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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. 18ABC026
IN RE:)	
)	DECISION REGARDING
Señor Iguana’s Inc.)	MOTIONS FOR
and Lou Pejovich)	SUMMARY JUDGMENT
DBA Señor Iguana’s)	
Premises No. 1B-22729)	
)	
Respondent.)	
)	

INTRODUCTION

This is an administrative proceeding conducted pursuant to 1) the statutes and regulations governing the Idaho State Police, Alcohol Beverage Control (“ABC”), which statutes are generally contained in Idaho Code, Title 23, and 2) the Idaho Administrative Procedures Act contained at Idaho Code Title 67, Chapter 52 (“APA”).

Louis “Lou” Pejovich applied for a liquor license. ABC denied Mr. Pejovich’s liquor license application. Mr. Pejovich appealed ABC’s denial and requested a hearing pursuant to the APA. ABC appointed the undersigned to serve as Hearing Officer and to issue a Preliminary Decision pursuant to the APA.

Mr. Pejovich assigned his rights to the liquor license to Senor Iguana’s, Inc., an Idaho corporation (“Senor Iguana’s”). Thus, both Mr. Pejovich and Senor Iguana’s are parties to this proceeding. Unless the context indicates otherwise, references to Mr. Pejovich also include Senor Iguana’s.

On July 16, 2018, ABC and Mr. Pejovich appeared through counsel at a telephonic scheduling conference. The parties agreed to submit this matter to the Hearing Officer by dispositive motion. On August 20, 2018, ABC submitted a Motion for Summary Judgment and Agency's Memorandum in Support of Motion for Summary Judgment. Also, on August 20, 2018, Mr. Pejovich submitted a Motion for Summary Judgment and a Memorandum in Support of Petitioners' Motion for Summary Judgment. On August 29, 2018, ABC submitted a Memorandum in Opposition to Mr. Pejovich's Motion for Summary Judgment. On September 5, 2018, Mr. Pejovich submitted Respondent's Memorandum in Opposition to ABC's Motion for Summary Judgment. Oral argument on the motions was not requested by either party or by the Hearing Officer.

FINDINGS OF FACT

The Hearing Officer adopts the Statement of Undisputed Facts as proposed at pp. 1-8 of Mr. Pejovich's Memorandum, which proposed findings are not contested by ABC, as follows:

1. On July 11, 2017, Nichole Harvey of the Idaho State Police Alcohol Beverage Control Bureau ("ABC") sent written notice to Petitioner Louis Pejovich of the availability of a liquor license in Pocatello. On July 14, 2017, Mr. Pejovich notified Ms. Harvey and ABC of his desire to apply for the available liquor license in the city of Pocatello. *Agency Record, Exhibit 48.*

2. On September 28, 2017, Mr. Pejovich's then attorney Doug Balfour sent a memo to Nichole Harvey, indicating that Mr. Pejovich and Senor Iguana's worked out an arrangement for placement of the liquor license with the restaurant. *R. Exhibit 47.* Subsequent thereto, Mr. Balfour provided ABC via Ms. Harvey a copy of the lease agreement between Senor Iguana's and Mr. Pejovich, and property owner Caleb Corona for lease of the premises, as well as a copy of the contract between Marcia Corona and Mr. Pejovich in which Mr. Pejovich purchased 100% of Senor Iguana's stock. *R., Exhibit 46.*

3. In addition, on September 28, 2017, Mr. Balfour sent Ms. Harvey a copy of the Idaho Secretary of State website providing information as to Certificate of Organization showing Senor Iguana's to be in good standing. Mr. Balfour also sent ABC a copy of Senor Iguana's Articles of Incorporation. *R., Exhibit 45.*

4. On October 26, 2017, Mr. Balfour sent a memo to Ms. Harvey and Cheryl Rambo and Stephanie Altig noting that he had completed the form for the license application, attaching copies of Senor Iguana's shares transferring the shares to Mr. Pejovich and also explaining Mr. Pejovich had submitted his fingerprint card and fee, a copy of the building lease, a floor plan of the premises, a copy of the printed menu and a copy of Articles of Incorporation as well as a copy of the Idaho Seller's Permit from State Tax Commission. *R., Exhibit 44.*

5. In addition, on October 16, 2017, Don Anderson, State of Idaho Tax Commission Specialist's [sic], provided a copy of Form 1125-E, Compensation of Officers to Ms. Harvey. *R. Exhibit 43.*

6. In a letter dated October 17, 2017, Mr. Balfour sent Ms. Harvey, again, copies of the Stock Certificate representing 1,000 shares of Senor Iguana's issued to Mr. Pejovich, and the voiding of certificates from Caleb Corona and Marcia Corona. Mr. Balfour also noted that Senor Iguana's pays all sales and use tax to the Idaho State Tax Commission under the seller's permit previously provided by him to ABC and that Senor Iguana's maintains workers compensation insurance through the State Insurance Fund and proof of that. *R., Exhibit 41.* Further, on October 17, 2017, Ms. Harvey thanked Mr. Balfour by way of email acknowledging receipt of the aforementioned stock certificates. *R., Exhibit 40.*

7. By letter dated October 18, 2017, Mr. Balfour wrote Ms. Harvey, indicating that he was confused and frustrated as to what more ABC needed, that he had contacted Cheryl Rambo to find out what more was needed by way of the Secretary of State Website's and ABC's request for additional documents. Therein, Mr. Balfour stated that he provided ABC information from the Secretary of State showing Senor Iguana's to be a corporation in good standing, that it has filed its annual report and the Articles of Incorporation had been previously provided to ABC. Mr. Balfour again reiterated that he had sent a photocopy of the Seller's Permit showing Senor Iguana [sic] is authorized to make sales and report taxes, as well as Senor Iguana's maintaining both liability and worker's compensation insurance. Mr. Balfour then asked Ms. Harvey to provide him with further information and clarification as to what more ABC needed. *R., Exhibit 39.*

8. On October 20, 2017, Mr. Balfour wrote a letter to Ms. Harvey and Ms. Rambo, acknowledging their telephone conference, and that he had contacted the Secretary of State regarding notifying it of the change of the corporate structure, and the Secretary of State noted that Senor Iguana's could send a letter indicating who the new president was and that the

representative from the Secretary of State did not need to know about the shareholders. *R., Exhibit 38.* Mr. Balfour noted that Senor Iguana's had provided and completed all requirements for issuance of the liquor license.

9. On October 17, 2017, ABC received a copy of the contract which was entered into between Marcia Corona, the former stockholder of Senor Iguana's, in which Mr. Pejovich agreed to buy and Ms. Corona agreed to sell 100% shares of Senor Iguana's stock to Mr. Pejovich in exchange for which Mr. Pejovich would contribute a [sic] Idaho State Liquor license to Senor Iguana's. *R., Exhibit 35.* In addition, ABC received copies, again, of the Certificates issues to Mr. Pejovich for 1,000 shares and the voiding of the shares of Marcia Corona and Caleb Corona. Further, Exhibit 35 also notes the certificate of liability insurance for Senor Iguana's, as well as workers compensation insurance, the Idaho State Tax Commission seller permit issued to Senor Iguana's, the lease agreement for the property as well as an October 20, 2017, letter from Mr. Pejovich to the Idaho Secretary of State notifying it that [sic] was the President of Senor Iguana's. *See also Exhibit 23.*

10. On October 12, 2017, Mr. Pejovich signed and completed his liquor license application. *R., Exhibits 31 and 34.*

11. ...ABC was still not satisfied with the application. By Memorandum dated October 24, 2017, Mr. Balfour provided, again, a copy of the Lease Agreement from Mr. Pejovich, and payment of a transfer fee of \$20.00 to transfer the liquor license to Senor Iguana's and Mr. Balfour expressed his hope that this would conclude the matter and the license would be issued. *R., Exhibit 33.*

