

IN THE SUPREME COURT OF OHIO

ORIGINAL

A & Q MARKET, INC.

APPELLANT,

V

OHIO LIQUOR CONTROL COMMISSION

APPELLEE

09-2272

ON APPEAL FROM THE  
FRANKLIN COUNTY COURT  
OF APPEALS, TENTH  
APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 09AP-283

---

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT A & Q MARKET, INC.

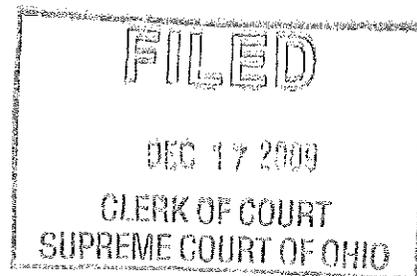
---

Kurt O. Gearhiser (0021245)  
The Gearhiser Law Firm, Inc.  
520 East Rich Street  
Columbus, Ohio 43215  
(614)221-5151  
(614)221-1778 facsimile  
[Obal3@yahoo.com](mailto:Obal3@yahoo.com)

COUNSEL FOR APPELLANT  
A & Q MARKET, INC.

Richard Cordray (0038034)  
Ohio Attorney General  
Scott Longo (0041230)  
Assistant Attorney General  
150 East Gay Street, 23<sup>rd</sup> Floor  
Columbus, Ohio 43215  
(614)644-2401  
Fax No. (614)728-9470

COUNSEL FOR APPELLEE  
OHIO LIQUOR CONTROL COMMISSION



**EXPLANATION OF WHY THIS CASE IS A CASE  
OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves a corporation A & Q Market, Inc. (hereinafter A & Q). A& Q is located in Hamilton County, Ohio and operates a carryout liquor permit issued by the State of Ohio, Department of Commerce, Division of Liquor Control (hereafter Division). A & Q is one of approximately 24,000 liquor permits issued by the Division to Ohio entities. The Liquor Control Commission (hereafter Commission) is the three member panel that hears cases brought by agents of the Ohio Department of Public Safety (hereinafter Public Safety). Any issue decided by the Commission affects not only 24,000 permit holders but hundreds of thousands of employees in the hospitality and retail industry.

In all cases before the Commission and possibly by a common pleas court on appeal the evidence should be carefully scrutinized before revoking a license. The loss of a license often results in a loss of substantial property rights and the incurrence of personal liability under a long-term lease. While a liquor permit has traditionally been looked upon by courts as a privilege, the right to pursue one's legitimate pursuit to own property and earn a living is fundamental to an ordered concept of liberty. This right should not be ignored unless the evidence conforms to the real meaning of the law permitting such extreme governmental action. It is obvious that in these situations, permit holders such as Aysar suffer large losses of property and in many cases are subjected to extreme hardship as a consequence of losing their liquor permits.

The case of *Henry's Caf , Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233, and the cases which have developed therefrom have resulted in giving to the Commission unlimited power over permit holders in this state. The case before the Commission is an administrative proceeding where preponderance of the evidence is the standard. This lowest standard of proof can be used by the Commission to revoke a license for even the most minor of administrative violations. It has been almost

fifty years since this court issued its decision in *Henry's Café, supra*, and the result has been to give the Commission unfettered power, making it all but impossible to overturn an order of the Commission. A revocation of a license is the most severe order which can be issued by the Commission and Appellant believes the courts should review this standard.

A & Q believes that a review of OAC 4301:1-1-52(B)(6) should be made by this Court. A & Q believes the Commission exceeded its power as outlined in R C 4301.022, .03 and .04. These powers are limited by the Ohio Legislature and nowhere has the legislature granted to the Commission the right to review the use or misuse of Ohio Direction Cards and WIC vouchers. Almost every location that accepts EBT cards and WIC vouchers is also a liquor permit holder. Therefore any action by the Commission can affect the public that uses these benefit cards and vouchers. This Court should review the statutes and regulations and the facts of this case as it is important to provide guidance to the thousands of Ohio permit holders.

