

**A CONTESTED MATTER BEFORE THE DIRECTOR
OF THE IDAHO STATE POLICE**

IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,)	
	)	CASE NO. 14ABC-COM007
Complainant,	)	License No. 1796
	)	Premise No. 10B-15
vs.)	
	)	DIRECTOR'S FINAL ORDER
ESTATE OF JENEANE YOUNGSTROM,)	
Licensee, d/b/a ARCO VILLAGE CLUB,)	
)	
Respondent.)	

This matter is before Colonel Ralph W. Powell, Director of the Idaho State Police, pursuant to "Respondent's Petition for Review of Recommended Order and Memorandum in Support, Appeal and Request for Oral Argument" filed on or about March 13, 2015, by the Estate of Jeneane Youngstrom, Licensee, d/b/a, Arco Village Bar ("Respondent"). The parties have been given an opportunity to submit briefing to me on all disputed issues and I have reviewed the entire contested case record filed in this matter. This matter being fully briefed, the issues being rather straight-forward, and oral argument being discretionary under Idaho Code § 67-5245(5), I deem oral argument unnecessary as it will not materially advance my understanding of the issues or the decision-making process. For these reasons, Respondent's request for oral argument is denied.

The matter being fully submitted, I enter this Final Order in accordance with the provisions of Idaho Code §§ 67-5245 and 67-5246(3) and IDAPA 04.11.01.730.¹

INTRODUCTION AND PROCEDURAL HISTORY

Alcohol Beverage Control ("ABC") is a Bureau within the Idaho State Police. On behalf of the ISP Director, ABC issues alcohol beverage licenses. ABC issued a liquor license to Jeneane Youngstrom to operate an establishment under the name Arco Village Club in Arco, Idaho. After Ms. Youngstrom died, the license was transferred to her estate and the bar continued operation under the management of Judy Stedtfeld, the court appointed personal representative of the estate. In September 2013, Ms. Stedtfeld became too ill to continue the bar and it sat idle for approximately one (1) year, during which time there was no actual use of the license.

Based upon the lack of use of the license to sell liquor, on or about April 7, 2014, ABC filed a formal administrative Complaint against the license. Respondent filed a timely Answer to the Complaint and the duly appointed Hearing Officer set the matter for evidentiary hearing.

Before a hearing could be held, ABC filed a Motion for Summary Judgment. After receiving briefing and affidavits from the parties, on December 5, 2014, the Hearing Officer granted ABC's Motion.

Respondent filed a Motion for Reconsideration of the Hearing Officer's decision. The matter was set for hearing on February 18, 2015. After hearing oral argument, on

¹ These provisions apply to an agency head's review of a "preliminary order." Other provisions apply to review of a "recommended order." Idaho Code, § 67-5243(2) states that a hearing officer should denominate whether the order is a preliminary order or a recommended order. The hearing officer did not expressly caption his December 5, 2014 order as one or the other, although in the body of the order he refers to it as a recommended order. This is incorrect. Under his contract, the hearing officer only had authority to enter preliminary orders; so notwithstanding any contrary reference, this was a preliminary order. While under other circumstances the effect of the two kinds of orders may have significantly different consequences, under the procedural posture of this case there is no effective difference and, therefore, this misstatement by the hearing officer is irrelevant to the result.

February 23, 2015, the Hearing Officer denied Respondent's motion and affirmed his prior decision for ABC. Following the Hearing Officer's ruling, Respondent filed its Petition for Review to me, as the agency head.

On March 26, 2015, I entered a scheduling order. Although the order allowed the parties to submit additional briefing directly to me, both parties waived that right and informed my office in writing that they would rely upon the briefs filed with the Hearing Officer.

PRELIMINARY ISSUE

Before addressing the merits of the case, there is one (1) preliminary procedural matter that deserves brief discussion.

As mentioned above, on December 5, 2014, the Hearing Officer entered his order granting ABC summary judgment. By Motion for Reconsideration, dated December 18, 2014, Respondent requested the Hearing Officer to reconsider his order. Thereafter, the parties and the Hearing Officer agreed to a briefing schedule and hearing date regarding the motion. The agreement required ABC to submit its brief by February 4, 2015 and the Respondent to file its brief by February 11, 2015. A January 16, 2015 Notice of Hearing was entered by the Hearing Officer formalizing these dates and setting the matter for oral argument on February 18, 2015.

