

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

NO. 17-ALJ-17-0466-CC

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

v.

South Carolina Department of Revenue, Respondent.

RECORD ON APPEAL

Other Counsel of Record:

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S. C. Department of Revenue
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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

NO. 17-ALJ-17-0466-CC

South Carolina Department of Revenue.....Respondent,

v.

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

RECORD ON APPEAL

Other Counsel of Record:

Lauren Acquaviva, Esquire
S. C. Department of Revenue
P.O. Box 12265
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Attorney for Appellant

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P. O. Box 8596
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RECORD ON APPEAL

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III. CERTIFICATE OF COUNSEL

I certify that this is the accurate record on appeal.

By: 

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STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211-9979
803-898-5130 Fax # 803-896-0171

November 6, 2017

Anthony DeSue, Jr.
550 Westmoreland Rd.
Columbia, SC 29229

Re: Department Determination
File No.:32076650-PBW/PLB
The Venture Grouping LLC, d/b/a Zen Ultra Lounge

Dear Mr. DeSue:

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If 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.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: P.O. Box 12265, Columbia, SC 29211.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in cursive script that reads "Lauren Acquaviva".

Lauren Acquaviva
Counsel for Litigation
803-898-5110
Lauren.Aquaviva@dor.sc.gov

Enclosures

LA:sho

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DEPARTMENT DETERMINATION

Applicant:

The Venture Grouping LLC
d/b/a Zen Ultra Lounge
9557 Two Notch Road, Unit G
Columbia, SC 29223

File No.:

32076650-PBW/PLB

Date of Application:

May 17, 2017

Matters in Dispute:

1. Did the South Carolina Department of Revenue (Department) properly deny The Venture Grouping LLC, d/b/a Zen Ultra Lounge's (Applicant), application for an on-premises beer and wine permit and restaurant liquor by the drink license based upon the fact the Applicant's principal is not of good moral character as required by S.C. Code Ann. § 61-2-100(D) (2009)?
2. Did the Department properly deny the Applicant's application for the on-premises beer and wine permit and restaurant liquor by the drink license based upon the fact the Applicant failed to provide requested information as required under S.C. Code Ann. § 61-2-90(6) (2009)?
3. Did the Department properly deny the Applicant's application for a restaurant liquor by the drink license due to the Applicant's failure to be engaged primarily and substantially in the preparation and service of meals as required by S.C. Code Ann. § 61-6-1610(A) (2009)?
4. Should the Department deny the Applicant's application for an on-premises beer and wine permit and restaurant liquor by the drink license due to the Department's inability to determine whether the proposed location is suitable for licensure?

Determinations:

1. The Department properly denied the Applicant's application for an on-premises beer and wine permit and restaurant liquor by the drink license based upon the fact that the Applicant's principal is not of good moral character as required by § 61-2-100(D).

2. The Department properly denied the Applicant's application for an on-premises beer and wine permit and restaurant liquor by the drink license based upon the fact the Applicant failed to provide requested information as required under § 61-2-90(6).
3. The Department properly denied the Applicant's application for a restaurant liquor by the drink license due to the Applicant's failure to be engaged primarily and substantially in the preparation and service of meals as required by § 61-6-1610(A).
4. The Department must deny the Applicant's application for an on-premises beer and wine permit and restaurant liquor by the drink license due to the Department's inability to determine whether the proposed location is suitable for licensure.

Relevant Facts:

1. On May 4, 2016, the Department received an application for an on-premises beer and wine permit and restaurant liquor by the drink license permit from Collective Minds, LLC, d/b/a Mynt Lounge and Bistro (Mynt), located at 2732 Decker Boulevard, Columbia, South Carolina.¹ The application listed the following principals: Benjamin W. Rogers (95% owner) and Dennis Taylor (5% owner). The Department assigned file number: 32073179 to the application.
2. On June 7, 2016, South Carolina Law Enforcement Division (SLED) Agent Ida Dixon conducted a standard investigation of the location to determine compliance with the statutory requirements for licensure.
3. SLED also conducted an ownership investigation to determine what relationship, if any, Mynt and/or its principals had/has with DRC of SC, Inc., d/b/a Voss, and DRC of SC, Inc., d/b/a/ Mynt Lounge and Bistro.
4. Due to a timely public protest, the Department denied the application for a permit and license pursuant to a denial letter dated August 30, 2016.
5. Mynt timely protested the denial of the permit and license pursuant to a letter received by the Department on August 30, 2016.
6. On September 23, 2016, the Department issued its determination wherein it denied Mynt's application for the following reasons:
 - a. Mynt failed to disclose all of its principals;
 - b. Mynt failed to immediately apply for a new permit and license after it acquired ownership, possession, and/or control of Mynt;
 - c. Mynt and/or its principals are not of good moral character;

