

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



IDAHO STATE POLICE,)
ALCOHOL BEVERAGE CONTROL,)
)
Complainant,)
)
vs.)
)
DANIEL S. FUCHS, Licensee,)
dba, AUBREY'S HOUSE OF ALE,)
)
Respondent.)
_____)

Hearing No. 08ABC-COM112
License No. 7323.0
Premise No. K-7323

DIRECTOR'S FINAL ORDER

This matter is before the Director of the Idaho State Police on review of the Preliminary Order entered by the duly appointed Hearing Officer on December 24, 2009. The parties have been given an opportunity to submit briefing to the Director on all disputed issues and the Director has reviewed the contested case record filed in this matter. In accordance with the contested case provisions of title 67, chapter 52, Idaho Code, and IDAPA 04.11.01, the Director hereby enters this Final Order.

**I.
INTRODUCTION**

Respondent, Daniel S. Fuchs, dba Aubrey's House of Ale ("Fuchs"), currently holds liquor License No. 7323.0, authorizing him to sell beer, wine by the glass and bottle, and liquor by the drink, at retail. On or about October 23, 2008, the Complainant, Idaho State Police, Alcohol Beverage Control ("ABC"), filed an administrative Complaint against Fuchs thereby commencing this action. In relevant part, the Complaint alleged that Fuchs violated provisions relating to the sale of liquor by the drink imposed by

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Idaho Code § 23-908(4) and IDAPA 11.05.01.010.03, thereby authorizing the forfeiture or revocation of Fuchs' liquor license under Idaho Code §§ 23-908(4) and 23-933(1).¹

Both parties moved for summary judgment before the Hearing Officer. On or about December 24, 2009, the Hearing Officer entered his Preliminary Order finding that there were no genuine material issues of disputed facts and that as a matter of law Fuchs was entitled to summary judgment. From this Order, ABC filed a timely Petition, pursuant to Idaho Code § 67-5245, requesting that the Director review and reverse the Hearing Officer's decision.

II. UNDISPUTED FACTS

There is no dispute regarding the material relevant facts in this case. The Hearing Officer outlined those relevant facts in his Preliminary Order, § V., pp. 10-13. The Hearing Officer's recitation of the undisputed facts is correct and is hereby incorporated in full into this Final Order by reference.

III. PRELIMINARY MATTERS

Before the Hearing Officer, ABC filed a Motion for Protective Order seeking an order excluding from the record the following evidence: (1) testimony regarding settlement negotiations between the parties; (2) testimony from Fuchs' legal counsel, Brian Donesley;² and (3) testimony regarding ABC's past practices and interpretation of the statute and rule at issue in this case. In his Preliminary Order, the Hearing Officer ruled on the Motion. He granted ABC's request to exclude the testimony regarding

¹ ABC had also charged Fuchs with violating Idaho Code § 23-1055 by not purchasing beer as a retailer from an authorized dealer or wholesaler. However, this charge was not pursued by ABC and is not before the Director.

² The testimony from Brian Donesley consisted of an affidavit and could have encompassed oral testimony at an evidentiary hearing, if one had been held.

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settlement discussions and any testimony from Mr. Donesley, but denied the Motion as to ABC's objection to evidence concerning ABC's prior interpretation and enforcement of the applicable law.

Fuchs has not raised any argument or claim in his briefing to the Director that the Hearing Officer erred in ruling on ABC's Motion for Protective Order. Therefore, the Hearing Officer's ruling excluding the settlement negotiations and excluding the testimony of Mr. Donesley are not at issue and are not properly before the Director. However, as to the Hearing Officer's third ruling, ABC has expressly raised the correctness of the Hearing Officer's decision as one of the issues on review to the Director. See, Complainant's Brief on Review by Agency Head, p. 3.³

