



**James Robert Gordon, t/a Smokey's Restaurant v. Virginia Alcoholic Beverage Control Board et al.**

Case No. CL10-701

**CIRCUIT COURT OF ROANOKE COUNTY, VIRGINIA**

*81 Va. Cir. 388; 2010 Va. Cir. LEXIS 277*

December 1, 2010, Decided

**HEADNOTES**

On an appeal of an administrative agency decision to a circuit court, the burden is on the appellant to designate and demonstrate an error of law subject to review by the court.

On an appeal of an administrative agency decision, the court is required to give deference to the agency decision based on the proper application of its expert discretion.

Administrative agency findings of fact may be rejected by a court on appeal only if, after considering the record as a whole in the light most favorable to the agency, the reviewing court determines that a reasonable mind would necessarily come to a different conclusion.

**JUDGES:** **[\*\*1]** JUDGE ROBERT P. DOHERTY, JR.

**OPINION BY:** ROBERT P. DOHERTY, JR.

**OPINION**

**[\*388]** BY JUDGE ROBERT P. DOHERTY, JR.

This matter went to a hearing officer, then to the full Alcoholic Beverage Control Commission, and is now on appeal to this Court. The owner of Smokey's Restaurant objects to the decision suspending his license to sell beer. This action was taken by the Board upon finding that an employee of Smokey's sold two bottles of beer to a seventeen-year-old in violation of §§ 4.1-304 and 4.1-225(1)(c), *Code of Virginia* (1950), as amended, and in violation of 3 VAC 5-50-10. They also found that he kept wine on the licensed premises, taxed distilled spirits, and untaxed moonshine, all of which he was not authorized to sell or possess on premises with his beer sales only license. They found these facts violated §§ 4.1-324(A)(7)

and 4.1-225(1)(c), *Code of Virginia* (1950), as amended. Finally, the Licensee was found to have failed to keep complete, accurate, and separate records of his beer sales on the premises as required by §§ 4.1-204 and 4.1-225(1)(c) *Code of Virginia* (1950), as amended, and by 3 VAC 5-70-90. Smokey's argues that the Board erred in finding the evidence sufficient to make it liable for the above **[\*\*2]** allegations.

**[\*389]** In **[\*\*3]** support of its argument Smokey's asserts that the beer sales to the minor was simply a mistake by the bartender on the age of a customer, no sale was completed because money was not exchanged, and the minor never took possession of the beer. In support of its argument as to the on premises possession of the unlicensed wine, taxed alcohol, and untaxed moonshine, Smokey's contends that the on premises possession of items alleged to have violated the scope of its ABC license, meaning the wine, taxed alcohol, and untaxed moonshine, were not kept on the licensed premises but in a locked storage room separate from its business that was used only for personal storage. Smokey's further argues that the special agents of the ABC board exceeded their authority by demanding and gaining access to the storage room without a search warrant or without permission. Finally, Smokey's argues that because the owner's wife, who was the bookkeeper, testified that respondent kept the appropriate records on site, the board and the hearing officer erred in finding sufficient evidence that respondent failed to keep complete, accurate, and separate records of his beer sales on the licensed premises.

*Standard of **[\*\*4]** Review and Analysis*

On an appeal of an agency decision to the Circuit Court, the burden is on the complaining party to "designate and demonstrate an error of law subject to review by the court." § 2.2-4027, *Code of Virginia* (1950), as

amended. The Court is required to give deference to an agency decision based on the proper application of its expert discretion. See *Fralin v. Kozlowski*, 18 Va. App. 697, 701, 447 S.E.2d 238, 11 Va. Law Rep. 71 (1994). Additionally, the Court gives deference to the findings of the hearing officer and of the Board, as both had the opportunity to observe the witnesses first hand and determine the credibility and appropriate weight to give to the testimony of each witness and to each item of evidence.

