THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

March 01, 2018

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Case Name: **Lockengage, LLC d/b/a Central Ale House v. State of New Hampshire Department of Revenue Administration**
Case Number: **216-2017-CV-00328**

You are hereby notified that on February 21, 2018, the following order was entered:

RE: APPEAL:

See copy attached. (Nicolosi, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Patrick J. Arnold, ESQ; Lynmarie C. Cusack, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Lockengage, LLC dba Central Ale House

v.

State of New Hampshire Department of Revenue Administration ("DRA")

Docket No. 216-2017-CV-00328

Order

Plaintiff, Lockengage, LLC, appeals DRA's decision to revoke its Meals and Rentals Tax Operator's License ("License"). DRA revoked plaintiff's License after holding a hearing on March 23, 2017. Plaintiff petitioned the Hearings Bureau for reconsideration, but the Hearing Officer upheld the revocation. Upon consideration of the record, the parties' arguments, and the applicable law, plaintiff's appeal is DENIED.

Factual Background

Matthew Gage and Michael Loughran currently own plaintiff. (Certified Record ("CR") at 12.) Plaintiff holds License 057140 for Central Ale House located at 23 Central Street in Manchester, New Hampshire. (Id.)

In October 2014, the Attorney General ("AG") began a criminal investigation into plaintiff for underreporting Meals and Rooms Tax ("MRT"). (Id. at 43.) With the help of DRA's Audit Division, the AG determined that between June 2012 and August 2015 plaintiff failed to remit MRT amounts totaling $85,824.79. (Id.) This investigation revealed that Ms. Sophea Yay, the day-to-day manager/operator of Central Ale House, had failed to remit a substantial portion of the MRT collected from patrons. (Id. at 43–44.) The AG brought charges against her for MRT amounts totaling $37,101.01, and on

January 19, 2017, she pled guilty to theft and perjury. (Id. at 44.) The AG declined to bring charges against plaintiff for failing to remit the remaining amounts. (Id.)

On February 27, 2017, the Collection Division of the DRA ("Collections") sent plaintiff a *Notice of Revocation of Meals & Rentals Tax Operators License, 057140* ("Notice"), which notified plaintiff that it intended to revoke its License for failure to remit MRT. (Id. at 40.) It informed plaintiff that a hearing would be held to give it the opportunity to show cause as to why the License should not be revoked. The hearing was held on March 23, 2017, at which Mr. Loughran appeared on behalf of plaintiff. (Id. at 14.) The hearing record includes a written submission from Collections, and the hearing argument and testimony. (Id.)

Mr. Loughran testified that he had not reviewed the Notice or Collections' written submission with an attached *History of the Case* (the "History"). (Id. at 15.) He also indicated a general "unfamiliarity with the facts at issue and how much was owed[.]" (Id.) The Hearing Officer offered Mr. Loughran time to review the Notice and History, which he declined. Mr. Loughran additionally testified that plaintiff had hired a certified public accountant to file timely MRT returns and payments, and three managers to avoid further issues like those resulting from Ms. Yay's misconduct. (Id.) Mr. Loughran also argued that closing Central Ale House would make it difficult to pay the outstanding MRT owed. (Id. at 15–16.) Collections presented evidence concerning: (1) plaintiff's failure to remit over eighty thousand dollars in MRT; (2) Ms. Yay's guilty plea to theft and perjury; (3) several returned payments of MRT caused by insufficient funds; and (4) plaintiff's late filing of the January and February 2017 MRT returns and payments. (Id. at 16.)

On March 29, 2017, the Hearing Officer issued a Final Order, in which she found that the plaintiff "has a clear pattern of noncompliance with the MRT laws." (Id. at 17.) She noted that Mr. Loughran's testimony at the hearing did not inspire confidence that plaintiff "will meet its obligation to file MRT returns and promptly remit the tax collected[.]" (Id.) She then held that "[plaintiff] repeatedly violated RSA Chp. 78-A, RSA 78-A:8 and N.H. Code of Admin. Rules, Rev. 207.06." (Id. at 18.) Therefore, she revoked plaintiff's License. (Id.)