While the parties no doubt had good intentions in setting these timelines to accommodate the full and fair presentation of their arguments as to the Motion for Reconsideration, they were powerless to do so after the motion was denied by operation of law on or about January 8, 2015.

Under the clear provisions of Idaho Code § 67-5243(3), "The petition [for reconsideration] is deemed denied if the presiding officer does not dispose of it within

twenty-one days after the filing of the petition.” To “dispose” of a petition (or motion) means to make a ruling on its merits. As stated, Respondent’s motion was dated December 18, 2014. Therefore, by operation of law it was denied on or about January 8, 2015 (21 days later) when the Hearing Officer failed to enter a ruling on the motion by that deadline.

This conclusion is reinforced by the Idaho Supreme Court’s opinion in *A & B Irrigation District v. Idaho Dept. of Water Resources*, 154 Idaho 652 (2012). In the *A & B Irrigation District* case, the Supreme Court held that under the identical wording of another statute in the Administrative Procedures Act (Idaho Code § 67-5246(4)), an order on a motion for reconsideration issued by the Director of the Department of Water Resources after the twenty-one day period was a “nullity,” since the Director lost jurisdiction and authority to issue the order.

Applying the ruling in *A & B Irrigation District* to the same unambiguous language of Idaho Code § 67-5243(3) leads to the inescapable conclusion that in this case the parties lacked the ability to extend the statutory time-frames and Respondent’s Motion for Reconsideration was denied by operation of law on January 8, 2015, because the Hearing Officer had not disposed of the motion by that date.

This means that the Notice of Hearing, the briefing of the parties pursuant to the Notice, the actual hearing, and the Hearing Officer’s February 23, 2015 order denying the Motion for Reconsideration are all nullified and are not properly before me for review, since they occurred or were entered after the Hearing Officer lost jurisdiction. As such, I will focus exclusively on reviewing the correctness and propriety of the Hearing Officer’s December 5, 2014 preliminary order granting ABC summary judgment.

ISSUE

Did the Hearing Officer correctly enter summary judgment for ABC based upon a finding that Respondent Arco Village Club failed to keep the license in actual use and thereby violated the provisions of IDAPA 11.05.01.10.02?

DISCUSSION

ABC charged Respondent with violating the "actual use" requirement imposed by IDAPA 11.05.01.10.02 ("ABC Rule 10.02"). ABC Rule 10.02 defines the term "licensed premises" as used in title 23, chapters 9, 10 and 13. In pertinent part, ABC Rule 10.02 states that "All licenses must be prominently displayed in a suitable premises and remain in actual use by the licensee and available for legitimate sales of alcoholic beverages by the drink."

ABC charged Respondent with violating this rule based upon undisputed evidence that Respondent's last purchase of alcohol was on August 21, 2013, and because of the illness of Judy Stedtfeld, the bar was not operating and did not make any actual sales of alcoholic beverages between late September or early October 2013, and September 29, 2014, when it was sold. Respondent's defense is that ABC and the Hearing Officer are misreading the statute and that in a February 5, 2014 telephone conversation with ABC Licensing and Office Supervisor Nicole Harvey, Ms. Stedtfeld was led to believe that she had additional time to sell or lease the bar.

In granting summary judgment to ABC, the Hearing Officer relied upon the affidavits of Ms. Stedtfeld and Ms. Harvey, as well as the respective briefing of the parties. The Hearing Officer found that there was no genuine issue of material fact, and that ABC was entitled to judgment as a matter of law. In so ruling, the Hearing Officer

expressly rejected Respondent's argument that the doctrine of quasi-estoppel precluded summary judgment for ABC.

Summary judgment proceedings are not expressly mentioned in the Idaho Administrative Procedures Act or the Idaho Rules of Administrative Procedure ("IRAP"). However, motion practice is authorized by the IRAP and summary judgment proceedings are routinely used in contested case proceedings, including proceedings by professional licensing boards, commissions and agencies, and have been recognized by appellate courts in judicial reviews. Furthermore, Respondent never objected to the use of summary judgment proceedings in this case; therefore, the legitimacy of the Hearing Officer using this procedural mechanism is not at issue. Whether summary judgment was appropriate is the issue.

