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Ira K. Hearn v. Utah Liquor Control Commission : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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05 MAR 1976

IRA K. HEARN, JR.,

Petitioner,

-vs-

UTAH LIQUOR CONTROL
COMMISSION,

Respondent.

BRIGHAM YOUNG UNIVERSITY
Case No. J. Reuben Clark Law School
14269

BRIEF OF RESPONDENT

PETITION FOR REVIEW FROM THE DECISION OF
THE UTAH LIQUOR CONTROL COMMISSION

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IN THE SUPREME COURT OF THE
STATE OF UTAH

IRA K. HEARN, JR.,

Petitioner,

-vs-

UTAH LIQUOR CONTROL
COMMISSION,

Respondent.

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Case No.
14269

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Petitioner is requesting review of a public hearing held pursuant to Utah Code Ann. § 32-1-5.5(3), as amended in 1975, to determine whether there was cause to remove petitioner from the office of Director of the Utah Liquor Control Commission; and of a decision made by the Utah Liquor Control Commission pursuant thereto.

DISPOSITION BY THE UTAH LIQUOR CONTROL
COMMISSION

The hearing was held before the Utah Liquor Control Commission on August 22, 1975. On September 3, 1975, the Commission issued an order removing petitioner from the office of Director of the Utah Liquor Control Commission, effective immediately.

RELIEF SOUGHT ON REVIEW

Respondent requests that the decision of the Utah Liquor Control Commission be affirmed.

STATEMENT OF FACTS

Petitioner assumed the position of Director of the Utah Liquor Control Commission on January 2, 1975, after being approached by the Governor about the position on December 19, 1974 (Hearing Transcript-18) and officially approved by the Commissioners shortly thereafter (HT-17). He was serving in that position on Thursday, August 14, 1975, when he was called to the office of the Commission (HT-25).

At that time, he was handed a letter which gave him notice of a hearing to be held eight days later, on August 22, 1975, to determine whether or not he should remain as Director of the Commission. The notice explained the "cause," an inefficient working relationship, in this manner:

"It is the opinion of the Commission that difficulties have arisen over the last six months between the Director of the Utah Liquor Control Commission and the Commission members. It is the Commission's opinion that these difficulties prevent us from working amicably and cohesively with you as Director of the Utah Liquor Control Commission. Because of this, we feel that the Commission's business is not being carried out in a co-operative manner nor with a singleness of purpose." [Commissioner's Certification of Documents, hereinafter Com. Cert., Paragraph 4, No. 1.]

Five days later, in a prompt response to an August 19 letter from petitioner's counsel (Com. Cert., Para. 6, No. 3), the Commission explained that the "difficulties" amount to:

" . . . a general deterioration of communication and direction between the Commission and Director which leaves

the Commission with no confidence
in the Director."

And, with respect to the request for more time, the Commission expressed their feeling that, due to the non-adversary nature of the forthcoming hearing, the time allowed was adequate.

A public hearing was held on Friday, August 22, 1975, at 9:00 a.m. Mr. Robert Thurman moderated the hearing. Present were: the Commissioners, Mr. Hulbert, Mr. Corkey, and Mr. Durbano, and their attorney, William W. Barrett, Assistant Attorney General; Director Hearn and his counsel, Robert B. Hansen, Deputy Attorney General; a certified shorthand reporter; and a number of concerned citizens. The three commissioners, in turn, explained the reason ("cause") for the action being considered, and offered specific examples. Due to the nature of the issue being considered, no cross-examination of these statements or any subsequent statement was allowed. Director Hearn offered a statement by and through his counsel's examination. Thereafter, members of the public offered opinion

and discussion of the specific examples into the record, some through pre-arranged questioning by Mr. Hansen.

On September 3, 1975, the Utah Liquor Control Commission made 13 findings based on the record and ordered petitioner's dismissal, effective immediately. The vote was a 2-0 majority, with Chairman Hulbert abstaining.

