STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1695

Jerry Buchanan d/b/a Lickety Split, Inc.,
Relator,

vs.

City of Minneapolis,
Department of Regulatory Services,
Respondent.

Filed July 25, 2011
Affirmed
Shumaker, Judge

Minneapolis Department of Regulatory Services
Citation No. 10-0740624

Randall D. Tigue, Randall Tigue Law Office, P.A., Golden Valley, Minnesota (for relator)

Susan L. Segal, Minneapolis City Attorney, Lee C. Wolf, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Relator appeals an administrative hearing officer's decision upholding respondent's administrative citations against relator for operating a business without a place-of-entertainment license. Relator also challenges the constitutionality of the ordinance requiring the license, and the administrative-hearing procedure. We affirm.

FACTS

Relator Jerry Buchanan owns and operates Lickety Split, Inc., a business selling pornographic movies and other unspecified products of a sexual nature. Buchanan purchased the store as a bookstore in 2007. The store also offers coin-operated DVD-viewing booths where patrons may view pornographic movies in enclosed booths inside the store.

On March 6, 2008, Buchanan applied for and received a one-year place-of-entertainment license because he anticipated providing live nude dancing at the store. However, after deciding not to offer live dancing, he allowed the license to lapse. A year and a half later, following a city inspection, respondent City of Minneapolis sent a delinquent-license notice to Buchanan and an administrative citation and fine for operating the store's DVD-viewing booths without a place-of-entertainment license. Buchanan did not obtain the license, nor did he appeal the citation. The city issued a second and then a third citation.

The administrative citations informed Buchanan that he had violated Minneapolis, Minn. Code of Ordinances (MCO) § 267.1120 (2010), which requires all persons

operating or conducting a place of entertainment to obtain a City of Minneapolis place-of-entertainment license. A "place of entertainment" is defined as "any privately owned place wherein entertainment is offered or given to the public." MCO § 267.1110 (2010). "Entertainment" includes "the production or provision of sights or sounds or visual or auditory sensations which are designed to or may divert, entertain or otherwise appeal to members of the public who are admitted to a place of entertainment, which is produced by any means, including . . . video reproduction." *Id.* Buchanan appealed the third administrative citation and requested a hearing.

On April 27, 2010, a hearing was held before an administrative hearing officer. After the hearing, the parties agreed on a joint statement of facts, wherein Buchanan admitted that Lickety Split operates DVD-viewing booths available to the public; the store did not have a place-of-entertainment license when the city inspected it; and the store received three citations for not having the license. The parties also stipulated "[t]hat the City has not taken action to require an adult bookstore with video viewing booths to obtain a Place of Entertainment license until the present case with Lickety Split and the Hennepin Boutique in 2009."

The hearing officer issued findings of fact, conclusions of law, and an order denying Buchanan's appeal and upholding the city's citations and fines. In this certiorari appeal, Buchanan contends that there is insufficient evidence to support the hearing officer's decision. He also alleges that the ordinance requiring a place-of-entertainment license is an unconstitutional infringement upon his First Amendment rights, and that the

hearing procedure and the city's choice of a hearing officer violated his due-process rights.

D E C I S I O N

Proper Forum

The initial question in this appeal is whether this court is the proper forum for constitutional challenges to the city's ordinance since Buchanan did not raise the constitutional issues in an "appeal" to the district court.

To obtain judicial review of a decision where no right of judicial review has been provided by statute or appellate rules, a party must petition this court for a writ of certiorari. *Neitzel v. Cnty. of Redwood*, 521 N.W.2d 73, 76 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). "Certiorari is, by its nature, a review based solely upon the record." *Amdahl v. Cnty. of Fillmore*, 258 N.W.2d 869, 874 (Minn. 1977). Certiorari is a vehicle for the review and correction of decisions and determinations already made. *State ex. rel. Nordin v. Probate Court of Hennepin Cnty.*, 200 Minn. 167, 169, 273 N.W. 636, 637 (1937); *see also* 3 David F. Herr & Sam Hanson, *Minnesota. Practice*, § 115.4 at 514 (5th ed. 2010) (stating "scope of review by certiorari is quite limited").

