

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

IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,	)	
	)	CASE NO. 14ABC-COM0269
Complainant,	)	License No. 3409
	)	Premise No. 1P-21
	)	
vs.	)	
	)	<b>DIRECTOR'S FINAL ORDER</b>
THE ESTATE OF CHARLES O'LEARY ROE, AND MICHAEL O. ROE, General Personal Representative and Licensee, dba, JOE'S CLUB or JOE'S CLUB, INC.,	)	
	)	
Respondents.	)	
	)	
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This matter is before Colonel Ralph W. Powell, Director of the Idaho State Police, pursuant to the "Petition for Review of Preliminary Order" filed on or about November 10, 2014, by the Estate of Charles O'Leary Roe, and Michael O. Roe, General Personal Representative and Licensee, dba, Joe's Club or Joe's Club, Inc. ("Respondents"). The parties have been given an opportunity to submit briefing to me on all disputed issues and I have reviewed the contested case record filed in this matter. In accordance with the provisions of title 67, chapter 52, Idaho Code, and IDAPA 04.11.01.01, I hereby enter this Final Oder.

**INTRODUCTION AND PROCEDURAL HISTORY**

Alcohol Beverage Control ("ABC") is a Bureau within the Idaho State Police. On behalf of the ISP Director, ABC issues alcohol beverage licenses to bars and other establishments. For many years, Charles O'Leary Roe operated an establishment named Joe's Club in Payette, Idaho. ABC had issued an alcohol beverage license to Roe for this business.

Charles O'Leary Roe died shortly after renewing his ABC license in the summer of 2013. This contested case was commenced on May 2, 2014, when ABC filed an administrative "Complaint for Revocation of Retail Alcohol Beverage License" against Respondents for alleged violations of the liquor laws and rules. An Answer to the Complaint was timely filed. Thereafter, the ABC license at issue in this case was not renewed by Respondents. Before an evidentiary hearing could be held on the allegations of the Complaint, ABC filed a motion to dismiss the Complaint with attorney Michelle Points, the duly assigned Hearing Officer. The motion to dismiss was based solely upon Respondents' failure to renew the license.

After receipt of briefing from the parties, on October 20, 2014, Ms. Points entered a preliminary order granting ABC's motion. A week later the Hearing Officer entered an amended preliminary order dismissing the Complaint ("Amended Order"). It is from this Amended Order that Respondents have brought this petition for review to me, as ISP Director and agency head.

#### **ISSUE**

The merits of the underlying Complaint were not reached by the Hearing Officer and are not currently before me. Rather, the only issue pertains to the appropriateness of the Hearing Officer's decision granting ABC's motion to dismiss.

No one disputes the fact that the Respondents failed to renew the liquor license issued for the operation of Joe's Club. The sole issue before me is ABC's argument that the failure to renew renders the contested case proceedings moot since the license expired and no longer exists, therefore there is nothing left to discipline, as well as the Respondents' counter-argument that the obligation to renew the license was "tolled" by

the filing of the Complaint and, therefore, the agency has jurisdiction to continue the contested case action.

## **DISCUSSION**

This case is in a rather unique procedural posture. Typically, it is the licensee who has filed a motion to dismiss an administrative complaint and it is the agency who is arguing that the case should continue. Here exactly the opposite is happening. ABC filed a motion to dismiss its own Complaint and the Respondents are encouraging me to reinstate the disciplinary proceedings; and, by extension, the license.

Notwithstanding the unusual procedural status of these proceedings, the dispositive issue is clear and straightforward.

At the Hearing Officer's request, the parties submitted written briefs on the tolling issue. Upon review to my office, ABC has complied with my written order requiring the submission of further briefing at the Director level. In contrast, Respondents responded to my order by merely filing a two-page document entitled "Memorandum in Support of Respondents' Petition for Review of Preliminary Order." Notwithstanding its title, Respondents' submission is not a brief or memorandum of law. Rather, it is nothing more than a near mirror-image of its "Petition for Review of [the Hearing Officer's] Preliminary Order." This "Memorandum" does not cite any authority or make any arguments; instead, it simply states that Respondents are relying upon the briefing they submitted to the Hearing Officer.

