

1980

# Club Stanyon Street, A Utah Non-Profit Membership Corporation v. Utah Liquor Control Commission : Brief of Respondent In Support of Respondent's Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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CLUB STANYON STREET, a Utah :  
non-profit membership :  
corporation, :

Petitioner, :

-v-

Case No. 16304

UTAH LIQUOR CONTROL :  
COMMISSION, :

Respondent.

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BRIEF OF RESPONDENT IN SUPPORT OF  
RESPONDENT'S PETITION FOR REHEARING

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BRIEF OF RESPONDENT IN SUPPORT OF  
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STATEMENT OF THE NATURE OF THE CASE

Petitioner in this matter, a private liquor club, asked the Supreme Court to review a Utah Liquor Control Commission Order suspending the club's liquor license for one week. After a hearing on June 18, 1980, before the Supreme Court, this court vacated the Commission's Order, as contained in its opinion, No. 16384, filed July 16, 1980, (corrected copy.)

RELIEF SOUGHT

Respondent Utah Liquor Control Commission seeks a rehearing of this matter before the Utah Supreme Court.

STATEMENT OF FACTS

This matter was set before the Court on June 18, 1980. On June 9, 1980, counsel for petitioner requested oral argument. Counsel also requested and received from respondent a stipulation to continue the hearing from June 18, 1980, to sometime after June 23, 1980, because counsel for petitioner would be out of the state and not available to argue the case, but did desire to have oral argument on this matter.

Without further notice of any kind to respondent, the petitioner club was represented in oral argument before the Court on June 18, 1980, and in that argument, petitioner presented for the Court's consideration an issue not addressed in petitioner's brief on appeal which was supported with new authority not cited in its brief.

The main issue raised in petitioner's argument before the Court on June 18, 1980, was the content of alcohol or proof of liquor in the drinks served to the law enforcement agent. In addition, the main authority relied on in petitioner's argument was the recent case of DeFusion Company v. Utah Liquor Control Commission, No. 16368, filed June 10, 1980. In the opinion of this Court, No. 16384, dated July 16, 1980, (corrected copy) it is clear that this Court considered the new issue and

new authority as controlling in the matter before the Court:

The situation here is similar to that in a recent case of DeFusion Company v. Utah Liquor Control Commission, No. 16368, filed June 10, 1980. Sparing repetition we refer to that decision as applicable here.

Without notice of any kind, counsel for respondent Commission was unable to present any oral argument whatsoever on the issues raised in the brief, and was unable to meet the issue on the alcohol content of the drink addressed for the first time in oral argument. Further, counsel was surprised by new authority relied on by counsel for petitioner without any chance to have the Court consider the respondent's views on the case.

As a result of counsel for petitioner neglecting to advise that petitioner would be represented on June 18, 1980, that he intended to address an additional issue not addressed in petitioner's brief, and that he further intended to rely on additional new authority not cited in the brief, petitioner was given undue advantage and respondent has been unduly prejudiced by a surprise and by the inability to have this Court consider any argument contrary to petitioner's case.

Respondent now respectfully asks this Court to grant a rehearing to consider respondent's case and to

allow its response to the issue and authority raised for the first time at oral argument.

ARGUMENT  
POINT I

COUNSEL'S FAILURE TO ADVISE RESPONDENT THAT THE HEARING WOULD GO FORWARD WITH ORAL ARGUMENT UNDULY PREJUDICED RESPONDENT'S CASE.

Respondent was entitled to rely on petitioner's counsel's representations that he would be out of the state and unavailable for oral argument and that the hearing would probably be continued. While it is realized that the stipulation is not binding on the court, the practice is to grant a continuance where there is a legitimate reason and an agreement by counsel for that continuance. Thus, where no continuance was granted, petitioner's counsel should have informed respondent that the hearing would go forward with oral argument in addition to the briefs which had been submitted.

At oral argument on June 18, 1980, petitioner's club was represented by counsel. While petitioner's counsel in fact made arrangements for representation of petitioner before the court, he neglected to give notice that the matter would be heard before the court thus resulting in the absence of respondent's counsel.

During the oral argument petitioner through its counsel raised the issue of the alcoholic content of the drinks and argued that there was not sufficient basis for the Commission's finding of alcohol content. The issue of alcoholic content in the drinks was not raised or addressed in petitioner's brief and therefore arose for the first time as a new issue in oral argument. Respondent has thus been surprised and prejudiced without opportunity to respond to the issue of proof of alcoholic content of the drinks.

