

STATE OF OHIO
OFFICE OF THE INSPECTOR GENERAL

RANDALL J. MEYER, INSPECTOR GENERAL

REPORT OF
INVESTIGATION



AGENCY: OHIO LIQUOR CONTROL COMMISSION
FILE ID NO.: 2011-059
DATE OF REPORT: APRIL 2, 2012

The Office of the Ohio Inspector General.... The State Watchdog

“Safeguarding integrity in state government”

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The Inspector General’s Office remains dedicated to the principle that no public servant, regardless of rank or position, is above the law, and the strength of our government is built on the solid character of the individuals who hold the public trust.



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REPORT OF INVESTIGATION

FILE ID NUMBER: 2011-059

SUBJECT NAMES: Michael J. Shaheen
Paul M. Booth

POSITIONS: Liquor Control Commissioners

AGENCY: Ohio Liquor Control Commission (OLCC)

BASIS FOR INVESTIGATION: Complaint

ALLEGATIONS: Abuse of office/position

INITIATED: March 18, 2011

DATE OF REPORT: April 2, 2012

ALLEGATION

On or about March 18, 2011, the Office of the Ohio Inspector General received a complaint alleging Ohio Liquor Control Commission Chairman Michael Shaheen and Vice-Chairman Paul Booth ignored a mandate of the Ohio Tenth District Court of Appeals sustaining a lower court order placing two liquor permits held by two Cincinnati, Ohio, restaurants in non-renewal status. The complainant further alleged Shaheen then arranged for the Ohio Liquor Control Commission to vote to reinstate the licenses over the objection of both the commission's executive director and one of the three commission members.

BACKGROUND

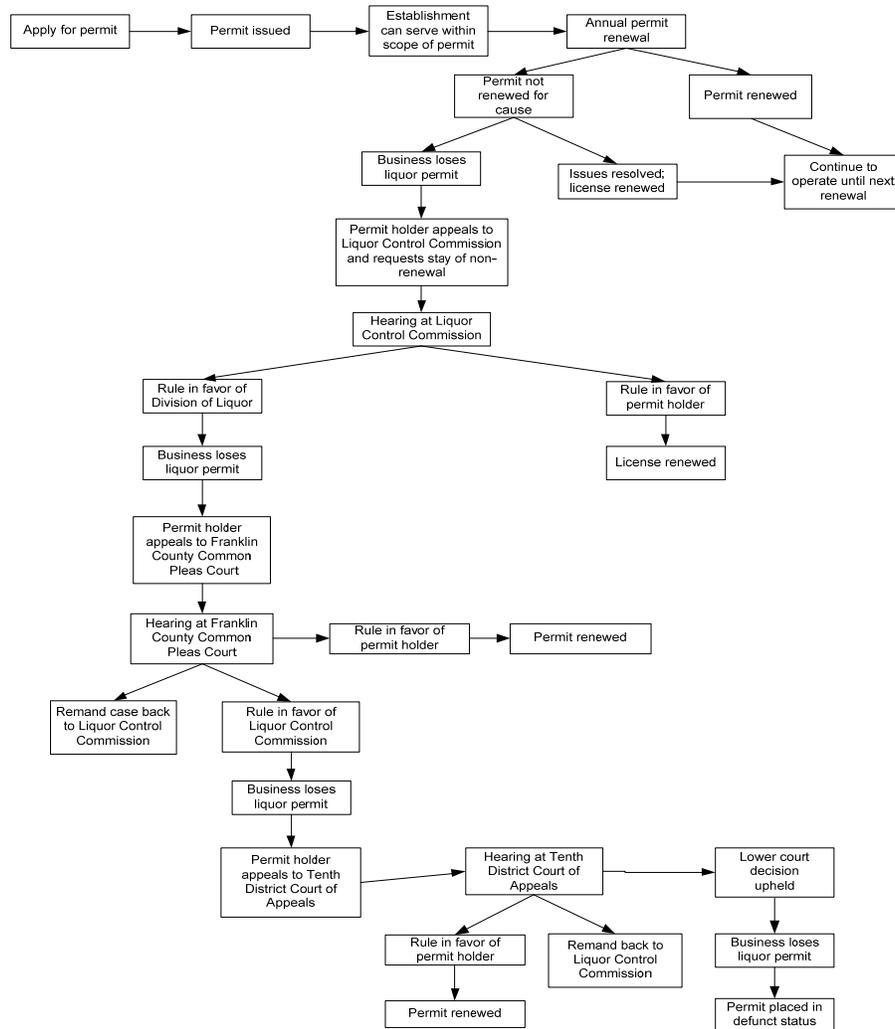
The Ohio Liquor Control Commission (OLCC) is responsible for ensuring compliance with the liquor laws and regulations of the state. The commission hears appeals on cases related to violations of state liquor laws that could result in fines or the suspension or revocation of liquor permits. The commission also hears appeals from either permit holders or communities that object to decisions made by the Ohio Department of Commerce Division of Liquor Control concerning the issuance, renewal, or transfer of liquor permits. In addition, the Ohio Liquor Control Commission hears appeals on the non-renewal of liquor sales permits based on a permit holder's failure to pay taxes. The commission works in conjunction with the Ohio Department of Commerce Division of Liquor Control and the Ohio Department of Public Safety Investigative Unit.

