Buffalo Law Review

Volume 10 | Number 1 Article 5

10-1-1960

Administrative Law—Scope of Administrative Discretion to Grant or Deny Licenses

Buffalo Law Review

THE COURT OF APPEALS, 1959 TERM

ADMINISTRATIVE LAW

SCOPE OF ADMINISTRATIVE DISCRETION TO GRANT OR DENY LICENSES

The State Liquor Authority and its subordinate local boards were created by the Alcoholic Beverage and Control Law to regulate and control traffic in alcoholic beverages through a licensing system. The broad standard of "public convenience and advantage"[1] set forth in the authorizing law has been generally recognized by the courts as empowering the Liquor Authority with wide discretion in formulating its rules and policy.

In *Gross v. New York Alcoholic Beverage Control Board*,[2] the courts demonstrate that this discretion, however broad, can be the subject of abuse.

The plaintiff there applied for a change in classification for his restaurant from a beer and wine license to a liquor license. His application to the defendant board was refused because he had neither requested nor received a waiver from the Liquor Authority on its thirteen month moratorium on the acceptance of applications for restaurant licenses. This restriction was set forth in Rule 45[3] promulgated by the Liquor Authority to limit the number of on-premises licenses pending completion of a survey of needs.

The plaintiff brought this proceeding under Civil Practice Act article 78 alleging that the refusal to accept his license application under the waiver provision of Rule 45 effectively denied him the right to a court review of the Authority's decision, as specifically provided in Section 121[4] of the Alcoholic Beverage Control Law.

The dismissal of plaintiff's petition at Special Term was reversed by the Appellate Division. The Court of Appeals affirmed the reversal in a four to three decision marked by a vigorous dissent.

The Court, in striking down Rule 45, condemned it as illusory in that its actual effect was far more sweeping than any purpose that might be suggested by a casual perusal of its terms.

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1. N.Y. Alcoholic Beverage Control Law § 2.
2. 7 N.Y.2d 531, 200 N.Y.S.2d 12 (1960).
3. The relevant portion of Rule 45 provides:
. . . on and after February 1st, 1959 and pending the completion of the aforesaid survey and study and determination thereon, the number of annual restaurant liquor or wine licenses shall be limited to the number in effect throughout the State after all applications for such licenses filed prior to February 1st, 1959 or filed as the result of the next succeeding paragraph have been acted upon, and further . . .
. . . that during the period February 1st, 1959 through January 31st, 1960, no application for any of the aforesaid licensed (whether by way of an original application or by way of a change in class) shall be accepted by any Local Board or Zone Office of the Liquor Authority except that any person may be granted a waiver of the foregoing limitation provided that he shall establish by proof satisfactory to the State Liquor Authority compliance with . . . [certain specified] conditions."
4. This section specifically provided for judicial review in those instances where the Authority either denied, issued or revoked a license.

The Liquor Authority claimed that the rule must be sustained as being within the powers set forth in sections of the authorizing statute, particularly Section 17 which makes limitation of licenses discretionary and allows a prohibition of the acceptance of applications for a class of licenses that has been limited.[5] It likens Rule 45 to Rule 17 which was upheld by the Court in *Brenner v. O'Connell.*[6]

The majority opinion admitted that Section 17 allowed a moratorium on the issuance of license and acceptance of applications to be declared but insisted that Rule 45 differed sharply from Rule 17 in the case cited in that, the latter rule provided for an absolute limitation. The instant rule while similarly providing a cut off date after which no application will be accepted for the given class of licenses proceeds to open the door a crack by adding a waiver clause. This, the Court maintains, allows the Liquor Authority to disregard at will its own declared limitation. The effect was to replace the lawfulness of an absolute bar on applications with an unlawful or unauthorized method for the issuance of licenses. It circumvents, said the Court, the elaborate procedure provided by the Legislature in Sections 64, 55 and 54 as well as the right to review in Section 121 of the Control Law. According to the Court, Sections 64 and 55 are identical in that each allows that "any person may make an application" and each incorporates the relevant controlling procedure of Section 54.[7] They differ only in that Section 55 relates to beer whereas Section 64 relates to liquor.

Since no section mentions or provides for a waiver procedure, the Court held that Rule 45 erected a new and unauthorized procedure for granting licenses and was in excess of statutory authority. It deprived the applicant of substantial rights to review at the administrative level as well as by the courts because of the silence of the provisions in Sections 54 and 121 as to any recourse available upon a refusal to grant a waiver.

The dissenting opinion lashed out at the holding, calling it an impeachment of a high administrative body and stating that it strikes at the very heart of

5. Supra note 1, § 17(2) gives the Authority the power:
...To limit in its discretion the number of licenses of each class to be issued within the state or any political subdivision thereof and in connection therewith to prohibit the acceptance of applications for such class or classes of licenses which have been so limited.

6. 308 N.Y. 636, 127 N.E.2d 715 (1955).

7. Supra note 1, § 64(1):
Any person may make an application to the appropriate board for a license to sell liquor at retail to be consumed on the premises where sold.
§ 64(3):
Section fifty-four shall control so far as applicable the procedure in connection with such application.
§ 55(1):
Any person may make an application . . . for a license to sell beer at retail to be consumed upon the premises.
. . . All of the provisions contained in subdivision two and three of the preceding section (54) shall apply to the procedure relative to an application for a license under this section.

the legislative policy of directing the Liquor Authority to determine how public convenience and advantage will be best promoted.

The minority rejects the contention that Rule 45 is *ultra vires* as to the powers given by the statute. The opinion leaves no doubt but that it views the holding inconsistent with the prior upholding of Rule 17 in the *Brenner* case. It maintained that Rule 17 and Rule 45 are essentially the same. The waiver could be justified on the grounds that the very nature of an eating place requires a greater flexibility in meeting the necessities of public convenience and advantage than does a liquor license for off-premise consumption as in Rule 17. The waiver provision, it insists, is not a gross usurpation of legislative authority but rather is merely an aid to expeditious and efficient administration.

No numerical limitation on a class of licenses or applications is required if such rigidity impedes the Liquor Authority in carrying forward its statutory mandate, according to the minority opinion. It also suggested that the Court's confusion resulted from its comparing of Section 55 to Section 64. Section 55, said the dissent, merely provides the standard for judging a bona-fide restaurant[8] while Section 64 refers to off-premises liquor consumption and not to a restaurant liquor license.

The logical inference to be drawn from these arguments is that the procedure of Section 54 does not necessarily apply to restaurant liquor licenses to the extent it does to a license for off-premise consumption of liquor. To hold otherwise said the minority would be to ignore the compelling problems which the Legislature intended the Liquor Authority to solve. In any event the Authority has the ultimate say in whether or not a license shall issue.

Finally, the dissent convincingly argued that if denial of a waiver was a denial of a license as the majority opinion suggested, then it must follow that judicial review is available under Section 121 and not cut off by any unauthorized procedure.

A discretionary power that is exercised by an administrative official must be delegated to him by statute. The statute must also contain guides or standards in the use of this discretion in order to insure that the administrator carries out the intent of the Legislature. However, in the case of licensing officials these requirements of the delegation of discretion and guides in its exercise may be implied where the granting of the license would result in a thwarting of public policy which the licensing statute is evidently, either from its history or from its face, designed to implement.[9]

The Administrative Code of the City of New York provides for the

8. Supra note 1, § 55(3).

9. Rosenberg v. Moss, 296 N.Y. 595, 68 N.E.2d 880 (1946); Schwab v. Grant, 126 N.Y. 473, 27 N.E. 964 (1891); Arroyo v. Moss, 269 App. Div. 824, 56 N.Y.S.2d 17 (1st Dep't 1945), aff'd 295 N.Y. 754, 65 N.E.2d 750 (1946).

licensing of public carts.[10] The petitioner in *Barton Trucking Corp. v. O'Connell*[11] made application for such a public cart license in order to carry on its business in the garment industry. The Commissioner refused the license because the petitioner Corporation's treasurer had been convicted, some twenty years before, of extortion in connection with the same garment industry. The Commissioner took the position that in refusing the license he acted in good faith for the safety and welfare of the general public and that the nature of the crime of which petitioner's treasurer was convicted was sufficient reason to deny the license. The Supreme Court denied a petition to annul the order and the Appellate Division reversed and remanded to the Commissioner on the ground that the twenty year old conviction did not show a present unfitness in petitioner.

The Court of Appeals in a 4 to 3 decision upheld the Commissioner on the ground that this twenty year old crime showed a sufficient possible detriment to the public welfare. The Court held that the purpose of the statute was not simply to raise revenue (the fees barely meeting administrative costs) but to act as a control in an industry in which there had been found a great deal of corruption. The Court reasoned that the Commissioner need not act as a mere automaton, but had implied discretion in issuing licenses where the purpose of the licensing statute is not merely revenue raising but control for the public welfare. The Commissioner's refusal, based on the twenty year old conviction, was not an abuse of discretion because of the nature of the crime and because of the particular industry involved.

There is a line of cases in New York to the effect that a licensing official may not use this implied discretion to refuse a license for reasons other than that the granting of such license would violate some other law or regulation having the force of a law. In one case,[12] heavily relied upon by petitioner in his brief, the Court held that the Commissioner may not refuse a license even for the protection of the public if he has not been delegated standards by the Legislature. However, it is to be noted that in these cases the statute in question was not immediately related, either in its purpose or history, to the

10. Administrative Code of the City of New York, ch. 32, Art. 15, §§ B32-93.0 to B32-96.0.

§ B32-92.0 defines a public cart as . . . every vehicle, either horse drawn or motor driven, which is kept for hire or used to carry merchandise . . . within the city, for pay.

§ B32-96.0 regulates the rates to be charged by public cartmen and the number of persons to be employed on a particular hauling job.

§ B32-95.0 . . . the Commissioner shall issue a license to the owner of the public cart together with the plate upon payment of the license fee.

11. 7 N.Y.2d 299, 197 N.Y.S.2d 138 (1959).

12. Small v. Moss, 279 N.Y. 288, 18 N.E.2d 281 (1938).

The Commissioner of Services of New York City refused a theatre license on the ground that its location would present a "traffic condition that would be dangerous to the traveling public." The Court held that, absent delegated standards, the Commissioner has no implied power to refuse a license except where it would violate another ordinance or regulation which has the force of a law. In this case the evil sought to be prevented was not directly related to the purpose of the statute.

See also Dr. Bloom Dentist, Inc. v. Cruise, 259 N.Y. 358, 182 N.E. 16 (1932).

supposed evil sought to be prevented by the Commissioner. In this respect these cases are distinguishable from the holding in the present case.

The holding in the present case would appear to be as far as the courts of this state will go in ratifying an exercise of implied discretion of an administrative official. Perhaps a better solution to the problem would be for the Legislature to explicitly confer on the licensing official discretion to refuse a license for unfit moral character, together with standards to be used in its application, rather than allow the licensing official to supply "legislative omissions" in individual cases.

In *Swalback v. State Liquor Authority*,[13] an action was brought under the Civil Practice Act, Section 1283 et seq. to annul the determination of the State Liquor Authority, disapproving the application of petitioner to remove his package liquor store from the City of Rochester to an area near a shopping center in the suburban Town of Henrietta. This removal was caused by the State Highway Department's acquisition of petitioner's former premises in conjunction with the construction of a state highway.

