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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.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

References to the Answer Brief of the Respondent will be referred to as: (Br. page #).

ARGUMENT

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

The Petitioner has argued in its initial brief that § 561.32(2), Fla. Stat. is an unconstitutional delegation of legislative power to an administrative agency of the State.

The Petitioners argued first that the doctrine of non-delegation is viable in Florida. The Respondent agrees (Br.3).

The Petitioners argued next that the two exceptions to the non-delegation rule cited by the lower court's opinion were either not as broad as stated or were inapplicable to the subject statute. The answer of the Respondent to each exception will be discussed separately.

The first exception discussed was that of licensing. The Petitioners suggested that within the extremely broad area of licensing, the only exception that really exists is with those questions surrounding the personal fitness of the applicant. The Respondent had no response to this. The Petitioners also asserted that the subject statute had nothing to do with the personal fitness of the applicant and, thus

this exception does not apply. The Respondent has agreed here with the Petitioners and the dissenter in the lower court's opinion that the personal fitness of the applicant is not an issue (Br.6, 8). However, while admitting that personal fitness is not an issue, the Respondent maintains that the statute still somehow falls within the exception (Br.6). If the exception is one for personal fitness of an applicant and the statute is not concerned with personal fitness, then the exception simply does not apply to this statute.

The Petitioners argued that while an exception to specific standards and guidelines may exist, there must still be within the statute palpable, discernable, if only general legislative standards. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 8 FLW 467 (Fla. 1983). The Respondent claims that the Beverage Law is replete with "specific guidelines for the issuance and disciplining of beverage licenses" (Br.5). First, this would seem to belie the position that specific guidelines are impractical in the licensing of alcoholic beverage licensees. Second, under the subject statute an applicant for transfer must qualify under the various statutes to hold a license. The subject statute has nothing to do with disciplining a licensee; it relates to license transfer. What is significantly absent from the Respondent's brief is any attempt to show authoritatively or otherwise, what

palpable standards the legislature gave in this statute when it gave discretion to the DABT to grant or deny transfer applications when administrative charges were pending. Nor was there any attempt to show what the legislative intent was.

Finally, the Petitioner cited Carbo v. Meiklejohn, 217 So.2d 159 (Fla. 1st DCA, 1968) as an example that no blanket exception exists to the non-delegation rule in licensing matters. The Respondent answers by stating that Carbo, supra dealt with personal fitness and the instant case does not and, therefore, they are distinguishable (Br.8). If that is the Respondent's position, then the statute in Carbo, supra which admittedly falls within the "licensing" exception to the non-delegation rule and which contained more legislative standards than the subject statute herein, was declared unconstitutional and the subject statute herein must be, as the dissenting lower court opinion states, a fortiori unconstitutional.

The second exception involves those areas regulated by the police power of the State. The Petitioners argued that some general standards must still be contained within a statute under the police power to the extent that a reviewing court could determine whether agency action was consistent with legislative intent. Again, the Respondent

failed to point to any palpable standards within the subject statute. Instead, the Respondent argues something to the effect that the statute is reasonably related to the purpose of protecting the public welfare by allowing licensees to be disciplined and by preventing the unbridled transfer of licenses (Br.7-8). First, the Petitioner has not made an equal protection or due process argument. Second, the Petitioners do not suggest there should be allowed the unbridled transfer of licenses but, rather, suggest that the legislature, having seen fit to grant discretion to the agency in situations such as these, must, pursuant to constitutional mandates give some indication of its intent through some kind of standards or guidelines. Third, there is nothing to prevent the DABT with proceeding with administrative charges against the licensee even after license transfer so as to obtain a revocation of said licensee's right to hold a license in the future. In fact, Fla. Stat. 561.32(1)(b) states:

"...judicial transfer of a license shall not prevent the division from suspending the license or imposing a civil penalty against the licensee of record that held the license at the time of the Beverage Law violation. However, should the division obtain a revocation of the license against the previous licensee of record, the revocation shall be effective only to impair the qualifications of the officers, directors, stockholders or persons having any interest in the license at the time of the revocable offense."

And fourth, the Respondent agency as well as the people of the State of Florida should be pleased that an unqualified license holder has transferred his license to a qualified, bona-fide purchaser.

In the Respondent's last paragraph under this point, it argues that Adult World, Inc. v. State, 408 So.2d 605 (Fla. 4th DCA, 1981) stands for the proposition that a transferee under Fla. Stat. 561.32(2) must show a bona-fide sale, approval of its application and show an absence of agency proceedings as prerequisite to license transfer (Br. 9). The Petitioner, frankly, is at a loss to explain what this means. No one can show approval of an application prior to the application being approved. Furthermore, if the legislature had so intended, it could have passed a law stating that licenses were non-transferrable during the pendency of administrative charges. Instead, the legislature passed §561.32(2), the statute in question here, which contemplates approving some transfer applications and denying others when administrative charges are pending but fails to state what factors should be considered in making that discretionary determination. In any event, in Adult World, supra, the licensee therein claimed it was entitled to a transfer as of right. The district court upheld

the agency's denial of the transfer application because the applicant failed to show a bona-fide sale of the business. Here, there is no argument that the sale was anything but a bona-fide, arms-length transaction to a qualified purchaser, to-wit: MANDELL (R.28-35).

The statute in question is an unconstitutional delegation of legislative authority in violation of the non-delegation rule. The Respondent can point to no standards whatsoever in the statute to indicate how the discretion granted should be utilized or what the legislative intent was. It should be declared unconstitutional.

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

The Petitioners argued, basically, that in the exercise of discretion an agency must, in the absence of any rule or policy, give reasons for its actions. The Respondent answered by admitting that there was no rule in existence at the time (Br. 11). In fact, the Respondent even claims that a rule has since been formulated (Br. 12)¹. The Respondent argued, instead, that the Petitioners failed to demonstrate a change from prior agency practice, that a convicted felon should not hold an alcoholic beverage license, and that the agency's actions were explained because they are reviewable.

First, the Respondent claims that "review of the transcript" fails to show there was any evidence at the hearing to establish the policy of the DABT was different from the action taken in the instant case (Br. 10)..Counsel

1. In commenting on the non-record activity, the Respondent now says its newly formulated policy in rule form is to deny every transfer application when charges are pending. That is hardly an exercise in discretion, but sounds more like a refusal to exercise a legislative grant of discretion.

apparently didn't "review" the transcript very thoroughly because on page 8 of the transcript of the hearing of April 1, 1982 (R. Appendix), the hearing examiner is listing and identifying the joint exhibits of the parties admitted into evidence by stipulation. Exhibits 4A and 4B in evidence were, respectively, the recommended and final orders in a prior administrative matter styled D.A.B.T. v. Singapore J.V., Inc. DOAH case #80-2174 (R. 52-57). In that case, a licensee stockholder (albeit a minor one) was convicted of a Federal felony. The DABT filed administrative charges against the license, and the offending licensee thereafter sold his interest in the business. The DABT in its final order adopted the recommendation of the hearing officer in allowing the sale and ruling that the divestiture rendered the issues moot (R. 52-57). The facts of Singapore are similar to those in the instant case to the extent that the DABT allowed a person convicted of a Federal felony to divest himself of his interest in an alcoholic beverage license whereas in the instant matter the DABT, for unknown reasons, disallowed such a divestiture. The recommended order in the instant case summed up this situation perfectly. The hearing examiner stated:

"DABT's action in Singapore does not dictate the result in this case. An agency may deviate from its prior practice or precedent as long as its action is adequately explained. See, §120,68(12)(b), Fla. Stat. (1981). But explanation of the agency's exercise of discretion is what is missing in this case." (R.34).

Throughout the Respondent's answer brief runs the theme that a convicted felon is not permitted to hold an alcoholic beverage license. The Petitioners do no dispute this. ASTRAL sold its license. The DABT should be happy. MANDELL was a qualified applicant. Mr. Willner would be prohibited from obtaining another license pursuant to the Beverage Law. The mere stating of a statutory provision in an answer brief hardly relieves an agency from the thrust of the Administrative Procedure Act which requires explaining an agency's use of discretionary authority.

Finally, the Respondent argues that its actions are reviewable and, therefore, adequately explained (Br. 11-12). The answer brief states that the reason the license transfer was denied was because ASTRAL's owner was convicted of a Federal felony and, therefore, not entitled to hold a license. This was the first occasion in the entire history of this case that DABT ever tried to give a reason for its actions. Actually, this was merely a statement of counsel that the record contained facts establishing a proper explanation. The Respondent is proposing a rule of law which states that a reviewing court should wade through records of administrative action and, if it should find facts which would be sufficient

and adequate reasons for the unexplained actions of the agency, then said actions are permissible. The Petitioners assert that a better policy would be to adhere to the current state of the law which, as set out in Petitioner's initial brief, requires explanation of discretionary agency action.

In this case, for instance, the crime committed by ASTRAL's shareholder was totally unrelated to the operation of the license (R. 37). Perhaps the DABT did deny the transfer because of the conviction of the licensee even though such action would be contrary to Singapore. But maybe that was not the reason. Perhaps the Director does not like short people (Willner is short), or perhaps he does not like Mr. Mandell's religion or any number of other reasons. It is to eliminate this speculation that the law requires reasoned explanations of agency actions. To merely say now that the record contains sufficient facts upon which to justify the agency action fails to satisfy the need for a stated agency policy and to eliminate the possibility of improper agency conduct. Had the final order of the agency stated that the transfer was denied because of how Mr. Mandell was attired at some social function attended by the Director, this Court would have

no problem in reversing that order despite the record containing other evidence sufficient to justify a denial. The lack of any stated reason for the denial is no different and merely raises suspicions. Furthermore, so there is no doubt that the final order denying the transfer failed, indeed refused, to state the reasons therefor, the relevant portions thereto are reproduced as follows:

"8. DABT disapproved petitioner's application to transfer the license solely on the ground that there were pending proceedings against the license holder....

9. DABT presented no evidence in support of denying petitioner's application other than there were pending administrative proceedings against the licensee. It did not explain or offer any reasons why, in this case, it should exercise its discretion by denying petitioners' application. To the extent its decision rests on non-rule policy considerations, it did not explicate them or subject them to scrutiny or hearing.

10....The provisions of F.S. 561.32 require no explanation of the Division's discretion thereunder and as a statutory power such discretion is not a matter of policy." (R.38).

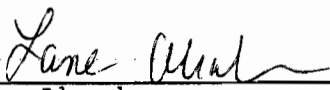
The DABT failed to give any explanation for its discretionary actions and, therefore, its final order must be disapproved. The lower court was in error in affirming the agency action. Pursuant to §120.68(13)(a)(1), Fla. Stat. this Court may order the DABT to transfer the license to MANDELL as the recommended order suggests.

CONCLUSION

The Respondent has failed to point out sufficient standards in the subject statute to save it from being an unconstitutional delegation of power. Additionally, the failure of the DABT to even state the reasons for its actions is contrary to the dictates of the Administrative Procedure Act. Consequently, the lower court opinion should be disapproved and the license should be transferred to the Petitioner MANDELL.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to James A. Watson, Esquire, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida, 32301, this 21 day of March, 1984.



Lane Abraham