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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable H.W. Funderburk, Administrative Law Judge

Case No. 19-ALJ-17-0269-CC

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

and

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

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the Administrative Law Court in a *de novo* hearing properly condition the renewal of Petitioner's beer and wine permit and liquor license upon service of a 90-day suspension?

STATEMENT OF THE CASE

On March 20, 2019, the South Carolina Department of Revenue (“Respondent” or “Department”) issued a Notice of Intent to Cancel to Study Hall, LLC d/b/a Study Hall (“Appellant” or “Study Hall”). At that time Appellant maintained both an on-premises beer and wine permit and restaurant liquor by the drink license. The Department’s basis for canceling the permit and license was the Appellant’s principal, Jonathan Starkey (“Starkey”), lacked the requisite moral character to hold an alcohol permit and license.¹ Appellant timely protested the Notice of Intent to Cancel on June 18, 2019.

Department issued its Department Determination on July 17, 2019, finding that Starkey was not of good moral character as required by S.C. Code Ann. § 61-2-100(D), 61-4-520, and 61-6-1820(2). Accordingly, because Appellant’s principal lacked the requisite moral character, the Department determined Appellant’s permit and license should be canceled. On August 14, 2019, Appellant filed a Request for a Contested Case Hearing with the Administrative Law Court (“ALC”).

On December 17, 2019, the ALC held the hearing on this matter. The Department called several witnesses and presented evidence that Starkey lacked the requisite moral character

¹ The Department came to this determination after the Appellant was cited for the sale of alcohol without a license. Additionally, the Department learned that Starkey surrendered an alcohol license in Statesboro Georgia to avoid revocation proceedings when an eighteen year old patron of his establishment was killed by an intoxicated, under-age employee. After the Department determined Starkey lack the requisite moral character to hold an alcohol license and permit the Appellant received a separate administrative citation on October 13, 2019, for selling alcohol on Sundays without a license.

necessary to hold an alcohol license and permit. Kathrine Gatto testified that her son had been killed by an intoxicated underage employee of Starkey's business in Statesboro, Georgia. (R.p. 145, lines 13-15). Statesboro Georgia, Deputy Chief Bryant testified that Starkey's prior business, Rude Rudy's, had been the location of a homicide/murder and the business had a culture that "allows under age employees and patrons to drink alcohol...." (R.p. 121, lines 19-22); that even after the death of Michael Gatto, Starkey's business continued to serve underage individuals alcohol. (R.p. 128, lines 11-17); that Starkey surrendered his City of Statesboro alcohol license as part of a settlement agreement to avoid the revocation of his license.² (R.p. 413) (R.p. 129, line 19-p.130, line 3). SLED Special Agent Keith Dorman provided testimony and evidence that the Appellant was issued a criminal citation for selling beer, wine and alcoholic liquor without a license (R.p. 424) (R.p. 184-p.187, line 5); and received an administrative citation for selling alcohol on Sunday without a license (R.p.464); (R.p.192, line 8-p.195, line 3). ABL Supervisor Krista Strzelczyk testified that the Appellant's license expired in November 2018, and that December 2018, ABL Renewal Notice of Denial clearly stated in two separate paragraphs that "you must cease all sales of beer, wine and /or liquor until you receive your renewed license." (R.p.422) (R.p.164, line 12- p.165, line 3). She also confirmed that the Appellant did not have a license on February 28, 2019, when SLED made the arrest and seizure of contraband alcohol. (R.p. 166, lines 21-25).

In response, the Appellant called witnesses and presented evidence to prove Starkey was of good moral character. On January 15, 2020, the ALC issued its Order granting the permit and

² The application for an alcohol permit or license in South Carolina requires the applicant attest that they have not previously had an alcohol beverage permit or license suspended or revoke.

license with the condition that the Appellant's permit and license "shall be suspended for ninety (90) days." (R.p.1)

On January 23, 2020, Appellant filed a Motion to Reconsider the 90-day suspension and a stay of the suspension while the motion was considered. On February 5, 2020, the Court stayed the suspension until the court ruled on the motion. On March 9, 2020, the ALC denied the Appellant's motion stating that the "Court's imposing a suspension for slightly less than the length of time [Study Hall] operated without a permit and license is certainly less severe than a cancelation that might disqualify Starkey from being permitted or licensed and less severe than a revocation with similar consequences." (R.p.15 ¶ 13).

On March 11, 2020, Appellant filed a Petition for a Writ of Supersedeas with the ALC; requesting a stay of the suspension during the pendency of this appeal. On March 13, 2020, the ALC issued a Writ of Supersedeas staying the suspension. The Appellant claims that the ALC exceeded its statutory authority by issuing a 90-day suspension. However, in a contested case, "the ALJ stands in the discretionary shoes of the agency. . . ." S.C. Dep't of Health & Env'tl. Control, Petitioner, No. 15-ALJ-07-0554-CC, 2016 WL 5867852 (Oct. 3, 2016). By standing in the shoes of the Department, the ALC is "authorized to establish conditions or restrictions which [the court] considers necessary before issuing, or renewing a license or permit." S.C. Code Ann. § 61-2-80 (2009).

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500–501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Env'tl.

Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken Cty. Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C Code Ann. § 1-23-610(B) (Supp. 2015) provides the following standard:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the [Appellant] have been prejudiced because the finding, conclusion or decision is:

- 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 other error of law;
- e) clearly erroneous in the 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.

The ALC's decision to impose a 90-day suspension as a condition on the license should be affirmed because the conclusion reached by the Court is not in violation of any statutory provisions, contains no errors of law; and its conclusion was not arbitrary, capricious, or characterized by the abuse of discretion.

RELEVANT FACTS AND LEGAL ARGUMENT

I. Factual Basis for Department's Determination That the Permit and License Should Be Canceled.

A. Appellant sold beer, wine and alcoholic liquor without a license.

One of the reasons the Department sought to cancel Appellant's permit and license was because Appellant sold beer, wine, and alcoholic liquor without a license. Evidence gathered by SLED on February 28, 2019, indicated that Appellant had made \$130,708.80 in illegal alcohol sales. R.p. 424 (Petitioner's Exhibit 8) R.p. 188:13-191:8; Hrg. Transcr. 90:13-93:8. Only after Appellant was cited for illegal alcohol sales did it provide the Department the documentation necessary to obtain its license. Unfortunately the Department did not learn of the February 28, 2019, arrest until after the permit and license were granted.

B. Starkey's business practices in Statesboro, Georgia.

After the arrest of Starkey on February 28, 2019, the Department was contacted by Kathrine Gatto, who informed the Department that her son had been killed at Starkey's prior business in Statesboro, Georgia. Her son, who was underage and consuming alcohol, was beat to death by an intoxicated, underage, off-duty employee. The Department discovered that Starkey's business was known to locals as a place where underage individuals could drink alcohol. Additionally, the Department learned that in order to avoid revocation of his alcohol license Starkey agreed to surrender his alcohol license and to never operate an alcohol establishment in the City of Statesboro, Georgia.

Starkey's history in Georgia, combined with his arrest for selling alcohol without a license were indications that Starkey lacked the requisite moral character to hold an alcohol license and permit.

II. Legal Analysis and Argument

A. The ALC Did Not Exceed Its Authority By Imposing Conditions for The License And Permit.

i. Contested case hearings before the ALC are *de novo* hearings.

The suspension or revocation of an alcohol license is controlled by S.C. Code Ann. § 12-60-1310 to 12-60-1350 (2014). Under these statutes, the Department issues the licensee a notice informing it of the Department's decision concerning the status of the license or of any penalty the Department is seeking to impose. The Department bears the initial burden of proof of showing why the permit and/or license should be canceled. If Department meets its burden of proof, the burden shifts to the licensee. In this matter that means Appellant was tasked with presenting defenses or mitigating circumstances that would justify the ALC's departure from the Department Determination.

