

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

P.F. Chang’s China Bistro, Inc., d/b/a P.F. Chang’s China Bistro,
Petitioner,
v.
South Carolina Department of Revenue,
Respondent.

Docket No. 16-ALJ-17-0083-CC

FINAL ORDER AND DECISION

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (“ALC” or “Court”) pursuant to S.C. Code Ann. §§ 1-23-310 *et seq.* (Supp. 2015), S.C. Code Ann. § 1-23-600(B) (Supp. 2015), and S.C. Code Ann. § 61-2-260 (2009) for a contested case hearing. The Petitioner, P.F. Chang’s China Bistro, Inc., d/b/a P.F. Chang’s China Bistro (hereinafter the Petitioner or P.F. Chang’s), applied for a renewal of its beer/wine and liquor license pursuant to S.C. Code Ann. §§ 61-6-100 *et seq.*), for its restaurant located at 1127 Woodruff Road, Suite 1627, Greenville, South Carolina. The Department of Revenue (hereinafter the Department) denied the Petitioner’s application for the renewal because of the criminal record of the restaurant manager of the Petitioner’s business. The court heard the matter on May 17, 2016. After carefully weighing all of the evidence, this court finds that the Petitioner has met all the statutory requirements for the renewal of its license, and that based upon the evidence presented at the hearing, the Petitioner has shown by a preponderance of the evidence that the applicant, Kyle Marsh, is of good moral character.

ISSUE

The only issue in dispute is the character of the applicant, Mr. Kyle Marsh.

FINDINGS OF FACT

This court has subject matter and personal jurisdiction. This court makes the following findings of fact, taking into consideration that the burden is on the Petitioner to establish its

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respective case by a preponderance of the evidence, and taking into account the credibility of the witnesses:

1. The Petitioner, P.F. Chang's China Bistro, Inc., d/b/a P.F. Chang's China Bistro was founded in 1993, and is now a successful, nation-wide restaurant specializing in Pan-Asian cuisine. It now has 214 restaurants located throughout the United States, with three (3) locations in South Carolina. The Petitioner operates a restaurant located in Greenville, South Carolina, at 1127 Woodruff Road, Suite 1627. The Petitioner submitted a renewal application to the South Carolina Department of Revenue on October 27, 2015, requesting a renewal of its liquor by the drink license and on-premises beer and wine permit. The Petitioner received a Conditional Renewal Denial Notice dated November 6, 2015, stating the renewal application for beer/wine and/or liquor was conditionally denied, citing improper moral character of the local manager, Mr. Kyle Marsh. The Petitioner protested the denial, and the Department issued a final agency determination on February 12, 2016. The Petitioner timely appealed that determination on March 9, 2016.
2. The Petitioner presented testimony from Robert Miller, a Regional Manager who oversees seven (7) of the Petitioner's restaurants in the southeast United States. Mr. Miller testified that Mr. Kyle Marsh is one (1) of the seven (7) general managers that he oversees. The Petitioner has held liquor by the drink licenses and on-premises beer and wine permits at the Woodruff Road location for almost ten (10) years and at its other locations in South Carolina for many years. The Petitioner has never had any of these licenses suspended or revoked. Mr. Miller testified that as a corporation, the Petitioner has numerous layers of internal supervision and corporate policies in place to ensure compliance with the law.
3. Mr. Miller also testified that the Petitioner is confident in Mr. Marsh's management of the Greenville restaurant and in his good moral character. Mr. Miller testified that the Greenville restaurant has over sixty (60) employees and generates over \$3,000,000 in annual receipts. Mr. Miller also testified that Mr. Kyle Marsh has not hidden his past from the Petitioner. Mr. Miller has known Mr. Marsh since 2010, when Mr. Marsh

became a server. At that time, Mr. Miller was the general manager for the Greenville restaurant. Mr. Miller testified that Mr. Marsh is well-regarded, and that he personally selected Mr. Marsh for the position that he currently holds. Mr. Marsh left for a short period of time to manage another competing restaurant, and it was Mr. Miller who encouraged Mr. Marsh to return to work with the Petitioner. Mr. Miller testified that Mr. Marsh has undergone personality tests, and other tests, and has performed well on all of the tests. Mr. Miller stated that Mr. Marsh is good leader, that he is focused on work, does things the right way, seeks more responsibility, and has shown himself to be trustworthy. Mr. Miller testified that Mr. Marsh has recently turned the Greenville restaurant around within a short time of becoming its general manager, and the restaurant is now off the “watch list.”¹ He also testified that Mr. Marsh has dramatically increased catering sales, resulting in bonuses for the restaurants management staff. In Mr. Miller’s opinion, Mr. Marsh is an honest, hard-working, competent and well liked leader with a bright future in the P.F. Chang’s organization.

4. Kyle Marsh testified that he was born in Biloxi, Mississippi, and went to school in Miami, Florida. He is thirty-nine (39) years old and is a legal resident of South Carolina. Mr. Marsh testified that he was a successful high school athlete, and received a baseball scholarship at a college in Florida. Unfortunately, due to a shoulder injury, he was never able to play a single college baseball game. After this, he went through a self-described dark period in his life where he became dependent upon drugs and alcohol. He testified that he “hit bottom” in approximately 2008, and was living on the street. Through the kind intervention of a concerned taxi cab driver Mr. Marsh was taken to the Miracle Hall Ministry in the Greenville, South Carolina area. At this facility, Mr. Marsh underwent intensive rehabilitation and was able to turn his life around in the intensive recovery program operated by the ministry. Through this course of work at the ministry’s kitchen and counseling, as well as enrolling and completing counseling courses through an online educational program, Mr. Marsh earned a counselor’s degree and eventually moved into

¹ The Greenville restaurant was on the “watch list” because it had negative sales in the period just before Mr. Marsh became the general manager.

- an apartment. He testified that he has been free of drugs and alcohol since that time, and has been actively involved in this Greenville area ministry.
5. Mr. Marsh also testified that during his dark period, he was arrested and ultimately convicted of two (2) misdemeanor offenses that occurred on two (2) separate occasions. Mr. Marsh was convicted of misdemeanor Breach of Trust with Fraudulent Intent in 2008. This conviction arose from thousands of dollars of inventory that went missing when he worked as an Assistant and Temporary Manager of a Columbia area restaurant. Additionally, he pled guilty to a misdemeanor Petit Larceny charge in 2011 involving stolen goods that were sold at a pawn shop. Mr. Marsh's convictions are finalized and he has had no other convictions since that time.
 6. Mr. Marsh testified that he had been under the impression that his prior convictions were expunged, therefore, he believed he was accurately representing his criminal history on the renewal application form when he indicated that he had never been arrested or convicted of an offense. Upon learning this was not the case, Mr. Marsh immediately began working to have his convictions expunged. He testified that he has always been honest with the Petitioner about his background, and that he is not trying to hide his past from anyone, to include the Department. Mr. Marsh's record does not contain any crimes involving alcohol and Mr. Marsh has never had a permit or license to sell beer, wine or liquor suspended or revoked.
 7. Mr. Marsh also testified that he has been married since, and that his wife is a source of support for him in his continued commitment to not return to his old way of life. They have a thirteen (13) month old daughter and he has reconciled with his parents and siblings, and sees them frequently. Though he is no longer in counseling for his own problems, he is still involved in the shelter and helps out at the shelter.
 8. Mr. Marsh got a job with the Petitioner as a server in 2010, and then he was promoted to bartending and then to manager. Now he has been promoted to Operating Partner, which is equivalent to the general manager. He oversees sixty (60) employees, and manages the daily operations for the Greenville restaurant.