12. On January 10, 2018, Mr. Pejovich was interviewed by Detective Jeremiah West of ABC. *R., Exhibit 30.*

13. On November 15, 2017, Mr. Balfour sent Ms. Harvey a memo noting that Detective Calvera of the Idaho State Police had visited Senor Iguana's premises and mentioned some confusion regarding the issuance of a liquor license. Detective Calvera notified Mr. Balfour to contact Ms. Harvey, and ask her as to the status of the license and what remained to be done, as the parties are anxious to get the liquor license moving forward. *R., Exhibit 29.*

14. On November 16, 2017, by way of letter dated that same date, Mr. Balfour sent ABC the liquor license which was executed at Ms. Harvey's instruction, and that the temporary license was going to expire and that they needed to get an extended temporary license. *R., Exhibit 27.*

Ms. Harvey noted that she would provide a temporary license to Mr. Balfour. *R., Exhibit 26.* By letter dated December 20, 2017, Mr. Balfour contacted Ms. Harvey again as to the status of the license, and that he wanted to have a telephonic conference with Mr. [sic] Altig and Ms. Rambo regarding the status of the application and noted that the temporary license expired at the end of December. *R., Exhibit 24.*

15. On December 28, 2017, Mr. Balfour sent a letter to Ms. Harvey noting that Mr. Pejovich requested an additional 90 days to complete and consider Mr. Pejovich's application for the liquor license. An extension was granted to Mr. Pejovich by letter dated December 29, 2017, from Ms. Harvey. *R., Exhibits 18, 19 and 21.* Further, in that letter, Mr. Balfour indicated that he had contacted Senor Iguana's accountant, and provided copies of checks for income withholding and sales tax noting that Senor Iguana's was properly acting as a corporation, provided a policy statement from the State Insurance Fund as to the workers compensation liability insurance, and also explained that ABC's request for a Bill of Sale as to the stock issuance was not required but that it would be provided, and that he would provide a signature card for the bank. *R., Exhibit 19.*

16. Thereafter, ABC was provided with an account agreement from Citizens Community Bank with the signatures of Caleb Corona, Marcia Corona, and Louis Pejovich. *R., Exhibits 16 and 17.*

17. On January 22, 2018, Mr. Balfour emailed Ms. Harvey and noted that he had provided her with the following:

- (1) contract showing the purchase of the Corporation;
- (2) page from the Idaho Secretary of State showing the Corporation being in good standing;
- (3) An Insurance Accord showing that Senor Iguana's has workers compensation and liability insurance;
- (4) Stock Certificates 1, 2, and 3, showing ownership in only Lou Pejovich;
- (5) Letters to the Secretary of State, the Tax Commission and the Industrial Commission, regarding ownership;
- (6) Mr. Pejovich's fingerprint card;
- (7) Completed application for the license;
- (8) Copies of the Articles of Incorporation;

- (9) A copy of the restaurant menu;
- (10) A copy of the State Tax Commission Seller's permit;
- (11) A copy of the lease for the restaurant;
- (12) A copy of the Citizens Community Bank signature card showing Lou Pejovich on the checking account.

R., Exhibit 15. Mr. Balfour also expressed the sentiments as to ABC's Captain being worried about "hidden owners," noting that there is no such issue.

18. On January 31, 2018, Ms. Rambo sent Mr. Balfour an email noting her concern related to a "straw man" and that there was a façade as to Mr. Pejovich being a licence [sic] or owner of the company. *R., Exhibit 7.* Thereafter, Mr. Balfour sent a letter to Ms. Rambo dated March 12, 2018, noting the following:

(1) Reference to the "straw man" was not an issue here because all parties have disclosed everything and have been up-front.

(2) That Mr. Pejovich needed a place for a liquor license, and negotiated with the owners of Senor Iguana's to place a license at their restaurant in exchange for Mr. Pejovich being the owner of the business.