Generally, an appellate court will consider constitutional issues raised by an appellant only if the appellant first raised and litigated them in the district court. *Egeland v. State*, 408 N.W.2d 848, 852 (Minn. 1987). However, in administrative law, administrative agencies lack subject-matter jurisdiction to decide constitutional issues because constitutional questions are within the exclusive province of the judicial branch. *See Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977). A party

wishing to challenge an administrative decision may commence an action or bring a motion in district court to raise issues outside the jurisdiction of the administrative process. *See* Minn. Stat. § 462.361, subd. 1 (2010) ("Any person aggrieved by an ordinance . . . of a governing body . . . may have such ordinance . . . reviewed by an appropriate remedy in the district court.").

Buchanan chose to bypass the district court and appeal directly to this court, contending that section 462.361 (2010) applies only to land-use issues. *See id.* Buchanan interprets the statute to mean that a party aggrieved by an ordinance of a governing body acting pursuant to section 462.351 (2010) (municipal planning and development), and section 462.364 (2010) (inconsistent laws) may first address the issue before the district court. He contends that he has not raised a municipal-planning-and-development issue and, therefore, is not subject to section 462.361.

Section 462.361 appears to provide that any party aggrieved by any ordinance of any governing body may first bring its challenges to the district court. But MCO 2.110 states that an "aggrieved party may obtain judicial review of the decision of the hearing officer by petitioning the Minnesota Court of Appeals for a writ of certiorari." Further, this court has discretion to address the issue in the interests of justice. Minn. R. Civ. App. P. 103.04. As such, we will address Buchanan's constitutional challenges.

First Amendment Violations

Buchanan contends that the ordinance requiring any place offering "entertainment" to obtain a license to operate is facially unconstitutional under the First Amendment because it is overly broad in its regulation of "entertainment." The proper

analysis for determining whether there is an unconstitutional infringement upon First Amendment rights is set out in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). In *Renton*, the court asked: (1) Does the ordinance ban an entire class of businesses, or is it a time, place, and manner regulation? (2) Is the ordinance content-neutral or content-based? (3) Is the ordinance designed to serve a substantial governmental interest? (4) Is there a reasonable alternative avenue of communication remaining? *Id.* at 47, 106 S. Ct. at 928 ("[C]ontent-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.").

The first step is determining whether the ordinance bans an entire class of businesses or is merely a time, place, and manner regulation. The ordinance here does not ban an entire class of businesses. It merely requires places of entertainment, an admittedly broad category, to obtain a place-of-entertainment license to operate. This is a regulation of the manner in which the business operates. The ordinance is much less restrictive than the one in *Renton*, which prohibited adult-motion-picture theaters from operating within 1,000 feet of places like schools and churches, and which the court held was a time, place, and manner regulation. *Id.* at 43, 106 S. Ct. at 926.

The second step is determining whether the ordinance is content-based or content-neutral. The ordinance in *Renton* was content-neutral because it did not regulate the content of the films shown at the movie theater, but rather the secondary effects of the movies. *Id.* at 47, 106 S. Ct. at 929. In *Renton*, the ordinance "d[id] not contravene the

fundamental principle that underlies our concern about 'content-based' speech regulations: that government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 48-49, 106 S. Ct. at 929.

Buchanan argues that a broad regulation of "entertainment" in general is a content-based regulation. However, he ignores the rule that the governmental purpose of the regulation is the controlling consideration:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989) (citing *Renton*, 475 U.S. at 47-48, 106 S. Ct. at 929-30). The city's regulation of places of entertainment by requiring a license to operate is not related to the regulation of the speech of adult-entertainment businesses; indeed, the ordinance regulates all places of entertainment, regardless of what kind of entertainment is offered there.

"Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.* (emphasis omitted). The ordinance here simply requires places that put on "shows, plays, skits, musical revues, children's theater, dance productions, public dance, musical concerts, opera and the production or provision of sights or sounds or visual or auditory sensations

which are designed to or may divert, entertain or otherwise appeal to members of the public" to obtain a license to engage in these activities. MCO § 267.1110. The license does not depend upon, restrict, or purport to regulate the content of what is shown at these places of entertainment. It does not single out certain types of shows or sensations. It certainly does not regulate the content of coin-operated DVD-viewing booths showing pornography in adult-entertainment businesses. The ordinance is content-neutral.

