

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 ABC 04787

<p>NC Alcoholic Beverage Control Commission Petitioner,</p> <p>v.</p> <p>MAA Gayatri Properties LLC T/A Ganesh Mart Respondent.</p>	<p style="text-align: center;">FINAL DECISION</p>
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This case was heard before Administrative Law Judge Melissa Owens Lassiter on March 23, 2021, via Microsoft Teams. Petitioner filed a proposed Final Decision on April 6, 2021, and Respondent filed a proposed Response thereto on April 9, 2021.

APPEARANCES

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

For Respondent: Neelimaben Gopaldas Parikh
Maa Gayatri Properties, LLC
Greensboro, North Carolina

ISSUES

1. Whether Respondent's employee and LLC member/manager, Neelimaben Gopaldas Parikh, failed to allow Alcohol Law Enforcement agents to view the entire premises during a lawful inspection, on or about March 18, 2020, at 1:30 p.m., in violation of N.C. Gen. Stat. § 18B-502(a)?

2. Whether Respondent's employee and LLC member/manager, Neelimaben Gopaldas Parikh, failed to keep the licensed premises clean, arranged, and well-lighted to allow ready access and observation by enforcement officers and to avoid any undue hazards to patrons (to wit, trash and empty malt beverage containers littered around exterior of building), on or about March 18, 2020, at 1:30 p.m., in violation of ABC Commission Rule 14B NCAC 15B .0212(b)?

GOVERNING STATUTES AND RULES

N.C. Gen. Stat. § 18B-104
N.C. Gen. Stat. § 18B-502(a)
N.C. Gen. Stat. § 1003
N.C. Gen. Stat. § 1005(a)(3)
14B NCAC 15B .0212(b)

WITNESSES

For Petitioner: Special Agent Trevor Howard, NC ALE
 Special Agent Nicholas Jones, NC ALE

For Respondent: Janvibn Parikh

FINDINGS OF FACT

BASED UPON careful consideration of the sworn witness testimony at hearing, documents admitted into evidence, and the entire record in this proceeding as appropriate for consideration, having weighed all evidence and assessed the credibility of the witnesses, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; whether such testimony is consistent with all other believable evidence in the case, and upon assessing the preponderance of the evidence from the record as a whole, the undersigned finds:

1. Since February 2008, Respondent has held permanent Off Premises Malt Beverage, Unfortified Wine, and Fortified Wine ABC permits ("ABC permits") for "Ganesh Mart," an establishment located at 1803 East Webb Avenue, Burlington, North Carolina.

2. On or about March 6, 2020, Alcohol Law Enforcement ("ALE") Special Agent Trevor Howard ("Howard") received an anonymous complaint from the Alamance County Sheriff's Office regarding an alleged controlled substance violation occurring at Respondent's establishment.

3. On or about March 18, 2020, at approximately 1:30 p.m., Agent Howard and ALE Special Agent Nicholas Jones ("Jones") conducted an inspection of Respondent's establishment. Upon entering the establishment, Howard and Jones identified themselves to the manager, Peggy Baldwin Barr ("Barr"). Barr was the only employee present at the business.

4. Agent Howard requested to view the beer and wine invoices for the business. Barr stated she did not know where the invoices were located and called a female employee who identified herself as the owner of the business. Howard spoke with the female, who was identified during the hearing as Janvibn Parikh, the daughter of Respondent's employee and corporate officer, Neelimaben Gopaldas Parikh. Agent

Howard requested to view the beer and wine invoices. Ms. Parikh advised Howard the invoices were in a cabinet under the cash register and in the office.

5. Agent Howard found that the office door was locked. He informed Ms. Parikh that he needed to view the entire premises. Ms. Parikh advised Howard that she would drive to the establishment to unlock the door and would be there in approximately twenty to twenty-five minutes.

6. While waiting on Ms. Parikh, Agent Howard continued the inspection by walking around the exterior of the premises. Howard found a twisted plastic sandwich bag containing a green substance residue on the sidewalk in front of the business.

