THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

Hon. John D. McLeod, Administrative Law Judge
Trial Court Case No. 2016ALJ170008CC

Appellate Case No. 2016-000593

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SC Court of Appeals

Ex Parte: Johnnie Cordero, Appellant,

In Re: Fnu Satish Kumar d/b/a Piney Xpress, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

APPELLANT'S INITIAL BRIEF

Johnnie Cordero
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Columbia, SC 29210
(803) 753-8091
Appellant, Pro Se

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STATEMENT OF ISSUES ON APPEAL

1. Did the court below err in permitting the amendment of the permit application at the hearing without notice to the public as required by SC Code Section 61-4-520 (7)(a) and 8(a).

2. Is the failure to fulfill such notice requirements jurisdictional such that any orders issued by the court are rendered void *ab initio*?

3. Did the court below err in denying Appellant's motion to intervene on the ground that the said motion was untimely despite the fact that it was filed on the day of the hearing and contained a Statement of Good Cause as required?

4. Did the denial of the motion to intervene under the circumstances of this case amount to an abuse of discretion such that reversal and remand are required?

STATEMENT OF THE CASE

Appellant, Johnnie Cordero, protestant below, filed a formal protest to the issuance of an on-premise beer and wine permit at 1001 Piney Woods Road, in Richland County, Columbia, South Carolina. The Respondent Department of Revenue (hereinafter "DOR") denied the permit based on Appellant's valid protest. The "DOR" found that "... other than the question of the suitability of location as stated in the public protest the Department has found that the applicant has met all other statutory requirements for licensure." (Resp. Exhibit #1, Dept. File. p. 000031 para. 2). The "DOR" did not conduct an investigation or issue an opinion as to the suitability of location as required by SC Code Section 61-4-520(5). Thereafter, Petitioner Satish Kumar filed a request for contested hearing. The hearing was held on March 8, 2016, before Administrative Law Judge Hon. John D. Mcleod. On the day of the hearing Petitioner filed a motion to amend his application to change it from a seven day *on premises* beer and wine permit to a seven day *off premises* beer and wine permit. (Trans. pg. 5, lines 3-6; pg. 41, lines 4-8). The court granted the motion.

At the hearing Appellant filed a Motion to Intervene which motion contained a Statement of Good Cause as required by Rule 20 RPALC (see, Protestant's Exhibit Number One). The motion was denied as untimely. This appeal follows.

STANDARD OF REVIEW

"Appeals from the ALC are governed by the Administrative Procedures Act (APA)." *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control,* 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct.App.2011); see S.C. Code Ann. §§ 1–23–310 to –400 (2005 & Supp.2011). "Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *MRI at Belfair*, 394 S.C. at 572, 716 S.E.2d at 113 (citing S.C. Code Ann. § 1–23–380(5) (Supp.2010)). " 'As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence.' " Id. (quoting *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control,* 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008)). "

ARGUMENT

1. THE COURT BELOW ERRED IN HOLDING A HEARING ON AN APPLICATION FOR OFF-PREMISES PERMIT TO SELL BEER AND WINE THAT HAD NOT MET THE JURISDICTIONAL NOTICE REQUIREMENTS OF SC CODE §§ 61-4-520 (7)(a) AND 8(a).

Title 61- 4-520 (7)(a)(iii) requires in pertinent part, that before a beer and wine permit may be issued the applicant is required, inter alia, to give public notice by publication at least once a week for three consecutive weeks and by displaying a sign for 15 days at the site. Both the publication and the sign *must state the type license applied for*.

In the instant case the publication and the sign posting were carried out timely and as required. However, the information provided turned out to be incorrect as to the mandatory requirement that the publication and the sign *must* state the type license applied for. Both notices stated that an *on-premise* beer and wine permit was applied for. At the hearing, however, the petitioner moved to amend the original application to apply for an *off-premises* beer and wine permit. Petitioner's motion was granted.

Appellant contends and urges this court to find that although the issue here may be one of novel impression it is, nonetheless of vital importance as it goes to the lower court's jurisdiction to hear the matter and therefore its ability to issue a permit under the circumstances of this case.

In the instant case the notice given to the public was that the petitioner was applying for an on-premises permit. *Notice of an application for an off-premises permit was never given yet a permit was granted.* The mandatory statutory requirement was, therefore, not complied with. There is no provision at law for an 11th hour amendment of the application, without notice to the public, as any such amendment would defeat the purpose of the notice requirement and undermine the intent of the legislature.

It is axiomatic that the Respondent DOR would not have authority to issue a permit for the sale of beer and wine had the petitioner not *first* complied with the *mandatory* notice requirements of SC CODE §§ 61-4-520 (7)(a)(iii) and 8(a).

