

Minutes of the Fairfax County Consumer Protection Commission

April 20, 2021

7:30 PM
Zoom Video Meeting
Chairman Fee presiding

Attendance:

Commissioners: Belkowitz, Callender, Fee,
Gulakowski, Hargraves, Hine, Kirk, Kratovil,
Roark, Rosier

Absent:

Commissioners: Javed

Staff:

Michael S. Liberman, Director
Cable and Consumer Services
(Fairfax)
Rebecca L. Makely, Director
Consumer Services Division
(Suite 433)
John W. Burton, Assistant County Attorney
Office of the County Attorney
(Suite 549)
Susan C. Jones, Branch Chief
Consumer Affairs Branch
(Springfield)
Carl Newcomb, Branch Chief
Regulation and Licensing Branch
(Burke)

The electronic meeting was called to order at 7:31 PM by Chairman Fee.

Quorum, Location, and Audibility of Members' Voices

Chairman Fee conducted a Roll Call to verify that a quorum of members were participating; and that each member's voice was clear, audible, and at appropriate volume for all of the other members; and the location from which each member was participating. The roll call was as follows:

Chairman Fee, Burke
Commissioner Belkowitz, Fairfax City
Commissioner Callender, Great Falls
Commissioner Gulakowski, Burke
Commissioner Hargraves, Kingstown
Commissioner Hine, Fairfax
Commissioner Kirk, Falls Church
Commissioner Kratovil, Mount Vernon
Commissioner Rosier, Great Falls

Chairman Fee passed the virtual gavel to Vice Chairman Gulakowski. A motion was made by Chairman Fee that each member's voice was adequately heard by each member of the Consumer Protection Commission (Commission.) This motion was seconded by Commissioners Kirk and Callender. This motion passed 9-0, with Commissioner Roark absent from the vote.

Need for an Electronic Meeting

A motion was made by Chairman Fee that the State of Emergency caused by the COVID-19 pandemic made it unsafe for the Commission to physically assemble and unsafe for the public to physically attend any such meeting, and that as such, FOIA's usual procedures, which require the physical assembly of the Commission and the physical presence of the public, could not be implemented safely or practically. Chairman Fee further moved that the Commission conduct the meeting electronically through a dedicated audio-conferencing line, and that the public can access the meeting by calling 1-888-270-9936 and entering access code 584548. The motion was seconded by Commissioner Kirk. The motion passed 9-0, with Commissioner Roark absent from the vote.

Need to Dispense with FOIA's Usual Procedures to Assure Continuity in Government/Continue Operations

A motion was made by Chairman Fee that all of the matters addressed on the agenda addressed the Emergency itself, were necessary for continuity in Fairfax County government, and/or were statutorily required or necessary to continue operations and the discharge of the Commission's lawful purposes, duties, and responsibilities. This motion was seconded by Commissioner Kirk. This motion passed 10-0.

Minutes

The minutes for the March 16, 2021, meeting were approved without objection.

Report of the Chairman

Chairman Fee had no matters to bring before the Commission.

Report of the Director

Director Liberman stated the Board of Supervisors (BOS) held budget public hearings on April 13, 14, and 15, 2021, with approximately 150 participants speaking. On Friday, April 23, the BOS will conduct a pre-budget mark-up. On Tuesday, April 27, 2021, the annual budget mark-up for FY 2022 will be conducted at the BOS meeting.

Commission Matters

Commissioner Belkowitz had no matters to bring before the Commission.

Commissioner Callender had no matters to bring before the Commission.

Commissioner Gulakowski mentioned an article in the *Washington Post* on a survey from the Insurance Institute for Highway Safety regarding emergency room accidents involving pedestrians, cyclists, and e-scooters. The article highlighted the frequency rates of accidents for e-scooters.

Commissioner Hargraves stated he was appointed to the Police Civilian Review Panel. He noted the vaccine are now opened to persons 16 years old and above.

Commissioner Hine had no matters to bring before the Commission.

Commissioner Kirk had no matters to bring before the Commission.

Commissioner Kratovil had no matters to bring before the Commission.

Commissioner Roark had no matters to bring before the Commission.

Commissioner Rosier was encouraged by the County stepping up to provide COVID-19 vaccines. The Lord and Taylor building in Tysons Corner will be a location where vaccines are offered. Commissioner Rosier mentioned speaking to a senior citizen on a billing issue with Verizon. This person continued to receive zero billing invoices. Staff investigated the issue and found the person attempted to open an additional telephone line account. The person did not follow through, but Verizon kept the account open which caused the zero billing invoices. Verizon has closed the account. Commissioner Rosier expressed concern over the traffic construction on Interstate 66 into Fairfax County. Commissioner Rosier contacted Virginia Department of Transportation about the access to Nutley Street and Route 123 interchange that is not clearly marked and could lead to accidents.

Chairman Fee mentioned seeing an article involving an insurance scam where scammers were following the obituaries and contacting survivors claiming premiums were not paid. To receive the insurance payout, the person needed to pay off the premium.

Old Business

Rebecca Makely, Director, Consumer Services Division, reviewed the CPC attendance calendar. It was noted Commissioner Javed had been absent from Commission meetings since January 2020.

A discussion ensued on term expiration, Bylaw authority, quorum issues, and contact efforts. The Commission requested staff contact Commissioner Javed and inform the Clerk to the Board regarding his attendance.

New Business

1. Appeal Hearing: Massage Therapist Permit Denial

Present: Appellant Isabel Middleton, legal counsel Barry Schneiderman, and translator Kay Simmons.

Chairman Fee read the following statement of Commission Responsibility. All hearings or other public proceedings conducted by the Commission shall be conducted in an informal manner. The Commission shall have the discretion to admit all evidence which may be of probative value even if that evidence is not in accord with formal rules of legal practice and procedure.

Applicants and appellants may appear, either by personal appearance, legal counsel, or other representation, to present argument and evidence on their behalf. In addition, the Commission may establish rules of procedure for the conduct of hearings which are consistent with law. Any interested party may record all public proceedings of any hearing in any manner which will not impede the orderly conduct of the hearing.

Mr. Schneiderman delivered the Appellant's presentation on behalf of his client, Isabel Middleton. He stated Ms. Middleton was re-appealing the denial of her massage license from the end of 2019. The facts and evidence were presented at the last hearing and Ms. Middleton has not performed any massages since that time. The single offense of residing in a bawdy house in 2018 in Arlington County should not operate to automatically lead to the denial of Ms. Middleton's license. Ms. Middleton was only employed in the establishment for two days and was not aware of any illegal activity. Ms. Middleton did not engage in an improper activity or prostitution and was not charged with that offense. The customer, an undercover Arlington County Police Officer, was clothed, and was not improperly touched or offered services. Ms. Middleton did plead guilty to resolve the issue. In 2019, the Commission discussed their discretion to reverse or modify the decision of the Director. The decision was split, and the denial was upheld. The denial affected Ms. Middleton's livelihood which caused financial hardship. The Commission invited and encouraged Ms. Middleton to reapply for her massage therapist license after one year. We respectfully urge the Commission to mitigate her 10-year ineligibility under these circumstances and approve her license. Ms. Middleton's prior good record and subsequent good record should come into play. The Commission should exercise their right to reverse the Director's decision or substantially reduce the penalty to one year which Ms. Middleton has served and issue the massage therapist license.

Rebecca Makely with the Department of Cable and Consumer Services delivered the County's presentation. Chapter 28.1 of the Fairfax County Code provides for the permitting and regulation of massage therapists and massage establishments operating in the County for the protection of health, safety, and general welfare of its citizens. In Fairfax County, for any person to offer or administer a massage, a valid massage therapist permit must be issued by the Department of Cable and Consumer Services Regulation and Licensing Branch (RALB.)

On December 18, 2020, Isabel Middleton filed an application with RALB for a massage therapist permit. Pursuant to Fairfax County, the completed application shall contain, among other items, the applicant's criminal record and consent to allow the Department to obtain a search of the Central Criminal Records Exchange.

The Virginia State Police record dated December 21, 2020, on Ms. Middleton, obtained through the Central Criminal Records Exchange as part of the criminal background check process performed by RALB, found a criminal conviction in Arlington County General District Court on October 5, 2018, of the Code of Virginia Section 18.2-347: Misdemeanor, Prostitution: Keep Reside in Bawdy Place. Ms. Middleton pled guilty to the charge and received a sentence of sixty (60) days, suspended. This is a violation of Chapter 28.1-1-3(1) which states:

Conviction, plea of nolo contendere or a forfeiture on a charge of violating any provision of §§ 18.2-346, 18.2-347 through 18.2-349, 18.2-355 through 18.2-358, 18.2-361, 18.2-368, 18.2-370, 18.2-370.1, 18.2-371, 18.2-386.1 or 18.2-387 of the Code of Virginia, which laws relate to sexual offenses, or any provision of an ordinance of the

County or a law or ordinance of another jurisdiction which prohibits the same conduct, within the past ten (10) years.

When making the decision regarding issuance or denial of Ms. Middleton's massage therapist permit, staff deferred to Fairfax County Code Section 28.1-2-3(c) which states:

*"If the Director determines from the information contained in the permit application and from the Director's investigation that the applicant has committed one or more disqualifying offenses or is otherwise unqualified under this Chapter to administer massage therapy in the County, the Director **shall** deny the application."*

As a result of the information contained in the permit application and from the Director's investigation, the applicant had committed a disqualifying offense. Pursuant to Fairfax County Code Section 28.1-2-3(c) the Director denied the application.

On February 8, 2021, via Certified Mail Return Receipt Requested, County staff notified Ms. Middleton that based on the disqualifying offense her application was denied.

On February 22, 2021, Ms. Middleton's legal counsel Barry A. Schneiderman of Kincheloe & Schneiderman Attorneys at Law, filed a Notice of Appeal and Request for Hearing.

On March 12, 2021, Fairfax County sent Mr. Schneiderman and Ms. Middleton a letter confirming the appeal hearing for Tuesday, April 20, 2021, 7:30 p.m. to be held virtually due to the pandemic.

