

**STATE OF INDIANA
BEFORE THE ALCOHOL & TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF:)	
)	
TRI-CITY VFW POST #1919)	PERMIT NO. RC45-21113
D/B/A VFW POST 1919)	
2144 FRONT STREET)	
GARY, IN 46407)	

Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Tri-City VFW Post #1919 d/b/a VFW Post 1919 ("Applicant" or "Permittee"), 2144 Front Street, Gary, Indiana ("permit premises"), permit number RC45-21113, pro se, is the Applicant for a renewal of a 211-4 Alcohol and Tobacco Commission ("ATC" or "Commission") liquor, beer and wine permit. The application was assigned to the Alcoholic Beverage Board of Lake County ("Local Board" or "LB"). The Local Board held a hearing on December 1, 2009 ("LB Hearing") and voted three (3) to zero (0) to deny the application. The ATC adopted the Local Board's recommendation on December 15, 2009, at its regular public meeting.

The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge E. Edward Dunsmore ("Hearing Judge"). An appeal hearing was held on April 15, 2010, ("Appeal Hearing") and at that time, witnesses were sworn, evidence was received and the matter was taken under advisement. The Hearing Judge, having read the typed transcript of the LB Hearing, the evidence submitted to the ATC during the Appeal Hearing, and the contents of the entire ATC file, as well as having taken official notice of the same, as well as the codes and standards adopted by this state, now tenders his Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. PROCEDURAL HISTORY

1. On September 23, 2009, Applicant filed its Application for a Renewal of Permit.
2. On December 1, 2009, the Local Board held a hearing and voted three (3) to zero (0) to deny the application.
3. On December 15, 2009, the ATC adopted the Local Board's recommendation.
4. On December 29, 2009, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.
5. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.
6. On April 15, 2009, the Hearing Judge conducted a hearing regarding the Applicant's appeal.

III. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this case:

1. Percy Moore, on behalf of Applicant and Permittee.

B. The following individuals testified before the Local Board against the Applicant in this cause:

None. However, since this was a renewal of an existing permit, the local board conducted questioning to assure that the requirements for renewal were met.

C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

None.

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Indiana State Excise Police incident reports (including narrative reports), dated February 28, 2008, December 28, 2008, July 12, 2009 and September 3, 2009.

IV. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Charlie Johnson, Commander of Applicant and Permittee.
2. Leon Hollingsworth, Senior Vice Commander of Applicant and Permittee.
3. Cecil Jones, Junior Vice Commander of Applicant and Permittee.

D. The following individuals testified before the Commission against the Applicant in this cause:

None

C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

None.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. The transcript of the Local Board hearing and the entire contents of the ATC file.

V. FINDINGS OF FACT

1. Tri-City VFW Post #1919 d/b/a VFW Post 1919, located at 2144 Front Street, Gary, Indiana 46407, is an applicant for an renewal of ATC type 211-4 liquor, beer and wine permit, under permit #RC45-21113. (ATC File)
2. On Thursday, February 28, 2008, Indiana State Excise Police Officer Richard J. Swallow observed the Applicant serving alcohol at the permit premises to non-members. Officer Swallow spoke with several staff members on the premises along with Senior Vice President Darius R. English. These individuals collectively indicated to Officer Swallow that they did not know that non-members could not purchase their own alcoholic beverages. Officer Swallow explained that if a member signed them in as guests and purchased the alcoholic beverages, then the guests could consume them. The staff indicated that they now understood. A Notice of Violation for Sale of Alcoholic Beverages to Non-Members was issued (IC 7.1-3-20-8.6; 605 IAC 1-13-1; 605 IAC 1-13-3). Applicant admitted the violation and paid a fine on May 13, 2008 violation. (ATC File; LB Hearing; Appeal Hearing)
3. On Sunday, December 28, 2008, at approximately 4:00 am, Indiana State Excise Police Officers Sgt. Alvin Taylor and Corporal Christopher Bard conducted an investigation at the permit premises. As a result, the Applicant was cited for one (1) count of sales at times unlawful (IC 7.1-5-10-1), one (1) count of consumption at times unlawful (905 IAC 1-10-2), and one (1) count of failure to remove containers after closing hours (905 IAC 1-10-1). The Applicant admitted the violations and paid a fine on April 7, 2009. (ATC File; LB Hearing; Appeal Hearing)
4. On Sunday, July 12, 2009, at approximately 1:30 am, Indiana State Excise Police Officers Sgt. Alvin Taylor, Jamie Patrick, Aussie Thompson, Kayla Dawson, Heather Heeg, Jeremy Reed and Jason Szemes entered the permit premises to conduct a complaint investigation. Sgt. Taylor and Officer Szemes encountered Cecil Jones, who identified himself as former Senior Vice Commander of the club. Officer Szemes informed Mr. Jones that the Excise Police were present to investigate a complaint that an employee, by the last name of Grant, was intoxicated while working and was over serving patrons. Ms. Grant was working at the time and did not exhibit signs of intoxication and did not appear to be serving intoxicated patrons. Officer Szemes asked about signatures on the pages of the note pad located in the foyer of the club. Mr. Jones informed the Officer that the note pad was the club's guest book. Mr. Jones informed Officer Szemes that he could not identify any of the signatures on any of the pages as the signature of a member of the club. It also could not be determined if guests were signed in by members as there was no designation for members or guests on the pages. Sgt. Taylor counted 242 signatures listed under columns dated July 11, 2009. Mr. Jones admitted that the signatures were those of guests who had signed themselves in to the club and had purchased alcoholic beverages.

