

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

The Venture Grouping, LLC, d/b/a Zen Ultra Lounge,

Petitioner,

vs.

South Carolina Department of Revenue,

Respondent.

Docket No. 17-ALJ-17-0466-CC

ORDER OF DISMISSAL

RECEIVED

MAY 21 2018

SC Court of Appeals

INTRODUCTION

This matter was originally before the Administrative Law Court (ALC or Court) upon the request of Petitioner The Venture Grouping, LLC, d/b/a Zen Ultra Lounge (Petitioner) for a contested case hearing to challenge the decision of Respondent South Carolina Department of Revenue (Department) denying an alcohol license. On January 22, 2018, Respondent moved to dismiss this matter on the basis that Petitioner failed to timely file its request for a contested case hearing. The Court agreed and granted the Department's motion.

Thereafter, the Court granted Petitioner's Motion to Reconsider, and vacated its original order dismissing the case. Both parties were once again afforded the opportunity to address the timeliness of Petitioner's request for a contested case hearing, and the propriety of the Department's motion to dismiss. Upon consideration of the facts, the arguments raised in the parties' submissions, and the law, the Court grants the Department's motion to dismiss.

BACKGROUND

On November 6, 2017, Respondent issued a Department Determination (Determination) to Petitioner, in which the Department denied Respondent's application for an on-premises beer and wine permit and a restaurant liquor-by-the-drink license. The Department's cover letter transmitting the Determination stated in part:

[I]f you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within thirty (30) days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a \$150.00 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

FILED

April 4, 2018

SC ADMIN. LAW COURT

Enclosed with the transmittal letter was a blank “Request for Contested Case Hearing Form.” The form, which was completed by Petitioner, stated, “**Attention:** All cases filed in the Administrative Law Court are subject to the Rules of Procedure found at the Court’s website www.scalc.net or from the Clerk of Court. Failure to follow these rules may result in dismissal of your case.”

The deadline to file a request for contested case hearing and serve the Department was December 6, 2017, thirty (30) days after the Determination was mailed. Petitioner filed its request for a contested case hearing on December 8, 2017. On January 22, 2018, Respondent moved to dismiss this matter on the basis that Petitioner failed to timely file its request, thereby depriving this Court of jurisdiction. Petitioner failed to timely respond to Respondent’s motion to dismiss. After thoughtful review of the facts of the case and the law, the Court granted the Department’s motion dismissing the case on its merits by order dated February 14, 2018.¹

On February 20, 2018, Petitioner filed a Motion to Reconsider. On February 26, 2018, this Court issued an order granting Petitioner’s motion to reconsider, and vacating the order of February 14, 2018, in order to afford the parties sufficient time for additional briefing as to the timeliness of Petitioner’s request for a contested case hearing. On March 12, 2018, the Department submitted a detailed reply outlining why it believed Petitioner’s request for a contested case hearing was untimely, and why the matter should be dismissed. On March 20, 2018, Petitioner responded outlining its opposition. Petitioner reiterated its position that the Department’s motion to dismiss was frivolous and that it should be awarded attorney fees.

DISCUSSION

The South Carolina Administrative Law Court is authorized to preside over contested cases governing alcoholic beverages, including beer, wine and liquor. See S.C. Code Ann. §§ 1-23-600 (Supp. 2017) and 61-2-260 (Supp. 2017). In order for this Court to hear a contested case, its jurisdiction must be properly invoked through a timely request for a contested case hearing. Section 12-60-1320 provides that a person may contest a Department determination by requesting a contested case hearing before the ALC “within thirty days after the date the department’s determination was sent by first class mail or delivered to the person. Requests for a hearing before

¹ Also on February 14, 2018, Petitioner filed its response opposing Respondent’s motion to dismiss. It claimed that Petitioner’s motion to dismiss was frivolous and requested an award of attorney fees.

the Administrative Law Court must be made in accordance with its rules.” S.C. Code Ann. § 12-60-1320 (2014).

Moreover, Section 1-23-600(B) states, “All requests for a hearing before the Administrative Law Court must be filed in accordance with the court’s rules of procedure.” S.C. Code Ann. § 1-23-600 (Supp. 2017). This Court’s rules “apply exclusively in all proceedings before the Administrative Law Court.” SCALC Rule 1. To that end, SCALC Rule 11(C) requires a request for a contested case hearing to “be filed and served within thirty (30) days after the date of the written decision of the agency’s determination.”

The Department contends that Petitioner did not timely file a request for a contested case hearing within the thirty-day (30) period of the date that the Determination was mailed on November 6, 2017, and thus, this Court has no jurisdiction over the matter. Petitioner maintains that the filing of its request was timely. Petitioner argues that the Determination or final agency decision was “served” on November 6, 2017, and that according to Rule 6, SCRCF, it had an additional five (5) days after December 6, 2017 (or until December 11, 2017) to file and serve its request. The Court disagrees with Petitioner’s interpretation of the statutes and rules at issue.

