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JUN 17 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable John D. McLeod, Administrative Law Judge

Docket Number: 16-ALJ-17-0008-CC
Appellate Case No. 2016-000593

Ex Parte: Johnnie Cordero.....Appellant,

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

v.

South Carolina Department of RevenueRespondent.

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PROOF OF SERVICE

I, Jean M. O'Connor, do hereby certify that I have caused to be mailed, via United States Postal Service, postage pre-paid, the South Carolina Department of Revenue's, Respondent, Initial Brief and Designation of Matter in the above-referenced matter to Kenneth E. Allen, Esquire, 1201 Main Street, Suite 1980, Columbia, SC 29201 and Johnnie Cordero, 4204 Mandel Drive, Columbia, SC 29210 on this 17th day of June of 2016.

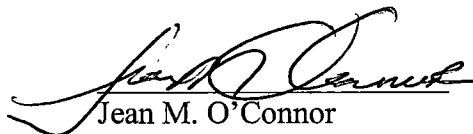

Jean M. O'Connor

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE1

ARGUMENTS:

I. The Administrative Law Court Did Not Abuse Its Discretion In
Denying Appellant’s Motion To Intervene.....5

II. The Appellant Is Not Entitled To Relief Regarding The Amendment Of
The On-Premises Beer and Wine Permit.....8

CONCLUSION11

TABLE OF AUTHORITIES

CASES:

<u>Beaufort Realty Co. v. Beaufort Cty.,</u> 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001).....	9, 10
<u>Brown v. South Carolina Dep't of Health and Env'tl. Control,</u> 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002).....	10
<u>Carson v. South Carolina Dep't of Natural Res.,</u> 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002).....	10
<u>Centex Intl. Inc. v. S.C. Department of Revenue,</u> 406 S.C. 132, 139, 750 S.E.2d 65, 68, 69 (2013).....	6
<u>Clark v. Aiken County Gov't,</u> 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005)	5
<u>Houston Gen. Ins. Co. v. Moore,</u> 193 F.3d 838, 839 (4 th Cir. 1999).....	6
<u>Lujan v. Defs. Of Wildlife,</u> 504 U.S. 555, 560-61, 112, S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)...	9
<u>Olson v. S.C. Dep't of Health & Env'tl. Control,</u> 379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008).....	5
<u>S. Carolina Tax Comm'n v. Union Cty. Treasurer,</u> 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988).....	6
<u>Travelscape, LLC, v. South Carolina Dept. of Revenue,</u> 391 S.C. 89, 705 S.E.2d 28 (2011):	6
<u>Turner v. S.C. Dep't of Health & Env'tl. Control,</u> 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008)	5
<u>Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue,</u> 358 S.C. 647, 650, 595 S.E.2d 890, 891 (Ct. App. 2004).....	7
<u>William v. Vanvolkenburg,</u> 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).....	7

STATUTES:

S.C. Code Ann. § 1-23-610(B) 5, 6, 10

S.C. Code Ann. § 61-4-525 (Supp. 2015) 2, 4

S.C. Code Ann. Regs. 7-201 (Supp. 2015) 2, 4

OTHER AUTHORITIES:

The Regulation of Alcoholic Beverages in South Carolina,
Honorable John D. Geathers and Justin R. Werner..... 10

ALC Rule 20(c)..... 7

ISSUES ON APPEAL

- I. **DID THE ADMINISTRATIVE LAW COURT ABUSE ITS DISCRETION IN DENYING APPELLANT’S MOTION TO INTERVENE?**
- II. **IS THE APPELLANT ENTITLED TO RELIEF REGARDING THE AMENDMENT OF THE ON-PREMISES BEER AND WINE PERMIT?**

STATEMENT OF THE CASE

This appeal arises from an order of the South Carolina Administrative Law Court (“ALC”) denying a motion to intervene by the Appellant, Johnnie Cordero (“Reverend Dr. Cordero”). The Appellant was protesting an on-premises beer and wine permit (the “Permit”) application submitted to the Department by Fnu Satish Kumar, d/b/a Piney Express (“Fnu Satish Kumar”), located at 1001 Piney Woods Road, Columbia, South Carolina.

On December 7, 2015, the Department received an application for the Permit from Fnu Satish Kumar. Subsequently, the Department received a valid public protest to the application for the Permit (the “Written Protest”) from Reverend Dr. Cordero on December 21, 2015.

