

STATE OF MINNESOTA

FILED  
Court Administrator

DISTRICT COURT

COUNTY OF RAMSEY

JUL 8 2011

SECOND JUDICIAL DISTRICT

By BH Deputy

Case Type: Civil

Court File No.: 62-CV-11-5203

---

In Re Temporary Funding of Core  
Functions of the Executive Branch of  
The State of Minnesota

---

**MEMORANDUM OF LAW IN  
SUPPORT OF PETITION FOR  
TEMPORARY FUNDING NECESSARY  
TO PROTECT RIGHTS OF CITIZENS**

**SYNOPSIS**

Although the legislature enjoys the exclusive constitutional power to appropriate funds, it cannot use that power to prevent the coordinate branches of government to exercise their core functions. Otherwise, the legislature could effectively nullify the authority of the executive and judiciary. Accordingly, in the wake of the legislature's choice not to appropriate funds for Fiscal Year 2011-12, the charge of this Court is to determine whether a particular executive action is a "core function" that must be funded and performed.

Here the Commissioner of Public Safety made the irrational, if not Kafkaesque, choice to enforce alcohol permit laws as a core function, but to deprive citizens of the permits necessary to comply with those laws. There is little question that this deprives the Petitioner alcohol retailers of the equal protection of the laws. The executive has created two classes of retailers: one lucky enough to remain in business because their license to purchase alcohol expired and was renewed before the shutdown; and the other who will suffer loss of their business because of permits expiring later in the year that cannot now be renewed in view of the shutdown. There is not a scintilla of

rationality to such a class distinction. It offends the equal protection guarantees of the Minnesota and U.S. Constitutions.

Judge Gearin has already ruled that “[c]ore functions include ... the protection of rights of citizens under the Minnesota and United States Constitutions.” June 29<sup>th</sup> Order, page 15, Conclusion of Law No. 4. The former director of Alcohol and Gambling Enforcement estimates that it will require the re-hire of one clerical employee at half-time to perform the ministerial functions necessary to issue the Buyer’s Cards that will remedy this equal protection violation.

Protecting the constitutional rights of citizens is an essential function of the executive. The legislature has no right to pass laws that violate the equal protection principle. Likewise, it has no right to accomplish the same violation indirectly via a failure to appropriate. Nor is the executive privileged to ignore its duty to protect constitutional rights by prosecuting retailers for failing to obtain permits that are impossible to obtain. The judiciary should require the executive to perform this core function despite the legislative failure to appropriate.

### **FACTS**

Petitioners incorporate by reference the sworn affidavits of Norman Freske, Erik Funk, and Frank Ball as well as the statement of facts contained in their Petition. For the convenience of the Court, Petitioners will state the operative facts in summary form as follows.

Alcohol retailers require a “Buyer’s Card” issued by the State of Minnesota to be able to purchase alcohol for resale. These cards do not all expire on the same date. Instead, they expire on a rolling basis one year after the date of their issuance. The

Alcohol and Gambling Enforcement Division of the Minnesota Department of Public Safety ceased issuing renewals of such cards, finding this not to be a core function. On the other hand, prosecuting retailers and wholesalers for the purchase and sale of alcohol in the absence of a Buyer's Card was considered a core function.

This Catch-22 leaves the retailers with no choice but to exhaust their inventories and then go out of business. Retailers typically have only 1 to 2 weeks of inventory on hand. It is expected that within the next week, hundreds of retailers will exhaust their inventories and will be forced out of business.

The loss of customers, staff, and goodwill as a result of this loss of business cannot be remedied with an after-the-fact damages award.

The proper remedy is to prevent the constitutional violation of retailers in the first instance by requiring the executive to employ the part time clerical staff necessary to issue the required permits.

### **ANALYSIS**

#### **I. THE PROTECTION OF RIGHTS OF CITIZENS UNDER THE MINNESOTA AND UNITED STATES CONSTITUTIONS IS A CORE FUNCTION OF THE EXECUTIVE BRANCH OF GOVERNMENT.**

To limit the "core functions" of government to preserving public order – i.e., protecting public infrastructure, housing prisoners, and doing the federal government's bidding via spending pass-through federal funds – is to get matters only half right. As pointed out by James Madison in Federalist No. 51: "you must first enable the government to control the governed; and in the next place oblige it to control itself." The great object of democratic government is to preserve public order without sacrificing

individual liberty. Thus, preserving the bill of rights is unquestionably a core function of government.

Judge Gearin has already recognized this fundamental principle in her Order of June 29<sup>th</sup>: "Core functions include ... the protection of rights of citizens under the Minnesota and United States Constitutions...." June 29<sup>th</sup> Order, p. 15, Conclusion of Law No. 4.

Therefore, if the executive branch must take action to prevent a deprivation of constitutional rights, that is a core function of government. It must be funded. Certainly, the legislature cannot deprive Minnesota citizens of their constitutional rights by affirmative legislation. By the same token, the legislature cannot deprive Minnesota citizens of their constitutional rights through the indirect expedient of a failure to appropriate. The Court should see to it that ministerial liquor licensing functions be funded and performed to the extent necessary to prevent a deprivation of constitutional rights.

