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ADMINISTRATIVE LAW

I. Amending of Certificate of Public Convenience

In *Chemical Leaman Tank Lines, Inc. v. South Carolina Public Service Commission,*[1] the supreme court reviewed an order of the Commission granting an amended certificate of public convenience and necessity to a transportation corporation. The applicant, Infinger Transportation Company, Inc., already possessing a certificate authorizing motor freight service over certain irregular routes within the state, applied to amend its certificate to allow much broader service. Although the plaintiff and Schwerman Trucking Company appeared to protest the application, the Commission granted the amendment "in order to better serve the requirements of public convenience and necessity."[2] In a subsequent hearing the Commission merely affirmed its order, concluding that Infinger's additional service would not have an adverse effect upon the protesting companies' operations in the state. The plaintiff then brought an action for judicial review of the Commission's order, but the trial court dismissed the complaint.

In reviewing the order of the Commission, the supreme court began by stating:

> [O]rders of the Public Service Commission issued under the powers and authority vested in it have the force and effect of law. . . . [T]he Commission's findings of fact are presumptively correct and its orders presumptively reasonable and valid . . . and . . . therefore, an order of the Commission such as is here involved will not be set aside except upon a convincing showing that it is without evidence to support it or that it embodies arbitrary or capricious action as a matter of law.[3]

Such a showing is exactly what the court found in the record, which disclosed merely that Infinger desired the amended certificate of service and that two prospective customers supported this amendment. Additionally, testimony revealed that existing carriers had always satisfactorily met the needs of these two custom-

1. 258 S.C. 518, 189 S.E.2d 296 (1972).
2. *Id.* at 521, 189 S.E.2d at 297.
3. *Id.* at 521-22, 189 S.E.2d at 297-98, *quoting from* Pee Dee Elec. Cooperative v. Public Serv. Comm'n, 229 S.C. 155, 163, 92 S.E.2d 171, 174 (1956).

ers and were willing if necessary to expand to meet any future needs. Finding, therefore, that the action by the Commission in granting the amendment was wholly without evidentiary support, the supreme court reversed the lower court and set aside the order of the Commission granting the amendment.

II. REVOCATION OF LICENSE TO PRACTICE MEDICINE

In *State Board of Medical Examiners v. Gandy,*[4] the supreme court for the second time considered the revocation of William Gandy's license to practice medicine. In 1963 the Board revoked Gandy's license but suspended the revocation for two years. In 1965, however, the Board revoked his license absolutely, based upon a general finding of misconduct. The circuit court affirmed, but the supreme court reversed and remanded the case for specific findings of fact.[5] On remand the Board issued a written order revoking Gandy's license for "receiving stolen goods and public drunkenness . . . as to violate the standards of the medical profession and constitute gross immorality under Section 56-1368 [of the] South Carolina Code . . . ."[6] The circuit court, however, determined that there was no evidence to support the charge of receiving stolen goods and that public drunkenness alone was not sufficiently grave to warrant a license revocation under section 56-1368.

The supreme court reinstated the decision of the Board to revoke Gandy's license to practice medicine. It found that the question was not whether Gandy had been guilty of misconduct grave enough to justify revocation of his license. Instead, the issue was whether he was guilty of misconduct during his probation sufficient to justify revocation of his probation and enforcement of the original judgment against him. When he was placed on probation, he was allowed to continue practicing medicine, contingent upon his maintaining good behavior and a satisfactory

4. 258 S.C. 349, 188 S.E.2d 846 (1972).

5. *See* State Bd. of Medical Examiners v. Gandy, 248 S.C. 300, 149 S.E.2d 644 (1966).

6. 258 S.C. 349, 353, 188 S.E.2d 846, 848 (1972). S.C. CODE ANN. § 56-1368 (Cum. Supp. 1971) provides in part:

> The grounds for revocation or suspension of a license shall be a satisfactory showing to the Board of any of the following:
>
> . . . .
>
> (2) That the holder of a license has been convicted of a felony or any other crime involving moral turpitude, drugs or gross immorality.

rehabilitation. This proceeding was instituted during the probationary period to determine if his alleged misconduct constituted adequate grounds to enforce the original revocation. Therefore, to support the finding that Gandy had violated the conditions of his probation, it was not necessary to prove statutory "gross immorality" but rather only conduct not constituting "good behavior."[7] The supreme court found that there was ample evidence to establish the charge of public drunkenness and to revoke the probation:

> The conduct of respondent—drunk, riding in his automobile with intoxicated minors, one of whom appeared to be doped, and with phenobarbital tablets, which he was not allowed to dispense, scattered on the seat and in the glove compartment—failed to comport with standards of good behavior. Such constituted ample ground for ending his probation and enforcement of his previous license revocation.[8]

III. LICENSE TO DISPENSE CONTROLLED DRUGS

The supreme court in *Suber v. South Carolina State Board of Health*[9] reviewed the Board's refusal to grant the plaintiff, a licensed podiatrist, a permit to dispense certain controlled drugs pursuant to the Controlled Substances Act.[10] This statute charges the Board with the duty of administering the requirements relative to the manufacture, distribution, and dispensing of certain controlled drugs. The plaintiff applied for a license to prescribe and dispense these controlled drugs but was granted a license for only one of the six categories, one containing primarily mild pain relievers and analgesics. The plaintiff then instituted suit and appealed to the supreme court when the lower court upheld the Board's decision.