(3) ... that the Secretary of State was not interested in knowing who owned the stock and that Senor Iguana's was a corporation in good standing. *R., Exhibit 6.*

(4) ... that the corporation had complied with Idaho's requirements for liability and workers compensation insurance, unemployment and the like. Mr. Balfour pointed out to Ms. Rambo that other businesses, such as Buffalo Wild Wings, hotels, restaurants and bars, do not require [sic] to have shareholders disclosed on the filings, noting that the Chili's Restaurant was owned by a Utah company. *R., Exhibit 6.*

(5) ... that she could contact Ray Carter, Senor Iguana's accountant and Terry Day, Mr. Pejovich's accountant. *R., Exhibit 6.*

19. By letter dated March 15, 2018, to Ms. Rambo, Mr. Balfour ... [reaffirmed his opinion that the license should be issued.] *R., Exhibit 5.*

20. Thereafter on April 12, 2018, ABC issued its decision concluding that Mr. Pejovich was not a bonafide owner of Senor Iguana's and that he had not timely complied with the administrative procedure act in submitting his application. *R., Exhibit 4.*

The Hearing Officer adopts the additional Findings of Facts as proposed by ABC at pp. 3-5 of Agency's Memorandum in Support of Summary Judgment, which proposed findings are not contested by Mr. Pejovich, as follows:

21. [A] September 28, 2017, Memorandum from Doug Balfour RE: Original Lease Agreement and unsigned contract between the Corona's and Pejovich, [stated] that Marcia E. Corona is the owner of all the stock in Sr. Iguanas, will exchange the stock for only the use of the Idaho State Liquor License, that the accountant for Sr. Iguana's will be Ray Carter of Pocatello and the accountant for Mr. Pejovich will be Terry Day of Boise. A further term and condition will be that two years after the license is placed at Sr. Iguana's, then Marcia Corona will have the option to repurchase the stock and assets including the liquor license for \$80,000.00. R #46.

22. [A] September 28, 2017, memorandum from Doug Balfour RE: print off from Secretary of State show[ed] Sr. Iguana's is in good standing and that Marcia E. Corona [w]as the registered agent of Sr. Iguana's. R #45.

23. [An] October 16, 2017, Email to Nichole Harvey from Doug Balfour with memo RE: 2016 corporate income tax filing, show[ed] the only officer's name still listed as Marcia Corona. R #43.

24. [An] October 16, 2017, Email to Doug Balfour from Nichole Harvey [provided] instructions to Mr. Pejovich on certain items required by ABC to show bona fide ownership of the business. R #42.

25. [An] October 17, 2017, Email to Doug Balfour from Nichole Harvey [stated] the requirement to make amendments at the secretary of state's office and the Idaho Tax Commission. ABC #40.

26. [An] October 17, 2017, signed contract by Marcia Corona and Lou Pejovich [provided for] transfer of shares of Stock for Liquor License, [and a] 2 year buy back agreement Liquor License Transfer R #35.

27. [An] October 24, 2017 [Confirmation of] ...Lease agreement [signed by Mr. Pejovich on behalf of Senor Iguanas] for the building. R #33.

28. [An] October 24, 2017, Email to Doug Balfour from Nichole Harvey [stated] lease information and why it does not meet ABC criteria. R #32.

29. [A] 12/22/2017, Copy of Certificate of Liability Insurance show[ed] the place to be insured for the liquor license is a storage unit at an airport hangar, not an actual building where the alleged liquor license is to be used. R #23.

30. During interviews with an ABC detective on November 14, 2017 and November 24, 2017, Marcia Corona stated that she was still president of Senor Iguana's, that she had no intention of selling Senor Iguana's and that she was leasing the liquor license from Mr. Pejovich. R. 30 and 35.

31. [A] December 28, 2017, Email chain between the Idaho Tax Commission and Nichole Harvey [showed] no change in responsible party. R #20.