II. **THE EXECUTIVE BRANCH DEPRIVES RETAILERS OF EQUAL PROTECTION OF THE LAWS, DUE PROCESS, AND JUST COMPENSATION BY DENYING LICENSES NECESSARY FOR THEM TO REMAIN IN BUSINESS.**

Licensure in the heavily regulated world of the alcohol industry is a cognizable liberty and property interest, protected by the Fourteenth Amendment as well as by the Minnesota Constitution. See *State by Mattson v. Saugen*, 169 N.W.2d 37 (Minn. 1969) (going concern value under a liquor license is a constitutionally-protected property right); *Mertins v. Commissioner of Natural Resources*, 755 N.W.2d 329, 336-37 (Minn. App. 2008) ("We do recognize due-process protections for driver's licenses,

professional licenses, and other licenses essential to the pursuit of a chose livelihood, career, or business”).

The irrationality of a policy which determines which retailers will survive based on what time of year their Buyer’s Card comes up for renewal is manifest. Equally clear is the constitutional dimension of the interest at stake – arbitrary barriers to the licensure necessary for one’s chosen profession. The irrational state action here violates at least three constitutional doctrines.

*First*, the arbitrary classification of retailers into those whose Buyer’s Cards are renewed before the shutdown and those whose cards come up for renewal afterwards deprives retailers of the equal protection of the laws. “Equal protection of the laws is an inherent but unenumerated right found and confirmed in Minnesota’s state constitution.” *Murphy v. Commissioner of Human Services*, 765 N.W.2d 100, 106 (Minn. App. 2009); *cf.* Minn. Const. Art. 1, § 2 (equal protection implicit in guaranty against “deprivation of any rights or privileges secured to any citizen ... unless by law of the land”); *see State v. Cox*, 2011 Minn. LEXIS 320 (Minn. June 15, 2011) (Stras, J., concurring) (equal protection right derives for Article 1, § 2). Equal protection “requires the state to treat similarly situated individuals alike.” *Studor, Inc. v. State of Minnesota*, 781 N.W.2d 403, 408 (Minn. App. 2010), *review denied*, 2010 Minn. LEXIS 405 (2010). “Therefore the initial inquiry is in an equal protection analysis is whether persons are similarly situated.” *Id.*

Retailers such as American Legion Post 567 and Triple Rock are similarly situated to other retailers lucky enough to have their Buyer’s Cards expire – and hence be renewed for one year – in February or March 2011. The only difference is the

happenstance of the expiration of Petitioners' Buyer's Cards on the date of the shutdown. By the afternoon of June 29, 2011, Alcohol and Gambling Enforcement was already shutdown. Those applying for Buyer's Cards on or after that date, or waiting on pending applications, are out of luck.

Because the retailers with licenses expiring before and after the shutdown are similarly situated, the next step in the equal protection inquiry is whether the constitutional challenge involves "a suspect classification or a fundamental right." If so, the standard of review is heightened. If not, the rational basis test applies. See *Studor*, 781 N.W.2d at 408. While the importance of licensure should not be trivialized, and merits due process protection (*see infra*), it does not involve a fundamental right or a suspect classification. Accordingly, the classification must be reviewed for a rational basis.

The rational basis test for the purposes of the equal protection clause of the Fourteenth Amendment to the federal constitution is more deferential than the Minnesota equal protection test. The federal test requires the Court to consider merely whether it was "reasonable for the lawmakers to believe that use of the challenged classification would promote" a legitimate purpose. *Studor*, 781 N.W.2d at 408. The Minnesota rational basis test, by contrast, provides:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*Greene v. Commissioner of Minnesota Department of Human Services*, 755 N.W.2d 713, 729 (Minn. 2008) (quoting *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979)).

Here, the distinctions which separate those who have renewed Buyer's Cards and those who do not are the definition of fanciful: the happenstance of the date of initial issuance of the Buyer's Card. The State, in essence, is playing dice with the livelihood of its citizen retailers. Those lucky enough to roll a date early in the year can get their Buyer's Cards renewed well before the shutdown; those with an unlucky date lose a livelihood that has in some cases been built up over decades of time. Nor can one divine some overarching rational purpose to such an arbitrary divide.

**Second**, the State's deprivation of renewed Buyer's Cards states a due process violation within the meaning of the State and federal constitutions. Article 1, § 7 of the Minnesota Constitution and the Fourteenth Amendment to the U.S. Constitution each prohibit citizens from being "deprived of life, liberty or property without due process of law." The threshold question is whether a Buyer's Card is a constitutionally protected property interest. Licensure in this industry is obtained and renewed over many years, and is understandably relied upon by retailers who hire staff, form customer relationships, and enter into contracts on the basis of continued licensure. It is an "entitlement" rather than a "unilateral expectation." See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Going concern value under a liquor license is, therefore, a constitutionally protected property right. See *Saugen*, 169 N.W.2d at 37; *Mertins*, 755 N.W.2d at 336-37 ("We do recognize due-process protections for driver's licenses,

professional licenses, and other licenses essential to the pursuit of a chose livelihood, career, or business”).