As a reminder for the Commission, Ms. Middleton's application was previously denied on September 30, 2019, for the same conviction previously noted.

Ms. Middleton appealed the September 30, 2019, application denial to the Consumer Protection Commission (CPC) and a hearing was held on December 17, 2019.

At the conclusion of that appeal hearing, the CPC voted 9-2 to uphold staff's denial of Ms. Middleton's application.

Subsequent to that motion and vote, further discussion ensued by the Commission. A motion was made that the CPC will uphold staff's decision for one year from that day December 17, 2019. That motion also passed 9-2.

Ms. Middleton has acted in accordance with the CPC December 17, 2019, motion and waited until December 18, 2020, to apply for a massage therapist permit.

Given the conviction of the Code of Virginia Section 18.2-347, which relates to sexual offenses, and Ms. Middleton's immediately related business, staff denied Ms. Middleton's application due to a disqualifying offense and in the interest of the health, safety, and welfare of the public.

After review and consideration, the CPC can make a motion to affirm, modify, or reverse the decision of the Director.

Questions ensued on the County's position in 2019 that the applicant must reapply for a massage therapist permit after one year; did staff update the criminal background search on the applicant; does the applicant have a license in another jurisdiction; did the applicant disclose prior record on the September 2019 application; police report indicating sexual contact; did the applicant admit to the offense; provision in the code that gives the CPC the ability to modify or amend the ten year threshold on a case by case basis; how does the CPC work around the code to be able to modify or reverse staff's denial; applicant's ability to support family without a license; was appellant represented by counsel when pleading guilty to the misdemeanor; Director's discretion to review charges if the application is denied again; has the commission modified a decision in the past; and is the license on a 12-month renewable schedule.

Further questions ensued on the applicant's state license, whether the state follows the same licensing guidelines, would the criminal charge be reviewed every year by staff, is the code subjective and the enforcement of its provisions flexible, how the 10-year charge can affect the livelihood of the applicant and whether the applicant understands why she is at the appeal hearing, and whether Fairfax County Code Section 31.2-14 (E) which states if the Commission reverses the decision of the director, the Commission shall direct the Director to issue or restore the license in accordance with its orders would allow the Director the ability not to deny the license in the future. Staff and counsel responded to the questions.

Barry Schneiderman presented a closing statement that the Commission sees a basis for mitigating the harsh penalty that was imposed and based on the discussions found a way to mitigate that penalty. The Commission's ruling last year did deny Ms. Middleton her license but gave Ms. Middleton the option to reapply this year and that the Commission would be willing to take a fair look at the issue.

Ms. Middleton did not have any further incidents. Ms. Middleton is asking the Commission to reverse this penalty and allow her to practice her profession.

Rebecca Makely presented the County's closing statement stating while staff are respectful and mindful of the discussion by the Commission and the presentation by the Appellant; staff continues to defer to the County Code in this regard.

Chairman Fee made the motion to grant the Appellant's application for a massage therapist license effective December 18, 2020. Commissioner Hargraves seconded the motion.

Commissioner Belkowitz made a motion to amend the Chairman's motion to not make the license retroactive from December 18, 2020, but to make it effective today, April 20, 2021, and to also direct the department to exclude this offense from future application for massage therapist license filed by the Appellant. Chairman Fee agreed to the first part of the motion as a friendly amendment but felt the second part was directed to staff and a different matter. Commission Belkowitz restated in accordance with Fairfax County Code Section 31-2-14(A)-(E) it is applicable. A request was made to read the sections of Code which read if the Commission reverses the decision of the Director, the Commission shall direct the Director to issue or restore the license in accordance with its orders. Commissioner Kirk spoke on the regulatory authority of the Director and that the offense would have to appear each year on the appellant's application. Commissioner Rosier stated she would second both parts of the motion once the verbiage was clear.

After further discussion on the main motion and subsequent motion, Chairman Fee withdrew his main motion.

Commissioner Kratovil stated he believes it is problematic that the Commission is reversing a decision made by the Director and puts the Commission and, therefore, the Director at odds with the Code. He understands the Commission has the authority do that and would suggest staff figure a way to revise the proceeding rules for the Commission to note that what we are doing tonight is a permissible role and authority of the Commission. A plain reading of the code should make the Commission's decision crystal clear.

After further discussion, Commissioner Belkowitz made the following motion:

Motion to reverse the decision of the Director, to include directing staff to issue Ms. Middleton's Massage Therapist permit effective April 20, 2021, provided that she is otherwise eligible for a Massage Therapist permit. Further the CPC directs staff not to automatically deny future Massage Therapist permit applications and/or renewals by Ms. Middleton on the grounds of the October 5, 2018, conviction alone.

The motion was seconded by Commissioner Rosier. The motion passed 6-4 with Commissioners Belkowitz, Callender, Hargraves, Kratovil, Rosier, and Fee voting in support of the motion and Commissioners Gulakowski, Hine, Kirk, and Roark voting in opposition of the motion.

Chairman Fee made a motion to adjourn. Commissioner Gulakowski seconded the motion. The motion passed unanimously. The meeting adjourned at 9:07 PM.