The Ohio Liquor Control Commission is comprised of a staff of three fixed-term commissioners and five full-time office employees. The three commissioners are appointed for a six-year term by the Governor of Ohio, with the advice and consent of the Ohio Senate. Although the Ohio Liquor Control Commission is responsible for conducting hearings and receiving objections regarding liquor permits, the commission is not responsible for issuing and renewing liquor permits.

The Ohio Department of Commerce Division of Liquor Control is responsible for controlling the manufacture, distribution, and sale of alcoholic beverages in Ohio. The division issues permits to approximately 23,000 privately owned and operated manufacturers, distributors and retailers

of alcoholic beverages.¹ The division oversees processing of applications and has the authority to reject and deny applications for various reasons. Ohio Revised Code §4303.29 establishes the number of liquor permits issued in a specific geographic location and is limited by the population of the area.

The chart below outlines the process to obtain and renew a liquor permit.



INVESTIGATIVE SUMMARY

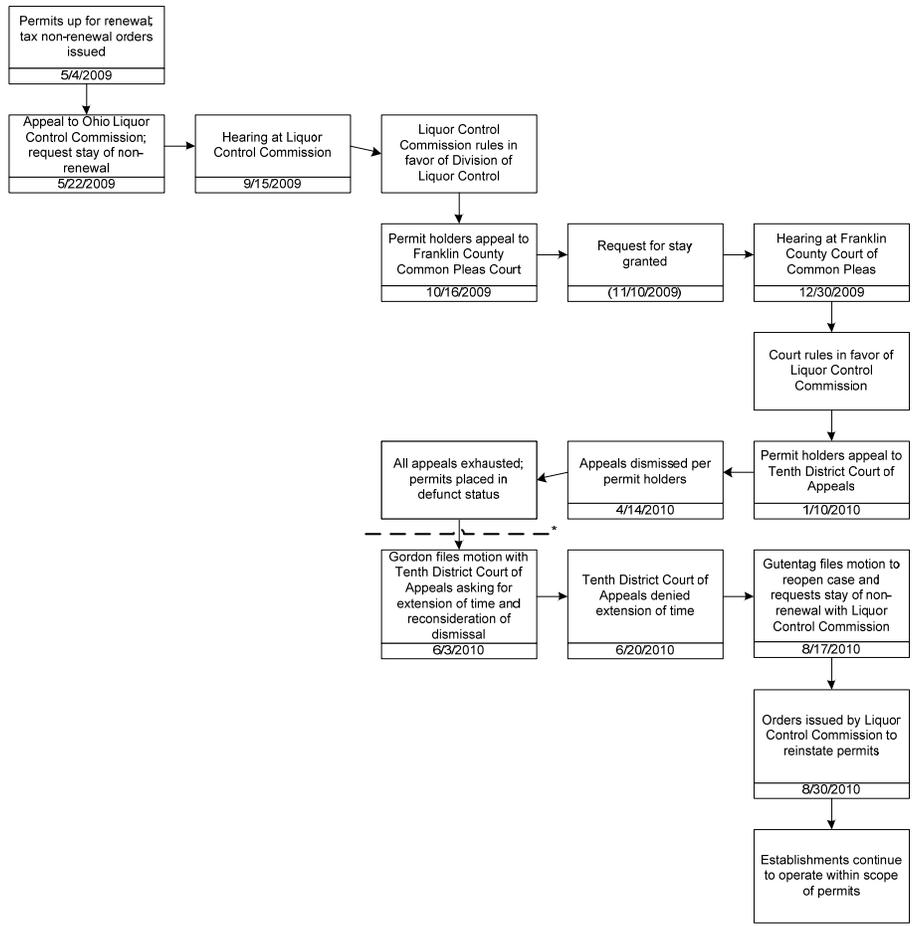
The Office of the Ohio Inspector General received a complaint alleging two liquor permits held by two restaurants in the Cincinnati, Ohio, area were placed in non-renewal status. After all

