

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

IN THE MATTER OF)	
THE PERMIT OF)	
)	
MARK NEWKIRK, JR.)	
d/b/a RODEO BAR)	PERMIT NO. RR46-32097
1103 FRANKLIN ST.)	
MICHIGAN CITY, IN 46360)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Mark Newkirk, Jr., d/b/a Rodeo Bar, 1103 Franklin St., Michigan City, IN 46360 permit number RR46-32097 (Applicant), is the applicant for the transfer of a permit to sell beer, liquor, and wine, in a restaurant located in an incorporated area to be issued by the Alcohol and Tobacco Commission (ATC). The application was assigned to the Alcoholic Beverage Board of LaPorte County (Local Board). The Applicant's matter was heard on February 4, 2016, where it was denied by a vote of 3-0, with one abstention. On February 16, 2016, the Commission adopted the findings of the Local Board and denied the permit. On March 7, 2016, the Applicant filed for an appeal hearing regarding the Commission's denial, which was granted.

The matter was set for hearing on June 20, 2016, and that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. The Hearing Officer also took judicial notice of the entire contents of the file related to this cause. Having been duly advised of the facts and law at issue, the Hearing Officer now submits these Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. Mark Newkirk, Jr., Applicant;
 2. Ian Young (Young), Manager; and
 3. Mark Killermann (Killermann), transferor.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. Bill of Sale for \$40,000 showing transfer of an alcohol license from Killermann to Applicant; and
 2. Lease of premises between Killermann (owner) and Applicant.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
1. Officer Tim Richardson, Michigan City Police Department (MCPD);
 2. Officer Mark Swistek, MCPD; and
 3. Officer Joe Formato, Indiana State Excise Police (INSEP).
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
1. Binder containing MCPD runs from 2010 through January 2016.

III. EVIDENCE BEFORE THE COMMISSION

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Mark Newkirk, Applicant;
 2. Ian Young, Manager; and
 3. Thomas Godfrey, Attorney for Applicant.
- B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. IRS application for EIN under Newkirk Young, LLC (Exhibit 1);
 2. Indiana BT-1 application under 11th Street Rodeo Bar (Exhibit 2);
 3. Indiana Secretary of State (ISOS) Certificate of Assumed Name of Newkirk Young, LLC (Exhibit 3);

4. ISOS registration of Article of Incorporation and Organization for Newkirk Young, LLC (Exhibit 4);
 5. Contract and bill with NWI Security for uniformed/unarmed security (Exhibit 5);
 6. Applicant menu (Exhibit 6);
 7. Check stub illustrating withdrawal of funds from Applicant's annuity plan in the amount of \$47,134.38 which was used to pay Killermann in full (Exhibit 7);
 8. Voucher illustrating withdrawal of funds from Applicant's retirement plan in the amount of \$42,896.33 used for payments towards business (Exhibit 8);
 9. Bill of Sale for alcohol permit number RR46-06543 from Killermann to Mark Newkirk, Jr. (Exhibit 9); and
 10. Lease between Applicant and court-appointed receiver (Exhibit 10).
- C. The following individuals testified before the Commission against the Applicant in this cause:
1. Officer Joe Formato, INSEP.
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. None

IV. FINDINGS OF FACT

1. Mark Newkirk, Jr., d/b/a Rodeo Bar, 1103 Franklin St., Michigan City, IN 46360 permit number RR46-32097 (Applicant), is the applicant for the transfer of a permit to sell beer, liquor, and wine. (ATC File).
2. The Applicant meets the qualifications to hold a permit pursuant to Ind. Code § 7.1-3-4-2. (Local Board Hearing; ATC Hearing).
3. The Applicant is of good repute in the community as required by 905 IAC 1-27-1. (ATC Hearing).
4. The Applicant began running the Rodeo Bar under an MQ in April, 2016.
5. Under Killermann, the Rodeo Bar has been the source of many police runs (Local Board Hearing).

