

STATE OF NORTH CAROLINA
COUNTY OF DARE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 ABC 10872

<p>NC Alcoholic Beverage Control Commission Petitioner,</p> <p>v.</p> <p>Azan Inc T/A Mulligan's Raw Bar and Grill Respondent.</p>	<p>FINAL DECISION</p>
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This contested hearing was heard before Administrative Law Judge Donald W. Overby on April 18, 2017 in Elizabeth City, North Carolina.

APPEARANCES

For Petitioner: Rachel M. Spears, Assistant Counsel
North Carolina Alcoholic Beverage Control Commission,
Raleigh, North Carolina

For Respondent: Glenn B. Lassiter, Jr.
Attorney at Law,
Pittsboro, North Carolina

ISSUES

1. Whether Respondent's employee, Andrew Scott Hooper, knowingly sold alcoholic beverages to David Scott Witmer, an intoxicated person, on or about February 22, 2016, in violation of North Carolina General Statute § 18B-305(a).
2. Whether Respondent's employee, Andrew Scott Hooper, allowed David Scott Witmer, an intoxicated person, to consume alcoholic beverages while upon the licensed premises, on or about February 22, 2016, in violation of ABC Commission Rule 14B NCAC 15B.0204.
3. Whether Respondent's employee, Andrew Scott Hooper, allowed William Davis Witmer, an intoxicated person, to consume alcoholic beverages while upon the licensed premises, on or about February 22, 2016, in violation of ABC Commission Rule 14B NCAC 15B.0204.
4. What penalty if any should be imposed upon the Respondent should a violation be proved?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, 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 these Findings of Fact, the ALJ 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 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.

FINDINGS OF FACT

1. Respondent, Azan, Inc., T/A Mulligans Raw Bar and Grille (“Respondent” or “Mulligans”) holds permanent Malt Beverage, Unfortified Wine, Mixed Beverages Restaurant and Mixed Beverages Catering ABC permits for Mulligans, located at 4005 South Croatan Hwy, Nags Head, North Carolina.

2. Agents Tony Boles (“Boles”) and Hunter Meekins (“Meekins”) are both Special Agents with North Carolina Alcohol Law Enforcement (“ALE”). During of their employment with ALE, they have both received training and have experience in identifying signs of intoxication.

3. The Witmer family was inside Mulligans on February 22, 2016 as patrons. For current purposes, the family included the father, Dr. David Scott Witmer (“D. Witmer”), his wife and their son, William David Witmer (“W. Witmer”). The Witmers are all of sufficient legal age to consume alcohol. They were seated at the bar in plain view of Respondent’s bartender which was initially a female and subsequently was Respondent’s employee, William Scott Hooper (“Hooper”).

4. The female bartender was on duty when the Witmers first came into Mulligans and when Agent Boles came in and began his observations.

5. Respondent provided Petitioner with video surveillance footage recorded at the restaurant on February 22, 2016. The video was entered into evidence during the hearing. It is video only without any audio.

6. According to the time on the video, which is corroborated by testimony with reasonable proximity, at 4:59 p.m. on February 22, 2016, Agent Boles entered Mulligans in an undercover capacity for observing any potential violations of law. The time is recorded in the video in military time.

7. The video shows all three Witmers being served by the female bartender what appears to be an alcohol mixed drink at 5:01 p.m. Agent Boles bought his first beer in Mulligans at 5:02 p.m.

8. For a brief time, both Hooper and the female were behind the bar during shift change, but the female can be seen leaving the bar area at 5:09 p.m. and Hooper taking full charge of the bar.

9. According to Agent Boles, shortly after entering Mulligans, he observed Dr. David Scott Witmer exhibiting what Agent Boles considered to be multiple signs of intoxication, in plain view of Hooper. These included: loudly speaking over other patrons, loudly making vulgar and/or inappropriate comments, glassy eyes, slurred speech, laying across the bar while holding his head up with his hands and leaning back in his bar stool.

10. After making these observations of D. Witmer, Agent Boles observed Hooper serve what appeared to be an alcohol mixed drink to both W. Witmer and D. Witmer, which he assumed contained spirituous.

