

## CONTROL OVER ULTRA VIRES ACTIVITY OF LIQUOR BOARD

*Pompei Winery, Inc. v. Board of Liquor Control*  
167 Ohio St. 61, 146 N.E. 2d 430 (1957)

Appellant, Pompei Winery, Inc., sold wine at prices below the minimum wholesale markings of 16% established by respondent, Board of Liquor Control. The Board suspended appellant's permits to sell bottled wine at wholesale pursuant to section 1, article VII of its own regulation 3. This regulation, to the effect that:

There will be added to the "minimum base cost" [set out previously in the regulation] of wine a wholesaler's markup of 20% (twenty per cent) of the minimum base cost; which price will be deemed the "minimum wholesale price" . . . was promulgated under authority of section 4301.13 of the Ohio Revised Code which is as follows:

The board [of liquor control] may determine and fix the minimum markups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both.

The Court of Common Pleas, the Court of Appeals, and the Ohio Supreme Court affirmed the order of the Board.

Administrative action of the type here challenged must not amount to an unconstitutional exercise of legislative authority,<sup>1</sup> and it must not be ultra vires the delegated rule-making authority.<sup>2</sup> The first requirement is easily met. The absence of any substantive property protection from due process and the unlimited authority accorded the states under the Twenty-First Amendment<sup>3</sup> combine to sustain nearly any breadth of delegation which a legislature sees fit to make.<sup>4</sup> Thus in *Blackman v. Board of Liquor Control*,<sup>5</sup> the statute here in question was held consti-

---

<sup>1</sup> OHIO CONST., Art. II, §1.

<sup>2</sup> *Schwartz v. Kelly*, 140 Conn. 176, 99 A.2d 89 (1953); *City of Baton Rouge v. Rebowe*, 226 La. 186, 75 So.2d 239 (1954); *Stouffer v. Board of Liquor Control*, 165 Ohio St. 96, 133 N.E.2d 325 (1956); and *State ex rel. Zugrou v. O'Brien*, 130 Ohio St. 23, 196 N.E. 664 (1935).

<sup>3</sup> *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1935); *Beckenstin v. Liquor Control Commission*, 140 Conn. 185, 99 A.2d 119 (1953); *Dundalk Liquor Co. v. Tawes*, 201 Md. 58, 92 A.2d 560 (1953); and *State v. Davis*, 132 Ohio St. 308, 7 N.E.2d 652 (1937).

<sup>4</sup> *Gipson v. Morley*, 217 Ark. 560, 233 S.W.2d (1950); *Reeves v. Simons*, 289 Ky. 793, 169 S.W.2d 149 (1942); *Dundalk Liquor Co. v. Tawes*, *supra* note 3; *Supreme Malt Products Co. v. Alcoholic Beverages Control Commission*, 334 Mass. 59, 133 N.E.2d 775 (1956); *Butler Oak Tavern v. Division of Alcoholic Beverage Control*, 20 N.J. 373, 120 A.2d 24 (1956); and *Nocera Bros. Liquor Mart, Inc. v. Liquor Control Hearing Board*, 81 R.I. 186, 100 A.2d 652 (1953).

<sup>5</sup> 95 Ohio App. 177, 113 N.E.2d 893 (1952).

tutional on the ground that a license to deal in alcoholic beverages is a mere privilege, and as such is not subject to the usual constitutional checks.

The question as to whether the Board of Liquor Control had acted *ultra vires* its delegated authority, however, is a more difficult issue, leading to one dissent. There can be no doubt that the Board took into consideration factors other than those relating to fair trading in fixing the minimum wholesale prices for wine. The preamble to the regulation establishing the percentage for the minimum markup declares the policy to be:

. . . to advance the social control of an alcoholic beverage . . .  
to stabilize the sale and distribution of bottled wine in Ohio  
. . . to eliminate practices in the sale and distribution of wine  
in Ohio which cause intemperance and improper usage of  
bottled wine.

