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LIQUOR CONTROL, DEPARTMENT OF—ISSUED PERMIT WITHOUT AFFORDING HEARING TO PROPER CHURCH AUTHORITIES—SECTION 6064-16 G. C.—PERMIT IS INVALID—IF RECIPIENT OF SUCH INVALID PERMIT REQUESTS “REISSUANCE” OF PERMIT OPPORTUNITY FOR FULL AND COMPLETE HEARING MUST BE GIVEN BEFORE PERMIT MAY BE ISSUED—AUTHORITIES IN CONTROL OF CHURCH.

SYLLABUS:

When the Department of Liquor Control has issued a permit without affording a hearing to the proper church authorities as required by Section 6064-16, General Code, the permit is invalid. If the recipient of such an invalid permit requests a “re-issuance” of the permit, an opportunity for a full and complete hearing must be given to the authorities in control of the church before such a permit can be issued.

Columbus, Ohio, Nov. 17, 1949

Hon. Oscar L. Fleckner, Director of Liquor Control
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“On the 22nd of June, 1948, a Class D-5 permit was issued to an individual at 214 West High Street, Mount Vernon, Ohio. This address is within five-hundred feet of the Christian and Missionary Alliance, a church. There was no opportunity afforded the church for a hearing as required by Ohio General Code 6064-16, due presumably to the fact that the Examiner did not report the presence of the church.

“The subject permit has now expired and is under consideration for re-issuance. This department would very much appreciate an opinion from your office in answer to the following questions:

“1. Under the above circumstances, is the department required to hold a hearing?

“2. Does the department have the right and duty to consider evidence offered by the church to the effect that the re-issuance of the permit applied for would be inadvisable?”

Section 6064-16, General Code, reads as follows:

“Applications for regular permits authorized by this act may be filed with the department of liquor control at any time after this act becomes effective. No permit shall be issued by the department under authority of this act until fifteen days after the application therefor is filed; and no permit shall be issued by the department under authority of this act if the business specified to be operated in the permit applied for is to be operated within a distance of five hundred feet from the boundaries of a parcel of real estate having situated thereon a school, church, library or public playground, until written notice of the filing of said application with the department shall have been personally served upon the authorities in control of said school, church, library or public playground and an opportunity shall have been provided said authorities for a full and complete hearing before the director of liquor control upon the subject of the advisability of the issuance of the said permit; except in the case of an application from a permit holder for a permit of the same class for the same location.”

In Volume III, Sutherland Statutory Construction, Section 5814 at page 96, it states in part as follows:

“One of the strongest indications as to what construction should be given to a statutory provision may be found in the use of negative, prohibitory, or exclusive words. Where statutory restrictions are couched in negative terms they are almost invariably held to be mandatory. In the language of one court ‘there is but one way to obey the command “thou shalt not,” and that is to refrain altogether from doing the forbidden act.’ Negative words alone may be the deciding factor to compel a mandatory construction for a statute of a kind which, without such words, would ordinarily be construed as directory. Thus, according to Sharswood, J., speaking for the Supreme Court of Pennsylvania, ‘Where (the) words are affirmative, and relate to the manner in which the power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed as directory; but negative words which go to the power or jurisdiction itself have never, . . . , been brought within that category.’ Negative words in a grant of power should never be construed as directory. And where an affirmative direction is followed by a negative or limiting provision, it is thereby rendered mandatory.

“* * * Prohibitory terms carry with them the same connotation and can be considered in the same light as express negative terms. * * * ”

Another method of determining whether or not a statute is mandatory is to look to the consequences resulting therefrom. In 37 O. Jur., Section 35 at page 332, it states:

“In determining whether an ambiguous statutory provision is intended to be mandatory or directory, it is sometimes proper to take into consideration the consequences which would result from construing it one way or the other. Thus, provisions of a statute have been adjudged mandatory where a contrary holding would give an administrative board unlimited latitude and render the procedure chaotic.”

If Section 6064-16, General Code, were not a mandatory statute, it would be possible to do away with any hearing by a church or school. If the legislature desired this result, they would have omitted this provision altogether. From the above it can be seen that Section 6064-16, General Code, is a mandatory statute.

In Volume II, Sutherland Statutory Construction, Section 2801 at page 214, it states in part as follows:

“The important distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while the failure to comply with the requirements of the latter either invalidates purported transactions or subjects the noncomplier to affirmative legal liabilities.”

In 37 O. Jur., Section 27 at page 323, it states:

“The word ‘mandatory’ has been used synonymously with ‘indispensable.’ A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding.”

In 37 O. Jud., Section 41 at page 335, it states:

“The performance of mandatory statutory requirements is a condition precedent to the privilege conferred. In fact, a mandatory provision in a statute is defined as one the omission to follow which renders the proceeding to which it relates illegal and void. Such provisions must be strictly pursued and complied with literally and fully in any or all events. They are not

left to discretion and, therefore, may not be disregarded. Moreover, they must be performed in the manner and within the time prescribed by statute. However, there are a number of cases in which substantial compliance is declared to be sufficient. In any event, substantial compliance cannot be found where there is a clear omission of some definite procedural requirement."

In the case of *The State, ex rel. City of Mansfield v. Hale, et al.*, 24 O. App. 166 at page 168, the court states:

" * * * Mandatory statutes are imperative. They must be strictly followed. Otherwise a proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends on a compliance with its requirements."

From your request I gather that there was neither notice nor opportunity for a hearing given to the church at any time. In other words, there has not been even a substantial compliance with Section 6064-16, General Code.

Since the Department of Liquor Control, a creature of statute, has only the powers granted by statute, it must carry on its functions in accordance with those statutes. In this situation, it did not comply with the statutes in granting a permit. Therefore, its act of issuing such a permit to this person was of no force or effect.

From the above it can be said that the individual is in the same position as an applicant for an original permit. In conclusion, therefore, it is my opinion that when the Department of Liquor Control has issued a permit without affording a hearing to the proper church authorities as required by Section 6064-16, General Code, the permit is invalid. If the recipient of such an invalid permit requests a "re-issuance" of the permit, an opportunity for a full and complete hearing must be given to the authorities in control of the church before such a permit can be issued.

Respectfully,

HERBERT S. DUFFY,
Attorney General.