¹The Premises is the same location where DRC of SC, Inc. previously held a permit and license - 2732 Decker Boulevard, Columbia, South Carolina.

- d. The Department could not determine whether Mynt had direct control over the proposed location; and
 - e. The location was the subject of a timely public protest.
7. A contested case hearing was held on February 27, 2017, with the Honorable Deborah Durden presiding.
8. On March 2, 2017, Judge Durden issued a Final Order in which she denied the on-premises beer and wine permit and restaurant liquor by the drink license for Mynt. The Court found that Anthony DeSue managed all of Mynt's finances and, thus, was an undisclosed principal of Mynt. See Collective Minds, LLC, d/b/a Mynt Lounge & Bistro v. S.C. Dept. of Revenue, Docket No.: 16-ALJ-17-0406-CC, 2017 WL 947019, at *2 (S.C. Admin. Law Ct. Mar. 2, 2017). The Court then found that Mynt's principals ran Mynt for a significant period of time under the guise of another person's license. In denying Mynt's application the Court stated the following:

Petitioner's operation under someone else's license and its failure to be honest in its untimely application show Petitioner's principals [which include Mr. DeSue] are not capable of following the alcohol laws of this state and are therefore not fit to run an alcohol establishment. The deceitful nature of Petitioner's actions further show that Petitioner's principals are not of good moral character.
- Collective Minds, 2017 WL 947019, at *7 (emphasis added).
9. On May 17, 2017, the Department received an application for an on-premises beer and wine permit and restaurant liquor by the drink license from the Applicant, The Venture Grouping LLC, d/b/a Zen Ultra Lounge, located at 9557 Two Notch Road, Columbia, South Carolina (Proposed Location). The Department assigned file number: 32076650 to the application. The application lists the Applicant's principal as Anthony DeSue, Jr.
10. On June 7, 2017, the Department mailed the Applicant a request for additional documentation. Specifically, the Department requested a copy of the Applicant's Grade A retail food establishment permit from the Department of Health and Environmental Control (DHEC) and the Applicant's retail sales tax license information.
11. On July 5, 2017, SLED Agent Dixon conducted a standard investigation of the location to determine compliance with the statutory requirements for licensure. Agent Dixon determined that the Proposed Location was undergoing renovations and would need a final inspection to determine whether the location was suitable and satisfied the restaurant requirements.
12. Pursuant to a denial letter dated July 24, 2017, the Department denied the Applicant's application for the following reasons:
 - a. The Applicant failed to provide all required information;

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- b. The Applicant and/or its principals are not of good moral character;
- c. The Applicant does not possess a Grade A retail food establishment permit from DHEC;
- d. The Proposed Location does not have a kitchen; and
- e. The Proposed Location does not have seating for forty (40) persons simultaneously at tables in a climate-controlled environment.

13. The Applicant timely protested the denial of the permit and license pursuant to letters received by the Department on September 14 and 26, 2017. The Applicant included a copy of its DHEC retail food establishment permit with the September 14 letter.

Analysis:

I. **The Department properly denied the application because the Applicant's principal is not of good moral character.**

Several statutory provisions address the moral character of an applicant for a beer and wine permit and liquor by the drink licenses in South Carolina. Section 61-2-100 (D) mandates "[t]he Department may not issue a license or permit under this title to any person unless the person and all principals are of good moral character." S.C. Code Ann. § 61-6-1820 (2009) further provides:

The department may issue a [liquor] license ... upon finding:

(2) The applicant, if an individual, is of good moral character or, if a corporation or association, has a reputation for peace and good order in its community, and its principals are of good moral character.