¹ Source: com.ohio.gov.

possible appeals were exhausted, the Liquor Control Commission, in violation of an appeals court’s decision, then reinstated the two liquor permits.

The two permits were issued to Rookwood Mews LLC DBA Pub at Rookwood Mews, located at 2692 Madison Road, Cincinnati, Ohio 45212, and to Nicholson’s Pub LLC located at 625 Walnut Street, Cincinnati, Ohio 45202. Non-renewal notices and the appeals process for both Rookwood Mews and Nicholson’s Pub occurred simultaneously. Furthermore, both entities were represented legally first by Nathan Gordon, attorney at law, and later by Mark Gutentag, attorney at law.

The following chart outlines the process taken on behalf of Rookwood Mews and Nicholson’s Pub after non-renewal orders were issued by the Ohio Department of Liquor Control and the process the permit holders followed in order to have their liquor permits reinstated.



* The events below the dashed line took place after all appeals were exhausted.

In May 2009, the Ohio Department of Commerce Division of Liquor Control issued tax non-renewal orders to both permit holders. **(Exhibit 1)** The non-renewal orders stated the Ohio Tax Commissioner notified the Division of Liquor Control that the permit holders were delinquent in filing sales or withholding taxes, and as such, the non-renewal orders would be in effect. Any sales of alcoholic beverages after June 1, 2009, would be illegal. The non-renewal orders stated the permit holders were entitled to appeal the order, which had to be filed by August 31, 2009, with the Ohio Liquor Control Commission. Ohio Revised Code §4303.271(D)(2)(a) states in part, "...the division of liquor control shall not renew the permit of any permit holder the tax commissioner has identified as being delinquent...until the division is notified by the tax commissioner that the delinquency, liability, or assessment has been resolved."

On May 22, 2009, Gordon filed a notice of appeal and request for stay before the Ohio Liquor Control Commission on behalf of both permit holders. **(Exhibit 2)** The appeal was requested to allow both permit holders to continue selling alcoholic beverages within the scope of their issued permits pending the appeal. Based on the notice of appeal filed, the OLCC sent both permit holders a letter informing them of a hearing date set for June 5, 2009, but on a motion of the OLCC, the hearing date was continued to an indefinite date. **(Exhibit 3)** A stay of execution order² was also granted on May 22, 2009, for the duration of the appeal. **(Exhibit 4)** Ohio Administrative Code §4301:1-1-65(B) permits the commission to grant the right to continue operation of the business until the appeal is heard and a final order of such appeal is made by the commission. On August 14, 2009, a letter was sent to both permit holders advising them of a hearing date set for September 15, 2009. **(Exhibit 5)**

On September 15, 2009, a hearing was held before the OLCC based on the appeal filed by the permit holders. The order from that hearing stated, "either no representative appeared on behalf of the permit holder or there was insufficient evidence presented to establish compliance with the requirements of section 4303.271 of the Ohio Revised Code." The commission affirmed the order of non-renewal issued by the Ohio Department of Commerce Division of Liquor Control. The permit holders were also notified that the order could be appealed with both the OLCC and the Franklin County Court of Common Pleas, and in this case appeals were filed. Ohio

² A stay of execution is a court order to temporarily suspend the execution of a court judgment or other court order.

