

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13ABC11233

<p>Rio Sports Restaurant And Lounge Inc., Petitioner,</p> <p>v.</p> <p>NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL COMMISSION, Respondent.</p>	<p>FINAL DECISION</p>
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APPEARANCES

Petitioner: Glenn B. Lassiter, Jr., Attorney at Law, Chatham County Bar

Respondent: Lorita K. Pinnix, Assistant Counsel, North Carolina Alcoholic Beverage Control Commission

HEARING

This contested case was heard on July 23 and 25, 2013, at the Office of Administrative Hearings in Raleigh by Beecher R. Gray, Administrative Law Judge. On July 24, 2013, Respondent filed an Affidavit of Personal Bias or Disqualification of Administrative Law Judge under the provisions of G.S. 150B-32. Petitioner filed a response in opposition to that affidavit and motion.

In accordance with G.S. 150B-32 and 26 NCAC 03 .0110, this Motion for Disqualification was heard on the record as a first order of business at the hearing on July 25, 2013. Counsel for Petitioner made an oral argument opposing the Motion. Counsel for Respondent deferred to the Affidavit and Motion as speaking for itself and stated that she was directed to file the Affidavit and Motion by the Deputy General Counsel for the Alcoholic Beverage Control Commission. Having heard from the parties and having considered the Affidavit and Motion, the Motion was DENIED.

BACKGROUND

Petitioner appeals from a decision of Deputy Administrator Robert Hamilton of the North Carolina Alcoholic Beverage Control Commission denying its application for Malt Beverages On-Premise, Unfortified Wine On-Premise, and Mixed Beverages Restaurant permits to allow the sale of alcoholic beverages at its business establishment.

ISSUE

The Petition in this matter alleges that Respondent prejudiced Petitioner's rights by acting erroneously, failing to act as required by law or rule, acting arbitrarily or capriciously, failing to use proper procedure, and failing to use appropriate discretion in making the decision to deny Petitioner's application for permits. The issues are whether those allegations are true and, if so, what the appropriate remedy would be. This case is governed by Article 3 of N.C.G.S. Chapter 150B, the Administrative Procedures Act, and Article 9 of N.C.G.S. Chapter 18B, which governs the requirements for alcoholic beverage permitting.

The undersigned Administrative Law Judge, based upon a clear preponderance of the evidence, and after giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency, and after careful review of the entire record in this matter, including the evidence taken at the hearing, makes the following:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. Petitioner, through and by Jacqueline Robinson, 100% owner and President of Rio Sports Restaurant and Lounge, Inc., applied for the above-referenced ABC permits for its location at 4927 West Market Street, Suite 3000B in Greensboro, North Carolina on or about September 8, 2011.
3. Petitioner's business is a medium-sized entertainment venue with a fire code occupancy limit of 863 persons, located in a large retail complex that also houses many other businesses, all of which share the address of 4927 West Market Street. The site appears to be a former industrial complex of some kind. (See P. Ex. X)
4. In one building of the complex (in the north central part of the aerial map P. Ex. X), there is a mini mall that houses several other businesses, some with ABC permits. That building also houses a center that hosts large events similar in size to some of the events held at Petitioner's business.
5. In another building on the complex (in the northwest part of the aerial map P. Ex. X), there is a strip mall complex that houses several businesses and shops, as well as restaurants, some of which hold ABC permits.
6. Petitioner's business is located in the rear of the complex (in the downstairs of the building in the south central part of the aerial map P. Ex. X) and located underneath an international grocery store that faces the parking area between the two other buildings.

