

RECEIVED

Jul 10 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 REPLY 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

INTRODUCTION..... 1

ARGUMENT.....2

 I. Respondent mischaracterizes the suspension as a “condition or restriction” of a license renewal when, in fact, a suspension is a punitive sanction to be imposed only after the finding of a violation, of which there was none in this case.2

 II. Respondent mischaracterizes the ALC’s ruling as imposing the penalty of suspension for alleged violation of two criminal statutes, which is outside the jurisdiction of the ALC.....5

 III. It would have been a violation of due process for the ALC to impose the penalty of suspension for any issue not properly before it.7

CONCLUSION.....12

TABLE OF AUTHORITIES

Statutes

S.C. Const. Ann. Art. I, § 22	7, 8
S.C. Code Ann. § 1-23-320	8, 9
S.C. Code Ann. § 1-23-370	8, 9
S.C. Code Ann. § 61-2-80	2, 4, 5
S.C. Code Ann. § 61-2-100	10
S.C. Code Ann. § 61-2-260	8
S.C. Code Ann. § 61-4-50	6, 7, 11
S.C. Code Ann. § 61-4-560	5
S.C. Code Ann. § 61-4-590	7, 8
S.C. Code Ann. § 61-6-4010	5, 6, 7
S.C. Code Ann. § 61-6-4310	11
South Carolina Administrative Law Court Rule 12	9
South Carolina Administrative Law Court Rule 15	9

Cases

<i>Bliss Columbia, LLC d/b/a Tryst v. S.C. Dept. of Revenue</i> , No. 17-ALJ-17-0119-CC (July 27, 2017)	3
<i>DolgenCorp, LLC d/b/a Dollar General Store #1307 v. S.C. Dept. of Revenue</i> , No. 10-ALJ-17-0902-CC (Feb. 10, 2011)	3
<i>South Carolina Dept. of Revenue v. Sandalwood Social Club</i> , 399 S.C. 267 (Ct. App. 2012)	7

Treatises

John D. Geathers & Justin R. Werner, <u>The Regulation of Alcoholic Beverages in South Carolina</u> (South Carolina Bar 2007).....	3, 4
--	------

INTRODUCTION

Appellant Study Hall, LLC d/b/a Study Hall, LLC (“Appellant”) comes before this Court to ask that this Court find that the Administrative Law Court (the “ALC”) exceeded its authority when it found for Appellant on the sole issue properly before it, yet still imposed a penalty on Appellant. In response, Respondent South Carolina Department of Revenue (“Respondent”) argues that because the ALC conducted a *de novo* hearing on the sole issue before it, the ALC has the unfettered authority to analyze the facts and locate within those facts *any* violation of the alcoholic beverage laws of the State of South Carolina and impose a penalty based upon said uncited violation. (Resp. Br. pp. 4, 11.) This is not the case.

Contrary to Respondent’s argument, the ALC’s role in a contested case is to weigh the facts to determine whether the alleged violation for which a licensee has been cited by Respondent has occurred and then, if the ALC finds that the cited violation has occurred, to determine an appropriate penalty for such violation. The *de novo* nature of a hearing before the ALC in a contested case means that the ALC need not defer to the agency’s findings of fact or conclusions of law on the claim presented to the ALC. It does not mean that the ALC can punish a different claim *sua sponte*.¹

¹ Appellant would point out here that Respondent included in its Brief many allegedly “relevant facts” regarding Mr. Starkey’s previous establishment in Georgia. Inclusion of such information is improper because the ALC explicitly ruled that incident “should not be considered now as a factor in a subsequent renewal” because Respondent and others were made aware of the tragic circumstances which occurred in Georgia before Appellant was issued its initial license or permit. (R.p.____; Order, p. 2, dated Mar. 13, 2020.) There is no reason for these facts to be included in Respondent’s Brief except to attempt to throw suspicion on the character of Mr. Starkey. The ALC found firmly that Mr. Starkey is of good moral character and that finding has never been appealed.

Here, the ALC considered the facts and evidence presented at the contested case hearing regarding the determination made by Respondent that Appellant's principal, Jon Starkey, allegedly lacked the requisite moral character for Appellant to sell alcohol. The ALC found for Appellant on the only issue it was statutorily authorized to analyze. Therefore, no penalty can be assigned.