11. These drinks were served by Hooper at 5:34p.m., more than 30 minutes after Agent Boles entered Mulligans. It was the only alcohol served by Hooper to the Witmers during the entire time that Agent Boles was observing them. Agent Boles bought his second beer at 5:29 p.m.

12. Based on his training and experience, Agent Boles determined there was evidence to indicate that D. Witmer "might" be intoxicated. He communicated his suspicion to Agent Meekins, who had remained outside, and told him that he was observing someone who might be intoxicated.

13. Agent Boles bought his third beer at 6:05 p.m.

14. After being contacted by Agent Boles, Agent Meekins entered Mulligans at 6:34 p.m. This was approximately an hour and a half after Agent Boles entered Mulligans, and one hour after the Witmers had last been served anything in Mulligans.

15. In entering Mulligans, Agent Meekins immediately focused his attention on the son because of his perception of the son's impairment. He did not pay any attention to the dad.

16. Agent Meekins observed the son, W. Witmer, exhibiting what he characterized as multiple "signs of intoxication." These signs included stumbling backwards as he attempted to put on his jacket, his eyes were glassy and Witmer appeared to be staring blankly.

17. The video does not show W. Witmer stumbling backwards as he put his jacket on; however, it is noticeable on the video that W. Witmer is unsteady on his feet and swaying slightly side to side while standing.

18. Agent Meekins approached W. Witmer, identified himself as an ALE agent and asked W. Witmer to speak with him outside of Mulligans. Per the video, one and a half minutes had elapsed from the time Agent Meekins had entered Mulligans until he and W. Witmer went outside.

19. As W. Witmer followed Agent Meekins, W. Witmer stopped to rest on a bench near the door. W. Witmer asked Agent Meekins to sit with him, stating that he was too intoxicated to stand. Agent Meekins noted that W. Witmer's speech was slurred at the time.

20. Shortly thereafter, D. Witmer joined Meekins and W. Witmer outside Mulligans.

21. While speaking with D. Witmer and W. Witmer, Agent Meekins observed that D. Witmer's voice was also slurred and he appeared to be very agitated. As Meekins spoke with D. Witmer, W. Witmer got very close to Meekins and began aggressively repeating everything D. Witmer said.

22. Based on his training and experience as a Special Agent with ALE, Meekins believed both D. Witmer and W. Witmer to be intoxicated during his interactions with them at Mulligans.

23. At a point prior to Agent Meekins entering Mulligans, bartender Hooper had stopped serving the son W. Witmer. He was even questioned by another patron about the propriety of "cutting off" the son.

24. All of Agent Meekins' observations of both father and son Witmers occurred at least an hour after their consumption of alcohol.

25. The video does not corroborate the Agents' testimony, observations and conclusions that either Witmer exhibited sufficient signs of impairment prior to being served alcoholic beverages that a reasonable person in the position of Mr. Hooper knew or would have known that either Witmer was intoxicated.

26. The video shows that the father, D. Witmer, did indeed have his elbows on the bar, but they were no different than the positions exhibited by Agent Boles throughout the video. Other patrons as well leaned on the bar. It seems that putting your arms and/or elbows on the bar is a natural position in that a patron either sits with their hands in their lap or on the bar. The options are interchangeable.

27. The video also shows Dr. Witmer leaning further on the bar, but only to talk to another patron beyond his son. Other patrons do the same thing.

28. The son, W. Witmer, is shown with his head downward, but not laying on the bar. By that time, he had already been cut off and was not served any more alcohol.

29. The video does not corroborate Agent Boles testimony that early on in his observations Dr. Witmer was slumping in his chair or "having trouble."

30. Without audio, it cannot be determined if either Witmer was slurred in their speech. From the video, it would have been practically impossible for Agent Boles to have determined that either Witmer had red glassy eyes. Agent Meekins did not mention Dr. Witmer's eyes.

31. The substantial and credible evidence is that the bar was very loud on that evening. It had been an octagonal-shaped gazebo that was closed in and made into a bar area. The bar itself is "U" shaped. This particular bar is loud, even when it is not packed with people.

32. Dr. Witmer's actions, as viewed in the video and as observed by Mr. Hooper, are just as indicative of typical actions of a patron drinking and having a good time as intoxication.