ABC argues in its briefing on review that the Hearing Officer improperly allowed evidence from past ABC and ISP administrators regarding the interpretation and enforcement of IDAPA 11.05.01.010.03. The evidence admitted by the Hearing Officer consisted of affidavits from John Gould, Edgar Rankin, Thomas Thompson, Denise Rogers, and Respondent Fuchs. With the obvious exception of Fuchs, these individuals had been employed by ISP and had worked at least a portion of their careers in positions interpreting or applying ABC statutes and rules. The testimony from each of these prior ISP administrators/employees was that during their tenure in working with ABC issues, IDAPA 11.05.01.010.03 had always been interpreted to only require that a new licensee hold his premise open and available for the sale of liquor by the drink, not that actual sales be made. Before the Hearing Officer, and now before the Director,

³ Interestingly, in a footnote at page 3 of its Brief on Review, ABC makes the curious comment that the Hearing Officer's decision regarding Complainant's Renewed Motion for Protective Order is not at issue in this review. Obviously, it is at issue since ABC raises and argues the point in its briefing. In any event, whether or not the Hearing Officer erred in this ruling is properly before the Director and will be addressed in this Final Order.

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ABC claims that these “past practices” are irrelevant. ABC argues that prior administrators either misread the rule or intentionally chose to disregard the rule in their discretion as law enforcement officers. In either case, ABC contends that the actions and words of prior administrators cannot operate as a bar or otherwise preclude the current ABC administrator, Lt. Robert Clements, from correctly interpreting the rule as written—to require actual sales of liquor by the drink during the applicable time period.

In denying ABC’s request to exclude this “past practices” evidence, the Hearing Officer examined the test for admissibility of evidence in a contested administrative proceeding. That test is set-forth at Idaho Code § 67-5251(1) and IDAPA 04.11.01.600 and permits, among other things, the exclusion of irrelevant evidence and also provides that, “All other evidence may be admitted if it is of a type relied upon by prudent persons in the conduct of their affairs.” This test allows great liberality in the admission of evidence. Whether or not evidence is irrelevant or is of a type that a reasonable person would rely upon is a determination entrusted to the sound discretion of the presiding officer. In practice, Hearing Officers typically admit evidence that may only be marginally relevant and then allocate the weight to be given that evidence during their evaluation and deliberation of the case. In other words, the test frequently becomes an issue of weight, not admissibility, and it is extremely rare for an agency head or a reviewing court to disturb a Hearing Officer’s decision to admit evidence.

In this case, the Hearing Officer concluded that the testimony of these witnesses was relevant and admissible. In the words of the Hearing Officer, “The testimony of the Respondent’s witnesses clearly provides assistance to the hearing officer and develops the record in this matter as contemplated by Rule 600.” Preliminary Order, p. 5.

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It cannot be said that the Hearing Officer's admission of this evidence was clearly in error. The Director is free to accord such weight to this evidence as he sees fit. Therefore, ABC's objection to the admission of the testimony in these affidavits concerning ABC's past practices in the interpretation or application of IDAPA 11.05.01.010.03 is rejected.

IV. ISSUES AND ANALYSIS

In its Petition for Review by Agency Head of Preliminary Order, ABC raised the following three (3) issues:

1. The hearing officer erred in considering evidence concerning "past practices" of former Idaho State Police officers and their interpretation of and failure to enforce Idaho Code § 23-908(4) and its companion administrative rule IDAPA 11.05.01.03 [sic].
2. The hearing officer's decision was arbitrary and clearly erroneous in that he failed, without explanation, to consider all of the relevant and undisputed evidence in this case.
3. The hearing officer erred as a matter of law when he misinterpreted and misapplied IDAHO CODE § 23-908(4) and IDAPA 11.05.01.03 [sic] based on the agency record in this case and the undisputed evidence contained therein. Specifically, and based on the agency record, the hearing officer erred as a matter of law when he found that during the first six months after a new city priority list license to sell liquor by the drink is issued, the statute and rule at issue do not require that actual sales of liquor by the drink be made during at

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least eight (8) hours per day, no fewer than six (6) days per week, but concluded instead the statutory and rule requirements of “actual use” and “actual sales” was satisfied if liquor by the drink was merely available for sale during the required time.

