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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC Court of Appeals

Dwight Demario Jacobs, d/b/a D & J 555)
Restaurant and Lounge,)
)
Petitioner,)
vs.)
)
South Carolina Department of Revenue,)
)
Respondent.)

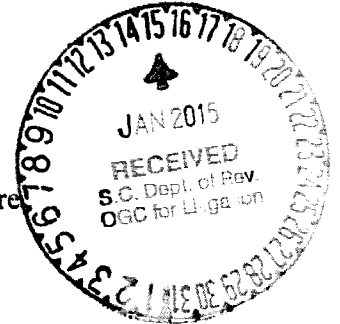
AMENDED FINAL ORDER

DOCKET NO. 14-ALJ-17-0029-CC

APPEARANCES:

Joenathan S. Chaplin, Esquire
For the Petitioner

Lauren Acquaviva, Esquire
For the Respondent



STATEMENT OF THE CASE

This matter is before the Administrative Law Court (“ALC” or “Court”) pursuant to S.C. Code Ann. §§ 1-23-310 et seq. (Supp. 2011), S.C. Code Ann. § 1-23-600(B) (Supp. 2011), and S.C. Code Ann. § 61-2-260 (2009) for a contested case hearing. Dwight Demario Jacobs, d/b/a D & J 555 Restaurant and Lounge (Petitioner or Jacobs), applied for an on premises beer and wine license and a business liquor by the drink license pursuant to S.C. Code Ann. §§ 61-6-100 et seq. (2009) for a restaurant, D & J 555 Restaurant and Lounge, located at 2418 Cushman Drive, Columbia, South Carolina 29203. The Petitioner completed the necessary application process, which revealed a conviction for assault and battery of a high and aggravated nature (ABHAN) in violation of South Carolina Code Ann. § 17-25-30. The Respondent South Carolina Department of Revenue (“Department”) denied the Petitioner’s application finding the Petitioner failed to meet the requirement that an applicant be of good moral character pursuant to S.C. Code Ann. § 61-2-100(D) (2009).

After notice to the parties, the court held a hearing on this matter on March 5, 2014. Both parties appeared at the hearing. The parties stipulated that the only issue to be presented to the

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court was whether Jacobs possessed the requisite moral character to be granted an on premises beer and wine permit and restaurant liquor by the drink license. Both parties presented evidence to the court, however, neither party provided witnesses or presented testimony. Notably, Jacobs did not testify at the hearing. Instead, he offered three affidavits attesting to his good moral character. The affidavits were admitted without objection. After carefully weighing all of the evidence, the court issued a Final Order and Decision on March 27, 2014, finding that the Petitioner's application for an on premises beer and wine license and restaurant liquor by the drink license should be granted. Upon a Motion for Reconsideration filed by the Department, this court issued an Order vacating its Final Order and Decision. For the reasons set forth in this Amended Final Order, the court now concludes that the Petitioner should not be granted an on premises beer and wine permit and restaurant liquor by the drink license.

ISSUE

The only issue in dispute is whether the Petitioner is of good moral character pursuant to S.C. Code Ann. § 61-2-100(D).

FINDINGS OF FACT

Having observed the exhibits presented at the hearing and evaluated their credibility, and taking into account the burden of persuasion by the parties, the court makes the following findings of fact by a preponderance of the evidence.

1. On August 14, 2013, the Petitioner submitted an application to the Department for an on premises beer and wine license and a restaurant liquor by the drink license for his restaurant, the D & J 555 Restaurant and lounge. The restaurant is located at 2418 Cushman Drive, Columbia, South Carolina. The application and the Department's file on the application are hereby incorporated into the record by reference.

2. Evidence was presented reflecting that the Petitioner had complied with all relevant statutory and regulatory criteria. Notice of the time, date, place and subject matter of the hearing was given to all parties.

3. Jacobs is the sole owner of D & J 555 Restaurant and Lounge and submitted the

Petitioner's application for licensure. He is over the age of twenty-one and meets the statutory residency requirements. The Petitioner is not delinquent in the payment of state or federal government taxes, penalties or interest.

4. D & J 555 Restaurant and Lounge, LLC is properly registered with the South Carolina Secretary of State's office, and has leased the premises from Melinda L. Jones, as evidenced by a written commercial lease dated November 16, 2010.

5. The Petitioner seeks an on premises beer and wine permit and a restaurant liquor by the drink license for its location at 2418 Cushman Drive, Columbia, South Carolina 29203.

