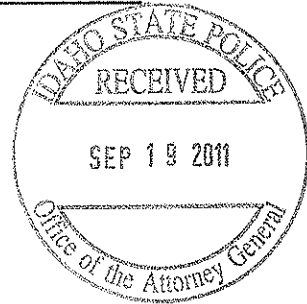


COPY

A CONTESTED MATTER BEFORE THE DIRECTOR
OF THE IDAHO STATE POLICE

IDAHO STATE POLICE, ALCOHOL)
BEVERAGE CONTROL,) Case No. 09ABC-COM017
) License No. 6359
) Premise No. 5B-6359
Complainant,)
)
vs.) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND PRELIMINARY ORDER
YANKEE D'S, LLC, Licensee) RE: MOTION TO DISMISS
dba ZOU 75,) AND SUMMARY JUDGMENTS
)
Respondent.)



This matter was heard telephonically on August 30, 2011 for argument upon Respondent's Motion to Dismiss, Motion for Summary Judgment, and Complainant's Motion for Summary Judgment. Both parties appeared through counsel.

The parties, through oral stipulation and their various Memorandum in support of and opposition to these motions, agreed there is no genuine issue of material fact and that this matter can be fully decided upon the motions.

The pleadings filed by both parties have been reviewed and are taken into consideration by this Hearing Officer in this decision.

FINDINGS OF FACT

1. This is an administrative action brought against Respondent pursuant to the provisions of Title 67, Chapter 52 of the IDAHO CODE.

2. Complainant is the Bureau of Alcohol Beverage Control.

3. Complainant has the authority to promulgate rules and regulations necessary to carry out the provisions of IDAHO CODE Title 23, Chapters 6-14, pursuant to IDAHO CODE §§ 67-2901, 23-932, 23-946(b), 23-1330 and 23-1408.

4. Complainant is the state entity charged under IDAHO CODE Title 23, Chapters 8, 9, 10 with the authority to enforce and police the Idaho Liquor Act, pursuant to IDAHO CODE § 23-804.

5. IDAHO CODE §§ 23-933, 23-1038 and 23-1331 provides the basis and authority for this Complaint.

6. Respondent currently holds a license to sell beer pursuant to IDAHO CODE § 23-1010, and liquor by the drink pursuant to IDAHO CODE § 23-903.

7. On February 5, 1973, Steve Clayton ("Clayton") submitted an application to Idaho State Police Alcohol Beverage Control Bureau for a future liquor license for the city of Hailey,

Idaho. The application stated "Premises will not be obtained until liquor license is granted."

8. On September 5, 2006, Alcohol Beverage Control ("ABC") sent a letter to Clayton advising him of the availability of a new Incorporated City Liquor License for the city of Hailey, Idaho.

9. On September 12, 2006, ABC received a letter from Clayton stating he intended to accept the liquor license.

10. On November 6, 2006, ABC received a letter from Clayton requesting a 60-day extension to complete the application requirements for the Hailey liquor license, which was granted.

11. On December 18, 2006, Clayton submitted to the Idaho Secretary of State Articles of Incorporation for Yankee D's LLC and listed himself as the manager.

12. On January 24, 2007, ABC received Clayton's liquor license application which did not list a restaurant as an asset but provided a Commercial Lease Agreement between R&B Ventures, LLC and Zou 75.

13. Clayton also requested to transfer the new license from his name into the name of Yankee D's, LLC.

14. Clayton then notified the Hailey City Clerk that "Rob Croner (sic) has been offered an opportunity to buy the license at the end of a two year applicant ownership requirement."

15. Clayton also states that he "respectfully requests the City provide the letter of approval for future license to Yankee D's LLC, who [sic] license will be operated by Zou 75, Inc."

16. Clayton then attends a Hailey City Council meeting to request a waiver to Idaho Code 23-913, which prohibits the issuance of a liquor license to a business within 300 feet of a church or public school. He states to the council that he has been on the liquor license waiting list "since 1976 and that the state rules require him to attach the license to a property and season it for two years before he can sell it."

17. On May 31, 2002, Robert Cronin ("Cronin") submitted to the Idaho Secretary of State, an application for an assumed business name of Zou 75 for his business, 75, Inc.

18. On June 12, 2002, Cronin submitted a business license application to the city of Hailey for 75, Inc., dba Zou 75, located at 416 North Main Street, Hailey, Blaine County, Idaho.

19. On June 12, 2002, Kris Cronin ("K. Cronin") submitted an application for a beer and wine license to the city of Hailey.

20. On January 21, 2004, Cronin submitted a business license renewal application to the city of Hailey for Zou 75.

21. On December 20, 2004, Cronin submitted a business license renewal application to the City of Hailey for Zou 75 and listed himself as the owner of the business.

