

OPINION NO. 90-052**Syllabus:**

Pursuant to R.C. 4303.292(A)(1)(b), the Department of Liquor Control has authority to refuse to renew or transfer the ownership of, and shall refuse to transfer the location of, any retail permit where the permit holder is delinquent in paying the unemployment compensation contributions due from the holder as an employer under R.C. 4141.23, if the Department finds, in a reasonable exercise of its discretion, that such delinquency demonstrates that the permit holder has operated his liquor permit business in a manner that demonstrates a disregard for the laws of this state.

To: Ellen O'Brien Saunders, Administrator, Ohio Bureau of Employment Services and John R. Hall, Director, Ohio Department of Liquor Control, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, July 16, 1990

I have before me your opinion request concerning the authority of the Department of Liquor Control with respect to the transfer and renewal of liquor permits. Your opinion request sets forth the following background information:

The Department of Liquor Control has, for over twenty-five years, relied on the general authority of Revised Code Section 4303.292(A)(1)(b) to refuse to renew or transfer liquor permits held by employers based on information provided by the Ohio Bureau of Employment Services that the employers are delinquent in their unemployment compensation taxes. In 1987, the Ohio General Assembly enacted Revised Code Section 4303.26(B)(1) and Revised Code Section 4303.271(D)(1)-(5). These provisions mandate the Department of Liquor Control to refuse to renew or transfer the liquor licenses of sales tax delinquents. In light of the enactment of these provisions, the Department of Liquor Control now questions whether it has the authority under Revised Code Section 4303.292(A)(1)(b) to refuse to renew or transfer liquor licenses for nonpayment of unemployment compensation taxes. There are presently 194 transfer requests by employers with outstanding unemployment compensation taxes, totaling nearly \$900,000, pending before the Department of Liquor Control.

Based upon these facts, you specifically ask: "Does the Department of Liquor Control have the authority under [R.C. 4303.292(A)(1)(b)] to refuse to renew or transfer liquor permits held by employers determined by the Ohio Bureau of Employment Services to be delinquent in their unemployment compensation taxes?"

I begin my discussion by noting that, the Department of Liquor Control is established pursuant to R.C. 4301.02. R.C. Chapters 4301 and 4303 establish a statutory scheme for, among other things, the Department's issuance, transfer, renewal, and cancellation of permits to manufacture, sell, and transport beer and liquor. Concerning the general powers of the Department, the court in *Solomon v. Liquor Control Commission*, 4 Ohio St. 2d 31, 212 N.E.2d 595 (1965), stated in syllabus, paragraph two:

Section 4301.10, Revised Code, sets forth the powers and duties of the Department of Liquor Control and provides, *inter alia*, that it shall control the traffic in beer and intoxicating liquor, including the sale thereof, enforce the laws pertaining thereto, ... delegate to its agents any powers of investigation which the department itself possesses and exercise all other powers expressly or by necessary

implication conferred on it by the laws governing the dispensing and sale of alcoholic beverages.

Thus, whether the Department of Liquor Control may refuse to transfer or renew the permit of an employer who has unpaid unemployment compensation contributions depends upon whether the General Assembly has directly or impliedly authorized the Department to do so.

The first statute you mention, R.C. 4303.292, states in part:

(A) The department of liquor control *may* refuse to issue, transfer the ownership of, or renew, and *shall* refuse to transfer the location of any *retail permit* issued under this chapter if it finds:

(1) That the applicant any partner, member, officer, director, or manager thereof, or any shareholder owning ten per cent or more of its capital stock:

(a) Has been convicted at any time of a crime which relates to his fitness to operate a liquor establishment;

(b) *Has operated his liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state;*

(c) Has misrepresented a material fact in applying to the department for a permit;

(d) Is in the habit of using alcoholic beverages or dangerous drugs to excess, or is addicted to the use of narcotics. (Emphasis added.)