The third step in the analysis is determining whether the ordinance is designed to serve a substantial governmental interest. In *Renton*, the legitimate governmental interest was the preservation of the quality of urban life. *Renton*, 475 U.S. at 50, 106 S. Ct. at 930. Here, the city has not suggested what the governmental interest is, but the language of the ordinance suggests that at least one governmental interest is enabling the city to inform the fire department of areas where large groups of people routinely gather:

> Any person desiring to operate or conduct a place of entertainment shall apply to the division of licenses and consumer services . . . . The division shall present a copy of the application to the fire department for its report and recommendation . . . . A complete application for a license hereunder shall contain . . . [a] scaled diagram showing the floor plan and the location of the building.

MCO § 267.1130 (2010). Requiring a license in order to alert the fire department to the locations and floor plans of places where groups of people routinely gather is a legitimate governmental interest in that it provides firefighters with critical information for dealing with fires and evacuation of places on fire.

The fourth step is determining whether the ordinance leaves open a reasonable alternative method of communication. This ordinance clearly does so because it does not

ban adult businesses from operating, but merely requires them to be licensed in order to operate. And Buchanan has made no showing that the cost of the license or the requirements for obtaining it are so onerous that the license is a subterfuge for a ban. The ordinance does not violate Buchanan's First Amendment rights.

Discretion of Government Officials

Buchanan next argues that the city has allotted too much discretion to government officials to deny place-of-entertainment licenses to businesses, without specifying narrow, objective, and clearly stated guidelines for the exercise of that discretion.

"[A]n overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129, 112 S. Ct. 2395, 2400-01 (1992). The *Forsyth* court allowed an over-breadth challenge to an ordinance "where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker." *Id.* at 129, 112 S. Ct. at 2401. The *Forsyth* court stated that

> a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority . . . . If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion . . . by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.

Id. at 131, 112 S. Ct. at 2401-02. Buchanan contends the discretion vested in city officials to deny place-of-entertainment licenses is improper for this reason.

Whether Buchanan can even raise this challenge is uncertain. The appellants in *Ward* similarly argued the ordinance placed too much discretion in the hands of decisionmakers. *Ward*, 491 U.S. at 793, 109 S. Ct. at 2755. However, the Supreme Court explained that such challenges are narrowly circumscribed:

> As a threshold matter, it is far from clear that respondent should be permitted to bring a facial challenge to this aspect of the regulation. Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity. The grant of discretion that respondent seeks to challenge here is of an entirely different, and lesser, order of magnitude, because respondent does not suggest that city officials enjoy unfettered discretion to deny bandshell permits altogether. Rather, respondent contends only that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.

Id. at 793-94, 109 S. Ct. at 2755 (citation omitted). Like the challengers in *Ward*, Buchanan does not allege that his DVD-viewing booths are prohibited. And they are not, for he merely needs a license to operate them, as does every other place of entertainment, like theaters and concert grounds.

Despite the uncertainty of Buchanan's right to assert his challenge, we will consider the constitutionality of the ordinance to determine whether it contains sufficient limiting language to prohibit unfettered discretion in city officials. The *Ward* court found

that the challenged ordinance sufficiently limited the discretion of officials charged with determining whether the noise was too loud because it directed officials to "confer with the sponsor if any questions of excessive sound arise, before taking any corrective action," and to ensure that "the sound amplification is sufficient to reach all listeners within the defined concertground." *Id.* at 795, 109 S. Ct. at 2756. So, in *Ward*, the officials' discretion was limited only by the requirements that they confer with the sponsor before requiring reduction of the noise level and that they ensure that all listeners attending the concert would be able to hear the music.

Unlike the ordinance in *Ward*, which limited discretion in two ways, MCO § 267.1150 (2010) more significantly restricts the discretion of city officials, and provides that the city may only deny a license if: (1) the application has material omissions or false statements; (2) the premises are a public nuisance; (3) the applicant does not comply with the article's provisions; (4) the operation violates a law or ordinance; (5) the application is incomplete; (6) the applicant fails to prohibit alcoholic or controlled substances on the premises unless authorized; and (7) the applicant owes administrative fees. But none of these reasons emerge here because the city never denied a license to Buchanan. He simply did not apply for one, and thus his constitutional challenges are theoretical in nature.