## STATEMENT OF THE FACTS

This appeal involves three different dates of violation, October 12, 2007 (Case Number 1012-08), December 4, 2007 (Case Number 1014-08) and December 17, 2007 (Case Number 1015-08). On the dates above agents of the Department of Public Safety (Department) went to the premises and used either an Ohio Direction Card or WIC voucher. The agents asked for and received cash for the card/vouchers on all three occasions. The person involved with the permit premises was Adel Quraga the husband of the owner of the permit. The permit holder was cited for violation Liquor Control Commission Regulation 4301:1-1-52(B)(6) (hereinafter referred to as OAC 4301:1-1-52(B)(6)).

On October 8, 2008 the permit holder entered a denial to the charges in the three cases and stipulated to the investigators' reports. The attorney for the permit holder admitted that Mr. Quraga had been convicted but presented statements indicating that the owner had no knowledge of the employee's actions. The owner, Deborah Quraga, has operated the business for ten years and is now working full time at this premises. The husband no longer works at the store.

As a result of the hearing the Commission issued a revocation of the license. Appellant timely appealed to the Franklin County Common Pleas Court. Both parties submitted briefs to the court. On February 13, 2009 the court issued its decision and on March 4, 2009 the judgment entry was filed finding that the order of the Liquor Control Commission was supported by reliable, probative and substantial evidence and was in accordance with law. Appellant timely appealed to the Tenth District Court of Appeals which affirmed the lower court on November 3, 2009.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE LOWER COURT AND THE COMMISSION BECAUSE THE COURT SHOULD HAVE FOUND THAT THE ORDER OF THE COMMISSION WAS NOT IN ACCORDANCE WITH LAW BECAUSE THE COMMISSION DOES NOT HAVE THE POWER TO ENFORCE STATUTES RELATING TO THE USE OF EBT AND WIC BENEFIT CARDS.**

R C 119.12 governs appellant's appeal in this case through the lower courts. A & Q believes the lower court erred in affirming the Franklin County Common Pleas Court and the Commission. The Commission does not have the authority to enforce issues involving the use of EBT cards and WIC vouchers. Appellant believes that the powers granted to the Commission in R C 4301.022, .03 and .04 are not sufficient to allow the Commission to hear cases involving food stamps and WIC coupons.

The powers of the Commission are listed in 4301.022, .03 and .04. The Commission generally enforces R C Chapters 4301 and 4303 and its own rules. However the powers of the Commission are limited pursuant to the statutory authority granted to the Commission in R C 4301.22, .03 and .04. The Commission has no authority to place anyone in jail, as the Commission can only suspend, revoke and cancel permits. The commission cannot enforce violations of any law and has only those powers that the General Assembly has granted to it.

R C 4301.022 is entitled "Liquor Control Commission; appointment; power". However this section deals with the duties, powers and appointments of the individual Commission members and not the Commission as a whole. Nothing in this section deals with hearings before the Commission.

R C 4301.03 is entitled "Commission rules, Standards, Requirements and Orders". Nothing in this section enables the Commission to issue orders or even hear cases relating to the Ohio Direction Card or WIC voucher. 4301.03(A) authorizes rules for the manufacture, distribution, transportation and

sale of beer and intoxicating liquor; 4301.03(B) authorizes rules for the conduct of any retail business issued permits; 4301.03(D) authorizes rules for the packaging and seal for bottles and packages; 4301.03(F) authorizes rules for the transfer of permits; 4301.03(G) authorizes rules for the quota system for issuing permits; 4301.03(H) authorizes rules and orders referencing sale of beer and liquor on Sundays; 4301.03(I) authorizes rules for cash deposits for kegs, etc. and 4301.03(J) authorizes rules of importation. R C 4301.03(C) and (E) are unrelated to the issue of this case.

R C 4301.04 is entitled Powers of the Commission. However this section only says that the Commission can “suspend, revoke and cancel permits”, and “consider, hear and determine all appeals authorized by Chapters 4301 and 4303”. Other matters listed in this section as powers of the Commission are unrelated to citations issued by the agents of the Department.