I have carefully reviewed the Hearing Officer's Preliminary Order and the evidence and briefing submitted by the parties. I am convinced that the Hearing Officer applied the correct legal standard applicable to summary judgment motions and that his conclusion that there was a violation of ABC Rule 10.02 because of lack of "actual use" for approximately one (1) year is correct.

The Hearing Officer entered Findings of Fact and Conclusions of Law that are well reasoned and fully supported by the contested case record. Those findings and conclusions clearly establish a violation of the "actual use" requirement imposed by IDAPA 11.05.01.10.02 (ABC Rule 10.02). Frankly, the Hearing Officer is "spot on" in his analysis and conclusions; and it would serve little purpose in simply reiterating or attempting to expand upon those findings and conclusions here. Therefore, I expressly adopt in full the Hearing Officer's December 5, 2014 preliminary order as my own.

The only additional comments I will make regarding the Hearing Officer's preliminary order is Respondent's claim that the Hearing Officer erred by not applying the doctrine of quasi-estoppel to rule in its favor. My comments should be considered as additional Findings of Fact or Conclusions of Law, as applicable.

Respondent grounds its quasi-estoppel argument in an alleged telephone conversation between Judy Stedtfeld and ABC employee Nicole Harvey on February 5, 2014. According to Ms. Stedtfeld, Harvey told her that "[Since] the bar has been closed for more than ninety (90) days, and in fact more than 150 days from August 21, 2013, and [sic] that the license would have to be leased or sold in order to keep it." Affidavit of Judy Stedtfeld, dated November 13, 2014, ¶ 8. Ms. Stedtfeld goes on to testify: "Your Affiant relied upon the representations of Ms. Hardy and continued to attempt to find a lessee or sale of the liquor license for the Arco Village Bar and in fact did so on September 29, 2014." *Id.*

In her own affidavit, Nicole Harvey testified that she does not recall any such conversation, but that if it did occur she clearly misspoke since the references to 90 and 60 (totaling 150) days in ABC Rule 10.02 apply to instances where there has been a loss or move of the physical licensed premises—something that did not happen here. Affidavit of Nichole Harvey, dated November 19, 2014, ¶¶ 11-12.

It is significant to note that Ms. Stedtfeld does not claim that Ms. Harvey told her she had an additional week, month, year, or other definitive time period within which to sell the bar or lose the license. The claim is that Harvey said the license had to be sold or leased or it would be lost. Such a statement, assuming for summary judgment purposes that it was indeed made, is not inconsistent with a requirement that the sale or

lease be immediate. There is nothing in the Stedtfeld affidavit indicating that Respondent was given any additional time to sell the bar.

If Respondent is contending that Ms. Stedtfeld drew an implication from the alleged statement that Harvey was granting her an indefinite period of time (perhaps years) or whatever amount of time it took to sell the bar, no reasonable person could have made such an interpretation from the alleged comment. And, while the references to a 90 day and potential additional 60 day grace period mentioned in ABC Rule 10.02 should perhaps be adjacent to each other for clarity sake, it is clear that they both apply to circumstances where the physical licensed premises have been lost or moved. It stretches credibility to the breaking point to claim those time periods apply to or affect the stand-alone sentence in ABC Rule 10.02 that licenses must remain in actual use and be available for legitimate sales of alcoholic beverages.

The Hearing Officer correctly ruled that the grace periods of ABC Rule 10.02 were not applicable and thus Ms. Stedtfeld's affidavit did not create a genuine issue of material fact which would preclude the issuance of summary judgment for ABC.

In addition, the Hearing Officer correctly ruled that quasi-estoppel did not apply. As ABC pointed out, "quasi-estoppel cannot circumvent the requirements of the law...[n]or may the defense of estoppel be applied against the state in matters affecting its governmental or sovereign functions.' *Floyd v. Board of Com'rs of Bonneville County*, 137 Idaho 718, 727-728...." (Complainant's Reply to Respondent's Response to Complainant's Motion for Summary Judgment, p. 7). ABC is correct in arguing that enforcement of the liquor laws is a governmental or sovereign function.