Other than the timely filed Written Protest submitted by Reverend Dr. Cordero, the Department determined that Fnu Satish Kumar met all other statutory requirements for licensure and would have granted the Permit. As a result of the Department’s receipt of the timely filed Written Protest, the Department denied the Permit, pursuant to a denial letter dated December 31, 2015. Fnu Satish Kumar timely protested the denial of the Permit, via letter received by the Department on January 5, 2016.

Fnu Satish Kumar commenced an action in the ALC by requesting a contested case hearing in January of 2016, seeking relief from the South Carolina Department of

Revenue's (the "Department") Determination issued on January 12, 2016 (the "Determination"). In its Determination, the Department denied Fnu Satish Kumar's application for the Permit because the Department received a timely filed public protest in opposition of the Permit, pursuant to S.C. Code Ann. § 61-4-525 (2009) and S.C. Code Ann. Regs. 7-201 (Supp. 2011)¹. These statutes allow the public to submit written protests to the Department against the issuance of a beer and wine permit if a protestant complies with the requirements of the statute in rendering the protest. Accordingly, based on the receipt of the Written Protest (as defined below), the Department could not lawfully issue the Permit, pursuant to the mandates set forth in § 61-4-525.

The ALC issued a Notice of Hearing on February 10, 2016. On March 8, 2016, the ALC held a contested case hearing on the matter. At the contested case hearing on March 8, 2016, Fnu Satish Kumar amended its application for an on-premises beer and wine permit to an off-premises beer and wine permit, without objection from the Department. Also, at the hearing, Reverend Dr. Cordero moved to intervene in the case. The ALC denied Reverend Dr. Cordero's motion to intervene. The ALC issued a Final Order on the matter on March 14, 2016 (the "Final Order"), finding that Fnu Satish Kumar's store was suitable for an off-premises beer and wine permit and granted the Permit.

On March 18, 2016, the Appellant filed a Notice of Appeal and served the same on the Department, the Respondents, and the ALC.

¹Regulation 7-201 provides, in pertinent part: "If a valid protest is received with respect to the issuance of a new permit or Permit, the new permit or Permit will not be issued until the protest is resolved and the determination is made that the permit or Permit must be issued."

STATEMENT OF THE FACTS

Fnu Satish Kumar is a general convenience store for one-stop shopping that is located in Richland County. Fnu Satish Kumar has been open since January 23, 2016. The area surrounding the location is mostly residential, but the subject location is zoned neighborhood-commercial. (R., p. __, Tr., p. 10, line 7.) Puneet Kumar is the day-to-day operations manager for this business along with his father, Fnu Satish Kumar. Fnu Satish Kumar was the applicant. (R., p. __, 4:10; Tr., p.7, 4:10.)

The Department received Fnu Satish Kumar's application for an on-premises beer and wine permit in December of 2015. After receiving the application, South Carolina Law Enforcement Division (SLED) conducted an inspection of the proposed location and concluded that the location met all of the statutory requirements for an on-premises beer and wine permit. The Department also received a valid public protest to the application from Reverend Dr. Cordero on December 21, 2015. (R., p. __; Department Determination, pg. 1.)

Other than the timely filed Written Protest submitted by Reverend Dr. Cordero, the Department determined that Fnu Satish Kumar met all other statutory requirements for the Permit. (R., p. __; Department Determination, pg. 1.) As a result of the Department's receipt of the timely filed Written Protest, the Department denied the renewal of the License, pursuant to a denial letter dated December 31, 2015. (R., p. __; Department Determination, pg. 1.) Fnu Satish Kumar timely protested the denial of the permit, via letter received by the Department on January 5, 2016. (R., p. __; Department Determination, pg. 1.)

On January 12, 2016, the Department issued its Determination on this matter. The Determination denied Fnu Satish Kumar's application for an on-premises beer and wine permit because the Department received a timely filed Written Protest in opposition to the permit pursuant to § 61-4-525 and Regulation 7-201. (R., p. __; Department Determination, pg. 2.) These statutes allow the public to submit Written Protests to the Department against the issuance of a beer and wine permit if a protestant complies with the requirements of the statute in rendering the protest. Accordingly, based on the receipt of the Written Protest from Reverend Dr. Cordero, the Department could not lawfully issue the Permit, pursuant to mandates set forth in § 61-4-525. (R., p. __; Department Determination, pg. 2.)

