

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Docket No. 18-ALJ-17-0216-CC

WKSC, LLC, d/b/a Savannah's Gentlemen's Club & Steakhouse,  
  
Petitioner,  
  
v.  
  
South Carolina Department of Revenue,  
  
Respondent.

**RECEIVED**

SEP 05 2018

SC Court of Appeals

**ORDER DENYING  
INTERVENTION**

**STATEMENT OF THE CASE AND BACKGROUND**

This matter is before the Administrative Law Court (ALC or court) for a contested case hearing pursuant to S.C. Code Ann. §§ 1-23-310 *et seq.* (2005 and Supp. 2017), S.C. Code Ann. § 1-23-600(B) (Supp. 2014), and S.C. Code Ann. § 61-2-260 (2009 and Supp. 2017). The Petitioner, d/b/a Savannah's Gentlemen's Club and Steakhouse, applied for an on-premises beer and wine permit and restaurant liquor by the drink license, which was denied by the South Carolina Department of Revenue (Department) for several reasons, including the receipt of valid written protests, insufficient information provided by the Petitioner, and the suitability of the location. The Department received two hundred thirty-nine (239) written protests to the Petitioner's application. On June 19, 2018, the Department issued a Final Determination Letter denying the Petitioner's applications. On June 20, 2018, the Petitioner sought a contested case hearing with the ALC. On June 28, 2018, this matter was assigned to this court.

On July 19, 2018, this court issued an Order and Notice of Hearing, establishing the time and date of this hearing (10:00 a.m., September 22, 2018), its location, and the court's procedure, among other matters. Due to the extraordinarily large number of protestants in this case, the court had to make special preparations to accommodate the anticipated protestants and attendees at the hearing.<sup>1</sup> Because the logistics involved in such a large hearing, and to ensure timely adjudication of this

<sup>1</sup> With 239 protestants, in addition to spectators, this case has the largest number of attendees of any matter before the ALC. The largest courtroom in the court can only accommodate seventy (70) occupants. Therefore, the court had to make special accommodations and coordinate with an adjoining state agency co-located in the same building as the court to borrow its conference room for the day of the hearing. Large screen monitors in that agency's conference room have been equipped to receive live video and audio feed so spectators and protestants who cannot sit in the courtroom will still be able to view the proceedings, and so protestants will know when their turn has come to testify. Additionally, the court has had to modify security procedures to accommodate the large number of attendees and ensure the safety of the public.

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SEP 05 2018

SC ADMIN. LAW COURT

matter, the court issued an Administrative Memorandum to Individuals Protesting A License or Permit. This memorandum set forth, among other things, that the protestants with common objections or who are members of a group or organization protesting the Petitioner's license applications should appoint a spokesperson who can effectively present the concerns of the group or organization, in order to minimize the number of witnesses that would be speaking at the hearing. Additionally, the Memorandum contained the following paragraph:

**SCALC Rule 20 governs motions to intervene. If you wish to intervene as a party in this case, you must file a motion to intervene with the Administrative Law Judge assigned to hear the case no later than August 10, 2018. Any motion to intervene filed after that date will be deemed by the court to be untimely and prejudicial to the rights of existing parties. All motions to intervene must meet the qualifications set forth in SCALC Rule 20(B).**

The court's Order and Notice of Hearing and the Memorandum were electronically transmitted to all parties and protestants on July 19, 2018.

On August 30, 2018, the court received a Motion for Leave to Intervene, filed by counsel, seeking to permit The Honorable Chip Huggins of South Carolina House of Representatives District 85 (Lexington County) to intervene in the matter. The Movant (already a protestant) sought to intervene, alleging that: (1) he would be aggrieved or adversely affected by potential issuance of the license; (2) his interests would not be properly represented by the Department; (3) his interest would not be represented by the Petitioner; and (4) he would not unduly prolong the proceeding or otherwise prejudice the rights of existing parties. The Movant further asserted that by permitting intervention, the court could potentially streamline the process of hearing the case and enhance the rights of existing parties. In addressing the tardiness of the motion, the Movant asserted that he had good cause for filing the motion late because (1) his interest would not be properly satisfied unless he was afforded the rights bestowed upon parties to the litigation, (2) judicial economy would best be served with an officially named Party Protestant, and (3) the Movant's counsel was not retained until August 29, 2018, the day before the filing of the motion.