As to ABC’s first issue on appeal, that issue was discussed and disposed of in Section III (“Preliminary Matters”), above. The Hearing Officer did not err in admitting evidence concerning ABC’s past practices.

As to ABC’s second issue on appeal, that issue was withdrawn by ABC and is not before the Director in this appeal. See, ABC’s Brief on Review, p. 4.

Therefore, ABC’s only remaining issue on review to the Director from the Hearing Officer’s Preliminary Order is issue number three: Did the Hearing Officer misinterpret and misapply the applicable statute and rule?

A. Is IDAPA 11.05.01.010.03 ambiguous and, if so, what is its proper interpretation?

On June 2, 2008, ABC issued Fuchs a license to sell alcoholic beverages under the name Aubrey’s House of Ale in Coeur d’ Alene, Idaho. As a new licensee, Fuchs was subject to the provisions of Idaho Code § 23-908(4) and IDAPA 11.05.01.010.03. In relevant part, section 23-908(4) states that, “Each new license issued on or after July 1, 1980, shall be placed into actual use by the original licensee at the time of issuance and remain in use for at least six (6) consecutive months or be forfeited to the state” Emphasis added. As noted by the parties, the Legislature’s purpose in requiring “actual use” was to discourage speculation in liquor licensing where a person would secure a license and then essentially do little or nothing with the license and then later

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sell the license at a greatly increased or inflated price. Unfortunately, the statute did not define the term "actual use."

In an effort to add clarity to the term, ISP promulgated an administrative rule. After being approved by the 1993 Legislature, the rule was codified at IDAPA 11.05.01.010.03 ("Rule 10.03"). The rule provides:

For purposes of Section 23-908(4), Idaho Code, a "new license" is one that has become available as an additional license within a city's limits under the quota system after July 1, 1980. The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.

ABC charged that Fuchs violated the rule and, by extension, the controlling statute.

Before the Hearing Officer, and on appeal, both parties argue that Rule 10.03 is unambiguous; however, the parties are diametrically opposed as to the meaning of the rule. ABC claims that Rule 10.03 requires a new licensee to sell alcohol by the drink every hour, for at least eight (8) hours a day, at least six (6) days a week. In contrast, Fuchs claims that the rule does not require any sales. Rather, he asserts that the rule only requires him to make alcohol available for sale at least eight (8) hours a day, at least six (6) days a week. Fuchs supports his position with the affidavits of prior ISP administrators and employees John Gould, Edgar Rankin, Thomas Thompson, and Denise Rogers. The testimony of these individuals regarding the interpretation of Rule 10.03 is consistent with Fuchs'.

In analyzing this issue, the Hearing Officer concluded that Rule 10.03 was clear and unambiguous. The Hearing Officer stated, "The rule promulgated by the

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Complainant to satisfy the 'actual use' language of Idaho Code § 23-908(4) unequivocally states that the requirement of Idaho Code § 23-908(4) that a new license be placed into actual use by a licensee and remain used for six consecutive months is satisfied if the licensee makes actual sale of liquor by drink during at least eight hours per day and no fewer than six days per week. Thus, it would appear a licensee would be required to make actual sales of liquor by the drink sometime while it is in operation for eight hours a day/no fewer than six days a week." Preliminary Order, p. 15 (underlining added).

In these statements, the Hearing Officer seems to be siding in ABC's favor by finding that actual sales are required under Rule 10.03. However, the Hearing Officer's statement leaves the amount of actual sales unclear. Focusing on the word "during," the Hearing Officer could have been indicating that at least one (1) sale was required during each eight (8) hour day, six (6) days per week, or that only one (1) sale was required during each six (6) day week.

However, later in his decision, the Hearing Officer injects additional unnecessary confusion by seemingly contradicting this finding and stating that, "These rules [Idaho Code, § 23-908(4) and Rule 10.03] plainly state that liquor must be available for sale during the duration of the time the licensee is required to maintain business hours. Any other interpretation is impractical." Preliminary Order, p. 17. In other words, the Hearing Officer, after considering the affidavits regarding ABC's past practices, reverses his initial conclusion that actual sales are required and concludes that simply making liquor available is sufficient to satisfy Rule 10.03.

