



MEMORANDUM

TO: Alcoholic Beverage Control Board DATE: July 29, 2019

FROM: Erika McConnell, Director RE: Request for Reconsideration for OAH
Case No. 18-0628-ABC; License 4733 No
DBA, held by Triplets Inc.

At the July 9, 2019, meeting, the board adopted the administrative law judge's decision on the appeal of the denial of a fourth waiver request and license renewal for beverage dispensary license 4733, No DBA, held by Triplets Inc. The decision is attached.

Under the Administrative Procedures Act AS 44.62.540, the board has the authority to order a reconsideration. This request to you does not constitute a formal petition of a party because I am your employee, but I feel compelled to bring the issues below to your attention because the board's adoption of the judge's recommended decision has significant ramifications on licenses in delegated status, and on staff procedures and resources. As always, my staff and I share your commitment to an orderly and consistent process that serves the public.

I am asking the board to reconsider this decision for the following reasons:

1. By adopting this decision, the board has accepted the concept of a 'de facto' denial implemented by the director without specific board action, which is not mentioned in Alaska statutes and appears to be contrary to the authority granted by statute. AS 04.06.080 provides that the board may delegate the authority to the director to temporarily grant or deny the issuance, renewal, or transfer of a license, but "The director's temporary grant or denial of the issuance, renewal, or transfer of a license or permit is not binding on the board." Clearly, only the board may deny the transfer of a license. If a delegated approval by the board is not fulfilled because the applicant has not met some condition of the delegation, the license remains in delegated status until the delegation is fulfilled or the license is brought back to the board for further action. We have seen this happen many times.

But the decision you adopted provides the director the effective authority to deny an application. The decision says the 'de facto' denial is a real denial, despite no board action, that triggers the director's obligation to initiate the due process notification requirements at AS 04.11.510. This gives the director authority that is specifically not granted to her in statute. The language of AS 04.11.510, as I read it, is all based on the board's denial of an application.

2. In this decision, the judge removes significant responsibility from the licensee and lays it upon AMCO staff. AS 04.21.030 (Responsibility of licensees, agents, and employees) states, "The licensee has a duty to exercise that degree of care that a reasonable person would observe to ensure that a

business under the person’s control is lawfully conducted. This duty of the licensee includes, but is not limited (1) to ensuring the compliance by agents or employees with this title and regulations adopted under this title...”

Yet the decision as adopted makes AMCO staff responsible for monitoring the exact status of each application and providing communications with each applicant regarding next steps that are sufficient to meet individual licensees’ particular circumstances, which may include any number of circumstances that the staff would have no reason to know about, including the applicant’s absence from the state, change of address, change of plans, physical disability, and/or persistent inattention. AMCO does not have and never has had the resources to perform such personalized service for applicants, and providing such a service is not specifically required in either the statutes or the regulations. AMCO provides a great deal of information on its website and has worked hard to make applications and instructions clear and user-friendly. AMCO answers inquiries by phone and email and in-person. But the statute, as noted above, clearly places the burden of compliance with requirements on the licensee, which means that the licensee must have familiarity with the requirements, and the licensee must be responsible for fulfilling those requirements. A typo made by an AMCO staffer in an email that was to provide a notification that is not required by statute—and in fact is specifically NOT required in statute—cannot not excuse a licensee from

- familiarity with the statutes and regulations (to which the licensee certified in this situation),
- paying attention to which license is actually mailed to him, and
- providing accurate information on all forms and applications submitted to the board.

Because the decision you adopted appears to give the director authority that does not exist in the statute, and because it would impose new and burdensome communication requirements on the staff that are unsupported by statute or regulation, I ask you to reconsider your decision.

If you decide not to reconsider your decision, I will calendar time at the September board meeting for the board to discuss and give my staff and me explicit direction on the following points, to ensure consistent treatment of delegated approvals in the future:

- What form of notification should staff send, and how frequently, to remind a licensee in delegated status of matters that have not been resolved? How should staff prioritize these notifications in relation to review of applications?
- How should the staff treat non-responses?
- At what point does a license in delegated status become subject to the director’s authority to issue a ‘de facto’ denial and thus be sent a notice of denial under AS 04.11.510(b)(1)?

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of)	
)	
TRIPLETS, INC.)	OAH No. 18-0628-ABC
)	Agency No. 4733

DECISION

I. Introduction

A liquor license must be operated for a certain amount of time each year. If a liquor license is not operated for that minimum time, a waiver of the yearly operation requirements must be requested and received from the Alcohol Beverage Control Board (Board). Within certain parameters, the Board has the discretion to deny requests for a waiver.

Triplets, Inc. is the owner of Alaska Beverage Dispensary License No. 4733, which it acquired in 2014. It applied for and received waivers of the yearly operating requirement in 2014 and 2015. Triplets submitted applications to waive the operating requirement for 2016 and 2017. The waiver requests and the related renewal request were denied. Triplets requested a hearing to challenge those denials.