6. Since April, 2016, no police runs have been cited at the Rodeo Bar. (ATC Hearing).

7. While the bar was being operated by Killermann, neither Applicant nor manager (Young) had any decision-making authority nor say in the operations. (ATC Hearing).

8. Killermann owned the building in which the Rodeo Bar is located and was initially going to lease the premises to the Applicant. (Local Board Hearing).

9. In the time between the Commission denial and the Appeal Hearing, Killermann declared bankruptcy and the building is now in receivership; lease payments have been made on a monthly basis to the receiver since April 2016. (ATC Hearing).

10. The Applicant entered into a contract in April 2016 with a professional security agency to provide additional security for the bar which includes a uniformed and equipped guard, and an ID scanner. (ATC Hearing).

11. Initially, the business was being purchased on contract by Applicant from Killermann. (Local Board).

12. In the interim period between the Local Board hearing and the Appeal hearing, the Applicant has paid a total of approximately \$60,000 in full to Killermann and any debts that might have been owed, completing the sale in full. (ATC Hearing).

13. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and 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 Commission is authorized to act upon proper application. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission, including a public hearing and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).
6. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
7. In determining whether to allow a transfer, the Commission may consider whether the transfer is done at arms-length.
8. The Commission may reverse a local board's action in denying an application for a permit *only* if it finds that 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 unsupported by substantial evidence. Ind. Code §7.1-3-19-11.

9. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

IV. RECOMMENDATION

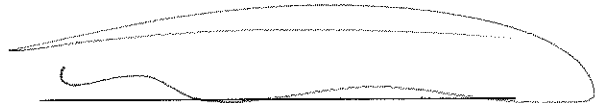
Mark Killermann has operated the Rodeo Bar since 2000. During that time, at various periods, the Michigan City Police Department has had numerous calls to the location, as exhibited by the binder rendered at the Local Board hearing. In fact, when Killermann applied for a renewal for this permit under 1103-05, Inc. RR46-06543, he was denied (that denial is presently under appeal). Both Applicant and Ian Young have worked for Killermann, but they had no input as to the operations while Killermann owned the bar.

At the Local Board hearing, the Board expressed serious and substantial concerns regarding the Applicant's independence from Killermann – their fear being the Killermann, whom they had already denied a renewal due to his poor operations, would continue to have influence on the Applicant in the operations of the bar. These stemmed from Killermann's ownership of the building, the terms of the sales contract, and the lack of proof that the Applicant was using his own funds to purchase the establishment. The Applicant has provided evidence to the Commission at the de novo appeal hearing quelling these concerns and alleviating the questions concerning Killermann's interest in the Rodeo Bar.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the LaPorte County Local Board resulting in a 3-0 vote to deny the transfer for the permit number RR46-32097, should be reversed and the Alcohol and Tobacco Commission should approve said application. The application of Mark Newkirk, Jr., 1103 Franklin Street,

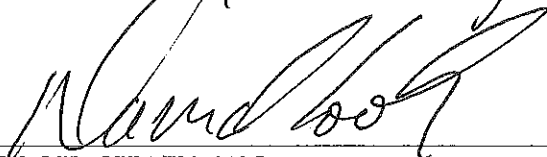
Michigan City, IN 46360, for a beer, liquor, and wine retail, was sufficient and the permit applied for herein is APPROVED.

DATE: August 8, 2016

A handwritten signature in black ink, appearing to read "David Rothenberg", is written over a horizontal line.

David Rothenberg, Hearing Officer

Approved this 6 day of September, 2016.



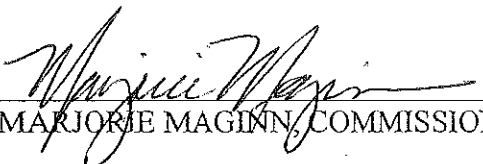
DAVID COOK, CHAIRMAN



DAVID COLEMAN, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER