is affected. This is only true, however,

where the proceedings before the board, whether by partial or total membership, were proper in all other respects.

As to the group of cases described in the first question, the answer is affirmative. In addition to the foregoing interpretation of the nature of the board's power, I direct attention to Opinion No. 2609, Opinions of the Attorney General for 1958, which reads in part as follows:

“Finally, it will be seen that Section 4301.04, Revised Code, contains the following provisions:

* * * (C) The board may 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. The board shall accord a hearing to any person appealing or complaining against, at which such person has the right to be present, to be represented by counsel, to offer evidence, and to require the attendance of witnesses.

‘(H) For the purpose of any hearing or investigation which they are respectively authorized or required by such chapters to conduct, the board, any member of the board, the director, or any agent of the department, designated in writing for that purpose, may administer oath, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. * * *

“This statute makes no express provision on the point of how the evidence thus adduced at a hearing conducted by a member is to be brought to the attention of the full board, but in view of the necessity of preparing a record of the agency's proceedings for use in appeals as provided in Section 119.12, Revised Code, it is fairly to be implied that such member must cause a record to be made of such evidence for review by the board as a whole. Such a record would enable all members to consider the same evidence as was heard by the member who conducted the hearing, rather than to consider the findings, conclusions, and recommendations of a single member. Because members of boards, *etc.*, are not mentioned in Section 119.09, Revised Code, in connection with referees or examiners, and

because of the provision in Section 4301.04, *supra*, authorizing one member to conduct a hearing, it may be concluded, under the maxim *expressio unius*, that such provision is the full extent of a member's authority so to act.

"I conclude, therefore, in specific answer to your query Section 119.09, Revised Code, does not authorize the board of liquor control to appoint one of its members who is an attorney as its referee or examiner to conduct a hearing and report to the board his findings of fact, conclusions of law, and recommendation of board action, but such board is authorized by Section 4301.04, Revised Code, to designate any member of such board to conduct a hearing to make up a record of the evidence, therein adduced, for review by the board as a whole."

It follows that if one member of the board is authorized by statute to conduct a hearing and cause a record to be made from which the board as a whole may properly issue an order, then it is proper for the board to make an order after reviewing the record but without rehearing the case, where said record was made at a prior hearing conducted by two members of the board (both of whom are still members of the board) then and there acting as duly appointed members of the board of liquor control.

In *Metro Tavern, Inc. v. Board of Liquor Control*, 111 Ohio App., 269, a hearing was conducted before the board by one member only, another member being present but entertaining the view that three members of the board were the minimum needed for a quorum and therefore declining to take part in the hearing. As a result, that day the board consisted of one member only. A hearing was held, witnesses called, motions made and overruled and the case taken under advisement. Thereafter, at a later date, the board issued its order in the case, the order being signed by the member who conducted the hearing and by the two members not present at the hearing. The order also set forth the dissent of the member declining to take part and a statement of the reason for his dissent that the board lacked jurisdiction.

Subsequently the case was appealed to the court of common pleas and taken to the court of appeals, whereupon it was reversed on other grounds.

As to the group of cases described in question No. 2, the answer is negative. This conclusion is not based on any lack of continuity of the board's authority to act but is based on the fact that a final order has been entered and the board has no statutory authority to vacate or modify its own final order, or to reopen a case once it has made a determination.

Although the order does not employ the most concise or exacting language available, its meaning and intent is nonetheless quite clear. Wherein the second paragraph reads "And the Board * * * considers the case closed", the board's intention as to the finality of said order can hardly be disputed.

Whether or not this is technically a proper final order is purely academic inasmuch as it purports to be a proper final order and undoubtedly has been relied upon as such.

Orders of the board of liquor control are penal in nature, therefore where such an order is confusing or vague, it should be construed strictly in favor of the alleged violator, inasmuch as the burden of proof is on the department.

Accordingly, it is my opinion and you are advised:

1. The Board of Liquor Control has authority under Sections 4301.04 (C) and 4301.04 (H), Revised Code, to enter an order in a case where no order has previously been entered, providing said order is based on a review of the record of the hearing and providing said record was caused to be made by one or more members of the board, in accordance with Regulation No. 65 of the Board of Liquor Control.

2. The Board of Liquor Control is without authority to reopen a case where an order has previously been entered in which the board found the permit holder in violation but was unable to agree as to penalty and concluded said order with a statement that the board considers the case closed.

Respectfully,

WILLIAM B. SAXBE

Attorney General