S.C. Code Ann. § 61-4-520(1) (2009) provides a similar requirement as it relates to beer and wine permits.

Although there is no single criterion by which to determine if a person is of good moral character, "it is a generally recognized principal that a liquor license may be refused [to] a person who has previously been convicted of a crime or crimes, particularly a violation of the liquor laws." Wall v. S.C. Alcoholic Beverage Control Comm'n, 269 S.C. 13, 16, 235 S.E.2d 806, 808 (1997). While the Applicant's principal - Mr. DeSue - has not been convicted of any crimes related to the State's alcohol laws, he demonstrated that he cannot abide by the alcohol laws of this State when he assisted in the operation of Mynt, which operated under another person's alcohol permit. Furthermore, Judge Durden found that none of Mynt's principals - including Mr. DeSue - were of good moral character. Collective Minds, 2017 WL 947019, at *7. Mr. DeSue is the sole principal of the Applicant. Because he has disregarded the alcohol laws of this State in the recent past, he does not possess the requisite moral character to hold an alcohol license. Accordingly, the Department properly denied the application based on the Applicant's principal not possessing the requisite moral character to hold an alcohol license.

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II. The Department properly denied the on-premises beer and wine permit and restaurant liquor by the drink license due to the fact the Applicant failed to provide requested information.

Section 61-2-90(6) requires any person desiring a license or permit to provide information to the Department that the Department requires in order to determine if the application meets all the statutory requirements. One such requirement is set forth in S.C. Code Ann. Regs. 7-200.1(F) (Supp. 2016), which provides that all alcohol license applicants must obtain and maintain a retail sales tax license. Thus, if an alcohol license applicant fails to provide its retail sales tax license information to the Department, the Department cannot issue the license or permit.

On June 7, 2017, the Department advised the Applicant, in relevant part, that the Applicant needed to provide the Department with its retail sales tax license number in order for the Department to complete the processing of the Applicant's application. As of the date of this Determination, the Applicant has failed to provide the Department with the requested information. As such, the Department cannot determine if the Applicant meets the statutory requirements for licensure. Therefore, the Department may not issue the on-premises beer and wine permit and restaurant liquor by the drink license to the Applicant.

III. The Department properly denied the Applicant's application for a restaurant liquor by the drink license based on the Applicant's failure to be engaged primarily and substantially in the preparation and service of meals as required by § 61-6-1610(A).

The Department has the sole and exclusive power to regulate the issuance of beer and wine permits and liquor by the drink licenses pursuant to the terms of Title 61 of the South Carolina Code. Chapter 6 of Title 61 is known as the "Alcohol Beverage Control Act" and establishes the requirements for licensure for various alcohol retailers, including restaurant liquor by the drink licenses. In order to hold a restaurant liquor by the drink license, an establishment must be "bona fide engaged primarily and substantially in the preparation and service of meals." Section 61-6-1610(A). To further clarify this requirement, "bona fide engaged primarily and substantially in the preparation and serving of meals" is defined as:

- ... a business that provides facilities for seating not fewer than forty persons simultaneously at tables for the service of meals and that:
- (a) is equipped with a kitchen that is utilized for the cooking, preparation, and serving of meals upon customer request at normal meal times;
 - (b) has readily available to its guests and patrons either menus with the listings of various meals offered for service or a listing of available meals and foods, posted in a conspicuous place readily discernible by the guest or patrons; and
 - (c) prepares for service to customers, upon the demand of the customer, hot meals at least once each day the business establishment chooses to be open.

S.C. Code Ann. § 61-6-20(2) (Supp. 2016) (emphasis added). Additionally, kitchen is defined as:

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... a separate and distinct area of the business establishment that is used solely for the preparation, serving, and disposal of solid foods that make up meals. The area must be adequately equipped for the cooking, serving, and storage of solid foods and must include at least twenty-one cubic feet of refrigerated space for food and a stove.

Section 61-6-1610(I).