33. The contentions that Dr. Witmer was loud, crude and obnoxious are not outside the norm for patrons at bars—drunk or sober. Some people by nature are loud, crude and obnoxious. While perhaps these are some indicators of impairment, those contentions, viewed in totality of the circumstances of these particular facts and especially the video, do not corroborate that Dr. Witmer was substantially intoxicated to the degree that a reasonable observer would know or should know that he was substantially impaired.

34. The video does show that the father and son Witmer were both substantially animated while a certain group of men were in the bar area, but much more restrained after most of that group left.

35. It is important to note that Hooper knew there were cameras in the bar area. The owner, Constantine Zinovis, was in the bar/restaurant that evening and could observe and did observe the bar on cameras.

36. During the two-hour observation of Agent Boles, the only alcohol served to the Witmers at all were drinks given to all three by the female bartender at 5:01 p.m., and drinks given to the father and son by Hooper at 5:34 p.m.

37. Agent Boles got his fourth beer at 6:37 p.m., shortly after the Witmers left.

38. Mr. Hooper had received various training in identifying intoxicated persons. However, he was tending to many duties and other patrons and could not reasonably be expected to watch one or two patrons so closely as Agent Boles did for such a long time, and observe all of the things Agent Boles observed during that time.

39. The evidence does not establish that Dr. Witmer was intoxicated.

40. The evidence, as admitted, is more supportive of a conclusion that William David Witmer was intoxicated; however, the observations on which this conclusion might be based occurred after Witmer had been cut off by Hooper and could not have been observed by Hooper prior to service to Witmer, or prior to Witmer consuming alcoholic beverages.

CONCLUSIONS OF LAW

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

1. The Office of Administrative Hearing has jurisdiction in this matter. N.C.G.S. § 18B-906(a) and N.C.G.S. § 150B-23.

2. The Petitioner has the burden of proof in this matter and pursuant to N.C.G.S. § 150B-25.1B(b) to establish a violation by clear and convincing evidence.

3. Pursuant to N.C.G.S. § 18B-305(a), “it shall be unlawful for a permittee or his employee or for an ABC store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated.” (Emphasis added)

4. The requirement of “knowledge” is a key element in this statute.

The word “knowingly,” as so used, means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged. These words combined in the phrase “wilfully and knowingly” in reference to violation of the statute, mean intentionally and consciously. (Emphasis added)

State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819, 823 (1940).

5. A person acts knowingly when the person is aware or conscious of what he or she is doing.

Knowledge means ‘an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it and his direction of it are such as to give him actual information concerning it.’ State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Underwood v. State Bd. of Alcoholic Control, 278 N.C. 623, 632, 181 S.E.2d 1, 7 (1971).

6. In interpreting the very statute at issue herein, the North Carolina Court of Appeals held that the burden is on the Petitioner to prove that “the patron was intoxicated and that the licensee or permittee knew or should have known that the patron was in an intoxicated condition at the time he or she was served.” Harshbarger v. Murphy, 90 N.C. App. 393, 397, 368 S.E.2d 450, 452 (1988).

7. Pursuant to ABC Commission Rule 14B NCAC 15B.0204, “no permittee or his employee shall allow an intoxicated person to consume alcoholic beverages on his licensed premises.” (Emphasis added) Thus, there must be sufficient evidence to demonstrate the patron was “intoxicated” at the time he or she was allowed to consume on the premises.

8. The NC ABC Commission Rule 14B NCAC 15B.0101(2) defines the term “intoxicated” as

the condition of a person whose mental or physical functioning appears to be presently substantially impaired as a result of the use of alcohol or other substance, such as when the person appears to a reasonable observer to be so far under such influence that: (A) the person's emotions are conspicuously uncontrolled; or (B) the person's intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech and

coordination of volition with muscular action, or some of these faculties or processes are materially impaired.

9. The listing of ways in which one's degree of impairment may be shown in 14B NCAC 15B.0101(2) are illustrative and are neither exclusive or all inclusive.

10. The test established by ABC Commission rules are more stringent by definition than that found in the traffic laws for impaired driving. For driving while impaired, the test is "appreciable impairment of either his bodily or mental faculties or both." Here, the test is "substantial" impairment to show intoxication.