The Supreme Court, Special Term, rendered an order annulling the determination of the State Liquor Authority and the State Liquor Authority appealed. The Appellate Division[14] reversed the order of the Special Term and petitioner appealed. The Court of Appeals (4-3) reversed the order of the Appellate Division, annulled the determination of the State Liquor Authority and remitted the matter to the Authority for further proceedings.

The State Liquor Authority placed its decision upon the grounds that to locate the store in such close proximity to a large shopping center would be contrary to the policy[15] of prohibiting the location of retail wine and liquor stores in a modern shopping center and would be disruptive of the statutory plan for the location of liquor stores in neighborhoods so as best to serve public convenience and advantage.

The Legislature has made it clear that the Liquor Authority shall "determine whether public convenience and advantage will be promoted by the issuance of licenses . . . and the location of premises licensed thereby, subject only to the right of Judicial review."[16] Section 101-c of the Alcoholic Beverage Control Law was added in 1950. That Section provides for the imposition of minimum consumer prices and contains the language relied on by the Liquor Authority as one of the principle supports for its policy expressed in the above mentioned Bulletin. It reads in part, "to eliminate price wars which unduly stimulate the sale and consumption of liquor and wine, disrupt the orderly sale and distribution thereof and tend to destroy the statutory plan for the

13. 7 N.Y.2d 518, 200 N.Y.S.2d 1 (1960).
14. 7 A.D.2d 883, 181 N.Y.S.2d 290 (4th Dep't 1950).
15. Expressed in State Liquor Authority Bulletin No. 279, Dec. 9, 1955.
16. N.Y. Alcoholic Beverage Control Law § 2.

location of off-premises liquor and wine stores in neighborhood communities which most effectively serve public convenience and advantage."[17]

Elsewhere in the Alcoholic Beverage Control Law and Legislature has specifically sanctioned the location of liquor stores in other than neighborhood communities.[18] As the majority pointed out, these specified locations attract considerable trade which would otherwise be transacted locally.

The policy of the State Liquor Authority of prohibiting liquor stores in shopping centers has been the subject of judicial review in the past and has received the sanction of the lower courts of this state.[19]

The majority strongly disapproved of the general policy to exclude liquor stores from every shopping center as unreasonable and unsupportable. The dissent held that although reliance on this general policy, per se, in no way establishes arbitrary action, its application is always subject to review.

Courts will not disturb the exercise of administrative discretion vested in the State Liquor Authority unless the action complained of is deemed arbitrary and unreasonable.[20] However the courts have by no means abdicated their judicial responsibility to review and pass upon administrative actions claimed to be arbitrary and without support in fact or law. A finding of an administrative agency "is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be reasonably drawn."[21]

The authority's attack on petitioner's proposed site is premised on the idea that public convenience and advantage would not thereby be promoted. It is difficult to comprehend this argument, when the mushrooming growth of shopping centers is accounted for by the fact that the public finds them both more convenient and advantageous. It seems that in a growing suburban community such as the Town in question, the concept, "neighborhood," connotes a different idea than it did ten years ago. It is not improbable that with our suburban areas zoned and restricted so as to keep business establishments in confined areas, that a liquor store contained in a shopping center does fit into the legislative concept of neighborhood distribution even though these establishments incidentally may draw from a larger area.

These proposals although perhaps not universally true do point up the fact strongly contended for by the majority, that a general policy which excludes liquor stores from every shopping center is unreasonable and unsupportable. It further indicates that the Authority must deal with the situations case by case, appraising the facts as each application is submitted.