On September 4, 2018, the court conducted a telephone conference with counsel for all existing parties and the Movant. During that telephone conference, the Movant's counsel restated his grounds for seeking leave to intervene. He asserted that the Movant did not feel that his interests or the interests of his constituents, residing in and around the proposed location, were adequately represented by the current parties, and that while Representative Huggins was the only person seeking to intervene, he believed that his arguments against licensing the Petitioner represented a

grassroots position in general opposition to the licensing of the establishment. Furthermore, he asserted that by permitting the intervention, it might streamline the process of hearing the matter because as a party, Representative Huggins could better present the objections held by the other protestants. While he could not represent that the Movant's intervention would curtail the number of protestants seeking to speak at the hearing, counsel for the Movant asserted that he believed such would be the case.

When asked about the reason for the tardiness of the motion, counsel for the Movant again pointed out to the court that he was retained on August 29, 2018 and filed his Motion for Leave to Intervene the following day. As to why the Movant waited until August 29, 2018 to retain counsel and seek to intervene, he stated that he believed there was some difficulty or delay in acquiring the funds for his representation, and that there may have been some uncertainty about the process, due to the Movant not being an attorney. Finally, the Movant's counsel asserted that he would be ready to proceed on the scheduled hearing date, and that he would not delay the proceedings.

Counsel for the Department did not take a position on the Motion for Leave to Intervene. However, counsel for the Petitioner strongly opposed the motion. The Petitioner's counsel pointed out that the Motion for Leave to Intervene was filed outside the standard timeline established in SCALC Rule 20(c), which requires motions to intervene to be filed within twenty (20) days before the hearing, and it was filed outside the specific August 10, 2018 deadline this court established for this hearing in the court's Administrative Memorandum attached to its July 19, 2018 Order and Notice of Hearing. Counsel for the Petitioner further asserted that the basis for seeking to intervene was political rather than based on real opposition to the location, in that the Movant is involved in a contested race for re-election and is seeking to curry political capital with constituents. Finally, the Petitioner's counsel asserted that permitting intervention at this late date would prejudice his client. He stated that he does not generally depose non-party protestants to a liquor license because protestants are mere witnesses and do not have the right to call witnesses, cross-examine, or make argument. On the other hand, he generally does depose an intervening party protesting a liquor license, and any witnesses the party may seek to call, due to the greater rights afforded a party. However, because of the late date of the Movant's motion, effectively one business week before the hearing, he would be unable to prepare and depose the Movant and any other witnesses the Movant might seek to call in his case before the court.

### **DISCUSSION**

The issue before the court is whether the Movant should be granted leave to intervene. ALC Rule

20. ALC Rule 20 governs intervention in contested cases pending before the ALC. Rule 20 states in pertinent part:

Any person may intervene in any pending contested case hearing upon a showing that: (1) the movant will be aggrieved or adversely affected by the final order; (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene; (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties. ALC Rule 20(B).

A party seeking to intervene has the burden of showing that intervention is proper. *See In re Horry Co. State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004) (stating that the applicant for intervention bears the burden of demonstrating required elements for intervention). The time for filing a motion to intervene is governed by ALC Rule 20(C), which provides:

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.

In this case, the court is dealing with a cumbersome proceeding and an extraordinarily large number of attendees. The 239 protestants, all potential witnesses, coupled with anticipated spectators, have strained the court's ability to effectively and safely conduct the hearing. No other hearings have been scheduled during the date of the hearing<sup>2</sup>, and the court has carefully developed a plan, borrowing space from a neighboring state agency, and wired an adjoining conference room with video and audio feed to accommodate the large number of attendees. In recognition of the unique nature of this proceeding, the court sent out a memorandum with its Order and Notice of Hearing, informing protestants that if they **"...wish to intervene as a party in this case, you must file a motion to intervene with the Administrative Law Judge assigned to hear the case no later than August 10, 2018."** (emphasis included). Further, the memorandum stated "(a)ny motion to intervene filed after that date will be deemed by the court to be untimely and prejudicial to the rights

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<sup>2</sup>The South Carolina Administrative Law Court has six judges who sit on its bench and there are three courtrooms in the building. No other hearings are being held on the scheduled day of this hearing due to the strain on the court's personnel and resources.

of existing parties.” A copy of the Order and Memorandum was electronically sent to all protestants on July 19, 2018, and the Movant electronically acknowledged receipt on the same day.