Mr. Hearn has petitioned this Court for a review as to whether a "cause" for removal was established within the spirit of Utah Code Ann. § 32-1-5.5 (Supp. 1975) and whether the hearing was fair and reasonable with respect to his statutory and constitutional rights.

ARGUMENT

POINT I

A. THE CHARGE MADE AGAINST PETITIONER DID CONSTITUTE "CAUSE" FOR REMOVAL FROM THE OFFICE OF DIRECTOR OF THE UTAH LIQUOR CONTROL COMMISSION.

It is respondent's position that, when the specific nature of the office is taken into account, the inability to perform within an efficient working

relationship constitutes "cause" for removal from the directorship of the Utah Liquor Control Commission within the intended meaning of Utah Code Ann. § 32-1-5.5, as amended in 1975.

Where a public officer may only be removed from office for "cause," and no standards are provided, what constitutes such "cause" is determined by reference to the character of the office in question. As petitioner asserts, Taylor v. Lee, 119 Utah 302, 226 P.2d 531 (1951), (hereinafter cited as Taylor v. Lee or Taylor) provides Utah's most cogent guidelines for defining "cause." (See petitioner's brief, page 8.) The Court there noted:

"Removing for cause" infers that the office-holder has failed to perform his duties or was incompetent or unsuitable for the position to which he was appointed and directly reflects upon his official or personal qualifications." 119 Utah 317-317.

Out of necessity, this standard is a general one which must be applied to the office in question on a case by case basis. Those who apply it should characterize the office and its requisite duties to determine what would constitute

cause for removal from that office with respect to the above-stated guidelines. Then the specific circumstances should be tested against those general determinations.

For example, in Taylor v. Lee, Taylor was a member of the Commission of Finance, who was serving the public directly and was responsible to the public. Further, as the Court carefully noted, his appointment was for a definite term of years (119 Utah at 311). Because of these comparatively independent characteristics of the office, the Court was compelled to make a factual determination as to whether Taylor had failed to perform his duty, was incompetent, or was unsuitable for the position--any one of which would constitute "cause" for removal. The Court centered its analysis upon factual evidence which was claimed to have shown incompetence and inefficiency. (119 Utah 321, et seq.)

The situation in the case at bar is to be distinguished from that in Taylor. Here we have a public official whose primary responsibility, in fact, is to the commissioners who are, in turn, responsible to the

public. See Utah Code Ann. §§ 32-1-4; 32-1-5.5(1), (2), (4); 32-1-6(a), (m), (n), (o) (Supp. 1975). The director of the liquor commission receives his statutory directive from Utah Code Ann. § 32-1-5.5 (Supp. 1975):

"(1) * * * The director shall be the executive and administrative head of the liquor control commission and shall carry out the policy of the commission. * * * He * * * shall possess such other qualifications as may be prescribed by the commission.

(2) The director is accountable to the liquor control commission for the faithful performance of his duties and for carrying out the commission's policies.

(3) * * *

(4) Subject to the powers and responsibilities delegated to the commission by this act, the director shall:

(a) * * *

(b) Within the general guidelines, policies, and procedures approved by the commission, provide day-to-day direction, co-ordination and delegation of responsibilities in the administrative activities of the commission.

* * *

(g) Perform such other duties as may be prescribed by law * * * and assist the commission in the proper discharge of its duties and responsibilities." (Emphasis added.)

Thus, the key to the director's performance is statutorily couched in his day-to-day working relationship with the commission. With respect to his interest in the office, the director is in a position analogous to that of a cabinet official. Uniquely, he is not appointed for a term of years; nor is he protected by state "merit worker" statutes. Rather, he serves in a position which has an uncertain duration and, by design, has only a hearing on "cause" to assure him that, if and when he is eventually removed, it will not be for political or trifling reasons.