Thus, R.C. 4303.292(A)(1) establishes several reasons for which the Department may refuse to issue, transfer the ownership of, or renew a retail permit issued under R.C. Chapter 4303; such reasons also operate to prohibit the transfer of location of any such retail permit.¹ *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage"). You state that, based upon the language of R.C. 4303.292(A)(1), the Department has traditionally refused to renew or transfer a permit of a permit holder who has outstanding contributions owing to the Bureau of Employment Services. Since your question concerns only the renewal and transfer of permits, I will limit my discussion to those two activities.

The second statute mentioned in your opinion request, R.C. 4303.26, allows for the filing of applications for regular permits authorized by R.C. 4303.02-.23 with the Department of Liquor Control. R.C. 4303.26 also prohibits the issuance of a permit "until fifteen days after the application for it is filed." The balance of the statute sets forth the various notice and hearing requirements imposed upon the Department when certain types of applications are filed. R.C. 4303.26 specifically enumerates the entities entitled to notification upon the filing of an application for various permits or when certain permits become available. The portion of R.C. 4303.26 about which you ask states:

(B)(1) When an application for *transfer of ownership* of a permit is filed with the department, the department shall give notice of the application to the department of taxation. Within twenty days after receiving this notification, the department of taxation shall

¹ R.C. Chapter 4303 provides for the issuance of permits regulating the manufacture, distribution, sale, and transportation of beer and liquor. Only certain types of permits relate to retail sales. *See, e.g.,* R.C. 4303.11, 4303.12, 4303.121, 4303.13.

notify the department of liquor control and the proposed transferee of the permit if the permit holder owes any delinquent sales taxes to this state or has failed to file any sales tax returns, to the extent that such delinquent taxes and delinquent returns are known to the department of taxation at that time. *The department of liquor control shall not transfer ownership of the permit until returns known to be delinquent are filed and until any such tax delinquency is resolved.* As used in this division, "resolved" means that the tax delinquency has been paid or an amount sufficient to satisfy the delinquency is in escrow for the benefit of the state. The department of taxation shall notify the department of liquor control of the resolution. After the department of liquor control has received such notification from the department of taxation, the department of liquor control may proceed to transfer ownership of the permit. Nothing in this division shall be construed to affect or limit the responsibilities or liabilities of the transferor or the transferee imposed by [R.C. Chapter 5739]. (Emphasis added.)

R.C. 4303.26(B)(1) expressly prohibits the Department from transferring the ownership of a permit "until returns known to be delinquent are filed and until any such [sales] tax delinquency is resolved." See generally 6 Ohio Admin. Code 4301:1-1-14 (specifying, among other things, when the transfer of a permit will be allowed). R.C. 4303.26(B)(1) does not, however, restrict any other permit actions, e.g., transfer of location or renewal.

The final statute mentioned in your opinion request is R.C. 4303.271, which specifically concerns the renewal of permits, stating in part:

(A) Except as provided in divisions (B) and (D) of this section, *the holder of a permit issued under [R.C. 4303.02-.23], who files an application for the renewal of the same class of permit for the same premises, shall be entitled to the renewal of the permit. The department of liquor control shall renew the permit unless the department rejects for good cause any renewal application, subject to the right of the applicant to appeal the rejection to the liquor control commission.*

(B) The legislative authority of the municipal corporation, board of township trustees, or the board of county commissioners of the county in which a permit premises is located may object to the renewal of a permit issued under [R.C. 4303.11-.183] for any of the reasons contained in [R.C. 4303.292(A)]....

...The department shall then hold a hearing...to determine whether the renewal shall be denied for any of the reasons contained in [R.C. 4303.292(A)]....

....
(D)(1) Annually, beginning in 1988, *the tax commissioner shall cause the sales and withholding tax records in the department of taxation for each holder of a permit issued under [R.C. 4303.02-.23] to be examined to determine if the permit holder is delinquent in filing any sales or withholding tax returns or has any outstanding liability for sales or withholding tax, penalties, or interest imposed pursuant to [R.C. Chapter 5739 or R.C. 5747.06 and .07]. If any delinquency or liability exists, the commissioner shall send a notice of that fact...to the permit holder....The commissioner shall also notify the department of liquor control of the delinquency or liability....*

(2)(a) *Except as provided in [R.C. 4303.271(D)(4)], the department of liquor control shall not renew the permit of any permit holder the tax commissioner has identified as being delinquent in filing any sales or withholding tax returns or as being liable for outstanding sales or withholding tax, penalties, or interest as of the first day of the sixth month preceding the month in which the permit expires, or of any permit holder the commissioner has identified as having been*

assessed by the department on or before the first day of the third month preceding the month in which the permit expires, until the department is notified by the tax commissioner that the delinquency, liability, or assessment has been resolved.

