

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 ABC 03310

Club Hush Management Company LLC Petitioner, v. North Carolina Alcoholic Beverage Control Commission Respondent.	FINAL DECISION
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THIS MATTER came on for hearing before the Hon. J. Randolph Ward, Administrative Law Judge, on June 14, 2016 in Charlotte, North Carolina on the Petitioner's appeal of the rejection of its application for alcoholic beverage permits to operate a private club. Following the deposition of Angel M. Melendez on June 29, 2016, the submission of additional exhibits and stipulations concerning the evidence, and the opportunity for the parties to submit additional written arguments and proposed decisions, this Final Decision was prepared.

APPEARANCES

For Petitioner: Ty McTier, Esq.
David Redding, Esq.
Redding, Tison & Jones, PLLC
Charlotte, North Carolina

For Respondent: LoRita K. Pinnix, Assistant Counsel
Missy P. Welch, Assistant Counsel
N.C. Alcoholic Beverage Control Commission
Raleigh, North Carolina

ISSUES

Whether Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by rule or law, to the substantial prejudice of Petitioner's rights, by rejecting Petitioner's application for Alcoholic Beverage Control Permits for Malt Beverage On Premise, Unfortified Wine On Premise, and Mixed Beverages Private Club?

STATUTES OR RULES AT ISSUE

N.C. Gen. Stat. §§ 14-72(a), 14-100, 18B-101(12), 18B-104(a)(2), 18B-900(a)(3) & (c)(2b), 18B-901(b), 18B-901(c)(1) & (8), 18B-901(d), 18B-903(a)(4), 18B-903(c)(1), 18B-903(f), 18B-905, 18B-906(a), 18B-1001(1) f., 18B-1003(c)(1), 150B-23(a), and 150B-25.1(a);

South Carolina Code of Laws §16-13-0230(b)(3); and, 14B NCAC 15B .0101(1), 14B NCAC 15B.0107(a), (c)(3), (4) & (6), and 14B NCAC 15B .0211(1).

WITNESSES

Petitioner's Witnesses: Mr. Joshua Alan Smith
Mr. Kaseem Z. Pennington
Mr. Mitchell Jean
Mr. Dorean White
Mr. Marc Hubbard

Respondent's Witnesses: Sergeant Michael Ford
Detective Matthew Lewis
Detective Travis Cook
Detective Juan Varela
ALE Agent Robert W. Huneycutt
Dep. Administrator Angel M. Melendez (*by deposition*)

EXHIBITS

Petitioner's Exhibits A. Temporary Permit
B. Notice of Suspension
D. Notice of Rejection
E. White's E-mail & Ariel's Affidavit
F. Corporate Resolution
G. Receipts 76/78
K. Application for Certificate of Authority
(*Deposition Exhibit*) H. Mr. Hubbard's driver license

Respondent's Exhibits 1. Lease Agreement of Dec. 10, 2014
2. Lease Addendum of October 25, 2015
3. S.C. "Sentence Sheet" of June 25, 2015
4. Dec. 31, 2015 Empire Distributors invoice
5. Dec. 31, 2015 Adams Beverages credit card receipt
6. Jan. 16, 2016 Mecklenburg ABC Board invoice
(*Deposition Exhibit*) 7. Affidavit of Mr. Najid Ariel
(*Deposition Exhibit*) 8. Federal Probation Officer's letter of January 15, 2016

N.B.: The parties' objections to each the three exhibits introduced during the Deposition of Angel Menendez on June 29, 2016 were subsequently withdrawn.

UPON DUE CONSIDERATION of the arguments and stipulations of counsel; the exhibits admitted; and, the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and,

upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. At all times pertinent to this controversy, the Petitioner, Club Hush Management Company, LLC (hereinafter, "Petitioner"), a limited liability company, had its principal place of business at 421 E. Sugar Creek Road in Charlotte, N.C., the site of the private club operated by the firm under the name "Club Hush." The owner of the real estate where Club Hush was situated is American Ventures Group, LLC ("American Ventures"). Mr. Marc Hubbard is the sole owner and managing member of American Ventures, which also owns the trademark "Club Hush." (Tr 69:2-9 & 71:5-11)

2. Mr. Hubbard testified that he had owned and operated around 20 clubs in the Charlotte area since 1996, but had changed his business strategy from personally managing such establishments to building a "Club Hush chain." His business plan involved acquiring a suitable building, up-fitting it to house a club, and leasing the premises to an operator, who would also be licensed to use the Club Hush name and marks. On the date of the hearing, there were ten locations operating under the name Club Hush. (Tr 70:4-10 & 71:5-11.) Mr. Hubbard referred to having had a location in Bennettsville, S.C., and "working on" deals to open clubs in Tampa and near Atlanta. (Tr 82:14-18.)