Idaho appellate courts have held that when the government is not acting in a propriety function, estoppel "must be invoked with caution and only in exceptional cases

[with recognition] that its application is the exception and not the rule." *Naranjo v. Idaho Dept. of Corrections*, 151 Idaho 916, 919 (Ct. App. 2011) quoting, *Boise City v. Sinsel*, 72 Idaho 329, 338 (Idaho 1952). The *Naranjo* Court went on to note that the Idaho Supreme Court had not yet delineated what circumstances would be so exceptional as to make estoppel principles applicable against the government, but the argument is irrelevant if the elements of estoppel are not present. *Naranjo*, 151 Idaho at 920. The *Naranjo* Court held that quasi-estoppel was not applicable under the facts in that case because the doctrine requires that one party unconscionably asserts a position inconsistent with a previously held position to the detriment of the other party, something not present in the case. *Id.*

One year after *Naranjo*, the Idaho Supreme Court reviewed several cases involving estoppel and noted that "[I]n order to state a claim for promissory, equitable, and quasi-estoppel, a plaintiff must at least allege, among other things, a promise or representation by the party to be estopped," and "Quasi-estoppel involves a party taking 'a different position than his or her original position.'" *Idaho Wool Growers Assoc. v. State of Idaho*, 154 Idaho 716, 723 (2012) (citations omitted). Finding no promise upon which to hang an estoppel argument, the court affirmed the district court's dismissal of Idaho Wool Growers estoppel claims against the state. *Id.*

As in *Idaho Wool Growers Assoc.*, Respondent in this case has not shown that there was a promise made by ABC that Judy Stedtfeld could legitimately rely upon. There is certainly no evidence in the record that ABC has changed its position in any fashion, let alone unconscionably, or that Respondent has detrimentally relied upon anything that ABC has done. The Stedtfeld affidavit fails to offer any explanation of how Respondent suffered harm based upon any alleged statement by Nicole Harvey.

For these reasons, and those stated in the Hearing Officer's decision, he properly rejected Respondent's quasi-estoppel argument and granted summary judgment to ABC as a matter of law.

AN APPROPRIATE SANCTION

Concluding that Respondent violated the rule as charged, I must determine an appropriate sanction or remedy. ABC requests revocation of the license and the Hearing Officer recommended revocation. Respondent argues that Ms. Stedtfeld's failing medical condition prevented her from utilizing the license and keeping the bar open.

The Hearing Officer was sympathetic to Ms. Stedtfeld's plight. He acknowledged her serious medical problems and recognized that they might indeed prevent her from personally operating the bar, but he noted that Respondent offered no argument with citation to authority that supported a position that the medical exigencies excused compliance with the actual use requirement of ABC Rule 10.02. Hearing Officer's Decision, p. 6.

I too have empathy for Ms. Stedtfeld's medical condition. I also appreciate that securing a buyer for the bar was, to some extent, beyond Respondent's control. However, neither of these factors sanctioned non-compliance with the actual use obligation.

Respondent could have hired someone to run the bar for it while Ms. Stedtfeld was incapacitated. Furthermore, the selling price of the property was exclusively within Respondent's control and the price could have been adjusted downward to facilitate a sale in a more expeditious manner. The point is, Respondent had options.

Finally, there are a fixed number of liquor licenses available and they are highly sought after. Indeed, there is frequently a waiting list on file with ABC for open licenses. ABC is obligated to closely monitor these licenses for compliance with applicable laws and rules and is properly charged with bringing appropriate revocation actions when a licensee is non-compliant. This is only fair and equitable to those seeking a license. It is especially appropriate when, as here, the licensee has failed to put the license in actual use for approximately one (1) year.

The selection of a disciplinary sanction for a proven violation is entrusted to the sound discretion of the administrative agency. *Knight v. Dep't of Insurance*, 124 Idaho 645 (1993); *Pence v. Idaho State Horse Racing Comm'n.*, 109 Idaho 112 (1985). Utilizing that discretion, and after carefully considering all my options and alternatives, as the agency head, I conclude that revocation of Respondent's liquor license is the most reasonable and appropriate sanction.

ATTORNEY FEES AND COSTS

Both parties have requested an award of attorney fees and costs pursuant to Idaho Code § 12-117. The Hearing Officer's Preliminary Order does not address the issue.

Under Idaho Code § 12-117, an administrative agency shall award attorney fees, witness fees and other reasonable expenses to the prevailing party, but only when the losing party "acted without a reasonable basis in fact or law." In this case, I have affirmed the Hearing Officer's Preliminary Order and found that Respondent violated the applicable rule. Therefore, Respondent is not the prevailing party and is not eligible for attorney fees under Section 12-117. However, while this is a close call, I am also declining to award fees and costs to ABC.