Furthermore, the Board's own witness testified that a twelve percent markup would have been sufficient had only fair-trade factors been considered, whereas the markup actually fixed was sixteen percent.<sup>6</sup> It is debatable whether the Ohio legislature intended to grant the Board authority to take into consideration such social factors as temperance in view of the fact that the title of the bill, which later became Ohio Revised Code section 4301.13, stated that the act was:

To provide for the sale of bottled wine under fair trade regulations and for that purpose to authorize the Board of Liquor Control to adopt such regulations. . . .

The majority sustained the Board's action by implying that the purpose of the Act was to ". . . absolutely control the liquor industry in Ohio as a matter of social and public policy." (Emphasis is that of the court.) The relevant case authority tends to uphold the implication of social objectives where the control of alcoholic beverages is involved.<sup>7</sup> In the absence of conflict between administrative action and legislative directive, the former will stand as not inconsistent with the latter. The Ohio case of *Goady v. Leonard*,<sup>8</sup> is illustrative. There, the Board of Liquor Control prohibited establishments selling alcoholic beverages from advertising such commodities by means of outside signs on the premises. The statute<sup>9</sup> under which the Board purported to act authorized the Board to make uniform regulations governing all advertising of

<sup>6</sup> The question of whether or not the Board acted arbitrarily in establishing a minimum lower than the minimum set forth in its own regulation was not raised by the plaintiff.

<sup>7</sup> *Schwartz v. Kelly*, *supra* note 2; *Mayor v. Savannah Distributing Co.*, 202 Ga. 559, 43 S.E.2d 704 (1947); *Reeves v. Simons*, *supra* note 4; *Zangerle v. Evatt*, 139 Ohio St. 563, 41 N.E.2d 369 (1942); *State ex rel. Zugrou v. O'Brien*, *supra* note 2; *Blackman v. Board of Liquor Control*, *supra* note 5; *Nocera Bros. Liquor Mart, Inc. v. Liquor Control Hearing Board*, *supra* note 4.

<sup>8</sup> 132 Ohio St. 329, 7 N.E.2d 649 (1937).

<sup>9</sup> OHIO REV. CODE §4301.03.

alcoholic beverages throughout the state. The court read this statute in *pari materia* with another statute<sup>10</sup> which prohibited wholesalers and manufacturers from making gifts or providing aid to retailers of alcoholic beverages. The court held that the regulation in question was a reasonable attempt by the Board to prevent wholesalers and manufacturers from evading the statute on gifts and aid to retailers, and therefore was in furtherance of the policy of the legislature as expressed in the statutes.

Most courts, however, instead of finding a definite purpose which the legislature was attempting to accomplish will, at least where alcoholic beverages are involved, generalize to the effect that the administrative agency is bound to "act according to law"<sup>11</sup> or that the regulation must be "reasonable,"<sup>12</sup> then proceed to find that the administrative regulation in question is reasonable or lawful. A supporting line of reasoning is that the understanding of the administrative agency as an expert body is entitled to some judicial deference.<sup>13</sup> If, though, the contradiction between the administrative regulation and the statute under which it was promulgated is patent, the courts will hold the regulation invalid as being *ultra vires*.<sup>14</sup>

*Lloyd Moore*

---

<sup>10</sup> OHIO REV. CODE §4301.24.

<sup>11</sup> *Stouffer v. Board of Liquor Control*, *supra* note 2.

<sup>12</sup> *Gainé v. Burnett*, 122 N.J.L. 39, 4 A.2d 37 (1939); *Blackman v. Board of Liquor Control*, *supra* note 5; *Nocera Bros. Liquor Mart, Inc. v. Liquor Control Hearing Board*, *supra* note 4.

<sup>13</sup> *American Power and Light Co. v. S.E.C.*, 329 U.S. 90 (1946); *Gary v. Powell*, 314 U.S. 402 (1941); and *Butler Oak Tavern v. Division of Alcoholic Beverage Control*, *supra* note 4. The court in the case of *Coady v. Leonard*, *supra* note 8, deferred to a considerable extent to the expertise of the Board of Liquor Control.

<sup>14</sup> *Allyn's Appeal*, 87 Conn. 734, 71 Atl. 794 (1909); *Dundalk Liquor Co. v. Tawes*, *supra* note 3; also see dictum to this effect in *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 772, 8 So. 2d 913 (1942).