3. On December 1, 2014, Mr. Hubbard transferred all his interest in the Petitioner limited liability company ("LLC") to Najid Ariel, who thus became the sole owner and managing member of the LLC. (P Ex F & G.) Mr. Ariel subsequently transferred a 20% interest in the business to Dorian White, and became a "silent partner." Mr. White became the managing member, and was solely responsible for the day-to-day operation of the Petitioner firm and its Charlotte "Club Hush" location. (Tr 43:22-44:18; 54:4-16; P Ex B, p 1.)

4. In his testimony at the hearing, Mr. Hubbard was -- as he described himself -- "unapologetic" about frequently being in Club Hush's location on Sugar Creek Road to see that the stipulations of the lease and the licensing agreement were carried out. He described these as encompassing security, including weapons searches; fire safety preparations like unchained doors, and a fire alarm system monitored by the fire department; and other precautions to protect guests. He monitored the use of the trademarked name, e.g., assuring that lascivious images were not associated with the name. He was interested in "what they're promoting," because "I'm trying to create a brand here." He would personally collect lease payments. He considered the new owners of the club "my two best friends in the world," and was himself an enrolled member of the club. The original lease of Dec. 10, 2014 (R Ex 1, p 13) was altered by the Lease Addendum of October 25, 2015 (R Ex 2, p 13) to change the hours when the landlord could inspect the premises from "9 a.m. to 5 p.m." to "unlimited." Mr. Hubbard testified that he had a "vested interest" in the Petitioner firm obtaining ABC permits, so that it would be capable of paying rent. (Tr 71;2-73:1, 75;9-76:12, 78:12-80:2, 80:9-82:18, 86:9-17 and 90-91.) Mr. White testified that this venture was his first experience managing a club, but that he had been a close friend of Mr. Hubbard's for 20 years, and had observed how Mr. Hubbard had managed his clubs, which he described as, "successful - not a hard model to copy." (Tr 54:24-56:5.)

5. The ABC permits for an establishment automatically expire if its ownership changes, and as early as December 2014, the new owner(s) of the Petitioner firm were working on obtaining permits to open Club Hush. (N.C. Gen. Stat. § 18-B-903(c)(1); Tr 101:8-12.)

6. A city or county government may make recommendations to Respondent concerning the suitability of a person or a location to receive ABC permits, although the Respondent retains the sole final authority to make that decision. N.C. Gen. Stat. §18B-901(b) & (d). When permits are sought to open an establishment selling alcohol, Respondent requires the applicant to send the local government an ABC form soliciting its opinion. The Charlotte Mecklenburg Police Department was designated to investigate and prepare the Respondent's "001 Form" for that purpose in the locality where Petitioner's business was to operate.

7. A primary focus of the ABC permitting process is the suitability of the persons proposing to own and operate the business, and Respondent can consider any evidence bearing on whether an applicant would be likely to comply with the ABC laws. The ABC statutes specifically prohibit issuing a permit for an LLC that has either a managing member, or an owner with a 25% or greater interest in the LLC, who has been convicted of a felony within the past three years. A permittee is also prohibited from employing a person who has been convicted of a felony within the previous three years.

8. On June 25, 2015, Mr. Hubbard was convicted in Spartanburg County, South Carolina, on his plea of "guilty" as indicted, of "Breach of Trust with Fraudulent Intent, value of \$10,000 or more," and sentenced to ten years imprisonment, suspended with probation for five years. (R Ex 3; Tr. 191:9-193:6.)