It follows that the Administrative Law Court would not have jurisdiction to hear this matter if the petitioner had not *first* complied with the notice requirements. The notice requirements are *mandatory*. They *must* state the type of license applied for. The licenses are not fungible. A person who holds an on-premise permit may not legally sell beer and wine "to go". Likewise a permit holder of an off-premises license may not legally sell beer and wine to be consumed on the premises. It is also axiomatic that the mandatory notice requirements are not met if the notice misstates the type of permit sought. Because the notice requirement is mandatory it cannot be inaccurate, waived or ignored. Failure to comply must therefore be jurisdictional.

Appellant contends that since this matter goes to the court's subject matter jurisdiction it may be raised at anytime, even on appeal. Appellant suggests that the court was without authority to hear this matter and that the only remedy is to remand for the petitioner to file the correct application and give the appropriate statutory notice. In the alternative, the petition for on premises consumption should be denied as petitioner did not meet the requirements for on premises license.

2. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO INTERVENE FILED ON THE DAY OF THE HEARING ON THE GROUND THAT THE MOTION WAS UNTIMELY.

The grant or denial of a motion to intervene is within the sound discretion of the adjudicative body. However, such discretion is bounded by guiding principles and factors. Further, the South Carolina Rules of Civil Procedure and the Rules of Procedure of the Administrative Law Court provide that intervention is proper if intervention will not unduly prolong the proceeding or otherwise prejudice the rights of existing parties. *See,* Rule 24, SCRCP; Rule 20, RPALC. For the reasons set forth more particularly hereinafter the Appellant's Motion to Intervene should have been granted and the denial of the motion was a clear abuse of discretion.

In *In Re Horry County State Bank*, 361 S.C. 503 (S.C. Ct. App. 2004) this court opined:

> "Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. *See Black's Law Dictionary* 826 (7th ed. 1999). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP, which is modeled after the federal rule. Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all parties who may be affected. *See Berkeley Electric* at 189, 394 S.E.2d at 714. However, this does not mean intervention should always be granted. Instead, "we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2)." *Id* ."Each case will be examined in the context of its unique facts and circumstances." *Id.*

In *Ex Parte Reichlyn*, 310 S.C. 495, 498 (1993) the South Carolina Supreme Court noted that:

> "A party moving to intervene under Rule 24(a)(2), SCRCP, must: 1) establish timely application; 2) assert an interest relating to the property or transaction which is the subject of the action; 3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and 4) demonstrate that its interest is inadequately

> represented by other parties. *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712 (1990).

In *Davis v. Jennings*, 304 S.C. 502, 504 405 S.E.2d 601(1991), the Supreme Court of South Carolina held that a court must consider the following factors in determining whether a motion to intervene is timely:

> "1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; 2) the reason for the delay; 3) the stage to which the litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention."

In the instant case the Motion to Intervene was denied based on Rule 20 of the Administrative Law Court Rules of Procedure (RPALC). Rule 20 (c) provides in pertinent part that:

> "C. Time for Motion for Intervention. The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings. Unless otherwise ordered by the administrative law judge, the motion to intervene shall be filed at least twenty (20) days before the hearing. *Any later motion shall contain a statement of good cause for the failure to intervene earlier.* (Emphasis added).

Rule 24 and presumably Rule 20 are modeled after Federal Rule of Civil Procedure 24(a) and (b). Both statutes refer to timeliness of the motion but only Rule 20 sets a specific number of days within which a motion to intervene may be filed. However, the 20 day requirement is at best suggestive and cannot be jurisdictional since it permits filing of the motion at the hearing. It follows that the question of the timeliness of the motion to intervene in this matter is the threshold question that must be addressed.

Appellant contends that the twenty day filing requirement for a motion to intervene is suggestive and not mandatory since it permits, as it must, that the motion may be made after the twenty days but must contain a statement of good cause. More importantly, a letter sent to appellant by Respondent DOR states "a motion to intervene may be made at the hearing". Since this letter is a form letter sent to all protestants Appellant contends that this court may take judicial notice of its contents.

Therefore, Rule 20 is not mandatory and therefore not jurisdictional. Since the 20 day time frame set forth in Rule 20 RPALC is not jurisdictional it cannot deprive Appellant of the right to intervene. If Rule 20 is not jurisdictional *and* the motion was filed on the day of the hearing as permitted by the rule it cannot be untimely according to Rule 20. Despite these facts the court summarily denied the Appellant's Motion to Intervene in the following ruling from the bench:

> THE COURT: Thanks. Well, not withstanding your very articulate argument, I'm going to -- I'm going to deny the motion on the basis of the timeliness alone. The rules are written for a reason. If this were 19 days ahead of the trial or something like that I might bend them a little bit and allow you in, but on the day of the hearing, just can't do it. Denied." (Trans. p. 23, lines 16-23).

The Appellant responded as follows:

> MR. CORDERO: Your Honor, one more thing. Just on preservation for appeal in case this decision is overturned. Forgive me for sitting, the statute provides -- that such a motion can be made on the day of the hearing, so of course its discretionary on your part, we understand that, but the motion is not technically untimely because it is being filed on the day of the motion. That's all I'm going to say just for the record. Thank you, Your Honor. And I accept your ruling. (Trans. p. 23, line 24 through p. 24 line11).

Later in the hearing the court revisited its earlier ruling as follows:

> THE COURT: All right. Before you step down I want to go back to your motion for just a moment.
>
> MR. CORDERO: Yes, sir.
>
> THE COURT: You heard the objections cited by Mr. Allen. And when I said the timeliness of it was the basis for my refusal ---
>
> MR. CORDERO: Yes, sir.
>
> THE COURT: --- or denial of it, that encompasses the unfairness to the counsel in preparing his case to meet whatever possibilities might arise from cross-examination and the presentation of witnesses. So, perhaps I was a little bit too brief in my explanation of the reason for the denial, but it is in respect of the duties of the

other counsel that added to my decision. Thank you, sir.

MR. CORDERO: I -- I do understand, Your Honor, and I certainly accept. (Trans. p.37, line 24 through p. 38 line 16).

The threshold inquiry in any motion to intervene is whether the motion is timely. *NAACP v. New York*, 413 U.S. 345, 369 (1973). It follows that if the motion is, in fact, untimely the court need not continue its analysis. Apparently, the court below found it necessary to further support its denial of the motion. Unfortunately, the court's elaboration did not serve to support the denial. In fact, it served to undermine it. This is necessarily true because the court's elaboration proves too much. As mentioned above the court said ".. unfairness to counsel in preparing his case to meet the possibilities of cross examination and presentation of witnesses...." was part of its reason for denial. But these are not grounds to deny a motion to intervene. Although it is true that the court must consider all the circumstances it must be remembered that this was an *administrative hearing*. The entire proceeding lasted thirty-eight minutes. One witness was called. Appellant informed the court that he did not intend to call witnesses (Trans. p. 23, lines 3-4), and that he only wanted the opportunity to cross-examine the Petitioner and to have the right to appeal an adverse decision. (see, Trans. p. 21, lines 1-8). Appellant contends that for the foregoing reasons his motion filed on the day of the hearing was, as matter of law, timely filed.

3. THE COURT'S DENIAL OF APPELLANT'S MOTION TO INTERVENE WAS AN ABUSE OF DISCRETION IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT (APA) . S.C.CODE ANN. §§ 1–23–310 to –400 (2005 & Supp.2011).

The standard of review for a Rule 24(a)(2) [and presumably a Rule 20 motion] is whether the judge abused his discretion in granting or denying the motion. *S.C. Tax Comm'n v. Union County Treasurer,* 295 S.C. 257, 260, (Ct. App. 1988). "An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." *Eason v. Eason, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009).*

Appellant contends that in the instant case the court's decision was controlled by an error of law. The court concluded that a motion to intervene made on the day of the hearing was, *ipso facto,* untimely. In his ruling from the bench the court stated that "...[t]he rules are written for a reason. If this were 19 days ahead of the trial or something like that I might bend them a little bit and allow you in, *but on the day of the hearing, just can't do it.* Denied." (Trans. p. 23, lines 16-23). (Italics added). Here the court appears to imply that it would be *bending the rules* to allow the intervention at 19 days before the trial but on the day of the hearing it could not be done.

In this regard a form letter sent to all persons who protest the issuance of alcohol licenses and permits in the State of South Carolina, under the imprimatur of the State of South Carolina Department of Revenue, a copy of which was received by Appellant contains an attachment entitled ADMINISTRATIVE MEMORANDUM TO INDIVIDUALS PROTESTING A LICENSE OR PERMIT. The memorandum states in pertinent part that: "A motion to intervene may be made at the hearing, but you must show good cause for failure to make the motion earlier." Appellant cannot emphasize enough that the Administrative Memorandum is served upon all persons who protest. The notice simply reiterates Rule 20(c) that provides, again, in

pertinent part that *Any later motion shall contain a statement of good cause for the failure to intervene earlier.* (Emphasis added).

Although this Administrative Memorandum was not in the record below Appellant contends that this court may take judicial notice of its existence and content as it is an official publication of an administrative agency of the State of South Carolina.