As asserted by the Department, Petitioner was required to request a contested case hearing “within thirty days after the department’s determination was sent by first class mail or delivered to [Petitioner].” S.C. Code Ann. § 12-60-1320 (2014) (emphasis added). See also, SCALC 11(C) (“Unless otherwise provided by statute, a request must be filed and served within thirty (30) days of actual or constructive notice of the agency’s determination.”). As required by law, the Department properly mailed Petitioner the Determination on November 6, 2016. S.C. Code Ann. § 12-60-1310(D)(2)(a) (2014).

While the deadline for filing and serving the request for a contested case hearing was December 6, 2017, Petitioner did not file its request for a contested case hearing with this Court until December 8, 2017, the date on which the envelope containing the request was postmarked.² Petitioner served the Department with the request on December 7, 2017. The failure to timely file and serve the request for a contested case hearing within the allowable time frame deprived the Administrative Law Court of jurisdiction to hear a contested case. See Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

²The filing date in this Court is the date on which the document was delivered or the date on which the envelope containing the document was postmarked. See SCALC Rule 4(B).

Petitioner argues that SCALC Rule 3(C) which is similar to Rule 6, SCRCF,³ allowed it an additional five (5) days to request a contested case hearing. The Court disagrees and has consistently adhered to the interpretation stated by the Department in its memorandum. Rule 3, SCALC, is inapplicable here as it applies “[w]henver a party has the right or is required to do some act or take some proceedings within a prescribed period after the **service** of a notice or other paper upon him and notice or paper is **served** upon him by mail, by e-mail, or upon a person designated by statute to accept **service** ...” (emphasis added). Thus, Rule 3(C) only applies once a notice or other paper for which service is required, is “served” upon a party.

Petitioner next claims that the Department’s email of November 6, 2017, which also transmitted the Determination does not constitute “service” and lacks relevance to this matter. The Court disagrees. Again, neither Section 12-60-1320 nor Rule 11(C), SCALC require “service” of the Determination. Only first-class mailing is required. Had the legislature intended service, it would have expressly stated as much.

While an email transmittal of the Determination alone would be insufficient under Section 12-60-1320 and Rule 11(C), Petitioner’s response to it evidences that Petitioner had actual notice of the Determination on November 6, 2017 pursuant to Rule 11(C). Because Petitioner failed to request a contested case hearing within thirty (30) days from the date the Department mailed the Determination to Petitioner, or within thirty (30) days of actual notice of the Determination, this Court has no jurisdiction to hear the matter, and the case must be dismissed.

In dismissing this case, this Court is sympathetic to Petitioner’s circumstances. While the dismissal may seem harsh, it has an obligation to carefully examine jurisdictional questions like that presented here, and has no authority to enlarge the time within which a request must be filed. See, e.g., State v. Johnston, 327 S.C. 435, 438, 489 S.E.2d 228, 230 (Ct. App. 1997), rev’d on other grounds, 333 S.C. 459, 510 S.E.2d 423 (1999) (holding that “it is the duty of the court to assure that it renders no decision in a matter when it has no authority to act”).

³ Rule 6, SCRCF, is inapplicable in the present case pursuant to SCALC Rule 1 which provides that this Court’s rules apply exclusively in all proceedings before the Administrative Law Court. This is particularly the case when this Court has its own rule for purposes of time. By way of example, Rule 3(C) would apply in the instance in which a party was required to file with the court and serve on all parties, a copy of the Record on Appeal pursuant to SCALC Rule 36(A).

Finally, the Department's motion was not frivolous and was based on a reasonable application of the law to the facts. Its position is consistent with prior rulings of this Court on similar issues. Petitioner's request for attorney fees and any other sanction is denied.

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that Respondent's motion to dismiss is **GRANTED**, Petitioner's request for attorney fees is **DENIED**, and the above-captioned case is **DISMISSED** with prejudice.

AND IT IS SO ORDERED.




Deborah Brooks Durden
Deborah Brooks Durden
Administrative Law Judge

April 4, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, 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).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

April 4, 2018
Columbia, South Carolina

FILED

April 4, 2018

SC ADMIN. LAW COURT

ISAACS & ALLEY, LLC

ATTORNEYS AT LAW

2000 PARK STREET, SUITE 100
COLUMBIA, SOUTH CAROLINA 29201-2011

W. JOSEPH ISAACS (1944-2009)
FOUNDING PARTNER

G. ROBIN ALLEY
gra@isaacsandalley.com

TELEPHONE (803) 252-6323
TELECOPIER (803) 252-3612

Mailing Address:
POST OFFICE BOX 8596
COLUMBIA, SOUTH CAROLINA 29202-8596

May 21, 2018

RECEIVED

MAY 21 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

**Re: The Venture Grouping, LLC, d/b/a Zen Ultra Lounge vs. South
Carolina Department of Revenue
Appellate Case No: 2018-000848**

Dear Ms. Kitchings:

Please find enclosed the Order of Dismissal in the above-referenced matter. If you have any questions, please feel free to contact me.

With Kind Regards,

Sincerely,
ISAACS & ALLEY, LLC


G. Robin Alley

GRA/dlw

Enclosure

cc: Lauren Acquaviva, Esquire (w/enclosure)