Respondent walked a very fine line in making factual and legal arguments that bordered on frivolousness. Perhaps the only reason I am hesitant to award fees and expenses to ABC is the way IDAPA 11.05.01.10.02 is written, with the violated actual use requirement "sandwiched" between two unrelated provisions relating to time extensions when a licensed premise has been lost or moved. This created just enough "wiggle room" for Respondent to make the unsuccessful arguments it did, without clearly being made without a reasonable basis in fact or law.

Therefore, I decline to award attorney fees to ABC, even though it is the prevailing party.

CONCLUSION

1. I hereby adopt in full as my own the Findings of Fact, Conclusions of Law and Preliminary Order of the Hearing Officer, dated December 5, 2014;

2. Respondent failed to keep its license in active use and make it available for legitimate sales of alcoholic beverages by the glass, thereby violating IDAPA 11.05.01.10.02;

3. Liquor License No. 1796, issued to Respondent the Estate of Jeneane Youngstrom, d/b/a Arco Village Club, IS HEREBY REVOKED;

4. Each party shall bear its own attorney fees and costs.

IT IS SO ORDERED.

DATED this 14th day of July 2015.



Colonel Ralph W. Powell
Director, Idaho State Police

DUE PROCESS AND APPEAL RIGHTS

This is a final order of the Director. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The Director will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Idaho Code § 67-5246(4).

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order may appeal this final order to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of July 2015, I caused to be served, a true and correct copy of the foregoing Director's Final Order in the above-referenced matter on the following individuals by the method indicated below:

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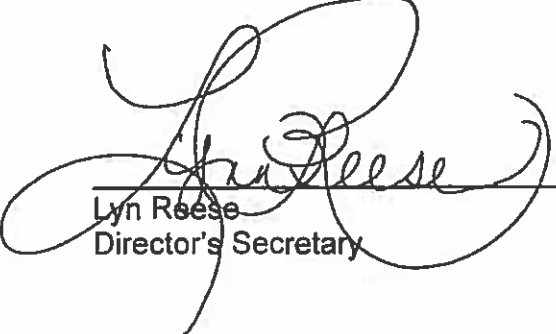
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Lyn Reese
Director's Secretary

**A CONTESTED MATTER BEFORE THE DIRECTOR
OF THE IDAHO STATE POLICE**

IDAHO STATE POLICE,)	
ALCOHOL BEVERAGE CONTROL,)	
)	
Complainant,	)	Case No. 14ABC-COM4007
	)	License No. 1796
vs	)	Premise No. 10B-15
)	
Estate of Jeneane Youngstrom, Licensee,	)	HEARING OFFICER'S DECISION
dba, Arco Village Club,	)	GRANTING COMPLAINANT'S
	)	MOTION FOR SUMMARY
Respondent.	)	JUDGMENT
)	

Date of Decision: December 5, 2014

Hearing Officer: Kipp L. Manwaring

Complainant: Idaho State Police, Bureau of Alcohol Beverage Control
(Agency)

Respondent: Estate of Jeneane Youngstrom, Judy Ann Stedtfeld,
Personal Representative

INTRODUCTION AND PROCEDURAL HISTORY

In accordance with iDAPA 04.11.01.154.01, the hearing officer was duly appointed and authorized by the Idaho State Police, Bureau of Alcohol Beverage Control to conduct hearing of this matter and issue a written decision.

Complainant filed a complaint to revoke Respondent's retail alcohol beverage license for failure to keep the license in actual use. Respondent answered by denying the material allegations of the complaint.

Complainant filed a motion for summary judgment. Respondent opposed the motion and filed the Affidavit of Judy Ann Stedtfeld in support. Complainant file a reply together with the Affidavit of Nichole Harvey.

Neither party requested a hearing on the motion for summary judgment. The Hearing Officer determines the record on summary judgment was adequate and no hearing on the motions was required.

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ORIGINAL
IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

ISSUE

Is a licensee's failure to continue an alcohol beverage license in actual use grounds for revoking the license?

FINDINGS OF FACT

The following facts are taken from the Certification of Agency Record dated July 28, 2014, Affidavit of Judy Stedtfeld dated November 13, 2014, and Affidavit of Nichole Harvey dated November 19, 2014.

1. In April 2007 Jeanne Youngstrom obtained title to certain real property in Butte County, Idaho improved with a bar/restaurant known as the Village Club (the Licensed Premises).
2. On July 3, 2007 Youngstrom applied for a Retail Alcohol Beverage License.
3. Effective August 1, 2007 the Idaho State Police Bureau of Alcohol Beverage Control issued License Number 1796 (License) to Youngstrom authorizing her to serve beer, wine and liquor on the Licensed Premises.
4. Youngstrom maintained the License until her death on January 30, 2010.
5. Following Youngstrom's death, Judy Stedtfeld was duly appointed as personal representative of the Estate of Jeanne Youngstrom in Butte County Case No. CV-10-15.
6. On behalf of the Estate, Stedtfeld renewed the License for the Licensed Premises.
7. As personal representative, Stedtfeld operated restaurant and bar on the Licensed Premises until about September 2013.
8. Stedtfeld last purchased liquor for the bar on August 21, 2014.
9. Stedtfeld was hospitalized on October 15, 2013 for surgery and medical care.
10. As of October 2013 Stedtfeld was no longer physically able to operate and manage the Licensed Premises.
11. According to Stedtfeld, the Licensed Premises was closed from September 2013 through September 2014, during which time there was no actual use of the License.
12. Stedtfeld listed the Licensed Premises for sale in January 2014.
13. Detective Chad Goody made a physical inspection of the Licensed Premises on February 5, 2014 and found the premises closed and in an evident state of disuse.

14. Detective Goody made inquiries of local beer, wine, and liquor distributors to determine the history of purchases by the Licensed Premises.

15. Bender Beverage was a distributor to the Licensed Premises and reported the Licensed Premises' last purchase of beer and wine was on August 7, 2013.

16. Watkins Distributing was a distributor to the Licensed Premises and reported the Licensed Premises' last purchase of beer and wine was on August 8, 2013.

17. The Idaho State Liquor Dispensary reported the Licensed Premises' last purchase of liquor was on August 21, 2013.

18. The City of Arco reported that the city alcohol license for the Licensed Premises expired on December 31, 2013.

19. Stedtfeld stated she closed the Licensed Premises while attempting to sell it.

20. On September 29, 2014 Stedtfeld as personal representative entered into a written purchase and sale agreement to sell the Licensed Premises to a buyer.

21. Since October 1, 2014 the buyer has been operating the Licensed Premises through agreement with Stedtfeld pending closing of the purchase.

22. In her affidavit Stedtfeld asserts that on February 5, 2014 she telephone Nichole Hardy (sic) at the Agency. Stedtfeld's affidavit states, "Ms. Hardy advised your Affiant that the bar has been closed for more than ninety (90) days, and in fact more than 150 days from August 21, 2013, and that the license would have to be leased or sold in order to keep it. Your affiant relied upon the representations of Ms. Hardy and continued to attempt to find a lessee or sale of the liquor license for the Arco Village Bar and in fact did so on September 29, 2014."

23. Nichole Harvey's affidavit states, "I do not remember specifically having a conversation with Judy Stedtfeld regarding what she was to do about the liquor license held by Jeneane Youngstrom, who had deceased. ...In Ms. Stedtfeld's affidavit, she says that on February 5, 2014, I advised her that the bar had been closed for more than 90 days, and in fact more than 150 days from August 1, 2013, and that it would have to be leased or sold in order to keep it. If I did say this, and I most assuredly do not recall doing so, I would have been incorrect in making any reference to the '90' or '150' days, as those periods of time that a liquor license can be out of 'actual use' did not apply to the situation with the Arco Village Club as the physical premises had not been lost or moved.

Even if these grace periods of up to 150 days during which a liquor license could lawfully be out of actual use, that time had long since passed since the bar closed on August 21, 2013 and the conversation that Ms. Stedtfeld allegedly had with me was February 5, 2014.”

24. Plainly, there is a dispute of fact. However, the factual dispute is not on an question material to the issue on summary judgment.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Administrative Code and Statutes

In pertinent part IDAPA 11.05.01.010.02 states, “All licenses must be prominently displayed in a suitable premises and remain in actual use by the licensee and available for legitimate sales of alcoholic beverages by the drink.”

Under Idaho Code § 23-933, the director may “suspend, revoke, or refuse to renew a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the provisions of this chapter or rules and regulations promulgated by the director....”

Legal Standards

On a motion for summary judgment in an administrative law proceeding, the hearing officer applies the same standard as used in judicial actions. Summary judgment is proper “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). If the evidence reveals no disputed issues of material fact, then only a question of law remains.

Burden of Proof

Complainant has the burden of proof to show by a preponderance of the evidence that Respondent has violated the Act or Board rule. *Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 926 P.2d 213 (Ct. App. 1996).

Complainant’s Prima Facie Case

Complainant contends Respondent violated IDAPA 11.05.01.010.02 because the License did not “remain in actual use”. Based upon the undisputed facts, Respondent’s

did not maintain its License in actual use. Accordingly, it is question of law on whether the lack of actual use is a violation of the regulation allowing Complainant to revoke the License.

Under the statute cited above, a violation of the regulation is grounds for revocation of the License. See *BV Beverage Co., LLC v. State*, 155 Idaho 624, 315 P.3d 812 (2013).

Respondent's Arguments

Respondent raised no affirmative defenses in its answer. It is axiomatic that a party may raise defenses in response to a motion for summary judgment.

Respondent argues that IDAPA 11.05.01.010.02 applies only in the event of a loss or move of the physical Licensed Premises. Therefore, the "actual use" provision is inapplicable because the Licensed Premises was not lost or moved.

Respondent's reading of the regulation is misplaced. A plain reading of the regulation leads to the determination that the loss or move language is separate from and not integrally connected to the actual use language. The specific full sentence unequivocally applies to all licenses displayed in all suitable premises, not just those premises that were lost or moved.

Respondent next urges that IDAPA 11.05.01.012.02 controls. It does not. That regulation sets forth the ability of an executor to continue the business of a licensee who had died. There is nothing in that regulation excepting from application of the actual use regulation an executor who is authorized to continue using a License following the death of a licensee.

Respondent contends quasi-estoppel applies to bar Complainant from asserting a violation of the actual use regulation due to a representation that Respondent had a 90-day or greater time period to sell or transfer the License. As already noted, the facts underlying Respondent's contention are disputed. Nonetheless, the disputed facts are not material to the issue on summary judgment.

Following Youngstrom's death, Stedtfeld applied for and received a transfer of the License to the Estate. Thus, the question of grace periods following death of a licensee are not material. Respondent acknowledged the License had not been in actual use for a period of one year. Regardless of whether the Agency's agent made a

representation of grace period within which Respondent could sell or transfer the License, the undisputed fact remains that the License did not remain in actual use as required by regulation. Consequently, quasi-estoppel does not apply to bar Complainant from asserting the actual use violation.

Finally, Respondent suggests application of the actual use regulation should be suspended due to medical exigencies. No doubt, Stedtfeld suffered serious medical problems she admits prevented her from operating or managing the Licensed Premises. However, Respondent did not support her argument with any authority, and the Hearing Officer is unaware of any authority, that medical exigencies excuse a licensee from the actual use regulation.

CONCLUSION

Complainant has established that Respondent violated IDAPA 11.05.01.010.02 where the License did not remain in actual use.

Respondent's arguments are not persuasive. Even though a dispute of fact exists regarding Complainant's alleged representation of time periods, such dispute is not material to the issue of whether the License remained in actual use.

There are no genuine disputes of material fact. Complainant is entitled to summary judgment.

ORDER

Summary judgment is entered in favor of Complainant. It is recommended that Respondent's License be revoked for violation of IDAPA 11.05.01.010.02.

This is a recommended order of the hearing officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this recommended order will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

Within twenty-one (21) days after (a) the service date of this recommended order,
(b) the service date of a denial of a petition for reconsideration from this recommended

order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee of the agency head) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Dated this 5th day of December 2014.


Kipp L. Manwaring, Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 5th day of December 2014, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

DOCUMENT SERVED:

HEARING OFFICER'S DECISION
GRANTING COMPLAINANT'S MOTION
FOR SUMMARY JUDGMENT

PARTIES SERVED:

Stephanie A. Altig, Esq.
700 S Stratford Drive
Meridian, ID 83642
MAILED
EMAILED

Lynn Hossner
109 North Second West
St. Anthony, ID 83445
MAILED
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Alicia Lambert
Legal Assistant

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