

STATE OF INDIANA

BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION

IN THE MATTER OF)
THE PERMIT OF)
TOUCH OF CLASS, Inc.) PERMIT NO. RR54-91395
1080 Corey Boulevard)
Crawfordsville, Indiana 47933)
Permittee.

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter came before the Indiana Alcohol and Tobacco Commission (ATC), James W. Payne Hearing Judge presiding, on a denial by the Montgomery County Local Alcoholic Beverage Board (LCB) on the renewal of the permit issued by ATC to Touch of Class, Inc. (Permittee) with a long and complicated history, in part caused by the Covid pandemic. The final denial hearing by the LCB occurred on January 6, 2022, made by a 2-1 vote. The ATC upheld the denial on January 19, 2022.

I. BACKGROUND

On or about October 4, 2019, Permittee filed its Application for Renewal of Alcohol Beverage Permit, and the hearing was scheduled by LCB on January 2, 2020, and March 5, 2020. At the conclusion of the hearing, the LCB voted to deny the renewal application by a two to one vote. Thereafter, on May 18, 2020, the ATC adopted the recommendation of the LCB and denied the application.

Permittee timely filed a notice of appeal which was set for hearing on October 20, 2020. On or about October 15, 2020, the Permittee filed its request for remand to the LCB. On May 4, 2021, the ATC voted to remand the renewal to the LCB "with instructions" for a reinvestigation of facts specifically any proposed changes of stockholders of the permit.

The LCB thereafter on January 6, 2022, voted 2-1 against renewal of the permit. The ATC adopted the recommendation to deny on January 19, 2022. Permittee again timely appealed the matter of the denial of the renewal and the matter was set for and heard on August 18, 2022.

II. FINDINGS OF FACTS

1. Permittee is an Indiana Corporation and holds of alcohol permit for beer/wine/liquor under permit number RR54-91395.
2. On or about October 4, 2019, permittee filed its Application for Renewal of Alcohol Beverage Permit which listed it as a corporation and listed ownership and position listings- Joe Downing is listed as owning 60% and Denise Wilhoit is listed as owning 40%.
3. On January 2, 2020, and February 5, 2020, hearings were held before the LCB on the issue of the renewal.
4. At that hearing the following individuals gave evidence in sworn testimony – Joe Downing and Joseph Nunez- there were no remonstrators.
5. At those hearings, questions were raised regarding the actual ownership of the Corporation and whether an individual known as Mike Bickers was an actual owner of the Corporation.
6. Testimony presented significant indications that the actual owner of the business of the Permittee was in part or in full owned by Mike Bickers – Mike Bickers is a resident of Illinois, lives with Denise Wilhoit as his “common-law wife”, Mike Bickers owns the building in which Permittee operates and uses the permit, and rent is paid to make Bickers in cash every month.
7. In 2013 when Joe Downing and Denise Wilhoit became the stockholders in the permittee, the application of an Indiana law required that, in part, no one owning 60% or more of the permit holder could live out the state of Indiana.
8. The evidence showed that Denise Wilhoit and Mike Bickers were in a 24-year relationship, were stated to be in a common-law marriage, and that Joe Downing is a decades long friend of Mike Bickers, lives in Indiana, and owns 60% of the stock of permittee.
9. Joe Downing indicated that he paid in 2013 less than \$25,000 for the permit, bar equipment, some limited inventory and furniture when other evidence indicated it was \$20,000.
10. Joe Downing testified at the January 2, 2020, hearing that the rent was “very high. Too high” and then testified at the February 5, 2020, hearing the rent was \$1500 a month.
11. On or about July 20, 2019, Indiana Excise Police filed a violation of the conditions of the permit which included that an employee did not have a permit displayed, no record of employee permit, and adult entertainment nudity, the results of which allegations an \$800 fine was paid.

