

STATE OF IOWA
BEFORE THE DEPARTMENT OF COMMERCE
ALCOHOLIC BEVERAGES DIVISION

IN RE:

DOCKET NO. A-2014-00066
DIA NO. 14ABD016

Matt & Karen, Inc.
d/b/a O Face Bar
2400 9th Avenue
Council Bluffs, Iowa 51501

PROPOSED DECISION

Liquor License No. LC-38449

On May 6, 2014, the Council Bluffs City Council (local authority) denied the liquor license renewal application filed by Matt & Karen, Inc., d/b/a O Face Bar (licensee) for Liquor License No. LC-38449. The licensee filed a timely appeal with the Iowa Alcoholic Beverages Division (Division). A telephone hearing was held before the undersigned administrative law judge on July 28, 2014. The licensee was self-represented by owner Matthew Overmyer. The local authority was represented by City Attorney Don Bauermeister.

THE RECORD

The record includes the Electronic Beer Permit Renewal Application; the Division's May 7, 2014 Notice of Denial to Licensee; Notice of Appeal; Notice of Hearing; and the testimony of Matthew Overmyer.

ISSUE

Whether the Council Bluffs City Council (local authority) properly denied the renewal application filed by Matt & Karen, Inc., d/b/a O Face Bar for Liquor License No. LC-38449 based on activities depicted on the reality show Bar Rescue?

FINDINGS OF FACT

Matthew Overmyer is the 100% owner of Matt & Karen, Inc., d/b/a O Face Bar (licensee), which is located at 2400 9th Avenue in Council Bluffs, Iowa. Liquor License

LC-38449 was initially issued to the licensee on May 24, 2011. On or about April 15, 2014, the licensee electronically filed the renewal application for its liquor license. The licensee's answers to the criminal history question on the application indicated that the licensee's owner had not been charged, arrested, indicted, or convicted of any felony or misdemeanor offenses since the license was last renewed. (Electronic Liquor License Renewal Application)

On May 6, 2014, the local authority entered its denial of the license on the "Local Authority Endorsement" page of the electronic renewal application. The "reason for denial" section of the "Local Authority Endorsement" page states: "For activities depicted on the reality show Bar Res." The local authority provided the following additional information under the "Comments:"

Further detail made in the denial motion by Council Member Watson, seconded by Council Member Branigan, these activities included but were not limited to acts of disorderly conduct and assault and battery by the owner of the bar and employees of the bar. Violations of the City Fire Code by an employee of the bar; violations of the City Health Code by employees of the bar; violations (sic) of the State law restricting smoking in the bar by both owners (sic) and employees of the bar. And, the general conduct of the owner"

(Electronic Liquor License Renewal Application, Local Authority Endorsement Page)

The local authority did not present any witnesses or exhibits at hearing.

The licensee presented the testimony of its owner, Matthew Overmyer. Mr. Overmyer explained that he was approached by "Bar Rescue," which is a reality television show on Spike TV. In return for participating in the television program, the licensee would get publicity for its business and the opportunity to get the bar remodeled and "set up for success" by the show's host, John Taffer. Mr. Overmyer agreed to participate and signed confidentiality agreements. A camera crew was sent to O Face Bar to film a "casting video" over a one week period. Overmyer was told that the casting video footage would be shown only to John Taffer and executives at Spike TV so they could decide which of a number of bars in the Council Bluffs/Omaha area would be chosen for the show. (Overmyer testimony)

When the filming crew arrived, Overmyer learned that the show wanted to show chaos at the bar, including fighting, disorderly conduct, and an empty bar without customers.

O Face Bar was not open to the public during the filming, and the show's producers did not want the bar's regular customers to be part of the filming. During a one hour segment called the "stress test" Bar Rescue provided people to serve as undercover customers and to complain about the quality of the drinks, service, or food. During the filming, Overmyer slapped one of his employees and one of his female employees assaulted another family employee after the Bar Rescue crew suggested that they needed more drama. The crew also filmed Overmyer's wife smoking in the back office of the bar and ringing a bell to keep track of a customer taking shots. Overmyer testified that these scenarios were suggested and encouraged by the crew. He further testified that the filming crew provided the bell and edited the filming of the shots, which actually showed the same shot being taken over and over. (Overmyer testimony)

After three days, Overmyer told the crew that he was done with the "shenanigans" and would not cooperate with filming any more staged scenarios. The crew then left and said they would use the footage that they had. Overmyer believed that the "casting" video taken by the crew would not be used on the television show and was surprised and embarrassed when the casting footage was aired on the March 23, 2014 Bar Rescue episode. O Face Bar has seen a decline in its business since the show aired. (Overmyer testimony).

CONCLUSIONS OF LAW

I. Scope of Issues-Burden of Proof

When a licensee appeals the local authority's denial of its license to the Alcoholic Beverages Division (Division), the hearing held before the Division is the licensee's opportunity to establish its compliance with the requirements for holding the license.¹ The scope of evidence at hearing, however, must generally be confined to those issues for which notice was provided to the licensee prior to hearing.² In addition, although the burden of persuasion lies with the licensee, the local authority is expected to go forward with evidence that supports the reason given for the denial. If the Division Administrator determines, following a hearing, that the licensee complies with the requirements for holding the liquor license, then the Administrator shall order the issuance of the license. If the Administrator determines that the licensee does not comply with the requirements for holding the liquor license, the Administrator shall disapprove the issuance of the license.³

¹ Iowa Code section 123.32(7)(2013).