The errors assigned by the Petitioner in this case deal with whether the agency had sufficient evidence to support its findings of fact and whether it properly applied the law. See *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1, 4 Va. Law Rep. 2665 (1988). Where there has been a formal agency hearing pursuant to the Virginia Administrative Process Act, as here, the determination of factual issues is to be made "upon the whole evidential record provided by the agency." *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123 (1983). [\*\*5] The findings must be supported by substantial evidence in the record. The phrase "substantial evidence" is a term of art and refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* Agency findings of fact may be rejected only if, after considering the record as a whole in the light most favorable to the agency, the reviewing court determines that a reasonable mind would necessarily come to a different conclusion. *Id.*

[\*390] What all of this means is that if it is possible for two different triers of fact to hear the same evidence

but reach different conclusions based upon which witnesses they believe and the weight they give to certain items of evidence, then this Court is not allowed to second guess those findings of fact on appeal. "When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did." § 2.2-2027, *Code of Virginia* (1950), as amended. The Court finds that there was "substantial evidence" on [\*\*6] the record for the Board to make the decisions that they did and that they properly applied the law. In reaching this conclusion, the Court took into consideration not just the individual items of evidence or snippets of testimony emphasized by the individual parties, but the totality of the circumstances included in the entire record.

Substantial evidence supported the findings appealed by Licensee, including but not limited to (1) that Licensee sold alcoholic beverages to a minor; (2) that Licensee kept on its premises alcoholic beverages that he was not authorized to sell or possess on the premises including wine, taxed distilled spirits, and untaxed moonshine; (3) that the licensee had expanded the business premises to include the storage room; (4) that the search of the storage room was consensual; and (5) that the licensee failed to keep complete, accurate, and separate records of beer sales on the premises. All of these findings are affirmed. The Board's actions suspending Smokey's ABC license is also affirmed.



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**Gordon v. Va. Alcoholic Bev. Control Bd., 2010 Va. Cir. LEXIS 277, 81 Va. Cir. 388 (2010)**

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**SHEPARD'S SUMMARY**

**Unrestricted Shepard's Summary**

**No subsequent appellate history.**

**Citing References: None**

**PRIOR HISTORY ( 0 citing references )**

**(CITATION YOU ENTERED):**

*Gordon v. Va. Alcoholic Bev. Control Bd., 2010 Va. Cir. LEXIS 277, 81 Va. Cir. 388 (2010)*

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

JAMES ROBERT GORDON )  
SMOKEY'S RESTAURANT & LOUNGE ) **MOTION TO RECONSIDER**  
(LICENSE NO.: 052345-Beer On & Off Premises )  
INCIDENT NOS: 200808200058 & 200807080231) )  
 ) CIVIL NO.:CL10000701  
v )  
 )  
DEPARTMENT OF ALCOHOL BEVERAGE CONTROL )  
COMMONWEALTH OF VIRGINIA )

The Petitioner, James Robert Gordon, t/a Smokey's Restaurant & Lounge, by counsel, hereby moves this Court to reconsider the letter opinion dated December 1, 2011 in regard to **Charges 2, 3, and 4** (possession of alcoholic beverages in the locked storage room) on the grounds this Court has misapplied the standard of review, misapplied the law in this appeal, and there is no evidence to support the decision of the ABC Board.

**CHARGES 2, 3 AND 4 (POSSESSION OF ALCOHOLIC BEVERAGES IN THE LOCKED STORAGE ROOM) SHOULD BE DISMISSED BECAUSE THE LOCKED STORAGE ROOM WAS NOT PART OF THE "LICENSED PREMISES"**

Charges 2, 3, and 4 allege the Petitioner on August 19, 2008 kept on the licensed premises "any alcoholic beverages other than that which he is authorized to sell by such license or by this title". Va. Code §§ 4.1-324A.7 and 4.1-225.1c. Charge 2 alleges possession of wine; Charge 3 alleges possession of ABC bought alcoholic beverages; and Charge 4 alleges possession of moonshine whiskey. Each of these beverages was found in a locked storage room down the hall from, but not part of, the restaurant, nor part of the "ABC licensed premises."

The Court adopted the ABC Board's reasoning that the locked storage room was part of the "licensed premise" despite the uncontradicted evidence that the written ABC license itself

clearly describes the “licensed premise” as not including the locked storage room. There is no dispute about this fact.