In addition, in support of its argument on the alcoholic content, petitioner relied on the recent case of DeFusion Company v. Utah Liquor Control Commission, No. 16368, filed June 10, 1980. The case was not cited in petitioner's brief and no notice was ever given to respondent that petitioner club intended to rely on the case. Yet it is clear that petitioner relied on that particular case to support its argument on alcoholic content of the drinks and that the court considered the DeFusion case controlling. "Sparing repetition we refer to that decision as applicable here." Thus, it is clear that the respondent has been surprised and prejudiced by the introduction of a new case and authority with no opportunity to distinguish or explain that case to the court.

The Supreme Court has invariably refused to consider matters raised for the first time on appeal. In this case not only was the matter and authority raised for the first time on appeal, but it was raised only at oral argument, in respondent's absence and without notice. Surely due process of law allows respondent some opportunity to address the issue and respond to the arguments which are advanced by the petitioner. It is difficult to make a fully considered decision on only one side of the issue, and respondent should be allowed to have its side of the issue heard.

#### POINT II

THE RECORD CLEARLY SUPPORTS THE COMMISSION'S ORDER AND DEMONSTRATES ADEQUATE PROOF OF ALCOHOLIC CONTENTS OF THE DRINKS.

Even though the issue and authority were raised only at oral argument and not in petitioner's brief, it is clear that the court's opinion centers around proof of alcoholic content of the drinks sold to the enforcement agent:

Without any proper foundation or proof as to their alcoholic content, the samples of drinks which he had taken were received as evidence.

\* \* \*

The situation here is similar to that in our recent case of DeFusion Company v. Utah Liquor Control Commission filed June 10, 1980. Sparing repetition we refer to that decision as applicable here.

It is our conclusion that the record does not justify the order of the Commission suspending the plaintiff's license. It is therefore vacated. Club Stanyon Street v. Utah Liquor Control Commission, filed June 16, 1980. No. 16384.

In the foregoing DeFusion Company case the clear question was whether there was "... a purchase from the state liquor store at the club of an alcoholic beverage." In other words, there must be evidence that a "drink is an alcoholic beverage as defined in the act." In effect the DeFusion Company case requires more evidence than simply a name alone. In our case, (Stanyon Street) the court's opinion concludes that "the record does not justify the order of the Commission suspending the plaintiff's license."

Respondent submits that the Court erred and that there is in fact adequate proof of support of the Commission's decision. The testimony, as revealed in the record, was that at least on two occasions the enforcement agent ordered an alcoholic beverage by the name of "vodka collins." He was served that drink and he paid the price for that drink.

(Transcript of Hearing pp. 23-24.) In addition, the officer testified that the samples had been analyzed and the reports relating to that analysis were submitted and received by the hearing officer. There never were any samples offered or received into evidence. In the context of ordering and paying for and drinking a "vodka collins" from a state store in a licensed private club the facts clearly support the Commission's finding and order. The Commission is not held to a standard of "beyond a reasonable doubt" in a hearing to determine whether to suspend or remove a state store, and the evidence, uncontroverted, is sufficient.

On the evidence, the Commission found as follows:

5. Narcotic and liquor law enforcement agent William Lang utilized the facilities of the Club Stanyon Street, and ordered a vodka/collins and paid \$1.50. Even without the evidence, the fact that the agent ordered an alcoholic beverage and the licensee charged the agent for an alcoholic beverage convinces the Commission that the beverage contained alcohol.

6. Sample of the alcoholic beverage purchased November 14, 1978, was obtained.

7. Utah State Division of Health toxicology service report is attached and was presented as evidence. Said report states that the sample contained alcohol.

8. Narcotic and liquor law enforcement agent William Lang utilized the facilities of Club Stanyon Street and purchased alcohol from the state store within said organization on November 22, 1978.

\* \* \*

10. A sample of the drink purchased November 22, 1978, was obtained. Toxicology report indicated drink contained alcohol.

The law is clear that findings of facts by the Commission are conclusive and binding in a review of the matter by the Supreme Court:

The findings and conclusions of the Commission on questions on fact shall be final and shall not be subject to review. Section 32-1-32.6, Utah Code Annotated.

If the court has determined that the action by the Commission is arbitrary or capricious then the court should say so in its opinion. If the action is not arbitrary or capricious then the court should uphold the Commission's decision. Moreover, the Commission in finding No. 8 found facts showing a violation of the Commission's regulations, but the opinion is silent on this point.