The Applicant failed to meet its burden of demonstrating that it is engaged primarily and substantially in the service of meals as required by law. Specifically, the SLED Agent found that the proposed location is undergoing renovations. Therefore, the SLED Agent could not verify whether the proposed location had seating for forty, a kitchen meeting the statutory requirements, or menus for patrons. Because the establishment is undergoing renovations, it does not currently meet the requirements for licensure pursuant to §§ 61-6-1610 and 61-6-20. Thus, the Department properly denied the Applicant's application for a restaurant liquor by the drink license.

IV. The Department must deny the Applicant's application for an on-premises beer and wine permit and restaurant liquor by the drink license due to the Department's inability to determine whether the proposed location is suitable for licensure.

The Department must deny the Applicant's application for an on-premises beer and wine permit and restaurant liquor by the drink license because the Department cannot determine whether the Proposed Location is suitable for licensure. Two statutes address the suitability of a proposed location. S.C. Code Ann. § 61-2-170 (2009) prohibits alcohol from being sold on a drive-through or curb service basis and § 61-4-520(5) requires the Department to determine whether a proposed location is a proper one prior to issuing a permit. Additionally, the South Carolina Supreme Court has held that the Department is empowered to determine if a proposed location is suitable for a liquor by the drink license. See Schudel v. S.C. Alcoholic Beverage Control Comm'n, 276 S.C. 138, 142, 276 S.E.2d 308, 310 (1981). Thus, the Department must determine that a proposed location is suitable for licensure prior to issuing a permit or license. Here, the Proposed Location is undergoing renovations. Because the Proposed Location is being renovated, the Department cannot determine whether the Proposed Location is suitable for licensure. As such, the Department must deny the Applicant's application.

Conclusion:

If you agree with this Department Determination, please withdraw (in writing) your application within (30) thirty days of the date of this Determination. If you disagree, please appeal the Determination within such (30) thirty day period as noted on the attached cover letter.²

November 6, 2017

²If the Applicant cures the renovation-related defects addressed in this Determination prior to a hearing in this matter as determined by a final inspection of the Proposed Location by SLED, the Department may withdraw the corresponding reasons for denial.

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ISAACS & ALLEY, LLC

ATTORNEYS AT LAW

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COLUMBIA, SOUTH CAROLINA 29201-2011

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

W. JOSEPH ISAACS (1944-2009)
FOUNDING PARTNER

G. ROBIN ALLEY
gra@isaacsandalley.com

Mailing Address:

POST OFFICE BOX 8596
COLUMBIA, SOUTH CAROLINA 29202-8596

December 7, 2017

S. C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: File No. 32076650-PBW/PLB

Dear Sir:

Please find our request for a contested case hearing in the above-referenced matter. If you require anything further, please let me know.

With Kind Regards,

Sincerely,
ISAACS & ALLEY, LLC


G. Robin Alley

GRA/dlw

Enclosure

cc: SC Department of Revenue (w/enclosure)

2017 12 07 10:57:39 AM

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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.

NOTICE OF ASSIGNMENT
(Contested Case)

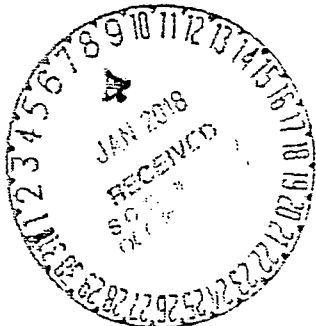
DOCKET NO. 17-ALJ-17-0466-CC

NOTICE IS GIVEN that a request for a contested case hearing was filed on December 8, 2017. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2016), the **Honorable Deborah Brooks Durden**, Administrative Law Judge, has been assigned to preside in this matter. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550. Pursuant to SCALC Rule 4A, all future filings (except for the Agency Information Sheet) must be filed directly with the above assigned Judge and shall include the docket number.

Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

A copy of any document or any other item filed with the Court shall be sent to all other parties at the time of filing. If a mailing address changes, or if an address is incorrect, the Court must be notified immediately of the correct address.

This the fourth day of January 2018.



Ralph King Anderson, III
Chief Administrative Law Judge

By: Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

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S.C. Code Ann. § 12-60-460 (2014) and ALC Rule 11(C) operate as a statute of limitations.