Mr. Jones also stated that the club did not have an authorized guest day for the business day of Saturday, July 11, 2009. A review of the Applicant's log at Indiana State Excise Police District 1 club book showed that the club had not had a guest day approved since prior to January 2008. Officer Szemes issued a permit violation citation for sale of alcoholic beverages to non-members (905 IAC 1-13-3). The record does not show the disposition of these charges. (ATC File; LB Hearing; Appeal Hearing)

5. On Thursday, September 3, 2009, at approximately 6:30 p.m., Indiana State Excise Police Lieutenant Tim Cleveland, Corporal Chris Bard and Officer Jeremy Reed conducted an investigation at the permit premises. The officers discovered that the bartender, Veronica Turnispeed, did not have an employee permit. Further inspection revealed that only four members were present and that seventeen non-members were present at the permit premises and that no one was listed on the guest book. The post manager, Janice Montgomery, told the officers that the non-members were "honorary members", being non-members who come into the post often. The laws and rules regarding non-members were explained to Ms. Montgomery and she stated that she had been misled about who could and could not be a member. Lt. Cleveland then suggested to her that the club receive a server training program to be provided by an Excise Officer and that all questions and concerns could be answered at the program. Ms. Montgomery stated that she would set up the program soon. Notices of Violations were issued for: one count of no employee permit (IC 7.1-5-6-3); one count of no employee permit records (905 IAC 1-12.1-2); and, one count of sale to non-members (905 IAC 1-13-3). The record does not show the disposition of these charges. (ATC File; LB Hearing; Appeal Hearing)
6. At the LB hearing, board member Ruesken indicated that the file reflected four permit violations (see immediately above) and that most of them dealt with non-members being present in the bar, without signing the guest book. He further indicated that every year he (board member Ruesken) had been on the board similar violations had been present. Percy Moore indicated to board member Ruesken that the club had a new administration now. Board member Ruesken indicated that the same thing was stated at the last renewal hearing. Board member White agreed and stated that every year the board goes over the same violations and receives the same excuses. Board member Ruesken stated that the club has no respect for the local board, that the club has violations of some nature on an every-other-month basis and that he (Ruesken) recommended a denial. Board member White stated that every year the local board is told that "it's a new commander, or it's a new administration" and yet the same violations keep occurring. Board member White indicated to Mr. Moore that at the last renewal hearing, she told the person present for the permittee that if the same conduct was still occurring that she would vote to deny renewal of the permit. (LB Hearing; ATC File)
7. A lengthy discussion between local board members and Percy Moore transpired regarding the current four permit violations and the rules regarding non-members, guests, the guest book and guest policies. Mr. Moore stated that the club and new administration was trying to "right the ship". Board member White stated that she was aware that before the club acquired its license about four or five years ago that it had been operating as a "bootleg thing", without a permit. The vote was then taken and was 3-0 to deny the permit renewal based on failure to maintain a high and fine reputation for decency and

law obedience (IC 7.1-3-9-10) and the permit premises has become a public nuisance (905 IAC 1-27-2). (LB Hearing; ATC File)

8. The following individuals provided the following information at the Appeal Hearing:
 - a) Charlie Johnson is the current Commander of the permittee. He testified that he doesn't understand why the post is a public nuisance, because it contributes to charities and pays taxes. (Appeal Hearing)
 - b) Leon Hollingsworth is the current Senior Vice Commander. He testified that the club does a lot for the community and school children financially and that the club cannot survive financially if it doesn't have sufficient clientele. He says that if they are too strict on rules that they make people mad and that they call the Excise Police. (Appeal Hearing)
 - c) Cecil Jones is the current Junior Vice Commander. He testified that the bartender who was cited for not having a permit had her purse stolen and that she had applied for a new permit. (Appeal Hearing)
9. Any Finding of Fact may be considered a Conclusion of Law, if the context so warrants.