While ABC argues that this development constitutes a fatal deficiency warranting dismissal of Respondents' request for review, I hesitate to dismiss this review based solely on a technicality. Since I am able to ascertain Respondents' position and arguments from reviewing the briefing they submitted to the Hearing Officer, I will do so.

As alluded to earlier, Respondents do not contest the fact that they failed to renew the liquor license by the renewal deadline, or even within the thirty-one (31) day “grace period” thereafter. Respondents simply argue that the pending disciplinary case “tolled” (or excused) their obligation to renew the license.

Respondents do not cite any Idaho statutory or case law authority that supports their position, and the facts and legal issues discussed in the cases they do rely upon from other jurisdictions are so dissimilar to the facts and issues presented with Joe’s Club, that those out-of-state cases are of little or no assistance in resolving this case.

What is helpful is the extremely well reasoned, thorough and articulate decision of the Hearing Officer discussing and rejecting Respondents’ arguments and accepting the argument made by ABC. Frankly, the Hearing Officer is “spot on” in her analysis and conclusions; and it would serve little purpose in simply reiterating or attempting to expand upon those findings and conclusions here. Therefore, I expressly adopt in full the Hearing Officer’s Amended Order as my own. A true and correct copy of the Hearing Officer’s “Amended [Preliminary] Order” is attached hereto as “Exhibit A,” and incorporated herein by reference.

Respondents failed to timely renew the liquor license at issue in this case and that obligation was not “tolled” by the pending contested case proceeding. Respondents had adequate notice of the renewal obligation and filing deadline, not only by law but also in communications with ABC staff. Inexplicably, they chose to ignore this requirement. Once the license expired and the grace-period had run, ABC and I, as ISP Director, lost jurisdiction (the authority) to renew the license. *BV Beverage Co. v. State of Idaho, et al.*, 155 Idaho 624 (2013). *See also, Cheerleaders Sports Bar & Grill, Inc. v. State of Idaho*, Case No. CV-0C0814425 (Fourth Dist., Memorandum Decision

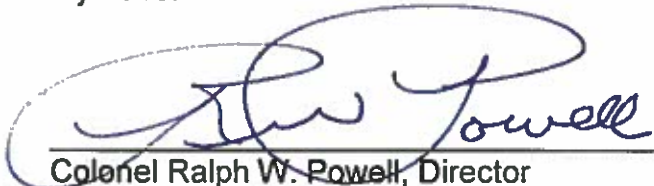
and Order, filed November 13, 2009); *The "O" LLC, d/b/a The Oasis Fine Food and Spirits v. State of Idaho*, Case No. CV 2011-4243 (Fifth Dist. Court, Memorandum Decision and Order, filed July 16, 2012).

### CONCLUSION

For the above-stated reasons, and those stated in the incorporated Amended Preliminary Order (attached), the Hearing Officer properly granted ABC's Motion to Dismiss the administrative Complaint filed in this matter.<sup>1</sup> Accordingly, this matter IS HEREBY DISMISSED, each party to bear its own costs and attorney fees.

IT IS SO ORDERED.

DATED this 11<sup>th</sup> day of February 2015.

  
Colonel Ralph W. Powell, Director  
Idaho State Police

### DUE PROCESS AND APPEAL RIGHTS

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

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

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<sup>1</sup> ABC raises several other issues in its briefing. Since Respondents did not file any briefing on this review, they did not respond to ABC's additional arguments. Given the resolution of this matter it is unnecessary for me to address the other issues advanced by ABC.

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of February 2015, I caused to be served, a true and correct copy of the foregoing Director's Final Order on the following individuals by the method indicated below:

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[mor@givenspursley.com](mailto:mor@givenspursley.com)  
*Attorney for Respondents*

Certified Mail  
 First Class Mail  
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 Statehouse Mail  
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\_\_\_\_\_  
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IDAHO STATE POLICE, ALCOHOL  
BEVERAGE CONTROL,

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THE ESTATE OF CHARLES O'LEARY  
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Respondents.

Case No. 14ABC-COM0269  
License No. 3409  
Premise No. 1P-21

AMENDED ORDER DISMISSING  
CONTESTED MATTER

THIS ORDER AMENDS THE ORDER DISMISSING CONTESTED MATTER,  
ENTERED OCTOBER 20, 2014.

On May 2, 2014, the Idaho State Police, Alcohol Beverage Control (hereinafter "ISP") through the Office of the Attorney General, filed a "Complaint for Revocation of Retail Alcohol Beverage License" (hereinafter "Complaint") seeking revocation of the alcohol beverage license for the entity doing business as "Joe's Club" in Payette, Idaho, under license number 3409 (hereinafter "License"). The stated basis for revocation as set forth in the Complaint was that Joe's Club failed to keep the License in actual use in violation of IDAPA 11.05.01.010.02 and Idaho Code §§ 23-933 and 23-1037.

AMENDED ORDER DISMISSING CONTESTED MATTER



ISP asserts that the License expired as a matter of law on July 3, 2014.

ISP filed its “Motion to Dismiss Complaint for Revocation of Retail Alcohol Beverage License” (“Motion”) on August 8, 2014. ISP takes the position that because the Director has no authority to grant or deny a renewal application after a license has statutory expired and because Joe’s Club did not file a timely renewal application, this revocation proceeding is moot.

Joe’s Club filed a response to the Motion, wherein it asserted that the issue is not whether the Director can grant or deny a renewal application after the statutory deadline, but rather, whether the filing a contested revocation proceeding by ISP prior to the expiration of the statutory deadline to submit a renewal application, tolls the running of that deadline.

**A. The Applicable Statutes Do Not Support An Argument For Tolling.**

Idaho Code § 23-908(1) provides in relevant part that all licenses **shall** expire if a licensee does not file renewal application prior to the first day of the designated renewal month (which is the expiration date), or within the thirty-one (31) day grace period following the expiration date. The provision goes on to state that renewal applications for licenses accompanied by the required fee **must** be filed with the Director on or before these deadlines.

Contrary to the argument asserted by Joe’s Club, the date by which a license shall expire is not a “putative” date. The statute does not merely suggest a “commonly

accepted” time frame in which to file a renewal application. There is nothing ambiguous about the language in the statute as to when the renewal application must be filed.

Idaho Code actually speaks to situations where a renewal application is submitted during a revocation proceeding. Idaho Code § 23-933(4) provides:

When a proceeding to revoke or suspend a license has been or is about to be instituted, during the time the a renewal application of a license is pending before the director, the director shall renew the license notwithstanding the pending proceedings, but such renewed license may be revoked or suspended without hearing if and when the previous license is for any reason, revoked or suspended.

Joe’s Club could have submitted its renewal application for the License prior to its expiration, notwithstanding the fact that a revocation proceeding had been (or was about to be) initiated. Per Idaho Code § 23-933, the Director would have renewed the License and this case would have proceeded on the substantive claims and defenses of the parties. However, there is no provision within the Idaho Code that grants the Director authority to renew a license after it expires pursuant to unambiguous provisions of Idaho Code §23-908(1).

There is no component of the applicable statute that supports a finding that a licensee is relieved from timely filing a renewal application even if there is a pending revocation proceeding. To the contrary, Idaho Code § 23-933(4) suggests that a revocation proceeding *does not* toll the requirement to timely file a renewal application, and those two “events” can and do occur simultaneously or in conjunction.

**B. The Cases Relied Upon By Joe’s Club Do Not Support A Finding That The Deadline To File A Renewal Application Is Tolloed.**

Joe’s Club places reliance on several out-of-state cases in which, it is argued, that licenses do not or cannot cease to exist during the pendency of a revocation proceedings.

Joe's Club cites several cases to support its asserted proposition, but places primary emphasis on the cases of *Trappers Lake Lodge & Resort v. Colorado Dept. of Revenue*, 179 P.3d 198 (Colo. App. Div. 5, 2007), and *Orchard v. Orchard*, 738 N.W. 2d 820 (Neb. 2007). However, these cases do not support the arguments made by Joe's Club on the question of whether it was required to file a renewal application notwithstanding the filing a revocation proceeding.

In *Trappers, supra*, the subject licenses were in effect from March 2004 through March of 2005. In December of 2004, the State Licensing Authority (SLA) began revocation proceeding. The parties attempted to reach a settlement but were unable to, so the SLA set the matter for hearing in June of 2005. The Licensee objected, arguing that the SLA no longer had jurisdiction to revoke the license because it had expired. The Colorado Court of Appeals affirmed the SLA in holding that a revocation proceeding commenced before the expiration of a license can be completed even after a license has expired. *Trappers* did not speak to the issue of tolling, as the Licensee asserted in that case that the subject license had expired, i.e. that nothing should be tolled.

The court in *Trappers* cited to cases in other jurisdictions that held that agency proceedings (i.e. revocation, disciplinary, etc.) could be carried through to their conclusion despite the expiration of a license, at the agencies discretion. However, no case cited held that the agency did not have the discretion to dismiss an action in the same circumstance.

In *Orchard v. Orchard*, 738 N.W. 2d 820 (Neb. 2007), the Orchard Hill Mercantile ("Mercantile") applied for and was granted a liquor license by the Nebraska Liquor Control Commission ("Commission"). Neighbors of the Mercantile objected and

appealed the Commission's granting of the liquor license to the District Court ("Neighbors). The District Court reversed the decision of the Commission. Under Nebraska statute, a liquor license cannot exceed one year. Prior to the Mercantile's one-year deadline passing, it applied for a renewal. The Mercantile's renewal application was denied by the Commission, based upon the ruling of the District Court. The District Court's decision was then appealed to and affirmed by the Nebraska Supreme Court. The Neighbors asserted that the appeal was moot given the fact that over a year had passed since the license was issued, and had therefore expired.

The Nebraska Supreme Court held that the case was not moot because if it were to have reversed the District Court's decision, the Commission could then accept the Mercantile's previously submitted renewal application; the Mercantile had "an interest in judicial resolution beyond the expiration of its original license..." *Id.* at 827.

The *Orchard* decision does not assist Joe's Club. Contrary to *Orchard*, in this case, Joe's Club did not submit a renewal application prior to the expiration of the License; thus, ISP made no substantive decision pertaining to the License that could be affected by the outcome of this revocation hearing. There was no "collateral attack" on the License as asserted by Joe's Club.

Put another way, take the following scenario: ISP initiated revocation proceedings against Joe's Club and the Director revoked its License based on the substantive claims against Joe's Club. Joe's Club appealed. Joe's Club timely filed a renewal application for the License (prior to its statutory expiration), which was denied by ISP due to the revocation. Joe's Club prevails on appeal. Based on the facts of *Orchard*, Joe's Club may have an argument that it is entitled to the License given the reversal of the

revocation. However, Joe's Club didn't file a renewal application, and ISP didn't deny a renewal application. *Orchard* does not support Joe's Club's assertion that it "demonstrates" that a liquor license cannot lapse while "its very existence is in jeopardy." Opening Brief, p. 3. *Orchard* is inapplicable on its facts.

These cases are more akin to the case of *BV Beverage Co. v. State of Idaho, et al*, 155 Idaho 624, 315 P.3d 812 (2013), described below, wherein a challenge to an agency action was found non-reviewable because there was no agency action to challenge, given that there no renewal application filed.