Nowhere in these sections are there any provisions which explicitly provide for the enforcement of Ohio Direction Cards and WIC vouchers. The Commission may argue that it has the authority to adopt rules and that OAC 4301:1-1-52(B)(6) does deal with EBT cards and WIC vouchers. However the Commission can only enforce rules that it has the power to adopt as granted by the legislature. Nothing in R C 401.022, .03 or .04 specifically authorizes the Commission to adopt administrative rules allowing for such enforcement or to hear cases about EBT cards, WIC vouchers or any other electronically transferred benefit.

The Commission does not hear cases concerning the sales of cigarettes to underage persons when the sales are made by permit holders in Ohio. The permit holder is cited into court but does not receive an administrative violation. The Commission does not hear cases about smoking in a permit premises but the permit holder is cited and fined by the Ohio Department of Health. The Commission does not hear these types of cases because the legislature has not given the Commission the authority to hear these cases. Likewise, there is no authority in 4301.022, .03, or .04 for the Commission to hear cases

involving the use of an Ohio Direction Card, WIC voucher or any other electronically transferred benefit. No sections of R C Chapter 4301 or 4303 enable or grant to the Commission the power to pass rules on these issues and no sections of Chapters 4301 or 4303 even discuss EBT cards or WIC vouchers. The Commission should not hear these types of cases. These matters should be heard in criminal court if there is a violation of the criminal code. The State of Ohio and the federal government could take away the permit holder's ability to accept these benefit cards if improper or illegal actions occur. However the Commission should not be involved as the Commission does not have the power to revoke a license for this type of administrative violation.

The court below held that the Commission was vested with the authority to draft OAC 4301:1-1-52(B)(6). It appears the court believed that R C 4301.03 granted the powers to the Commission. However R C 4301.03 states in pertinent part:

“The liquor control commission may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, standards, requirements, and orders necessary to carry out this chapter and Chapter 4303. of the Revised Code, but all rules of the board of liquor control that were in effect immediately prior to April 17, 1963, shall remain in full force and effect as rules of the liquor control commission until and unless amended or repealed by the liquor control commission. The rules of the commission may include the following:

(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 division of liquor control in the suspension, revocation, and cancellation of those permits;

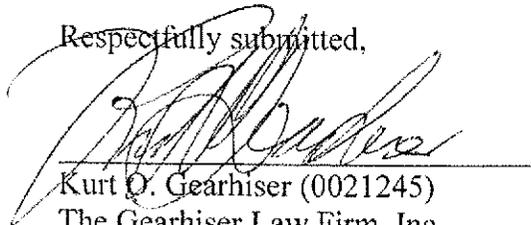
(B) Rules and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to this chapter and Chapter 4303. of the Revised Code, with a view to ensuring compliance with those chapters and laws relative to them, and the maintenance of public decency, sobriety, and good order in any place licensed under the permits. No rule or order shall prohibit the sale of lottery tickets issued pursuant to Chapter 3770. of the Revised Code by any retail business authorized under permits issued pursuant to that chapter.”

The emphasis in this section indicates that any rules adopted by the Commission and orders issued by the Commission should enforce Chapters 4301 and 4303 of the Revised Code. Nowhere in R C Chapters 4301 or 4303 has the legislature granted to the Commission the power to hear cases involving food stamps or WIC coupons. The court below erred when it found that the Commission had the authority to adopt OAC 4301:1-1-52(B).

### CONCLUSION

Appellant respectfully requests that this Court accept jurisdiction of the case. The case is one of public or great general interest. It is important to determine whether the Commission has the power to adopt OAC 4301:1-1-52(B)(6) and enforce this regulation against Ohio's permit holders. The decision in this case not only affects the approximately 24,000 permit holders but the large population of Ohioans who are using benefit cards and vouchers.

