IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No. 63,904

ASTRAL LIQUORS, INC., and
R.J.MANDELL CORPORATION,

Petitioners,

vs.

STATE, DEPARTMENT OF BUSINESS REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

Respondent.

APPLICATION FOR DISCRETIONARY REVIEW
OF OPINION OF THE DISTRCIT COURT OF
APPEAL OF FLORIDA

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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INTRODUCTION

This case is the consolidation of two cases at the district court level. There were two records prepared which were not consolidated. To avoid confusion, any record citation is a reference to the record in the R. J. Mandell Corp. v. DABT record unless the citation specifically states otherwise such as (R. Astral - page) in which case it is the Astral Liquors v. DABT record to which reference is being made.

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, Astral Liquors, Inc. (ASTRAL), was the owner and operator of a business catering to the general public and, incident to that business, was the holder of a duly issued alcoholic beverage license #23-276, series 4 COP (R. Astral 32). On August 27, 1980, the principle stockholder and corporate officer of ASTRAL was convicted of a Federal criminal offense (R. Astral - 48). This offense was totally unrelated to the operation or use of the alcoholic beverage license in question (R.37).

On November 26, 1980, the Respondent, Division of Alcoholic Beverages and Tobacco (DABT), filed administrative charges against ASTRAL based on the aforestated criminal offense on the theory that ASTRAL was no longer qualified to hold the license (R. Astral, 2-4).

On April 10, 1981, ASTRAL consummated the sale of its business, including the subject alcoholic beverage license, to the Petitioner, R. J. Mandell Corp. (MANDELL) with the signing of a written contract (R. 49-51). On May 26, 1981, pursuant to said contract, MANDELL filed an application with the DABT for the transfer of the subject license to itself (R. 3-6).

On September 22, 1981, the DABT denied the transfer application solely on the grounds that an administrative case involving the subject license was pending referring to the ASTRAL charges filed on November 26, 1980 (R. 7). MANDELL requested and was granted an administrative hearing on the denial of the transfer application (R. Astral 49-50).

Subsequent to the denial of the transfer application, an administrative hearing was conducted on December 8, 1981 on the ASTRAL matter before a hearing examiner of the Division of Administrative Hearings (R. Astral 31-34). That hearing culminated in a final order by DABT dated March 4, 1982 revoking the license in question on the grounds that the holder of ASTRAL's stock was no longer qualified to hold such a license (R. Astral 31-34). On March 4, 1982 ASTRAL filed a notice of appeal to the Third District Court of Appeal of Florida from this final order (R. Astral 62).

On April 1, 1982, an administrative hearing, before the same hearing examiner that heard the ASTRAL matter, was held on the denial of MANDELL's transfer application (Appendix - Transcript). On June 9, 1982, the hearing examiner filed his recommended order which recommended that the transfer application be granted and the DABT transfer the subject license to MANDELL (R. 28-35). However, on July 26, 1982, the DABT rejected that recommendation and entered a final order

denying the transfer application (R. 36-41).

MANDELL thereafter filed a notice of appeal to the Third District Court of Appeal of Florida from this final order. The ASTRAL appeal and the MANDELL appeal were then consolidated in the District Court. On February 22, 1982, the Third District Court of Appeal filed its opinion affirming the two orders of DABT (Appendix -1). However, the District Court, upon motion, granted a rehearing in the matter and, on June 21, 1983, filed a majority opinion adhering to its original opinion with one dissenting opinion (Appendix - 2).

Following an application for discretionary review to this Court from the opinion of the Third District Court of Appeal on the grounds of conflict and the express declararation of a State statute to be valid, this Court, on January 9, 1984, accepted jurisdiction to hear this matter.

ARGUMENT

I. FLORIDA STATUTE 561.32(2) IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER BECAUSE IT GIVES TO A GOVERMENTAL AGENCY UNBRIDLED AND UNRESTRICTED DISCRETION TO GRANT OR DENY LICENSE TRANSFER APPLICATIONS.