“Administrative regulations are subject to the same principles of statutory construction as statutes. . . . When interpreting a statute or rule, we will construe the statute as a whole to give effect to the intent of the legislature or promulgating entity. . . . The language of a rule, like the language of a statute, should be given its plain, obvious and rational meaning.” *Wheeler v. Idaho Transportation Department*, 148 Idaho 378, 384 (Ct. App. 2009), (citations omitted), *review denied*. If the rule is unambiguous, the rule should be applied as written, without engaging in statutory construction; however, if resort to statutory construction becomes necessary, it is the duty of a reviewing court to ascertain and give effect to the intent of the promulgating entity and the public policy behind the rule. *Schroeder v. Idaho Transportation Department*, 147 Idaho 476, 479-80 (Ct. App. 2009).

Turning then to a review of the literal wording of Rule 10.03, it is very difficult to understand how the Hearing Officer could have concluded that the rule is unambiguous or that it clearly does not require any sales by a licensee.

In relevant part, the rule states: “The requirement of Section 23-908(4), Idaho Code, that a new license shall be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.” (Underlining added for emphasis). The rule clearly requires “actual sales” of liquor by the drink as initially recognized by the Hearing Officer, but subsequently rejected. Construing the rule to not require any sales ignores this plain language. To conclude as did Fuchs, the Hearing Officer, and prior ISP administrators that no sales are actually required and that the rule only requires the establishment to hold liquor by

the drink available for sale eight (8) hours a day, six (6) days a week totally ignores the language of the rule, which requires one (1) or more actual sales. If that was the original intent of the rule, it should have been drafted something like: "The requirement of Section 23-908(4), Idaho Code, that a new license shall be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes available for sale liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week."

The Hearing Officer's interpretation of Rule 10.03 is clearly incorrect. However, this does not automatically dictate that ABC's interpretation is correct. Examining the language of the rule, reasonable minds can reach different conclusions regarding its precise meaning. In other words, it is ambiguous. The rule can reasonably be read one (1) of three (3) possible ways. A licensee must:

- a. sell at least one (1) glass of liquor every hour for at least eight (8) hours, six (6) days or more a week. (This would require at least forty-eight (48) sales a week and is how ABC is apparently interpreting the rule); or
- b. sell at least one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8) hours per day, six (6) days or more a week. (This would require at least six (6) sales a week); or
- c. sell at least one (1) glass of liquor sometime during a period of time during which the establishment is open at least eight (8) hours a day, at least six (6) days a week (this would require only one (1) sale a week).

The proper interpretation of IDAPA 11.05.01.010.03 is that a new licensee must sell at least one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8) hours per day, six (6) days or more a week. This interpretation is consistent with the public policy behind the requirement of Idaho Code § 23-908(4) that a new license "must remain in use" (i.e., that sales of liquor actually be made under the license), but yet does not impose a particularly onerous burden on the licensee. With extremely minimal advertising and effort, Fuchs, or any other licensee, can promote his business and achieve at least one (1) sale every day that he is open. Requiring at least one (1) sale is a reasonable, obtainable, and objective standard for determining whether a licensee is serious about exercising the use of his license or has some other ulterior motive, such as speculating in the purchase and sale of licenses.⁴

B. Did Fuchs violate IDAPA 11.05.01.010.03?

Now that the proper interpretation of Rule 10.03 has been determined, the obvious question becomes: Did Fuchs violate the rule? While the Director has decided that Fuchs was not required to make hourly sales as apparently advocated by ABC, Fuchs has failed to meet his obligation of making at least one (1) sale per day as required by the Director's interpretation of the rule. Indeed, Fuchs has even failed to meet his burden even under the most generous interpretation of the rule that would require only the sale of one (1) drink per week.