9. The Charlotte Mecklenburg Police Department ("CMPD") received Petitioner's "001 Form" or "local government opinion form" from Mr. Ariel on December 23, 2014 and again on September 21, 2015. (Tr 98:11-12, 100:18-19, 101:11, 102:6 & 104:14.) Sgt. Ford testified that CMPD did not process these requests because they were not accompanied with "a zoning compliance form" and other documents his office routinely sought before submitting their opinion on a request for ABC permits. (Tr 98:11-19.) Mr. Hubbard believed that a locality had 15 days to respond to the request for an opinion, and that the Respondent should not await CMPD's response any longer than that before considering Petitioner's application. He testified that Petitioner's ability to fulfill the financial obligations of their lease depended on opening the club, and he personally contacted CMPD and Respondent about Petitioner's application, and sought help from legislators. (Tr 85:4-88:10.)

10. In September 2015, Mr. White and Mr. Hubbard met with Respondent's Deputy Administrator, Angel M. Menendez, to discuss the application process, identifying themselves as the manager and landlord, respectively, of Club Hush. Later that month, Petitioner submitted an application, signed by Messrs. White and Ariel, seeking permits for Club Hush for "Malt Beverage On Premise, Unfortified Wine On Premise, and Mixed Beverage Private Club" ABC permits. *See*, Angel M. Menendez Depo. 17:21-19:16.

11. In its “001 Form”, CMPD requested that the Respondent deny the ABC permits Petitioner sought. Mr. Menendez testified that the local government objected for three “primary reasons,” i.e., “the level of involvement by Mr. Hubbard and [his] prior history tied to private clubs;” the proposed location, due to its history of “assaults and fights and [af]frays;” and, the objections of “a number of local businesses ... to that type of establishment in their neighborhood.” (Tr 20:10-19.)

12. In October 2015, Mr. White was concerned about the delay in considering Petitioner’s application and was preparing for legal action. A member of Respondent’s staff suggested to him that Respondent would be willing to promptly issue a temporary permit, if Petitioner would accept a 270-day term for the temporary permit, rather than the statutory 90 days. (Tr 50:2-9; 62:9-17.) On October 20, 2015, Mr. White sent an email to Respondent’s counsel, stating that he believed Petitioner could prove that Mr. Menendez had held up their application for CMPD Form 001 beyond the statutory 15 days, but was willing to forgo legal action if a temporary permit was issued, and to “stipulate to a 270-day temporary permit to ensure compliance with all ABC rules and regulations.” (P Ex E.) Mr. Ariel, as majority owner of the Petitioner, also sent Respondent an affidavit, executed on October 22, 2015, showing that he was aware that any violation could result in an immediate suspension of the proposed temporary permit. (P Ex E, p 2 and R Ex 7.) Respondent issued the Petitioner’s Temporary Permit for Malt Beverage On Premise, Unfortified Wine On Premise, and Mixed Beverages Private Club on October 23, 2015, with an expiration date of May 10, 2016 -- a period of 200 days from issuance. (P Ex A; Depo. 19:20-21.) Mr. Menendez testified that applications “all take longer than the 90-day period simply because of the extensive work” involved, and estimated that “typically all in all, between three and six months” under temporary permits was normal. (Tr 48:7-8)

13. Based on an “ABC inspection” on November 1, 2015 by two members of the CMPD’s ABC Enforcement Section, the Respondent suspended Petitioner’s temporary permit on January 15, 2016 for 12 days, and required Mr. White to attend a “responsible alcohol seller program.” The citations supporting the suspension included the charge that Petitioner was employing an “unsuitable person,” referencing Mr. Hubbard and his felony conviction. The officers observed him walking up and down beside a long line of patrons waiting to get into the club, while security was wandering and searching people before they entered. When one of the security personnel was asked who was in charge, he responded, “Mark Hubbard.” (P Ex B, p 2; Tr 121:12-122:13; 139:7-9.)

14. Petitioner’s temporary permit was again suspended on February 5, 2016, for a period of seven days, based on the findings of an ABC inspection on December 6, 2015. Three of the four citations listed in the Official Notice of Suspension again involved Mr. Hubbard’s activities at the club, which Respondent considered the actions of a manager. Mr. Hubbard was again identified as “in charge” by a security guard and another employee, and was observed talking with a fire department official who was there for a safety inspection. This second suspension letter concluded with the statement that, “Further violations of the ABC laws will result in additional suspensions or rejection of your application for permanent permits.” (P Ex C, p 2.)

