

DISTRICT COURT
TWIN FALLS CO. IDAHO
FILED

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BY _____
CLERK

DEPUTY

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

The "O" LLC, d/b/a The Oasis Fine)
Food and Spirits,)

Petitioner,)

v.)

State of Idaho, Dept. of ISP, Bureau of)
Alcohol Beverage Control,)

Respondent.)

CASE NO. CV 2011-4243

**MEMORANDUM DECISION DISMISSING PETITIONER'S PETITION FOR
JUDICIAL REVIEW**

This matter comes before this court on a Petition for Judicial Review. Petitioner and Respondent filed briefs with the court, and neither party requested the matter be set for oral

argument. Therefore, this court took this matter under advisement on June 14, 2012. For the reasons set forth below this court now DISMISSES the petitioner's Petition for Judicial Review.

FACTS

The Petitioner (The O) held a Retail Alcohol Beverage License for an establishment in Twin Falls. The liquor license had an expiration date of June 30, 2011. Renewal is governed by Idaho Code § 23-908(1). The statute provides for a 31 day grace period after the expiration date to renew the license. Respondent, State of Idaho, Idaho State Police, Bureau of Alcohol Beverage Control (ABC), is the agency empowered with enforcement of the laws pertaining to liquor licenses. This case concerns issues in the renewal of the license and the actions taken by ABC subsequent to physically issuing a license for the period of July 1, 2011 to June 30, 2012.

The matter arose because the application for renewal of the license was accompanied by a check that was returned for non-sufficient funds (NSF). The check was dishonored on or about July 21, 2011. Prior to learning the check had been dishonored ABC had accepted the check and issued a paper license to The O in reliance on the check. Once ABC learned that the check had been dishonored it sent a certified letter to the licensee requiring that the check be made good. The check was not made good within the 31 day grace period required for renewal of the liquor license. On August 3, 2011 ABC, acting through Captain Clark Rollins, issued an Order to Cease and Desist selling alcoholic beverages. AR, 1. On August 9, 2011 The O filed a Petition for Reconsideration of the Order to Cease and Desist with ABC. AR, 2. Legal counsel for ABC responded to this on September 7, 2011. AR, 4. On September 19, 2011 ABC issued a Response to the Petition for Reconsideration which Denied the Petition. AR, 5. ABC concluded that it had no subject matter jurisdiction to hear the Petition under the Idaho Administrative Procedures Act

because there was no contested case since The O's license had been lost by failing to pay the statutorily required fee for renewal. *Id.* at 6. The O then filed this Petition for Judicial Review.

STANDARD OF REVIEW

In reviewing an agency decision the standard of review is governed by Idaho Code § 67-5279. The appellate court must not “substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” I.C. § 67-5279(1). Rather, the court is required “to defer to the agency’s findings of fact unless they are clearly erroneous.” *Price v. Payette County Bd. Of County Comm’rs*, 131 Idaho 426, 429 (1998).

An agency’s action may be overturned only if its findings, inferences, conclusions, or decisions: (a) violate constitutional or statutory provisions; (b) exceed the agency’s statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Price*, 131 Idaho at 429. In addition, the petitioner is required to show that a substantial right has been prejudiced. I.C. § 67-5279(4).

ANALYSIS

There is one fundamental issue in this case. It is whether the physical license issued for the period of July 1, 2011 to June 30, 2012 was a validly issued license. If it was, ABC is required to comply with the Idaho Administrative Procedure Act’s (“APA”) procedures under Idaho Code § 67-5254. That is, ABC must first give “notice and an opportunity for an appropriate contested case” before it “revoke[s], suspend[s], modify[ies], annul[s], withdraw[s], or amend[s]” the license. I.C. § 67-5254(1). If those procedures are required, then subsidiary issues arise, such as whether ABC complied with other requirements of the APA. ABC contends, essentially, that the The O’s 2010-2011 license expired, and no timely and sufficient application

for renewal was produced, so no valid license for 2011-2012 ever existed. Rather, the license expired, and ABC has no authority under the law to issue a license. The O contends that a valid license was issued, and as such, ABC must comply with APA procedures in order to cancel that license. This court finds that because The O did not comply with the unambiguous requirements for renewal of its liquor license, no valid liquor license was ever issued by ABC for July 1, 2011 to June 30, 2012; there was no license to revoke as it expired.

A. The O's Liquor License Expired by Operation of Law and Because The O Failed to Make a Timely and Sufficient Application for Renewal, no Validly Issued Renewal License Existed

Idaho Code § 23-908(1) is unambiguous in its requirements that annual renewals for a liquor license must be made through an application accompanied by a required fee no later than thirty-one days after the first day of the renewal month. I.C. § 23-908(1). The license expires “at 1:00 o'clock a.m. on the first day of the renewal month.” *Id.* Therefore, the ability to renew expires thirty-one days after the first day of the renewal month. *Id.* If the requirements of renewal are not satisfied by that time, there is no other mechanism available to renew the expired license set forth in the statute.

