

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Penalty Assessment Order
Issued to Herman Bar and Grill, L.L.C.

**ORDER GRANTING IN PART AND
DENYING IN PART THE
DEPARTMENT'S
MOTION FOR SUMMARY
DISPOSITION**

This matter is pending before Administrative Law Judge James E. LaFave pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings on May 4, 2015.

Jonathan D. Moler, Assistant Attorney General, represents the Department of Commerce (Department). Amy J. Doll, Fluegel, Anderson, McLaughlin & Brutlag, represents Herman Bar and Grill, L.L.C. (Respondent).

On September 11, 2015, the Department filed a Motion for Summary Disposition. On October 1, 2015, Respondent filed a response to the motion. Oral argument took place on October 19, 2015, and the record closed.

Based upon the motion and the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED THAT:

1. The Department's Motion for Summary Disposition of the claim that Respondent violated Minn. Stat. § 181A.04, subd. 3 (2014), is **GRANTED**.
2. The Department's Motion for Summary Disposition of the claim that Respondent violated Minn. Stat. § 181A.115 (2014), is **DENIED**.
3. This matter will proceed to an evidentiary hearing as scheduled on December 9, 2015, to address the remaining issues.

Dated: November 13, 2015

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

I. Factual and Procedural Background

Respondent Herman Bar and Grill is a restaurant and bar located in the rural community of Herman, Minnesota.¹ The building housing Respondent is divided into two parts. The front half of the building is an off-sale liquor store, and the back half of the building contains the restaurant and bar.² Respondent's bar and dining areas are contained within one large room.³ According to Patrice Haney, Respondent's manager, the bar and dining areas "can be" separated by a temporary partition wall, which is generally used for private parties.⁴ When the temporary partition wall is open, there is a "distinction" between the bar area and dining room "created by a partial wall and lower beam in the ceiling."⁵ Alcoholic drinks consumed by customers are prepared in the bar area and served in both the bar and dining areas.⁶

In February 2014, the Department received a complaint that Respondent was employing minors in a place serving intoxicating beverages.⁷ In response to the complaint, the Department conducted an investigation, which included reviewing employee records and other information from Respondent.⁸

On October 1, 2014, the Department issued a Penalty Order to Respondent containing three allegations: (1) violation of Minn. Stat. § 181A.04, subd. 3, for employing minors under the age of 16 after 9:00 p.m.; (2) violation of Minn. Stat. § 181A.04, subd. 6 (2014), employing a minor under the age of 18 after 11:00 p.m. on an evening before a school day without a note signed by the student's parent or guardian; and (3) violation of Minn. Stat. § 181A.115, for employing minors under the age of 18 in rooms serving intoxicating liquors.⁹ Based on these allegations, the Department fined Respondent \$3,500.¹⁰

Respondent objected to the Penalty Order on October 9, 2014.¹¹ In response to the allegations of employing minors working later than 9:00 p.m., Respondent claimed its timeclock is always set to "daylight savings time" and therefore not accurate.¹² However, Respondent conceded that on one occasion, one minor employee did work 25 minutes past 9:00 p.m.¹³ In response to the allegations of employing minors in an area where alcohol is served, Respondent claimed its minor employees were hired for

¹ Affidavit of Patrice Haney (Haney Aff.) ¶ 2.

² Haney Aff. ¶ 1.

³ See Affidavit of Heather Yursi (Yursi Aff.), Ex. I.

⁴ Haney Aff. ¶ 6.

⁵ *Id.*

⁶ Haney Aff. ¶ 3.

⁷ Yursi Aff. ¶ 2.

⁸ Yursi Aff. ¶¶ 3-6, Exs. B-E.

⁹ Yursi Aff., Ex. F at 3.

¹⁰ Yursi Aff., Ex. 5 at 5.

¹¹ Yursi Aff., Ex. G.

¹² *Id.*

¹³ *Id.*

“special events” when “alcohol is not served in the dining room” and during the “buffet on Sundays” when “alcohol is not served.”¹⁴ Thus, Respondent disputed the basis for the Department’s Penalty Order.

Based on Respondent’s objections, the Department conducted additional investigation into the matter, including conducting two interviews and obtaining photographs of Respondent’s bar and dining areas.¹⁵ On February 26, 2015, the Department issued an Amended Penalty Order to Respondent, which eliminated the third allegation that Respondent employed minors under the age of 18 past 11:00 p.m. on a school night, and reduced the penalty fine assessed to \$3,000.¹⁶ Respondent also objected to the Amended Penalty Order on March 5, 2015.¹⁷

On May 4, 2015, the Department filed a Notice and Order for Hearing and Prehearing Conference with the Office of Administrative Hearings. The issues in this case were set forth as follows:

1. Did Respondent violate Minn. Stat. § 181A.04, subd. 3, by employing minors under the age of 16 past 9:00 p.m.?
2. Did Respondent violate Minn. Stat. § 181A.115, by employing minors under the age of 16 where intoxicating beverages were served?
3. Must Respondent pay a total civil penalty of \$3,000 for its violations of Minn. Stat. §§ 181A.03 and 181A.115, pursuant to Minn. Stat. § 181A.12?
4. Must Respondent comply with Minn. Stat. §§ 181A.04, subd. 5, Minn. Stat. § 181A.115, and Minn. R. 5200.0910, subp. P?¹⁸

On September 11, 2015, the Department filed a Motion for Summary Disposition. On October 1, 2015, Respondent filed a response to the motion. Oral argument took place on October 19, 2015.

II. Standard of Review for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.¹⁹ A motion for summary disposition may be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of

¹⁴ Yursi Aff., Ex. G.

¹⁵ Yursi Aff., Exs. H-I.

¹⁶ Yursi Aff., Ex. J.

¹⁷ Yursi Aff., Ex. K.

¹⁸ NOTICE AND ORDER FOR HEARING AND PREHEARING CONFERENCE at 4 (April 28, 2015).

¹⁹ *Pietsch v. Minnesota Bd. of Chiropractic Exam’rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2015).

law.²⁰ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.²¹ In other words, the Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.²²

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.²³ A fact is material if its resolution will affect the outcome of the case.²⁴ If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.²⁵ A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.²⁶ Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.²⁷

Ultimately, summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.²⁸ Thus, summary disposition is only proper when no fact issues need to be resolved.²⁹

III. Legal Arguments

The Department claims "there is no genuine issue of material fact that Respondent violated both Minn. Stat. §§ 181A.04 and .115," and therefore "the Court should grant th[e] motion for summary disposition."³⁰ First, the Department argues "even assuming that Respondent's time clock was set to daylight savings time, Respondent allowed [two employees under the age of 16] to work past 9:00 p.m."³¹ The Department points to evidence in the record showing M.D. worked until 9:25 p.m. on October 2013, and that L.S. worked until 9:46 p.m. in November 2013 as well as 9:04 p.m. and 9:24 p.m. on two dates in February 2014.³² The Department claims these facts constitute a violation of Minn. Stat. § 181A.04, subd. 3, which states "no

²⁰ See *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

²¹ See e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

²² See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

²³ See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

²⁴ See *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).

²⁵ See *Thiele*, 425 N.W.2d at 583.

²⁶ See *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

²⁷ See Minn. R. Civ. P. 56.05.

²⁸ See *Sauter*, 70 N.W.2d at 353.

²⁹ See *id.*

³⁰ Department's Memorandum of Law in Support of Motion for Summary Disposition (Dept. Mem.) at 5.

³¹ Dept. Mem. at 6.

³² *Id.*

minor under the age of 16 shall be permitted to work any day before 7:00 a.m. or after 9:00 p.m.”³³ Thus, the Department believes disposition as a matter of law is appropriate.

Second, the Department argues that evidence in the record established that minors under the age of 16 “bused tables in rooms where alcohol was served” and “handled” alcohol by washing dishes “when alcohol was being served.”³⁴ The Department points out that the majority of shifts worked by L.S. and M.D. were in the evening when alcohol was normally served by Respondent.³⁵ The Department claims these facts establish a violation of Minn. Stat. § 181A.115, prohibiting minors from being employed in “rooms constituting the place in which intoxicating liquors or 3.2 percent malt liquors are served” or in “any tasks involving the serving, dispensing, or handling of such liquors that are consumed on the premises.”³⁶ Therefore, the Department asserts that summary disposition is also appropriate on this claim. Finally, the Department asks that “the Court affirm [the Department’s] penalty order in its entirety” because “Minn. Stat. § 181A.12 lays out statutorily defined penalties for specific violations” and that the fine assessed in this case is mandated and appropriate.³⁷

During oral argument on the summary disposition motion, the Department conceded that evidence presented by Respondent in opposition to summary disposition has created “a tryable issue of fact” regarding the issue of whether Respondent violated Minn. Stat. § 181A.115, by employing minors under the age of 16 in a place where intoxicating beverages were served. But requested summary disposition on the allegation that Respondent employed minors under the age of 16 past 9:00 p.m.