7. Petitioner's business is located in a lower area down a single-entrance driveway ramp. While customers may park in other areas of the complex, this location provides a good opportunity for Petitioner to oversee its clientele--to the extent possible--as they come and go from its premises.
8. The large amount of parking at this facility, as well as the available control of ingress and egress, make the location desirable for Petitioner's business as there is adequate parking for large crowds as shown by the lack of complaints by any residents or businesses in the area about the operation of Petitioner's business.
9. Petitioner's facility is a large open complex set up for entertainment. It contains several very large televisions, an area with billiard tables, and seating for approximately 185 persons. It has a centrally-located bar area. It has a full kitchen and large restrooms. The premises are generally clean, well lit, and in good order. (P. Exs. H, AA-HH)
10. In addition to management, Petitioner's business routinely employs between six (6) and eighteen (18) bartenders and eight (8) to twelve (12) servers. There are up to twenty-five (25) inside security personnel at the business, depending upon the size and type of event being held. In addition, there is outside security of up to seven (7) or eight (8) bonded officers, plus additional security provided by up to seven (7) off-duty police officers. There also is outside security provided by contract security that patrols the entire complex 24 hours a day.
11. From time to time, Petitioner utilizes a promoter to secure entertainment to appear at its venue and to promote events there, similar to the way larger complexes such as the Greensboro Coliseum operate.
12. At the time of its application in September 2011, Petitioner presented all required documentation for its pending application to Respondent, and Respondent in turn issued temporary ABC permits to Petitioner on September 8, 2011, and initiated an investigation into Petitioner's application(s.)
13. Among the documents submitted to Respondent at the time of the application was a local governmental opinion form, properly executed on behalf of the City of Greensboro by Captain R. B. Whisenant, which indicated that the City of Greensboro approved of the applicant and the applicant's location.
14. Other documents submitted at that time indicated that Petitioner was in compliance with local ordinances regarding zoning, building codes, and fire codes.
15. As a part of the application review and investigation, Respondent requested that the North Carolina Alcohol Law Enforcement Division ("ALE") conduct an investigation for Petitioner's permit application.

16. The investigation report returned to Respondent by the ALE Division found that Petitioner was qualified in all respects to obtain and hold the ABC permits for which it had applied. (See P. Ex. H)
17. The record is devoid of evidence that Respondent completed any further investigation of Petitioner's application prior to May 5, 2012, or that Respondent had any negative information about the applicant, the application, the location, or operation of the applicant's business prior to May 5, 2012. Petitioner operated on a temporary ABC permit during the entire nine (9) month period between September 8, 2011, and May 5, 2012, without any action by Respondent on Petitioner's application, other than renewal of the temporary permit.
18. Sometime between May 6 and May 10, 2012, Respondent received information from the Greensboro Police Department concerning an alleged incident on May 5, 2012, at Petitioner's location. Based upon those allegations, on May 10, 2012, Respondent, through its administrator Michael Herring, issued a letter suspending Petitioner's temporary ABC permit for 14 days and requiring that Petitioner and all of its employees attend alcohol awareness training. (R. Ex. 3)
19. Petitioner and its employees, including Jacqueline Robinson, attended alcohol awareness training as directed. Upon the completion of the fourteen-day suspension, Petitioner's temporary ABC permit was reinstated.
20. Respondent's letter also stated that further violations of the ABC laws would result in additional suspensions or rejection of Petitioner's application.
21. Detective Calvert of the Greensboro Police Department conducted an ABC inspection and investigation of the alleged incident on May 5, 2012, and issued a Written Warning to Petitioner for some relatively minor technical ABC violations. (P. Ex. K)
22. Detective Calvert's inspection report found that matters inspected were in order, with the exception of one liquor bottle missing a mixed beverage tax stamp.
23. With regard to that bottle, Detective Calvert found that he could not attribute that issue to any wrongdoing by Petitioner, and thus issued only a Written Warning.
24. Subsequent to Respondent's decision to suspend Petitioner's temporary ABC permit, and contemporaneously with efforts by the Greensboro Police Department to convince Respondent to reject Petitioner's application for ABC permits, Detective Calvert filed criminal charges against Jacqueline Robinson for a violation of N.C.G.S. 18B-1005(b) on May 5, 2012. The extent and reach of those efforts by the Police are illustrated in the various Police Department emails offered as Petitioner's Exhibits admitted into evidence. (P. Exs. M-R)
25. In addition to having persons attend the training sessions as noted above, Petitioner, having been made aware of potential security issues, took additional security measures

upon reopening, which included, but were not limited to, having more security personnel on the premises, including off-duty police officers, and conducting more thorough inspections of persons entering the premises.

26. Petitioner at that time entered into an exclusive agreement with Jerry Gilmore to promote various events at its business location.
27. As a promoter, Jerry Gilmore was in charge of contracting for entertainers, or otherwise scheduling and marketing various events for Petitioner's business, while Petitioner maintained full responsibility for overseeing the premises and the alcoholic beverage sales and service.
28. Jerry Gilmore has promoted events for approximately 20 years and has an outstanding record for promoting many events without serious incidents of violence over that time period.
29. After Petitioner's temporary ABC permit was reinstated, and up and until Petitioner's application was rejected, Jerry Gilmore promoted dozens of events for Petitioner without incident at Petitioner's business, other than one additional alleged incident which ultimately contributed to Respondent's rejection of this application.
30. In November 2012, Respondent's Audit Division notified Deputy Administrator Hamilton that there were possible issues with Petitioner qualifying for the restaurant mixed beverage permit sought because of an allegation concerning food sales percentages.
31. After being contacted by Respondent concerning this issue, Petitioner retained William Potter, Attorney at Law, to work with Respondent to resolve this issue.
32. Petitioner, through Attorney Potter, engaged in discussions with Deputy Administrator Hamilton concerning this issue. Based on those discussions, Respondent agreed to give Petitioner an opportunity to switch its application from a mixed beverage restaurant to mixed beverages private club application.
33. Attorney Potter agreed to work with Petitioner to provide the documentation requested by Respondent to make the change to a private club application, including submission of supporting documentation for private clubs and a new local government opinion form from the Greensboro Police Department.
34. Deputy Administrator Hamilton subsequently set several deadlines for the new paperwork to be submitted, but each deadline passed without submission of the documents requested by Respondent. (Ultimately those items were tendered and accepted by Respondent in good order in April 2013, but too late for consideration by Deputy Administrator Hamilton prior to his Notice of Rejection.) Issuance to Petitioner of a permanent private club permit once that documentation was filed was discussed

between Attorney Potter for Petitioner and Deputy Administrator Hamilton sometime during the process and prior to the rejection of Petitioner's application.

35. Respondent never investigated Petitioner's application for a private club permit, but the finding above indicates that, but for the other matters that arose, it is possible that a private club permit could have been issued to Petitioner with no further investigation.
36. Petitioner was attempting to provide the requested documents but was delayed because of the City of Greensboro's requirement that Petitioner submit proof of passing zoning, building code, and fire code inspections. The delay was because of construction and inspection issues, difficulty in scheduling inspections, and additional delays associated with attempting to obtain the approvals during the holiday season.
37. On January 29, 2013, Respondent, through a letter from Deputy Administrator Hamilton, issued a suspension of Petitioner's mixed beverage restaurant temporary permit until Petitioner provided Respondent with the necessary documentation to transfer its mixed beverages permit to a private club permit.
38. Petitioner continued to operate its business with malt beverage and unfortified wine permits while it attempted to comply with the private club requirements.
39. The Greensboro Police Department, through Detective Calvert, in response to Petitioner's attempts to provide the new local governmental opinion form requested by Respondent, faxed to Deputy Administrator Hamilton a 19-page document which included two letters from the Greensboro Police Department setting forth objections to the issuance of any ABC permit to Petitioner.
40. On February 27, 2013, after review of the fax submission and the other documents in the ABC file, and without further investigative review or analysis of those documents or any other item, Deputy Administrator Hamilton issued a Notice of Rejection to Petitioner disapproving Petitioner's application and setting forth various grounds for that disapproval. (R. Ex. 1, P. Ex. A)
41. The facts alleged in the Notice of Rejection were based almost solely on unproved allegations made by officers of the Greensboro Police Department, which wanted to convince Respondent to reject Petitioner's application. Respondent did not request any independent investigation of those allegations nor did it afford Petitioner any opportunity to respond to those allegations prior to making its decision to reject Petitioner's application. No representative of Respondent visited Petitioner's premises, other than during the original ALE investigation, which occurred prior to the May 10, 2012, suspension. Respondent neither met with any representative of Petitioner nor requested from Petitioner any information or response to the allegations after receiving the allegations and prior to its Notice of Rejection.
42. The Notice of Rejection states several facts that purport to be grounds supporting Respondent's decision to reject Petitioner's application. Those grounds can be

summarized as: 1) That on January 1, 2013, Petitioner was charged with various ABC Violations; 2) That Jerry Gilmore and Petitioner were charged with a violation of G.S. 18B-1005 for failing to superintend the premises on January 1, 2013; 3) That Petitioner's ABC permits were suspended for 14 days because of incidents that occurred on May 5, 2012; 4) That between January 1, 2012 and January 24, 2013 there were 115 various police calls to Petitioner's location described as 4927 West Market Street, Greensboro, N.C. without further specification of any exact location; 5) That there were multiple arrests at Petitioner's location during January 2013; and 6) Facts that allege, by implication or otherwise, that Petitioner was engaged in the illegal sale of spirituous liquor on February 23, 2013.

43. Despite the factual assertions in the Notice of Rejection, the Notice of Rejection offers no legal conclusions as to the Statutory or Regulatory basis by which Respondent found that the alleged facts support its decision that Petitioner's application should be denied.
44. North Carolina General Statutes 18B-900 and 18B-901 are statutes that establish qualifications for applicants and the matters which Respondent must review in the application process. No item in either of those statutes is cited in the Notice of Rejection as a basis for the denial of Petitioner's application.
45. Petitioner's 100 percent owner and manager, Jacqueline Robinson, is over 21 years old, a resident of North Carolina, has not been convicted of any crime of a disqualifying nature, has never had an alcoholic beverage permit revoked, and has no outstanding judgments entered against her that would disqualify her under Article 1A of N.C.G.S. Chapter 18B.
46. No persons were arrested inside Petitioner's business while Petitioner's application was pending.
47. All criminal charges resulting from the May 5, 2012, allegations against Jacqueline Robinson were dismissed.
48. No alcoholic beverage offenses or other criminal charges were lodged against Jacqueline Robinson or any employee of the business for any incident occurring on the premises of Petitioner's business while Petitioner's application was pending.
49. Respondent, other than in the Notice of Rejection, did not charge Petitioner with any ABC violation for any incident occurring on the premises of Petitioner's business while Petitioner's application was pending.
50. There is competent evidence that no resident of the neighborhood or no business located in the neighborhood, or any other resident of the City of Greensboro or business located in the City of Greensboro, filed any complaint against the operation of Petitioner's business with the Police Department or Respondent while Petitioner's business was in operation.

51. The police calls and criminal charges referenced in the Notice of Rejection were pulled directly from a computer-generated report provided by facsimile from Detective Calvert to Respondent or asserted in letters from the Greensboro Police Department.
52. Those calls for service and arrest records were pulled based on Petitioner's address (which Petitioner shares with many other businesses) only. The calls and arrests were not analyzed by Detective Calvert or Deputy Administrator Hamilton to determine how they may be related to Petitioner's operation with ABC permits prior to the issuance of the Notice of Rejection.
53. Respondent offered no credible evidence at the trial of this matter establishing that the matters alleged were in any way related to the operation of Petitioner's business with ABC permits, or as to how they were related to the way Petitioner conducted its business operations.
54. The bare bones and conflicting allegations concerning calls for service and arrests, as received but not analyzed by Deputy Administrator Hamilton, and as presented in this hearing, carry reduced or little probative value in determining whether the applicant is entitled to receive the permits for which it has applied.
55. At a minimum, to be relevant to that determination and review, there would need to be a showing as to the exact location of the incidents that are the subject of that information, and there also would need to be a demonstrated association between operation of Petitioner's business and the proffered incidents.
56. Respondent's own evidence concerning the call reports was in conflict and carries little probative value concerning any activities of Petitioner.
57. At the time Deputy Director Hamilton reviewed and rejected Petitioner's application, he believed that a police call was a 911 call to an address. It has been shown that the police calls discussed in this matter may have originated from several sources, including self-reporting by police officers specifically patrolling or assigned to patrol in the general vicinity of an address; there was no contextual analysis by Respondent of this information.
58. Respondent's evidence concerning the ABC violations alleged in its Notice of Rejection, even when viewed in a light most favorable to Respondent, fail to provide a sufficient basis for a conclusion that any ABC violation occurred on Petitioner's premises during the time that Petitioner's application was pending. N.C.G.S. 18B-901(d) states that the ABC Commission has the sole power in its discretion to determine the suitability and qualifications of an applicant for an ABC permit and the authority to determine the suitability of a location.
59. Despite Respondent's assertion that the review of this action is limited to the matters reviewed by it during the application process, the Undersigned finds that when one reviews the applicable statutes, including N.C.G.S. 150B and especially N.C.G.S. 18B-

906(a), the ABC Commission does not have unbridled discretion, but must exercise its discretion in accordance with the applicable laws that govern it. See Waggoner v. North Carolina Board of Alcohol Control, 7. N.C.App. 692, 696-697, 173 S.E. 2d 548, 551(1970).

60. Under N.C.G.S. 150B-23, the Office of Administrative Hearings is charged with reviewing Respondent's action concerning Petitioner's permit application and entering a decision as to whether Respondent substantially prejudiced Petitioner's rights.
61. The statutes that govern the alcoholic beverage permitting process are N.C.G.S. 18B-900 and N.C.G.S. 18B-901.
62. The Notice of Rejection issued by Respondent's Deputy Administrator in this case is wholly inadequate in that it fails to cite valid statutory reasons for the denial of Petitioner's application. It fails to cite any provision from either statute cited in Finding 61 above.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. The Notice of Rejection issued by Deputy Administrator Hamilton on behalf of Respondent fails to cite sufficient statutory reasons for the denial of Petitioner's application.
3. Respondent misapplied the provisions of N.C.G.S. 18B-1005(b) in this matter. That law states that it is illegal for Petitioner [Permittee] to fail to superintend the premises in person or through a manager. Statutory language is to be given its ordinary meanings and judicial notice is taken that the word "superintend" means "to be in charge of." Here, Respondent seeks to apply that statute in an expansive fashion to mean that any undesirable act or omission that occurs on the premises is directly attributable to Petitioner without any further evidence. Petitioner proved that, at all times pertinent to this case, the premises always were superintended by a manager.
4. The evidence proffered by Respondent fails to establish sufficient nexus between the allegations concerning arrests and police calls and the operation of Petitioner's business with or without ABC permits.
5. Petitioner has shown sufficient facts to establish *prima facie* that it is entitled to the issuance of the permits for which it has applied.
6. Respondent prejudiced Petitioner's rights in this case by failing to use proper procedure and by acting erroneously because of insufficient evidence.

7. Respondent correctly contends that it should be given due deference in determining which applications before it should be approved. Respondent asserts that the deference due its decision should be broad and unfettered because Respondent is not an “investigative” agency and because Respondent rarely rejects any application. Respondent is charged with determining the suitability of applicants and locations for the lawful operation of ABC-permitted businesses. As such, Respondent has a duty to the citizens of the State to conduct fair and balanced inquiries into the applications it receives, and to consider certain statutory factors set out in N.C.G.S. 18B. Respondent cannot avoid or alter this responsibility by merely asserting that it is not an investigative agency.
8. It was shown by the evidence in this case that the items Respondent considered in making its decision to reject this application were various assertions made by a Police Department. The degree to which the process utilized by Respondent provides for proper investigation and analysis of third party allegations bears a relationship to the degree of deference Respondent should be afforded in a review of its decisions concerning permit applications.
9. In the instant case, a more thorough analysis and investigation of the data that the Police Department submitted to Respondent was essential. Additionally, that data should have been weighted by consideration of the context within which the data was collected and submitted, and by considering the conclusions that then could be drawn about Petitioner’s business operations with alcoholic beverage permits. In a case of this type, the presiding judge has a duty thoroughly to explore the facts supporting the decision made by Respondent. Neither Respondent nor its Police Officer witnesses specifically were able to validate the concerns set out in the Notice of Rejection as legitimate grounds for the denial of this application.
10. There is no competent evidence in the record to support a conclusion that this Petitioner would not comply with the ABC laws or that operation of Petitioner’s business is detrimental to the neighborhood as a basis for finding the applicant or the location to be unsuitable.
11. For the current regulatory scheme of the ABC permit application evaluation process to be effective, it is imperative that the official Notice of Rejection state with specificity the factual and statutory bases for rejection of the application.
12. Based upon substantial evidence in the record, Petitioner has made a *prima facie* showing that it is qualified for the permits sought and that its location is a suitable one for the permits for which it applied.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the greater weight of the evidence, I find that Petitioner has shown that Respondent’s action in this case in

denying Petitioner's Alcoholic Beverage Permit is not supported by the evidence, is erroneous and affected by procedural error, and is REVERSED. Petitioner is entitled to the ABC permit or permits for which it applied in this case or, in the discretion of the Commission as a more appropriate permit, the alternate ABC permit or permits for a Mixed Beverage Private Club.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of August, 2013.

Beecher R. Gray
Administrative Law Judge