ARGUMENT

- I. **Respondent mischaracterizes the suspension as a “condition or restriction” of a license renewal when, in fact, a suspension is a punitive sanction to be imposed only after the finding of a violation, of which there was none in this case.**

Respondent argues in its Brief that “requiring a 90-day suspension as a condition of the license and permit was within the authority of the ALC.” (Resp. Br., p. 9.) In support of this argument, Respondent cites South Carolina Code Section 61-2-80 for the proposition that the “department . . . is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit.” Notably, the ALC does not cite this section as its authority for imposing the suspension. Further, Respondent's analysis is in error for two reasons. First, Respondent mischaracterizes the suspension as condition or restriction. Second, at issue in this case was the proposed cancellation of Appellant's existing alcohol license and permit, not the issuance or renewal of a license or permit.

We first examine the concept of a “condition or restriction” versus a sanction. A condition or restriction can generally be understood as a measure taken to ensure compliance with the existing requirements of holding a license or permit or as an ongoing protection for the surrounding community. A condition or restriction is not punitive in nature.

For example, in a matter concerning the suitability of a retail location for the issuance of a license to sell beer and wine, when the ALC found that school children were frequenting the location, the ALC imposed a condition on the licensee that it could not sell chilled beer or single cans of beer. *Dolgencorp, LLC d/b/a Dollar General Store #1307 v. S.C. Dept. of Revenue*, No. 10-ALJ-17-0902-CC at 3 (Feb. 10, 2011). In *Dolgencorp*, the condition was stipulated to as an effort to ensure compliance with the existing legal requirements that aim to prevent children from having access to alcohol and to prevent the location from being a magnet for crime by making the beer sold in the store less appealing to shoplifters or those consumers who may purchase the beer and drink it on site. *Id.*

Another example of a condition and a restriction that the ALC placed on the issuance of an alcohol license can be found in *Bliss Columbia, LLC d/b/a Tryst v. S.C. Dept. of Revenue*, No. 17-ALJ-17-0119-CC (July 27, 2017). In *Bliss*, the petitioner stipulated to a restriction of hours of operation such that it would only operate between the hours of 11:00 a.m. and 12:00 a.m. (midnight) and a condition that it would not operate as a sexually oriented business. *Id.* at 4. The purpose of the condition and restriction was to address the “rights and welfare of those who live near Petitioner’s business as well as the potential impact on law enforcement.” *Id.*

In contrast, a suspension is not a protective “condition or restriction” of a license; a suspension is a **sanction** imposed to remedy an actual violation. A suspension is punitive.

The primary **sanction** available to the Department under Title 61 to remedy an alcoholic beverage violation is the suspension or revocation of the permit, license, or certificate issued to the individual or business in question. The Department is also generally authorized, in its discretion, to impose a

monetary penalty upon a licensee in lieu of the relatively harsh sanctions of license suspension and revocation.

John D. Geathers & Justin R. Werner, *The Regulation of Alcoholic Beverages in South Carolina* at 32 (South Carolina Bar 2007) (emphasis added).

A penalty is not the same as a condition or restriction of a license or permit because a penalty's purpose is not to ensure compliance with an existing law nor is it an ongoing protection for the surrounding community. In this case, the ALC recognized that the suspension is a penalty stating, "the penalty [suspension] imposed by this Court is less severe than the cancellation (revocation) of the permit and license renewal." (R.p.____; Order Denying Respondent's Motion to Reconsider, p. 3, filed March 6, 2020.) Because a suspension is not a condition or restriction, Section 61-2-80 does not give the ALC the authority to impose a suspension as a condition or restriction.

Additionally, Section 61-2-80 only authorizes Respondent, and thus the ALC standing in its shoes, to attach a condition or restriction when considering the renewal or issuance of a permit or license. The issue in this case was not whether Appellant's permit and license should be issued or renewed, it was whether Appellant 's license and permit should be canceled because Mr. Starkey was alleged to lack sufficient moral character.

Appellant was issued a license and permit by Respondent on March 7, 2019. (R.p.____; Pt'r's Ex. 1, p. 006.) The ALC recognized this, stating that a "valid renewal went into effect on March 7, 2019." (R.p. ____, Order Denying Respondent's Motion for Reconsideration at 2, fn. 1.) Respondent issued its Notice of Intent to Cancel this license and permit on March 20, 2019. (R.p.____; Pt'r's Ex. 1, 052-053.) At the time the Notice of Intent to Cancel was issued and at the time of the hearing before the ALC until present, Appellant held a valid alcohol license and permit. The sole issue before the ALC was

whether Appellant's license and permit should be canceled; therefore, Section 61-2-80, addressing the issuance and renewal of a license or permit is inapplicable.

Contrary to Respondent's argument, the 90-day suspension that Appellant challenges in this appeal is a penalty and cannot be characterized as a condition or restriction on the issuance or renewal of Appellant's existing license and permit. Accordingly, Section 61-2-80 provides no authority for the ALC to have imposed the suspension.

II. Respondent mischaracterizes the ALC's ruling as imposing the penalty of suspension for alleged violation of two criminal statutes, which is outside the jurisdiction of the ALC.

Respondent argues, in the alternative, that in a contested case the ALC has the "broad discretion" to depart from the alleged administrative violation presented in the agency's determination and impose a penalty for violations never cited by the agency. (Resp. Br., p. 11.) This is an incorrect statement of what the ALC ruled and, if the ALC had so ruled, it would be in excess of the ALC's jurisdiction.

In its Final Order, the ALC rules on the sole issue of Mr. Starkey's moral character, holding "[t]he court concludes that he possesses the requisite moral character to hold an alcoholic beverage license." (R.p. ____, Final Order at p. 11.) Respondent argues that the ALC went beyond the issue of moral character and imposed the suspension as a penalty for violation of South Carolina Code Sections 61-4-560 and 61-6-4010. (Resp.'s Brief, p. 11-12.) Respondent states, "As there was no dispute as to whether the violations occurred the ALC determined it to be an appropriate condition that the Appellant serve a suspension" (Resp. Br., p. 12.)

Respondent seems to be arguing that the ALC found that Appellant violated Section 61-4-560 and 61-6-4010, and then the ALC imposed the suspension as a penalty for those violations. This cannot not be the case. These two statutes prescribe criminal penalties (misdemeanors punishable by fines or imprisonment) for violations, which makes them criminal statutes outside the ALC's limited jurisdiction for adjudication of administrative matters.¹ S.C. Code An.. § 1-23-600. Indeed, it is logical for these statutes to be strictly criminal, because they address persons who sell alcohol without a license for Respondent to bring an administrative action against.

Respondent never cited Appellant for violating Section 61-4-50 or Section 61-6-4010. Moreover, the ALC recognized that although Appellant had been issued Arrest Warrants for operating without a permit and unlawfully storing alcoholic liquors in a place of business, he had applied for the Pre-Trial Intervention program and had already paid the application fee for that program. (R.p. ____, Final Order, p. 6.) Thus, not only was the ALC without jurisdiction to make any such adjudication of a criminal matter, but also there had been no criminal adjudication on the alleged violations of Section 61-4-50 and Section 61-6-4010 by any court with jurisdiction.

The ALC took these two statutes into consideration only when deciding the issue of moral character. The ALC held that a possible violation of those two statutes did not render Mr. Starkey of insufficient moral character.

Respondent's failure to follow the law, therefore, was not due to an inability to distinguish between right and wrong. Moreover, the evidence reflects that Mr. S[t]arkey possesses the ability to comply with the law when properly informed. The court concludes that he possesses the requisite moral character to hold an alcoholic beverage license.

(R.p. ____, Final Order, p. 11.)

Finally, there is no doubt that Respondent has jurisdiction to revoke or suspend permits authorizing the sale of beer or wine. S.C. Code Ann. § 61-4-590(A). As explained in greater detail in Appellant's Brief, this means that "only [Respondent] may bring violations under its regulations." *South Carolina Dept. of Revenue v. Sandalwood Social Club*, 399 S.C. 267, 280 (Ct. App. 2012).

