

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2018-001613
Case No. 18-ALJ-17-0216-CC

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SC Court of Appeals

Ex Parte: Representative Chip Huggins,.....Appellant.

In re: WKSC, LLC d/b/a

Savannah's Gentlemen's Club & Steakhouse,.....Petitioner, Respondent,

v.

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

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THE MOTION TO INTERVENE FILED BY REPRESENTATIVE CHIP HUGGINS WAS UNTIMELY.

STATEMENT OF THE CASE

The facts of this case are not in dispute. On March 7, 2018, Petitioner/Respondent WKSC, LLC d/b/a Savannah's Gentlemen's Club & Steakhouse (“Savannah’s Gentlemen’s Club”) located at 4029 Fernandina Road, Columbia, South Carolina, applied for an on-premises beer and wine permit and restaurant liquor by the drink license. ROA 41-44 (Application for Retail Beer, Wine and Liquor). Many taxpayers filed a protest form with the Respondent, South Carolina Department of Revenue, including Representative Chip Huggins, Appellant. ROA 36-40 (Beer, Wine & Liquor Protest Form). The Department of Revenue denied the issuance of the permit and license pursuant to a denial letter dated April 13, 2018. ROA 19-20 (Conditional Application Denial Notice). Savannah’s Gentlemen’s Club timely protested the denial of the permit and license pursuant to a letter dated April 19, 2018. ROA 45 (Letter from Kenneth E. Allen). The Department of Revenue issued a Final Determination Letter dated June 19, 2018. ROA 21-35 (Department Determination). Savannah’s Gentlemen’s Club filed a Request for Contested Case Hearing in the Administrative Law Court on June 20, 2018. ROA 46-47 (Letter from Kenneth E. Allen to ALC).

On July 19, 2018, Judge S. Phillip Lenski issued an Order and Notice of Hearing, setting a hearing on the merits for September 11, 2018.¹ ROA 1-4 (Order and Notice of Hearing, including Memorandum). Attached to Judge Lenski’s Order was an Administrative Memorandum to Individuals Protesting a License or Permit. (*Id.*). The Administrative Memorandum and Order both cautioned the protestants “any motion to intervene filed after [August 10, 2018] will be *deemed by the court to be untimely and prejudicial to the rights of existing parties.*” (*Id.*). (emphasis added).

Huggins moved to intervene as a party pursuant to Rule 20 of the Rules of Procedure for the Administrative Law Court on August 30, 2018. ROA 13-16 (Motion for Leave to Intervene).

¹ On Monday, September 10, Judge Lenski’s law clerk emailed the parties stating the Governor of South Carolina issued an Executive Order closing government offices. Therefore, Judge Lenski continued the hearing indefinitely.

The motion to intervene was denied by the ALC on September 5, 2018. ROA 5-12 (Order Denying Intervention). Huggins timely appealed to this Court.

STANDARD OF REVIEW

"In an appeal of the final decision of an administrative agency, the standard of appellate review is whether the AL[C]'s findings are supported by substantial evidence." *Sanders v. S.C. Dep't. of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008). "In determining whether the ALC's decision was supported by substantial evidence, the [c]ourt need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). The standard of review for a motion to intervene is whether the court abused its discretion in denying the motion *S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988).

ARGUMENT

The ALC abused its discretion in denying Huggins' motion to intervene and the denial was not supported by substantial evidence in the record.

Rule 20 of the Rules of Procedure for the Administrative Law Court provides:

- A. Motions for Intervention. A motion for leave to intervene shall be served on all parties and shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of the intervention on the proceedings. A proposed answer or position in intervention shall be attached to the motion.
- B. Grounds for Intervention. 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.
- 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.

SCALC Rule 20.

While SCALC Rule 20 is not identical to SCRCF Rule 24, they are analogous.

Rule 24(a)(2) states:

Upon timely application anyone shall be permitted to intervene in an action:...(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This Court has held a party seeking intervention under Rule 24(a)(2) must: “(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.” *In re Horry Cty. State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004). As noted in Judge Lenski’s Order Denying Intervention, he did not consider whether Huggins’ reasoning for intervening were proper, but rather “focus[ed] on the timeliness of the motion, and the justification given for its late filing.” ROA 9, line 3.

The South Carolina Supreme Court provided a four-test test for determining timeliness: “(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 v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

In his motion to intervene filed twelve days before the contested case hearing, Huggins outlined the reasons he sought to intervene and also cited three reasons to support his statement of good cause for the failure to intervene earlier. Specifically, Huggins asserted (1) its interest would not be properly satisfied without the rights afforded to properly identified parties to the litigation; (2) judicial economy would be best served with an officially named Party Protestant; and (3) counsel for Huggins was retained on August 29, 2018. ROA 13-14.

Although the ALC cited *Davis v. Jennings* in its Order Denying Intervention, the ALC had predetermined any motion to intervene filed after the ALC’s deadline of August 10, 2018, would be untimely. In fact, in Judge Lenski’s Administrative Memorandum, it was clearly stated that the

“any motion to intervene filed after [August 10, 2018] will be deemed by the court to be **untimely and prejudicial**” regardless of the reason. ROA 3, line 24 (emphasis added). Therefore, there was no discretion or consideration given to either the timeliness of the motion and/or the good cause shown. It is reasonable to assume that the ALC had already determined the outcome of any motions to intervene filed after August 10, 2018 regardless of the reasoning for the late filing.

By determining any motion to intervene filed after August 10, 2018, regardless of when it was filed, or the reason it was filed, would be “untimely and prejudicial to the rights of the existing parties,” the ALC demonstrated an abuse of discretion before any potential motions were filed. Under the reasoning laid out in the ALC’s July 19, 2018 Order and Notice of Hearing, a motion to intervene filed August 11, 2018 (even just one day after the deadline) would still be considered untimely and prejudicial, notwithstanding the good cause shown by a potential intervener.

As noted by the South Carolina Supreme Court, intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all parties who may be affected. *Berkeley Elec. Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Furthermore, the Supreme Court cautioned against the consequences of setting up rigid applications of Rule 24(a)(2). *Id.* It is clear that “[e]ach case [must] be examined in the context of its unique facts and circumstances.” *Id.* In this particular case, Judge Lenski set up a rigid deadline for filing motions to intervene and forewarned all potential interveners that he would be not examining any facts or circumstances, but rather he would simply deny every motion to intervene filed after his arbitrary date of August 10, 2018.

Had the ALC conducted an evaluation of the good cause shown by Huggins, the evidence shows Huggins meets the four-part test for determining timeliness. First, the motion to intervene was filed on August 30, 2018, twelve days before the hearing. Although Huggins originally

appeared as a protestant on March 27, 2018, he was not represented by counsel until August 29, 2018. As a lay person, Huggins was unaware of the rights afforded to him as a party, compared to simply participating as a protestant. As this Court is well aware, substantial rights are afforded to a party in all litigation. Conversely, those same rights are not afforded to a protestant in a contested case hearing before the ALC. A protestant is only allowed to testify as to his/her reasoning why the beer/wine permit and/or the liquor by the drink license should not be granted, but that same protestant does not have the right to provide an opening, closing, cross-examination, presentation of evidence or rights to appeal. As a lay person, Huggins was not aware of the substantial rights he was not afforded before the ALC as a mere protestant and sought to obtain those rights by filing a motion to intervene.

Additionally, the contested case hearing was not scheduled to be heard until September 11, 2018. Huggins made it clear to the ALC that he did not seek to delay the contested case hearing and was ready to proceed on September 11, 2018. Counsel for the Department of Revenue did not take a position on Huggins' motion to intervene. However, Savannah's Gentlemen's Club strongly opposed the motion to intervene claiming that such intervention would be prejudicial. With that being said, Savannah's Gentlemen's Club is unable to articulate any reasonable prejudice they would suffer if Huggins intervened by simply relying solely on the unsupported argument they would like to take Huggins' deposition and the twelve days did not provide them enough time to do so. However, nothing prevented Savannah's Gentlemen's Club from deposing any of the protestants before the contested case hearing. Savannah's Gentleman's Club did not conduct a single deposition even though they had information from the protestants who submitted a protest form, including Huggins' name, address, phone number, fax number, and e-mail address, and the specific reasons why the application should be denied. In support of its unfounded argument that

it would have liked to conduct a deposition of any person seeking to intervene, counsel for Savannah's Gentlemen's Club admittedly recognized the greater rights afforded to a party as cited in Judge Lenski's order. Under this reasoning, if all 239 protestants moved to intervene on or before the ALC's deadline of August 10, 2018, Savannah's Gentlemen's Club could argue the motion to intervene should be denied because they wouldn't have time to take the depositions. Savannah Gentleman's Club had knowledge on all of the protestants and the basis for each protest well in advance of the hearing and could have noticed as many depositions as it deemed appropriate. Nevertheless, pursuant to the Rules of Procedure for the Administrative Law Court, Savannah Gentlemen's Club had enough time to properly notice the deposition of Huggins prior to the September 11, 2018 hearing to fully investigate the claims if it determined such was appropriate – yet, again, Savannah Gentlemen's Club failed to so.

Lastly, Huggins properly detailed the prejudice he would suffer if the intervention was denied in his motion to intervene. However, the motion to intervene was summarily denied by the ALC as a result of the preconceived basis to deny all motions to intervene filed after August 10, 2018. Rule 20 of the SCALC is clear, and the plain language considers the scenario where motions to intervene may be filed after a deadline; “Any later motion shall contain a statement of good cause for the failure to intervene earlier.” Although Rule 20 required the ALC to consider Huggins’ statement of good cause for the failure to intervene earlier, the ALC’s declaration contained in both the Order and Notice of Hearing and the attached Administrative Memorandum decreeing “*any* motion to intervene filed after [August 10, 2018] will be *deemed by the court to be untimely and prejudicial* to the rights of existing parties” ignored the obligation of Rule 20 to consider any “later” motions to intervene, regardless of the good cause articulated therein.

The proclamation by Judge Lenski that any later motion would be untimely and prejudicial, irrespective of the timing or reasons for the same, ignores the plain language of Rule 20 and South Carolina law allowing intervention. Therefore, regardless of the “reasons” contained in the order denying Huggins’ motion to intervene, Judge Lenski’ abused his discretion, as it is clear he used no discretion at all. His ruling was made prior to any later motion to intervene being filed; as he explicitly warned it would be in his July 19 order and accompanying memorandum.

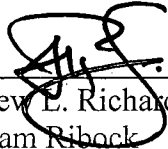
CONCLUSION

For all the reasons stated herein, Huggins respectfully requests this Court reverse the ALC's ruling and remand the matter to the ALC to allow Huggins to intervene and participate in the contested case hearing.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

June 3, 2019



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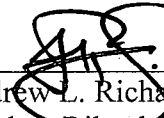
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South Carolina Department of Revenue,.....Respondent.

ATTORNEY'S CERTIFICATE

The undersigned hereby certifies Appellant's Final Brief complies with Rule 211(b).

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