Because the Buyer's Cards at issue are, then, a constitutionally protected property interest, the retailers cannot be deprived of them without due process. The process due is determined by the nature of the property interest, the risk of an erroneous deprivation, the probable value of substitute procedures, and the government's interest including fiscal and administrative burdens. *Mertins*, 755 N.W.2d at 337-38; *Mathews v. Eldridge*, 424 U.S. 319 (1976). Here no process is provided to determine if there is a legitimate basis for the deprivation of the Buyer's Card – as opposed to the arbitrary occurrence of the renewal date in relation to the shutdown.

Nor can the process due be provided by later, post-deprivation lawsuit for money damages. Money cannot compensate retailers for the loss of a livelihood or the loss of employees and customers built up over decades of time. As remarked by Judge Friendly in awarding injunctive relief in a case in which the plaintiff was threatened with the loss of his automotive business: “But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award.” *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970).

In addition, the due process guaranty requires more than procedural protection. Under the doctrine of “substantive” due process, the constitution requires that the deprivation of the constitutionally cognizable property interest be substantively rational. This requires the same rational basis test as does the equal protection clause. See

*Grussing v. Kvam Implement Co.*, 478 N.W.2d 200, 201 (Minn. 1991). For the reasons noted above, the deprivation here was not substantively rational. The state action here therefore violates both equal protection and substantive due process.

**Third**, the taking and destruction of the Petitioners business property requires just compensation and a public purpose pursuant to Minn. Const., Art. 1, § 13. It is difficult to divine any public purpose served by the destruction of those retailers whose renewal dates coincide with the shutdown. Nor can those retailers be justly compensated for the taking except by reason of an order preventing the taking in the first place.

In sum, state action which results in the destruction of those retailers whose Buyer's Cards are to be renewed around or after the government shutdown is inherently arbitrary, deprives the retailers of protected property rights, and state constitutional claims under the equal protection, due process, and just compensation clauses. The challenged state action here has deprived or is about to deprive the Petitioners of their constitutional rights. Protecting those rights is a core function of the executive branch.

III. **THE TEMPORARY FUNDING OF THE LIMITED CLERICAL FUNCTIONS NECESSARY TO ISSUE BUYER'S CARD RENEWALS IS NECESSARY TO PRESERVE AND PROTECT THE CONSTITUTIONAL RIGHTS OF MINNESOTA CITIZENS.**

MLBA Director Frank Ball has discussed this issue with the attorney for the Commissioner of Public Safety and with the Interim Director of Alcohol and Gambling Enforcement. On behalf of Minnesota retailers, Ball requested that the Director issue a Memorandum of Understanding certifying to wholesalers that the retailer in question qualified for a renewed Buyer's Card and that a sale could be effected without

enforcement action. The Commissioner and Interim Director refuse to issue any such certification.

Based on Mr. Ball's experience as past Director of Alcohol and Gambling Enforcement, to process the Buyer's Card renewals, verify entitlement, and manage the electronic database will require the services of a clerical employee working half-time.

The equal protection of the laws guaranteed by the Minnesota and federal Constitutions is a core function of the executive branch of government. The limited funding of one part-time clerical employee necessary to review and issue Buyer's Cards and enter same on the electronic database will allow the Department of Public Safety to provide Minnesota citizens the equal protection of the laws.

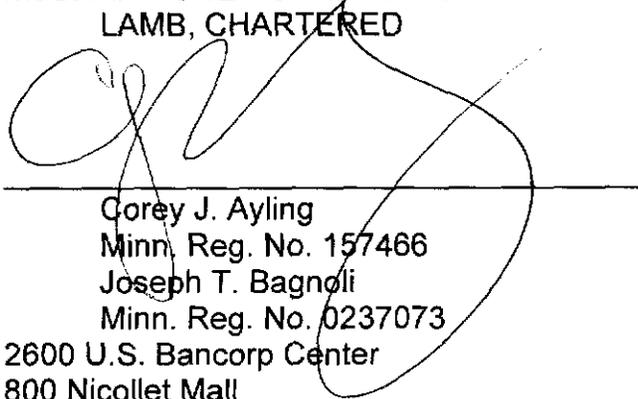
The Court should order the executive branch to re-employ the clerical staff necessary to review and issue Buyer's Cards and to enter same on the electronic database.

**CONCLUSION**

For the above-stated reasons, the Court should order the executive branch to fund and perform a core function of government by re-employing the part time clerical staff necessary to review and issue Buyer's Cards and to enter same on the Division's electronic database.

Dated: July 8, 2011.

McGRANN SHEA CARNIVAL STRAUGHN &  
LAMB, CHARTERED



A large, stylized handwritten signature in black ink is written over a horizontal line. The signature is cursive and appears to read 'Corey J. Ayling'.

Corey J. Ayling  
Minn. Reg. No. 157466  
Joseph T. Bagnoli  
Minn. Reg. No. 0237073  
2600 U.S. Bancorp Center  
800 Nicollet Mall  
Minneapolis, MN 55402

*Attorneys for Petitioners Liberty, Triple Rock,  
and MLBA*