

3794

1. LIQUOR CONTROL—PERMITS—ENACTMENT OF SECTION 4303.291 RC, 100 GA, HAS EFFECT TO AMEND BY NECESSARY IMPLICATION, PROVISIONS OF REGULATION 64, OHIO BOARD OF LIQUOR CONTROL—D-4 PERMITS WHICH MAY BE ISSUED—LIMITED TO FIGURE EQUAL TO NUMBER ISSUED AND OUTSTANDING APRIL 11, 1949 — ISSUANCE WITHIN PARTICULAR SUBDIVISIONS.
2. REGULATION, AMENDED, D-4 PERMITS, HAS REFERENCE AND APPLICATION ONLY TO APPLICANTS AND PERMITTEES OTHER THAN DESIGNATED FRATERNAL ORGANIZATIONS — STATUTORY QUOTA, SECTION 4303.29 RC—STATUS AS TO FRATERNAL ORGANIZATIONS AND OTHER PERMITTEES—TOTAL NUMBER OF PERMITS ISSUED AND OUTSTANDING APRIL 11, 1949.

SYLLABUS:

The enactment of Section 4303.291, Revised Code, by the 100th General Assembly, has the effect of amending by necessary implication the provisions of Regulation 64 of the Ohio Board of Liquor Control limiting the number of D-4 permits which may be issued within particular political subdivisions to a figure equal to the number thereof issued and outstanding as of April 11, 1949, and as thus amended such regulation, as to D-4 permits, now has reference and application only to applicants and permittees other than the fraternal organizations designated in such legislative enactment. In the application of such regulation as amended, and eliminating any question of the effect of the statutory quota provided by Section 4303.29, Revised Code, the number of permits which may currently be issued thereunder to applicants other than such fraternal organizations should be determined by reference to the number of permits issued and outstanding on April 11, 1949, to permittees other than such fraternal organizations, and not to the total number of permits issued and outstanding on such date.

Columbus, Ohio, April 30, 1954

Hon. Anthony A. Rutkowski, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Section 4303.29, Revised Code, provides as follows:

“ ‘Not more than one D-3, D-4, or D-5, permit shall be issued for each two thousand population, or part thereof, in any county

or municipal corporation, except that in any city of a population of fifty-five thousand or more, one D-3 permit may be issued for each fifteen hundred population, or part thereof.' * * *

"Section 4303.291 of the Revised Code reads as follows:

" 'The issuance of a D-4 permit to a unit of an organization chartered by the congress of the United States or a subsidiary unit of a national fraternal organization, when the parent organization has been in existence for eight years or more at the time application is made for a D-4 permit, shall not be limited by virtue of any rule or regulation promulgated by the board of liquor control limiting the number of D-4 permits which may be issued in the state of Ohio or any political subdivision thereof.'

"Regulation No. 64 of the Board of Liquor Control reads in part as follows:

" 'Section I—The number of D-3, D-3A, D-4 and D-5 permits which may be issued within the State of Ohio and within each political subdivision thereof is hereby limited to a figure which shall be equal to the number of permits of each above designated class respectively issued and outstanding in the State of Ohio and in each political subdivision thereof as of April 11, 1949.

" 'No new D-3, D-3A, D-4 and D-5 permits shall be issued except permits issued pursuant to the provisions of Regulation 14, and except, also, new permits issued upon the expiration of any existing permits to the same permit holder for the same location.
* * *

" 'Section IV—This regulation shall not be construed so as to increase the number of permits of the above designated classes permissible under Section 6064-17 of the General Code of Ohio and Regulation 10.'

"(Regulation 10 of the Board of Liquor Control was rescinded Jan. 4, 1954.)

"Regulation 11 of the Board of Liquor Control provides as follows:

" 'When in any county, city or village the quota for Class D-3, D-4, or D-5 permits shall have been filled, the department shall notify the applicant that such quota is filled and return to the applicant the permit fee upon request of the applicant, providing such request includes an authorization to cancel and withdraw the application. Upon the cancellation, revocation or surrender of any permit or failure of a person holding a permit to re-apply for another permit of the same class in such quota-filled location, applications shall then be processed in the order in which

same were filed and pending by the department until the quota is again filled.

“Upon expiration of a permit, however, preference shall be accorded to the holder of the expiring permit.’

“Pursuant to Section 4303.291 of the Revised Code as quoted above, the Department is issuing new D-4 permits; also pursuant to the case of the Kenwood Country Club v. the Department of Liquor Control, Case No. 4914, decided by the Court of Appeals of Franklin County, the Department is issuing D-4 permits to replace those permits which have been extinguished by cancellation, revocation, failure to renew, or rejection.

“The Department respectfully requests your opinion as to the following question :

“Eliminating consideration of the statutory quota set by Section 4303.29 of the Revised Code, may the Department, in determining the number of D-4 permits which must be issued under the authority of the Kenwood Country Club case cited above, consider as ‘issued and outstanding’ for the purposes of Regulation No. 64 of the Board of Liquor Control, D-4 permits issued pursuant to Section 4303.291 R. C. quoted above?

“For example, assume that in City X there were issued and outstanding on April 11, 1949 (date of the ‘freeze’ order) 10 D-4 permits. Assume further that on January 1, 1954, there were, as the result of revocation, cancellation, failure to renew, or rejection of a permit, only 9 permits issued and outstanding in City X. If as of January 1, 1954, there were on file with the Department 2 applications, the first in point of time being an application filed by a national fraternal organization and the second in point of time being one filed by an Ohio country club, may the Department issue a D-4 permit to the national fraternal organization under the authority of 4303.291 R. C. and *also* issue a D-4 permit to the Ohio Country Club under the authority of the Kenwood Country Club case, or does the issuance of the permit to the national fraternal organization permit the issuance of a D-4 permit to the Ohio country club?”