9. Tammy Young testified for the Department. She has been the ABL division supervisor for nine (9) years and has worked at the Department for twenty-eight (28) years. She testified that she reviews applications and decides whether to approve or deny them. She reviewed the Petitioner's application in this matter, and she was the person who denied the renewal application. She testified that Mr. Marsh indicated that he had no conviction when he completed the renewal application. The Department determined that Mr. Marsh has two (2) misdemeanor convictions, as listed above, and that both crimes are considered crimes of moral turpitude. The Department further determined that based on these convictions, he is not of good moral character and should not be licensed. Therefore, his application was denied. Ms. Young also testified that neither of Mr. Marsh's convictions were alcohol related offenses. She testified that it is the administrative position of the Department not to grant a license to someone with convictions for crimes of moral turpitude within ten (10) years of the application. She also testified that though Mr. Marsh had checked that he did not have convictions, he also attached his arrest record, which included the two convictions, to his license application.
10. On rebuttal, Mr. Marsh testified that he checked that he had no convictions because he believed it meant felony convictions. He also reiterated that he attached his arrest record to the renewal application, and that he has always been "up front" about his past.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this court concludes the following as a matter of law:

Jurisdiction over this case is vested with the South Carolina Administrative Law Court pursuant to §§ 1-23-310 *et seq.*, § 1-23-600(B), and § 61-2-260. "[T]he issuance or granting of a license to sell beer or alcoholic beverages rests in the sound discretion of the body or official to whom the duty of issuing it is committed[.]" *Palmer v. S.C. Alcoholic Beverage Control Commission*, 282 S.C. 246, 248, 317 S.E.2d 476, 477 (Ct. App. 1984). The weight and credibility assigned to evidence presented at a hearing is within the province of the trier of fact. *See S.C. Cable*

Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trier of fact who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. *See, e.g., Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); *Wallace v. Milliken & Co.*, 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

At least two provisions address the character of an applicant for a retail liquor license.² S.C. Code Ann. § 61-2-100(D) provides that “[t]he Department may not issue a license or permit under this title to any person unless the person and all principals are of good moral character.” Additionally, S.C. Code Ann. § 61-6-110(3) provides that an applicant for a retail liquor license is ineligible if “... not of good repute.”

Good repute is a separate component of character, but it is related to a person's overall good character. In a prior order of this court in an analogous case, one administrative law judge persuasively described moral character as a component of repute. “Moral character is one component of reputation, while the collective opinion of one's peers regarding one's deportment, integrity, and community standing is another component. Evidence relating to each component is relevant and probative.” *South Carolina Dep't of Revenue and Taxation v. Burris*, 96-ALJ-17-0201-CC, 1999 WL 146238 (July 24, 1996).

Additionally, the term “good moral character” is not defined. The South Carolina Attorney General has opined that:

What constitutes good moral character in a given case, then, we cannot say for there is no single criterion in South Carolina by which to judge it; therefore, the Commission itself must determine in each instance whether one possesses it or not. Yet in making that determination, the Commission would not be justified in refusing a license simply upon a “moral appraisal,” or either because previous misconduct which is not relevant to the conduct of the business for which the license is sought because of a remote conviction of a minor offense, or because of an unproved accusation of a crime.

1969 S.C. Op. Att'y Gen. 159 (1969). *See also* 53 C.J.S. Licenses § 62:

² The Department cites S.C. Code Ann. § 61-6-1820 (Supp. 2009), but this provision does not appear to apply to the issuance of retail liquor licenses.

Good moral character can be required [for a license to sell alcohol], as long as it has a rational connection to the applicant's fitness or capacity. An applicant's past conduct or criminal convictions may be considered in the decision whether or not to grant the license. However, a license may not be denied to an applicant on a moral appraisal, or for previous misconduct, which is not relevant to the conduct of the business for which a license is sought. Also, a license may not be needed on the grounds that the applicant has been convicted of a crime if the crime or acts which led to conviction are not related to the business, occupation, or profession for which application is made.