32. [A] December 28, 2017, Letter to ABC, via email, from Doug Balfour ...shows photocopy[ies] of checks being signed by Marcia Corona. R #19.

33. [A] January 31, 2018, Email to Doug Balfour from DAG Cheryl Rambo [stated] the documentation Mr. Pejovich needed to supply to ABC in order to qualify for a new priority license. R. #7.

34. [A] March 12, 2018, Letter to DAG Cheryl Rambo from Doug Balfour [contained] copies of Annual Report Form showing Marcia Corona as President of Sr. Iguana's. R. #6.

35. On January 20, 2018, Mr. Pejovich advised an ABC detective that the Coronas still have ownership rights in the business and will exercise full control over the business.

STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment "shall be rendered '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.'" *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) quoting I.R.C.P. 56(s); *see also Avila w. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995). In making this determination, a Court should liberally construe the record in favor of the party opposing the motion and draw all reasonable inferences and conclusions in that party's favor. *Smith*, 128 Idaho at 738, 918 P.2d at 587 (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29,30 (1994)). Based on the evidence, if reasonable persons could reach differing conclusions or draw conflicting inferences, summary judgment may be denied. *Id.* (citing *Harris v. Department of Health and Welfare*, 123 Idaho 295,

298 847 P.2d 1156, 1159 (1992)). However, if the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Id.*, 128 Idaho at 718-719, 918 P.2d at 587-88 (citing *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991)).

“Summary judgment is proper when ‘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.’” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007), (quoting I.R.C.P. 56(c)).

The burden is on the moving party to prove there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Cafferty v. State, Dept. of Transp., Div. of Motor Vehicle Servs.*, 144 Idaho 324, 327, 160 P.3d 763, 766 (2007) (emphasis added). When, as in the present case, there will be no jury trial and the Hearing Officer will act as the trier of fact, the Hearing Office “is not necessarily constrained to draw inferences in favor of the nonmoving party. Rather, the [Hearing Officer] may draw those inferences which he or she deems most probable on uncontroverted facts.” *Stillman v. First National Bank of North Idaho*, 117 Idaho 642, 643, 791 P.2d 23, 24 (Ct.App. 1990), citing *Argyle v. Slemaker*, 107 Idaho 668, 70, 691 P.2d 1283, 1285 (Ct.App. 1984); *Riverside Development Co., v. Ritchie*, 103 Idaho 515, 650 P.3d 657 (1982). This is because where the evidentiary facts are not disputed and the Hearing Officer rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the Hearing Officer alone will be responsible for resolving the conflict between those inferences. See *Pierson v. Jones*, 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981); *Hollandsworth v. Cottonwood Elevator Co.*, 95 Idaho 468, 471, 511 P.2d 285, 288 (1973).

Idaho Rule of Civil Procedure 56(e) provides further guidance regarding summary judgment standards.

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

ISSUE

Has Mr. Pejovich demonstrated that ABC's failure to issue a liquor license to him was unlawful?

ANALYSIS

Neither party has disputed any of the material facts. The only question is whether, based on the undisputed facts, ABC or Mr. Pejovich is entitled to judgment as a matter of law. Mr. Pejovich asserts that he met all of the legal requirements to obtain a liquor license and ABC's failure to issue a liquor license was arbitrary and capricious and not supported by substantial evidence.

Idaho law provides authority to ABC to regulate the sale of liquor, based upon the Idaho Constitution, Art. III, Sections 24 and 26. ABC has authority to grant licenses to sell liquor in accordance with the terms and conditions imposed by the Idaho Legislature. Idaho Code Section 23-514 provides ABC authority to grant permission to specific applicants to sell alcoholic beverages.

NATURE OF PERMIT. A permit shall be a personal privilege, subject to be denied, revoked, or canceled for its abuse. It shall not constitute property; nor shall it be subject to attachment and execution; nor shall it be alienable or assignable. Every permit shall be issued in the name of the applicant and no person holding a permit shall allow any other person to use the same. The division, if not satisfied of the integrity and good faith of an applicant for a permit, may refuse to issue the same, or may refuse to issue a renewal thereof.

The permission granted by the license is granted only to the specific applicant and to no one else.

ABC is authorized and directed to regulate the sale of liquor by the drink, and to issue licenses to applicants who meet the terms and conditions imposed by the Idaho Legislature implementing regulations. *See* Idaho Code Sections 23-903 and 23-907. There is no dispute that Mr. Pejovich has met the specific requirements for issuance of a liquor license as set forth in Idaho Code Section 23-905. The question is whether Mr. Pejovich has met the requirements of Idaho Code Section 23-908, which provides:

23-908. FORM OF LICENSE – AUTHORITY... (1) ...Every license issued under the provisions of this chapter is separate and distinct and **no person except the licensee therein named except as herein otherwise provided, shall exercise any of the privileges granted thereunder....**

(4) **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** and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. **Such license shall not be transferable for a period of two (2) years from the date of original issuance**, except as provided by subsection (5)(a), (b), (c), (d) or (e) of this section. (emphasis added).

In enacting Idaho Code Section 23-908 the Idaho Legislature included a Statement of Purpose which provided:

The purpose of this bill is to discourage speculation in liquor licensing by requiring the original holder of the license to put it into use immediately upon its receipt and to continue its use for six consecutive months and by providing that the license will not be transferrable for two years after its original issuance.

To assure this intent, the Legislature enacted the dual requirements that a liquor license applicant/holder must personally put the license into actual use within six months **and** must not transfer the license to another person or entity for two years. The apparent policy purpose of the transfer prohibition/restriction is to allow regulation of the fitness and character of applicants who seek permission to sell liquor by the drink.

Idaho Code Section 23-907 establishes procedures for ABC to carefully vet who can receive a liquor license so as to prevent a “sham” ownership which results in ABC losing control over who can receive a license. *See Uptick v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 (1982). An example applicable to this proceeding is that Caleb Corona is ineligible to receive a liquor license since he has been convicted of a felony. If a liquor license can be controlled by a person or entity other than the licensee, there can be no real control over who can sell liquor by the drink. It is reasonable for ABC to be concerned about the possibility of hidden ownership interests.

Only a person who holds a retail beer license is eligible to receive a liquor license. Idaho Code Section 23-910(5). A similar provision to Idaho Code Section 23-908 dealing with liquor

licenses is found in the language establishing eligibility to receive a license to sell beer. Idaho Code Section 23-1010 requires that an applicant for a license to sell beer must show:

- (2) ... (a) **That the applicant is the bona fide owner of the business which will be engaged in the sale of beer** at retail and with respect to which license is sought; ...
- (6) ... **If license is received on any application containing a false material statement, knowingly made, such license shall be revoked. If at any time during the period for which license is issued a licensee becomes unable to make the affirmative showings required by this section, license shall be revoked,** or, if disqualification can be removed, the license shall be suspended until the same shall be removed. The procedure to be followed upon **refusal**, revocation or suspension of license as herein provided for shall be in accordance with the procedure set forth in this act. (emphasis added).

ABC determined that Mr. Pejovich’s application for a liquor license did not meet the requirements of Idaho Code Section 23-908 or 23-1010 in that the original licensee, Mr. Pejovich, did not intend himself to exercise the privileges granted pursuant to the license. ABC reasoned that Mr. Pejovich was not the bona fide owner of the business where the liquor license was to be housed. Strictly speaking, the “bona fide owner” terminology applies to beer licenses. There is no allegation in this proceeding that a beer license should be revoked, only that a liquor license should not be granted. However, the Idaho Code Section 23-908 liquor license provision imposes a similar bona fide ownership requirement by mandating that only the person awarded the license may exercise the privileges of selling liquor by the drink. ABC concluded that the substance of the agreement between Mr. Pejovich and the Coronas was to immediately transfer the true ownership and control of the license to the Coronas in violation of the two-year waiting period.

