

STATE OF NORTH CAROLINA
COUNTY OF NORTHAMPTON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 DHR 06208

LAKEHOUSE PUB,)
) Petitioner,)
))
v.))
))
NC DEPARTMENT OF HEALTH)
AND HUMAN SERVICES,)
Division of Public Health,)
) Respondent.)

DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on February 15, 2011. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, further arguments and proposals after receipt of the official transcript. Mailing time was allowed for submission including the day of mailing as well as time allowed for receipt by the Administrative Law Judge.

After the hearing, Respondent notified the Undersigned that the parties had entered into settlement negotiations. All submissions were stayed pending report of the parties regarding settlement. In October 2011, Respondent notified the Undersigned that Petitioner had sent a letter to the ABC Commission about his restaurant/bar in order to satisfy both the requirements for a cigar bar exemption and the ABC laws, which action failed to result in a settlement. Respondent had not ordered a transcript in the hope the matter would be resolved and requested submissions of materials be extended to 30 days from receipt of the transcript. Respondent's request was granted.

In December, 2011, Respondent informed the Undersigned that Petitioner had not ordered a transcript of the case and was unaware that Respondent had ordered and received one. Further and more importantly, Respondent notified the Undersigned that Petitioner had recently raised another possible option for settlement that both parties wished to explore, believing that an extension of an additional 60 days would provide time for the parties to explore and reach settlement. If settlement was not reached, the parties were to submit all materials, proposals and the like by February 17, 2012. No proposals were received and this case and all associated materials were placed in settlement pending file awaiting the withdrawal of the Petition.

In a recent 2015 review of all files as a result of the Office of Administrative Hearings changing over to a new case management system, this case was shown as not receiving documentation of a settlement and no notice of withdrawal had been received. In fact no materials have been received from either party since Respondent's last correspondence. The Undersigned has closed the record.

APPEARANCES

For Petitioner: Richard C. Gardner
Littleton, North Carolina 27850

For Respondent: John P. Barkley
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

WITNESSES

1. Jeffery Lassater, Alcohol Law Enforcement (ALE)
2. Jim Martin, Division of Public Health (DPH)
3. Jessica Crawford, Warren County Health Department
4. Andy Smith, Warren County Health Department
5. Ulysses Ross
6. Richard Gardner

EXHIBITS

Petitioner's Exhibits 1-5 (Photographs) were admitted into evidence
Respondent's Exhibits 1-6, 8-9 were admitted into evidence

ISSUE

Whether Respondent properly determined that The Lakehouse Pub no longer met the requirements for exemption as a cigar bar from the State statutes prohibiting smoking in restaurants and bars.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (ALJ) makes the following Findings of Fact. In making the findings of fact, the Undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, and interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other

believable evidence in the case. From the sworn testimony and the admitted evidence, the Undersigned makes the following findings of fact.

FINDINGS OF FACT

1. The Petitioner is a business operating in Northampton County, North Carolina; Mr. Richard Gardner is the proprietor of the Lakehouse Pub.
2. The Respondent is an agency of the State of North Carolina which is charged with regulating, among other things, smoking laws in public facilities and establishments.
3. Petitioner began operating a mixed-beverage restaurant and cigar bar in a single structure in 2004.
4. Petitioner submitted an application to operate a cigar bar to the Respondent on January 12, 2010, following a change in the law which prohibits smoking in restaurants.
5. On February 23, 2010, Respondent certified that Petitioner was authorized to operate a cigar bar pursuant to an exemption in N.C. Gen. Stat. § 130A-496(b)(2). (Resp. Ex. 3)
6. Respondent admits that the permit was issued without full knowledge of Petitioner's unique building and facility specifics.
7. Both the cigar bar and restaurant are housed in the same structure, and there is a folding door and cloth partition between the two which allows individuals access to both sides of the business.
8. In addition, the only restrooms in the Petitioner's structure are located in the cigar bar.
9. To maintain the cigar bar exemption, Petitioner was required to submit quarterly affidavits which document the percentage of sales from alcohol, food and cigars.
10. Petitioner provided sales projections in 2008, but failed to submit a Q1 2010 affidavit as required.
11. Petitioner failed to supply Respondent with timely quarterly affidavits sufficient to maintain the exemption.
12. Mr. Jim Martin, Director of Policy and Programs with the Tobacco Prevention and Control Branch of the Division of Public Health spoke with Mr. Garner regarding documentation required for continued qualification for the exemption.
13. Petitioner and Mr. Martin met on July 14, 2010 to discuss sales data and the physical layout of the location.