ASTRAL sold its alcoholic beverage license and its business to MANDELL (R. Astral 55-57). MANDELL, under normal procedure, applied to the DABT to transfer the license to itself (R. 62). DABT denied the application on the sole ground that there was a pending administrative action against ASTRAL and that §561.32(2) Fla. Stat. gave DABT the absolute discretionary power to grant or deny license transfer applications when there were pending administrative matters (R. 47). The Petitioners suggest that §561.32(2) Fla. Stat. is an unconstitutional delegation of legislative authority and should be declared invalid by this Court.

Non-delegation rule.

Article II, Section 3 and Article III, Section 1, Fla. Const. give to the legislature of Florida the exclusive power to make the law. The legislature may not delegate its law making powers

to other branches of the government. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). In that case, this Court re-affirmed the validity of this doctrine of non-delegation of legislative power as being viable in Florida.

Under this doctrine, the legislature may not delegate to an administrative agency unbridled discretion to state what the law is. In short, "the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expediant." Askew, supra (at 924).

The test to determine whether a legislative delegation of authority to an administrative agency runs afoul of the non-delgation rule was set out in Askew, supra as follows:

> "[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law." (at 918-919)

Restated in other terms, a delegation of legislative power is violative of the non-delgation rule if the discretion delegated is not bridled by some legislature standards or guidelines which are sufficient enough to allow a reviewing body to determine whether or not the agency action is consistent with the general legislative intent in

the affected area. Reynolds v. State, 383 So.2d 228 (Fla. 1980).

The statute in question here, Section 561.32(2), Fla. Stat. states:

> (2) No one shall be entitled as a matter of right to a transfer of a license or interest in a license or to a change of executive officers or directors when the division has notified the licensee in writing that revocation or suspension proceedings have been or will be brought against the license; and the transfer of such license or financial interest in such license or the change of executive officers or directors in such case shall be within the discretion of the division.

This statute is completely lacking any standards, guidelines, policy or statement of legislative intent whatsoever. It states, basically, that when the holder of an alcoholic beverage license wishes to sell it to another, and there is a pending administrative charge against the seller, that the DABT shall have absolute discretion to grant or deny the transfer irrespective of any other considerations. It is, of course, true that the transferee/buyer must be otherwise qualified under the applicable Beverage Law licensing statutes which set very specific guidelines and standards for the issuance of a license (see §561.17, 561.18 and 561.19, Fla. Stat). However, the statute under review here permits the DABT to deny license transfers, even to otherwise qualified applicants, at the complete

discretion of the agency. This discretionary authority is unbridled by any legislative standards. Not only are there no specific standards or guidelines stated in the statute, there are no general, vague, hazy or foggy ones. There aren't even any hints at what the legislative intent might be in this area.

The triggering event for the application of agency discretion under the statute is the pendency of administrative charges. It is clear that the discretion to be utilized has nothing to do with the qualifications or fitness of the applicant. It is left entirely up to the agency to decide under what circumstances the transfer should be granted or denied. Applying the aforestated test under the non-delegation rule to this statute, it is impossible for a reviewing court to determine whether the exercise of agency discretion is consistent with the legislative intent because that intent is unstated in the statute. In this case, for instance, the applicant, MANDELL, was qualified to hold an alcoholic beverage license, the sale was a bona-fide, arms length transaction and MANDELL presented a prima facia case for approval of its transfer application. (R. 28-35) Nevetheless, DABT denied the application for no stated reason other than the pendency of administrative charges (which brings the matter within the purview of the subject statute)

(R. 36-41). Neither this Court, nor any other court of this state can now juxtapose the agency action with the legislative intent of the statute to determine consistency because not only is the legislative intent unknown, but, also, the reasons for the agency action are unknown. (Discussed in more detail in II, below) Any agency action under this statute is virtually unreviewable. The statute is, therefore, an unlawful delegation of legislative power.