² 185 IAC 10.21(3).

³ *Id.*

II. Statutes and Rules Defining Good Moral Character Required for Liquor Licensees and Beer Permittees

A liquor control license or beer permit may only be issued to a person who is of “good moral character” as defined by Iowa Code chapter 123.⁴ Some of the “good moral character requirements are objective measures. In order to be a “person of good moral character,” a person must not have had a revoked liquor license in the previous two years, must not have had a felony conviction in the previous five years, and must be a citizen of the United States and an Iowa resident or must be licensed to do business as a corporation in this state.⁵ However, the statutory definition of “good moral character” also includes the following more subjective standard:

- a.* The person has such financial standing and good reputation as will satisfy the administrator that the person will comply with Iowa Code chapter 123 and all laws, ordinances, and regulations applicable to the person's operations.”⁶

This case potentially implicates the “good reputation” portion of that definition. The Division’s administrative rules implement Iowa Code chapter 123 and provide further detail and guidance for evaluating a licensee or permittee’s “good reputation.”⁷ Pursuant to the Division’s rules, the factors that a local authority may consider when evaluating an applicant's “good reputation” specifically include:

- ...pattern and practice by the licensee or permittee or the licensee's or permittee’s agents or employees, of violating alcoholic beverages laws and regulations **for which corrective action has been taken** since the previous license or permit was issued...⁸

Although “corrective action” is not defined by the rule, it clearly would include any administrative or criminal sanctions that have been imposed against the licensee or permittee by the courts, the Division, or the local authority. “Corrective action” should not be read so narrowly, however, so as to eliminate a local authority’s ability to consider recent violations by the licensee or permittee or the licensee’s or permittee’s employees when there has not been sufficient time to obtain sanctions prior to

⁴ Iowa Code sections 123.30(1)(a), 123.127(1)(b), 123.128(2)(2013).

⁵ Iowa Code section 123.3(34)(b),(c), and (d).

⁶ Iowa Code section 123.3(34)(a)(2013).

⁷ 185 IAC 4.2(4).

⁸ 185 IAC 4.2(4)“b.” (emphasis added).

reviewing the renewal application. In those cases, it is reasonable to construe “corrective action” to include the local authority’s formal investigation and/or the issuance of citations, filing of criminal charges, or filing of an administrative hearing complaint against the licensee or permittee and to allow the local authority the opportunity to prove the violation at the administrative hearing.

III. Analysis

The local authority presented no evidence to support its denial of the renewal application. The local authority did not submit the episode of Bar Rescue on which it relied to deny the license. The only evidence in the record is Matthew Overmyer’s testimony and cross-examination.

Based on the limited evidence in the record, the local authority’s decision to deny the liquor license renewal must be reversed. The local authority argued that the denial was justified because the March 23, 2014 Bar Rescue episode depicted drunkenness, assaultive behavior, and smoking on the licensed premises and reflected negatively on the licensee, the city, and the state. Although the record indicates that the licensee exercised poor judgment by participating in the filming of the television show, the record was insufficient to show a pattern of liquor law violations sufficient to justify denying the license renewal application on good moral character grounds. Overmyer credibly testified that the licensee has had only one liquor law violation in over three years. The local authority submitted no contrary evidence. In addition, it does not appear that O Face Bar was open to the public at the time of the filming, and it appears that the segments on the show that depicted assaultive behavior, smoking in the office, and over-serving were staged. Moreover, there is no evidence that the local authority has taken any corrective actions against the licensee or the licensee’s employees for any violation(s) of the state liquor laws.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the decision of the Council Bluffs City Council to deny the renewal application filed by Matt & Karen Inc., d/b/a O Face Bar for Liquor License No. LC-38449, is hereby REVERSED. If this Proposed Decision becomes a final decision, License No. LC-38449 shall be renewed.

185 IAC 10.27(1) and (2) provide that any adversely affected party may appeal a proposed decision to the Administrator of the Alcoholic Beverages Division within thirty (30) days after issuance of the proposed decision. In addition, the Administrator

may initiate review of a proposed decision on the Administrator's own motion at any time within thirty (30) days following the issuance of a proposed decision.

Requests for review shall be sent to the Administrator of the Alcoholic Beverages Division, 1918 S.E. Hulsizer, Ankeny, IA 50021. Unless otherwise ordered, each appealing party may file exceptions and briefs within thirty (30) days of the notice of appeal or order for review. Within thirty (30) days thereafter, any party may file a responsive brief. The Administrator may shorten or extend the briefing period as appropriate. The Administrator may resolve the appeal on the briefs or provide an opportunity for oral argument. 185 IAC 10.27(6). The administrator may affirm, reverse or modify the proposed decision.

A party who is adversely affected by the proposed decision shall not be deemed to have exhausted administrative remedies unless the adversely affected party files a request for review of the proposed decision within the time provided and the Administrator has reviewed the proposed decision and has affirmed, reversed, or modified the proposed decision.

Dated this 11th day of August, 2014.



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