

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

FILED

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 ABC 0157

ROY HOYT DURHAM
LISA CHAMBERS DURHAM
t/a LINCOLN HOUSE
Petitioners

v.

N.C. ALCOHOLIC BEVERAGE
CONTROL COMMISSION
Respondent

OFFICE OF
ADMINISTRATIVE
HEARINGS

DECISION

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on July 3, 2002 in Newton, North Carolina, August 7, 2002 in Lincolnton, North Carolina and August 8, 2002 in Newton, North Carolina.

APPEARANCES

For Petitioners:

W. Robinson Deaton, Jr.
Deaton & Biggers, PLLC
Shelby, North Carolina

For Respondent:

LoRita K. Pinnix, Assistant Counsel
North Carolina Alcoholic Beverage
Control Commission, Raleigh, North
Carolina

ISSUES

1. Whether Respondent's denial of Petitioners' application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and Mixed Beverage restaurant Alcoholic Beverage Control permits because of evidence which would tend to show that Petitioners would not abide by the ABC laws and that the operation of the business at this location would be detrimental to the neighborhood as provided by N.C.G.S, 18B-901 (c)(8), to wit: On or about January 28, 2001, Petitioner, Ray Hoyt Durham, performed services while or after having

consumed alcoholic beverages, while upon the licensed premises in violation of 4 NCAC 02S .0212(a)(3) is supported by the evidence?

2. Whether Respondent's denial of Petitioners' application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and Mixed Beverage restaurant Alcoholic Beverage Control permits because of evidence which would tend to show that Petitioners would not abide by the ABC laws and that the operation of the business at this location would be detrimental to the neighborhood as provided by N.C.G.S, 18B-901 (c)(8), to wit: on or about January 28, 2001, the Petitioners' employees, Tim Greer, Dean Barker and Jackie McDaniels performed services while or after having consumed alcoholic beverages, while upon the licensed premises, in violation of 4 NCAC 02S.0212(a)(3) is supported by the evidence?

3. Whether Respondent's denial of Petitioners' application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and Mixed Beverage restaurant Alcoholic Beverage Control permits because of evidence which would tend to show that Petitioners would not abide by the ABC laws and that the operation of the business at this location would be detrimental to the neighborhood as provided by N.C.G.S, 18B-901 (c)(8), to wit: on or about March 3, 2001, March 22, 2001 and March 25, 2001, the applicants knowingly allowed fighting or other disorderly conduct that could have been prevented with undue danger to the Petitioners, their employees or patrons, while upon the licensed premises, in violation of N.C.G.S. 18B-1005(a)(2) is supported by the evidence?

4. Whether Respondent's denial of Petitioners' application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and Mixed Beverage restaurant Alcoholic Beverage Control permits because of evidence which would tend to show that Petitioners would not abide by the ABC laws and that the operation of the business at this location would be detrimental to the neighborhood as provided by N.C.G.S, 18B-901 (c)(8), to wit: on or about October 17, 2001, October 18, 2001 and October 19, 2001 Petitioners' employee, David Franklin Sides, knowingly allowed violations of the gambling statutes to occur upon the licensed premises in violation of N.C.G.S. 18B-1005(a)(3), is supported by the evidence?

5. Whether Respondent's denial of Petitioners' application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and Mixed Beverage restaurant Alcoholic Beverage Control permits because of evidence which would tend to show that Petitioners would not abide by the ABC laws and that the operation of the business at this location would be detrimental to the neighborhood as provided by N.C.G.S, 18B-901 (c)(8), to wit: on January 28, 2001, March 3, 2001, March 22, 2001, March 25, 2001, October 17, 2001, October 18, 2001 and October 19, 2001, the Petitioners failed to superintend in person or through a manager, the business for which an ABC permit was issued in violation of N.C.G.S. 18B-1005(b) is supported by the evidence?

RELEVANT STATUTES AND RULES

N.C.G.S. 14-292 – Gambling - Except as provided in Part 2 of this Article, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which money, property or other thing of value is bet, whether the same be at stake or not, shall be guilty of a Class 2 misdemeanor.