The lower court, however, while acknowledging the non-delgation doctrine, states that there are two exceptions to the doctrine which apply to this case. The lower court opinion states that when the statute deals with "licensing and the determination of the fitness of license applicants" or with occupations which are subject to the State's police power by virtue of this effect on the public welfare[1], the rule of non-delgation does not apply and that the legislature may delegate absolute discretion in those areas. The Petitioners dispute both the validity and propriety of such arule and an examination of both so-called exceptions reveals that the lower court's analysis is in error.

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1 The opinion specifically talks of occupations engaged in by privilege, but the broad exception, as developed by case law, relates to the police power.

Licensing exception

This Court first spoke of an exception to the non-delegation rule in Permenter v. Younan, 31 So.2d 387 (Fla. 1947). In that case the Court held that where broad discretion is granted to administrative officials to grant or deny a liquor license based upon the "personal fitness" of the applicant, such discretion is permissably granted but that it is not arbitrary. The Court stated that such ordinances must not be construed to give the official "the right abritrarily to discriminate between applicants by granting a license to one and refusing it to another, without good reason" (at 389). The Court concluded that an aggrieved applicant had the remedy of Court action to test the reasonableness of a license denial where an application was denied on the grounds of personal fitness.

Permenter, supra was followed by North Broward Hospital District v. Mizell 148 So.2d 1 (Fla. 1962) in which this Court, once again, stated:

> An exception from the strict requirements of legislative prescription is often recognized in the area of determination of personal fitness. (at 4).

The reason for this exception is that the subject of an applicant's personal fitness is not one which is readily definable or susceptible to specific legislative

standards. In such cases, the Court stated in a footnote, (fn.11) a more general grant of authority requiring less specific standards is permissable.

In Carbo v. Meiklejohn, 217 So.2d 159 (Fla. 1st DCA, 1968), a statute under the Beverage Law which dealt with the licensing of liquor wholesalers was declared unconstitutional due to a lack of legislative standards with no mention of any exception to the non-delegation rule for any type of licensing matter. In fact, the first mention of a blanket exception to include all licensing matters was in Brewer v. Insurance Commissioners, 392 So2d 593 (Fla. 1st DCA, 1981). There, the Court cited Permenter, supra and Mizell, supra, for the proposition that "licensing" matters fell within the "personal fitness" exception. It is clear that neither Permenter nor Mizell makes an exception for anything other than "personal fitness" matters. The Brewer opinion simply added the word "licensing" to the exception and, thus, broadened its scope to enormous proportions without any reason. While personal fitness matters may be impossible to define and lay down specific legislative guidelines for, all licensing matters do not suffer the same infirmity. The Brewer, supra rule, which was probably no more than an unfortunate choice of a phrase, creates a broad exception to the general rule of non-delegation

without any reasons, analysis or explanation. Indeed, even the statute in question in Brewer, supra, dealt with the personal fitness of an insurance agent.

Nevertheless, this Court has recently jumped on the bandwagon and, citing Brewer, supra stated that "in the licensing area there exists an exception to the requirement that the legislature must always enunciate express guidelines and standards". Gulfstream Park Racing Association, Inc. v. Department of Business Regulation 8 FLW 467 (Fla. 1983). The Petitoners herein urge this Court to return to the analysis of Mizell, supra and hold that this part of the licensing area for which an exception exists is the part in which the personal fitness of a license applicant is in issue.

Even if an exception to the non-delegation rule exists, regardless of its scope, the exception does not mean that no standards or guidelines whatsoever are necessary. No reported case, other than the instant one, stands for that proposition. The cases cited above merely say that where the exception exists, specific and explicit legislative standards are not necessary. A more general legislative statement is permissable. Thus, in Gulfstream, supra, this Court stated that there must be, at least, palpable legislative standards surrounding a licensing statute.

Here, Fla. Stat. 561.32(2) is not saved from

unconstitutionality by the application of the "licensing" exception for two reasons. First, as the dissenter in the lower court's opinion points out, the statute has absolutely nothing whatsoever to do with the personal fitness of the license applicant. Second, the statute contains not even a general statement of legislative guidelines. There are no standards whatsoever and, therefore, it does not even fulfill the less stringent requirements of the law under the afore-discussed exception.

