

RECEIVED

Jun 05 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

South Carolina Administrative Law Court Case No. 19-ALJ-17-0269-CC

Appellate Case No. 2020-000435

South Carolina Department of Revenue,

Respondent,

-vs-

Study Hall, LLC, d/b/a Study Hall, LLC,

Appellant.

INITIAL BRIEF OF APPELLANT

Kathleen McDaniel (SC Bar No. 74826)
Sarah J.M. Cox (SC Bar 104316)
BURNETTE SHUTT & McDANIEL, PA
912 Lady Street, Second Floor (29201)
PO Box 1929
Columbia, South Carolina 29202
Telephone: (803) 904-7913
Facsimile: (803) 904-7910

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW..... 5

ARGUMENT..... 5

CONCLUSION..... 7

TABLE OF AUTHORITIES

Statutes

S.C. Code Ann. § 61-2-100..... 3, 6

S.C. Code Ann. § 61-2-145..... 2

S.C. Code Ann. § 61-4-520..... 3

S.C. Code Ann. § 61-4-560..... 3

S.C. Code Ann. § 61-4-4060..... 3

S.C. Code Ann. § 61-6-1820..... 3, 6

South Carolina Administrative Law Court Rule 29..... 4

Cases

MRI at Belfair, LLC v. South Carolina Dept. of Health and Environmental Control,
394 S.C. 567, 716 S.E.2d 111 (Ct. App. 2011)..... 5

South Carolina Dept. of Revenue v. Meenaxi, Inc.,
417 S.C. 639, 790 S.E.2d 792 (Ct. App. 2016)..... 5

South Carolina Dept. of Revenue v. Sandalwood Social Club,
399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012)..... 5, 6

STATEMENT OF ISSUE ON APPEAL

- I. Did the Administrative Law Court act outside its statutory authority when it imposed a 90-day suspension on Appellant even though the court found in Appellant's favor on the sole issue before the court?

STATEMENT OF THE CASE

Appellant holds an on-premises beer and wine permit issued by Respondent. Appellant also holds a liquor-by-the-drink license issued by Respondent. Appellant's on-premises beer and wine permit and liquor-by-the-drink license expired on November 30, 2018. On December 7, 2018, Appellant applied for a renewal of its on-premises beer and wine permit and its restaurant liquor-by-the-drink license at the offices of Respondent. (R.p.____; ABL Renewal Application, Pet'r's. Ex. 1, 001-004.) On the same date, Respondent issued a Renewal Notice of Denial (the "Notice of Denial") stating that the renewal was denied because a principal, Jonathan Starkey ("Starkey"), had not filed state income taxes for the tax years from 2014 through 2017. (R.p.____; ABL Renewal Not. of Denial, Pet'r's. Ex. 1, 049-050.) The Notice of Denial further stated that Starkey had 90 days to file his taxes. (Id.) The Notice of Denial also required Appellant to furnish verification of its liability insurance policy complying with S.C. Code Ann. § 61-2-145. (*Id.*)

Before leaving Respondent's offices, Starkey immediately provided proof of Appellant's liability insurance policy to Respondent. (R.p.____; Tr. p. 130.) Starkey's understanding at the time was that he had 90 days to provide proof that he had filed his taxes and if he did not do so, Appellant's on-premises beer and wine permit and its restaurant liquor-by-the-drink license would be suspended. (R.p.____; Tr. pp. 130-131.) Starkey was not aware that Appellant did not have an on-premises beer and wine permit and restaurant liquor by the drink license until February 28, 2019. (R.p.____; Tr. p. 140.)

On February 28, 2019, State Law Enforcement Division ("SLED") agents conducted an undercover alcohol operation at Appellant's premises and purchased a single beer from Appellant. (R.p.____; Case Memo., Pt'r's Ex. 1, 007-008.) Following the

purchase, the agents obtained a search warrant and seized approximately \$16,000 worth of alcohol from Appellant. (R.p.____; Aff. of Jon Starkey, Ex. 1 to Mot. for Reconsideration and Stay.) Because Starkey was not present to be issued a ticket, SLED agents obtained two arrest warrants for Starkey for violation of S.C. Code Ann. § 61-4-560 for Operation without a Permit and § 61-6-4060(A), for Unlawful Storage of Liquor in a Place of Business. (R.p.____; Pt'r's Ex. 1, 008.)

On March 7, 2019, Appellant furnished the required tax documentation to Respondent, and Respondent issued an on-premises beer and wine permit and a restaurant liquor-by-the-drink permit to Appellant. (R.p.____; Pt'r's Ex. 1, 005-006.)

On March 20, 2019, Respondent South Carolina Department of Revenue ("Respondent") issued a Notice of Intent to Cancel to Appellant. (R.p.____; Pt'r's Ex. 1, 051-052.) The sole reason cited by Respondent for its intent to cancel Appellant's license and permit was that "selling alcoholic beverages without a license indicates that [Starkey lacks] the requisite moral character to hold an alcohol permit and license as required by [South Carolina law.]" (Id.)

Appellant timely protested the Notice of Intent to Cancel by letter received by Respondent on June 18, 2019. (R.p.____; Pt'r's Ex. 1, 054-055.) Respondent then issued its Determination on July 17, 2019, concluding that Starkey was not of good moral character as required by S.C. Code §§ 61-2-100(D), 61-4-520, and 61-6-1820(2) and therefore was not a proper person to hold an alcohol license. (R.p.____; Pt'r's Ex. 1, 056-060.) On August 14, 2019, Appellant timely filed a Request for Contested Case Hearing with the South Carolina Administrative Law Court ("ALC"). (R.p.____; Req. for Cont. Case Hr'g.)

On December 17, 2019, the ALC held a hearing on this matter. (R.p.____; Tr.) Appellant called witnesses and presented evidence to prove Starkey's good moral character. (Id.) Respondent called witnesses and presented evidence to attempt to prove Starkey is of poor moral character. (Id.) On January 15, 2020, the ALC issued its Order finding that Respondent had erred and that Starkey is of the requisite moral character for Appellant to hold an alcohol license. (R.p.____; Order, dated Jan. 15, 2020.) However, the ALC also ordered that "[Appellant's] license and permit shall be suspended for ninety (90) days." (Id.) It is this 90-day suspension that Appellant challenges in this appeal.

On January 23, 2020, Appellant moved the ALC pursuant to SCALC Rule 29(D), to reconsider its Order filed January 15, 2020, so as to remove the 90-day suspension and to stay the suspension while considering the motion. (R.p.____; Mot. for Reconsideration and Stay.) On February 5, 2020, the ALC granted Appellant's motion for stay pending its decision on the motion for reconsideration. (R.p.____; Order, dated Feb. 5, 2020.) On March 9, 2020, the ALC denied Appellant's motion to reconsider. (R.p.____; Order, dated Mar. 9, 2020.)

This Appeal by Study Hall, LLC followed. Respondent South Carolina Department of Revenue did not file any cross-appeal.

On March 11, 2020, Appellant filed a Petition for Writ of Supersedeas, requesting that the suspension be stayed during the pendency of this appeal. (R.p. _____; Pet. for Writ Supersedeas, filed March 11, 2020.) On March 13, 2020, the ALC issued a Writ of Supersedeas staying the suspension during the pendency of this appeal. (R.p _____, Order, dated March 13, 2020.)

STANDARD OF REVIEW

“In an appeal from the decision of an administrative agency, the Administrative Procedures Act [(the APA)] provides the appropriate standard of review.” S.C. Dep't of Revenue v. Meenaxi, Inc., 417 S.C. 639, 648, 790 S.E.2d 792, 796–97 (Ct. App. 2016). “Pursuant to the APA, this court may reverse or modify the ALC if the appellant's substantial rights have been prejudiced because the administrative decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by an error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” MRI at Belfair, LLC v. S.C. Dep't of Health & Env'tl. Control, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011).

ARGUMENT

Appellant brings this appeal because the ALC's imposed a penalty on Appellant even though the ALC found in Appellant's favor on the sole issue before it. When the ALC found that Appellant had not committed the offense alleged in the Notice of Intent to Cancel and yet imposed a penalty on Appellant *sua sponte*, the ALC acted outside its statutory authority.

“An administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose.” S.C. Dep't of Revenue v. Sandalwood Soc. Club, 399 S.C. 267, 278, 731 S.E.2d 330, 336 (Ct. App. 2012) (internal citations removed). “DOR has the authority to determine an appropriate administrative penalty, within the statutory limits established by the legislature, after the parties have had an

opportunity for a hearing on the issues . . . and in assessing a penalty, DOR should give effect to the major purpose of a civil penalty, which is deterrence.” Id. at 278-79, 336. “[O]nly DOR may bring violations under its regulations, and no private right exists to bring a claim against a business under DOR’s regulatory scheme.” Id. at 280.

In a contested case hearing before the ALC, “[the ALC] is the fact-finder and it is [the ALC’s] prerogative ... to impose an appropriate penalty based on the facts presented.” *Id.* at 280, 337. However, the ALC can only penalize a licensee for violations cited by DOR. See id. at 278.

Here, Respondent cited only one reason in its Determination for its cancelation of Appellant’s license. That one reason was Starkey’s alleged lack of good moral character. (R.p.____; Pt’r’s Ex. 1, 063.) Per S.C. Code Ann. §§ 61-2-100(D) and 61-6-1820(2), a business’s principals must be of good moral character for the business to be issued a license or permit to sell alcohol. A business’s principal either is or is not of sufficient moral character to hold an alcohol license or permit. Thus, if a business’s principal is not of good moral character, the only appropriate penalty is revocation or cancelation of said license. Therefore, if the ALC had found that Starkey, Appellant’s sole principal, lacked good moral character, it could only cancel or revoke Appellant’s alcohol license and permit. On the other hand, if the ALC found that Starkey had the requisite good moral character, the ALC could only allow Appellant to retain its license and permit. No other options are available under the law for the imposition of a penalty on a party with sufficient good moral character.

Nowhere in its Order does the ALC state the statutory basis for the imposition of the 90-day suspension. The Order points to no statute that Appellant violated that would

give the ALC authority to impose any sort of penalty. Moreover, if the ALC had imposed a penalty for the violation of statutory provision other than the requirement of sufficient moral character, that also would have exceeded the ALC's authority because the existence of sufficient moral character was the only issue before the ALC. The sole basis of Respondent's decision to cancel Appellant's alcohol license and permit was lack of good moral character. No other administrative grounds were before the ALC.

The ALC analyzed Starkey's moral character and held that Starkey "possesses the requisite moral character to hold an alcoholic beverage license" and that Appellant meets the applicable requirements for licensure. (R.p.____; Order dated Jan.15, 2020.) Because this was the only issue before the ALC and the court found in favor of Appellant, penalizing Appellant *in any way* is acting outside the statutory authority of the agency. Therefore, the punitive portion of ALC's Order should be reversed because it was imposed outside the statutory authority of the ALC, and Appellant should be allowed to continue to operate without a suspension.

CONCLUSION

For the foregoing reasons, Appellant Study Hall, LLC d/b/a Study Hall, LLC, respectfully asks that this Court reverse the 90-day suspension in the ALC's January 15, 2020 and March 9, 2020 Orders and allow Appellant to continue to sell alcohol without suspension.

Respectfully submitted,

s/ Kathleen M. McDaniel

Kathleen McDaniel (SC Bar No. 74826)

Sarah J.M. Cox (SC Bar 104316)

BURNETTE SHUTT & McDANIEL, PA

PO Box 1929

Columbia, South Carolina 29202

Tel. (803) 904-7913

Fax (803) 904-7910

KMcDaniel@BurnetteShutt.Law

ATTORNEYS FOR APPELLANT

Columbia, South Carolina

June 5, 2020

RECEIVED

Jun 05 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

South Carolina Administrative Law Court Case No. 19-ALJ-17-0269-CC

South Carolina Department of Revenue,

Respondent,

-vs-

Study Hall, LLC, d/b/a Study Hall, LLC,

Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Appellant's Initial Brief in the above-referenced matter has been served on all parties of record by emailing a copy of the same to the following:

Patrick McCabe, Esq.
SOUTH CAROLINA DEPARTMENT OF REVENUE
300A Outlet Pointe Boulevard
Columbia, SC 29211
Patrick.mccabe@dor.sc.gov

_____/s/Sarah J.M. Cox_____
Sarah J.M. Cox (Bar No. 104316)
BURNETTE SHUTT & McDANIEL, PA
Post Office Box 1929
Columbia, South Carolina 29202
P: 803.904.7930
F: 803.904.7910
SCox@BurnetteShutt.Law

**ATTORNEY FOR APPELLANT STUDY
HALL, LLC**

June 5, 2020

Columbia, South Carolina

Sarah J. M. Cox

From: Sarah J. M. Cox
Sent: Friday, June 5, 2020 3:08 PM
To: Patrick.McCabe@dor.sc.gov
Cc: Kathleen M. McDaniel; Traci B. Wolfe, PP
Subject: SC Dept of Revenue v. Study Hall, LLC d/b/a Study Hall LLC
Attachments: Initial Brief of Appellant Study Hall LLC dba Study Hall LLC.pdf; Appellant's Designation of Matter on Appeal.pdf

Patrick,

I hope you are well. Please see attached and served upon you **Appellant's Initial Brief** and **Designation of Matter on Appeal** in the above-referenced matter.

Sarah Cox