Rule 201 SCRCP governs judicial notice of Adjudicative facts and is identical to the Federal Rule. Rule 201(f) provides that judicial notice may be taken at any stage of the proceeding. An appellate court may take judicial notice of official letters that set forth an administrative practice, such as an agency's practice of taking certain legal positions. *see* Frederick Bernays Weiner, *Briefing and Arguing Federal Appeals* (§82(ii), p. 251 and n.129) (Law book Exchange and Hein 2001)(1961). Appellant submits herewith a true copy of the letter and Administrative Memorandum as Exhibit A.

CONCLUSION

For the foregoing reasons Appellant respectfully requests that this court grant the following relief: (1) reverse and remand this matter on the ground that the court was without jurisdiction to issue a permit when the petitioner had not met the mandatory notice requirements set forth in SC Code § 61-4-520 (7)(a)(iii) and 8(a); (2) grant Appellant's Motion to Intervene as timely filed; and (3) for such other and further relief as to this court may seem just, proper and equitable.

Dated: Columbia, South Carolina
18 May 2016

Respectfully submitted,

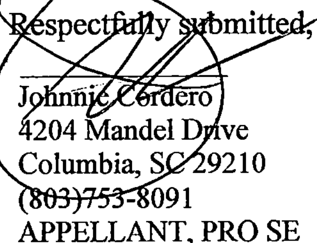

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EXHIBIT A

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211

Dear Sir or Madam:

The South Carolina Department of Revenue is transmitting to the Administrative Law Court an application for the sale of beer, wine, or alcoholic liquors. As you have indicated that you are protesting this application, a copy of the agency information sheet is enclosed.

It is not necessary for you to take any additional action at this time. The Administrative Law Court will schedule this matter for a hearing, and will inform you of the date, place, and time of the hearing so that you may attend. If you do not plan on attending the hearing, please inform the Administrative Law Court as soon as possible after you receive the hearing notice.

A person who files a protest and fails to appear at a hearing after affirming a desire to attend the hearing may be assessed a fine or penalty to include court costs. S. C. Code Ann. §§ 61-4-525 and 61-6-1825 (2009). The decision to assess a fine or penalty is made by the Administrative Law Judge to whom the case is assigned.

From this point on, all motions, requests, or inquiries about the hearing should be directed to the Administrative Law Court, Edgar A. Brown Building, Suite 224, 1205 Pendleton St., Columbia, South Carolina 29201. The telephone number of the Administrative Law Court is (803) 734-0550. You may find the court's rules at www.scalc.net.

Sylvia Osborne
Administrative Assistance
803-898-5008

ADMINISTRATIVE MEMORANDUM TO INDIVIDUALS PROTESTING A LICENSE OR PERMIT

Upon written request of a person who resides in the county where the license is requested to be issued, the department must not issue the permanent license until interested persons have been given an opportunity to be heard. S.C. Code Ann. § 61-6-1820 (2009). In the present case, the Applicant, upon notification of your protest, has requested a hearing before an Administrative Law Judge to hear evidence and determine whether the protested application(s) should be granted.

As a Protestant, you have the right to appear at the hearing to testify in opposition to the application(s), and have limited participation in the proceedings. A group of Protestants with common opposition should designate a spokesperson to present evidence and speak for the group. There is no maximum number of witnesses which may be called, but the Administrative Law Judge may limit cumulative testimony. Protestants may choose to be represented by an attorney.

A Protestant is not considered a party of record to the contested case. Byers v. S.C. Alcoholic Beverage Control Commission, 316 S.E.2d 705 (Ct. App. 1984). To have full participation rights at the hearing, including the right to cross examine witnesses, to receive a copy of the Administrative Law Judge's order, and to appeal an adverse decision, a Protestant must request to be admitted as a party. See Sabella v. S.C. Alcoholic Beverage Control Commission, 346 S.E.2d 530 (Ct. App. 1986).

Rules of Procedure for the Administrative Law Court provides that a person may intervene in a pending case upon showing:

(1) that he or she will be aggrieved or adversely affected by the final order;

(2) that his or her interests are not being adequately represented by existing parties; and

(3) intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.

If you wish to intervene as a party, you must file a Motion to Intervene with the Administrative Law Judge assigned to hear the case at least twenty (20) days before the hearing. A motion to intervene may be made at the hearing, but you must show good cause for failure to make the motion earlier. Blank forms for a Motion for Leave to Intervene are available from the Administrative Law Court upon request. A filing fee of $50.00 is required for all Motions to Intervene filed with the Court, with checks or money orders made payable to the Administrative Law Court and should be mailed to the attention of the Clerk's office.