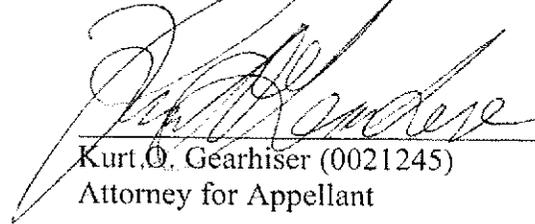
Respectfully submitted,



Kurt O. Gearhiser (0021245)  
The Gearhiser Law Firm, Inc.  
520 East Rich Street  
Columbus OH 43215  
(614)221-5151  
(614)221-1778 – facsimile  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief of Appellant was sent by regular U. S. mail on the 16<sup>TH</sup> day of December, 2009 to Scott Longo, Assistant Attorney General, 150 East Gay Street, 21st Floor, Columbus, Ohio, 43215.



---

Kurt O. Gearhiser (0021245)  
Attorney for Appellant

## **APPENDIX A**

*Kurt Gearhiser*

FILED  
CLERK OF COURTS  
FRANKLIN COUNTY, OHIO

2009 NOV -3 PM 2:13  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

A & Q Market, Inc.,	:	
	:	
Appellant-Appellant,	:	
	:	No. 09AP-283
v.	:	(C.P.C. No. 08CVF10-15349)
	:	
Liquor Control Commission,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on November 3, 2009

*The Gearhiser Law Firm, Inc., and Kurt O. Gearhiser, for appellant.*

*Richard Cordray, Attorney General, and Scott A. Longo, for appellee.*

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, A & Q Market, Inc. ("appellant" or "the permit holder"), has appealed a judgment by the Franklin County Court of Common Pleas affirming a decision by appellee, the Ohio Liquor Control Commission ("appellee" or "the commission"), revoking appellant's liquor license. For the reasons that follow, we affirm.

{¶2} Appellant is a liquor permit holder doing business in Cincinnati, Ohio, owned by Deborah Quraga. Between October and December 2008, an investigation was conducted into the possible misuse of food stamp (EBT) cards and WIC benefit cards. As part of the investigation, confidential informants would approach appellant's employees and offer to sell EBT cards and WIC vouchers for an amount of cash less than the remaining balances. The cards would then be used and returned to the seller when the remaining balances were depleted. Deborah Quraga's husband, Adel Quraga, was the purchaser. Adel Quraga was ultimately convicted on criminal charges arising from these transactions.

{¶3} A total of five cases, numbered 1012-08, 1013-08, 1014-08, 1015-08, and 1016-08, were filed with the commission. While denying the charges, appellant stipulated to the accuracy of the investigation report in case numbers 1012-08, 1014-08, and 1015-08. In return for the stipulation, case numbers 1013-08 and 1016-08 were dismissed, as was the second of two charges in case number 1015-08. As a result of the stipulation and dismissal, the three charges before the commission were two charges of trafficking in EBT cards and one charge of illegal use of WIC benefit cards, all in violation of Ohio Adm.Code 4301:1-1-52(B)(6).

{¶4} After the hearing, the commission issued an order revoking appellant's liquor permit. Appellant appealed to the Franklin County Court of Common Pleas, which affirmed the commission's order, finding it was supported by reliable, probative, and substantial evidence, and was otherwise in accordance with law. Appellant then filed this appeal, asserting a single assignment of error:

THE ORDERS OF THE LIQUOR CONTROL COMMISSION ARE NOT IN ACCORDANCE WITH LAW BECAUSE THE LIQUOR CONTROL COMMISSION DOES NOT HAVE THE POWER TO HEAR CASES INVOLVING ILLEGAL TRANSACTIONS IN FOOD STAMP CASES OR WIC CARDS.

{¶5} Pursuant to R.C. 119.12, a court of common pleas reviewing the decision of an administrative agency may affirm the agency's order if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence, and is otherwise in accordance with law. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826. This requires the common pleas court to engage in a two-step process. The first involves a hybrid factual/legal inquiry, in which the court defers to the agency's resolution of evidentiary conflicts and factual findings, unless the court concludes that the agency's findings are internally inconsistent, impeached by evidence in the record, rest upon improper inferences or are otherwise unsupportable. *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 1993-Ohio-182. The second step requires the court of common pleas to construe and apply the law. *Id.*

{¶6} An appellate court's review of a trial court's determination regarding an administrative order is more limited, being confined to a consideration of whether the trial court abused its discretion in making that determination. *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191. However, the appellate court's review of issues of law is plenary. *Bartchy*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339.