N.C.G.S. 14-301 Operation or possession of slot machine - separate offenses – it shall be unlawful for any person, firm to operate, keep in his possession or in the possession of any other person, firm..., for the purpose of being operated, any slot machine or device where the user may become entitled to receive any money, credit, allowance, or anything of value, as defined by N.C.G.S. 14-306....

N.C.G.S. 18B-1005(a)(2) – Conduct on licensed premises – (a) Certain Conduct. - It shall be unlawful for a permittee or his agent or employee to knowingly allow any of the following kinds of conduct to occur on his licensed premises ... (2) any fighting or other disorderly conduct that can be prevented without undue danger to the permittee, his employees or patrons. ...

N.C.G.S. 18B-1005(a)(3) – Conduct on licensed premises – (a) Certain Conduct. - It shall be unlawful for a permittee or his agent or employee to knowingly allow any of the following kinds of conduct to occur on his licensed premises ... (3) any violation of the controlled substances, gambling or prostitution statutes or any other unlawful act...

N.C.G.S. 18B-1005(b) Conduct on licensed premises ... It shall be unlawful for a permittee to fail to supervise in person or through a manager the business for which a permit is issued.

4 NCAC 2S .0100(1) Definitions – In addition to the definitions found in Sections 18B-101 and 18B-1000 of the North Carolina General Statutes, the following definitions apply to this Subchapter: (1) “Employee” mean any person who performs a service for any person holding an ABC permit, regardless of whether that person is compensated for the performance of those services.

4 NCAC 2S .0212(a)(3) Consumption: Intoxication by Permittee prohibited – No permittee or his employee shall consume alcoholic beverages on the licensed premises except under the following conditions: ... (3) The permittee or employee shall not perform services of any nature while or after consuming alcoholic beverages.

Based upon the stipulations contained in the parties' Order on Final Pre-Trial Conference entered in the record on July 3, 2002 and by the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The parties received notices of hearing more than fifteen (15) days before the hearing.

2. Petitioners, Ray Hoyt Durham and Lisa Chambers Durham, trading as Lincoln House and located at 604 Clark Drive, Lincolnton, North Carolina submitted an application to Respondent for malt beverage on premise, unfortified wine on premise, fortified wine on premise and mixed beverage restaurant permits in January 2001. In 2000 Lincolnton, as part of Lincoln County, by voter approval, elected to permit the sale of mixed beverages for the first time in Lincolnton.

3. Petitioners were issued temporary malt beverage on premise, unfortified wine on premise, fortified wine on premise and mixed beverage restaurant permits on January 23, 2001. (Pet. Ex. #26) Respondent normally requires the issuance of a temporary permit if the applicants, after the passage of such a referendum, have not attended ABC sponsored informational classes. Notice of such classes was advertised in local newspapers. Petitioners did not attend such classes. Petitioners operated a clean, well-arranged establishment involving both the sale of food and alcoholic beverages to the public. (Pet. Exs. #1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22 & 23).

4. On February 2, 2001, an Official Notice of Rejection was sent by Respondent to Petitioners disapproving Petitioners' application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and mixed beverage restaurant permits. The reasons for the rejection were:

Any other evidence which would tend to show whether the applicants would abide by the ABC laws and whether the operation of their business at this location would be detrimental to the neighborhood, as provided by N.C.G.S. 18B-901(c)(8), to wit:

- (A) On or about the 28th day of January 2001, the applicant, Ray Hoyt Durham, performed services while or after having consumed alcoholic beverages, while upon the licensed premises in violation of 4 NCAC 02S. 0212(a)(3).
- (B) On or about the 28th day of January 2001, the applicants' employees, Tim Greer, Dean Barker and Jackie McDaniels, performed services while or

after having consumed alcoholic beverages, while upon the licensed premises, in violation of 4 NCAC 02S .0212(a)(3).

- (C) On or about the 28th day of January 2001, the applicant, Ray Hoyt Durham and Lisa Chambers Durham, failed to superintend in person or through a manager the business for which an ABC permit was issued, in violation of N.C.G.S. 18B-1005(b).

5. On February 6, 2001, the Official Notice of Rejection was rescinded by Respondent and the temporary malt beverage on premise, unfortified wine on premise, fortified wine on premise and mixed beverage restaurant permits were returned to Petitioners based on statements by the applicant Lisa Durham that the "employees" involved in the January 28, 2001 incident were discharged, and the Petitioners seemed serious about addressing problems at the business. Lisa Durham referenced these individuals who were discharged as "employees."

6. On March 28, 2001 an Official Notice was served on Petitioners by Respondent. This Notice directed Petitioners to surrender their temporary ABC permits because of fighting by intoxicated persons on the licensed premises. (Resp. Ex. #2)

7. On April 11, 2001, the temporary malt beverage on premise, unfortified wine on premise, fortified wine on premise and mixed beverage restaurant permits were returned to Petitioners after security concerns at the business were addressed by Petitioners. (Resp Ex. #2) Petitioners, through their legal counsel, submitted "a written business plan" to Respondent outlining in four numbered paragraphs specific actions Petitioners were to take to correct Respondent's objections previously identified and discussed. (Pet. Ex. #27)

8. On November 28, 2001 an Official Notice of Rejection was sent by Respondent to the Petitioners disapproving their application for malt beverage on premise, unfortified wine on premise, fortified wine on premise and mixed beverage restaurant permits. The reasons for the rejection were: (Resp. Ex. #3)

- (A) On or about the 28th day of January 2001, the applicant, Ray Hoyt Durham, performed services while or after having consumed alcoholic beverages, while upon the licensed premises in violation of 4 NCAC 02S .0212(a)(3).
- (B) On or about the 28th day of January 2001, the applicants' employees, Tim Greer, Dean Barker and Jackie McDaniels, performed services while or after having consumed alcoholic beverages, while upon the licensed premises, in violation of 4 NCAC 02S .0212(a)(3).
- (C) On or about the 3rd day of March 2001, the 22nd day of March 2001 and the 25th day of March 2001, the applicants knowingly allowed fighting or other disorderly conduct that could have been prevented with undue

danger to the applicants, their employees or patrons, while upon the licensed premises, in violation of N.C.G.S. 18B-1005(a)(2).

- (D) On or about the 17th day of October 2001, the 18th day of October 2001 and the 19th day of October 2001 applicants' employee David Franklin Sides knowingly allowed violations of the gambling statutes to occur upon the licensed premises in violation of N.C.G.S. 18B-1005(a)(3).
- (E) On or about the 28th day of January 2001, the 3rd day of March 2001, the 22nd day of March 2001, the 25th day of March 2001, the 17th day of October 2001, the 18th day of October 2001 and the 19th day of October 2001, the applicants failed to superintend in person or through a manager the business for which an ABC permit was issued, in violation of N.C.G.S. 18B-1005(b).

This Notice of revocation was served on Petitioners. The temporary permits were surrendered and since November 28, 2001, Petitioners have not held permits.

9. On Sunday January 28, 2001, (date also applicable to Findings #10-14) Alcohol Law Enforcement Agent S. Tally entered Petitioners' business located at 604 Clark Drive in Lincolnton, North Carolina. The purpose of this visit was to conduct a routine check of the licensed premises.

10. Once Agent Tally entered Petitioners' business, he observed patrons in the restaurant and several employees of the business performing services. Agent Tally observed Petitioner Ray Hoyt Durham checking the buffet bar in the restaurant and giving instructions to employees. While Petitioner Ray Durham was performing these tasks, he was consuming a mixed drink, containing spirituous liquor.

11. Agent Tally observed Tim Greer, a bartender at the Lincoln House, as he prepared a strawberry daiquiri for a patron. This drink contained spirituous liquor. Mr. Greer filled the customer's glass and poured the remaining drink into a glass behind the bar and consumed from this glass at times when he was not busy with customers. He consumed alcoholic beverages while performing the duties of a bartender.

12. Agent Tally observed Dean Barker deliver bottles of beer to customers. Mr. Barker then opened a malt beverage, a Bud Light, and consumed from the bottle. After drinking the beer, Mr. Barker performed services for the business and went behind the bar area of the business and assisted Mr. Greer.

13. Agent Tally observed Jackie McDaniels delivering malt beverages to customers, helping the bartender, Tim Greer, with a pitcher of beer for a customer and going behind the bar area in the business. Ms. McDaniels was consuming an alcoholic beverage while performing these services.

14. Agent Tally spoke to Petitioner Ray Durham on January 28, 2001 about the persons consuming on the licensed premises. Mr. Durham described them as helping out in the business that day and upon being informed that those who were performing such duties were considered as employees, Mr. Durham indicated he was unaware of this characterization. Petitioner Lisa Durham in a later conversation with Agent Tally informed him that the employees who were consuming on January 28, 2001 had been fired.

15. On March 3, 2001 ALE Agent Tally issued a written warning to Petitioners' business regarding the sale of alcoholic beverages to intoxicated persons.

16. Officer Randy Willis, Lt. Patrol Division, in the Lincolnton Police Department, responded to a call on March 25, 2001, at approximately 1:15 a.m. at the Lincoln House. There was a group of 10 or 15 people assembled outside in the parking lot when he arrived. Lt. Willis spoke with Tim Greer. The incident was based upon a complaint of an assault that had occurred on the premises that evening.

17. On March 22, 2001, Sgt. William S. Vaughn of the Lincolnton Police Department, Patrol Division, responded to a call for service to assist with an intoxicated customer (Billy Joe Reynolds). This patron had consumed, with several companions that night, a portion of a case of beer before arriving on the premises. This patron admitted that he had consumed five or six beers after arrival on Petitioners' premises. His behavior became belligerent. When Sgt. Vaughn arrived, he was informed that a car with the suspect was about to depart. One of the individuals inside of this car had knocked over Petitioner's Sanyo cash register, the Verifine Bankcard machine, and had broken the glass tip jar. Tim Greer, the bartender, approached the car in the parking lot. He was struck in the head by one of the occupants. When Sgt. Vaughn tried to intercede to restrain and arrest this individual, the same individual began punching Sgt. Vaughn with his fists, eventually knocking him unconscious. Sgt. Vaughn was taken to the Lincoln Medical Center to receive treatment for being knocked unconscious. Ms. Georgette Marie Harris, a companion, gave a statement to the Lincolnton police concerning this incident. Although a number of these patrons had been drinking prior to coming to the Petitioners' premises, Ms. Harris indicated, after speaking to her friend, Monica Mull, the bartender, she drank four or five 16 oz. Natural Light beers in a period of about two hours or so. Billy Joe Reynolds had been previously convicted of an assault on a law enforcement officer and was the patron that assaulted Sgt. Vaughn. (Pet. Ex. 29).

18. In addition to March 22, 2001, Sgt. Vaughn responded to another call involving an intoxicated customer on the premises of Petitioners' place of business.

19. On March 9, 2001 and March 23, 2001, ALE Agent Tally spoke to employees at Petitioners' business about concerns regarding the service of alcoholic beverages to intoxicated persons, prior incidents in the parking lot, a security plan for the business and the use of metal detectors at the business.

20. On October 17, 2001, Deputy Donnie Sain of the Lincoln County Sheriff's Department entered the Lincoln House in an undercover capacity. Deputy Sain approached one

of the three video poker machines on the licensed premises and inserted money into the machine (108915)("Pot of Gold"). After playing the machine for about 40 minutes, Deputy Sain pressed a button on the machine and received a paper coupon worth \$10.00. He presented this coupon to David Sides, an employee of Petitioners' business, and received \$10.00 for the coupon.

21. On October 18, 2001, Deputy Sain returned to the Lincoln House to continue the undercover operation. On this date he inserted money into the two machines, (108913 10 mins.)(108914 30 mins.) he had not played the night before. Again, after playing for a period of time on each machine, Deputy Sain pressed a button on each machine and received a paper coupon, each worth \$25.00. He presented the tickets to David Sides, an employee of the business. At first Sides indicated that he would give him drinks from the bar in exchange, but after recognizing Deputy Sain as a patron from the night before, Mr. Sides gave Deputy Sain a total of \$50.00 for the coupons.