In January of 2016, Fnu Satish Kumar requested a contested case hearing at the ALC seeking relief from the Determination. The ALC issued a Notice of Hearing on February 10, 2016, which scheduled the contested hearing for March 8, 2016.

At the contested case hearing on March 8, 2016, Fnu Satish Kumar amended his application for an on-premises beer and wine permit to an off-premises beer and wine permit, without objection from the Department. (R., p. __, 3:10; Tr., p. 5, 3:10.) Also, at the contested case hearing, Reverend Dr. Cordero, the protestant, filed a motion to intervene and a statement of good cause. (R., p. __, 4:10; Tr., p. 19, 4:10.) Reverend Dr. Cordero brought numerous individuals with him to the ALC. Reverend Dr. Cordero stated that his good cause was that he was unaware that the Department was a neutral party in this matter and that his interests as a protestant were not going to be adequately represented at the hearing. (R., p. __, 7:19; Tr., p. 20, 7:19.) The Department did not have any objections to Reverend Dr. Cordero's motion to intervene. (R., p. __, 10:11;

Tr., p. 21, 10:11.) Fnu Satish Kumar objected to the motion on the basis that the motion was not filed timely, and because it would be unfair because there was no time to prepare for the numerous individuals Reverend Dr. Cordero brought to Court, and whom he could call as witnesses if he was allowed to intervene. (R., p. __, 14:25, p. __, 1:5; Tr., p. 22, 14:25, 1:5.) The ALC denied Reverend Dr. Cordero's motion to intervene because of the timeliness of the motion and due to the unfairness to the parties of the case. (R., p. __, 17:23, p. __, 2:14; Tr., p. 23, 17:23, p. 38, 2:14.)

The ALC issued a Final Order on the matter on March 14, 2016 (the "Final Order"), finding that Fnu Satish Kumar's store was suitable for an off-premises beer and wine permit and granted the Permit. (R., pp. ____; ALC Final Order.)

ARGUMENTS

I. The Administrative Law Court Did Not Abuse Its Discretion In Denying Appellant's Motion To Intervene.

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the standard of review. Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Env'tl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). Further, the review of the Final Order must be confined to the record. This Court may not substitute its judgment for the judgment of the Administrative Law Judge as to the weight of the evidence on questions of fact. Specifically, S.C. Code Ann. § 1-23-610(B) (2005) states:

The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or

modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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 other 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.

Section § 1-23-610(B). See, Travelscape, LLC, v. South Carolina Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011).

The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct.App.2008); see Media Gen. Communications, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010) (“A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law.” (citing S. C. Code Ann. § 1-23-610(B)(a), (d)) (emphasis added).

Centex Intl. Inc. v. S.C. Department of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 68, 69 (2013).

The standard of review for a motion to intervene is whether the Court abused its discretion in denying the motion. S. Carolina Tax Comm'n v. Union Cty. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988). Specifically, the decision of whether or not a motion to intervene is *timely* should not be disturbed on appeal unless there is an abuse of discretion. Houston Gen. Ins. Co. v. Moore, 193 F.3d 838, 839 (4th Cir. 1999). An abuse of discretion occurs when a trial court's decision is unsupported by the

evidence or controlled by an error of law. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 358 S.C. 647, 650, 595 S. E.2d 890, 891 (Ct. App. 2004). Appellant in this case contends that denying Appellant's motion to intervene was an error of law.

The ALC did not abuse its discretion in denying Appellant's motion to intervene because it found that the motion was untimely. Rule 20(c) of the Administrative Law Court Rules of Procedure (RPALC) states:

(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.

The rule clearly states that the motion *shall* be filed at least twenty (20) days prior to the hearing, and that if the motion is not filed timely, then it *shall* contain a statement of good cause for the failure to intervene earlier. Whether or not Appellant has established good cause is within the sole discretion of the court. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). Appellant in this case filed his motion to intervene on the day of the hearing; therefore, the Appellant failed to file his motion within the time required by Rule 20. While the Appellant's motion also contained a statement of good cause, as required by Rule 20, the good cause asserted did not entitle the Appellant to relief from the mandated time limit of Rule 20. The good cause asserted by the Appellant was that Appellant had only recently been made aware that the Department was merely a neutral party, and that he wanted the rights

to appeal if the ALC granted Fnu Satish Kumar's license. The Appellant could have learned this information well before the hearing by contacting the Department or hiring an attorney. His election not to do either of these things does not constitute good cause. The ALC denied the motion at the hearing based on the timeliness and the unfairness to the parties of the case if the motion were granted on the day of the hearing. Specifically, the ALC observed the difficulties for parties of the case in the presentation of Appellant's witnesses and preparing for cross examination of those witnesses if Appellant's motion to intervene were granted on the day of the hearing.