12. At the conclusion of all the testimony, a motion was made to approve the renewal request of the permittee but died for a lack of a second – thereafter, a motion was made to deny the request for renewal and the motion passed by and 2-1 vote.
13. Because the vote was 2 to 1, the ATC at an administrative hearing on the matter affirmed the denial of the renewal of Permittee’s permit on May 18, 2020.
14. The Permittee timely filed a formal appeal for the ATC to hear the matter and a Hearing Judge was assigned to hear the matter on October 20, 2020.
15. On October 15, 2020, permittee filed its Motion for Continuance of Appeal Hearing and Request for Remand Back to the Local Board which Motion was granted on or about May 4, 2021, with instructions in a letter dated June 4, 2021, that the LCB make inquiries into certain issues.
16. On January 6, 2022, the LCB held the remand hearing pursuant to the instructions of ATC at which Oraida Nunez, Tammy Wyman, and Mike Bickers testified.
17. Oraida Nunez and Tammy Wyman purchased the stock in permittee having paid \$10,000 on the condition that they would be allowed to continue to operate the business with an alcoholic beverage permit.
18. Oraida Nunez stated that the rent was \$3000 a month.
19. Oraida Nunez stated that there was an ATM machine on the premises and that the money from the business went to the ATM and into an account held by Mike Bickers, who owns the ATM machine. All bills were paid in cash, including the rent
20. Oraida Nunez and Tammy Wyman stated they did not know there were prior ATC violations.
21. When asked about the business plan requested by ATC, Oraida Nunez said, “I haven’t looked at that paper” but only stated that the mission is to “get better”.
22. Mike Bickers testified that he owns the ATM machine but that “Denise has control. She disperses...”- Indicating Denise Wilhoit, his girlfriend, common-law wife.
23. At one point during questioning about the validity of the business process of the ATM machine, payment of bills etc., Mike Bickers said, “Everything on that is moot because everything has been transferred”.
24. At the end of this hearing, a motion was made to deny the request for renewal, a second was made, and the vote was 2-1 in favor of the vote to deny the renewal request.
25. The Permittee timely filed a motion to appeal the LCB hearing.

26. The appeal of the denial to renew the permit on the January 6, 2022, hearing was heard on August 18, 2022.
27. At the hearing by the ATC, by the Hearing Judge, on August 18, 2022, Amber Lowenstein was the sole witness.
28. 31 exhibits were offered and received into evidence on that date and Exhibit number 32 was submitted shortly after the hearing.
29. It was stated that the issue before the ATC was the renewal of the permit for RR54-91395.
30. Amber Lowenstein testified that she filed a manager's questionnaire and had a valid permit.
31. Amber Lowenstein testified that Oriada Nunez and Tammy Wyman were no longer interested in pursuing Touch Class, Inc., the alcohol permit, or running the business and that she had been asked to take over.
32. Amber Lowenstein indicated that she has been operating the business at the location in Crawfordsville, Indiana in 2022.
33. Amber Lowenstein indicated verbally and in Exhibit 30 that her intent was to change from the current business model to that of a sports bar within two years, starting a new company and operating at a new location.
34. Amber Lowenstein indicated that the ATM machine on the premises belongs to Mike Bickers, doesn't work, and that she has asked him to remove the machine- this is the same ATM machine through which prior owners had deposited money and through which bills have been paid, although testimony also indicated that many bills were paid by cash.
35. Mike Bickers and Denise Wilhoit have been in a personal relationship for 24 years- described by some as a common-law marriage –, that some testimony indicated they lived together, and have several businesses together.
36. Indication by several witnesses and in writing were that the business had "never turned a profit".
37. Receipts submitted as exhibit for the payment of business personal property by Joe Downing and Denise Wilhoit were \$10,000, not \$20,000 as testified to- testimony indicated that the contract could not be located.
38. The testimony was consistent that Mike Bickers owns the real estate at which the business of Permittee is conducted in Crawfordsville, Indiana.
39. The testimony was consistent that Mike Bickers on several similar businesses Indiana and Illinois.

40. Mike Bickers served for a period as the registered agent of Touch of Class, Inc. –LCB hearing of January 2, 2020, transcript page 7, line 159 to 165 and Exhibit 22.
41. Mike Bickers served for an extended period of time as the treasurer of permittee.
42. On January 2, 2020, Mike Bickers stated that he had not been to the business of Permittee for two years (LCB hearing January 2, 2020, transcript page 20, line 46) but later stated that he met at the business with the new owners “a few months ago: (LCB hearing of January 2, 2022, transcript page 21, line 750).
43. At the LCB hearing on January 2, 2020, testimony was that “all money goes into the ATM account – page 25, line 602) and that Mike Bickers holds the ATM account, and all of the money goes into the ATM (page 26, lines 627- 631).
44. Testimony on several occasions indicated that the rent payments payable to make Mike Bickers was \$2000 or \$3000 per month while Exhibit 28, the lease to Amber Lowenstein states that the rent is to be \$8000 per month, inconsistent with the prior rent and the intent to purchase a business that has never made any money.
45. In Exhibit 31, the statement is made that the rent is \$2000 per month for Amber Lowenstein, and not the \$8000 listed in Exhibit 28 which began on February 4, 2022.
46. Exhibit 32, the affidavit of Tammy Wyman, said that she, Tammy Wyman, gave Amber Lowenstein the right to 60 shares of Touch of Class, Inc- the affidavit being dated August 29, 2022.
47. The renewal request under Exhibit 9 was for January 15, 2021, and that, since the denial of the renewal request, Permittee has been operating under a series of extensions.
48. Amber Lowenstein stated in Exhibit 29 that it is her intent to operate the business currently as it has been operated for approximately two years and then to start a new company owned solely by her.
49. There was no testimony provided or evidence or documents submitted that indicated Amber Lowenstein had authority to operate the business, particularly inconsistent with Exhibit 28, the lease with Amber Lowenstein with Mike Bickers as landlord.
50. Testimonies, statements, and evidence made at the LCB hearings in 2020 and the one in 2022 demonstrate conflicting facts that are irreconcilable.
51. The testimonies, statements and evidence presented a reasonable inference that make Mike Bickers a silent and behind the scenes owner and operator of the Permittee.

