

04 N.C.A.C. 2S .0105(a)
04 N.C.A.C. 2S .0105(b)
04 N.C.A.C. 02S .0202(a)
04 N.C.A.C. 02S .0212(a)
04 N.C.A.C. 02S .0212(a)(3)
04 N.C.A.C. 2S .0512(c)
04 NCAC 2S .0513(9)

EXHIBITS

Petitioner's exhibits 2, 4, 5, 6, and 8 were introduced and admitted. Respondent's 1-6 were introduced and admitted.

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 makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence 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 witnesses, any interest, bias, or prejudice the witnesses may have, the opportunity for the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Final Decision:

FINDINGS OF FACT

1. Petitioner's request for an expedited hearing was granted and the parties received notices of hearing on June 17, 2014.
2. Petitioner, Marcus Lamar Bellamy, an individual trading as Bellas Grill, a business located at 1470 J K Powell Boulevard in Whiteville, North Carolina.
3. Petitioner submitted an application to Respondent for Malt Beverage on premise, Unfortified Wine on premise and Mixed Beverages Restaurant Alcoholic Beverage Control permits in February 2014.
4. Petitioner received Temporary Permits from the Respondent on February 11, 2014. The expiration date for the temporary permits was August 30, 2014.
5. On March 9, 2014, between 3:30pm and 3:37pm, North Carolina Alcohol Law Enforcement Special Agent Robert Hebert entered Bella's Grill. This morning was the beginning of Daylight Savings Time. Therefore, time went forward one hour at 2:00 am. Otherwise, the time would have been 2:30am.
6. Agent Hebert observed the applicant, Marcus Bellamy ("Petitioner"), standing on the bar with a bottle of spirituous liquor in one hand and a cup in the other.

7. Agent Hebert observed most or all of the patrons at the business possessing cups or bottles of beer and open bottles of beer and cups on the bar. Agent Hebert did not observe any of the bar staff clearing the bar.

8. Agent Hebert told an employee, Matresse McAllister, to stop selling alcohol and pick up the beverages. Agent Hebert told Petitioner to turn off the music and pick up the beverages. Neither Ms. McAllister nor Mr. Bellamy complied with the agent's request.

9. Agent Hebert was then approached by approximately six patrons who were shouting at him and drinking beer from beer bottles. These patrons approached Agent Hebert in such a way to cause him to feel threatened. Agent Hebert radioed for immediate assistance from the Whiteville Police Department. Mr. Bellamy then told the patrons to stop drinking and leave because more police were on the way.

10. After officers from the Whiteville Police Department arrived, Agent Hebert observed Shannel Henderson behind the bar cleaning. He noticed a strong odor of alcohol about her person.

11. Agent Hebert observed eight empty spirituous liquor bottles in a box behind the bar at the location. The tax stamps had not been defaced on the bottles.

12. Agent Hebert inspected the kitchen on the premises. The only food he found on the premises was two one-pound bags of chicken nuggets in a freezer.

13. Agent Hebert observed only three seats inside the dining area for patron seating.

14. On March 14, 2014 at approximately 8:40 pm, Agent Hebert returned to Bella's Grill and observed one table and three chairs in the dining area of the business.

15. Agent Hebert observed two signs on the kitchen door which stated "Kitchen Closed" and "No Food Available".

16. Agent Hebert observed 16 empty bottles of spirituous liquor under the bar. The tax stamps on the bottles had been defaced, but the bottles had not been disposed of immediately.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter.

2. It shall be unlawful for a permittee or his agent or employee to knowingly allow any violation of Chapter 18B to occur on his licensed premises. N.C. Gen. Stat. § 18B-1005(a)(1). "It shall be unlawful for a permittee to fail to superintend in person or through a manager the business for which a permit is issued." N.C. Gen. Stat. § 18B-1005(b).

3. The Alcoholic Beverage Control Commission (“Commission”) shall consider “any other evidence that would tend to show whether the applicant would comply with the ABC laws” in determining whether the applicant and the business location are suitable. N.C. Gen. Stat. § 18B-901(c)(8). “The Commission shall have the sole power, in its discretion, to determine the suitability and qualifications of an applicant for a permit.” N.C. Gen. Stat. § 18B-901(d).

4. No permittee or his employees shall be on the licensed premises after consuming alcoholic beverages. 04 NCAC 02S .0212(a) Furthermore, no permittee or employee shall perform on duty work after consuming alcoholic beverages. 04 NCAC 02S .0212(a)(3).

5. “All tables and counters shall be cleared of all alcoholic beverages, bottles, cans, glasses and containers by 2:30 a.m. No permittee or his employees shall allow a patron to possess a container of alcoholic beverages after 2:30 a.m.” 04 NCAC 02S .0202(a).

6. A mixed beverages permittee or his employee shall not “possess any empty container of spirituous liquor purchased for resale in mixed beverages if the mixed beverages tax stamp on that container has not been permanently defaced.” 04 NCAC 2S .0513(9).

7. “To qualify as a restaurant, an establishment's gross receipts from food and nonalcoholic beverages shall be not less than thirty percent (30%) of the total gross receipts from food, nonalcoholic beverages, and alcoholic beverages. A restaurant shall also have a kitchen and an inside dining area with seating for at least 36 people.” N.C. Gen. Stat. § 18B-1000(6). The Commission shall consider the extent to which a facility to be qualified as a restaurant has a printed menu with substantial entrees, complete cooking and refrigeration equipment, greatest portion of food prepared in facility’s kitchen, food is consumed on premises, separate kitchen and service staffs, seating for dining customers primarily at tables, small portion of the premises is devoted to activities unrelated to the service and consumption of food and sales of food are significantly greater than sales of nonalcoholic beverages in deciding whether to issue, suspend or revoke permits. 04 NCAC 2S .0105(b). “Food shall be available at all times while alcoholic beverages are being served. Partial food menu or prepackaged food in individual servings may be offered after 10:00 pm.” 04 NCAC 2S .0105(a).

8. Once empty, the permittee or his employee shall permanently deface the mixed beverages tax stamp and dispose of empty containers of spirituous liquor. 04 NCAC 02S .0512(c).

9. “No permittee or his employee shall interfere with or fail to cooperate with an ALE agent or any other law enforcement officer in the performance of his duties.” 04 NCAC 02S 213.

10. Agent Hebert entered Bella’s Grill after 3:30am to find the applicant Marcus Bellamy standing on the bar with a bottle of spirituous liquor in one hand and a cup in the other hand. The patrons possessed cups or bottles of beer in violation of 04 NCAC 02S .0202(a). Agent requested Matresse McAllister, employee, to pick up the alcoholic beverages as required by 04 NCAC 02S .0202(a). Ms. McAllister did not comply. Agent Hebert also requested Petitioner to turn off the music and pick up the alcoholic beverages. Petitioner did not comply.

This failure to comply was in violation of 04 N.C.A.C. 2S .0213. Patrons approached Agent Hebert in a threatening manner prompting him to call for immediate assistance from the Whiteville Police Department.

11. Agent Hebert observed Shannel Henderson, an employee, behind the bar cleaning. He noticed a strong odor of alcohol coming from her person. Cleaning the bar after consuming an alcoholic beverage was in violation 04 N.C.A.C. 02S .0212 (a) and 04 N.C.A.C. 02S .0212 (a)(3). He observed eight empty spirituous liquor bottles behind the bar where the tax stamps had been defaced in violation of 04 N.C.A.C. 2S .0513(9).

12. Agent Hebert found two one pound bags of chicken nuggets in a freezer in violation of N.C. Gen. Stat. § 18B-1000(6) and 04 N.C.A.C. 2S .0105(a). The dining area only contained three seats for patron seating in violation of 04 N.C.A.C. 2S .0105(a).

13. Agent Hebert returned to Bella's Grill on March 14, 2014 at approximately 8:40pm. He observed one table and three chairs in the dining area and two signs on the kitchen door stating "Kitchen Closed" and "No Food Available" in violation of in violation of 04 N.C.A.C. 2S .0105(a). He also observed 16 bottles of spirituous liquor under the bar with defaced tax stamps, but these bottles had not been disposed of immediately in violation of in violation of 04 N.C.A.C. 2S .0512(c).

14. Petitioner is not a suitable person to hold ABC permits because the evidence shows that the applicant would not comply with the ABC laws pursuant to N.C. Gen. Stat. § 18B-901(c)(8).

15. The Petitioner bears the burden of proof to show the agency acted or failed to act in violation of N.C. Gen. Stat. § 150B-23. Petitioner failed to show the requirements of N.C. Gen. Stat. § 150B-23 by a preponderance of the evidence.

16. Respondent did not exceed its authority or jurisdiction, did not act erroneously or failed to use proper procedure in denying Petitioner's application for Malt Beverage on premise, Unfortified Wine on premise and Mixed Beverages Restaurant Alcoholic Beverage Control permits.

DECISION

It is hereby ordered that Respondent's Notice of Rejection, rejecting Petitioner application for ABC permits, be **UPHELD**.

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative

decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, 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 _____ day of July, 2014

Craig Croom
Administrative Law Judge