As explained more fully herein, the ALC's decision to deny Appellant's motion to intervene was not controlled by an error of law and, therefore, should not be overturned. The ALC found the motion to intervene was not within the time required by the rules and the good cause asserted by the Appellant was not sufficient to overcome the unfairness to the parties. Such is not an error of law. Because there was no error of law, the issue becomes whether the ALC's denial of Appellant's motion to intervene was supported by substantial evidence in the record. As explained above, each factual finding underlying the decision to deny Appellant's motion to intervene, including the untimeliness of the matter and the unfairness of being able to call previously undisclosed witnesses, was supported by substantial evidence in the record. Therefore, the ALC did not abuse its discretion in denying Appellant's motion to intervene. Accordingly, this Court should uphold the ALC's decision.

II. The Appellant Is Not Entitled to Relief Regarding The Amendment Of The On-Premises Beer And Wine Permit.

In order for a party to have the right to appeal, they must first establish standing. There are three elements of standing: (1) the plaintiff must have suffered an “injury in fact” which is (a) concrete and particularized (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ (2) there must be a causal connection between the injury and the conduct complained of, and (3) it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). The party appealing bears the burden of establishing the three elements of standing. Id. Additionally, the party appealing must prove that it is aggrieved by an order. Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). “A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest.” Id.

Here, the Appellant has failed to meet the first prong showing that he has suffered any type of injury as a result of the ALC Final Order. Appellant argues that he was not given proper notice of the off-premises beer and wine permit; however, the Appellant has failed to provide any evidence of how this has caused him any “injury in fact.” Appellant further argues that the ALC did not have jurisdiction to hear the present matter if the notice requirements were not met; however, this is based on Appellant’s erroneous belief that an on-premises beer and wine permit does not allow the sale of beer and wine for off-premises consumption. As discussed in more detail below, an on-premises beer and wine permit does allow for the off-premises consumption of beer and wine; therefore, Appellant has suffered no injury as a result of the amendment of the beer and wine application from on-premises to off-premises at the hearing. Consequently, Appellant

does not have standing under the three element test since Appellant is not an aggrieved party who has suffered an injury.² Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001).

Furthermore, even if Appellant had standing, the Court's review is limited to the record. Section 1-23-610(B). Issues presented on appeal must have been raised and ruled on at the lower court level. *See, e.g.*, Brown v. South Carolina Dep't of Health and Env'tl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (issues not raised to and ruled upon by the ALC are unpreserved for appellate review); *563 Carson v. South Carolina Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency).

In this case, Appellant did not raise the issue of whether or not a hearing on an off-premises beer and wine permit had met the jurisdictional notice requirements during the ALC hearing. Because Appellant failed to raise such issue at the lower court level, this issue was not ruled on by the Administrative Law Court and, therefore, it is unpreserved for review by this Court.

Finally, even if Appellant had standing, Appellant was given proper notice of the application for an off-premises beer and wine permit, despite the fact the application was amended at the hearing. The Department's longstanding policy is that an on-premises beer and wine permit does not prohibit the sale of beer and wine for off-premise consumption. The Regulation of Alcoholic Beverages in South Carolina. Honorable

²Only the first prong of the three element test for standing is analyzed because if Appellant has not established an injury in fact, then it is unnecessary to analyze the next two prongs.

John D. Geathers and Justin R. Werner, 2007, page 119. Essentially, an on-premises beer and wine permit is an on-and-off premises beer and wine permit. Id. Consequently, when Appellant had notice of the application for an on-premises beer and wine permit, Appellant also had notice regarding an off-premises beer and wine permit. For these reasons, all of the notice requirements regarding an off-premises beer and wine permit were met, and the ALC's decision should be upheld.

CONCLUSION

For the foregoing reasons, the Department requests that this Court uphold the ALC's Final Order, and the ALC's denial of the Appellant's motion to intervene.



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