Although there is no single criterion by which to determine if a person is of good moral character, the commission of a crime involving moral turpitude implies the absence of good moral character. 1969 Op. S.C. Att'y Gen. No. 2709 at 159; 1989 S.C. Op. Att'y Gen. No. 89-89 at 237. There is no exhaustive list of crimes that involve moral turpitude, but such crimes generally involve a breach of duty to other members of society.

A crime of moral turpitude is an act of baseness, vileness or depravity in the private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man. ... In determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellow man which is breached by the commission of the crime.

State v. Ball, 292 S.C. 71, 73 354 S.E.2d 906, 908 (1987) *overruled in part on other grounds*, *State v. Major*, 301 S.C. 181, 391 S.E.2d 235 (1990). (Supp. 2015)

The party seeking a license has the burden of proving it has met all of the statutory requirements for the license. 48 C.J.S. *Intoxicating Liquors*, § 114 (1981). Here, the Petitioner has met that burden.

DISCUSSION

While convictions for criminal offenses that have been deemed by our courts as crimes of moral turpitude are evidence of a person's lack of good moral character, they are not dispositive of the issue. The court must consider other evidence, if presented, which is relevant to the moral character of the applicant. In *Front St. Soc. Club, d/b/a Front St. Soc. Club, Petitioner*, Docket No.: 11-ALJ-17-0547-CC, 2012 WL 1893269 (May 17, 2012), the Petitioner appealed the Department's denial of his on-premises beer and wine permit application and private liquor by the drink license

application on the basis that the Petitioner lacked the requisite moral character. The Petitioner's background check showed two arrests for assault and battery and two for brandishing a firearm. He was only charged with one count of assault and battery and one count of brandishing a firearm. The brandishing a firearm charge was dismissed and the Petitioner served thirty days in jail on the Assault and Battery Charge. The incidents occurred five years before the ALC reached its decision. The court determined that (1) the Petitioner's conviction was an isolated incident, (2) the Petitioner's criminal record did not list any crimes involving the misuses of alcohol and/or drugs, and (3) the evidence indicated that the Petitioner was a productive citizen with a desire to positively serve his community, and, accordingly, reinstated the Petitioner's on-premises beer and wine permit and private liquor by the drink license.

In this case, Mr. Marsh presented testimony pertaining to his troubled past. As a young college student, Mr. Marsh saw his dreams of a career in sports end with an injury that "destroyed" his shoulder. After more than a decade of playing competitive baseball and entering college with the intent of becoming a college athlete, his shoulder injury caused him to "lose his identity" and drift away from his lifelong goals and his family. He abused alcohol and drugs, and eventually found himself homeless and alone. It was during this dark time in his young life that Mr. Marsh was convicted of the breach of trust and larceny offenses. Through the charity of others, Mr. Marsh was accepted into a mission in Greenville, South Carolina, and entered into a program that helped him overcome his addiction and develop healthy life skills. After over nine months of daily classes and work at the mission, Mr. Marsh re-started his life. He rented an apartment and in 2010 he became employed as a server (waiter) at the Woodruff Road P.F. Chang's restaurant in Greenville, South Carolina.

Upon the commencement of his employment with P.F. Chang's restaurant in 2010, the unrefuted testimony of Mr. Miller was that he was a top performing employee and he was steadily promoted through the P.F. Chang's organization. He was promoted to bar tender, then manager, and in 2015 he became the Operating Partner of the Woodruff Road restaurant, a position tantamount to the restaurant's general manager. The Woodruff Road P.F. Chang's restaurant has over sixty (60) employees and generates over \$3,000,000 in annual receipts. Throughout his career progression at P.F. Chang's, Mr. Marsh demonstrated positive character traits, including hard work, a positive

attitude, friendliness towards other employees and customers, competence and honesty.