A statute of limitations has been defined as the action of the state in determining that after the lapse of a specified time a claim shall not be enforceable in a judicial proceeding. Thus, any law which creates a condition of the enforcement of a right to be performed within a fixed time may be defined as a statute of limitations.

51 Am. Jur. 2d Limitations of Actions § 2 (1970). Thus, since § 12-60-1320 and ALC Rule 11(C) set forth a thirty-day time limit to request a hearing, they operate as a statute of limitations. Accordingly, the failure of a person to request a contested case hearing within the statutory thirty-day period “divests the ALC of jurisdiction to hear a contested case.” Wedgefield Plantation Homeowners Ass’n v. S.C. Dept. of Health and Envtl. Control, Docket No.: 04-ALJ-07-0351-CC, 2005 WL 1520475 *2 (S.C. Admin. Law Ct. Jun. 1, 2005). Therefore, the Court should dismiss this case for failure to timely file the request for a contested case hearing.

In this case, the Department mailed the Petitioner a written Department Determination (the “Determination”) on November 6, 2017, via first class mail as required by S.C. Code Ann. § 12-60-1310(D)(2)(a) (2014). The Department mailed the Determination via first class mail on November 6, 2017 to Anthony DeSue, Jr., the Petitioner’s principal, at 550 Westmoreland Road, South Carolina 29229, which was the address provided to the Department by the Petitioner. The undersigned also emailed a copy of the Determination to Mr. DeSue at his request on November 6, 2017. (See Email attached as Exhibit A). The Determination was accompanied by a cover letter explaining to the Petitioner that (1) it had thirty (30) days to request a contested case hearing with the ALC, (2) it had to mail the request along with a \$150.00 filing fee to the ALC at the address listed on the request for contested case hearing form, and (3) it had to send a copy of the request to the Department at P.O. Box 12265, Columbia, South Carolina 29211-9979. (See Cover Letter

attached as Exhibit B). Accordingly, the Petitioner's deadline to file a request for contested case hearing with the ALC and serve the Department was December 6, 2017.

Despite the December 6, 2017 deadline, the Petitioner did not serve the Department with its request for contested case hearing until December 7, 2017.¹ Additionally, the U.S. Postal Service never returned the Determination the Department mailed to the Petitioner. On December 29, 2017, the Department received a copy of a memorandum from the ALC regarding the Petitioner's failure to comply with ALC Rule 11. Said memorandum indicated that the ALC received the Petitioner's incomplete request for a contested case hearing on December 11, 2017. Finally, on January 8, 2018, the Department received a Notice of Assignment from the ALC, which was filed on January 4, 2018, indicating that the Petitioner filed its request for a contested case hearing on December 8, 2017.

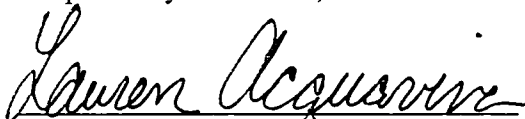
As discussed above, a person must request a contested case hearing within thirty (30) days after the Department sends the person the Department Determination. The Department mailed its Determination to the Petitioner via first class mail on November 6, 2017. The Determination was not returned to the Department, and there is no indication from the U.S. Postal Service that the Petitioner failed to receive the Determination. Therefore, because the Determination was sent to the Petitioner on November 6, 2017, in accordance with § 12-60-1310(D)(2)(a), the Petitioner needed to file its request for a contested case hearing and serve said request on the Department by December 6, 2017, in order to comply with § 12-60-1320 and ALC Rule 11(C). The Petitioner failed to file its request a contested case hearing and serve said request on the Department by

¹The Department did not receive the Petitioner's request for contested case hearing until December 11, 2017, and said request was postmarked December 8, 2017. However, the date on the cover letter and the date on the proof of service is December 7, 2017. For purposes of this Motion, the Department is using December 7, 2017, as the date of service because such date is the most favorable to the Petitioner.

December 6, 2017. Because the Petitioner failed to timely request a contested case hearing, the ALC does not have jurisdiction to hear this matter. Accordingly, this matter should be dismissed by the Court.