15. On February 5, 2016, ALE Agent Robert W. Huneycutt and CMPD officers served the “Official Notice of Suspension” resulting from the December 6, 2015 inspection of Petitioner’s

premises. When they arrived, they encountered Mr. Hubbard in front of the club, and he telephoned Mr. White to come accept service of the suspension document. The officers carried out another ABC inspection while there, and took an envelope from a radio station, addressed to Club Hush, attention Mark Hubbard. (Tr 185:24-186:7.) While ALE Agent Huneycutt was with Mr. White, Mr. Hubbard approached the officer and began talking about the ABC permits. ALE Agent Huneycutt refused to discuss ABC business with Mr. Hubbard, and told Mr. White that Mr. Hubbard “could not have anything to do with a ABC licensed business because he was basically an unsuitable employee [as] determined by ABC law.” (Tr 184:18-185:2.)

16. On February 13, 2016, ALE Agent Huneycutt revisited Club Hush to return its ABC permits, and to conduct an inspection. Upon requesting and inspecting the club’s invoices, he found three for purchases of alcoholic beverages, and one for radio advertising, that bore Mr. Hubbard’s name and/or signature. (T. p. 197-205; R Ex 4, 5 & 6.) These were a contract for spots on WQNC-FM in Charlotte, dated December 7, 2015; an Empire Distributors invoice for two cases of Rosé, dated December 31, 2016; a credit card receipt from Adams Beverages for the purchase of beer on December 31, 2015; and, a Mecklenburg ABC Board warehouse “transportation permit/invoice” for 17 bottles of alcoholic beverages, dated January 16, 2016.

17. Prior to the rejection of the Petitioner’s permit application, Mr. Menendez became aware that Mr. Hubbard was under the supervision of a federal probation officer. On December 12, 2012, Mr. Hubbard became a Federal “pretrial supervisee” due to investigations in Hawaii and Pennsylvania -- which were “ongoing” as of January 15, 2016 -- in which he was named as a defendant. U.S. Probation Officer Richard Bogan, Jr. had supervised Mr. Hubbard since October 2015. Prior to January 15, 2016, each of Officer Bogan’s face-to-face meetings with Mr. Hubbard had been at Club Hush, before the club’s business hours. The “profit / loss sheets” Mr. Hubbard provided monthly to the Probation Office showed “Club Hush as his primary source of income.” Ofc. Bogan had inquired and learned about the “day-to-day operations” of the club, including maintenance and renovation of the building that housed it, and was under the impression that Mr. Hubbard “acts as the primary manager and operator of Club Hush.” (R Ex 8; P Ex D, p 3; Depo. 34:12-37:23.)

18. On March 4, 2016, Respondent served the “Official Notice of Rejection” of Petitioner’s application for ABC permits, citing primarily the involvement of Mr. Hubbard in the operations of the club, and the multiple instances in which he was perceived to be acting as an employee of Petitioner, denoted with references to the statute prohibiting an ABC permittee to employ a person convicted of a felony within three years of the conviction.

19. The Petitioner timely filed a request for a contested case hearing in the Office of Administrative Hearings on March 30, 2016.

20. The Office of Administrative Hearings gave the parties due notice of the hearing in this matter on May 9, 2016 and June 9, 2016.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. §§ 18B-906(a) and 150B-23.

2. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011); *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. The Petitioner has the burden of proving that the Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, as alleged in the Petition, by a preponderance of the evidence. N.C. Gen. Stat. §§ 150B-23(a); 150B-25.1(a).

4. The Respondent North Carolina Alcoholic Beverage Control Commission has the sole power, in its discretion, to determine the suitability and qualifications of an applicant for an ABC permit. N.C. Gen. Stat. § 18B-901(d).

5. The issuance of permits to vend alcoholic beverages on premises in North Carolina is governed by Chapter 18B, Article 9 of the General Statutes, § 18B-900, *et seq.*

6. “Before issuing a permit, the Commission shall be satisfied that the applicant is a suitable person to hold an ABC permit ... ,” and “shall consider ... “[a]ny ... evidence that would tend to show whether the applicant would comply with the ABC laws,” specifically including the “reputation, character, and criminal record of the applicant.” N.C. Gen. Stat. § 18B-901(c)(1) & (8). Article 9 specifically prohibits granting a permit to a limited liability company with a manager, or an owner of a twenty-five percent or greater interest in the firm, who has been convicted of a felony within the preceding three years. N.C. Gen. Stat. § 18B-900(a)(3) & (c)(2b).