As a nationwide chain with over 200 restaurants located throughout the United States, P. F. Chang's has many auditing and monitoring systems designed to track the profitability of each restaurant and to guard against theft, fraud, and other threats to the viability of the business. Mr. Marsh's performance has been subjected to many reviews and audits, and his work has consistently been found to be impeccable. Mr. Miller testified that under Mr. Marsh's leadership, the Woodruff Road restaurant has become profitable again, and during his tenure as the Operating Partner, the restaurant increased its catering sales by 400 percent, more than any other P.F. Chang's restaurant in the chain.

Mr. Miller testified that in his opinion, based on over five years of observing Mr. Marsh's work performance, he found Mr. Marsh to be an honest, hard-working, excellent employee, who is trustworthy and in whom he has total confidence. He further testified that due to the rigorous audits and other monitoring in place at all the Petitioner's restaurants, if there had been any problem with Mr. Marsh's performance, it would have been discovered.

Additionally, evidence was presented that since completing his course of study and work at the mission and embarking on his career with the Petitioner, Mr. Marsh has married and has become a father. Mr. Marsh testified that his spouse would never tolerate him returning to his past behavior, and that as a father he would never entertain any thought of doing so.

Considering the totality of the evidence presented at the hearing pertaining to Mr. Marsh's moral character, this court finds that while the two convictions on Mr. Marsh's criminal record do raise questions about his moral character, the overwhelming evidence supports the conclusion that Mr. Marsh's troubled past is behind him, and that he has demonstrated that he is a person of good moral character. His successful management of a multi-million dollar business with sixty employees, coupled with the testimony of his supervisor, a representative of a national restaurant chain, that he is valued and trusted member of the organization, convinces this court that Mr. Marsh meets the criteria for licensure.³

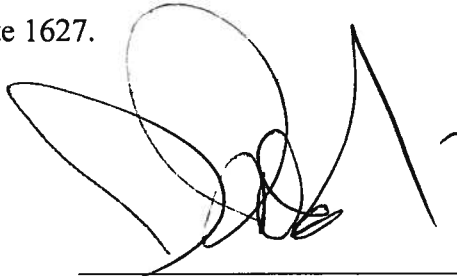
³ The court considered the testimony of a representative from the Department that Mr. Marsh indicated on his application that he had not been arrested or convicted of any criminal offenses. However, Mr. Marsh testified that he misread the question and believed that it was only asking about felony convictions, of which he has none. Furthermore, Mr. Marsh attached a copy of his criminal record, which included the two convictions, to his

ORDER

Based upon the Findings of Fact and Conclusions of Law stated above, the court finds that the Petitioner meets the statutory requirements for a renewal of its retail liquor license. It is therefore

ORDERED that the Department's Determination dated February 12, 2016, denying the Petitioner's renewal application for a liquor by the drink license and on-premises beer and wine permit because the licensee's principal was not of good moral character is **REVERSED** and it is **ORDERED** that the Department shall **GRANT** the Petitioner's renewal application for a liquor by the drink license and on-premises beer and wine permit for its restaurant located in Greenville, South Carolina, at 1127 Woodruff Road, Suite 1627.

IT IS SO ORDERED.



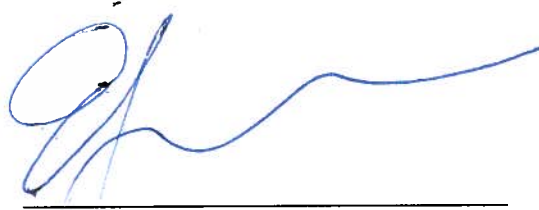
S. Phillip Lenski
Administrative Law Judge

May 23, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

application. Therefore, this court is inclined to accept the explanation of the applicant that his incorrect answer on his application was a result of his misreading the question instead of an effort to mislead the Department.

I, Edye U. Moran, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Edye U. Moran
Law Clerk

May 23, 2016
Columbia, South Carolina