14. Mr. Martin had reviewed online information regarding the business, and from photographs determined that Petitioner's business was more akin to a family restaurant than a bar.
15. Mr. Martin was also concerned at this time about the age of patrons and potential smoke migration from the cigar bar into the restaurant.
16. Based upon his observations from the online pictures, Mr. Martin testified that "smoke would easily migrate into the restaurant side." (T., p41.)
17. "Smoking is prohibited in all enclosed areas of restaurants and bars[.]" N.C. Gen. Stat. § 130A-496(a).
18. Smoking, however, is allowed in cigar bars if "smoke from the cigar bar does not migrate into an enclosed area where smoking is prohibited." N.C. Gen. Stat. § 130A-496(b)(2).
19. Mr. Martin expressed his concern to Petitioner that gaps in these areas between the restaurant and the cigar bar might compromise Petitioner's exemption because smoke could migrate into the restaurant.
20. While Mr. Martin speculated that migration could take place and presented illustrative evidence, there was no direct evidence presented that this had in fact occurred.
21. In addition, the only restrooms in Petitioner's structure were in the cigar bar, which could have required restaurant patrons under the age of 21 to be in the bar area.
22. Although no evidence was presented that this had in fact occurred, it is reasonable to infer that underage individuals would use Petitioner's restrooms, thus extending the restaurant into the bar.
23. On August 16, 2010, Respondent notified Petitioner by letter that the facility no longer qualified for the exemption and that smoking was no longer allowed in the building. (Resp. Ex. 1) Respondent submitted a letter to Petitioner on September 22, 2010, in which it denied continuation of the exemption because Petitioner no longer met the definition of a qualifying cigar bar. (Resp. Ex. 2)

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v.*

Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.
3. Effective January 2, 2010, “smoking is prohibited in all enclosed areas of restaurants and bars” unless specifically allowed by law. N.C. Gen. Stat. § 130A-496.
4. Cigar bars that were operating prior to July 1, 2009 were exempted from this prohibition, provided “smoke from the cigar bar does not migrate into an enclosed area where smoking is prohibited.” N.C. Gen. Stat. § 130A-496(b)(2).
5. To qualify for this exemption, cigar bar owners are required to provide Respondent with quarterly reports which detail “the revenue generated from the sale of alcoholic beverages and cigars as a percentage of quarterly gross revenue.” N.C. Gen. Stat. § 130A-496(b)(2).
6. The preponderance of the evidence presented shows that smoke from the cigar bar portion of Petitioner’s facility most likely migrates into the restaurant portion of the structure. The partition that was utilized and the gaps it created, while perhaps precluding some smoke from flowing into the restaurant, did not prevent all smoke migration as contemplated by the plain language of N.C. Gen. Stat. § 130A-496(b)(2).
7. Evidence presented demonstrates by a preponderance of the evidence that Petitioner failed to timely file quarterly affidavits as required by N.C. Gen. Stat. § 130A-496(b)(2). Even though the Respondent was working with Petitioner to address concerns about the business operation, the fact remains that Petitioner failed to timely file his Q1 affidavit for 2010, and there was no evidence that Petitioner filed a Q2 affidavit.
8. Petitioner fails to meet the definition of a cigar bar as set forth in N.C. Gen. Stat. § 130A-496(b)(2).
9. The evidence presented demonstrates that the Respondent did not exceed its authority or jurisdiction, did not act erroneously, used proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by rule or law.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following

Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency as required by N.C. Gen. Stat. § 150B.

Based on those conclusions and the facts in this case, the Undersigned holds that the Respondent properly determined that The Lakehouse Pub no longer met the requirements for exemption as a cigar bar from the State statutes prohibiting smoking in restaurants and bars.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services.

IT IS SO ORDERED.

This the 21st day of January, 2016.

Augustus B. Elkins II
Administrative Law Judge