There were several days, and even some whole weeks, where Fuchs failed to make any sales of liquor by the drink. Indeed, during the month of August 2008 when

⁴ Because of the ambiguity of IDAPA 11.05.01.010.03, it would be appropriate for further clarification of this rule. To that end, the Director will be reviewing this matter for possible rulemaking in the near future.

Fuchs was open for business twenty-six (26) days, he only sold liquor by the drink on one (1) of these days (August 30, 2008). This fact is not disputed and is affirmatively established by the sales records attached to the Affidavit of Daniel Fuchs; Exhibit R-DF-17. See *also*, Preliminary Order, p. 12 (outlining the dismal sales record of Fuchs during the relevant six (6) month period).

For the foregoing reasons, there is no question that Fuchs violated Rule 10.03. It is perhaps not surprising that Fuchs made so few sales given his failure to advertise the location (by sign or otherwise), his failure to have the location listed in the building directory, his failure to stock an adequate inventory (he only had three (3) bottles of alcohol, only one (1) of which was open, when Lt. Clements inspected the facility on September 16, 2008), or to otherwise make any apparent, tangible effort to actually sell liquor.

C. Does the doctrine of quasi-estoppel apply?

The Hearing Officer granted summary judgment to Fuchs on two (2) grounds: (1) Rule 10.03 only required Fuchs to hold his establishment open for the sale of liquor, not actually make any sales, and (2) the legal doctrine of quasi-estoppel was applicable and prevented ABC from taking inconsistent positions on the interpretation of Rule 10.03. The Hearing Officer accepted Fuchs' argument that the affidavits from the prior ISP administrators regarding ABC's previous interpretation of Rule 10.03 to not require any sales of liquor barred the current ABC administrator, Lt. Robert Clements, from now interpreting and applying the rule to actually require sales.

ABC correctly notes that equitable estoppel cannot normally be applied against a governmental entity acting in its sovereign capacity or when exercising its police

powers. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831 (2003). While this has been the traditional rule, there appears a trend in the court decisions to relax this doctrine to avoid inequities. Furthermore, Fuchs argues the doctrine of quasi-estoppel, not equitable estoppel. While very similar, there is a difference between these two principles.

In a recent case, the Idaho Supreme Court restated the elements of quasi-estoppel:

The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Terrazas v. Blaine County, 147 Idaho 193, 200, fn. 3. (2009).

In ruling in favor of Fuchs, the Hearing Officer merely cited *Young v. Idaho Department of Law Enforcement*, 123 Idaho 870 (Ct. App. 1993), without elaboration, and stated that quasi-estoppel was applicable since ABC has taken inconsistent positions in enforcement of Rule 10.03. Preliminary Order, p. 18. However, as recognized in *Young* and *Terrazas*, taking inconsistent positions is not enough to establish the doctrine of quasi-estoppel. The party against whom estoppel is being sought must be "reaping an unconscionable advantage" by changing positions and the other party must be harmed by the change in positions.

In the present case, ABC has taken inconsistent positions, but only in the sense that prior administrators interpreted Rule 10.03 one way, and now Lt. Clements is interpreting the rule in a different manner. However, this is not the type of inconsistent

positions envisioned by the doctrine of quasi-estoppel. Under the facts of this case, there was no inconsistency between ABC's application of Rule 10.03 to Fuchs' license to operate Aubrey's House of Ale. While it may be true that under the prior interpretations in 2003, Fuchs did not have to make any actual sales in connection with his four (4) licenses to operate facilities in Nampa, as to Aubrey's, he has been consistently informed that actual sales were required. Indeed, as early as July 20, 2005, Fuchs' attorney, Brian Donesley, was notified in a letter from Lt. Clements that henceforth, Rule 10.03 would be interpreted to require actual sales. See, Exhibit C5.bb. As to Fuchs, he was notified in a February 25, 2008 letter from Nichole Harvey, ABC Management Assistant, that the license at issue in this case (i.e., License No. 7323.01 for Aubrey's) would be subject to the actual sales requirement. See, Exhibit C5.tt. Therefore, it is disingenuous for either Mr. Fuchs or Mr. Donesley to claim that they were unaware of the actual sales requirement until Lt. Clements' deposition was taken on July 7, 2009, well after the commencement of this contested case proceeding.