Presumably, the position was provided for because of the public's interest in a smooth-running, efficient government. Therefor, the director is to advise other public officials and to implement the policies they make. By statutory design, this position has no natural end; he will serve until he is removed for "cause" or chooses to resign. This situation is vastly different from the one in the Taylor case. In this case, the same public interest in a smooth-running, efficient government must allow for removal of this office-holder when those to whom he is

responsible decide that " * * * business is not being carried out in a cooperative manner nor with a singleness of purpose" (Com. Cert., para. 4, No. 1) and are left " * * * with no confidence in the Director." (Com. Cert., para. 6, No. 3.)

Governor Rampton, in his January 20, 1975, letter to Chairman Hulbert, suggesting structural guidelines, very aptly warned that, " * * * the most ideal structure cannot yield good management where there is not cooperation and good feeling between those responsible for the implementation of the program."

(Supp. Certification of Petitioner, Para. 2.) Certainly, a determination of "cause" for removal of the director must take into account the unique character of the office and this need for cohesion. As expressed in their notice letter to the director (Com. Cert., para. 4, No. 1), the commissioners were of the opinion that the petitioner's attitude and conduct violated the mandate of the section of the Liquor Control Act quoted above. It was far from a secret that the

petitioner disagreed conceptually in management philosophy with the commissioners. (See HT-20,23, 39,40,41,42.) In fact, in petitioner's brief (p. 15-16), it is proudly proclaimed that:

"His opinion that three full time Commissioners were neither necessary nor desirable for the formulation of policy and tended to provoke conflict and controversy in day-to-day administration was sound, qualified and in the best interests of sound public administration of the agency."

The respondents, like the Governor, feel that sound public administration of the agency is couched in cohesion and cooperation, not conflict and controversy. In August, 1975, they decided that the petitioner's convictions had influenced his behavior, and had affected their working relationship, which the legislators had made so vital to his position. They were responsible to the public for his work as well as their own. The commissioners decided that it was in the public's best interest to consider removal for cause.

Analysis injects these factors into the "unsuitable for the position" standard on "cause" set forth above. A director who is unable to serve the commission "amicably and cohesively" may not be suitable for the job. This situation constitutes a "cause" for removal from office upon which a public hearing before the commissioners should be held.

Thus, it has been shown that the Utah Liquor Control Commission did state a viable and valid "cause" for removal when, in their notice to petitioner, they explained that "* * * difficulties prevent us from working amicably and cohesively with you * * * [and that] [b]ecause of this, we feel that the Commission's business is not being carried out in a cooperative manner nor with a singleness of purpose."

B. THE COMMISSION DID NOT ACT ARBITRARILY, CAPRICIOUSLY, OR UNREASONABLY IN DISMISSING PETITIONER.

Utah Code Ann. § 32-1-32.6 (1953), the statute upon which petitioner's standing for review is based, directs that the issue under review shall extend no further than to determine whether the Commission "regularly pursued its authority." In deciding this issue:

" * * * The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and findings and conclusions of the commission on reasonableness and discretion." Utah Code Ann. § 32-1-32.6 (1953).

Similarly, the Court in Taylor ruled that judicial review of the question of cause should test only for arbitrariness. In the Taylor case, Justice Latimer explained:

"We believe the best rule to be that if there is any evidence of a legal and substantial basis reasonably tending to support the Governor's findings, then he has not been arbitrary and his decision should be affirmed." Id. at 320.

Thus, if a valid cause has been stated, the Court may only check to see that the decision upon the hearing on that cause was not arbitrary. The statute cited above makes this especially true where a matter of discretion is being reviewed.

The petition for review at hand represents such a case. The "cause" before the commission--unsuitability for the position--was one which was necessarily couched in personal feelings and opinions concerning the liquor commission and the working relationship between the commissioners and the director. The decision to be made had to be discretionary in nature, not factual.

Petitioner's own testimony provided enough evidence to justify the Commission in their discretionary conclusion that their "cause" for removing the director had been substantiated. To begin with, his testimony is peppered with references to infighting about the basic philosophies of managing the commission. (See especially HT-33,34,39,40,41,42.)

This difficulty went beyond a mere difference in political belief. It went to the heart of the relationship between the director and the commission and appears to have created a wall between them. Further, petitioner's reference (at HT-32) to "at least 20 recommendations or studies or proposals to the Commission" to which he received only one response indicates a lack of concerted action within the commission, another part of the "cause" for removal. Finally, the Commission's findings upon the record bring out examples, which when accumulated, make evident the continuing effect of the philosophical/relationship difficulties. There, the commission noted specific resultant behavior by petitioner which was outside his role of advisor and implementor of Commission policy. Those acts need not be recounted here, since they are clearly set forth in the findings.

Respondent asserts that the Utah Liquor Control Commission found substantial evidence in the hearing record that there was cause for Director Hearn's

dismissal. Further, respondent contends that the Commission did not act arbitrarily or capriciously or without reason in using its discretion and authority to order said dismissal.

POINT II

PETITIONER WAS OFFERED A FULL AND FAIR OPPORTUNITY TO MEET THE CHARGES, PRESENT HIS DEFENSE AND PRESERVE HIS RECORD FOR APPEAL.

Utah law provides that the Director of the Utah Liquor Control Commission may only be removed from office after a public hearing, Utah Code Ann. § 32-1-5.5(3) (Supp. 1975). The Code does not provide procedural guidelines for the hearing, however. Petitioner argues that the August 22, 1975, hearing did not satisfy the "minimum requirements" for such a hearing, citing Taylor v. Lee, supra, and some cases from other jurisdictions. These "minimum requirements" are based upon the constitutional protections of due process of law. It is respondent's position that, when analyzed with reference to the

spirit of the due process concept, the hearing in question was adequate and fair with respect to petitioner's interests, and thereby satisfied the minimum requirements of procedural due process.

It is basic to the concept of procedural due process that the type of procedural safeguards required depends on the issue being considered.

In one recent case it was held that:

"Unlike some legal rules, due process is protean in nature. The determination of what process is due depends on appropriate accommodation of the competing interests involved."

Chung v. Park, 514 F.2d 382, 386 (3d Cir. 1975), citing Goss v. Lopez, ___ U.S. ___, 42 L.Ed.2d 725 (1975), and Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 6 L.Ed.2d 1230 (1961). See also Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313, 94 L.Ed. 865 (1950); and Frost v. Weinberger, 515 F.2d 57, 66 (2d Cir. 1975), where it was noted that:

"[t]he [U]nited States Supreme [C]ourt's decisions can be fairly summarized as holding that the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it."

Article I, Section 7 of the Utah Constitution assures Utahns of the right to due process. As mentioned earlier, the Utah Code Annotated assures the commission's director a hearing before removal for cause. Taylor v. Lee, Utah's principle expression on the procedure for removal of an office-holder for cause, speaks in due process terms (see 119 Utah 315-317). Specifically, the hearing's purpose is to assure the office-holder that he may be deprived of his office only for cause-- "and not for political or trifling reasons." 119 Utah 316. Recognizing that, in Utah, there is no property right in holding a public office (see 119 Utah 316), the Court noted that there are individual rights

attached to an office which must be protected by a public hearing. Thereby, the office-holder would be given a reasonable opportunity to present his side.

Pursuant to the above principles, the Court stated:

" * * * that the minimum requirements are these: (1) A written notice of the nature of the charges couched in ordinary and understandable language; (2) a notice of the time and place of hearing; (3) an opportunity by the office-holder to be heard and answer the charges; (4) the right to be represented by counsel, with opportunity for cross-examination; and (5) the presence of a reporter to preserve the testimony so that, if necessary, the question of cause can be made the subject of judicial review."

The Court immediately added:

"While these requirements would appear to require a full dress hearing, the proceedings can and should be administratively conducted." Taylor v. Lee, 119 Utah 302, 316, 226 P.2d 531 (1951).

When applying these requirements to different situations one must be sure to apply with them the

principle of protean due process. While circumstances in many cases will be so similar that the noted guidelines will be followed without variance, some will be different to such a degree that the requirements may be molded to fit the different situation and still provide the essence of the protection. This is especially true in an administratively conducted hearing. In Taylor, the Court expressed the essence of its holding when it propounded that the real issue was whether " * * * plaintiff was offered a full and fair opportunity to meet the charges, present his defense and preserve his record for appeal. . . ." (119 Utah 318.) With these concepts in mind, it may be projected that the due process test of such hearing procedure is whether it was (1) fair, and (2) reasonable under the circumstances.

As explained above, it is evident that the case at bar is very different from that in Taylor v. Lee. Petitioner was serving an indefinite term in office, implying even less of an interest in the

office than Taylor could claim. He held a cabinet-type position with respect to the commission--which made him directly responsible to them, rather than the public. Further, Mr. Hearn had a day-to-day working relationship with the commission. It is these differences, plus the discretionary nature of the "cause" at issue, which combined to allow some remolding of the "minimum requirements" listed in Taylor without taking away from the essence of the ruling.

Petitioner, on August 14, 1975, was given written notice of the nature of the charges. Looking to the circumstances, respondent asserts, the letter from the Commissioners fairly stated the "cause" (as argued at length above), and were reasonable in their expectation that the petitioner, with whom they worked every day, would understand its nature. Moreover, if there was any doubt in the petitioner's mind, respondents' August 19, 1975 (Com. Cert., para. 5, No.2) response to a request for specificity made clear the general, non-factual character of the problem.

As for notice of the time and place of the hearing to be held, petitioner claims no error. Both were clearly set forth in the notice letter (Com. Cert., para. 4, No. 1).

The third of the "minimum requirements" to be afforded the office-holder is an opportunity to be heard and answer the charges. Petitioner was given eight days' notice of the "cause" to be at issue in the hearing. Considering the discretionary nature of the "cause" and consequent non-adversary character of the hearing (there would be no need to prepare a defense to factual issues), eight days was sufficient. Respondents voiced this conviction in their answer to an untimely request--after five of the eight days--by petitioner's counsel for a delay (see Com. Cert., para. 6, No. 3). In this case, petitioner needed only to prepare his side in a way calculated to convince the commission that their lack of confidence was unjustified or would be repaired. At the hearing, after the commissioners explained the cause to the public, petitioner was given a fair opportunity to

respond to the charges; and took advantage of it. He was even allowed to call upon certain members of the public to express their views. This opportunity to be heard was more than adequate, and certainly fair and reasonable under the circumstances.

Petitioner makes no claims that he was not adequately represented by counsel. But he does claim that the denial of cross-examination of those who offered personal opinions into the record constituted a denial of procedural due process. Respondent contends that, under the circumstances, this procedure was not due to petitioner and, further, that cross-examination would have been meaningless had it been allowed. The "cause" was an issue for discretion, not factual determination. Cross-examination is a tool used in trials and trial-like adjudications to bring out the truth. In considering a discretionary decision, it is opinions and ideas which are of primary interest to the examiners, not factual truth. In this hearing, cross-

examination would not have aided petitioner. As shown in the previous paragraph, petitioner was given a fair opportunity to present his side. Cross-examination would not have made it more fair. The denial was reasonable under the circumstances and fair to both sides.

Petitioner does not claim error with respect to the record of the hearing.

CONCLUSION

Pursuant to Utah Code Ann. § 32-1-5.5 (Supp. 1975), and the applicable requirements of due process with respect to hearings, the Utah Liquor Control Commission held a hearing on a valid "cause" for removal of their director, found substantial information in the record of the hearing to support that cause, gave the director a full and fair opportunity to meet the charges, present his defense and preserve his record for this appeal, and, therefore, validly dismissed petitioner from the position he had held.

Respondent respectfully urges that their
decision dismissing petitioner be affirmed.

Respectfully submitted,

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