The letter opinion of this Court held that there is “substantial evidence” that “the licensee had expanded the business premises to include the storage room”. (emphasis added). But the issue in this case involves the “licensed premises”, not the “business premises”. This issue is very much a legal one, and not just a factual issue, as explained more fully below. Moreover, the evidence shows that the locked storage room was not used as part of the restaurant, or “business premises”.

The ABC Board adopted the tortured reasoning that the licensee himself could somehow expand his ABC license to include the locked storage room which was never part of his ABC license. There is nothing to warrant this bizarre reasoning. For example, there was never a proceeding to alter or expand his “licensed premises”.

Thus, it is contrary to the law to deem the locked storage room part of the ABC license when it clearly and unambiguously does not include the locked storage room. Nor is there any evidence whatsoever, much less substantial evidence, to support the decision.

This is not a case involving the need for “specialized expertise” of the ABC Board. It is plainly a judicial function to apply the clear and unambiguous description of the “licensed premises” in the record to the location of the locked storage room, and it simply does not fit.

In Johnston-Willis, Ltd v. Kenley, 369 S.E. 2d 1, 6 Va. App. 231 (Va. App. 1988) Judge Koontz explained the appropriate standard of review: namely, legal issues are not given the deference given to factual issues. While factual issues are reviewed under the ‘substantial evidence’ standard of review, this test is “wholly inappropriate” in regard to legal issues.

“Thus, where the legal issues require a determination by the reviewing court whether an agency has, for example, accorded constitutional rights, failed to comply with statutory authority, or failed to observe required procedures, less deference is required and the

reviewing courts should not abdicate their judicial function and merely rubber-stamp an agency determination.”

Id. at 7-8.

Here, not only is there no evidence to support the ABC Board decision, but the appeal involves legal issues. It implicates the statutory jurisdiction and authority of the ABC Board in regard to the scope of its regulatory authority. For example, it implicates the authority of the ABC Board to vary, expand or limit, the scope of a previously issued license, after the fact, without notice or due process proceeding. Under the holding of the ABC Board, the due process rights of the Petitioner as to the scope and limitations of his license are violated. The ABC Board decision has restricted, without prior notice or proceeding, where alcoholic beverages – other than beer covered by his license -- can be stored.

The issue implicates the constitutional due process rights of a licensee to notice that he could not maintain certain alcoholic beverages in a location not covered by the description in his license, i.e., the private locked storage room not described as part of his ABC “licensed premises”. His constitutional due process rights are violated when he is sanctioned for possessing alcoholic beverages on premises not covered, and not believed to be covered, by his license. For example, the ABC Board cannot sanction a person for storing such beverages at a private home. In short, the issues involved in this appeal in regard to Charges 2, 3 and 4 are clearly legal and not just factual in nature.

To recap the facts, noted in the Petition for Appeal, the ABC application investigation report clearly shows that the “licensed premises” constitutes only the 64 ft. x 34 ft. portion of the building that is the restaurant and that the remaining portions of the building (50 ft. x 25 ft.) are neither licensed as, nor used as, the restaurant. Rather, they are used as PJ’s Beauty Salon and a private locked storage room, among other things. Thus, the locked storage room was

never made part of the "licensed premises" as described in the ABC license itself, as a matter of law.

The leasing agent explained that the restaurant was only the 64 ft. x 34 ft. portion of the building, described in photographs and diagrams in evidence. And this is exactly what is set forth in the application investigation report. The fact that the locked storage room was never part of the licensed premises is further explained by the fact that, when the license was obtained in 1990, the remainder of the L shaped building, namely, the 50 ft. x 25 ft. portion, was subleased to other persons for a hair salon and an insurance office. The exterior doors to this other part also do not open to the restaurant.

The hair salon portion remains subleased to another person and the insurance company space later became Mr. Gordon's private storage room, but "was never used as Smokey's Restaurant." Tr. of November 4, 2009 Hearing at 135. The license has never been changed and "the restaurant . . . remains" that 64 ft. x 34 ft. part of the building. Tr. of November 4, 2009 Hearing at 142. ABC agents never saw the storage room in the initial or subsequent inspections, and the dimensions of the licensed premises never changed. "[I]t's been the same since we signed the lease in September of 1990." Tr. of November 4, 2009 Hearing at 145.