In the Kenwood Country Club case, mentioned in your inquiry, the memorandum opinion of the Court of Appeals merely expressed approval of the reasoning and conclusions stated in Judge Randall’s opinion in the lower court. In such opinion, Case No. 184,834, Common Pleas Court of Franklin County, Judge Randall pointed out an inconsistency between the board’s Regulations 11 and 64, as follows :

“In the instant case, both Regulation 11 and Regulation 64 deal with the subject matter of quotas and each of them also deals

with the same types of permits, to-wit: D-3, D-4 and D-5 permits. However, there is an apparent inconsistency between the provision of Regulation 11 which provides that upon the surrender of a permit, applications shall be processed in the order in which they were filed until the quota is again filled and the provisions of Regulation 64 which provides that no new D-3, D-4 and D-5 permits shall be issued except permits issued pursuant to Regulation 14 and except also new permits issued upon the expiration of any permits to the same permit holder for the same location. Consequently, the Court is called upon to construe the second paragraph of Section 1 of Regulation 64 in the light of the principles of construction above referred to so that if possible, Regulation 11 and Regulation 64 may be harmonized and effect given to each."

Another inconsistency, it should be noted, is found in the seeming conflict of different provisions in Section I of Regulation 64 itself, the limitation to the April 11, 1949, figure being followed by a prohibition of the issuance of any D-3, D-4 or D-5 permits except as to renewals and as to permits issued under Regulation 14. In the resolution of these inconsistencies Judge Randall said:

"* * * There is nothing in Regulation 11 which indicates that it applies only to the statutory census quota. Since Regulation 64 in its entirety is not clear in view of the apparent conflict between the first and second sections thereof, the clear and unambiguous provision in Regulation 11 must be considered in determining the intent and scope. There is no indication in Regulation 11 that the Board intended to limit permits in a subdivision to a number less than issued and outstanding on April 11, 1949."

In the recent legislative enactment, Section 4303.291, Revised Code, the provision that in case of the fraternal organizations therein designated the issuance of D-4 permits "shall not be limited by any rule or regulation" presents two clear implications. The first is that the issuance of such permits to such fraternal organizations is to be subject to the statutory limitations set out in Section 4303.29, Revised Code, and the second is that such limitation "by any rule or regulation" shall continue to apply in the case of D-4 applicants other than such fraternal organizations.

In this situation, with the "fraternal" applicants excluded from the operation of these limiting regulations, and the "nonfraternal" applicants remaining subject to them, your inquiry raises the question of the extent, if any, to which the number of "fraternal" permits already issued must

be considered in determining the number of "non-fraternal" permits which may be issued under such regulations.

We may note initially that Regulation 64 refers definitely to "the number of permits of each above designated class respectively issued and outstanding * * * as of April 11, 1949."

By this language the board intended, of course, that in computing what we may call the "freeze figure" of April 11, 1949, regard should be had to *all* such permits, including "fraternal" as well as "non-fraternal," then outstanding. The legal effect of this regulation has been changed, however, by the recent legislative enactment exempting "fraternal" applicants from its operation. The question thus is not what the *board* intended in the original promulgation of this regulation, but what the *Legislature* intended the operation of the regulation to be following the removal of the so-called "fraternals" from its operation.

The Legislature was well aware, of course, of the provisions of Regulation 64 when the recent legislation on this subject was enacted, for the application of such regulation was the primary subject of its enactment. The Legislature must be presumed to have understood, therefore, that the effect of its enactment would be to leave "non-fraternal" applicants subject to the provisions of such regulation, and, specifically, subject to the "freeze figure" of April 11, 1949. In computing such "freeze figure" since such enactment became law, it must be remembered that the words of the regulation, "The number of * * * D-4 * * * permits which may be issued" now refer, by operation of law, only to such as are not exempted under the recent legislative enactment. Accordingly, the language later employed in the initial sentence of the regulation, "each of the above designated class," must now be deemed to refer to permits other than those issued to "fraternal" organizations.

In this view of the matter it thus becomes necessary now to recompute the "freeze figure" as of April 11, 1949, having regard only to those permits of the "non-fraternal" type which were outstanding on that date.

Your inquiry does not indicate what figure would result from such recomputation in the example described therein, and I am unable, therefore, to give a categorical answer to the precise question involved in such example.

Accordingly, in specific answer to your inquiry, it is my opinion that the enactment of Section 4303.291, Revised Code, by the 100th General Assembly, has the effect of amending by necessary implication the provisions of Regulation 64 of the Ohio Board of Liquor Control limiting the number of D-4 permits which may be issued within particular political subdivisions to a figure equal to the number thereof issued and outstanding as of April 11, 1949, and as thus amended such regulation, as to D-4 permits, now has reference and application only to applicants and permittees other than the fraternal organizations designated in such legislative enactment. In the application of such regulation as amended, and eliminating any question of the effect of the statutory quota provided by Section 4303.29, Revised Code, the number of permits which may currently be issued thereunder to applicants other than such fraternal organizations should be determined by reference to the number of permits issued and outstanding on April 11, 1949, to permittees other than such fraternal organizations, and not to the total number of permits issued and outstanding on such date.

Respectfully,
C. WILLIAM O'NEILL
Attorney General