If the facts on which the Authority based its denial of petitioner's applica-

17. Id. § 101(c).
18. N.Y. Alcoholic Beverage Control Law § 105(2).
19. Green v. Rohan, 3 Misc. 2d 680, 159 N.Y.S.2d 119 (Sup. Ct. 1956); Deitch v. Rohan, 3 Misc. 2d 458, 152 N.Y.S.2d 143 (Sup. Ct. 1956).
20. Fiore v. O'Connell, 297 N.Y. 260, 78 N.E.2d 602 (1948).
21. Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940).

tion for a license bears no reasonable relation to the policy to be enforced, its determination is to be annulled and the license should be granted.[22]

The New York City Charter grants general licensing power to the Commissioner of Licenses except for licensing power conferred by law on any other person.[23]

The Administrative Code of the City of New York requires junk dealers to be licensed, bonded, and prescribes procedures and restrictions designed to reduce the availability of a market for stolen property.[24]

In *In re Bologno v. O'Connell*[25] the Commissioner of Licenses refused to issue a license to petitioner solely on the ground that the operation of a junk yard might be harmful to the neighborhood even though it was an unrestricted use area. The Supreme Court granted an application by the petitioner for an order directing the Commissioner to issue a license. The Appellate Division unanimously affirmed the order.[26] The Court of Appeals also affirmed, with two judges dissenting.

The majority opinion in the Court of Appeals took the position that although the Legislature has the power to impose regulations concerning the location of junk businesses as well as the character of the people who operate them, only authority of the latter type was delegated to the Commissioner of Licenses. This approach is consistent with the Administrative Code which specifically grants the following authority to the Planning Commission. . .

> For each such district, regulations may be imposed designating the trades and industries that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety, and general welfare. The commissioner shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well considered plan.[27]

The Court reasoned that the Planning Commission, which is delegated, pursuant to the above statute, the authority and responsibility for zoning regulations concerning trades and industry is, the only authority to deny location to an industry on the grounds that its presence could be detrimental to, and out of harmony with a certain area. The Court concluded from this premise that if considerations solely germane to zoning regulations were the only ones used by the Licensing Commissioner to deny the instant petitioner

22. Baird v. State Liquor Authority, 277 App. Div. 60, 98 N.Y.S.2d 298 (1st Dep't 1950).
23. § 773.
24. Ch. 32, art. 18, §§ B32-113.0—B32-124.0.
25. 7 N.Y.2d 155, 196 N.Y.S.2d 90 (1959).
26. 7 A.D.2d 749, 181 N.Y.S.2d 765 (2d Dep't 1958).
27. Administrative Code of the City of New York § 200-2.0.

his license, then such denial was arbitrary. It was arbitrary because an administrator must base his decisions upon a delegation of authority received from the Legislature and such delegation of authority must contain a standard, either express or implied, that will guide the administrator in the exercise of such authority. This standard must be sufficiently definite to overcome any objectives that the Legislature is abdicating its legislative function and then violating the constitutional separation of powers. The majority opinion in the instant case decides that the standard which the Administrative Code granted to the Commissioner of Licenses was to either grant or deny a license to a junk dealer according to his character as relating to his susceptibility to deal in stolen property. It follows that if he uses any other standard than this (that ipso facto) he exceeds his authority, and no matter how reasonable the standard is which the Commissioner uses, if it is not the standard that the Legislature provided him with, then his action is arbitrary.

The majority was strongly influenced by the consideration that to allow the Commissioner of Licenses to determine what industries would tend to harm an area, that had been zoned an unrestricted use area, would overlap with the function of the Commissioner of Planning. They refused to indulge in the heresy that the Legislature would grant conflicting and overlapping jurisdiction.

One of the main cases relied on by the dissent was *Rosenberg v. Moss*[28] which was affirmed by the Appellate Division, 3 to 2, *no opinion* and affirmed by the Court of Appeals 5 justices for and 2 justices taking no part, with *no opinion.* In that case the trial judge stated, that the location of the premises as well as the character of the applicant are relevant factors in determining whether the grant of a license might impair the public health, safety or morals of the community. So too the suitability of the premises involved may be of prime importance. All these matters and many more must enter into the consideration. Since there is no appellate opinion in the *Rosenberg* case and the contention of the petitioner in that case was that the Commissioner had no discretion to look at things other than his citizenship and his willingness to pay the statutory licensing fee it is improbable that it could be controlling in the instant case.[29] Another argument advanced by the dissent was the curious statement, "If the zoning map and the certificate of occupancy from another city department established petitioner's rights to run a junk yard business at this location, there would be no point to having a separate junk yard licensing law." This statement is odd because the Court of Appeals specifically stated in *People v. American Wool Stock Corp.*,[30] ". . . its purpose and