(b) ...The permit shall be reinstated if the permit holder and the tax commissioner or the attorney general demonstrate to the liquor control commission that the commissioner's notification of a delinquency or assessment was in error or that the issue of the delinquency or assessment has been resolved.

(3) ...[I]f it is determined that the notification was in error, [the commissioner] immediately shall inform the department of liquor control that the renewal application may be granted. The renewal shall not be denied if the delinquency or unreported liability is the subject of a bona fide dispute pursuant to [R.C. 5717.02, 5717.04, 5739.13, or 5747.13].

(4) If the commissioner concludes that under the circumstances the permit holder's delinquency or liability has been conditionally resolved, he shall allow the permit to be renewed, conditioned upon the permit holder's continuing performance in satisfying the delinquency and liability...If the taxpayer defaults on any agreement to pay the delinquency or liability or fails to keep subsequent tax payments current, the liquor control commission, upon request and proof of the default or failure to keep subsequent tax payments current, shall indefinitely suspend the permit holder's permit until all taxes and interest due are paid.

(5) The commissioner may adopt rules to assist in administering the duties imposed by this section. (Emphasis added.)

When R.C. 4303.271 is read in its entirety, it appears that the focus of the section is to establish a permit holder's right to the renewal of the same class of permit for the same location, subject to the Department's rejection of such renewal "for good cause," R.C. 4303.271(A), and subject to the limitations set forth in divisions (B) and (D). The limitation provided for in R.C. 4303.271(B) allows specific governmental entities to object to the renewal of those permits issued under R.C. 4303.11-.183. Pursuant to that division of the statute, the reasons which the Department may consider as the basis for refusing the renewal of such a permit are the reasons set forth in R.C. 4303.292(A).² Further, R.C. 4303.271(D)(1) specifically imposes upon the Tax Commissioner the duty to conduct an annual examination of the tax records to determine if any holder of a permit issued under R.C. 4303.02-.23 "is delinquent in filing any sales or withholding tax returns or has any outstanding liability for sales or withholding tax, penalties, or interest imposed pursuant to [R.C. Chapter 5739 or R.C. 5747.06 and 5747.07]." R.C. 4303.271(D)(2) specifies that the Department of Liquor Control "shall not renew the permit of any permit holder the tax commissioner has identified as being delinquent in filing any sales or withholding tax returns or as being liable for outstanding sales or withholding tax, penalties, or interest" as of specific times, until the Department is notified by the Tax Commissioner that the delinquency, liability, or assessment has been resolved.

Your opinion request asks whether, in light of the enactment of R.C. 4303.26(B)(1)³ and R.C. 4303.271(D)(1)-(5),⁴ the Department of Liquor Control

² R.C. 4303.292(A)(1), set forth above, specifies matters concerning, among others, the permit applicant which matters may be the basis for denying the requested permit action. R.C. 4303.292(A)(2) concerns objections about the place for which the permit is sought.

³ Division (B)(1) was added to R.C. 4303.26 in 1985-1986 Ohio Laws, Part III, 5401 (Am. Sub. H.B. 627, eff. Sept. 24, 1986).

⁴ Division (D) was added to R.C. 4303.271 in 1987-1988 Ohio Laws, Part II, 2635, 2823 (Sub. H.B. 231, eff., in part, Oct. 5, 1987).

still has authority under R.C. 4303.292(A)(1)(b)⁵ to refuse to renew or transfer a permit held by a person owing unemployment compensation contributions to the Bureau of Employment Services since the legislature has now dictated certain actions to be taken regarding unpaid sales taxes or withholding taxes of permit holders, while not specifically addressing unpaid unemployment compensation contributions. For the reasons that follow, however, it appears that the enactment of R.C. 4303.26(B)(1) and R.C. 4303.271(D)(1)-(5) has not altered the Department's authority to act pursuant to R.C. 4303.292(A)(1)(b) with respect to permit holders who are delinquent in paying the unemployment compensation contributions required by R.C. Chapter 4141.