{¶7} In this case, appellant does not argue that the commission's decision is not supported by reliable, probative, and substantial evidence. Rather, appellant argues that the commission's decision is not in accordance with law. Specifically, appellant argues that the commission has no authority to enforce statutes relating to the misuse of EBT and WIC benefit cards.

{¶8} R.C. 4301.03 grants the commission authority to adopt any rules necessary to carry out Chapters 4301 and 4303 of the Revised Code. Such rules may include, "[r]ules and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to this chapter and Chapter 4303. of the Revised Code, with a view to ensuring compliance with those chapters and laws relative to them, and the maintenance of public decency, sobriety, and good order in any place licensed under the permits." R.C. 4301.03(B).

{¶9} Appellant was charged with violations of Ohio Adm.Code 4301:1-1-52(B)(6), which provides, in relevant part:

(B) Prohibited activities; no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:

\* \* \*

(6) Solicit for value, or possess, buy, sell, use, alter or transfer, or allow to be solicited, possessed, bought, sold, used, altered, or transferred for value USDA food stamp coupons, Electronic Benefit Transfer (EBT) cards, WIC program benefit vouchers, or other electronically transmitted benefits, in a manner not specifically authorized by the Food Stamp Act of 1977, or the Child Nutrition Act of 1966.

{¶10} Appellant argues that nothing in R.C. Chapters 4301 or 4303 gives the commission the specific authority to regulate the sale or use of EBT and WIC benefit

cards. Appellant therefore argues that the adoption of the rule appellant was charged with violating, Ohio Adm.Code 4301:1-1-52(B)(6), was outside the scope of the commission's authority.

{¶11} A rule adopted by a state agency pursuant to statutory authority has the force and effect of law unless it is unreasonable or is in clear conflict with a statutory provision governing the same subject matter. *Ohio Council 8, American Fedn. of State, Cty. & Mun. Emps., AFL-CIO v. Cincinnati*, 69 Ohio St.3d 677, 1994-Ohio-367. Furthermore, courts should give deference to a state agency's interpretation of a statute governing its actions, as long as the interpretation is not irrational, unreasonable or inconsistent with the statutory purpose. *Morning View Care Ctr. – Fulton v. Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878.

{¶12} The ultimate issue in this case is whether the commission unreasonably interpreted the statutory purpose set forth in R.C. 4301.03(B) of maintaining "public decency, sobriety, and good order" on liquor permit premises to include the prohibition contained in Ohio Adm.Code 4301:1-1-52(B)(6) on sale or transfer of EBT and WIC benefit cards in or on liquor permit premises. We cannot say the commission's interpretation that the rule regarding sale or transfer of EBT and WIC benefit cards was encompassed by its statutory authority to adopt rules to maintain public decency, sobriety, and good order on liquor permit premises was unreasonable. In fact, the rule's prohibition bears an obviously reasonable relationship to the statutory purpose, as it addresses concerns that recipients of EBT and WIC benefits might use those benefits to purchase items the benefits were not intended for, such as alcohol. As such, the commission did not exceed its statutory authority when it adopted the rule, and the

Franklin County Court of Common Pleas did not err in concluding that the commission's order was in accordance with the law.

{¶13} Therefore, appellant's assignment of error is overruled. Having overruled the assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

FRENCH, P.J., and KLATT, J., concur.

---

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

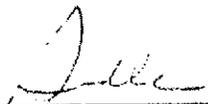
2009 NOV -3 PM 2:16

A & Q Market, Inc., :  
Appellant-Appellant, :  
v. : No. 09AP-283  
Liquor Control Commission, : (C.P.C. No. 08CVF10-15349)  
Appellee-Appellee. : (REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 3, 2009, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

SADLER, J., FRENCH, P.J., and KLATT, JJ.

By  \_\_\_\_\_  
Judge Lisa L. Sadler