The plaintiff contended that as a licensed podiatrist he was entitled to a permit to dispense all controlled drugs, but the Board maintained that issuance of such permits was discretionary. The question, therefore, was whether the plaintiff was entitled to a permit solely because he was a licensed podiatrist or

7. " 'Good behavior' is conduct authorized by or conformable to law." State v. Miller, 122 S.C. 468, 475, 115 S.E. 742, 745 (1923).
8. 258 S.C. 349, 357, 188 S.E.2d 846, 850 (1972).
9. 193 S.E.2d 520 (S.C. 1972).
10. S.C. CODE ANN. §§ 32-1510.21 *et seq.* (Cum. Supp. 1971).

whether the Board had the right, in the exercise of its discretion, to refuse such a permit.

By statute the practice of podiatry is limited to the diagnosis and medical and surgical treatment of local ailments of the human foot, and a podiatrist is authorized to prescribe therapeutic drugs for the relief of such ailments.[11] The Controlled Substances Act provides that "[p]ractitioners shall be registered to dispense any controlled substances . . . in Schedules II through V if they are authorized to dispense . . . under the law of this State."[12] Since the statute defines "practitioner" to include a podiatrist,[13] the plaintiff contended that the Board was required to register him to dispense all of the controlled drugs. The Controlled Substances Act, however, demonstrates a legislative intent that issuance of such a license be within the sound discretion of the Board of Health. The statute actually requires that the Board "shall register an applicant" only "if it determines that the issuance of such registration is consistent with the public interest."[14] Among the factors that must be considered in determining public interest are "[s]uch other factors as may be relevant to and consistent with the public health and safety."[15] Therefore, the supreme court affirmed the Board's decision that a medical practitioner is entitled to a permit to dispense controlled drugs *only* if the Board, in the exercise of its discretion, determines that issuance of the permit is in the public interest.

IV. ACTIONS BY ALCOHOLIC BEVERAGE CONTROL COMMISSION

The supreme court affirmed the Alcoholic Beverage Control Commission's suspension of a motel lounge owner's wine and beer permit and possession and consumption permit in *Winter v. Pratt.*[16] The Commission, which had found the plaintiff guilty of

11. *Id.* § 56-1543.1.
12. *Id.* § 32-1510.42(c).
13. *Id.* § 32-1510.27 (Supp. 1972) provides in part:

"Practitioner" means:

(1) A physician, dentist, veterinarian, *podiatrist,* scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this State. [Emphasis added.]

14. *Id.* § 32-1510.42(a) (Cum. Supp. 1971).
15. *Id.*
16. 258 S.C. 397, 189 S.E.2d 7, *appeal dismissed mem.*, 93 S. Ct. 430 (1972). *See generally* Survey of S.C. Constitutional Law *infra.*

selling liquor illegally, suspended the plaintiff's permits but offered the payment of a fine as an alternative to the suspension.[17] Appeal to the supreme court followed the lower court's affirmation of this order.

The motel lounge was licensed to sell beer, wine and set-ups but was prohibited from dispensing liquor over a certain alcoholic content in mixed drinks.[18] At the time of the violation the lounge was charging for the set-ups and ostensibly "giving" the liquor to its customers. The court held that the lounge's purported "gift" to its customers was just a subterfuge intended to evade the law.[19] Since monetary consideration passed to the lounge, the true nature of the transaction was a sale and not a gift.[20]

The plaintiff attacked the constitutionality of the statutes involved on grounds of indefiniteness and arbitrariness. The court, however, rejected these contentions, finding that the South Carolina Constitution[21] and pertinent statutes[22] provided clear warning to the plaintiff that his conduct was illegal. Also, the court felt that the language of *Pirates' Cove, Inc. v. Strom*,[23] to which the plaintiff had been a party, was sufficiently clear to

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17. S.C. CODE ANN. § 4-27.7 (Cum. Supp. 1971) provides in part: "The Alcoholic Beverage Control Commission shall impose a monetary penalty as an alternate [*sic*] to revocation or suspension in all cases where the Commission has the authority to suspend or revoke a license or permit. . . ."

18. S.C. CONST. art. 8, § 11 provides in part:

> In the exercise of the police power the General Assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State . . . . *Provided,* that no license shall be granted to sell alcoholic beverages in less quantities than one-half pint . . . .

S.C. CODE ANN. § 4-78 (1962) provides in part:

> No retail dealer shall:
> (1) Sell, offer for sale, barter, exchange, give, transfer or deliver or permit to be sold, bartered, exchanged, given, transferred or delivered any alcoholic liquors in less quantities than one-half pint . . . .

19. 48 C.J.S. *Intoxicating Liquors* § 244 (1947) states:

> In any case, where a sale or gift of liquor would be contrary to law, the courts will discountenance any trick, artifice, or subterfuge intended to evade its terms. No matter what the disguise or pretense, it is enough to sustain a conviction if liquor was actually sold or given in violation of the law . . . .