WHEREFORE, the Department submits that the Petitioner failed to timely file its request for a contested case hearing, divesting the ALC of jurisdiction to hear this case, and moves that this Court dismiss this matter with prejudice.

Respectfully submitted,



Lauren Acquaviva (Bar No. 100528)
Counsel for Litigation
Marcus D. Antley, III (Bar No. 102176)
Counsel for Litigation
Jason P. Luther (Bar No. 78021)
General Counsel for Litigation
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Phone: 803-898-5110
Fax: 803-896-0171
Lauren.Acquaviva@dor.sc.gov
CourtOrders@dor.sc.gov

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
January 22, 2018

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.)
)
In Re: 32076650-PBW & PLB)
_____)

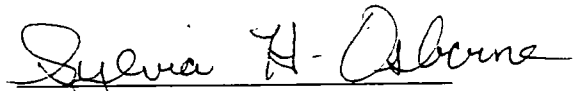
Docket No. 17-ALJ-17-0466-CC

PROOF OF SERVICE

I, the undersigned employee of the South Carolina Department of Revenue, Office of General Counsel, do hereby certify that I have served and filed, as appropriate, the Notice of Motion and Motion to Dismiss in connection with the above-captioned matter by depositing a copy of the same in the United States Mail on the below date, postage prepaid to the following parties at their address of record:

The Honorable Deborah Brooks Durden
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Ste. 224
Columbia, SC 29201

G. Robin Alley, Esquire
Isaacs & Alley, LLC
PO Box 8596
Columbia, SC 29202-8596



Sylvia H. Osborne
Administrative Assistant
Office of General Counsel
South Carolina Department of Revenue

Columbia, South Carolina
January 22, 2018

FILED

JAN 22 2018 000010

SC ADMIN. LAW COURT

EXHIBIT B



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211-9979
803-898-5130 Fax # 803-896-0171

November 6, 2017

Anthony DeSue, Jr.
550 Westmoreland Rd.
Columbia, SC 29229

Re: Department Determination
File No.:32076650-PBW/PLB
The Venture Grouping LLC, d/b/a Zen Ultra Lounge

Dear Mr. DeSue:

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If 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.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: P.O. Box 12265, Columbia, SC 29211.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in cursive script that reads "Lauren Acquaviva".

Lauren Acquaviva
Counsel for Litigation
803-898-5110
Lauren.Aquaviva@dor.sc.gov

Enclosures

LA:sho

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**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

BACKGROUND

The above-captioned case is 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). By a Notice of Motion and Motion to Dismiss filed on January 22, 2018, Respondent moved to dismiss this matter because Petitioner failed to timely file their request for a contested case hearing with this Court, and thus failed to properly invoke this Court's jurisdiction. Petitioner has not filed a response to the Motion to Dismiss. For the reasons set forth below, I find that Respondent's motion to dismiss must be granted.

On November 6, 2017, Respondent issued a Final Agency 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 letter of decision explained how to challenge the determination by filing a request for a contested case hearing with the Administrative Law Court. The cover letter explained that the request must be filed with the Administrative Law Court and a copy sent to the Department within thirty days of the date of the letter and provided Petitioner with information about the Court's filing fee. Enclosed with the letter was a blank form with the address to the Court for Petitioner to complete to request a contested case hearing with this Court. The form, filled out 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."

FILED

February 14, 2018

SC ADMIN. LAW COURT

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The deadline to file a request for contested case hearing with this Court and serve the Department was December 6, 2017. Petitioner filed a Request for a Contested Case Hearing with this Court on December 8, 2017.