Administrative Code §4301:1-1-65(B) permits the commission to grant the right to continue operation of the business until the appeal is heard, and a final order of the appeal is made by the Commission within 21 days after the mailing of the order that was given in the September 15, 2009, hearing. **(Exhibit 6)**

On October 16, 2009, a notice of appeal was filed with the Franklin County Court of Common Pleas by Gordon on behalf of both permit holders. **(Exhibit 7)** On November 10, 2009, a judgment entry was filed by the court granting the stay and authorizing both permit holders to continue operating during the course of the appeal. **(Exhibit 8)**

On December 1, 2009, OLCC filed a motion to dismiss the appeal filed by Gordon. On December 30, 2009, the Franklin County Common Pleas Court granted OLCC's motion to dismiss. **(Exhibit 9)**

On January 10, 2010, Gordon filed an appeal with the Ohio Tenth District Court of Appeals. On April 14, 2010, the appeal was dismissed at the request of the permit holders. **(Exhibit 10)** By dismissing the appeal, all appeals were exhausted. This meant these liquor permits were no longer valid and the establishments could no longer serve liquor within the scope of their permits. The Ohio Department of Commerce Division of Liquor Control was notified that all appeals had been exhausted and the original order for non-renewal stood, at which time the liquor permits were placed into defunct status.

According to Ohio Administrative Code §4301:1-1-08:

A former or current permit holder whose permit has been revoked for cause shall not be issued any permit for a period of one year at that location following the effective date of such revocation. A permit shall not be issued or transferred to a location for a period of one year following the effective date of a revocation or refusal to issue, transfer or renew any permit under division (A)(2) or (B)(1)(2) and division (D) of section 4303.292 of the Revised Code.

When an establishment is issued a permit, it gives the permit holder the right to serve alcoholic beverages within the scope of the permit. When that permit is defunct or revoked, it is returned to the Ohio Department of Commerce Division of Liquor Control. Any permit returned to the division under such conditions is null and void, and can never be reissued. Once a permit is defunct or revoked, a new permit can be issued to a different establishment.

At the time Rookwood Mews and Nicholson's permits were defunct (or revoked), two new permits should have been made available to other establishments within the geographical area where Rookwood Mews and Nicholson's Pub were located. The Ohio Department of Commerce Division of Liquor Control maintains a waiting list of individuals interested in procuring a liquor permit. The superintendent for the division indicated to the Office of the Ohio Inspector General there was a waiting list for permits in one of the geographical areas but could not identify who was on the waiting list at that time.

On June 3, 2010, Gordon filed a motion with the Tenth District Court of Appeals requesting an extension of time and for reconsideration of the dismissal. **(Exhibit 11)** On June 28, 2010, the Tenth District Court of Appeals denied the application for the extension of time. **(Exhibit 12)**

On August 17, 2010, Attorney Mark Gutentag filed a motion before the OLCC to reopen both cases and requested a stay. **(Exhibit 13)** On August 31, 2010, the OLCC filed an order based on the motion filed by Gutentag. **(Exhibit 14)** The motion for reconsideration was granted and the OLCC ordered the Ohio Department of Commerce Division of Liquor Control to issue the permits accordingly. These orders were signed by OLCC commissioners Michael Shaheen, chairman, and Paul M. Booth, vice-chairman. Commissioner Robert Gardner dissented and did not sign the order. As indicated on the order, Gardner gave the following reasons for dissenting:

1. The two permits were defunct, so that nullifies the stay request.
2. The two cases ran the course through the commission, Franklin County Common Pleas Court and the Tenth District Court of Appeals, each time affirming the tax non-renewal order for failure to pay outstanding owed sales tax.
3. There was no confirmation from the Ohio Department of Taxation that the outstanding taxes were paid for both permits.

4. The commission could be setting a dangerous precedent by granting these motions.

On December 16, 2011, members of the Office of the Ohio Inspector General met with Shaheen to get a better understanding of why the decision was made to renew the permits belonging to Nicholson's Pub and Rookwood Mews. During the interview, Shaheen was given an opportunity to explain why the permits were renewed even though they did not appear to be renewed in accordance with Ohio law. Shaheen stated while there did not appear to be a statutory mechanism to renew the permits once dismissed in the court of appeals, the commission had broad discretion to act, and that the renewal of the permits resulted in numerous jobs being saved. After providing his rationale for the renewals, Shaheen was asked whether or not the commission had ever acted similarly in the past. Shaheen thought that the commission had acted similarly on numerous occasions and said he would provide the case names and make the cases available for inspection.

