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November 2015

# S&S Family Entertainment, LLC d/b/a Hermitage Strike & Spare vs. Alcoholic Beverage Commission

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**State of Tennessee**  
**Department of State**  
Administrative Procedures Division  
312 Rosa L. Parks Avenue  
8<sup>th</sup> Floor, William R. Snodgrass Tower  
Nashville, Tennessee 37243-1102  
Phone: (615) 741-7008/Fax: (615) 741-4472

November 5, 2015

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RE: In the Matter of: S&S Family Entertainment, LLC d/b/a Hermitage Strike &  
Spare  
Docket No. 33.01-130587J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division  
Tennessee Department of State

/aem  
Enclosure

**BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION**

**IN THE MATTER OF:**

**S&S FAMILY ENTERTAINMENT, LLC  
D/B/A HERMITAGE STRIKE & SPARE**

**DOCKET NO. 33.01-130587J**

**NOTICE**

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **November 20, 2015.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE  
ADMINISTRATIVE PROCEDURES DIVISION  
WILLIAM R. SNODGRASS TOWER  
312 ROSA PARKS AVENUE, 8<sup>th</sup> FLOOR  
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

**BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION**

**IN THE MATTER OF:**

**TENNESSEE ALCOHOLIC BEVERAGE  
COMMISSION,  
*Petitioner,***

**v.**

**S&S FAMILY ENTERTAINMENT, LLC  
d/b/a HERMITAGE STRIKE & SPARE,  
*Respondent.***

**License No. 105305**

**DOCKET NO: 33.01-130587J**

**INITIAL ORDER**

This contested case was heard in Nashville, Tennessee on August 11, 2015, before Administrative Judge Kim Summers, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Alcoholic Beverage Commission (ABC). Joshua Stepp, Staff Attorney, represented the ABC in this matter. The Respondent was represented by Lauren Wells, Esq.

The issue in this matter is the Respondent's alleged violation of Tenn. Code Ann. § 57-4-203. After consideration of the entire record, it is determined that the alleged violations have been proven by a preponderance of the evidence. This determination is based upon the following Findings of Fact and Conclusions of Law.

**SUMMARY OF EVIDENCE**

Five individuals provided witness testimony: Reginald McCullough, Special Agent with the Alcoholic Beverage Commission; Juan Gomez, Assistant Special Agent in Charge with the ABC; Ginna Winfree, ABC Assistant Director; Linda Frizzel, General Manager of Hermitage

Strike and Spare; and Sheila Moore, employee of Hermitage Strike and Spare, who testified that the date of birth on the driver's license at issue was 1993 and there was no red bar on the license indicating that the individual was under the age of majority.<sup>1</sup>

Ten Exhibits were entered into evidence – EXHIBIT NO. 1, Regulatory Citation from March 17, 2015; EXHIBIT NO. 2, Regulatory Citation from December 12, 2014; EXHIBIT NO. 3, Pictures of Sheila Moore; EXHIBIT NO. 4, Pictures of the Confidential Informant; EXHIBIT NO. 5, Driver's License for Confidential Informant; EXHIBIT NO. 6, Internet Article from Channel 2 News; EXHIBIT NO. 7, Penalty Schedules; EXHIBIT NO. 8, Grant Document from the Governor's Highway Safety Office; EXHIBIT NO. 9, May 26, 2015 Letter from Mark Hutchens; EXHIBIT NO. 10, Penalty Guidelines.

### **FINDINGS OF FACT**

1. Hermitage Strike and Spare is owned by S&S Family Entertainment and is licensed as a retail establishment for the resale of alcoholic beverages.

2. On December 12, 2014, Hermitage Strike and Spare was issued a citation and assessed a \$1500 civil penalty for selling an alcoholic beverage to a nineteen year old who was participating with the ABC on a compliance check. The offending employee was terminated, and Ms. Frizzel reinforced with the other employees the requirements for liquor sales.

3. Ms. Frizzel is a certified trainer for TIPS [Training for Intervention ProcedureS] and provides this training to employees of S&S Family Entertainment.

4. Pursuant to the grant from the Governor's Highway Safety Office, a compliance recheck must be done within ninety days of a violation.

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<sup>1</sup> The Confidential Informant was not available to testify at the hearing because he died in an accident on or about July 15, 2015.

5. On March 17, 2015, Reginald McCullough and Juan Gomez with the ABC conducted a compliance check on fifteen licensed retail establishments along with an eighteen-year-old confidential informant.

6. In preparation for the compliance checks, the confidential informant was asked to remove all items from his pockets other than the marked currency provided by the ABC and his actual driver's license which clearly showed his date of birth as April 10, 1996, and the red bar stating that he will not be 21 until April 10, 2017.

7. During the March 17, 2015, recheck on Hermitage Strike and Spare, an alcoholic beverage was sold to the confidential informant by employee Sheila Moore. Reginald McCullough and Juan Gomez observed the sale and verified the identification used by the confidential informant.