22. On July 28, 2006, Cronin submitted a business license renewal application to the City of Hailey for Zou 75. Cronin listed himself as the owner and manager of the business.

23. Cronin also submitted a Corporation Questionnaire for 75, Inc., listing himself as president, Brendan Dennehy ("Dennehy") as vice president and K. Cronin as treasurer.

24. On August 9, 2005, the City of Hailey received an application for a renewal of the beer and wine license for Zou 75. The application was submitted by Ramie Dennehy ("R. Dennehy"), who listed herself as well as Dennehy, Cronin and K. Cronin as the business owners.

25. On July 18, 2006, Cronin submitted a beer and wine license renewal application to the City of Hailey and listed himself as the president, B. Dennehy as the vice president, and K. Cronin as Treasurer. No other people were listed as members of the corporation.

26. On July 30, 2007, Cronin submitted a beer and wine license application to Blaine County and listed himself as president for 75 Inc., dba Zou 75.

27. On January 31, 2007, ABC is notified by Hailey City Clerk Heather Dawson that the city of Hailey granted Clayton the waiver to I.C. §23-913.

28. Clayton and Cronin then sign a commercial lease agreement leasing the property at 416 N. Main Street, Hailey, Blaine County, Idaho for two years from 75, Inc. to Yankee D's LLC.

29. On February 6, 2007, ABC received from Clayton the financial status of Yankee D's LLC which was being funded with \$1,500 to open a checking account and the net worth of Yankee D's LLC was approximately \$3,000.

30. On February 20, 2007, Edgar Redman ("Redman"), attorney in fact for Clayton, submitted an application for a certificate of assumed business name for Clayton to do business as Zou 75, listing Cronin as the manager of the business.

31. Idaho State Police Corporal Tim Davidson sent a letter to Clayton requesting additional documentation showing that Clayton was the bona fide owner of Zou 75.

32. The city of Hailey then received a notarized liquor license application from Clayton for the business Yankee D's dba Zou75 listing himself as the manager and only stock holder.

33. Clayton then contacted Cpl. Davidson and stated that the documents he already provided are sufficient to show that he is

the owner of Zou 75. Clayton did state that he hasn't been the owner of Zou 75.

34. On April 2, 2007, ABC received a letter from Greg Crockett ("Crockett"), attorney representing Clayton stating "Mr. Clayton has entered into a new relationship with the owner of Zou-75...his 'ownership' is a leasehold of that business as set forth in the Lease Agreement."

35. On April 16, 2007, ABC issued an Idaho State Police Retail Alcohol Beverage License to Yankee D's dba Zou 75, located at 416 N. Main St., Hailey Blaine County, Idaho.

36. The Yankee D's LLC liquor license was being used in the restaurant for Zou 75.

37. On July 27, 2007, Redman, Attorney of Fact, on behalf of Steven Clayton submitted a liquor license renewal application to ABC and listed the Tax ID number for Zou 75 and not the Tax ID number for Yankee D's.

38. On July 30, 2007, the city of Hailey received a business license application signed and notarized by Cronin for the business 75, Inc., dba Zou 75. Cronin listed himself as the named applicant and the location of the business as 416 North Main St., Hailey, Blaine County, Idaho.

39. Cronin also submitted to Blaine County a retail alcohol beverage license application for beer and wine as the president for 75, Inc., dba Zou 75.

40. At the time of both applications, Yankee D's LLC was the licensee for the premises and Clayton was the only legally, recognized member.

41. On July 31, 2007, Cronin submitted a business license application to the city of Hailey for Yankee D's LLC located at 416 N. Main St., Hailey, Blaine County, Idaho.

42. Cronin listed himself as the owner and manager Yankee D's LLC, dba Zou 75. Yankee D's LLC was the licensee for the premises and Clayton was the only legally, recognized member.

43. On August 1, 2007, ABC issued an Idaho State Police Retail Alcohol Beverage License to Yankee D's, for premises number 5B-6359.

44. On July 21, 2008, ABC received a license renewal application from Cronin for license number 6359 issued to Yankee D's dba Zou 75.

45. Cronin signed the application as a "member" and added himself as the manager of Yankee D's LLC declaring that he is the bona fide owner of the business and using the Federal Tax ID number for Zou 75 and not the Tax ID number for Yankee D's LLC.

46. The 2009 Alcohol Beverage License issued to Yankee D's LLC, dba Zou 75, license number 6359 was signed by Cronin as a "member." Cronin is not a member of Yankee D's.