IV. CONCLUSIONS OF LAW

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.
3. The ATC is commissioned to act upon proper application. *Id.*
4. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11.5
5. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a)
6. The Hearing Judge may also consider as evidence any codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e)
7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e); Ind. Code 4-21.5-3-27(d)
8. Tri-City VFW Post #1919, d/b/a VFW Post 1919, permit #RC45-21113, is an applicant for renewal of an ATC Type 211-4 liquor, beer and wine permit.

9. The Commission, in its absolute discretion shall issue, suspend or revoke, except as otherwise provided in Title 7.1, a retailer's or dealer's permit of any type. Ind. Code 7.1-3-19-1
10. The Commission may investigate in any manner it deems best to enable it to act upon the application in a particular case. The Commission may grant or refuse the application accordingly as it deems the public interest will be served best. The action of the Commission for a retailer's or dealer's permit of any type shall be final. Ind. Code 7.1-3-19-10
11. The Commission may issue a liquor retailer's permit only to a high grade club, restaurant, or hotel, which has a high and fine reputation for decency and law obedience. In no case shall a liquor retailer's permit be issued or stand unrevoked if the owner, manager or management of the establishment is not a person of strict integrity and high repute, or if the premises have been padlocked. Ind. Code 7.1-3-9-10.
12. In determining an applicant's, or permittee's eligibility to hold, renew or continue to hold a permit, particularly whether the applicant is of good moral character and of good repute, the Commission shall consider whether acts or conduct of the applicant, permittee or his employees or agents, would constitute action or conduct prohibited by the Indiana Penal Code (IC 35-41-1-1 *et. seq.*), or a criminal offense under the laws of the United States. 905 IAC 1-27-1
13. If a licensed premises becomes a public nuisance, or the licensed premises becomes the scene of acts or conduct which are prohibited by the Indiana Penal Code (IC 35-41-1-1 *et. seq.*), or by the criminal laws of the United States, the premises shall be subject to the sanctions specified in IC 7.1-2-6-1 through IC 7.1-2-6-14. 905 IAC 1-27-2
14. A public nuisance includes, but is not limited to, the business property of a person who knowingly or intentionally sells, possesses, manufactures, barter, gives away alcoholic beverages in violation of law or rule of the commission. Ind. Code 7.1-2-6-1
15. The definition of a permittee includes an agent, a servant or other person acting on behalf of the permittee, whenever a permittee is prohibited from doing an act under this title. Ind. Code 7.1-1-3-30(b)
16. 905 IAC 1-13-1 *et. seq.*, *inter alia*, defines the terms for membership in clubs, membership and guest lists, service to non-members and further delineates the required notices to local state Excise Police of certain activities for approval in advance.
17. All bartenders, servers, club officers, agents and employees of VFW Post 1919 were agents or other persons acting on behalf of the permittee, during the times they were interacting with the Excise Officers regarding the permit premises and the violations charged. Ind. Code 7.1-1-3-30(b)
18. A permit is fully expired and null and void at the end of the term for which it is issued. Ind. Code 7.1-3-1-3

19. The weight of the evidence and the burden of proof establish that the permittee, individually and by and through its relationships with its waitress(s), bartender(s) club officers, agents, and employees, have engaged in the following conduct:
 - a) Failing to maintain a high and fine reputation for decency and law obedience. Ind. Code 7.1-3-9-10
 - b) Allowing the permit premises to become a public nuisance. 905 IAC 1-27-2
20. The Local Board denied this permit renewal with sufficient evidence that supports a finding that this permit renewal request should be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to deny this application for renewal was based on substantial evidence and must be upheld.

It is hereby further ORDERED, ADJUDGED AND DECREED that the evidence adduced at the LB Hearing and the Appeal Hearing was against the Applicant, and the appeal of Tri-City VFW Post #1919, d/b/a VFW Post 1919, for renewal of this Type 211-4 permit, permit #RC45-21113, applied for at its Gary, Indiana location is hereby DENIED.

DATED: _____

E. Edward Dunsmore
Hearing Judge