11. Black's Law Dictionary, 5th Edition, defines "appreciable" as: "Capable of being estimated, weighed, judged of, or recognized by the mind. Capable of being perceived or recognized by the senses. Perceptible but not a synonym of substantial." (Emphasis added)

12. Black's defines "substantial" as: "Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable."

13. Rule 14B NCAC 15B.0101(2) applies the "reasonable person" standard to the person who must make the knowing determination that the patron is substantially intoxicated. Thus, the rhetorical question is to whom this standard is applied.

14. It is obvious that the reasonable observer has to be the reasonable bartender under the facts and circumstances of the particular case. The bartenders certainly cannot be held to the same standard as law enforcement officers. That would then require all bartenders in the state to have the same degree, expertise and knowledge as even seasoned and veteran law enforcement officers. And, as in this case, the law enforcement officer has no other duty but to watch the patron for two hours, whereas the bartender has many other duties to perform.

15. The "reasonable person" standard in the facts and circumstances of this case are applied to bartender Hooper to determine if, under these facts and circumstances, he acted reasonably and as any other reasonable bartender might.

16. The evidence, especially the video, does not support the conclusion that Hooper either knew or should have known that the father and son Witmers were substantially intoxicated at the time he sold them an alcoholic beverage, or that he allowed them to consume alcohol while substantially intoxicated.

17. The last time the Witmers were last served was 5:34 p.m., which was the only time Hooper served them. Agent Meekins did not make any observations of either Witmer until exactly one hour later. The observations by Agent Boles are not supported by the evidence, especially the video, with the possible exception of the loud and boisterous behavior. That behavior alone is not sufficient for a reasonable bartender to conclude with requisite knowledge and certainty that those patrons were substantially intoxicated.

18. Viewed in totality of the particular facts and circumstances of this contested case, and especially the video, the evidence does not corroborate that Dr. Witmer was substantially intoxicated to the degree that a reasonable observer would know or should know that he was substantially impaired. Even with additional indicia of impairment (as opposed to intoxication), based on what Hooper could observe, there was not sufficient indications that either Witmers were substantially impaired at the time he served them.

19. There is not clear and convincing evidence presented by Petitioner that demonstrates that Respondent's employee, Andrew Scott Hooper, knowingly sold alcoholic beverages to David Scott Witmer, an intoxicated person, on February 22, 2016, in violation of N.C.G.S. § 18B-305(a).

20. There is not clear and convincing evidence presented by Petitioner that demonstrates David Scott Witmer was a substantially intoxicated person to a degree that Respondent's employee, Andrew Scott Hooper, reasonably either knew or should have known he was substantially intoxicated when Hooper allowed David Scott Witmer to consume alcoholic beverages while upon the licensed premises, on February 22, 2016, in violation of ABC Commission Rule 14B NCAC 15B.0204.

21. There is not clear and convincing evidence presented by Petitioner that demonstrates William Davis Witmer was a substantially intoxicated person to a degree that Respondent's employee, Andrew Scott Hooper, reasonably either knew or should have known he was substantially intoxicated when Hooper allowed William Davis Witmer to consume alcoholic beverages while upon the licensed premises, on February 22, 2016, in violation of ABC Commission Rule 14B NCAC 15B.0204.

22. Although not raised as an issue in this case, it is noted that there is no evidence that the substances consumed by the Witmers contained any alcohol.

FINAL DECISION

Based upon the foregoing Findings of Facts and Conclusions of Law, the undersigned finds that the Petitioner has failed to carry its burden of proof in this case that the alleged violations occurred. Therefore, it is hereby Ordered that NO PENALTY should be imposed.

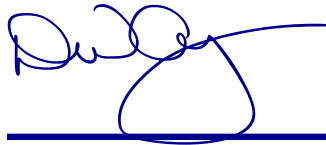
NOTICE

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

Under N.C. Gen. Stat. § 150B-45, any party wishing to appeal this Final Decision 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 a Petition for Judicial Review within 30 days after being served with a written copy of this Final Decision.**

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. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review, and requires service of the Petition for Judicial Review on all parties. 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 27th day of July, 2017.



Donald W Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 28th day of July, 2017.



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