7. Howard also observed empty malt beverage containers in the business' parking lot, beside the trash bin in the parking lot, and behind the exterior of the building. Some of the empty containers were still in black plastic bags. One half-empty malt beverage can was located near the pay phone box on the exterior of the business. Agent Howard did not see any trash located inside the establishment.

8. Agent Howard discussed issues such as age restricted products, four acceptable forms of identification for age verification and consumption of alcohol on the premises with employee Barr. As Agent Howard and Barr walked around the exterior of the premises, Howard pointed out the empty malt beverage containers located on three of the four sides of the building, as well as the plastic baggie. Howard reiterated the criminal and civil penalties of allowing patrons to consume on the premises.

9. Barr contacted Ms. Parikh again, who stated it would be another twenty minutes before she arrived at the business. Ms. Parikh was driving from High Point and was delayed by an automobile accident. Agent Howard did not believe that Ms. Parikh would show up at the business in another 20 minutes, so he and Jones left the business.

10. Agent Howard informed Barr that a violation report would be submitted to the ABC Commission, and that he and Jones would not be able to wait any longer for Ms. Parikh to arrive.

11. While Agent Howard visited Respondent's establishment to investigate a complaint of an alleged controlled substance violation occurring at Respondent's establishment, Agent Howard found no credible evidence to support that complaint. Although Agent Howard found a plastic sandwich bag containing a green substance on the exterior of the business, he did not send the residue to a lab for chemical analysis and did not charge Respondent with any criminal charges related to the residue.

12. When Agent Howard conducts inspections of ABC permitted establishments pursuant to N.C. Gen. Stat. § 18B-502, and the business' permittee is not on the premises, Howard usually waits fifteen to twenty minutes for the permittee to come to the business. Agent Howard usually exercises his discretion and judgment in deciding how long to wait for the permittee to arrive at the permitted establishment. In this case,

Agents Howard and Jones waited approximately twenty to twenty-five minutes for Ms. Parikh to arrive at Respondent's establishment.

13. There was no evidence that Ms. Barr or Ms. Parikh intentionally refused or prohibited Agents Howard and Jones from inspecting the premises.

14. At hearing, Agent Howard admitted that he often issues a written warning to an ABC permitted establishment if he is unable to conduct a full inspection of the entire permitted premises.

15. In this case, Ms. Parikh arrived at Respondent's establishment approximately thirty-five minutes after her first conversation with Agent Howard. She walked around the entire exterior of the premises, saw two empty "smashed" beer cans around the outside of the business, and threw those cans away.

16. At hearing, Agent Howard opined that large amounts of trash could cause health issues. However, Howard did not indicate the number of empty beer cans he observed around the exterior of Respondent's business. While Agent Jones testified that he saw a "plethora" of empty beer cans on the side and back of the business' exterior, Agent Jones did not indicate the actual number of empty beer cans he observed. Agent Howard did not take pictures of the trash located outside the establishment and did not know how long the trash had been outside the business.

17. Agent Howard has not returned to Respondent's business since March 18, 2020 to conduct another inspection of the premises.

18. Neither Howard nor Jones provided any evidence establishing how the trash they observed on Respondent's exterior premises posed an undue hazard to anyone.

19. Respondent has held ABC permits at this establishment since February 2008 and has no prior ABC violations.

20. Respondent's employees clean the exterior of the establishment twice a day, once in the morning and once at night. Through Ms. Parikh's testimony, Respondent established that it kept its beer and wine invoices underneath the counter of the business for ten years. On the date in question, Respondent kept some invoices underneath the cashier counter and some in the locked office. Respondent could not leave the office door in its business unlocked or leave a key with employees to unlock the office, because Respondent stores cash, cigarettes, and various documents in the office for safety or security reasons.

21. In this case, Agent Howard made a discretionary decision to cite Respondent for failing to keep a clean premises and failing to maintain 3 years of beer and wine invoices on the licensed premises. Howard cited Respondent for the ABC violations based on the amount of trash located on the exterior of the business and

because he could not review 3 years of beer and wine invoices which Respondent was required to maintain on its licensed premises. Agent Howard did not indicate at hearing why he chose to cite Respondent for the alleged violations on March 18, 2020 instead of issuing Respondent a written warning.