Respondent's attempts to distinguish *Sandalwood* from this case fall flat. The ALC in *Sandalwood* analyzed the facts presented at the contested case hearing, found additional violations of the alcoholic beverage regulations, and penalized the licensee for violations additional to the sole violation cited by the Department. *Id.* Here, Respondent argues that, although Appellant did not commit the only alleged violation properly before the ALC, the evidence supported additional violations for which the ALC could assess a penalty. The fact that the overall punishment of suspension is less severe than the punishment of revocation does not change the core issue here: *any* penalty is inappropriate when not tied to a violation cited by Respondent.

For these reasons, the ALC did not base, and could not have based, the suspension on any violation of Sections 61-4-50 and Section 61-6-4010.

III. It would have been a violation of due process for the ALC to impose the penalty of suspension for any issue not properly before it.

In its alternative argument, Respondent argues that because the contested case hearing before the ALC is *de novo*, that means that the ALC can impose a sanction based on its determination of any possible issue that comes up during the hearing. (Resp. Br., p. 11.) This contradicts the basic due process tenet of notice.

The basic requirements for procedural due process before an administrative agency are enshrined in the Constitution of the State of South Carolina:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. Ann. Art. I, § 22 (emphasis added).

In addition, the Administrative Procedures Act provides that “[n]o revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.” S.C. Code Ann. § 1-23-370(c).

In an alcohol licensing matter where Respondent seeks to revoke or suspend a permit, Respondent must provide notice of an alleged violation and then must conduct an investigation and issue a departmental determination to the permittee or licensee before it can revoke or suspend a permit. S.C. Code Ann. § 61-4-590(B). Once an agency has issued its departmental determination, the licensee may then challenge the agency’s departmental determination before the ALC by requesting a contested case hearing, which “must be heard by the Administrative Law Court pursuant to the South Carolina Revenue Procedures Act and the Administrative Procedures Act.” S.C. Code Ann. § 61-2-260 (Supp. 2005).

The specific requirements for a notice of hearing in a contested case are set forth in the Administrative Procedures Act, S.C. Code Ann. § 1-23-320. This notice must include a:

- (1) statement of the time, place, and nature of the hearing;

- (2) statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) reference to the particular sections of the statutes and rules involved;
- (4) short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished.

S.C. Code Ann. § 1-23-320(B)(4). These requirements are satisfied by two different documents in a contested case before the ALC.

First, after the licensee requests a contested case hearing, the agency must file and serve on all parties an “Agency Information Sheet,” which includes “identifying information of the agency action or inaction that is the subject of the hearing.” SCALC Rule 12(B) (emphasis added). This gives the ALC and all parties notice of which specific issues will be heard and decided by the ALC at the contested case hearing.

Second, the ALC issues a Notice of Contested Case Hearing, which “sets forth the date, time, place, and purpose of the hearing, the administrative law judge who will conduct the hearing, and any other matters necessary for the prompt resolution of the matter.” SCALC Rule 15.

It cannot be disputed that the sole basis of Respondent’s action against Appellant was the issue of Mr. Starkey’s moral character. This is consistently reflected at every stage of this action.

First, Respondent provided the notice of its intended actions to Appellant as required under S.C. Code Ann. § 1-23-370(c) when it served its Notice of Intent to Cancel on March 20, 2019, which expressly states that Respondent intended to cancel Appellant’s license and permit because Respondent alleged that Mr. Starkey was of deficient moral character to act as Appellant’s principal. (R.p.____; Pt’r’s Ex. 1, 052-053.)

Next, Respondent provided Appellant with its Department Determination, which describes the “Matter In Dispute” as:

Did the South Carolina Department of Revenue (Petitioner) properly cancel the Respondent’s on-premises beer and wine permit and restaurant liquor by the drink license based upon the fact the Respondent’s principal is not of good moral character pursuant to S.C. Code Ann. §§ 61-2-100(D), 61-4-520 and 61-6-1820(2) (2009)?

(R.p.____; Pt’r’s Ex. 1, 057-060.)

Finally, the sole issue in this matter is reflected in the Agency Information Sheet filed by Respondent, which describes the “Matter In Controversy” as:

Did the South Carolina Department of Revenue (Petitioner) properly cancel the Respondent’s on-premises beer and wine permit and restaurant liquor by the drink license based upon the fact the Respondent’s principal is not of good moral character pursuant to S.C. Code Ann. §§ 61-2-100(D), 61-4-520 and 61-6-1820(2) (2009)?