20. *See* Survey of Criminal Law and Procedure *infra.*

21. S.C. CONST. art. 8, § 11, quoted in note 18 *supra.*

22. S.C. CODE ANN. § 4-31 (1962) provides in part: "The Commission shall have sole and exclusive power to grant, issue, suspend and revoke all licenses provided for in this chapter." *Id.* § 4-91 (1962) provides in part: "It shall be unlawful for any person to . . . sell . . . any alcoholic liquors . . . except in accordance with the provisions of this chapter . . . ."

23. 249 S.C. 270, 153 S.E.2d 900 (1967).

eradicate any remaining doubts. The court said, "The very fact that liquor was dispensed in this most unusual way indicates that appellant understood the law he attempted to evade."[24] The fact that state law prohibited retailers from selling alcohol in quantities smaller than one-half pint did not of itself make the statutory scheme arbitrary or violative of the due process clause of the Federal Constitution:

> Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation . . . .
>
> The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[25]

The court also rejected the plaintiff's claims that the statutes unconstitutionally burdened interstate commerce and denied him equal protection of the law. The fact that motels in Georgia but not those in South Carolina were allowed to serve their customers mixed drinks did not, in the eyes of the court, render South Carolina's statutes an impermissible burden upon interstate commerce. Similarly, the statute authorizing railroads and airlines to sell liquor by the drink to their passengers on interstate trains and aircraft did not deny the plaintiff equal protection. In concluding, the court stated:

> Discrimination results only where like things are treated differently, or where different things are treated alike. The differences between innkeepers and common carriers are obvious. The liquor which appellant would serve to his customers has come to rest in this State. The liquor served aboard interstate trains and aircraft, and the passengers themselves, have not.[26]

In *Smith v. Pratt*[27] the Commission appealed to the supreme court from a judgment of the lower court ordering issuance of a beer and wine permit. The plaintiff had filed with the Commission for renewal of his permit, the issuance of which was protested

24. 258 S.C. at 405, 189 S.E.2d at 10 (1972).
25. Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963).
26. 258 S.C. at 408, 189 S.E.2d at 11-12 (1972).
27. 258 S.C. 504, 189 S.E.2d 301 (1972).

by nearby Epworth Children's Home. The Commission held a hearing after which it declined to renew the permit because it considered the location unsuitable for the sale of beer and wine. The lower court held that there was no competent evidence to support the finding that the location was unsuitable and the supreme court affirmed.

The language of the statute[28] concerning issuance of such a permit demonstrates that the Commission has broad discretion in determining the suitability of a location, but the court stated that "this discretion is not an unlimited one and does not authorize a determination of unsuitability which is wholly unsupported by any competent evidence."[29] The testimony that Epworth presented at the hearing concerned problems with teen-agers obtaining beer and wine at the plaintiff's store, but this evidence consisted almost entirely of generalities, opinions, and hearsay.

The fact that the plaintiff's store was located only 1000 feet from the entrance to Epworth was not in itself enough to render the location unsuitable for a beer and wine permit. The court pointed out that there were no statutory guidelines with respect to the proximity of a holder of a beer and wine permit to establishments such as churches, schools, or playgrounds (Epworth maintains all three), although there were such guidelines for retail liquor stores.[30] The court also asserted that the essence of Epworth's objection to the plaintiff's having a permit was not unsuitability of location but rather alleged illegal sales of beer to minors. While proof of such an illegal sale would constitute grounds for permit revocation, the court pointed out that a permit could not be so revoked without giving the licensee the alternative of paying a fine.[31] Because the licensee was not offered this alternative, the Commission's failure to renew his permit was an unlawful action. The court therefore affirmed the lower court's de-

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28. S.C. CODE ANN. § 4-212 (1962) provides in part:

No permit authorizing the sale of beer or wine shall be issued unless:

. . . .

(6) The location of the proposed place of business of applicant shall in the opinion of the Tax Commission be a proper one.

29. 258 S.C. at 507, 189 S.E.2d at 302 (1972).

30. S.C. CODE ANN. § 4-33.1 (1962) provides in part: "The Commission shall not grant or issue any license provided for in this chapter if the place of business is within three hundred feet of any church, school, or playground situated within a municipality . . . ."

31. *Id.* § 4-27.7 (Cum. Supp. 1971), quoted in note 17 *supra*.

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termination that the Commission's finding of unsuitability of location was without the support of any competent evidence.

Nevertheless, Justice Littlejohn, with Chief Justice Moss concurring, dissented and would have upheld the Commission's refusal to renew the beer and wine permit. They did not agree that the finding of the Commission was entirely without evidentiary support. Instead they felt that the hearsay evidence introduced by Epworth should have been considered and given probative weight because the hearing was an administrative proceeding and there was no objection to the evidence.[32]

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32. 2 AM. JUR. 2d *Administrative Law* § 382 (1962) provides in part: "Nevertheless, hearsay evidence is generally held admissible in proceedings before administrative agencies, at least for limited purposes, especially when not objected to."