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). However, for this Court to hear such a contested case, its jurisdiction must be properly invoked through a timely request for a contested case hearing. S.C. Code Ann. § 12-60-1320 (2014) 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 the Administrative Law Court must be made in accordance with its rules.” S.C. Code Ann. § 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.” ALC 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.” In the case at hand, Petitioner did not timely file the request for a contested case hearing with this Court. Therefore, Petitioner did not timely request a contested case hearing within the thirty-day period of the date on the cover letter to the Department determination, thus it did not cross the mandatory jurisdictional threshold of timely filing such a request with this Court. Accordingly, this Court has no choice but to find that Petitioner failed to properly invoke this Court’s jurisdiction and to conclude that this matter must be dismissed. In dismissing this case, this Court wishes to emphasize that, while it is sympathetic to Petitioner’s circumstances and realizes that this dismissal may seem harsh, it has an obligation to carefully examine jurisdictional questions like that presented here, 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”), and is constrained from extending the time for filing and serving a request for a contested case or deeming an untimely request to be timely because of the filing party’s mistake, inadvertence, surprise, or excusable neglect, see, e.g., Burnett, 252 S.C. 570-71, 167 S.E.2d at 572.

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that Respondent's motion to dismiss is **GRANTED** and the above-captioned case is **DISMISSED** with prejudice.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

February 14, 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

February 14, 2018
Columbia, South Carolina

FILED

February 14, 2018

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

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

Petitioner,

vs.

**ORDER GRANTING
MOTION TO RECONSIDER
AND VACATING PRIOR ORDER**

South Carolina Department of Revenue,

Respondent.

APPEARANCES: For the Petitioner: G. Robin Alley, Esquire
For the Respondent: Lauren Acquaviva, Esquire

This matter is before the Administrative Law Court (ALC) pursuant to Petitioner's Motion to Reconsider the ALC's February 14, 2018 Order of Dismissal in the above-captioned case granting Respondent's Motion to Dismiss on the ground that the Request for Contested Case Hearing was not timely filed. That motion was granted, in part, because no timely opposition to the motion was received by the Court. Subsequently, counsel for Petitioner has filed both a Motion to Reconsider and a memorandum in opposition to the Motion to Dismiss. Respondent has corresponded with the Court requesting an opportunity to submit a reply memorandum on the motion if this Court grants the Motion for Reconsideration.

IT IS HEREBY ORDERED that the Petitioner's Motion to Reconsider is **GRANTED** and the February 14, 2018 Order of Dismissal is **VACATED**.

IT IS FURTHER ORDERED that the Department of Revenue may submit a memorandum in reply related to its Motion to Dismiss within fifteen days of this order.

AND IT IS SO ORDERED.



Deborah Brooks Durden
Administrative Law Judge

February 26, 2018
Columbia, South Carolina

FILED

February 26, 2018

SC ADMIN. LAW COURT

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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

February 26, 2018
Columbia, South Carolina

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February 26, 2018

SC ADMIN. LAW COURT

department's determination was sent by first class mail or delivered to the [Petitioner]." S.C. Code Ann. § 12-60-1320 (2014) (emphasis added); see also Rule 11, SCALCR ("Unless otherwise provided by statute, a request must be filed and served within thirty (30) days after actual or constructive notice of the agency's determination."). The Department mailed the Petitioner a written Department Determination (the "Determination") on November 6, 2017, via first class mail as required by S.C. Code Ann. § 12-60-1310(D)(2)(a) (2014). Accordingly, the Petitioner's deadline to file its request for a contested case hearing with the Court and serve the Department was December 6, 2017. Despite the December 6, 2017 deadline, the Petitioner did not file its request for a contested case hearing with the Court until December 8, 2017, and did not serve the Department with its request until December 7, 2017. Therefore, the Petitioner failed to properly invoke this Court's jurisdiction and this matter must be dismissed.

I. Rule 3(C), SCALCR² does not extend the time to request a contested case hearing.

The Petitioner did not have an additional five days to request a contested case hearing. Said differently, the Petitioner only had thirty (30) days, not thirty-five (35) days, from the date the Department mailed the Determination to the Petitioner to request a contested case hearing. Section 12-60-1320 provides that a request for a contested case hearing must be made "within thirty days after the date the department's determination was sent by first class mail or delivered to the person." (emphasis added). Additionally, Rule 11(C), SCALCR provides: "Unless otherwise provided by statute, a request must be filed and served within thirty (30) days after