Fuchs has failed to meet his burden of establishing that Lt. Clements has inconsistently applied Rule 10.03 as to Fuchs and Aubrey's. Fuchs has also failed to show either that ABC has now reaped an unconscionable advantage or that Fuchs detrimentally relied upon the prior interpretation of Rule 10.03 and he has somehow now been harmed by ABC's current interpretation of the rule. There is simply no evidence in the record of detrimental reliance or change of position by Fuchs. Nor is there any evidence of financial harm to Fuchs in connection with the change in interpretation. While ABC changed its interpretation of the applicable rule, this occurred prior to Fuchs being issued the license to operate Aubrey's House of Ale and he was

notified in writing of the change, so there could be no detrimental reliance on ABC's prior interpretation which may have applied to Fuchs other licenses, but clearly never applied to the license at issue in this case.

For these reasons, the Hearing Officer erred in ruling that quasi-estoppel applied to this case, thereby barring ABC from changing its interpretation of IDAPA 11.05.01.010.03.

D. Has the agency conducted improper rulemaking?

Fuchs claims that ABC's current interpretation of Rule 10.03 constitutes rulemaking and as such is subject to the formal rulemaking process contained in the Idaho Administrative Procedures Act ("APA"). Fuchs states that, "There is no dispute that ABC changed its interpretation of IDAPA 11.05.01.010.03 with this proceeding." Fuchs' Brief on Review, pp. 26-27 [sic]. This is a misstatement of the record, since ABC clearly changed its interpretation of the rule at least as early as 2005, well before the instant action was commenced. In any event, whether ABC's new interpretation constitutes rulemaking is resolved by an examination of the APA.

An administrative rule is defined at Idaho Code § 67-5201(19). In relevant part, this statute provides that, "The term [rule] includes the amendment, repeal, or suspension of an existing rule, but does not include: any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule." Idaho Code § 67-5201(19)(b)(iv). In this case, ABC's notifications to Fuchs (including the interpretation adopted by the Director and stated in this Final Decision) qualify as written statements from the agency to the licensee pertaining to how the agency is interpreting Rule 10.03. As such, the interpretations

themselves are not rules and, therefore, are not subject to the formal rulemaking process. Therefore, Fuchs' claim that the agency has conducted improper rulemaking is without merit.

E. Is the agency's interpretation of IDAPA 11.05.01.010.03 arbitrary and unreasonable?

Fuchs' final argument in his brief on review to the Director⁵ is that requiring multiple sales of liquor by the drink every hour, eight (8) hours a day, six (6) days a week is arbitrary and unreasonable. See, Fuchs' Brief on Review, pp. 27-30 [sic]. Fuchs claims that ABC has violated his fundamental rights of due process by not giving him notice of what was required.

However, as explained above, the Director is rejecting ABC's apparent interpretation that hourly drinks are required of a new licensee. This is not the correct interpretation; therefore, Fuchs' argument is misdirected. To the extent that Fuchs is claiming that requiring him to make any actual sales of liquor is unreasonable and arbitrary, the reasonableness of this requirement has been addressed earlier in this decision.

On its face, IDAPA 11.05.01.010.03 requires "actual sales." Fuchs' misreading of the rule to ignore this express term is a clearly wrong interpretation. The only thing ambiguous about the rule was whether those actual required sales have to be hourly, daily, or weekly. The Director has now clarified that only one (1) sale per day is necessary to comply with the rule. This interpretation is consistent with the legislative

⁵ Fuchs raised other issues below, such as claims that requiring actual liquor sales exceeds the agency's authority or violates the Idaho Constitution. However, Fuchs does not raise these other issues in his briefing to the Director. Therefore, the Director need not address them as they have been waived or implicitly withdrawn.

intent and constitutes a rational basis of serving the public interests involved. There is nothing arbitrary or unreasonable about this interpretation.