8. Hermitage Strike and Spare was very busy on March 17, 2015, and Ms. Moore was filling in as a bartender, which was not her usual work assignment.

9. At the time of the sale, Ms. Moore had a server permit from the ABC, had been employed by S&S Family Entertainment for about a year, and had been stationed with Hermitage Strike and Spare for about one month.

10. A successful compliance recheck was conducted at Hermitage Strike and Spare on May 26, 2015.

11. The law limits a civil penalty to a maximum of \$1500. Accordingly, it is the internal policy of the ABC to suspend the retail license of any establishment that sells to a minor two times within a three-year period. If the second sale occurs during the 90-day recheck period, it is the internal policy of the ABC to impose a fifteen-day suspension. If the second sale occurs within three years but outside the 90-day recheck period, it is the internal policy of the ABC to

impose a ten-day suspension. This internal ABC policy has not been promulgated in a regulation or otherwise been incorporated into any document that is available to the public.

### APPLICABLE LAW

1. RULE 1360-4-1-.02(3) of the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies states, in pertinent part:

The “petitioner” in a contested case proceeding is the “moving” party, i.e., the party who has initiated the proceedings. The petitioner usually bears the ultimate burden of proof.

2. Tenn. Code Ann. § 57-4-203(b)(1)(B) provides the following prohibition with respect to the sale of alcohol to minors –

(B) Any licensee engaging in business regulated hereunder or any employee thereof who sells, furnishes, disposes of, gives, or causes to be sold, furnished, disposed of, or given any beer or malt beverage as defined in § 57-6-102 to any person under twenty-one (21) years of age is guilty of a Class A misdemeanor.

3. Tenn. Code Ann. § 57-4-202 provides the following penalties –

The commission shall have authority to revoke or suspend any permit granted herein for the violations of any applicable provision of this chapter, and any person aggrieved by the action of this commission in revoking or suspending a permit, or in refusing to grant a permit, may have such action reviewed as provided by the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

4. Pursuant to Tenn. Code Ann. § 57-1-201(b)(1)(A), the Commission may impose a maximum fine of one thousand five hundred dollars (\$1,500) against a retailer licensed under § 57-3-204.

### ANALYSIS and CONCLUSIONS OF LAW

1. The ABC has shown by a preponderance of the evidence the two alleged violations of Tenn. Code Ann. § 57-4-203(b)(1)(B) by employees of Hermitage Strike and Spare.

The testimony of Ms. Moore regarding the driver's license used by the confidential informant during the recheck on March 17, 2015, was found to be self-serving and lacking in credibility.

2. The Commission **HAS** shown by a preponderance of the evidence a violation of Tenn. Code Ann. § 57-4-203(b)(1)(B) for which suspension of Hermitage Strike and Spare's liquor license is warranted.

3. Because the March 17, 2015 compliance recheck was conducted ninety-five days after the initial violation, the second violation did not occur within the 90-day recheck period. Accordingly, the Commission **HAS NOT** shown that Hermitage Strike and Spare would be subject to a fifteen day suspension pursuant to the internal ABC policy.

4. Since the two violations of Tenn. Code Ann. § 57-4-203(b)(1)(B) occurred within three years, Hermitage Strike and Spare would be subject to a ten day suspension pursuant to the internal ABC policy. However, this policy is not controlling in this administrative proceeding since the policy has not been publicized or formalized in the law, and the Commission **HAS NOT** otherwise shown that the ten-day suspension is warranted under the circumstances.

5. The termination of the offending employee after the first violation showed that Hermitage Strike and Spare understood the gravity of the situation and should have conveyed to the remaining employees the potential serious consequences of another violation. The record does not show what specific remedial measures Hermitage Strike and Spare may have taken to reinforce this message.

6. Because the offending employee was terminated after the first violation and the second violation occurred outside of the 90-day recheck period, it is determined that a five-day suspension of the liquor license is warranted and justified under the facts and circumstances of this particular case.



7. Accordingly, the Commission's decision to suspend the liquor license of Hermitage Strike and Spare is **UPHELD, in part**. Hermitage Strike and Spare's liquor license shall be **SUSPENDED** for a period of **FIVE DAYS**.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the 5<sup>TH</sup> day of NOV. 2015.



KIM SUMMERS  
ADMINISTRATIVE JUDGE  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 5<sup>TH</sup> day of NOVEMBER 2015.



J. RICHARD COLLIER, DIRECTOR  
ADMINISTRATIVE PROCEDURES DIVISION  
OFFICE OF THE SECRETARY OF STATE

## **APPENDIX A TO INITIAL ORDER**

### **NOTICE OF APPEAL PROCEDURES**

#### **Review of Initial Order**

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8<sup>th</sup> Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

#### **Review of Final Order**

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

### **YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER**

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.