The locked storage room was also never used as part of the restaurant. Indeed, it was kept locked at all times, was not accessible to any patron or employee, was not used to store, prepare or serve any food at Smokey's, and was not used to sell or serve beer under the beer license. It was strictly a private, storage room filled with junk and miscellaneous personal items. And there is absolutely no evidence to the contrary.

Betty Gordon testified that since 1990 she worked on the financial records at home because of convenience and would take them back to the restaurant when she finished posting the invoices and check stubs to the books. As bookkeeper, she maintained the records behind

the bar at the restaurant for an ABC agent to review and then stored them at home. Tr. of May 18, 2009 Hearing at 96 – 99. On the night of August 19, 2008, invoices from part of June and July (representing six or eight weeks) had been inadvertently left in the storage room by Mr. Gordon in transit on the way home. But they were not ever stored in the room.

In short, there is no evidence whatsoever that the locked storage room was used as part of the restaurant, much less licensed as such.

Further, as previously noted, under well established Virginia law, a restaurant is a place where food is prepared for service to the public or where the food is served.

“‘Restaurant’ means any one of the following:

a. Any place where food is prepared for service to the public on or off the premises, or any place where food is served. Examples of such places include but are not limited to lunch rooms, short order places, cafeterias, coffee shops, cafes, taverns, delicatessens, dining accommodations of public and private clubs, kitchen facilities of hospitals and nursing homes, dining accommodations of public and private schools and colleges, and kitchen areas of local correctional facilities . . . . Excluded from the definition are places manufacturing packaged or canned foods which are distributed to grocery stores or other similar food retailers for sale to the public.”

Va. Code § 35.1-1(9). (emphasis added)

The Virginia Supreme Court has explained this clear law in *Alpaugh v. Wolverton*, 184 Va. 943, 36 S.E.2d 906 (1946), (“restaurant” as an establishment “where meals and refreshments are served”). The evidence is uncontradicted that food is prepared for service and is served solely in the open area of the restaurant where customers are located. Food is neither “prepared” nor “served” in the locked storage room.

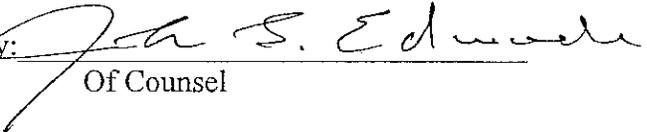
Thus, the locked storage room is not part of the “ABC licensed premise”, nor is it a “restaurant” within the meaning of the Code of Virginia, and items found there can not constitute a violation of Charge 2, 3 or 4, as a matter of law. Nor is there any evidence to support the ABC Board’s decision.

**CONCLUSION**

For these reasons, this Court should reconsider the letter opinion as to **Charges 2, 3 and 4** on the grounds the Final Decision and Order of the ABC Board is contrary to the law and there is no substantial evidence to support the decision and that this Court should grant such further relief as may be just and equitable and grant the Petitioner his costs.

Respectfully submitted,

JAMES ROBERT GORDON  
SMOKEY'S RESTAURANT &  
LOUNGE

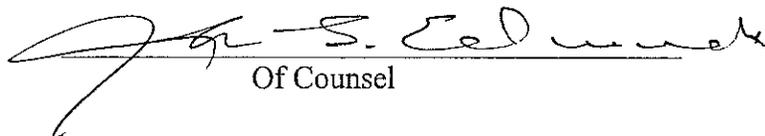
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 9<sup>th</sup> day of June 2011, a copy of this Motion to Reconsider was served upon counsel for the Department of Alcohol Beverage Control: Michelle Welch, Assistant Attorney General, 900 E. Main Street, Richmond, Virginia 23219 by first class mail and facsimile to (804) 371-2087, and upon W. Curtis Coleburn, Secretary to the Board, 2901 Hermitage Road, Richmond Virginia 23220 (P.O. Box 27491-7491) by first class mail and facsimile to (804) 213-4731.

  
Of Counsel