### **C. Idaho Case Law Dictates Dismissal Of The Case.**

Although Joe's Club takes a contrary position, the case of *BV Beverage Co. v. State of Idaho, et al*, 155 Idaho 624, 315 P.3d 812 (2013) is controlling. BV Beverage leased its liquor license to Iggy's Restaurant ("Iggy's) in 2008. Iggy's renewed the liquor license in 2009. The liquor license was set to expire on September 30, 2010.<sup>1</sup> On September 29, 2010, Iggy's sent BV Beverage notice that it had released its interest in the subject liquor license. ISP began revocation proceedings to revoke Iggy's license for failure to keep it in use. On September 29, 2010, agreed to stay the revocation proceedings on the condition that BV Beverage work to put the license in actual use. BV Beverage negotiated with another restaurant to lease the license and submitted the transfer application to ISP on January 7, 2011. ISP rejected the lease application because the license had not been timely renewed and expired by operation of law.<sup>2</sup>

The facts of this case are similar to BV Beverage:

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<sup>1</sup> Not including the thirty-one day grace period under I.C. § 23-908(1).

<sup>2</sup> There are other procedural due process issues raised in *BV Beverage*, which are not relevant to this decision on ISP's Motion to Dismiss.

... it is undisputed that BV Beverage knew that its liquor license was about to expire ... Notwithstanding such knowledge, BV Beverage simply failed to take any action to obtain renewal of the license until long after it and the grace period had expired.

*Id.* at 628, 315 P.3d at 812.

Joe's Club was on notice of when the License was to expire. The expiration date is printed on the face of the License in large bold font. In addition, the Complaint alleges in paragraph 7, that the time covered by the License was 6/04/13 – 5/31/2014. Joe's Club simply failed to take any action to renew the License, and it expired as a matter of law. ISP initiated the revocation proceeding in this case prior to the expiration of the license and per the holding in *BV Beverage*, it did not toll the time for Joe's Club to submit a renewal application.

#### **D. Conclusion**

This revocation proceeding against Joe's Club is moot. The legal consequence of Joe's Club failing to file a timely renewal application for the License is that it has no interest in a liquor license, thus no liquor license to revoke. The License ceased to exist upon its statutory expiration. The statutory authority and the case of *BV Beverage* discussed above support this conclusion and the cases cited and relied upon by Joe's Club are distinguishable and not persuasive.

ISP had the statutory right to initiate the revocation proceedings, and did so on a date preceding the statutory expiration of the License. Although the outcome is an unfortunate one for Joe's Club, its agents were on notice of when the License expired, as well as the statutes that pertained to its existence, and expiration.

THIS CONTESTED MATTER IS HEREBY DISMISSED,  
IT IS SO ORDERED.


Pursuant to IDAPA 04.11.01, this is a PRELIMINARY ORDER of this hearing officer.  
Pursuant to Idaho Code Section 67-5245, this Preliminary Order will become a Final Order  
without notice unless a Petition for Review is filed with the agency head, or with any person  
designated for this purpose by rule of the agency, within fourteen days from the date this of this  
AMENDED Order. The Petition for Review shall identify all legal and factual bases of  
disagreement with the Preliminary Order and send to:

Idaho State Police Alcohol Beverage Control  
700 S. Stratford Drive, Suite 115  
Meridian, Idaho 83642

or by fax to: (208) 884-7228

Dated this 28th day of October, 2014

POINTS LAW, PLLC

By   
Michelle R. Points  
HEARING OFFICER

CERTIFICATE OF SERVICE

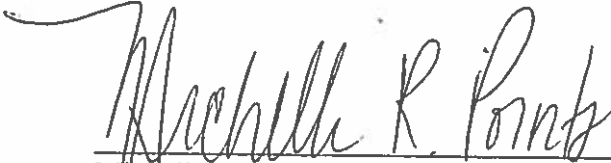
I HEREBY CERTIFY that on this 28th day of October, 2014, I caused to be served a true copy of the foregoing AMENDED ORDER DISMISSING CONTESTED MATTER by the method indicated below, and addressed to each of the following:

Kirk J. Houston  
kjh@moffatt.com

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Fax at (208) 385-5384

Kenneth M. Robins  
ken.robins@isp.idaho.gov

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Fax at (208) 884-7228

  
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Michelle R. Points