STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION

IN THE MATTER OF	)	
THE PERMIT OF	)	
	)	
NIGHTSHIFT OF NORTH WEBSTER	)	**PERMIT NO. RR43-02891**
d/b/a STIMMELATORS	)	
GENTLEMENS CLUB	)	
114 EAST WASHINGTON STREET	)	
NORTH WEBSTER, INDIANA 46555	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Applicant, Samuel Stimmel ("Applicant") is the applicant for transfer of a type 210[1] Commission permit known as Nightshift of North Webster, d/b/a Stimmelators ("Stimmelators"), 114 East Washington Street, North Webster, Indiana 46555, permit number RR43-02891. The application was assigned to the Alcoholic Beverage Board of Kosciusko County ("Local Board"). The Local Board held a hearing on September 1, 2005 and voted 3-1 to deny transfer of the permit. The Commission adopted the Local Board's recommendation on September 13, 2005.

The Permittee filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe ("Hearing Judge"). The matter was set for hearing on August 16, 2006 and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing ("LB Hearing"), the evidence submitted to the Commission during the appeal hearing ("ATC Hearing"), and contents of the entire Commission file ("ATC File"),

[1] Liquor, Beer and Wine (Restaurant) Retailer located in an incorporated area.

now tenders her 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. Samuel Stimmel, transferee and father of Tracy Stimmel; and,
2. Tracy Stimmel, transferor and daughter of Samuel Stimmel.

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

None.

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

1. Motion to Dismiss Texas charge of Making a False Statement on an Alcoholic Beverage Application; and,
2. February 8, 2005 issue of Warsaw Times Union with a front page article detailing the dismissal of the Texas criminal charges.

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

None.

III. EVIDENCE BEFORE THE COMMISSION

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

1. Samuel Stimmel, transferee.

B. 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:

1. North Webster Police Department Incident Report;

2. Motion to Dismiss Texas charge of Making a False Statement on an Alcoholic Beverage Application;
3. Minutes of January 5, 2005 Commission meeting; and,
4. Petition signed by members of the community (i) attesting to Sam Stimmel's "good moral character and high and fine reputation"; and, (ii) supporting transfer of the Permit.

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

None.

IV. FINDINGS OF FACT

1. The Applicant, Samuel Stimmel, is the applicant for transfer of the type 210 Commission permit known as Nightshift of North Webster, d/b/a Stimmelators, 114 East Washington Street, North Webster, Indiana 46555, permit number RR43-02891. (ATC File).

2. From October 1, 1999 to February 15, 2005, Samuel Stimmel was the sole stockholder of Stimmelators. (ATC File).

3. In approximately March 2001, Samuel Stimmel purchased a bar in Victoria County, Texas ("Texas Bar"). (ATC File).

4. Prior to July 2003, Applicant retained Ronald Ford ("Manager") as a manager for the Texas Bar; and, a Texas alcoholic beverage permit was maintained in the Manager's name. (ATC File).

5. In 2003, the Manager terminated his employment at the Texas Bar; at that time, Samuel Stimmel filed for a Texas alcoholic beverage permit ("Texas Permit") in his name. (ATC File).

6. A holder of a Texas Permit must be a resident of the State of Texas. (ATC File.)

7. In 2004, because Samuel Stimmel maintained his residency in the State of Indiana, the Texas Alcoholic Beverage Commission ("Texas Commission") charged him in Victoria

County, Texas with criminal violations of the Texas alcoholic beverage residency requirement statutes ("Texas Charges") under Cause No. 04-11-21-350-D. (ATC Hearing).

8. An application for renewal of Stimmelator's permit, RR43-02891, was heard by the Local Board on October 7, 2004. (ATC File).

9. The Local Board considered renewal in light of the Texas Charges pending against Samuel Stimmel. (ATC File).

10. The Local Board voted two (2) to two (2) on whether to renew the permit. (ATC File).

11. Because of concerns regarding the pending Texas Charges, Samuel Stimmel filed an application with the Commission on November 3, 2004 requesting the permit be transferred from Samuel Stimmel to Tracy Stimmel. (ATC File).

12. On January 5, 2005, the Commission permitted the renewal "to take place based on the approval of the transfer [to Tracy Stimmel] and that [Samuel Stimmel] have no activity or involvement in the permit, unless he would be cleared from what is going on in Texas with the law." (ATC File).

13. The Local Board considered the application for transfer from Samuel Stimmel to Tracy Stimmel on February 3, 2005; and, voted unanimously to approve the transfer. (ATC File).

14. On February 8, 2005, the Texas Charges were dismissed. (ATC File).

15. The Texas Charges were dismissed based on a distinction between "domicile" and "residence" as defined by Texas law; because Samuel Stimmel could legally maintain multiple residences in various states, he was not ineligible to hold the Texas Permit based on residency. (ATC File).

16. On June 22, 2005, the Commission received an application requesting the permit be transferred from Tracy Stimmel to Samuel Stimmel. (ATC File).

17. The Local Board considered the application for transfer from Tracy Stimmel to Samuel Stimmel on September 1, 2005; and voted three (3) to one (1) to deny transfer of the permit. (LB Hearing).

18. The Local Board members stated concerns including (i) the request for transfer from Tracy Stimmel to Samuel Stimmel occurred too quickly after the recent transfer from Samuel Stimmel to Tracy Stimmel; and, (ii) the transfer from Samuel Stimmel to Tracy Stimmel was related to the dismissal of the Texas Charges. (LB Hearing).

19. There is no evidence in the record that any relationship exists between the dismissal of the Texas Charges and the transfer from Samuel Stimmel to Tracy Stimmel. (ATC File).

20. The Commission upheld the Local Board's recommendation for denial of the transfer from Tracy Stimmel to Samuel Stimmel on September 13, 2005. (ATC File).

21. In the time that Tracy Stimmel has owned and operated Stimmelators, it has suffered financially and has decreased in value. (ATC Hearing).

22. Samuel Stimmel is now the manager of Stimmelators and has been operating on a Commission Manager's Questionnaire since June 2006. (ATC File).

23. Samuel Stimmel maintains a reputation for decency and law obedience in the community in which he conducts business. (ATC Hearing).

24. Tracy Stimmel no longer desires to own or operate Stimmelators. (LB Hearing).

25. Tracy Stimmel voluntarily consents to the transfer of stock in Stimmelators to Samuel Stimmel. (LB Hearing).

26. 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 transfer 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. 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 noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. Applicant may not hold a beer retailer's permit unless the applicant is of good moral character in the community in which the applicant resides. Ind. Code § 7.1-3-4-2(a)(2)(A).

9. Applicant may operate a permit premises under the authority of a Commission Manager's Questionnaire if he meets all other qualifications required for the issuance of a beer retailer's permit. Ind. Code § 7.1-3-4-2(a)(8).

10. Applicant is of good moral character and in good repute in the community in which he does business and is qualified to hold the permit he seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

11. No legal basis exists for denying transfer of the permit to the Applicant.

12. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.

13. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.

14. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*

15. The Commission may reverse a local board's action in denying an application for a permit 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.

16. The Local Board's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

17. 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 finding of the Local Board to recommend denial of transfer of the permit in this matter was arbitrary and

capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, Samuel Stimmel, for transfer of the permit known as Nightshift of North Webster, d/b/a Stimmelators, located at 114 East Washington Street, North Webster, Indiana 46555 for the application of this Type 210 permit no. RR43-02891 is approved, the recommendation of the Local Board in this matter is reversed, and the transfer applied for herein is hereby GRANTED.

DATED: _____

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U-Jung Choe, Hearing Judge