**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 CA 0064**

**ALI FINI D/B/A LA TIGER EXPRESS**

**VERSUS**

**ALCOHOLIC BEVERAGE CONTROL BOARD FOR THE CITY OF BATON ROUGE AND PARISH OF EAST BATON ROUGE**

RHP by JGH by JGH by JGH

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**On Appeal from the 19th Judicial District Court**
**Parish of East Baton Rouge, Louisiana**
**Docket No. 568,654, Section "27"**
**Honorable Todd W. Hernandez, Judge Presiding**

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**Baton Rouge, LA**

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**Plaintiff-Appellant**
**Ali Fini d/b/a LA Tiger Express**

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**Defendant-Appellee**
**Alcoholic Beverage Control Board for the City of Baton Rouge/Parish of East Baton Rouge**

**BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.**

**Judgment rendered** JUL - 7 2011

**PARRO, J.**

The applicant for Class B beer and liquor permits appeals the judgment of a district court, affirming the final decision of a local government authority, which denied the issuance of the permits to the applicant. For the following reasons, we affirm the judgment of the district court.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

Ali Fini owned a convenience store known as LA Tiger Express (Tiger Express) located at 300 Lee Drive in Baton Rouge. On March 28, 2008, Mr. Fini filed a notice-of-intent application, pursuant to LSA-R.S. 26:77, with the Office of Alcoholic Beverage Control (ABC) for the City of Baton Rouge and Parish of East Baton Rouge to obtain Class B beer and liquor permits, which are required to sell alcoholic beverages from the store. A sign notifying the public of the application was posted at the store by an ABC representative.[2] No complaint or opposition by the general public was filed regarding the notice of intent with ABC.

On June 26, 2008, the ABC Board for the City of Baton Rouge and Parish of East Baton Rouge (Board) conducted a hearing on Mr. Fini's notice-of-intent application, after which, the Board voted unanimously to deny the application. Mr. Fini d/b/a Tiger Express then filed a pleading entitled "Petition for Judicial Review and/or Devolutive Appeal of Administrative Decision" with the district court, seeking reversal of the Board's final decision[3] and a judgment ordering the Board to issue beer and liquor permits.

Following a hearing on December 15, 2008, the district court reversed the Board's decision and ordered the Board to issue the Class B beer and liquor permits, for which Mr. Fini had applied, upon payment of the required fees. The district court signed a judgment in accordance with this ruling on February 6, 2009, and the Board

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[1] Some of the facts provided herein are adopted from the earlier opinion of this court addressing the applicant's notice-of-intent application. See Fini v. Alcoholic Beverage Control Bd. for City of Baton Rouge, 09-0854 (La. App. 1st Cir. 2/10/10), 35 So.3d 301.

[2] It is undisputed that the sign posted by ABC remained on the premises in excess of the 15-day period required by LSA-R.S. 26:77(E).

[3] See LSA-R.S. 26:105.

suspensively appealed,[4] contending that the district court erred in failing to hold a trial *de novo* on Mr. Fini's petition for judicial review (appeal), in finding that the Board acted arbitrarily and capriciously in denying Mr. Fini's notice-of-intent application, and in reversing the decision of the Board.

Thereafter, Mr. Fini filed in this court a motion to remand the matter to the district court for an evidentiary hearing on the issue of whether the Board, by its post-February 6, 2009 actions, had acquiesced in the district court judgment. The Board opposed this motion.

After reviewing these issues, this court noted that Mr. Fini's appeal was subject to a trial *de novo* in the district court, in accordance with LSA-R.S. 26:106(A). This court concluded that the district court "misconstrued its role in the appellate process" in ruling on Mr. Fini's appeal without affording the parties a trial *de novo*. Fini v. Alcoholic Beverage Control Bd. for City of Baton Rouge, 09-0854 (La. App. 1st Cir. 2/10/10), 35 So.3d 301, 305. This court further concluded that in light of the district court's failure to afford the parties this opportunity, the district court did not consider the evidence submitted by the parties, nor did it allow for the introduction of any other evidence that may have been necessary for it to properly review the final decision of the Board. Accordingly, this court set aside the judgment of the district court and remanded the matter to the district court for a trial *de novo* on Mr. Fini's appeal of the Board's decision.[5] Id.