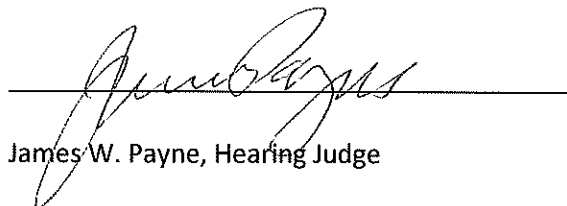
52. From the evidence presented, there is nothing usual and normal about the relationship between Mike Bickers and Touch of Class, Inc, as a corporation, particularly since his interaction between several different shareholders, intended shareholders and employees has been unique and questionable.
53. Mike Bickers was, early on in the start of Touch of Class, Inc., its designated Treasurer but after a few years not designated as such and even though no longer was designated as such had virtual control of the finances of it through the unusual and inappropriate use of an ATM machine which he both owned and controlled.
54. There was conflicting and inconsistent testimony about how income of the Permittee was received, documented and spent – some bills were paid by cash at some point, some money was deposited in the ATM machine at some point, some of the ATM deposited money was put into an unidentified account, and no statement was made how any credit card or debit card payments were handled/deposited.
55. The long-standing relationship between Mike Bickers and Denise Wilhoit, both personal and business, leads a reasonable person to conclude by a preponderance of the evidence that the ownership listed by Denise Wilhoit of 40% was not in fact an arms length or independent relationship and, in the alternative, justifies concluding that Mike Bickers was an undisclosed owner- since he owned several other similar businesses in 2 states.
56. That questionable relationship history leads to the conclusion by a preponderance of the evidence that Mike Bickers is an undisclosed or hidden owner or partner of Touch of Class, Inc.
57. The denial of the renewal of the permit of Permittee by LCB was not arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with the law.
58. The denial of the renewal of the permit Permittee by LCB was not contrary to the constitutional right, power, privilege or immunity of Permittee.
59. The denial of the renewal of the permit of Permittee by LCB was not in excess of or contrary to, statutory jurisdiction, authority, limitations or rights.
60. The denial of the renewal of the permit of Permittee by LCB observed the procedure required by law, and was supported by substantial evidence.
61. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

III CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to IC 71-1-2-2 and IC 7.1-2-3-9.
2. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript proceedings and exhibits put before the local Board. 905 IAC 1-36-7(a).
3. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including public hearings and a review of the record and documents in the ATC file. IC 7.1-3-19-1(a), 905 IAC 1-36-7(a), 905 IAC 1-37-1 9(e)(2); and IC 4-21.5-3.27(d).
4. The Findings are based exclusively upon the substantial and reliable evidence in the record of the proceedings and on the matters officially noticed in the preceding. 905 IAC 1-37-11€(2); IC 4-21.5-3-27(d).
5. The ATC may reverse a local board's action regarding a permit only if it finds the local Board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of or contrary to statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law or supported by substantial evidence. IC 71-3-19-11.
6. The decision of the LCB denying the renewal of the application of Permittee was not arbitrary and capricious.
7. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Montgomery County Local Board resulting in a 2-1 vote to recommend denial of the renewal of permit number RR54-91395 was supported by substantial evidence and was not arbitrary and capricious. The Indiana Alcohol and Tobacco Commission affirms the recommendation of the local board and denies the renewal of the permit of Touch of Class, Inc., 1080 Corey Boulevard Crawfordsville, Indiana 47933.

Dated December 5, 2022


James W. Payne, Hearing Judge

CC

Mark Webb, Esq.

Approved this 4th day of January, 2023.



JESSICA ALLEN, CHAIR



JAMES PAYNE, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER