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**BEFORE THE IDAHO STATE POLICE ALCOHOL BEVERAGE CONTROL  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

	)	
	)	Case No. 16ABC023
IN RE:	)	
	)	License No. 12937
Oscar Pedraza	)	Premise No. 2C-12937
DBA Salon Columbia	)	
Premises No. 2C-12937	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
Respondent.	)	PRELIMINARY ORDER
	)	

An evidentiary hearing was held on March 23, 2017, pursuant to the Idaho Administrative Procedures Act, Idaho Code Title 67, Chapter 52 and the Idaho Alcohol Beverage Code, Idaho Code Title 23. The hearing was held to consider the Complaint filed by the Idaho State Police, Alcohol Beverage Control (“ABC”) against Respondent Oscar L. Pedraza dba Salon Columbia Events Center (“Mr. Pedraza”). The Complaint alleges violations of Idaho liquor laws. ABC seeks revocation of Respondent’s retail alcohol beverage license.

Mr. Pedraza appeared in person by and through his attorney Frank Walker. ABC appeared through its agency representative, Captain Bradley C. Doty, and through Stephanie C. Nemore, Deputy Attorney General.

Both parties introduced exhibits into evidence and presented testimony. ABC presented the testimony of Detectives George Szeles and Horacio Caldera. Mr. Pedraza testified but did not present the testimony of other witnesses. Both parties cross-examined or had the opportunity to cross-examine the other party’s witnesses. Exhibits 1 through 29 were admitted into evidence. Exhibit A was admitted for illustrative purposes only.

ABC and Mr. Pedraza submitted written closing statements on March 31, 2017. Having carefully reviewed the record, the briefs, and the closing statements, these Findings of Fact, Conclusions of Law and Preliminary Order are hereby entered.

### FINDINGS OF FACT

1. During all relevant times, Mr. Pedraza has been licensed to sell and serve liquor by the drink, license number 12937 (pursuant to Idaho Code §23-903), beer (pursuant to Idaho Code §23-1010), and wine by the bottle and drink (pursuant to Idaho Code §23-1306);

2. In connection with each license application, Mr. Pedraza signed a statement that he "...understand(s) that state law controlling alcohol beverage licensing is found at Title 23, Idaho Code (<http://legislature.idaho.gov/idstat/Title23/T23.htm>) and the Alcohol Beverage Control administrative rules, IDAPA 11.05.01 (<http://adminrules.idaho.gov/rules/current/11.0501.pdf>), and that any violation of these laws or rules can result in criminal and/or administrative sanctions, and up to and including license revocation”;

3. In connection with each annual license, Mr. Pedraza was required to sign a statement acknowledging that “[a]cceptance of this license by a retailer shall constitute knowledge of and agreement to operate by and in accordance to the Alcohol Beverage Code, Title 23”;

4. The licensed location is 38012 Lake Ave., Caldwell, Idaho, premises number 2C-12937, referred to as the Columbia Events Center (“CEC”);

5. The CEC facility has a multi-purpose arena liquor license endorsement and regularly hosts events with 600 or more patrons;

6. Mr. Pedraza took over management of CEC about five years ago;

7. Mr. Pedraza is present whenever CEC is open for business;

8. Mr. Pedraza and CEC are required to provide a schedule of events to ABC as required by IDAPA 11.05.01.010.04 (“Rule 010.04”);

9. On August 3, 2015, Mr. Pedraza voluntarily admitted to permitting prohibited acts and to violating Rule 010.04 by failing to provide a schedule of CEC events from April 25, 2012

through June 2015, and agreed to sanctions of a \$7,500.00 monetary penalty and a twenty (20) day license suspension;

10. CEC was open for business and held numerous scheduled events from July 2015 through March 15, 2016, where alcohol service was planned;

11. As of March 25, 2016, Mr. Pedraza and CEC made no report to ABC of events held at CEC, where alcohol service was planned, from July 1, 2015 through March 15, 2016;

12. On March 24, 2016, ABC Detective Szeles was informed by Idaho State Police confidential informant #841 (“CI 841”) that liquor had been sold by the bottle at CEC;

13. CI 841 informed Det. Szeles that it was common practice for CEC bartenders to sell bottles of Buchanan Whiskey to CEC patrons, to permit patrons to mix their own drinks at their tables, and to provide mixers and plastic cups to facilitate this practice;

14. Mr. Pedraza testified at the hearing he was not aware that it was unlawful to sell liquor by the bottle at CEC;

15. On March 24, 2016, CI #841 advised Det. Szeles that CEC bartenders had been observed pouring liquor into an empty liquor bottle from another liquor bottle;

16. On March 24, 2016, CI #841 provided to Det. Szeles a video recording, recorded on March 3, 2016, which showed:

- a. A CEC female patron walking out of a CEC exit carrying a partially full bottle of liquor;
- b. The CEC female patron being stopped by a CEC security officer outside the CEC door she was exiting;
- c. The CEC security officer seizing the liquor bottle from the female patron;
- d. A female companion of the female patron advising the CEC security officer to call Oscar and stating that Oscar permits patrons to take liquor bottles;
- e. The CEC security officer delivering the seized liquor bottle to Ruben Pedraza, a CEC owner/manager and brother of Mr. Pedraza;
- f. A CEC bartender pouring liquor from a larger liquor bottle into a smaller liquor bottle;

17. Mr. Pedraza testified at the hearing he was unaware that it was illegal for CEC staff to pour liquor from one bottle into another;

18. Mr. Pedraza did not deny at the hearing that the “Oscar” referred to in paragraph 16.d. was him;

19. On May 14, 2016, Det. Szeles and ABC Detective Horacio Caldera conducted a surveillance operation inside CEC to check for liquor law violations;

20. Det. Caldera, working undercover, approached the CEC bar and asked a younger CEC female bartender if he could purchase a bottle of tequila, and the younger bartender replied in the affirmative;

21. The younger CEC female bartender was later identified as Alejandra Solis, a CEC employee;

22. The younger CEC female bartender turned to an older female CEC bartender and asked how much to charge for the sale of the bottle of tequila to Det. Caldera;

23. The older female bartender specified a price of \$105.00 for the sale of the bottle of tequila to Det. Caldera;

24. The older bartender was later identified as Maria Pedraza-Castenda and as Mr. Pedraza’s mother;

25. Maria Pedraza-Castenda holds a liquor license for a facility located in Meridian, Idaho, and is also an owner/manager of CEC;

26. Det. Caldera purchased a 750 ml bottle of Jose Cuervo® Especial Gold 40% ABV from the CEC female bartenders for the sum of \$105.00, paid in cash;

27. CEC purchased the bottle of Jose Cuervo® from the Division of Liquor Sales for the price of \$10.15;

28. After Det. Caldera gave away some shots of the Jose Cuervo® tequila to other CEC patrons, he departed the CEC premises with the partially full bottle of tequila;

29. Mr. Pedraza has not previously provided training to CEC staff regarding compliance with Idaho liquor laws;

30. CEC functions as a gathering place for the Hispanic community;

31. CEC has not generally been known by ABC to be a problem facility;

32. CEC has had fewer incidents reported to law enforcement than a similar facility located in Garden City, Idaho.

## ANALYSIS

### I. Failure To Provide List of Events

Rule 010.04.e provides:

Prior to the first of each month, the licensee *must* provide a schedule of events for the upcoming month to the director and local law enforcement office. This schedule must show the date and time of each event during which alcohol service is planned. The licensee must notify the director and local law enforcement at least twenty-four (24) hours in advance of any events where alcohol service is planned that were not included in the monthly schedule. (emphasis added)

CEC is a multi-purpose event center and is required to comply with Rule 010.04.

Mr. Pedraza admits that he failed to provide a list of events for the period from July 1, 2015 through March 15, 2016. Mr. Pedraza previously stipulated on July 30, 2015 to be sanctioned for failure to supply a list of events. He agreed to pay a \$7,500 monetary penalty and agreed to a twenty (20) day license suspension. When he applies for a license each year, he agrees to abide by Idaho liquor laws and is notified of the citations for the statutes and regulations. When he receives his license each year, he is required to sign his signature immediately under a statement that by signing he agrees to comply with Idaho liquor laws.

Mr. Pedraza's only defense is that he delegated to his bookkeeper the responsibility for notifying ABC of all events. He does not argue that this relieves him from his responsibility as a liquor license holder, and indeed it does not. Mr. Pedraza failed to provide a list of events immediately after his prior sanction. Mr. Pedraza has not taken seriously his responsibility to comply with the requirements imposed on him as a liquor licensee. Since a relatively light sanction did not adequately get his attention, a more serious sanction should be imposed. A substantial fine and significant suspension is warranted to encourage Mr. Pedraza and his staff to comply with the law and to deter other licensees from violating the law.

### II. Sale Only By The Drink.

Idaho Code §23-921 provides:

It shall be unlawful for any licensee to sell, keep for sale, dispense, give away, or otherwise dispose of any liquor in the original containers or otherwise than by retail sale by the drink.

CI #841 advised ABC Det. Szeles that it was common practice for CEC bartenders to sell liquor by the bottle. ABC documented two separate examples of this practice. The first example is documented on the video recording admitted as Exhibit 15. A CEC security officer stopped a female patron who was exiting CEC with a partially full liquor bottle. The patron or the person accompanying her believed this was authorized by Mr. Pedraza. She urged the officer to check with Mr. Pedraza, suggesting that it was an accepted practice authorized by Mr. Pedraza for CEC to sell liquor by the bottle. Also, CEC bartenders made drink cups and mixers available to CEC patrons who purchased liquor by the bottle, suggesting the sale of liquor by the bottle was a common CEC practice.

Idaho Code prohibits sale by the bottle so that bartenders can monitor overservice and customer inebriation. If the entire bottle is out of the custody of the bartender, the patrons are allowed to consume liquor with no direct supervision or control by the bartender.

A separate sale of liquor by the bottle was documented by Det. Szeles and Det. Caldera on May 14, 2016. Det. Caldera, working undercover, purchased a full or nearly full bottle of tequila from the CEC bar. This sale was conducted by CEC employee Alejandra Solis and approved by manager/owner and Mr. Pedraza's mother, Ms. Maria Pedraza-Castenda. Ms. Solis consulted with Ms. Pedraza-Castenda with respect to the price to be charged; not whether the sale should be made. This suggests that the sale of liquor by the bottle at CEC was routine enough that it did not have to be approved by an owner or manager.

Owner/Manager Maria Pedraza-Castenda determined the price of the sale of the bottle of tequila to Det. Caldera. The price she quoted was \$105.00, more than ten times the CEC purchase price of \$10.15 for the same bottle of tequila. Such a significant and profitable mark-up indicates a likely motive for disregarding the statutory prohibition against sale by the bottle.

Mr. Pedraza testified at the hearing he was not aware that sale by the bottle was illegal. This further corroborates that the practice was occurring. This specific transaction was approved by Mr. Pedraza's mother, who is not only an owner/manager of CEC but also holds a liquor license in Meridian in her own name. Both Mr. Pedraza and his mother should have known that selling liquor by the bottle violated Idaho law. Mr. Pedraza had held the CEC liquor license for five years. It is not credible that both Mr. Pedraza and his mother were unaware of the statutory

prohibition against sale of liquor by the bottle. They were both responsible for understanding and following Idaho liquor laws.

### III. Pouring From One Bottle Into Another Bottle

C.I. #841 documented a CEC bartender pouring liquor from one liquor bottle into another liquor bottle. The occurrence of the re-pouring incident was not disputed by Mr. Pedraza in his testimony at the hearing. This violates Idaho Code §23-921. A liquor licensee is permitted to sell to its patrons only liquor from its original bottle. If the bartender pours liquor from one bottle into another bottle, the sale to the customer is not from the original container. Nor is the liquor in the original bottle disposed of in the original container. It also constitutes keeping, dispensing and/or disposing of liquor other than by retail sale by the drink.

### CONCLUSIONS OF LAW

1. ABC is responsible for enforcing Idaho liquor law pursuant to Idaho Code, Title 23, Chapters 8, 9, 10 and 13;
2. ABC has proved by substantial and competent evidence that Mr. Pedraza violated Rule 010.04 by failing to report CEC events from July 2015 through March 15, 2016.
3. ABC has proved by substantial and competent evidence that Mr. Pedraza violated Idaho Code §23-921 by, on at least two occasions, selling or permitting liquor to be sold by the bottle to CEC patrons by CEC bartenders.
4. ABC has proved by substantial and competent evidence that Mr. Pedraza violated Idaho Code §23-921 by permitting a CEC bartender to pour liquor from one bottle into another bottle.