22. Petitioner requested a fifteen-day suspension of Respondent's ABC permits and a \$500.00 fine, in accordance with N.C. Gen. Stat. § 18B-104(a)(3a), for the subject alleged ABC violations. However, Petitioner presented no evidence at hearing explaining the factors it considers in determining the proposed sanction in this case. Neither did Petitioner present any evidence at hearing explaining and/or justifying the proposed sanction of a 15-day suspension and \$500.00 fine, other than argument that the proposed sanction was in accordance with N.C. Gen. Stat. § 18B-104.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the undersigned concludes:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. N.C. Gen. Stat. § 18B-906(a) and N.C. Gen. Stat. § 150B-23.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the 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).

3. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E. 2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E. 2d 588 (1993).

4. N.C. Gen. Stat. § 150B-25.1(b) states:

In a contested case involving the imposition of civil fines or penalties by a State agency for violation of the law, the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed rests with the State agency.

5. The clear and convincing evidence standard is greater than a preponderance of the evidence standard required in most civil cases, *In re Montgomery*, 311 N.C. 101, 109-110, 316 S.E.2d 246, 252 (1984), and requires "evidence which should 'fully convince.'" *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934)).

Alleged Violation of N.C. Gen. Stat. § 18B-502(a)

6. N.C. Gen. Stat. § 18B-502(a) provides:

To procure evidence of violations of the ABC law, alcohol law-enforcement agents, employees of the Commission, local ABC officers, and officers of local law-enforcement agencies that have contracted to provide ABC enforcement under G.S. 18B-501(f) shall have authority to investigate the operation of each licensed premises for which an ABC permit has been issued, to make inspections that include viewing the entire premises, and to examine the books and records of the permittee. The inspection authorized by this section may be made at any time it reasonably appears that someone is on the premises. . . .

(Emphasis added).

7. On March 18, 2020, Agents Howard and Jones conducted an unannounced inspection of Respondent's ABC licensed premises, as authorized by N.C. Gen. Stat. § 18B-502(a), to investigate a March 6, 2020 complaint of an alleged controlled substance violation occurring on Respondent's premises. The agents found no credible evidence to support that complaint. Although Agent Howard found a plastic sandwich bag containing a green substance on the exterior of the business, he did not send the residue to a lab for chemical analysis and did not charge Petitioner with any criminal charges related to the residue.

8. Agents Howard and Jones were unable to view the entire premises during that inspection because the office door was locked, and Respondent had not left a key on the premises for Respondent's employee to access the office. Respondent kept the office in Respondent's establishment locked because it stored valuable merchandise and cash in the office. It was reasonable for Respondent not to leave its employee with a key to the office because Respondent stored valuable merchandise and cash in the office for security or safety reasons.

9. Once Respondent's employee Barr notified Ms. Parikh, the daughter of the permittee, of the inspection, Ms. Parikh informed Agent Howard that she would arrive at the establishment within twenty minutes. However, Ms. Parikh was delayed by an automobile accident, and informed Howard she was delayed by another twenty minutes. Agent Howard did not believe Ms. Parikh would appear at the business, and he left the business. Howard and Jones spent approximately twenty to twenty-five minutes at the establishment. Ms. Parikh arrived at Respondent's business within thirty-five minutes after being notified of the inspection.

10. The ultimate question is whether it was reasonable for Agent Howard to wait for Ms. Parikh to arrive at Respondent's establishment to unlock the office, so Agent Howard could view "the entire premises." Agent Howard admitted at hearing that when he conducts ABC inspections, and the business' permittee is not on the premises, Howard

exercises his discretion and judgment in deciding how long to wait for the permittee to arrive at the permitted establishment. In this case, Agents Howard and Jones waited approximately twenty to twenty-five minutes for Ms. Parikh to arrive at Respondent's establishment. However, Agent Howard failed to give any credible reason, at hearing, why he did not wait for Ms. Parikh and why he did not believe she would arrive at the business within another twenty minutes.