On April 13, 2017, plaintiff petitioned the Hearings Bureau to reconsider the Final Order. The petition outlined the following facts and circumstances against revoking the License: (1) 2017 was only its the second year operating with the proper policies and procedures in place; (2) the business had changed its overall business model; (3) the five payments returned for insufficient funds had been repaid along with the fees and interest; (4) the January 2017 late filing was caused by being shut down for 10 days by the liquor commission; and (5) the February 2017 late filing was caused by 15 days of credit card processing issues. (Id. at 5.) Collections objected to the petition, stating the reasoning provided was the same as that presented at the hearing, and that plaintiff failed to "provide any new evidence that was not previously known either prior to or at the hearing to support its position or to show why the final order is incorrect or that there was an obvious error in the final order." (Id. at 21.)

On April 27, 2017, the Hearing Officer issued an Order on plaintiff's request for reconsideration. (Id. at 1–4.) She determined that the minimal newly presented evidence "[did] not meet the standard of review [under] N.H. Code of Admin. Rules, Rev. 206.02(e), as Mr. Loughran certainly should have been aware of the reasons for

the filings being late, and th[e] information could have been discovered and presented at the hearing[.]" (Id. at 3.) Furthermore, the Order concluded that the plaintiff did not point out any errors in the Final Order. (Id.) Therefore, the Hearing Officer upheld the revocation of plaintiff's License. This appeal followed.

Analysis

Plaintiff raises two arguments on appeal. First, it alleges that Rev. 207.06(h) of the N.H. Code of Administrative Rules is *ultra vires* and therefore invalid as it conflicts with applicable statutory provisions. Second, it alleges that Rev. 207.06(h) and RSA 78-A:5, I are void for vagueness. The Court declines to consider these issues as plaintiff has raised them for the first time on appeal.

There are two preconditions to triggering a state constitutional analysis, the first of which is "rais[ing] the State constitutional issue below." Appeal of Coffey (N.H. DOL), 144 N.H. 531, 534 (1999). "[I]ssues must be raised at the earliest possible time, because trial forums should have full opportunity to come to sound conclusions and to correct claimed errors in the first instance." In re Peirano, 155 N.H. 738, 744 (2007) (quoting Appeal of Bosselait, 130 N.H. 604, 607 (1988)). "Unless a claim is raised in the trial forum, there is no opportunity for a party to develop a factual record supporting his theory of relief, or to make an offer of proof sufficient to justify a demand to introduce relevant evidence and preserve an issue for appeal." Appeal of Pelleteri, 152 N.H. 809, 812 (2005). Courts "will not review on appeal constitutional issues not raised below." SNCR Corp. v. Green, 152 N.H. 223, 225 (2005).

"[T]he test to determine if a constitutional claim was sufficiently raised at the tribunal level is whether the claim was 'sufficient to put anyone on notice that [the

plaintiff] thereby meaning to raise a constitutional issue.'" Appeal of Kaplan (N.H. Dep't of Empl. Sec.), 153 N.H. 296, 301 (2006) (quoting Bosselait, 130 N.H. at 607). "'[G]eneralized assertions of unreasonableness' [do] not constitute 'sufficient notice that [the plaintiff was] raising constitutional concerns.'" Kaplan, 153 N.H. at 301 (quoting Pelleteri, 152 N.H. at 812). Plaintiff did not preserve—or indeed even mention—any constitutional claims regarding *ultra vires* and due process violations at the administrative level, despite having the opportunity to do so. (See CR at 5–6, 23–34.) While this may have been because Mr. Loughran was not represented by counsel before the DRA, the New Hampshire Supreme Court has stated that "the rules of preservation are not relaxed for a *pro se* [litigant]." State v. Porter, 144 N.H. 96, 100–01 (1999). Therefore, because plaintiff failed to preserve, or put anyone on notice that plaintiff intended to raise, these constitutional claims, the Court declines to consider the claims.

Accordingly, for the foregoing reasons, plaintiff's appeal is DENIED.

SO ORDERED.

2/22/2018
Date

Diane M. Nicolosi
Presiding Justice