In summary of Point I, the Court erred in two important ways regarding the Commission's order. First, the Court disregarded the law requiring the court to

recognize the Commission's findings of facts as conclusive. Second, the court erred when it cited a lack of foundation for samples which were never offered or received and are not at issue. Respondent submits that the order of the Commission is not arbitrary or capricious and should be upheld.

### POINT III

THE COURT MUST UPHOLD THE COMMISSION'S ORDER UNLESS THE ORDER IS CLEARLY ARBITRARY OR CAPRICIOUS.

The law in Utah is clear that this Court will uphold an order of the Liquor Control Commission unless it is arbitrary or capricious or beyond authority of the Commission. Pride Club v. Hulbert, 509 P.2d 819(1973).

In the Stanyon Street case the court's opinion continues:

The Commission as an administrative body may be justified in taking the position that it is not necessarily bound to adhere to the technical rules of evidence and procedure as applied in the courts. Nevertheless, wherein it is performing a duty of a judicial nature in which the findings of fact and the adjudication of important rights is involved, care should be taken that the procedures should comport with the procedures of fairness and due process. Club Stanyon Street v. Utah Liquor Control Commission, No. 16384, filed July 16, 1980.

It must be pointed out that it is not the Commission which "takes a position that the rules of evidence need not

be adhered to" rather the authority and responsibility is given directly to the Commission by the Legislature to adopt rules of practice and procedure for hearings wherein "technical rules of evidence need not be applied in the conduct of such hearings before the Commission...." Section 32-1-32.2(d), Utah Code Annotated. Thus, not adhering to the technical rules should not be cause for vacating the order of the Commission.

Moreover, the court refers to "adjudication of important rights" in this case. But the legislature has clearly spoken its intent regarding state outlets for the sale of liquor. A state store is defined as an outlet for the sale or lease of liquor located on premises owned or leased by the State of Utah. Section 32-1-3, Utah Code Annotated. Further,

no vendor or any other person shall be deemed to have a pecuniary interest in the establishment of or the continuation of any state store in any restaurant, social club or association licensed under the provision of Chapter 6, Title 16. Section 32-1-32.2(f), Utah Code Annotated.

Thus, the petitioner does not have an "important right" to a state store, and if the Commission then decides to suspend the state store, as was done in this case:

no appeal may be taken, writ issued or any review proceeding undertaken by the Supreme Court or any other court of any

action taken by the Commission to suspend or remove a state store from the premises of any restaurant, social club or association licensed under the provisions of Chapter 6, Title 16. Section 32-1-32.6, Utah Code Annotated.

Thus, the Legislature has determined that the Commission has sole right and authority to control outlets for the sale of liquor, and there is no right or authority which vests in a club simply because they are granted a privilege of operating a state store on their premises. The law is clear in this regard. The law is presumed to be correct, it has not been challenged, and it should be followed.

In the event that an act of the Commission should be found to be arbitrary or capricious, or beyond its authority, the court might be justified in reversing that act or vacating the order of the Commission. However, in that event, the court's opinion should clearly state the reasons why it finds the acts to be arbitrary or capricious. No such finding appears in this case.

#### SUMMARY

Respondent Commission has been prejudiced without any opportunity to argue its side of this matter to the Court. Moreover, respondent has been surprised to its detriment by the petitioners relying on a new issue and new authority not addressed in its brief. Without

any opportunity to argue or respond to that issue and authority, respondent is precluded from the protection of due process and fairness of law.

Moreover, the opinion of July 16, 1980, (corrected copy) indicates that there is not adequate support in the record for the Commission's decision. It is submitted that in point of fact there is adequate support in the record and that the findings of the Commission regarding those facts are conclusive and must be recognized by the Court.

Further, the Commission by law has exclusive authority to determine the operation of its own state stores. A private club gains no rights or interests in a state store and the law admits no review of a decision to suspend liquor sales through a state store.

Thus, in fairness to the respondent there should be an opportunity provided to hear and consider its side of the case and to correct the deficiencies in the opinion of July 16, 1980. Respondent therefore respectfully requests that this court grant a rehearing of the matter.

RESPECTFULLY SUBMITTED,

ROBERT B. HANSEN  
Attorney General

JOHN S. McALLISTER  
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing brief, postage prepaid, to:  
G. Blaine Davis, Attorney for Petitioner, 261 East Third South, Salt Lake City, Utah, 84111, on this the 5th day of August, 1980.

  
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