In evaluating the Movant’s Motion for Leave to Intervene, the court focuses on the timeliness of the motion, and the justification given for its late filing. The motion was not filed until Friday, August 30, 2018. It was filed twelve (12) days before the scheduled hearing, and on a Friday before the long Labor Day weekend, effectively leaving only one business week for the existing parties to adjust to the addition of a new party if granted. This is well outside the 20-day deadline for filing set forth in SCALC Rule 20, and 20 days after the August 10, 2018 deadline set by this court for this case. The Petitioner has asserted that granting the Movant’s motion at this late hour will prejudice the Petitioner’s ability to prepare for the hearing on the scheduled date, as he will be unable to schedule, conduct, and review depositions of any of the Movant’s witnesses.<sup>3</sup>

In the Movant’s motion, the grounds offered for its late filing are that (1) the Movant’s interest will not be properly satisfied unless he is afforded the rights bestowed upon parties to the litigation, (2) judicial economy would best be served with an officially named Party Protestant, and (3) the Movant’s counsel was not retained until August 29, 2018, the day before the filing of the motion. None of these offer any justification for the motion’s tardiness. While the Movant’s interests and any judicial economy realized by adding an intervenor may go towards good cause for being permitted to intervene, they fail to answer why the motion was filed out of time. The final justification, that counsel was not retained until the day before the filing, may address why the Movant’s counsel did not file the motion until August 30, 2018, however, it in no way addresses why the Movant failed to retain counsel until long after both the standard regulatory filing deadline and the special deadline set by the court in this case had expired. In the telephonic conference held by the court on September 4, 2018, the Movant’s counsel expounded upon the justifications asserted in the written motion establishing the Movant’s grounds for seeking intervention. However, when he attempted to explain or justify the late filing he could only suggest that there may have been some difficulty with the funding of counsel to intervene, and that there may have been some confusion about the administrative process, given that neither the Movant nor any of the other protestants the Movant has been communicating with are attorneys skilled in practicing before the court. While the court does not doubt this, the court does not find any of that explanation sufficient to justify permitting the Movant to intervene so late in the process, especially given the court’s written notice

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<sup>3</sup>The Movant’s counsel points out that the Petitioner could have deposed the Movant and any other protestants at any time prior to the hearing, as he knew the names of all protesting persons. However, this assertion ignores that there are 239 protestants in this matter. The thought that the Petitioner could have deposed all of them prior to the hearing, in anticipation that one or more might move to intervene in the action, is unrealistic, especially given the

to the Movant sent and received on July 19, 2018, stating that motions to intervene must be received no later than August 10, 2018 or they would be deemed untimely and prejudicial.

The court is persuaded by the test employed by this state's Supreme Court in evaluating the timeliness of motions to intervene filed by movants in Circuit Court, pursuant to SCRPC Rule 24. In *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), the South Carolina Supreme Court held that courts employ a four-part test for determining the timeliness of motions to intervene in civil proceedings pursuant to SCRPC Rule 24:

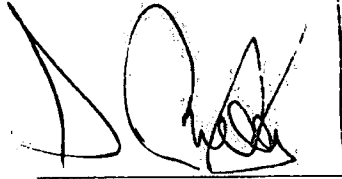
- (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit;
- (2) the reason for the delay;
- (3) the stage to which the litigation has progressed; and
- (4) the prejudice the original parties would suffer from granting intervention and the applicant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

*Davis*, 406 S.E.2d at 603. While SCALC Rule 20 is not identical to SCRPC Rule 24, they are analogous, and the test provides a sound basis for evaluating late filed SCALC Rule 20 motions to intervene. Here, the Movant was already a protestant in this action and had filed a written protest with the Department objecting to the Petitioner's license application sometime before June 19, 2018, the date the Department denied the Petitioner's application. Therefore, the Movant has known of and asserted his interest in this matter for months. The explanation for the late filing of this motion, discussed above, does not sufficiently justify its tardiness. The hearing, which is designed to be conducted expeditiously to afford the Petitioner an answer on whether its alcoholic beverage license and permit applications will be granted, is only one week away. Finally, the court accepts that the Petitioner would be prejudiced if it were to permit the Movant to intervene in that there is likely too little time for the Petitioner to schedule and conduct depositions of the Movant's witnesses. As to the harm the Movant will suffer, the court finds that while the Movant will not have the same rights as a party, he is still a protestant in this matter and will be afforded the opportunity to present his objections to the Petitioner's license applications on the day of the hearing.

Because the court finds that there was not good cause for the untimely filing of the Movant's Motion for Leave to Intervene, it must deny the motion.

**ORDER**

**IT IS THEREFORE ORDERED** that the Motion for Leave to Intervene is **DENIED**.  
**IT IS SO ORDERED.**



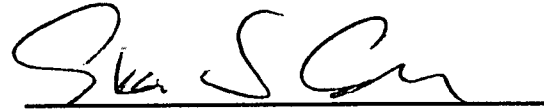
September 5, 2018  
Columbia, South Carolina

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S. Phillip Lenski  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I, Erika S. Easler, 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 black ink, appearing to read "Erika S. Easler", written over a solid horizontal line.

Erika S. Easler  
Judicial Law Clerk

September 5, 2018  
Columbia, South Carolina