Respondent opposes the Department’s motion, claiming the Department “has failed to present any admissible evidence to support summary disposition.”³⁸ Specifically, Respondent argues that the Department is asking the Administrative Law Judge “to rely upon inadmissible hearsay, to assume facts not in evidence, and to decide factual issues, all contrary to law.”³⁹ In essence, Respondent disputes the types of evidence submitted by the Department and claims much of it is biased, incomplete, or out of context.⁴⁰ However, “Respondent does not dispute that the evidence establishes that two of its minor employees (under age 16) worked beyond 9:00 p.m.” on four occasions.⁴¹ Rather, Respondent argues that “the fines imposed for these very minimal violations are excessive.”⁴²

During the oral argument on the Department’s summary disposition motion, Respondent again conceded that two employees under the age of 16 worked past 9:00

³³ Dept. Mem. at 5.

³⁴ Dept. Mem. at 7.

³⁵ *Id.*

³⁶ Dept. Mem. at 7-8.

³⁷ Dept. Mem. at 8-9.

³⁸ Respondent’s Memorandum in Opposition to Motion for Summary Disposition (Resp. Mem.) at 12.

³⁹ Resp. Mem. at 11.

⁴⁰ Resp. Mem. at 6-11.

⁴¹ Resp. Mem. at 3.

⁴² *Id.*

p.m. on four occasions, meaning the Department is entitled to summary disposition on the issue of whether Respondent violated Minn. Stat. § 181A.04, subd. 3 (2014). However, Respondent continues to assert that it is entitled to an evidentiary hearing to address the facts underlying the alcohol violations, as well as the basis for the \$3,000 fine.

IV. Legal Analysis

The outcome of the Department's Motion for Summary Disposition was decided by the concessions made by the parties during the course of briefing and oral argument.

First, Respondent does not dispute that evidence in the record establishes that two of its employees under age 16, L.S. and M.D., worked beyond 9:00 p.m. on four occasions.⁴³ Specifically, the record shows M.D. worked until 9:25 p.m. in October 2013, and that L.S. worked until 9:46 p.m. in November 2013. In addition, the record documents that L.S. worked until 9:04 p.m. and 9:24 p.m. on two dates in February 2014.⁴⁴ During the oral argument, Respondent again conceded that two employees under the age of 16 worked past 9:00 p.m. on "several occasions." These facts constitute a violation of Minn. Stat. § 181A.04, subd. 3, which states that "no minor under the age of 16 shall be permitted to work any day before 7:00 a.m. or after 9:00 p.m."⁴⁵ Thus, disposition of the Department's claim that Respondent violated Minn. Stat. § 181A.04, subd. 3, is warranted as a matter of law.

Second, during oral argument on the summary disposition motion, the Department conceded that evidence presented by Respondent in opposition to summary disposition has created "a tryable issue of fact" regarding the issue of whether Respondent violated Minn. Stat. § 181A.115. The statute prohibits minors under the age of 18 from being "employed in any rooms constituting the place in which intoxicating liquors or 3.2 percent malt liquors are served or consumed or in any tasks involving the serving, dispensing, or handling of such liquors."⁴⁶ Based on the Department's concession that genuine issues of material fact exist regarding whether Respondent violated the statutory prohibition, summary disposition is not appropriate.

V. Conclusion

For the foregoing reasons, the Administrative Law Judge concludes that the Department's Motion for Summary Disposition of the claim that Respondent violated Minn. Stat. § 181A.04, subd. 3, is **GRANTED**, but summary disposition of the claim that Respondent violated Minn. Stat. § 181A.115, is **DENIED**. This matter will proceed to an evidentiary hearing as previously scheduled on December 9, 2015, starting at 9:30 a.m., to address the remaining issues, including the amount of the fine.

⁴³ Resp. Mem. at 3.

⁴⁴ Yursi Aff., Ex. D.

⁴⁵ Dept. Mem. at 5.

⁴⁶ Minn. Stat. § 181A.115.

Prior to the evidentiary hearing, the Administrative Law Judge encourages the parties to consider engaging in a settlement conference or mediation to resolve the outstanding issues in this case. Pursuant to Minn. R. 1400.5950 (2015), the Office of Administrative Hearings can provide a mediator upon receipt of a mutual request for mediation submitted by the parties.

J. E. L.