7. A permittee may not knowingly employ a person convicted of a felony within the preceding three years. N.C. Gen. Stat. § 18B-1003(c)(1); 14B NCAC 15B .0211(1). A permittee’s “employee” is “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.” 14B NCAC 15B .0101(1). The Respondent may revoke the ABC permits of “persons” (including corporations) violating these provisions. N.C. Gen. Stat. §§ 18B-101(12); 18B-104(a)(2).

8. The preponderance of the credible evidence shows that Marc Hubbard, a person convicted in 2015 of “Breach of Trust with Fraudulent Intent, value of \$10,000 or more” in South Carolina, was an “employee” of the Petitioner, within the meaning of N.C. Gen. Stat. § 18B-1003(c)(1) and 14B NCAC 15B .0101(1), on November 1, 2015, December 6, 2015, December 7, 2015, December 23, 2015, December 31, 2015, January 16, 2016, and February 5, 2016.

9. Conviction of a felony in another jurisdiction is disqualifying under Article 9 if the criminal conduct would also constitute a felony in North Carolina. N.C. Gen. Stat. § 18B-900(b). South

Carolina Code of Laws §16-13-0230(b)(3) (2015), “Breach of trust with fraudulent intent,” provides, in pertinent part, that:

(A) A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny.

(B) A person who violates the provisions of this section is guilty of a: ...

(3) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is ten thousand dollars or more.

This crime is analogous to N.C. Gen. Stat. § 14-100 (2015), “Obtaining property by false pretenses,” which is a felony without regard to the value of the money or thing(s) of value fraudulently sought or obtained. This statute requires proof that the perpetrator has made:

(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.

State v. Cronin, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). In North Carolina, larceny of goods valued at more than one thousand dollars (\$1,000) is a felony. N.C. Gen. Stat. § 14-72(a) (2015).

10. In light of the clear mandate of the applicable statutes that a person convicted of a felony within the previous three years should not participate in the operation of a permitted business, and the repeated violation of the specific prohibition against a permittee having an “employee” in that status, within the meaning of N.C. Gen. Stat. § 18B-1003(c)(1), 14B NCAC 15B .0101(1), and 14B NCAC 15B .0211(1), the Respondent did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by rule or law, within the meaning of N.C. Gen. Stat. § 150B-23(a), in denying the Petitioner’s application for ABC permits on March 4, 2016.

11. A temporary on-premises malt beverage permit for a private club, such as that issued to Petitioner, should be issued specifying that it is valid for a period of 90 days, although there appears to be no bar to issuing second or consecutive temporary permits. N.C. Gen. Stat. §§ 18B-903(a)(4); 18B-905; 18B-1001(1)f. Respondent failed to act as required by law when it issued Petitioner’s Temporary Permit on October 23, 2015 with an expiration date of May 10, 2016. However, this error did not result in the denial of Petitioner’s application for ABC permits, or substantially prejudice the Petitioner’s rights. N.C. Gen. Stat. § 150B-23(a).

12. Respondent should have awaited the local government’s response to its notice of the Petitioner’s application for only “15 days from the time the [Respondent’s] notice was mailed or delivered” to CMPD before proceeding with its process of determining, based on all the pertinent

circumstances, whether to issue the Temporary Permit. N.C. Gen. Stat. §§ 18B-901(b). However, Respondent was entitled and obligated to consider CMPD's concerns about "evidence that would tend to show whether the applicant would comply with the ABC laws," whenever it was received. N.C. Gen. Stat. § 18B-901(c)(8). In addition, it is not clear from the evidence whether or how much awaiting the Charlotte Mecklenburg Police Department's "001 Form" actually delayed the Respondent's decision. The Petitioner, who had the use and benefit of the temporary permit for 114 days, has failed to show that this error substantially prejudiced its rights. N.C. Gen. Stat. § 150B-23(a).

13. The Office of Administrative Hearings does not have jurisdiction to review the suspension of temporary ABC permits. N.C. Gen. Stat. § 18B-906(a).

14. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C.App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C.App. 545, 549 (1971).

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

DECISION

The Respondent's decision to deny the Petitioner's application for ABC permits is **UPHELD**.

NOTICE

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

Under the provisions of N.C. 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 14th day of November, 2016.

J Randolph Ward
Administrative Law Judge