ABC points to a number of facts which demonstrate Mr. Pejovich did not himself intend to put the liquor license into use within six months and that he intended to transfer the privileges of the license to the Coronas prior to the two-year waiting period; that Mr. Pejovich was acting as a straw man for the Coronas. ABC supports its assertion with the following undisputed facts:

1. Senor Iguana’s was owned by Marcia Corona and managed by Caleb Corona.
2. Mr. Pejovich entered into an agreement with Marcia Corona to purchase the outstanding stock of Senor Iguana’s. The only consideration for the acquisition by Mr. Pejovich

of the Senor Iguana's stock was the transfer of the liquor license from Mr. Pejovich to Senor Iguana's.

3. The agreement provided that Marcia Corona had the right to buy back from Mr. Pejovich stock of Senor Iguana's (including the liquor license) for \$80,000 in cash after two years.

4. Caleb Corona was to continue as the manager of Senor Iguana's.

5. Marcia and Caleb Corona retained check signing authority for Senor Iguana's, although Mr. Pejovich was added as a co-signer.

6. The business was to continue to be located at the real property owned by the Coronas.

7. The accountant for Senor Iguana's was to continue to be the Corona's accountant.

8. The Coronas stated to ABC detective Caldera that they would continue to exercise full control over the business, that Ms. Corona still served as President of Senor Iguana's, that Senor Iguana's was leasing the liquor license from Mr. Pejovich, and the Coronas had no intention of selling the restaurant.

9. Mr. Pejovich advised ABC detective Caldera that the Coronas would continue to exercise full control over the Senor Iguana's accounts.

It was not arbitrary or capricious for ABC to conclude that the business arrangement between the Coronas and Mr. Pejovich did not result in Mr. Pejovich becoming the true good faith owner of Senor Iguana's. Rather, the arrangement was a circumvention of the ownership and transferability requirements of Idaho Code Section 23-908. Indeed, it appears that the substance of the agreement was that Coronas immediately purchased the license for \$80,000 and that they continued to be the real owners and managers of the business where the liquor license was to be housed. However, payment of the \$80,000 was to be deferred for two years, at which time the paper ownership was to be transferred back from Mr. Pejovich to the Coronas. This appears to be an equitable mortgage arrangement, where Coronas retained control over the business and the liquor license with the contractual right to regain paper ownership of the business and the license after two years. Mr. Pejovich was to be compensated \$80,000 for applying for and receiving a liquor license he would not himself put into use.

Mr. Pejovich was the original license applicant. Mr. Pejovich then assigned the license to Senor Iguana's. This was acceptable only so long as Mr. Pejovich had exclusive ownership and

control of Senor Iguana's. The transfer was not acceptable since the Coronas retained equitable ownership and control of Senor Iguana's. Under the agreement, the license would have been effectively transferred prior to the two-year waiting period required by Idaho Code Section 23-908(4) and Mr. Pejovich would not have, himself, put the license into use within six months.

The privileges of holding a license are personal to the licensee. *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 p.2d 991 (1951). It was not unreasonable for ABC to conclude that the Coronas became the true owners of the license prior to the two-year waiting period. It was reasonable to conclude that Mr. Pejovich was acting as a speculator in his attempts to acquire a liquor license. Mr. Pejovich and Coronas intended that Mr. Pejovich lease the license to Coronas for two years to evade the requirements of Idaho Code Section 23-908.

Mr. Pejovich cites several cases in support of the proposition that a liquor license constitutes a property right that cannot be unreasonably taken away by ABC. These cases appear to deal with issued licenses, not applications for a license. Also, the cases appear to have been decided prior to the amendments to Idaho Code Section 23-908 enacting the six-month and two-year conditions. Thus, these cases are not controlling law with respect to the facts of this proceeding.