28. N.YL.J., Aug. 14, 1941, p. 343, col. 7 (Sup. Ct. N.Y. County), aff'd 266 App. Div. 845, 43 N.Y.S.2d 852 (1st Dep't 1943), aff'd 296 N.Y. 595, 68 N.E.2d 880 (1946).

29. The Rosenberg case involved the denial of a bowling alley license by the Commissioner on the ground that its operation might be harmful to the neighborhood and the morals of the local children. That case also involved the construction of a different statute with different objectives. See Administrative Code, ch. 32, tit. B, art. 7, § B32-46.0.

30. 286 N.Y. 77, 81, 35 N.E.2d 905, 909 (1941).

effect is to control a business which provides a market for stolen property." This control is achieved by granting licenses to individuals who are not likely to receive stolen property and refusing to grant licenses to those people that the commissioner decides are prone to acting as receivers of stolen property.

It seems clear that the majority opinion is more likely to secure effective and harmonious business regulation by vesting the power to regulate different aspects of trade in those agencies that are best qualified to handle them. The Commissioner of Licenses may have been well meaning in his refusal to issue a license in order to protect the neighborhood, however he would have been powerless to protect the same area from a glue factory or a slaughterhouse because they do not require a license. It follows that the holding of *Picone v. Commissioner of Licenses* is applicable, "As the commissioner does not deny that petitioner is a fit and proper person to operate a junk (boat), it follows that his action in refusing to grant a license to the appellant was, however well intentioned, in a legal sense an abuse of his decretion."[31]

CERTAIN SITUATIONS REQUIRE AGENCIES TO GRANT FULL HEARING

The State Residential Rent Law[32] was amended in 1957[33] to make it mandatory for the Rent Administrator to use a sales price as the valuation base in a rent adjustment proceeding, when certain conditions exist.[34] The conditions are: (1) The sale must be bona fide and within the period from March 15, 1953 to the time of filing the application; (2) The transaction must be at arm's length, on normal financing terms at a readily ascertainable price; (3) It must be unaffected by special circumstances such as forced sale, exchange of property, package deal, work sale, or sale to a cooperative.[35] In *Realty Agency, Inc. v. Weaver*,[36] the Court of Appeals considered a case where a petition asking that the sales price be used as opposed to assessed valuation was denied by the Rent Administrator based upon his determination that the sale in question was not an "arm's length" transaction and was affected by special circumstances. The facts show that the stockholders of petitioner's principal held a 35 per cent interest in the operating profits and proceeds of sale of the property purchased. It is upon this ground, after the normal routine investigation, no hearing being granted to the petitioner, that the Administrator denied the petition for rent increase sufficient to allow a 6 per cent net annual return on the basis of the purchase price. The Court reversed the decision of the Appellate Division[37] which upheld the Rent Administrator's action. The Court decided that on the face of the record there was no substantial evidence to support the Administrator's finding that the consumated bargain was

31. 241 N.Y. 157, 162, 149 N.E. 336, 341 (1925).
32. N.Y. Sess. Laws, 1946 ch. 274 et seq.
33. N.Y. Sess. Laws, 1957 ch. 755, § 4(4)(a)(1).
34. Ackerman v. Weaver, 6 N.Y.2d 283, 189 N.Y.S.2d 646 (1959).
35. Supra note 33.
36. 7 N.Y.2d 249, 196 N.Y.S.2d 953 (1959).
37. 8 A.D.2d 773, 186 N.Y.S.2d 428 (1st Dep't 1959).