

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 14, 2020

The Honorable Nick Mosby
205 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Mosby:

You have asked for advice concerning the immunity that would be available to the members of the Baltimore City Board of License Commissioners ("the Board") or the Executive Secretary or other employees of the Board if they were sued on the basis of an action authorized by House Bill 509, "Baltimore City - Alcoholic Beverages Licenses - Grounds for Suspension." It is my view that the members of the Board and its staff are protected by the Maryland Tort Claims Act and the related qualified immunity found in the Courts and Judicial Proceedings Article ("CJ"). They may also be covered by qualified immunity against certain federal claims. In addition, they could be entitled to absolute immunity under the Maryland common law.

House Bill 509 would authorize the Executive Secretary of the Board to immediately suspend a license if the Executive Secretary has probable cause to believe that the license holder failed to take reasonable measures to prevent an act of violence that resulted in death or serious bodily injury. In the event of an immediate suspension, the Board is required to give notice to the license holder of the suspension and the date and time of a hearing on the suspension, post notice of the hearing online, and hold the hearing within five business days after the suspension is imposed.

Courts and Judicial Proceedings Article, § 5-522(b) provides that State personnel, as defined in State Government Article ("SG"), § 12-101, "are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article." Members of the boards of license commissioners and the employees of those boards are expressly included in the definition of State personnel at SG § 12-101(a)(9). As the language of CJ § 5-522(b) indicates, the immunity conferred is a qualified one whereby the individual must have acted within the scope of their employment, and without malice or gross negligence. This immunity is implemented by the Maryland Tort Claims Act, which waives the immunity of the State and its units, and substitutes the State as the liable party for the tortious acts and omissions of State personnel, but caps liability against the State at \$400,000 to a single claimant for injuries from a single incident. SG § 12-104(a).

The State Government Article also provides for the Attorney General to represent a State officer or employee who is sued if the officer or employee makes a written request for representation; the Attorney General investigates and determines that the officer or employee is not ineligible for representation; and the officer or employer enters into an agreement for representation. SG § 12-304(a)(1). An officer or employee is ineligible for representation if they were not acting within the scope of employment at the time of the act or omission for which the case was filed, the act or omission was malicious, or the act or omission was grossly negligent. SG § 12-304(b)(1). If the proceedings under the case do not reveal that the act sued over was not in the scope of duty of the officer or employee, or that the officer or employee acted maliciously or was grossly negligent, a settlement or judgment against the State or an officer or employee may be paid in whole or in part, including counsel fees and costs, by the Board of Public Works. SG § 12-404.

Thus, it is clear that officers and employees of the Board have immunity from suits in tort when acting to immediately suspend a license so long as they meet the qualifications in the Tort Claims Act. The Tort Claims Act does not prevent an employee from raising any other defenses that they might have. SG §§ 12-103(2); 12-306(b); 12-403(a). In federal court, this could include qualified immunity from suits under 42 U.S.C. § 1983, which protects government actors unless they violate a constitutional right and the unlawfulness of their conduct was clearly established at the time of the violation. *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018).

Board members and employees may also have absolute quasi-judicial immunity under the common law for their actions to revoke or suspend an alcoholic beverage license. In *Maryland Board of Physicians v. Geier*, 241 Md. App. 429 (2019), the Court of Special Appeals found that the Board of Physicians had absolute immunity from suit with respect to their issuance of a cease and desist order to a physician who had written prescriptions for himself and his family after his license was suspended. The Court discussed this immunity separately with respect to the claims under federal law, 42 U.S.C. § 1983, and with respect to State tort claims for invasion of privacy.

With respect to the federal claims, the Court of Special Appeals relied on *Butz v. Economou*, 438 U.S. 478 (1978), in which the Supreme Court extended absolute immunity to agency officials who perform adjudicative or prosecutorial functions in certain administrative proceedings. *Id.* at 518. In *Butz*, the Supreme Court held that “adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate . . . should be immune from suits for damages.” *Id.* at 512-513. The Supreme Court explained that the conflicts before agencies are “every bit as fractious” as those before courts and that similar safeguards are available. *Id.* at 513.

Applying *Butz*, the Court of Special Appeals noted that the Board of Physicians regulated and controlled physicians to protect the health, safety, and welfare of the public, and that it had the power to adopt regulations, to investigate allegations of violations of the law, to reprimand a licensee or take other disciplinary action including the levying of fines and the issuance of cease and desist orders. *Geier*, 241 Md. App. 450-451. In addition, Board regulations provided for hearings on these matters with notice of the charges, representation through counsel, the opportunity to present evidence and cross-examine witnesses, a written record, and an opportunity

for appeal. *Id.* at 494. Thus, the Court found that the Board members and employees had absolute immunity with respect to the § 1983 claim. *Id.* at 505.

With respect to the state tort claim, the Court noted that the Court of Appeals had not yet adopted the doctrine of absolute quasi-judicial immunity, but found that Maryland common law shared all of the doctrinal foundations of the *Butz* case and concluded that “*Butz v. Economou* is more persuasive than any other authority on the question of whether an agency official has absolute immunity from suit in an action under Maryland law.” *Geier*, 241 Md. App. at 517-519. As a result, the Court of Special Appeals held that “under Maryland common law, state officials are absolutely immune from suit for common-law, nonconstitutional torts based on the type of prosecutorial conduct for which those officials would enjoy absolute immunity under the principles stated in *Butz v. Economou*, 438 U.S. at 508-17.” *Geier*, 241 Md. App. at 519.

While *Geier* involved a health care regulatory board rather than a board of license commissioners, cases that I have found that do involve boards regulating alcoholic beverages have also applied absolute quasi-judicial immunity to them. See e.g., *Killinger v. Johnson*, 389 F.3d 765, 770 (7th Cir. 2004); *Reed v. Village of Shorewood*, 704 F.2d 943, 951 (7th Cir. 1983); *Brossette v. City Of Baton Rouge*, 837 F. Supp. 759, 763 (M.D. La. 1993); *Hamm v. Yeatts*, 479 F. Supp. 267, 270-271 (W.D. Va. 1979).

As a result, it is possible that Board members and employees are protected by absolute immunity for their action to revoke or suspend an alcoholic beverages license.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
mosby03