²The Petitioner cites Rule 6(e) of the South Carolina Rules of Civil Procedure (SCRCP) in the Petitioner's Response for the proposition that it was allowed to add five days to the time prescribed in § 12-60-1320. (Petitioner's Response 1). However, the South Carolina Administrative Law Court Rules (SCALCR) govern this matter. See Rule 1, SCALCR. While Rule 68, SCALCR provides that the Rules of Civil Procedure and Appellate Court Rules may be applied to resolve questions not addressed by the Administrative Law Court Rules, such application of the Rules of Civil Procedure is unnecessary here as the Administrative Law Court Rules address the question at issue.

actual or constructive **notice** of the agency's determination." (emphasis added). Rule 3(C), SCALCR 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 the notice or paper is **served** upon him by mail, by e-mail, or upon a person designated by statute to accept **service**" (emphasis added). Accordingly, in order for Rule 3(C), SCALCR to be triggered, a notice or other paper must have been "served" on the Petitioner. Because neither § 12-60-1320 nor Rule 11(C), SCALCR require "service" of a department determination, Rule 3(C), SCALCR was never triggered. As such, the Petitioner did not have an additional five (5) days from the date the Determination was mailed to request a contested case hearing.

Furthermore, the statement in the Petitioner's Response that the Department's November 6, 2017 email to the Petitioner does not constitute service and lacks relevance to this matter reaffirms the Petitioner's misunderstanding of § 12-60-1320 and Rule 11(C), SCALCR. As stated previously in this Reply, neither § 12-60-1320 nor Rule 11(C), SCALCR require **service** of the Determination. While § 12-60-1320 does require that a department determination be mailed, the Department's courtesy email to the Petitioner attaching the Determination, to which the Petitioner replied, supports the fact that the Petitioner had actual knowledge of the agency's determination under ALC Rule 11(C). As such, the Petitioner's thirty (30) day period to file its request for a contested case hearing began to run on November 6, 2017, which was thirty (30) days from both the date the Determination was mailed and the date the Petitioner had actual notice of the Determination. Accordingly, because the Petitioner failed to request a contested case hearing within thirty (30) days from the date the Department mailed its Determination to the Petitioner or within thirty (30) days from the date the Petitioner had notice of the Determination, the Court does not have jurisdiction to hear this matter. Therefore, this case must be dismissed.

II. The Department's Motion was not frivolous, and the Petitioner is not entitled to attorneys' fees.

The Department's Motion is not frivolous as such Motion is based on a reasonable application of the facts to the law. Moreover, the award of attorneys' fees to Petitioner is inappropriate in this case. Rule 72, SCALCR allows the presiding administrative law judge discretion to impose sanctions if he or she determines that a motion is frivolous as described in S.C. Code Ann. § 15-36-10. S.C. Code Ann. § 15-36-10(A)(4) (West, 2018) provides that an attorney may be sanctioned for the following:

- (a) filing a frivolous pleading, motion, or document if:
 - (i) the person has not read the frivolous pleading, motion, or document;
 - (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
 - (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
 - (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;
- (b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
- (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

None of the enumerated examples meriting sanction apply here, nor has the Petitioner argued that any apply.³ The undersigned read the Motion to Dismiss and reasonably believes under

³The Petitioner merely stated that it "is informed and believes that the Respondent's motion to dismiss is frivolous" (Petitioner's Response 2).

these facts and circumstances that the Petitioner's request for a contested case hearing was untimely filed and should be dismissed. Furthermore, the reasonableness of the Department's position is evidenced by the fact this Court endorsed it by originally granting the Department's Motion to Dismiss.

WHEREFORE, the Department reasserts that the Petitioner failed to timely file its request for a contested case hearing, divesting the Court of jurisdiction to hear this case, and moves that this Court dismiss this matter with prejudice and deny the Petitioner's request for attorney fees.

Respectfully submitted,



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Attorneys for S.C. Department of Revenue

Columbia, South Carolina

March 12, 2018

**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

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

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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.scale.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, SCRCPP, 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, SCRCP,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, SCRCP, 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.

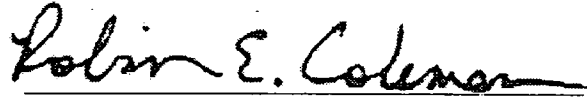


Deborah Brooks Durden
Administrative Law Judge

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

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SC Court of Appeals