CONCLUSION

Mr. Pejovich has not proved that ABC'S license denial decision was arbitrary and capricious or was not supported by substantial evidence. There are no material disputes of fact. ABC is entitled to judgment as a matter of law. Mr. Pejovich is not entitled to summary judgment.

ATTORNEY FEES AND COSTS

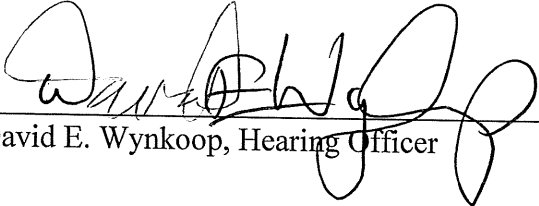
Both parties request attorney fees pursuant to Idaho Code Section 12-117(1) pursuant to which the prevailing party may be awarded attorney fees if the non-prevailing party proceeded without a reasonable basis in law or fact. Mr. Pejovich is not the prevailing party and so is not entitled to an award of fees. However, it cannot be said that Mr. Pejovich acted without a reasonable basis in law or in fact in this proceeding. Mr. Pejovich raised several good faith arguments which required serious consideration. Even though ABC is the prevailing party, it is not entitled to an award of attorney fees pursuant to Idaho Code Section 12-117.

ABC also requests attorney fees pursuant to Idaho Code Section 12-121. While ABC is the prevailing party, it cannot be said that Mr. Pejovich pursued this matter frivolously, unreasonably and without foundation. Thus, ABC is not entitled to an award of attorney fees pursuant to Idaho Code Section 12-121.

PRELIMINARY ORDER

ABC's Motion for Summary Judgment is GRANTED. Mr. Pejovich's Motion for Summary Judgment is DENIED. ABC's decision not to grant Mr. Pejovich a liquor license is AFFIRMED. No attorney fees are awarded.

DATED this 14th day of September, 2018.



David E. Wynkoop, Hearing Officer

APPEAL RIGHTS

Pursuant to Idaho Code Section 67-5243 this decision is a **PRELIMINARY ORDER**. It can and will become final without further action of the agency unless any party petitions for reconsideration before the Hearing Officer issuing this Preliminary Order or appeals to the Director of the Idaho State Police. Any party may file a motion for reconsideration of this Preliminary Order with the Hearing Officer issuing this 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 Idaho Code Section 67-5243(3).

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.

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 its own motion.

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 for 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.

Pursuant to Idaho Code Section 67-5270 and Section 67-5272, 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.

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

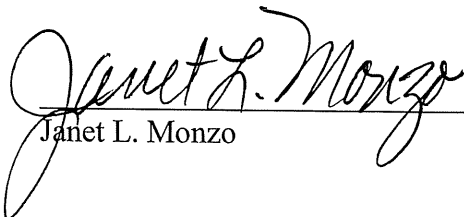
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of September, 2018, I served a true and correct copy of the foregoing upon the following, by the methods indicated below:

Cheryl Rambo	_____ via facsimile to 208-884-7228
Deputy Attorney General	<u>XX</u> via U.S. mail, postage prepaid
Alcohol Beverage Control	<u>XX</u> via email to cheryl.rambo@isp.idaho.gov
700 S. Stratford Drive	
Meridian, Idaho 83642	

Javier L. Gabiola	_____ via facsimile to 208-235-1182
COOPER & LARSEN, CHTD.	<u>XX</u> via U.S. mail, postage prepaid
Attorneys at Law	<u>XX</u> via email to javier@cooper-larsen.com
P.O. Box 4229	
Pocatello, ID 83205-4229	

Nichole Harvey	<u>XX</u> via email to nichole.harvey@isp.idaho.gov
Management Assistant	
Alcohol Beverage Control Bureau	
Idaho State Police	
700 South Stratford Drive, Suite 115	
Meridian, Idaho 83642	



Janet L. Monzo