The evidence presented at hearing established that the License 4733 was not operated in 2016 or 2017. However, Triplets thought the license had been transferred to a sister company, Twins, Inc., and was being operated at the Twins premises. This was mistaken, but the error was due in part to communication failures that were not caused by Triplets. The lack of notice supports the Board exercising its discretion to grant the waiver applications for 2016 and 2017, and to approve a waiver for 2018 due to this case having been in hearing status since 2018.

Triplets was also denied a renewal of its license because the underlying waivers had not been approved. Upon approval of the waivers, the renewal should also be granted.

II. Facts¹

Triplets and Twins are two separate Alaska corporations, both of which are wholly owned by brothers John Emmi and Ernest Emmi. Twins owns and operates the Grandview Hotel in Wasilla. The Grandview Hotel contains a restaurant known as The Grill on its lower level.² The Grill has a tourism beverage dispensary license, License 4419.³ Triplets owns a business

¹ The facts recited below were established by a preponderance of the evidence.

² Testimony of Sandra Joynes.

³ Agency Record (AR) § 4, p. 16

known as the Locals Pub & Pizzeria, which is located in a separate building adjacent to the Grandview Hotel.⁴ The Locals Pub & Pizzeria also has a tourism beverage dispensary license, License 5180.⁵ Sandra Joynes, who was the general manager for the Grandview Hotel, The Grill, and the Locals Pub & Pizzeria until July 2017, was responsible for the day to day operation of these businesses, with minimal oversight from the Emmis.⁶

Triplets purchased License 4733, a dispensary license, in 2014.⁷ It did not have a location to operate it and applied to the Board for a waiver of the yearly operation requirement in 2014 and 2015.⁸ The Board granted the waiver for those two years. Sandra Joynes was told by AMCO staff that a third waiver would not be granted.⁹

On September 21, 2016 Triplets applied to transfer License 4733 to Twins, at The Grill's location.¹⁰ The application indicated that Ms. Joynes was the contact person for Twins and listed her email as sandrajoynes@gci.net.¹¹ Elsewhere in the application, Ms. Joynes was authorized to discuss the transfer with AMCO staff. The application stated: "Sandra Joynes – GM of Operations. She runs the businesses."¹²

Following the submission of the transfer application, during September 23 – 30, there were multiple emails exchanged between Shilo Senquiz with AMCO and Ms. Joynes, using the email address sandrajoynes@gci.net,¹³ On September 30, 2016, however, Ms. Senquiz sent an email to sandrajoyes@gci.net, an incorrect address due to the omission of the letter "n". The September 30 email contained a letter attachment, stating that the transfer application was complete, but that the license "will not be finally issued and ready to operate until all necessary approvals are received and a preliminary inspection of your premises by AMCO enforcement staff is completed." The letter indicates that it was sent by email and does not contain a mailing address for the recipient.¹⁴

Ms. Joynes, who did not receive the mis-addressed letter, did not know that a premises inspection was required. No one from AMCO contacted Ms. Joynes to tell her that a premises

⁴ Testimony of Sandra Joynes.

⁵ AR §AR § 4, p. 16.

⁶ Testimony of Sandra Joynes; Testimony of Ernest Emmi.

⁷ AR § 2.

⁸ AR § 3.

⁹ Testimony of Sandra Joynes.

¹⁰ AR § 4, pp. 12 – 27.

¹¹ AR § 4, p. 13.

¹² AR § 4, p. 16.

¹³ AR § 4, pp. 2 – 6.

¹⁴ AR § 7, pp. 45 – 46.

inspection was required, nor did anyone from AMCO show up to do a premises inspection.¹⁵ John Emmi, who has an interest in two other liquor licenses besides the Twins and Triplets licenses, believed that the premises inspection requirement was only for brand new premises, which the Twins location was not.¹⁶

AMCO staff sent notice to the Department of Revenue, the Department of Labor – Employment Security, the Department of Labor – Workers Compensation, the Department of Environmental Conservation, the State Fire Marshall’s Office, and the City of Wasilla, telling those entities that an application to transfer License 4733 had been filed and asking them to indicate whether there were any non-compliance issues which would affect the transfer.¹⁷

The transfer was placed on the Board’s delegated consent agenda for October 26, 2016. The agenda said that “[a]ll statutory requirements have been met,” the background investigation was pending, and that approvals were still needed from the Department of Environmental Conservation and the City of Wasilla. The agenda does not mention a need for a premises inspection.¹⁸ The Department of Environmental Conservation submitted its non-objection to the transfer on October 20, 2016.¹⁹ The license transfer was approved as part of the delegated consent agenda.²⁰ The City of Wasilla submitted its non-objection on October 27, 2016, the day after the Board meeting.²¹

No one from AMCO contacted Ms. Joynes, who was the contact person on the transfer application, to let her know that in order for the transfer to be effectuated that the premises had to be inspected. She was told that the license would just show up in the mail, and she thought that the transfer had been approved. She thought that a license did show up in the mail and that she just hung it up.²² However, the license was never transferred, and so this clearly did not occur.²³ The liquor license that is currently displayed in The Grill is License 4419.²⁴ It is undisputed that neither Triplets nor Twins were notified that the transfer of License 4733 to Twins did not occur and that the transfer application had been denied.