22. On October 19, 2001, Deputy Sain, with other officers of the Lincoln County Sheriff's Department, entered Petitioners' business and confiscated all three video machines.

23. Other permitted ABC establishments in the vicinity had incidences of criminal activity and intoxicated patrons but retained their ABC permits.

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearing has personal and subject matter jurisdiction of this contested case.

2. On January 28, 2001, Petitioner Ray Hoyt Durham performed services after having consumed alcoholic beverages, while upon the licensed premises, in violation of 4 NCAC 2S .0212(a)(3).

3. On January 28, 2001, Petitioners' employees, Tim Greer, Dean Barker and Jackie McDaniels, performed services after having consumed alcoholic beverages, while upon the licensed premises, in violation of 4 NCAC. 2S .0212(a)(3). The definition of "employee" as found in 4 NCAC 2S.0100(1) is applicable.

4. On March 22, 2001, the Petitioners knowingly allowed fighting or other disorderly conduct that could have been prevented without undue danger to the Petitioners, their employees or patrons, while upon the licensed premises, in violation of N.C.G.S. 18B-1005(a)(2). This was a highly significant event where Sgt. Vaughn required hospitalization after being knocked unconscious by an obviously intoxicated patron who had been consuming on Petitioners' premises, with other intoxicated patrons, for a least two hours. Sgt. Vaughn

narrowly avoided serious injury. Petitioners failed to detect the degree of intoxication of these patrons when Petitioners entered their premises and continued to serve these patrons until they became belligerent.

5. On October 17, 2001, October 18, 2001 and October 19, 2001 Petitioners' employee, David Franklin Sides, knowingly allowed violations of the gambling statutes to occur upon the licensed premises in violation of N.C.G.S. 18B-1005(a)(3).

6. On January 28, 2001, March 22, 2001, October 17, 2001, October 18, 2001 and October 19, 2001, the Petitioners failed to superintend in person or through a manager the business for which an ABC permit was issued, in violation of N.C.G.S. 18B-1005(b).

7. Petitioners, trading as Lincoln House, are unsuitable to hold ABC permits at this time. The evidence at the hearing supports the Respondent's rejection of the application for ABC permits because it shows that the Petitioners would not abide by the ABC laws and operation of their business at this location, and this location would be detrimental to the neighborhood pursuant to N.C.G.S. 18B-901(c)(8).

8. Petitioners, and in particular Petitioner Lisa Chambers Durham, have the ability to operate a business establishment capable of holding ABC permits. The sale of alcoholic beverages is strictly regulated by the State of North Carolina. Agent Talley made every effort to assist Petitioners with obtaining permanent permits but was met with a string of continuous violations. Petitioners attempted to solve these violations in piecemeal fashion but seemed to not fully recognize their responsibility to the public and the law enforcement community for the safe and orderly sale of alcoholic beverages. Petitioners are established and successful restaurateurs and have the ability to operate their establishments in accordance with the ABC laws of this State. Some of the difficulties experienced by Petitioners may be attributed to their inexperience with mixed beverage permits. However, their ability to apply and hold permits in the future will depend, not just on their responsiveness to ABC officials, but their desire to take strict supervisory control over their premises and their employees, whether on or off duty.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is the decision of the undersigned Chief Administrative Law Judge that the Notice of Rejection by Respondent be upheld. Further, after a reasonable period of time and within Respondent's discretion, that Petitioners be allowed to apply again for temporary permits in order to establish that Petitioners are capable of taking reasonable charge of the permitted premises and to operate the premises in accordance with all applicable ABC statutes and rules.

ORDER

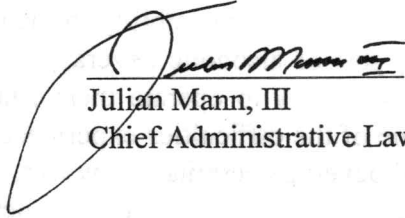
It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in N.C.G.S. 150B036(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. N.C.G.S. 150B-36(a).

The agency that will make the final decision in this contested case is the N.C. Alcoholic Beverage Control Commission.

This is the 3rd day of December, 2002.


Julian Mann, III
Chief Administrative Law Judge