S.C. Code Ann. §§ 61-2-100(D), 61-4-520, 61-6-1820(D), 61-4-150, 61-6-2610, and 61-2-100(D)

(R.p.____; Agency Information Sheet, dated September 4, 2019.)

It is also undisputed that the ALC in this case found for Appellant. The ALC states plainly, “[Appellant] has met its burden of demonstrating compliance with the statutory requirements for licensure. [Respondent’s] proposed cancellation of [Appellant’s] beer and wine permit and business liquor by the drink license is denied.” (R.p.____; Order, dated Jan. 15, 2020.) Simply put, Appellant was found not to have committed the violation for which it was cited by Respondent: having a principal with deficient moral character.

At the time of the hearing, Appellant was only on notice that it would have to prove the quality of Mr. Starkey’s moral character, not that it would have to defend against any other possible violations. At the hearing, counsel for Respondent stated plainly in his opening statement “[Respondent] determined that Mr. Starkey is not fit to hold a beer and

wine permit as defined by 61-4-50, and [Respondent] also determined that Mr. Starkey is not of good moral character as defined by 61-6-1820.” (R.p.____; Tr. of Hr’g held Dec. 17, 2019, p. 7.) Respondent’s counsel went on to conclude his opening statement with Respondent’s request to the ALC: “[W] are seeking a cancellation of [Appellant’s] on-premise beer and wine permit, a cancellation of [Appellant’s] restaurant liquor-by-the-drink license and an order from the Court to sell the contraband alcohol fees [sic] pursuant to South Carolina Code 61-6-4310.” (R.p.____; *Id.* p. 10.)

Although neither Respondent nor the ALC have tied the penalty of suspension to a violation cited by Respondent, the ALC purports to base the penalty on the *facts* presented, notwithstanding the lack of cited violation to which to tie the penalty, stating “While the Department did not seek a penalty specifically for this violation, it provided a factual basis for the Department’s proposed cancellation.” (R.p.____; Order, dated Mar. 13, 2020.) In other words, instead of stopping after determining Appellant did not commit the violation for which it was cited, the ALC went on to consider whether the facts presented at the hearing (for the sole purpose of establishing Mr. Starkey’s moral character) indicated any *other* violation of the state’s alcohol laws had occurred. This was a violation of Appellant’s due process right to notice of the claims against it and an opportunity to respond to those claims.

It was only after the ALC issued its Order on January 15, 2020 that Appellant was made aware that the ALC believed Appellant should be punished for something other than having a principal of poor moral character. At that point, the contested case hearing had already been held and therefore Appellant’s opportunity to bring evidence and argue against any other proposed violation had been foreclosed. Contrary to Respondent’s

argument, the ALC cannot help Respondent by analyzing the facts and finding a violation or violations for which it believed Respondent *could* have cited Appellant but did not.

CONCLUSION

Respondent sought cancelation of Appellant's alcohol license and permit for a single reason: that it believed Appellant did not meet the requirements for licensure based upon the alleged lack of good moral character of Jon Starkey. Appellant succeeded, and the ALC found Starkey to be of sufficient moral character. Appellant's license and permit should not be suspended for violations for which it has never been cited by Respondent, which were not found by the ALC, which would exceed the jurisdiction of the ALC, and of which there was no notice. Accordingly, this Court should reverse the ALC's imposition of any suspension of Appellant's license and permit.

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

July 10, 2020

RECEIVED

Jul 10 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 Reply 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**

July 10, 2020

Columbia, South Carolina

Sarah J. M. Cox

From: Sarah J. M. Cox
Sent: Friday, July 10, 2020 12:15 PM
To: Patrick.McCabe@dor.sc.gov
Cc: Kathleen M. McDaniel; Traci B. Wolfe, PP; Jill Prater
Subject: Study Hall LLC v. SC Dept of Revenue
Attachments: Bliss Columbia v SC DOR.pdf; Dollar General 1307 v SC DOR.pdf; Reply Brief of Appellant Study Hall LLC dba Study Hall LLC.pdf

Patrick,

I hope you are well. Please see attached and served upon you, **Appellant's Reply Brief** in the above matter and the additional unreported authority we cited.

Have a great weekend.

Sarah Cox

RECEIVED
Jul 10 2020
SC Court of Appeals