Police power

In Permenter v. Younan, supra the Court briefly discussed an exception to the non-delgation rule for businesses engaged in by privilege rather than as a matter of right. That exception has been merged over the years into the larger category of businesses which are subject to the police regulation of the state. Thus, in matters such as horse-racing, certainly a privileged occupation area, the appellate analysis has revolved around the "police power" exception and there has been no mention of a privileged occupation exception since Permenter. see ie. Solimena v. State, 402 So.2d 1240 (Fla 3rd DCA, 1981). Furthermore, alcoholic beverage licenses have since come to be recognized as property having value. House v. Cotton 52 So.2d 340 (Fla. 1951). The Permenter, supra opinion recognized an exception to the general rule based upon matters within

the police power of the state, but held that redress to an aggrieved party due to arbitrary action by an agency was available in the courts.

This Court then addressed the issue once again in State, Department of Citrus v. Griffen, 239 So.2d 577 (Fla., 1970). In dealing with a matter of the citrus industry, one which is so vital that is is within the police power to regulate, the court held that even when specific legislative guidelines are not practicable, there still must be some general standards to guide administrators in performing their administartive tasks.

Then, in Florida State Board of Architecture v. Wasserman, 377 So.2d 653 (Fla., 1979), this Court stated the test to be applied while synchronizing Permenter, supra and Mizell, supra. The court ruled that when dealing with adminstrative powers involved in some aspect of the police power, specific legislative guides are not necessary. However, any discretion granted to an administrative agency must carry with it legislative standards sufficient enough to permit the exercise of that discretion to be judicially reviewable. Thus, the rule is that the legislature may not delegate power under the "police power" exception unless that delegation contains some standards so that a reviewing court can determine whether agency action is consistent with the legislative intent. Department of Business

Regulation v. National Manufactured Housing Federation, Inc. 370 So.2d 1132 (Fla. 1979); Coco Cola Company v. State, Department of Citrus, 406 So.2d 1079 (Fla. 1981); Reynolds v. State, 383 So.2d 228 (Fla. 1980).

Here, once again, there are no standards in the subject statute. There is simply no way for any court to determine whether the denial of the application to transfer of the Petitioner, MANDELL, was a denial for reasons which the legislature contemplated when passing Fla. Stat. 561.32(2). The statute fails the test of a constitutional delegation of power.

The lower court opinion stands for the propositon that the legislature may delegate basically unreviewable discretion to any agency. An agency in these circumstances can grant or deny license applications at its complete whim and deny them to those it dislikes based upon race, religion, sex, political considerations or any other reason it wants and be insulated from any meaningful review. That cannot be the law. It is not the law. Fla. Stat. 561.32(2), by allowing this unrestricted wielding of power by an administrative agency is unconstitutional.

II. AN AGENCY, IN THE ABSENCE OF ANY RULE OR POLICY MUST EXPLAIN THE REASONS BEHIND ITS DISCRETIONARY ACTIONS

MANDELL made application to the DABT for the transfer of an alcoholic beverage license from ASTRAL to itself (R. 62). That application was denied solely on the grounds that there was a pending administrative hearing on the denial of the transfer. The hearing examiner recommended that the transfer application be granted because MANDELL had proven a prima facia case for transfer, the sale between ASTRAL and MANDELL was an arms length transaction, and DABT had given no reason or rationale to deny the application (R. 28-35). The DABT ignored the recommendation and entered a final order denying the transfer on the grounds that Fla. Stat. 561.32(2) give absolute discretion to DABT and that the agency was not required to give any explanation of its actions thereunder (R. 36-41). The Petitioners submit that it was error for the DABT to deny the application without explaining the reasons or policy behind its actions.