The administrative law judge acts as the finder of facts in a *de novo* proceeding. It is important to remember that there is a difference between a trial *de novo* and a *de novo* review. In a trial *de novo* the court is permitted to receive testimony and evidence in addition to what was presented in an earlier hearing. See, e.g., Bailey v. S.C. Dep't of Health, 388 S.C. 1, 4, 693 S.E.2d 426, 428 (Ct. App. 2010) (citing S.C. Code Ann. § 1-23-600(A) (Supp. 2009)) ("The ALC presides over all hearings of contested DHEC permitting cases and, in such cases, serves as the fact-finder and is not restricted by the findings of the administrative agency."). Conversely, in a *de novo* review, the appellate court's "review of the administrative law judge's order must be confined to the record." Id. ("The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact."); see also 5 C.J.S. Appeal and Error § 907. The hearings conducted by the ALC concerning alcohol licensing and enforcement are considered to be a trial *de novo*. "In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the *de novo* contested case proceeding." S.C. Dep't of Revenue v. Sandalwood Soc. Club, 399 S.C. 267, 279, 731 S.E.2d 330, 337 (Ct. App. 2012). See Be Mi, Inc. v. S.C. Dep't of Revenue, 408 S.C. 290, 758 S.E.2d 737 (Ct. App. 2014) (in reaching decisions in contested violation

matters the ALC serves as the sole finder of fact in a *de novo* contested case proceeding). See also Marlboro Park Hosp. v S.C. Dep't of Health & Env'tl. Control, 358 S.C.573, 579, 595 S.E. 2d 851, 854 (Ct. App. 2004) (holding that a contested case proceedings before the Administrative Law Court are *de novo* proceedings).

ii. In a *de novo* hearing the ALC is not restricted to a review of the initial finding by an administrative agency.

The crux of the Appellant's argument is that the sole issue before the ALC was the moral character of Starky, and therefore the imposition of the condition on the license exceeded the ALC's statutory authority. However, when reviewing an administrative agency's final determination the ALC is not restricted to the issues in the agency's determination. "In the posture of an appeal, the ALJ is not sitting in the appellate capacity and is not restricted to a review of the decision below. Instead, the proceeding before the ALJ is in the nature of a *de novo* hearing." Reliance Ins. Co. v. Smith, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997). "The ALC . . . serves as the fact finder and is not restricted by the findings of the administrative agency." Bailey v. S.C. Dep't of Health, 388 S.C. 1, 4, 693 S.E.2d 426, 428 (Ct. App. 2010). This allows the ALC to expand the scope of the hearing and receive additional evidence and conduct independent fact finding on issues presented before the court.

iii. The ALC has the authority to establish conditions or restrictions that it considers necessary.

Section 61-2-80 provides that "The State, through the Department. . . is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit." "Liquor licenses are neither contracts nor rights of property. They are mere permits, issued or granted in the exercise of the police power of the state to do what otherwise would be unlawful to do, and to be enjoyed on so long as the restrictions and conditions

governing their continuance are complied with.” Feldman v. S.C. Tax Comm’n, 203 S.C. 49, 26 S.E.2d 22, 25 (1943). These powers are extended to the ALC in a contested case hearing. “If the judge stands fully in the shoes of the Department, then he, like the Department is ‘authorized to establish conditions or restrictions which [he] considers necessary before issuing or renewing a license or permit.’” John D. Geathers & Justin R. Werner, The Regulation of Alcoholic Beverages in South Carolina at 189 (South Carolina Bar 2007). As the fact finder in a *de novo* proceeding the ALC has the discretion and authority to place conditions on a license or permit that it considers necessary. Thus, requiring a 90-day suspension as a condition of the license and permit was within the authority of the ALC.

iv. **The holding in Sandalwood is distinguishable from this case.**

In S.C. Dep’t of Revenue v. Sandalwood Soc. Club, 399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012), this Court found that ALC abused its discretion and committed an error of law when it penalized the licensee for violations that were not cited by the Department of Revenue. Based upon the testimony of an intervenor, the ALC imposed a more severe penalty than was requested by the Department of Revenue. The Court of Appeals reversed the ALC finding that “what amounted to a private citizen bringing a claim under the DOR’s regulatory scheme was an error of law. Because this error formed part of the basis for a more severe penalty, we reverse the ALC’s decision.” (Id. at 281, 337). In other words, the error in Sandalwood was that the ALC effectively permitted a private citizen to bring an enforcement action against the holder of an alcohol license, even though the statutory authority to administer and enforce alcohol licenses lies solely with the Department in conjunction with the South Carolina Law Enforcement Division (“SLED”).