The discretion of officials to deny a place-of-entertainment license is subject to significant narrowing language expressed in the seven bases for license denial. As Buchanan points out, the success of a facial challenge under the over-breadth doctrine rests on whether anything in the ordinance prevents a government official from the

unlimited exercise of his discretion. *See Forsyth*, 505 U.S. at 133 n.10, 112 S. Ct. at 2403 n.10. Under the ordinance here, the city must issue a license unless at least one of seven reasons for denial can be demonstrated. The ordinance is not overly broad as to the regulatory discretion it affords city officials.

Constitutionality of Public-Nuisance Statute

An application for a place-of-entertainment license may be denied if the premises are operated in such a manner that they are a public nuisance. Buchanan contends it is unconstitutional to allow an official to deny a license for this reason. The city contends that Buchanan has waived this issue because he failed to notify the Minnesota Attorney General as required by Minn. R. Civ. P. 5A, which states:

> A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if . . . (B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and (2) serve the notice and paper on the . . . Minnesota Attorney General.

Buchanan admits that he did not notify the Minnesota Attorney General of his constitutional challenge to the public-nuisance statute, Minn. Stat. § 609.74 (2010).

Buchanan contends that he does not take issue with the constitutionality of the public-nuisance statute, but rather with the ordinance, which provides that operation of premises that are a public nuisance is a ground for denying a license. MCO 267.1150(2). But there is no proper way of invalidating the ordinance without also addressing the constitutionality of the statute. For that, a notification to the Minnesota Attorney General

is required. Buchanan has failed to notify the Minnesota Attorney General and, thus, has waived this issue.

Due-process Violations

Buchanan contends that the city's administrative-hearing procedure violates the Due Process Clause because the city's hearing officers have a financial interest in the outcome of the adjudication. Defendants have a right to an impartial decisionmaker. *See Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927) (holding that allowing mayor to receive fees and costs, in addition to his salary, for trying and convicting defendants was a denial of due process because mayor had direct, personal, substantial pecuniary interest in outcome of case). "Parties to an administrative proceeding are entitled to a decision by an unbiased decisionmaker." *Buchwald v. Univ. of Minn.*, 573 N.W.2d 723, 727 (Minn. App. 1998), *review denied* (Minn. Apr. 14, 1998). The test is whether the decisionmaker's situation could tempt "the average man" as a judge to forget the burden of proof required to rule against an alleged violator. *Tumey*, 273 U.S. at 532, 47 S. Ct. at 444.

However, "[t]here is a presumption of administrative regularity, and the party claiming otherwise has the burden of proving a decision was reached improperly." *Buchwald*, 573 N.W.2d at 727. Further, there may be times when no other tribunal is available with authority to decide the case and when "an officer [must] serve in a decisionmaking capacity, no matter how disqualified by reason of bias, prejudice, or partiality." *Ginsberg v. Minn. Dep't of Jobs & Training*, 481 N.W.2d 138, 141 (Minn. App. 1992), *review denied* (Minn. Apr. 9, 1992).

Here, a list of hearing officers is created by the city attorney, who then selects a hearing officer from that list to hear a matter for which a hearing has been requested. MCO § 2.100(b) (2010). The alleged violator is free to request the removal of the assigned hearing officer, who will be automatically removed upon such a request. *Id.* The alleged violator may make a second request to remove a hearing officer, and that request is reviewed by the assigned hearing officer, who decides whether he can fairly and objectively review the case. *Id.* If he decides that he cannot do so, he will remove himself, and the city attorney will assign another hearing officer. *Id.* Hearing officers are hired for three-year terms, and the hearing officer in this case received $175,000 for the frequent services he provided the city over three years (2007, 2008, and 2009). Buchanan contends the hearing officer thus has a "direct, personal, and substantial pecuniary interest" in the outcome of the hearings over which he presides. The Minnesota Supreme Court explained the purpose of a rule disqualifying certain public officials from hearing cases:

> The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to ensure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present. Among the relevant factors that should be considered in making this determination are: (1) The nature of the decision being made; (2) the nature of the pecuniary interest; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decision; and (5) the other means available, if any, such as the opportunity for review, that

> serve to ensure that the officials will not act arbitrarily to further their selfish interests.