Assuming arguendo that the cited statute is not an unconstitutional grant of discretionary power to an agency, then the agency here has been given discretion to grant or deny a transfer application when administrative

charges are pending or might be filed involving the subject license. DABT, however, has adopted no rules and has established no policy regarding which transfer applications should be granted and which should be denied nor has it established rules or policy relative to the considerations it deems important to a determination of how to exercise its discretion. The leading case of McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA, 1977) explains that an agency need not adopt rules for everything and may, in fact, formulate policy by adjudication of individual cases but that when so doing, it must explicate its reasons for the actions it takes.

In McDonald, supra, the Court reviewed the relatively new APA and discussed its impact upon the burgeoning morass of agency regulation. The Court said:

> In three important arespects...the APA affects the scope and manner of exercise of agency discretion: (1) the APA prescribes the process by which disputed facts are found; (2) it requires that the agency adopt as rules its policy statements of general applicability, requires agency proof of inciperent policy not expressed in rules and permit countervailing evidence and argument; and (3) it requires an agency to explain the exercise of its discretion and subjects that explanation to judicial review (at 577).

That Court further stated that "[t]o the extent that agency action depends on nonrule policy, §120.68 requires its exposition as a credential of that expertise and experience." (at 583).

McDonald, supra, was followed by Hill v. School Board of Leon County, 351 So.2d 732 (Fla. 1st DCA, 1977) in which the Court succinctly expressed the beneficial reason behind requiring explanation of discretionary agency action:

> Affected agencies will be pressed toward rulemaking by the necessity otherwise to explicate and defend policy repeatedly in §120.57 proceedings for agency action affecting the substantial interests of parties. (at 733).

Thus, an agency must either memorialize policy through the rule making procedure of §120.54, Fla. Stat. or must explain and defend its discretionary actions which form the basis of emerging agency policy. See Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA, 1981). In short,

> "An agency which has opted not to establish guidelines for a particular proceeding is required to make specific findings of fact and state the policy reasons supporting the agency." Katz v. Florida State Board of Medical Examiners, 405 So.2d 465 (Fla. 1st DCA, 1981) at 466.

Furthermore, those reasons behind policy decisions are open to judicial review. "The APA procedural provision for direct judicial review ensures that discretion will be exercised responsibly and fairly." Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA, 1978).

The DABT, however, has blatantly refused to state its reasons for its actions or to even declare what its policy is in similar matters (R.36-41). The position of DABT is, essentially, that it can act in a manner which is unreviewable

by any court. An aggrieved party could not challenge any agency use of discretion because it would be impossible to show any abuse by the agency. Who would ever know the reasons behind agency action? An agency must be required to state the reasons behind its actions to subject them to public and judicial scrutiny. Failure to do so should result in judicial disapproval of the agency actions.

The lower Court, however, states that the license had already been revoked. That was not the case. The denial of the license transfer occurred about five and one-half months prior to the license being revoked (R.7) and(R. Astral, 31-34). Had the license been transferred in accordance with the law, there would have been no need to proceed with the administrative case against the prior owner. The lower court opinion also states that since administrative charges were pending, the agency was not required to transfer the license. That reasoning simply begs the question. The agency has discretion but must give reasons for the manner in which it utilizes that discretion.

The failure of the agency to state any reasons for its actions, formulate policy or rules for similar matters, or in any way to explain its actions is contrary to the intent of the APA. The lower court opinion should be reversed with instructions to adopt the recommended order of the hearing examiner.

CONCLUSION

Florida Statute 561.32(2) is an unconstitutional delegation of legislative authority to an administrative agency. It fails to provide any standards or guidelines to the agency to guide it in implementing the law and affords virtually unreviewable discretion to the agency. Worse, the agency has refused to state its reasons for denying the transfer application. There is no stated policy or agency rule governing the utilization of discretion under the statute.

This Court should declare Florida Statute 561.32(2) to be an unconstitutional delegation of legislative authority. It should disapprove the lower court opinion and should order DABT to transfer the subject license to Mandell.

Respectfully submitted

Lane Abraham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to James A. Watson, Esquire, The Department of Business Regulation, The Johns Building, 725 South Bronough Street, Tallahassee, Florida 32301, this 3 day of February, 1984.

Lane Abraham

LANE ABRAHAM