### SANCTIONS ANALYSIS

Idaho Code §23-933 provides potential administrative sanctions for violations of Idaho liquor laws. Those sanctions include license revocation, license suspension of up to one year, and a monetary payment not to exceed five thousand dollars (\$5,000.00).

ABC has asked the hearing officer to draft a preliminary decision as contemplated by the Idaho Administrative Procedures Act, specifically, Idaho Code §§67-5243 and 67-5245, and IDAPA 04.11.01.730. A preliminary order becomes final unless it is reconsidered or appealed.

Idaho Code 67-5243(1). This is contrasted with a recommended order which becomes final only after review by the agency head. *Ibid.* In a recommended order, the appointed hearing officer does not impose sanctions because the sanctions will be determined by the agency head. However, a preliminary order may well become a final agency decision if not reconsidered or appealed. Thus, the hearing officer must impose the appropriate sanction.

ABC states “It has long been ABC’s position that the assigned hearing officer in a contested case does not have authority to change the agency’s proposed penalty. Additionally, the agency (ABC) would have directed the hearing officer to use discretion as to the penalty upon sufficient proof of an ABC violation, without such, none was given.” ABC’s Closing Statement, p. 9.

The question becomes whether the hearing officer is bound by ABC’s proposed sanction of license revocation. The hearing officer has reviewed the appropriate statutes, regulations, and past hearing officer contracts with ABC and has found no specific guidance on this question. This hearing officer has acted as hearing officer for ABC on quite a few occasions for quite a few years and has not previously understood that he is bound by ABC staff’s proposed sanction. Other Idaho State agencies have asked this hearing officer to use discretion in ordering sanctions when issuing a preliminary decision.

The hearing officer is acting as an agent for the agency head when issuing a preliminary decision—in this case, the Director of Idaho State Police. ABC does not assert that the Director has no discretion in deciding the appropriate sanction. Thus, why would the Director’s hearing officer/agent lack such discretion? If ABC desires that its sanction decision be binding on hearing officers in the future, such desire should be clearly specified in the hearing officer contract. Or ABC could request that the hearing officer issue a recommended decision, in which case the hearing officer would not deal with sanctions at all, and the Director would rule on the sanctions to be issued.

In this case, the hearing officer recalls asking at the telephonic scheduling conference held on January 17, 2017, whether ABC requested a preliminary decision and whether the hearing officer should issue a sanctions order. The scheduling conference was not recorded and the hearing officer cannot be positive about his recollection. The hearing officer thinks he recalls counsel for ABC affirming that the hearing officer was asked to issue a preliminary decision and



to deal with the sanction to be imposed. It was not argued at that time that the hearing officer would be bound by ABC's proposed sanction of revocation.

Finally, the hearing officer is concerned about Mr. Pedraza's due process rights. This case has been largely about the sanction to be imposed. Mr. Pedraza admitted to violation of Rule 010.04. Mr. Pedraza acknowledged violations of Idaho Code §23-921, although he disputed the details and severity of the violation(s). If the hearing officer has no discretion regarding sanctions, what was the purpose of the proceeding? Indeed, Mr. Pedraza's case largely centered around having the sanction reduced from license revocation to suspension and/or fines.

On these unique facts, it is appropriate to conclude that the hearing officer must include in the order a decision regarding sanctions and that the hearing officer is not bound solely to the license revocation sanction proposed by ABC.

A severe sanction is appropriate. CEC had a culture of non-compliance with Idaho's liquor license laws. Within a short timeframe, four separate legal violations were well-documented. These violations occurred under the supervision of Mr. Pedraza, who had held a liquor license for the CEC location for at least five years and should have been familiar with Idaho liquor laws. He was present whenever CEC was open for business. Between the license application and the license document itself, Mr. Pedraza repeatedly was advised where to view Idaho's liquor statutes and regulations. Mr. Pedraza repeatedly acknowledged that he understood and agreed to comply with Idaho's liquor laws. Yet Mr. Pedraza, his mother/co-owner, and CEC bartenders engaged in at least four violations of the law. Three separate violations of Idaho Code §23-921 have been proven. Two instances of sale of liquor and one instance of pouring liquor from one bottle into another. Based on the evidence presented at the hearing, it is likely additional violations occurred since sale by the bottle was routine practice and Mr. Pedraza testified he was unaware the practice was unlawful. These are material violations. A prior fine and suspension was not adequate to focus Mr. Pedraza's attention on the importance of compliance with Idaho's liquor laws.

In support of a sanction other than revocation, Mr. Pedraza's attorney was persuasive that the CEC operation has had relatively few law enforcement interactions when compared with another similar facility, CEC has not previously had a reputation as a troubled facility, and CEC provides a valuable community gathering place. These mitigating factors support a sanction less than license revocation. Absent these mitigating factors, license revocation would be appropriate.

A one year suspension and a twenty thousand dollar (\$20,000) fine constitutes a severe sanction. Mr. Pedraza will be unable to sell liquor, beer or wine at CEC for a full year. This will likely affect the economic viability of the CEC operation. This suspension, together with the fines, should be adequate to deter Mr. Pedraza from future liquor law violations and to encourage other licensees to fully comply with Idaho's liquor laws.

#### PRELIMINARY ORDER

Violation of Rule 010.04. The alcohol beverage licenses of Mr. Pedraza and CEC are hereby suspended pursuant to Idaho Code §23-933 for a period of ninety (90) days.

Additionally, a fine shall be imposed of \$5,000.00 for this second violation of Rule 010.04.

Violations of Idaho Code §23-921. The alcohol beverage licenses of Mr. Pedraza and CEC are hereby suspended pursuant to Idaho Code §23-933 for a period of one year. This suspension shall run concurrently with the ninety-day suspension provided for violation of Rule 010.04. Additionally, a fine shall be imposed of \$5,000.00 for each of the three documented violations of Idaho Code §23-921 (for a total of \$15,000).

The total of the fine for violations of Rule 010.04 and Idaho Code §23-921 is \$20,000. The fines must be paid in full by Mr. Pedraza prior to any license reinstatement after the one-year license suspension.

#### ATTORNEY FEES

ABC has requested an award of attorney's fees. The applicable statute is Idaho Code §12-117 which provides:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

ABC is primarily the prevailing party. ABC prevailed totally in proving Mr. Pedraza's four violations of Idaho liquor laws. Mr. Pedraza did not prevail on any issue related to the facts of whether violations occurred. ABC also primarily prevailed with respect to sanctions. ABC

sought revocation of Plaintiff's liquor license. Mr. Pedraza argued that the more appropriate sanction is a 180-day suspension and a \$5,000 fine. The sanction imposed is a one-year license suspension and the total fines imposed for the four violations is \$20,000. Thus, each party partially prevailed on the sanction issues.

ABC is entitled to an award of seventy-five percent (75%) of its attorney fees. Mr. Pedraza lacked a reasonable basis in fact or law to contest any of the violations. The proof and argument related to the violations took approximately 75% of the hearing. The proof and argument related to the sanctions took approximately 25% of the hearing. Mr. Pedraza did have a reasonable basis in fact or in law to contest the revocation sanction, but only partially prevailed.

ABC may present its request for attorney fees in accordance with the applicable IDAPA Rules. *See* IDAPA 04.11.01.741.

#### COMPLIANCE WITH IDAPA 04.11.01.730

(a) This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order 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 Section 67-5243(3), Idaho Code.

(b) Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency.

(c) If any party appeals or takes exceptions to this preliminary order, opposing parties

shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on his own motion.

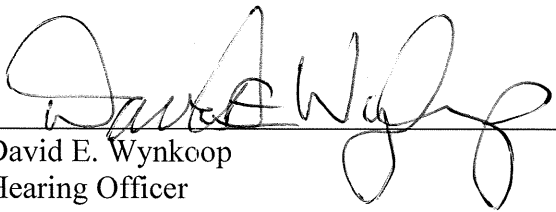
(d) If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. 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) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

(e) Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 operates its principal place of business in Idaho; or
- iv. The real property or personal property that was the subject of the agency action is located.

(f) This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 5<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
David E. Wynkoop  
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of April, 2017, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER upon each of the following, by the method indicated below:

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Janet L. Monzo