6. During the Department's review of the Petitioner's application, a South Carolina Law Enforcement Division (SLED) investigation was conducted on Jacobs. During the course of the investigation, Jacobs was interviewed by a SLED agent. SLED also ran a criminal background check into Jacob's criminal history. Jacobs' criminal background includes arrests for possession of cocaine, assault and battery of a high and aggravated nature, driving under the influence - first offense, criminal sexual conduct – third degree, and criminal domestic violence – first offense. However, Jacobs was not convicted of any of these charges.

7. Jacobs does have three misdemeanor convictions in his criminal record. He was convicted of disorderly conduct in 1983, common law assault in 2003, and ABHAN on September 10, 2013.¹

8. The Department asserts that Jacobs' ABHAN conviction is the basis for its denial of a beer and wine permit and liquor license on the grounds his conviction for this offense evidences a lack of good moral character. Jacobs was arrested for the crime on September 22, 2007. He pleaded guilty to the charge six years later on September 10, 2013 and was sentenced to five years with a suspended sentence.

9. The Petitioner introduced the indictment formally charging him with the crime of ABHAN. (Pet. Ex. 4). The indictment states that the unlawful act of violence was accompanied by "circumstances of aggravation, and /or differences in sexes, and/or indecent liberties with a

¹ Mr. Jacobs was arrested and charged with ABHAN in 2007. Presently, S.C. Code Ann. § 16-3-600(B)(2) provides that a person who commits ABHAN is guilty of a felony. However, ABHAN was not classified as a felony until the passage of 2010 Act No. 273, §6.B, eff. June 2, 2010. In 2007, when Mr. Jacobs committed the offense, it was a common-law misdemeanor. Gay v. Ariail, 673 S.E.2d 418 (2009).

female.”. Id.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

1. Jurisdiction over this case is vested with the South Carolina Administrative Law Court pursuant to §§ 1-23-310 et seq., § 1-23-600(B), and § 61-2-260. The issuance of a license to sell alcohol rests in the discretion of the body or official to whom the duty of issuing it is committed. Palmer v. S.C. Alcoholic Beverage Control Commission, 282 S.C. 246, 248, 317 S.E.2d 476, 477 (Ct. App. 1984); see also Wall v. S.C. Alcoholic Beverage Control Commission, 269 S.C. 13, 235 S.E.2d 806 (1977). The weight and credibility assigned to evidence presented at a hearing is within the province of the trier of fact. See S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trier of fact who observes a witness is in the best position to judge the witness’s demeanor and veracity and to evaluate the credibility of his testimony. See, e.g., Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

2. Section 61-6-1820 sets forth the criteria for the issuance of a liquor license. However, a liquor license may be denied if the Applicant is not of good moral character. See S.C. Code Ann. § 61-2-100(D).

3. It is recognized that a conviction of crime of moral turpitude indicates the absence of good moral character. See S.C. State Bd. of Dental Exam’rs v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946). Therefore, the question of moral turpitude is relevant to the Department in determining if a person is of good moral character when issuing a liquor license. See 1989 S.C. Op. Atty. Gen. 237 (S.C.A.G.), 1989 S.C. Op. Atty. Gen. No. 89-89, 1989 WL 406179. An applicant’s conviction of a crime of moral turpitude usually indicates a lack of good moral character required for licensure in the sale of alcoholic beverages, unless mitigating circumstances exist. See Id. The Department may also consider other crimes that are not necessarily crimes of moral turpitude when determining whether an applicant is of good moral character. See Wall v. S.C. Alcoholic Beverage Control Comm’n, 269 S.C. 13, 235 S.E.2d 806

(1977).

4. ABHAN does not invariably constitute a crime of moral turpitude. State v. Bailey, 275 S.C. 444, 446, 272 S.E.2d 439, 440 (1980). Whether ABHAN constitutes a crime of moral turpitude must be determined on the facts of each particular case. Absent some facts permitting the court to determine whether the underlying conduct of Jacobs in the commission of the offense constituted a crime of moral turpitude, there is no basis for a court to conclude that Jacobs' bare conviction of ABHAN constitutes evidence of moral turpitude. The Department provided no details to the court regarding the conviction. Furthermore, while the Department could have asserted that the ABHAN conviction, and the other criminal convictions on Mr. Jacobs' record demonstrated that he lacked good moral character for licensure, it did not make this argument. See Wall, 269 S.C. 13.