E.T.O., Inc. v. Town of Marion, 375 N.W.2d 815, 819 (Minn. 1985). The features of this case are (1) the decision was whether Buchanan should have obtained a place-of-entertainment license for the DVD-viewing booths in his store; (2) $1,000 in unpaid fines is at stake; (3) one hearing officer makes the decision; (4) the goal is to have uninterested persons make the decision; and (5) review in the district court or in this court is a means of prohibiting arbitrary rulings. In *E.T.O.*, the "interested" decisionmaker was a council member who lost $100,000 as a result of a liquor license being given to a nearby bar and was one of only three members voting in the hearing at issue. *Id.* at 816. The supreme court found this too substantial an interest for the council member's unbiased participation in the hearing. *Id.* at 820.

Buchanan supports his argument mainly with the analysis of *Haas v. Cnty. of San Bernardino*. But that case does not provide authority for his position:

> Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person's right to a hearing.

Haas v. Cnty. of San Bernardino, 45 P.3d 280, 290 (Cal. 2002). Even though *Haas* is not controlling authority in Minnesota, we note that the *Haas* court clearly distinguished between a hearing officer's "slight" pecuniary interest and a "direct, personal, substantial, and pecuniary interest." *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-26, 106 S. Ct. 1580, 1587-88 (1986)).

The hearing officer here was compensated substantially, but it was spread over three years and many cases, and the city was contractually obligated to pay him for those three years regardless of whether he rendered decisions favorable to the city. Furthermore, there is substantial evidence supporting the hearing officer's decision, so it cannot be said to have been arbitrary and capricious and the result of a personal, pecuniary interest. Absent any evidence that the city regularly refuses to re-hire hearing officers who rule unfavorably to the city or that hearing officers have exercised their discretion to further their personal interests, we cannot hold that the hearing process denies due process to aggrieved license applicants.

Sufficient Evidence

Buchanan contends the evidence is insufficient to support the hearing officer's decision that he needed a place-of-entertainment license. "If an administrative agency engages in reasoned decisionmaking, the court will affirm, even though it may have reached a different conclusion had it been the factfinder." *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984).

The city argues that Buchanan operates a place of entertainment. "Entertainment" includes "the production or provision of sights or sounds or visual or auditory sensations which are designed to or may divert, entertain or otherwise appeal to members of the public who are admitted to a place of entertainment, which is produced by any means, including . . . video reproduction." MCO § 267.1110. And a "place of entertainment" is

> any privately owned place wherein entertainment is offered or given to the public . . . other than . . . the following activities licensed by the city pursuant to provisions of this Code of

> Ordinances . . . places primarily devoted to the display and sale of radios, phonographs, tape recorders, pianos, musical instruments, records and tapes, moving pictures, television and stage equipment.

Id. Buchanan urges that the ordinance's exclusion of certain activities "is the most obvious reason why the city had never sought to impose the Place of Entertainment licensure requirement on adult bookstore movie booths in over 30 years."

No evidence was presented to describe exactly what Lickety Split sells, or whether it is a place "*primarily devoted* to the display and sale of radios, phonographs, tape recorders, pianos, musical instruments, records and tapes, moving pictures, television and stage equipment," as Buchanan suggests. *Id.* (emphasis added). The only description of what Lickety Split sells is Buchanan's limited testimony at the hearing describing the set-up of the store as including "sales material . . . video booths . . . [a] clothes boutique . . . [and a] retail area." It could be inferred that Lickety Split is primarily an adult bookstore, because: (1) Buchanan testified that Lickety Split was a bookstore when he purchased it; (2) Buchanan's attorney often references "adult bookstores" in Buchanan's brief, suggesting that Lickety Split is one; (3) Buchanan's attorney asks Buchanan during his testimony how long he has been involved in the "adult book store business"; and (4) Buchanan stipulated "[t]hat the City has not . . . require[d] an adult bookstore . . . to obtain a place of entertainment license until the present case with Lickety Split and the Hennepin Boutique in 2009."

But if Lickety Split is indeed an adult bookstore, as it appears Buchanan has conceded, it is not excluded from the definition of a "place of entertainment," because

places of entertainment are *other than* "places devoted to the display and sale of radios, phonographs, tape recorders, pianos, musical instruments, records and tapes, moving pictures, television and stage equipment." *Id.* Bookstores are not excluded from the definition of a "place of entertainment." So, Lickety Split, even as an adult bookstore, falls within the definition of a "place of entertainment" and must have a license to operate as such in the event it begins to operate as a place of entertainment, as the city contends it has done here. For these reasons, the hearing officer's decision was supported by sufficient evidence.

Affirmed.