47. An Administrative Violation Notice dated May 7, 2009 was issued. An Administrative Violation Notice dated January 26, 2010 was issued.

48. The Complaint alleges violations of I.C. §§ 23-905, 23-908(1), 23-908(4), and 23-1010(2)(a).

49. ABC sent out notices to all new licensees stating that a licensee must be the bona fide owner of the business engaged in the sale of alcoholic beverages.

QUESTIONS OF LAW

Respondents raise numerous defenses however the actual questions of law are quite narrow.

They are as follows:

1. Was Yankee D's the bona fide owner of the business using the license?
2. Did Yankee D's place the license into use within the first six months as required by I.C. §23-908(1)?
3. Did Yankee D's transfer the use of the license before two years in violation of I.C. §23-908(4)?

STANDARD FOR SUMMARY JUDGMENT

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 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). 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 Officer "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, 670, 691 P.2d 1283, 1285 (Ct.App. 1984); Riverside Development Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982). This is because where the evidentiary facts are not disputed and the Hearing Officer 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).

CONCLUSIONS OF LAW

The parties have engaged in extensive discovery and briefing in this matter. The parties have extended various arguments in support of their Motions. The place to begin is that both parties strive to give definitions to the term "bona fide" owner.

BONA FIDE DEFINITION

Black's Law Dictionary, Sixth Edition defines "bona fide"

as:

- ▶ with good faith
- ▶ honestly
- ▶ openly
- ▶ truly
- ▶ actually

Random House Dictionary, College Edition defines "bona

fide" as:

- ▶ genuine
- ▶ real

"Bona fide" is a word of general use in the English language. It is commonly known to mean "actual or real". It is

frequently used in commercial terms and dealings with products, users and purchasers of goods.

In the context of this matter it will be taken to mean "actual or real" which is the legal and common definition. (I.C. §23-902(17)).

Applying this definition within the context of I.C. §23-1010(2) (a) reveals that Yankee D's is not the bona fide owner of the business known as Zou 75. The Management Agreement places all of the rights and responsibilities with 75 Inc. and amounts to a defacto transfer of bona fide ownership to 75 Inc.

The "bona fide" owner must hold the license and place into actual use.

I.C. §23-909(1):

"...no person except licensee shall exercise the privileges...(4)...shall be placed into actual use by the original licensee."

Yankee D's is not "operating" Zou 75; 75 Inc. is the entity "operating" the business and is essentially the owner of that business.

CURE

Respondent claims a statutory right to cure pursuant to I.C. §23-1010(6) and that they would have, had they known what the problem was with the license. The difficulty with that argument is that the basis for the action by the State was set forth in the

Administrative Violation Notices dated May 7, 2009 and January 26, 2010 but Respondent made no effort to cure but rather took the position that the State was wrong in their action.

I.C. §23-1010(6) qualifies the cure by stating "...if disqualification can be removed". Upon these facts there would be no ability to cure the basis for the revocation, as the false statement (which comes within the preview of I.C. §23-1010(1)(a)) is that Clayton (Yankee D's) is the "bona fide" owner of Zou 75. Based upon the undisputed facts he is not, in reality, the "bona fide" owner under the meaning of the statute.

Respondents argue that as long as the licensee is responsible to the State for administrative and statutory enforcement for violations of the Idaho Beverage laws, then the licensee is the "bona fide owner" (See Rankin Affidavit and Thompson Affidavit) regardless of what the management agreement sets forth. This is an empty argument. The phrase "bona fide owner" applies to the ownership of the actual business using the license, not just the responsibility to the State.

Even if there is a statutory right to cure pursuant to §23-1010(6), the effect of the cure would be to show 75 Inc. as the "bona fide" owner which violates I.C. §23-908(4). Therefore a "cure" would result in the same action by the State.

Bottom line is that Respondent did not comply with the requirements of the statutes.

OWNERSHIP

The parties addressed the ownership issue by outlining the organizational structure of the business entities.

- ▶ Yankee D's is the licensee
- ▶ Yankee D's leaves the premises known as Zou 75 from 75 Inc.
- ▶ Yankee D's and 75 Inc. both have the dba Zou 75
- ▶ Yankee D's contracts with 75 Inc. to manage Zou 75
- ▶ Yankee D's pays 75 Inc. for rent and management services by allowing them to retain all gross revenues less an administrative fee paid to Yankee D's and amount into the Licensee's "liquor purchase" account. The administrative fee increases over time.

Pursuant to this Management Agreement all Yankee D's does to earn its fee is to allow 75 Inc. dba Zou 75 the privilege of using its liquor license. As between Yankee D's and 75 Inc., Yankee D's has contracted (transferred) away all of its rights and responsibilities and is not the entity actually using the license.