5. In matters of alcohol permits and licensure the Petitioner bears the burden of proof in showing that he meets all of the statutory requirements for licensure. ALC Rule 29 (B). The parties stipulated that the Petitioner met all other statutory requirements for licensure other than the requirement for possession of a good moral character. Therefore, the Petitioner has the burden of proving that he is of good moral character. Id. The Department asserts that this means that Jacobs has the burden of proving that his conviction of assault and battery of a high and aggravated nature was not a crime of moral turpitude. The Department cites Frederick J. Cole v S.C. Department of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591 (2009) as support for this position. However, this court is not necessarily persuaded by that decision. Neither Bailey nor any of its progeny create a presumption that a conviction for assault and battery of a high and aggravated nature is a crime of moral turpitude. Rather, the holding in Bailey is clear that such a conviction does not necessarily constitute a crime of moral turpitude, and that the determination requires an examination of the underlying facts of the case. Here, while the Petitioner must prove he is of good moral character, it is the Department that asserts that his conviction for ABHAN is a crime of moral turpitude, and thus shows his lack of good moral character. Therefore, the Department is taking the position that the Petitioner has the burden to disprove an assertion that the Department failed to prove.

6. However, this court need not reach a decision on the Department's assertion

because the Petitioner himself introduced evidence that reveals that the underlying facts of his ABHAN conviction demonstrate that the offense was of a nature that makes it a crime of moral turpitude. The Petitioner introduced a copy of the indictment that formerly charged him with the ABHAN offense. Pet. Ex. 4. The indictment states that the Petitioner's act was accompanied by "circumstances of aggravation, and/or differences in sexes and/or indecent liberties with a female." *Id.* The Attorney General has opined that "sexual crimes, or offenses which pertain thereto, or which are of a similar nature ... are all crimes which are regarded as involving moral turpitude." 1994 S.C. Op. Atty. Gen. No. 26, 1994 WL 199758, (1994). Because the underlying facts of the Petitioner's assault and battery of a high and aggravated nature indicate that his crime involved one of a sexual nature, as reflected by the indictment charging him with the offense, this court concludes that the offense did involve moral turpitude, and is therefore evidence of a lack of moral character.

7. The Petitioner also introduced, without objection from the Department, three affidavits from individuals claiming to know him and championing his good character. The court afforded limited weight to these character affidavits in the absence of any live testimony regarding the Petitioner's good character. The Petitioner offered no testimony regarding his good moral character. The Petitioner's weak character evidence fails to overcome the evidence of a lack of good moral character demonstrated by the Petitioner's conviction for a crime of moral turpitude.

8. Applying the law to the facts of this matter, the Department should deny the Petitioner's application for an on premises beer and wine license and restaurant liquor by the drink license.

ORDER

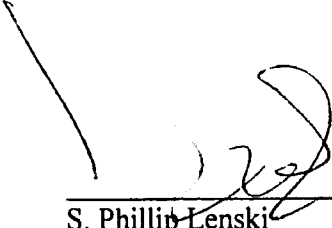
Based upon the Findings of Fact and Conclusions of Law stated above, the court finds that the Petitioner failed to prove that he possesses the good moral character necessary for an on premises beer and wine license and restaurant liquor by the drink license. It is therefore

ORDERED that the Department shall **DENY** Petitioner's application for an on premises beer and wine license and a restaurant liquor by the drink license for the premises located at 2418

Cushman Drive, Columbia, South Carolina 29203, in accordance with S.C. Code Ann. § 61-2-80, and § 61-6-1820.

IT IS SO ORDERED.²

January 14, 2015
Columbia, South Carolina

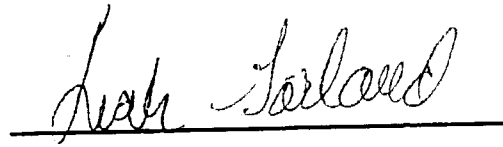


S. Phillip Lenski
Administrative Law Judge

² The court gave careful consideration to all of the issues raised by the Department in its Motion for Reconsideration in drafting this Amended Final Order. To the extent that any issues raised in the Motion for Reconsideration are not specifically addressed in this Amended Final Order, the court found them to be without merit.

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script that reads "Leah E. Garland". The signature is written in black ink and is positioned above a solid horizontal line.

Leah E. Garland
Judicial Law Clerk

January 14, 2015
Columbia, South Carolina

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