11. Given the factual circumstances of this case, and the evidence presented at hearing, the undersigned concludes that a thirty-five-minute wait for Ms. Parikh to arrive at Respondent's establishment, after Ms. Parikh specifically told Howard she was driving to the establishment, was a reasonable time for Agent Howard to wait so he could complete the ABC inspection of Respondent's establishment. Had Agent Howard waited for Ms. Parikh, he would have been able to complete his inspection and view the office and entire premises. There was no evidence that Ms. Barr or Ms. Parikh intentionally refused or prohibited Agents Howard and Jones from inspecting the premises. Instead, both Barr and Parikh made reasonable efforts to comply with Howard's request. Under these circumstances, Petitioner failed to prove by clear and convincing evidence that Respondent failed to allow Agents Howard and Jones to view the entire premises during its inspection on March 18, 2020 in violation of N.C. Gen. Stat. § 18B-502(a).

12. Agent Howard admitted at hearing that he often issued written warnings to ABC permittees if he was unable to conduct a full inspection of the entire permitted premises. In this case, Agent Howard made a discretionary decision to cite Respondent for failing to keep a clean premises and failing to maintain 3 years of beer and wine invoices on the premises. Yet, Agent Howard failed to give a credible explanation, at hearing, why he decided to cite Respondent's business for an alleged violation instead of giving them a written warning.

13. Petitioner also failed to present any evidence at hearing explaining the factors Petitioner used in deciding to impose the proposed sanction of a 15-day suspension and \$500.00 fine for violating N.C. Gen. Stat. § 18B-502(a). Neither did Petitioner present any evidence at hearing justifying why it determined the 15-day suspension and \$500.00 fine was the appropriate sanction, other than such sanction was in accordance with N.C. Gen. Stat. § 18B-104(a).

14. Even if one concluded that thirty-five minutes was an unreasonable time for Agent Howard to wait to complete his inspection of Respondent's establishment, and thus conclude that Respondent technically violated N.C. Gen. Stat. § 18B-502(a), the factual circumstances of this case and the minor nature of this violation do not rise to a sufficient level to justify the imposition of a 15-day suspension of Respondent's ABC permits and a \$500.00 fine.

Alleged Violation of Rule 14B NCAC 15B .0212(b)

15. Pursuant to ABC Commission Rule 14B NCAC 15B .0212(b), "a permittee shall keep the licensed premises clean and arranged and well lighted to allow ready

access and observation by enforcement officers and to avoid any undue hazards to patrons.”

16. While the ALE agents found trash and empty malt beverage containers littered around the exterior of Respondent’s building, there was insufficient evidence presented at hearing establishing the amount of trash on the exterior of Respondent’s business, and how long the trash had been there. There was no evidence presented at hearing proving the trash existing on Respondent’s premises created an undue hazard to Respondent’s patrons.

17. Petitioner failed to prove by clear and convincing evidence that Respondent violated ABC Commission Rule 14B NCAC 15B .0212(b) on March 18, 2020 by failing to keep the licensed premises clean and arranged to avoid any undue hazards to patrons.

FINAL DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent did not violate N.C. Gen. Stat. § 18B-502(a) and 14B NCAC 15B .0212(b) on March 18, 2020 and Petitioner shall impose no sanctions against Respondent based on the March 18, 2020 alleged violations.

NOTICE OF APPEAL

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 as indicated by 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 April, 2021.



Melissa Owens Lassiter
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.

Rachel Margaret Spears
NC ABC Commission
rachel.spears@abc.nc.gov (served electronically on April 14, 2021)
Attorney For Petitioner

MAA Gayatri Properties LLC
T/A Ganesh Mart
10 Pilot Ridge Court
Greensboro NC 27407
Respondent

This the 15th day of April, 2021.



Jerrod Godwin
Administrative Law Judge Assistant
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