F. Is either party entitled to an award of attorney fees?

Both parties have requested an award of attorney fees pursuant to Idaho Code § 12-117. The Hearing Officer declined to consider attorney fees because of the case of *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415 (2009), which held that section 12-117 did not authorize administrative agencies to award attorney fees in contested case proceedings. However, *Rammell* was overruled by the 2010 Idaho Legislature. Section 12-117 does indeed apply to this case.

Under Idaho Code § 12-117, an administrative agency shall award attorney fees to the prevailing party, but only when the losing party “acted without a reasonable basis in fact or law.” In this case, the Director has reversed the Hearing Officer’s Preliminary Order and found that Fuchs violated the applicable rule. Therefore, Fuchs is not the prevailing party and is not eligible for attorney fees under Section 12-117. However, neither is ABC. While the Director has concluded that Fuchs violated IDAPA 11.05.01.010.03, it cannot be said that he acted without a reasonable basis in fact or law.

The rule at issue in this case is ambiguous. Prior ISP administrators, the Hearing Officer, and both parties misinterpreted what the rule requires.⁶ Although Fuchs was properly put on advanced notice that actual sales were necessary, there was still considerable confusion over the exact details of those sales.

⁶ The current ABC Administrator, Lt. Clements, is correct in his interpretation that actual sales are required. However, he is incorrect in his conclusion that at least one (1) sale must be made every hour.

Under the totality of the circumstances, it would not be entirely correct to say that ABC is the prevailing party or that Fuchs acted without a reasonable basis in fact or law. Therefore, the Director declines to award attorney fees to either party.

**V.
CONCLUSION**

IDAPA 11.05.01.010.03 is ambiguous. There can be no doubt that the plain language of the rule requires a new licensee to make actual sales of liquor by the drink. Where the rule is ambiguous is in what quantum or frequency of sales is required. While it is possible to read the rule in three (3) conceivable ways, the most reasonable and logical interpretation is that the rule requires at least one (1) actual sale during each and every day that a licensed establishment is open for at least eight (8) hours, at least six (6) days per week. The ABC is not barred by the doctrine of quasi-estoppel, or any other argument raised by Fuchs, from enforcing this interpretation.

The record clearly shows that Fuchs violated IDAPA 11.05.01.010.03 by failing to make the necessary sales on numerous days and even several entire weeks during the relevant six (6) month period. However, given the confusion over the proper interpretation of the rule and its misapplication by both parties and the Hearing Officer, Fuchs will not be sanctioned for this violation, and the clarification of the proper interpretation of IDAPA 11.05.01.010.03 set forth in this Final Order will have prospective affect only.

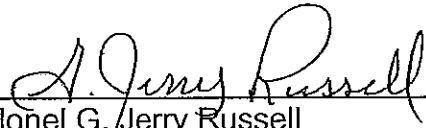
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IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

In accordance with the above, this case is dismissed, each side to bear their own attorney fees and costs.

Dated this 8th day of June 2010.


Colonel G. Jerry Russell
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 issue 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 issue 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.

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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 8th day of June 2010, 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:

Stephanie A. Altig
Lead Deputy Attorney General
Idaho State Police
700 S. Stratford Dr
Meridian, ID 83642-6202
Facsimile: (208) 884-7090

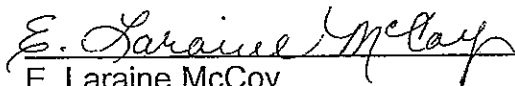
certified mail
 first class mail
 hand delivery
 via facsimile
 Statehouse mail

Brian N. Donesley
Attorney at Law
P. O. Box 419
Boise, ID 83701
Facsimile: (208) 343-4188

certified mail
 first class mail
 via facsimile

Roger L. Gabel
Deputy Attorney General
Office of the Attorney General
Contracts and Administrative Law Division
954 W. Jefferson, 2nd Floor
Boise, ID 83720-0010
Facsimile: (208) 854-8070

certified mail
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E. Laraine McCoy
Administrative Assistant 2

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