On January 10, 2012, Shaheen provided a list of cases believed to be similar. On January 19, 2012, these cases were reviewed by the Office of the Ohio Inspector General at the commission office. A review of the cases identified that the cases were similar procedurally in that they were all tax non-renewal cases that were appealed by the appellant to the common pleas court or the court of appeals. A key distinction between the cases, however, was that the cases at issue, Rookwood Mews and Nicholson's Pub, did not have any documentation from a court remanding the matter back to the commission, whereas each case that the Office of the Ohio Inspector General reviewed contained documentation from the court of record remanding the case back to the OLCC to be reheard, either by joint agreement of the OLCC and the plaintiff, coupled with a verification from the Ohio Department of Taxation that the delinquent taxes had been paid, or by the court on its own accord.

CONCLUSION

On September 15, 2009, the Ohio Liquor Control Commission affirmed the non-renewal orders of the Ohio Department of Commerce Division of Liquor Control regarding the permits of Rookwood Mews and Nicholson's Pub. At that point in time, the Ohio Liquor Control Commission lost jurisdiction to hear the matter further unless the Franklin County Court of

Common Pleas or the Ohio Tenth District Court of Appeals ordered the matter back to the commission. In both cases, the Franklin County Court of Common Pleas dismissed the permit holders' appeal based on a lack of subject matter jurisdiction. After the dismissal, the permit holders filed an appeal with the Ohio Tenth District Court of Appeals, which was subsequently dismissed at the request of the permit holders. Since the permit holders did not prevail on their appeals in either court and since neither court remanded the matter back to the Ohio Liquor Control Commission, the permit holders were without legal recourse to challenge the status of the permits which became defunct upon the ruling by the court of appeals.

On August 17, 2010, the permit holders filed a motion to reopen both cases with the Ohio Liquor Control Commission. Neither the Ohio Revised Code nor the Ohio Administrative Code contains any section that affords the Ohio Liquor Control Commission the authority or jurisdiction to reconsider a final order. Numerous persons were interviewed at both the Ohio Department of Commerce Division of Liquor Control and OLCC who consistently said that the permits were defunct, that the OLCC did not retain the jurisdiction to reconsider the order, and that they were unaware of any other instance whereby the commission had ever heard a motion to reconsider the status of a defunct permit. Commissioner Robert Gardner clearly expressed his concerns and dissented in the order granted by commissioners Michael Shaheen and Paul Booth, which circumvented the legal process. The law clearly states that once a permit is revoked, the permit holder cannot be issued a permit at the same location for a minimum of one year. Thus, once these permits were revoked, the next eligible permit applicants should have been afforded the opportunity to obtain them.

By voting to grant the renewal permits, Shaheen and Booth caused the commission to act contrary to Ohio law.

Accordingly, the Office of the Ohio Inspector General finds reasonable cause to believe a wrongful act or omission occurred in this instance.

RECOMMENDATIONS

The Office of the Ohio Inspector General makes the following recommendation and asks the Ohio Liquor Control Commission to respond within 60 days with a plan detailing how the recommendations will be implemented. The current chair of the Liquor Control Commission should:

1. Ensure the Ohio Revised Code and the Ohio Administrative Code pertaining to the application and renewal of liquor permits are followed.
2. Determine if administrative action is warranted against Michael Shaheen and Paul Booth for the reinstatement of the liquor permits held by Nicholson's Pub and Rookwood Mews.



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RANDALL J. MEYER, INSPECTOR GENERAL

NAME OF REPORT: Ohio Liquor Control Commission
FILE ID #: 2011-059

KEEPER OF RECORDS CERTIFICATION

This is a true and correct copy of the report which is required to be prepared by the Office of the Ohio Inspector General pursuant to Section 121.42 of the Ohio Revised Code.

A handwritten signature in black ink, appearing to read "Jill Jones".

Jill Jones
KEEPER OF RECORDS

CERTIFIED
April 2, 2012

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