In addressing your concerns, it is necessary to examine the general scheme of R.C. Chapter 4141 concerning the state plan for unemployment compensation. R.C. Chapter 4141 imposes upon each "employer," as that term is defined in R.C. 4141.01(A)(1), certain requirements with respect to the state's system of unemployment compensation. As determined in *Westwood Construction Co. v. Board of Review*, 11 Ohio App. 3d 120, 120, 463 N.E.2d 426, 427 (Franklin County 1983): "a liquor permit holder is the 'employer,' for purposes of unemployment taxes (see R.C. 4141.25), of all persons who work under the liquor permit at the location named in the permit...." Thus, a liquor permit holder, as an employer, may be subject to the provisions of R.C. Chapter 4141. Among the duties imposed upon an employer, as defined in R.C. 4141.01(A)(1), are the duty to "keep a true and accurate employment record of all his employees...and of the hours worked by each employee and of the wages paid to him," R.C. 4141.18; the duty to "furnish the administrator of the bureau of employment services upon request all information required by him to carry out [R.C. 4141.01-.46]," R.C. 4141.20(A); and the duty to pay contributions as they become due, R.C. 4141.23. Compliance with the provisions of R.C. Chapter 4141 is required, in part, by R.C. 4141.38, which states:

No person or no member of a firm or no president, secretary, general manager, or managing agent of a corporation, subject to [R.C. 4141.01-.46], shall fail to comply with such sections relating to the making of reports or the payment of contributions to the unemployment compensation fund.

Any fine collected for a violation of this section shall be paid to the administrator of the bureau of employment services and placed in such fund.

Each day's failure on the part of such person, member of a firm, or officer of a corporation to comply with such sections, after notice to such person, firm, or corporation from the administrator, constitutes a separate offense.

See generally R.C. 4141.99(C) ("[w]hoever violates [R.C. 4141.38] shall be fined not more than five hundred dollars"). R.C. 4141.38 thus makes the activity about which you ask, an employer's failure to pay contributions to the unemployment compensation fund, an offense punishable in accordance with R.C. 4141.99(C).

⁵ R.C. 4303.292 was most recently amended in 1987-1988 Ohio Laws, Part II, 3605 (Am. Sub. H.B. 419, eff., in part, July 1, 1987) without changing subdivision (A)(1). The most recent amendment of R.C. 4303.292 occurred prior to the amendment of R.C. 4303.271 in Sub. H.B. 231, but after the enactment of Am. Sub. H.B. 627. Thus, it does not appear that the changes made in Sub. H.B. 231 and Am. Sub. H.B. 627 were intended to affect the interpretation of R.C. 4303.292(A)(1)(b), the language of which has remained substantially unchanged since its original enactment in 1973 Ohio Laws, Part I, 1024 (Am. Sub. S.B. 343, eff. Nov. 23, 1973).

As set forth above, upon finding that an applicant for a retail permit, "has operated his liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state," the Department of Liquor Control may, pursuant to R.C. 4303.292(A)(1)(b), "refuse to issue, transfer the ownership of, or renew" a retail permit. R.C. 4303.292(A)(1)(b) further prohibits the Department from transferring the location of a retail permit upon making the finding set forth in R.C. 4303.292(A)(1)(b). The determination as to what activities are sufficient to show that a permit holder has "operated his liquor permit businesses in a manner that demonstrates a disregard for the laws...of this state..." however, is a matter within the sound discretion of the Department of Liquor Control. R.C. 4303.292. See 1990 Op. Att'y Gen. No. 90-032. See generally *State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915), *aff'd*, 241 U.S. 565 (1916). As Attorney General, I have no authority to exercise that discretion on behalf of the Department. Op. No. 90-032. Therefore, should the Department determine that such a violation constitutes the operation of the liquor permit business in a manner that demonstrates a disregard for the laws of the state, it may, upon that basis, refuse to grant, transfer the ownership of, or renew, a retail permit, and shall, upon that basis, refuse to transfer the location of a retail permit.