The O's liquor license expired on June 30, 2011. That is undisputed. What is disputed is whether renewal occurred prior to July 31, 2011, the last day The O had the ability to renew under Idaho Code § 23-908. The O contends that because it sent an application, as well as a bad check, to ABC before July 31, 2011, and ABC issued a paper license, The O was in possession of a “validly issued license.” Petitioner's Reply Brief, 5. The O's contention is contrary to the unambiguous requirements of Idaho Code §§ 23-903 and 23-908(1). The director of the Idaho State Police is empowered to issue licenses to “qualified applicants.” I.C. § 23-903. One of the qualifications for issuance of a license is that the required fee be paid before the end of the

renewal period. *See* I.C. § 23-908(1). The O failed to pay the fee before the end of the renewal period; therefore, the director of the Idaho State Police had no authority to issue it a license. As such, any license issued to The O was an invalidly issued license. Therefore, ABC was required to take no action to cancel the license because there was no license to cancel. The piece of paper evidencing the license is not the license itself, and physical possession of the document does not mean there is a license.

This reasoning is in line with instructive decisions issued by district courts in both Ada and Gooding counties. In *Cheerleaders Sports Bar & Grill, Inc. v. The State of Idaho, Department of Idaho State Police, G. Jerry Russell*, in which the court concluded that “nothing in the Idaho Code gives the Director of the Idaho State Police the option of renewing an expired liquor license after the thirty-one (31) day grace period.”¹ This court reaches the same conclusion. There is, however, a factual difference between that case and the present case. In this case, a paper license was issued before The O’s check was returned NSF.

The present appeal more closely resembles *Sagebrush Inn, Inc., dba, The Lincoln Inn v. Idaho State Police, Bureau of Alcohol Beverage Control*², in which the court concluded that because a check was NSF, even though a paper license was issued, “the license has been lost and cancelled...and cannot be reinstated.” This court agrees and concludes that where a check is returned NSF, thus failing to satisfy the fee requirement under Idaho Code §§ 23-904 and 23-908, no license can be validly issued if the fee is not actually filed with ABC before the end of the 31 day grace period. To complete a timely and sufficient application for renewal, the application must be accompanied by the fee within the 31 day grace period. I.C. § 23-908. In this

¹ Case No. CV-OC0814425, Fourth Judicial District of the State of Idaho, Ada County, Memorandum Decision and Order (November 13, 2009), 5 .

² Case No. CV-2011-0000053, Fifth Judicial District of the State of Idaho, Gooding County, Order Dismissing Amended Petition for Judicial Review and Request for Stay (May 10, 2011), 11.

case, the fee did not accompany the application, and was not filed within the grace period.

Therefore, The O never held a valid license for July 31, 2011 to June 30, 2012.

B. No Agency Action Was Required to Cancel The O's License, as its 2010-2011 License Expired by Statue, and it Did Not Submit a Timely and Sufficient Application for Renewal

The O argues that ABC failed to comply with numerous APA requirements, including the requirement that it be afforded “notice and an opportunity for an appropriate contested case” under Idaho Code I.C. § 67-5254(1) before its license was canceled. As discussed above, this requirement is only necessary when the applicant for a license has made a “sufficient and timely” application for renewal. I.C. § 67-5254(1). The O's application lacked the statutorily required fee, so ABC was not required to provide notice or an opportunity for a contested case. ABC had no APA requirements toward the O whatsoever because a complete application for renewal was never made. Therefore, it had no rights or privileges to cancel, revoke, annul, or adjudicate.

This court understands The O's argument that a number of procedural steps taken by ABC following the expiration of The O's license could be challenged if The O possessed a validly issued license for the period of July 31, 2011 to June 30, 2012. However, since no license was validly issued, nor was it required to be issued, there is no agency remedy available. There was no license once the grace period expired, and ABC was not required to take any action to cancel or revoke any previously issued license. No substantial rights of the petitioner were affected by the actions of ABC, as petitioner had no license and no right to a license.

It is not clear whether there is subject matter jurisdiction to hear this Petition for Judicial Review because the license expired without agency action. However, see *Fuchs v. State, Dept. of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626 (2012) (“Since there is no administrative remedy available to exhaust, we find that the district court properly has

jurisdiction over the petition for judicial review under I.C. § 67-5270); *see also Peterson v. City of Pocatello*, 117 Idaho 234, 236 (1990) (pursuit of administrative review is not required if doing so would be futile). In this case, the result is the same however the jurisdiction issue is resolved. The O's license lapsed by operation of the statute, and neither ABC, nor this court, has power to change that. Since ABC has no discretion to renew The O's license after the 31 day grace period, any attempt to pursue administrative appeals would be futile, as would any remand to the agency, dismissal of The O's Petition for Judicial Review is therefore appropriate. Moreover, since no procedure was required and no discretion was afforded to ABC, there is no remedy that this court can provide regarding any subsequent agency actions related to the license at issue in this case.

CONCLUSION

For the reasons stated above, the Petition for Judicial Review and Application for Injunctive Relief is DISMISSED and the preliminary injunction is lifted.

IT IS SO ORDERED

Dated: July 11, 2012

Signed: Jonathan Brody
Jonathan Brody, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2012, I caused a true and correct copy of the foregoing **Memorandum Decision Dismissing Petitioner's Petition for Judicial Review** to be served upon the following persons in the following manner:

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