The State is not arguing that management agreements are improper and cannot be used but that in this matter the false statements about ownership and the management agreement make this

factually and legally an improper transfer pursuant to I.C. §23-908(1)(4).

Respondent bases its position upon Fischer v. Cooper, 116 Idaho 374. Fischer requires the named licensee to operate under the authority of the licensee. Applying Fischer to this case reveals a thinly disguised improper transfer of the privilege of use of the licensee controverting the statutory restrictions of §§ 23-908(1) and (4). (Fischer v. Cooper, 116 Idaho 374 at 377; reaffirming Uptick Corp. v. Ahlin, 103 Idaho 364).

CRIMINAL LIABILITY

Respondent is correct that this Hearing Officer cannot adjudicate criminal liability under I.C. §23-905. However, the State is seeking a civil remedy for the false statement pursuant to its administrative and statutory authority, not a criminal penalty. Therefore the Respondent's Motion to Dismiss is denied.

ESTOPPEL

Respondent raises the issue of estoppel, arguing that the State is barred from taking steps to enforce the liquor laws in the current fashion because they may have done something different in the past. Reviewing the numerous affidavits and depositions it appears the State is properly enforcing the statutes as written in terms of the requirements that the licensee must meet in order to hold the license.

As Captain Rankin states, the management/indemnification agreement has no effect on a licensee's responsibility to the agency; ("so long as the responsibility of the licensee remained intact for statutory and administrative regulatory purposes." (See Rankin Affidavit)). However, Respondent failed in its responsibility to the agency by not fulfilling the statutory requirements of being a "bona fide" owner of the business and actual user of the license.

The licensee is free to make whatever operating agreement he desires as long as it meets the requirements of the statutes in terms of ownership, use and transfer of a liquor license.

Yankee D's has not complied with §23-908(1) and (4) therefore ABC is doing nothing different nor giving a different interpretation than as historically enforced.

This is consistent with the rationale of Fischer that the licensee is "responsible for the license."

ATTORNEY FEES AND COSTS

Respondent requests attorney fees and costs pursuant to I.C. §12-117 and other applicable law.

I.C. §12-117(1) mandates that the court award attorney fees and expenses to the prevailing party where the non-prevailing party acts without a reasonable basis in fact or law. (Ater v. Idaho Bureau..., 144 Idaho 281, 160 P.3d 438 (2007)).

Attorney fees and costs are denied. Respondent did not prevail. Further, the agency's action was taken upon a reasonable basis as Clayton (Yankee D's) was not in compliance with the requirements of I.C. §223-908(1) and (4) (see Hansen v. Dept. of Law Enforcement, 107 Idaho 19, 684 P.2d 996 (1984)).

CONCLUSION

ABC has the authority, pursuant to I.C. §23-933, 23-1038, and 23-1331 to bring this action and to enforce the liquor statutes and administrative rules. In doing so ABC has determined that Respondent is disqualified as it did not place the license into use in the first six months as required by I.C. §23-908(1) and then transferred the use of the license before two years violating I.C. §23-908(4). Additionally Respondent was not the bona fide owner of Zou 75.

When the licensee accepts the license, he impliedly agrees to obey and comply with the laws and reasonable regulations governing the privileges thereby granted. (State v. Meyers, 85 Idaho 129, 376 P.2nd 710 (1962)). Respondent has failed to obey and comply with the statutory requirements.

The basic issue is that the statutes require that the person, who uses the license, must be the actual licensee. In this case Respondent has not met that statutory requirement.

PRELIMINARY ORDER

The Respondent's Motion to Dismiss and Motion for Summary Judgment are denied. The Complainant's Motion for Summary Judgment is granted.

Based hereon the hearing set for October 3, 2011 is vacated, as the contested issue has been resolved by this decision and Order.

REVIEW OF PRELIMINARY ORDER

Pursuant to Idaho Code § 67-5243 this decision is a **PRELIMINARY ORDER**. It can and will become final without further action of the agency unless either party petitions for reconsideration before the hearing officer issuing this Preliminary Order or appeals to the Director of the Idaho State Police. Either 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 I.C. § 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 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.

Pursuant to Idaho Code §§ 67-5270 and 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 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 § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

Dated this 16th day of September, 2011.



Laird B. Stone
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of September, 2011, I caused a true and correct copy of the foregoing instrument, to be mailed, postage prepaid, to the following:

Jenny C. Grunke
Deputy Attorney General
Idaho State Police
700 S. Stratford Dr.
Meridian, ID 83642

Brian Donesley
Attorney at Law
P.O. Box 419
Boise, ID 83701-0419



Laird B. Stone