Your concern appears to be that the enactment of R.C. 4303.26(B)(1) and R.C. 4303.271(D) indicates the legislature's intent to abrogate the Department's authority under R.C. 4303.292(A)(1)(b) to find that a retail permit holder's failure to pay outstanding unemployment compensation contributions constitutes the operation of his liquor permit premises in a manner that demonstrates a disregard for the laws of the state. The argument appears to be that since the legislature has expressly dealt only with unpaid sales taxes and withholding taxes with respect to a permit holder's ability to transfer or renew a permit, that no other payments owing to the state, e.g., unemployment compensation contributions, may affect a permit holder's ability to transfer or renew his permit. It is clear, however, that the three statutes mentioned in your request, while all part of the statutory scheme governing the permit system prescribed by R.C. Chapter 4303, have separate and distinct purposes. R.C. 4303.26 establishes the system for applying for the various permits which may be issued under R.C. 4303.02-.26. Similarly, R.C. 4303.271 establishes the procedure for renewal of these permits. R.C. 4303.292, however, relates only to retail permits.

Specifically, R.C. 4303.26(B)(1) requires the Department of Liquor Control to notify the Department of Taxation in the case of filing of an "application for *transfer of ownership* of a permit," and prohibits the Department of Liquor Control from transferring ownership of the permit until all delinquent sales tax returns are filed and any delinquent sales taxes are resolved. R.C. 4303.271(A) establishes the right of the holder of a permit issued under R.C. 4303.02-.23, "who files an application for the renewal of the same class of permit for the same premises" to have such permit renewed, with the exceptions enumerated in divisions (B) and (D) of that section. R.C. 4303.271(A) further requires the Department of Liquor Control to renew such permit unless the Department rejects the application "for good cause." Thus, in addition to the reasons set forth in R.C. 4303.271(B) and (D) for the non-renewal of a permit of the same class to the same person for the same premises, such renewal may also be denied "for good cause." In fact, in considering whether to renew a permit issued under R.C. 4303.11-.183, the Department is expressly authorized by R.C. 4303.271(B) to consider objections by the appropriate legislative authority concerning the permit applicant's conduct under the general criteria set forth in R.C. 4303.292(A)(1). In light of the broad grant of authority to the Department under R.C. 4303.271 to refuse renewal of a permit for such general reasons, it does not appear that the legislature intended by the enactment of R.C. 4303.26(B)(1) and R.C. 4303.271(D) to limit the Department's discretion to deny renewal of the same class permit for the same premises. Rather, the legislature has merely specified in division (D) of R.C. 4303.271 one instance in which the Department may not issue such a renewal. In contrast, R.C. 4303.292(A) places limitations on a smaller group of permits, *i.e.*, retail permits, and imposes restrictions on their issuance, transfer of ownership, renewal, and transfer of location. Because of the differing objectives and coverage of each statute, I have no basis for concluding that the legislature's enactment of R.C. 4303.26(B)(1) and R.C. 4303.271(D) abrogates the authority of the Department of Liquor Control to

determine, in a reasonable exercise of its discretion, that violation of R.C. 4141.38 by a retail permit holder may constitute sufficient grounds to invoke the provisions of R.C. 4303.292(A)(1)(b). Full effect may be given to each statutory provision about which you ask, without reading into R.C. 4303.292(A)(1) any implied limitation.

It is, therefore, my opinion, and you are hereby advised that, pursuant to R.C. 4303.292(A)(1)(b), the Department of Liquor Control has authority to refuse to renew or transfer the ownership of, and shall refuse to transfer the location of, any retail permit where the permit holder is delinquent in paying the unemployment compensation contributions due from the holder as an employer under R.C. 4141.23, if the Department finds, in a reasonable exercise of its discretion, that such delinquency demonstrates that the permit holder has operated his liquor permit business in a manner that demonstrates a disregard for the laws of this state.