After remand, the district court conducted a bench trial concerning Mr. Fini's appeal, after which, the district court took the matter under advisement. On August 20, 2010, the district court issued a written ruling, which provided, in pertinent part:

> After consideration of the evidence introduced at the *de novo* trial, which was not introduced at the prior review hearing[,] the court found that the Board fairly considered petitioner's application. The reason for the denial of plaintiff's application was the fact that petitioner had a previous license revoked and that [the Board] desired to not exercise its discretion in granting the application under Parish Code Ordinance

[4] Although the Board filed a suspensive appeal, LSA-R.S. 26:106(B) only authorizes a devolutive appeal to the appellate court of proper jurisdiction.

[5] Based on this ruling, this court concluded that Mr. Fini's motion to remand was moot.

> [14472, Section 1.C.9.][6] The Board's ruling on petitioner's application was not in violation of any law[,] nor was it arbitrary and capricious in any manner. The decision of the ABC Board on June 26, 2008[,] concerning plaintiff's application is affirmed.

**STANDARD OF REVIEW**

Any party aggrieved by a decision of the local authorities to withhold a permit may, within ten days of the notification of the decision, take a devolutive appeal to the district court having jurisdiction of the applicant's or permittee's place of business. LSA-R.S. 26:106(A). Such appeals shall be filed in the district courts in the same manner as original suits are instituted therein. The appeals shall be tried *de novo*. Id. With this language in mind, it appears that the standard of review should be the same as that used in appeals from any other original suit.

On review by the appellate court, the manifestly erroneous or clearly wrong standard applies to the factual findings of the district court. A court of appeal may not overturn a judgment of a district court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. In order to affirm the factual findings of the trier of fact, the supreme court posited a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't

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[6] This section of the ordinance provides that each applicant for Class A, B, and C beer or liquor licenses and/or permits shall meet certain requirements, including that the applicant:

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> 1.C.9. Has not had any certificate, permit[,] or license to dispense alcoholic beverages as described anywhere in this ordinance, issued by any other parish, municipality, or state, suspended or revoked, or had the application denied. If the applicant has been so adjudged, the granting of any certificate, permit[,] or license or of a renewal is within the discretion of the Board.

of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

If the district court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Hulsey v. Sears, Roebuck & Co., 96-2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-77. However, an appellate court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story. Id. at 1177.

**DISCUSSION**

Based on the evidence introduced at the trial *de novo*, Mr. Fini had received two previous violations for selling alcoholic beverages to underage patrons. The first of these violations occurred in July 2005, when Mr. Fini sold alcohol to a minor in connection with a "controlled buy" orchestrated by ABC officials. According to the testimony of ABC Interim Director David Tetlow, ABC officials sent an individual who was 17-years-old, or younger, into Tiger Express to attempt to purchase alcohol. When Mr. Fini sold alcohol to that individual, Mr. Fini was cited for a violation of the Wine, Beer, and Liquor Ordinance 14472, Section 9.B (the ordinance), for unlawful sales of alcohol to a minor. On August 11, 2005, Mr. Fini and his attorney appeared before the Board and admitted the violation. The Board then imposed a 30-day suspension and a fine of $250.

In January 2006, Mr. Fini was again cited for selling alcohol to an underage person.[7] Tiger Express was cited, along with Mr. Fini individually as the person who sold the alcohol. After a hearing, the Board voted to revoke the alcohol license of Tiger Express. The Board gave Mr. Fini five days to remove all alcohol from the premises. In

[7] In this instance, the individual was 20 years and 7 months old.

addition, the Board imposed a $750 fine on Tiger Express and a $250 fine on Mr. Fini.[8]

Mr. Fini subsequently filed an appeal of this revocation in the district court. However, before the matter was heard by the district court, Mr. Fini and the parish attorney negotiated an agreement whereby Mr. Fini and Tiger Express would surrender the liquor license for a two-year period, rather than have it revoked. According to the testimony at the trial *de novo*, this agreement was reached in order to give Mr. Fini an opportunity to sell his business while preserving the value of the property.[9]

After the two-year period had lapsed, Mr. Fini, who had not sold the business, filed the notice-of-intent application that is the subject of the current appeal. A hearing on this application was held before the Board on June 26, 2008. At the trial *de novo*, Scott Wilfong, the chairman of the Board in 2008,[10] testified that the Board voted not to allow Mr. Fini to proceed to obtain a license at that meeting. Mr. Wilfong acknowledged that there was no opposition from the general public to Mr. Fini's application; however, he stated that it is generally the position of the Board that, when it has voted to revoke a liquor license, it will not grant a new license to that individual or business upon reapplication. According to Mr. Wilfong, during his tenure on the Board, revocation of a license has always been considered severe enough as a penalty to warrant the permanent refusal of a license upon reapplication. In addition, Mr. Wilfong testified that he had never seen the Board grant an application for a license when the applicant's license had previously been revoked.

Mr. Fini contends that because he voluntarily surrendered his license pursuant to the agreement with the parish attorney, his license was never revoked; thus, Mr. Fini argues that the Board should have granted his application for a new license. However, the evidence in the record demonstrates that the Board did vote to revoke Mr. Fini's

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[8] According to the disposition of the Board's action, the business was actually a corporation known as Alfi Inc. d/b/a LA Tiger Express. The corporation was ordered to pay the $750 fine, and Mr. Fini was ordered to pay the $250 fine. When filing the underlying petition in this matter, Mr. Fini filed as a sole proprietor doing business as LA Tiger Express.

[9] According to Mr. Fini, if the license had been revoked, no one would have been able to obtain a liquor license at that location. This agreement allowed him to preserve the right of any future purchaser of the property to apply for and obtain a liquor license.

[10] Mr. Wilfong had served on the Board since 2003, and had been on the Board when it voted to revoke the license of Tiger Express in 2006.

license. It was only after Mr. Fini appealed that ruling that an agreement was reached with the parish attorney to allow Mr. Fini to voluntarily surrender his license; nevertheless, the Board was not a party to this agreement, and Mr. Wilfong testified that the Board did not authorize or ratify the agreement. Although Mr. Fini initially testified that he entered this agreement believing that he would be granted a license upon reapplication, he later acknowledged that no one from the Board told him that this would occur and that he had simply based this belief on conversations with his attorney.[11]

As noted above, one of the requirements for the issuance of a liquor license pursuant to the ordinance at issue in this matter was that the applicant had not had any certificate, permit, or license to dispense alcoholic beverages suspended or revoked. If such a suspension or revocation has occurred, the issuance of a license to the applicant is within the Board's discretion. See Ordinance 14472, Section 1.C.9. According to the evidence in the record, Mr. Fini and Tiger Express had been cited twice before for selling alcoholic beverages to underage individuals, one of whom was a minor, which had resulted in the suspension and ultimate revocation of the liquor license for the business. Based on those facts and after a review of the record, we find no error in the district court's finding that the Board had not abused its discretion and was not arbitrary or capricious in refusing to grant Mr. Fini's application for a liquor license.

**CONCLUSION**

For the foregoing reasons, we affirm the judgment of the district court, which affirmed the decision of the Board, denying the issuance of Class B beer and liquor permits to Ali Fini d/b/a LA Tiger Express. All costs of this appeal are assessed to Ali Fini d/b/a LA Tiger Express.

**AFFIRMED.**

[11] Mr. Wilfong testified that no such promises had been made on behalf of the Board.