This case is distinctive from Sandalwood in that the 90-day suspension was not based upon claims brought by an intervenor; rather, the Department sought to cancel the license and the ALC

chose to impose a suspension based on testimony and evidence presented by SLED and the Department, the two agencies that are charged with administering and enforcing Title 61. See S.C. Code Ann. § 61-2-20 (2009). That evidence included, among other things:

- The State of Georgia had previously attempted to revoke Starkey's prior alcohol license in Statesboro, a fact that Starkey had never disclosed to the South Carolina Department of Revenue;
- Starkey had not filed South Carolina income tax returns for four years (2014 through 2017).
- Appellant had illegally sold beer, wine, and alcohol *for over three months* after his permit and license had expired on November 30, 2018, despite having received a notice from the Department on December 7, 2018 instructing Appellant "You MUST cease all sales of beer, wine and/or liquor until you receive your renewed license."
- Appellant's local option permit had expired on November 26, 2017, but Appellant continued to make illegal beer, wine, and alcohol sales on Sundays for 95 weeks until it was caught by SLED in October 2019. By failing to obtain a validly issued local option permit, Appellant had avoided paying the State approximately \$19,000 in local option permit fees.
- SLED arrested Starkey and seized contraband alcohol from Appellant's premises on February 29, 2019.

All of this testimony was presented in support of the Department's request—rather than the request of a private citizen or intervenor—to cancel the license and permit.

Another distinction between the present case and Sandalwood is that the ALC in Sandalwood imposed a harsher penalty than was requested from the Department of Revenue. Here, the 90-day suspension imposed by the ALC as a condition for licensure is a less severe penalty than the cancelation of the Petitioner's permit and license. Because the facts and procedural posture of this case are dissimilar from Sandalwood, the holding in Sandalwood does not support a reversal of the ALC in this appeal.

B. Alternatively, the ALC has the broad discretion in determining sanctions to be imposed upon an alcoholic beverage permit or license in a violation matter.

The Department has the authority to determine the appropriate administrative penalty for a violation when a licensee violates the statutes or regulations that govern the sale of alcohol. “[T]he department may, in its discretion, impose a monetary penalty upon the holder of a beer or wine license in lieu of suspension or revocation.” S.C. Code Ann. § 61-4-250. “[T]he department may revoke the permit of a person failing to comply with any requirement hereof.” S.C. Code Ann. § 61-4-270. If the penalty imposed by the Department is challenged in a contested case hearing the ALC becomes the fact-finder of the *de novo* proceeding. As the fact-finder, the ALC will determine if the violation occurred and impose an appropriate penalty based upon the facts presented. This penalty will be upheld so long as the ALC does not exceed its statutory authority. Walker v. S.C. Alcoholic Beverage Control Com’n, 305 S.C. 209, 407 S.E. 2d 633 (1991). Here, Mr. Starkey admitted that Study Hall was selling beer, wine and liquor without a license. The sale of beer and wine without a permit is a violation S.C. Code Ann. § 61-4-560. Additionally, the sale of alcoholic liquors violates S.C. Code Ann. § 61-6-4010. 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 equivalent or the Appellant to serve a suspension equivalent to the number of days it sold alcohol without a license.

Imposing this condition or admitted illegal alcohol sales is well within the statutory authority of the ALC.

CONCLUSION

De novo proceedings allow the ALC to examine any issue that is properly put before it, not just the original finding of the administrative agency. Moreover, “[a]s an administrative agency, [the ALC] is the fact finder and it is [the ALC’s] prerogative to impose an appropriate penalty based upon the facts presented.” Walker at 407, 634. Therefore, the ALC had the authority to impose a 90-day suspension as a condition of the Appellant’s alcohol license and permit. There is uncontroverted evidence in the record that Study Hall sold beer, wine and liquor during the period in which it did not have a license. While the Court found that that conduct did not rise to the level that it would prohibit Appellant from holding a license/permit, it was activity for which the Court found there should be action against the license/permit. For the reasons stated above, the Department respectfully requests this Court affirm the ALC’s 90-day suspension of Appellant’s license and permit.

Respectfully submitted,

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