¹⁵ Testimony of Sandra Joynes.

¹⁶ John Emmi testimony; AR § 4, p. 16.

¹⁷ AR § 4, pp. 28 - 55; AR § 7, pp. 47 – 54.

¹⁸ AR § 4, p. 59

¹⁹ AR § 4, pp. 35 – 36.

²⁰ Testimony of AMCO Director Erika McConnell.

²¹ AR § 4, p. 60.

²² Testimony of Sandra Joynes.

²³ Testimony of AMCO Director Erika McConnell.

²⁴ Testimony of John Emmi.

Ms. Joynes stopped working for Twins and Triplets in July 2017. She was replaced by a couple, the Metivas. The Metivas took over the day to day management of Twins and Triplets, with the understanding that they would eventually purchase those businesses.²⁵

A renewal application for License 4733 was received by AMCO on January 4, 2018.²⁶ AMCO had sent the application, containing prefilled information, to Triplets.²⁷ The prefilled information provided that Triplets, not Twins, was the owner of License 4733, and that it had no operating premises. Ernest Emmi did not fill out the remainder of the application. He thinks it was prepared by the Metivas. He signed the renewal application on December 28, 2017 without reading it.²⁸ The Metivas are no longer affiliated with Triplets or Twins. Ernest Emmi, when going to the Grandview Hotel in late December, discovered the Metivas not in residence, apparently on an extended vacation, and the business deeply in debt.²⁹

On February 2, 2018, AMCO staff emailed Triplets and let it know that there were problems with the renewal application and that it needed to apply for a waiver of operations for 2016 and 2017.³⁰ Up until this time, both John Emmi and Ernest Emmi thought that the license had been transferred.³¹ Triplets then applied for a waiver of operations for License 4733 for 2016 and 2017, submitting the application on February 28, 2018 over Ernest Emmi's signature.³² The waiver applications for both 2016 and 2017 contain the identical language:

The license was purchased in July 2014 from Wasilla Apple Inc. At this time we have no set plans for it and there is a possibility we may sell it.³³

However, in mid-February 2018, Twins had begun an extensive revision of the pool (aquatic) area in the Grandview Hotel with the idea of converting it into a pool (billiards) hall where the liquor license would be operated.³⁴ The explanation for the discrepancy is that the waiver application forms were filled out by one of the Triplets/Twins office staff who told Ernest Emmi that she had been instructed by AMCO staff to fill the forms the exact same way as they had been submitted in the past.³⁵

²⁵ Testimony of Sandra Joynes.
²⁶ AR § 5, pp. 5 – 9; Testimony of Ernest Emmi.
²⁷ Testimony of Ms. McConnell.
²⁸ Testimony of Ernest Emmi.
²⁹ Testimony of Ernest Emmi.
³⁰ AR § 5, pp. 2 – 4.
³¹ Testimony of Ernest Emmi and John Emmi.
³² AR § 6, pp. 6 – 9.
³³ AR § 6, pp. 7, 9.
³⁴ Testimony of Ernest Emmi; Triplets Exs. 4 – 9.
³⁵ Testimony of Ernest Emmi.

The renewal and waiver of operations applications were presented to the Board on April 16, 2018, where the Board denied the waiver of operation requests and the related renewal.³⁶ The matter came before the Board again on June 12, 2018, where the Board again denied the renewal and the waiver of operation requests.

Triplets requested a hearing to challenge the denials of its applications for renewal and waiver of operations for License 4733. Because of scheduling issues, and with consent of both parties, the hearing did not take place until April 12, 2019. Darryl Thompson represented Triplets. Sandra Joynes, Ernest Emmi, and John Emmi testified for Triplets. Assistant Attorney General Harriet Milks represented AMCO. AMCO Director Erika McConnell testified for AMCO. All of the parties' exhibits were admitted into evidence.

III. Discussion

During the period at issue in this case, a liquor license had to be operated a minimum of 30 days, eight hours per day, each year.³⁷ A licensee may request that the operating requirement be waived. In determining whether the waiver should be granted, "the board will determine whether, through no fault of the licensee or because the premises are under construction, the licensed premises could not be operated for the required period during the preceding year."³⁸ When, as is the case here, a licensee is applying for a third or subsequent waiver of the operating requirement, the applicable regulation provides:

The board will, in its discretion, deny a third or subsequent consecutive application for waiver unless the licensee clearly shows that the licensed premises were not operated because the premises were condemned or substantially destroyed by any cause . . . Additionally, a third or subsequent consecutive application for waiver that does not identify a licensed premises location will, in the board's discretion, be denied.³⁹

When a liquor licensee applies to renew a license that has not been operated for the yearly minimum requirement during each of the immediately preceding two years, the renewal "shall be denied . . . unless the board determines that the licensed premises are under construction or cannot be operated through no fault of the applicant."⁴⁰

³⁶ AR § 8, pp. 9 - 10.

³⁷ Former AS 04.11.330(a)(3) (statute in effect through October 10, 2018). The statute was modified, effective October 11, 2018, to change the operating requirement to 240 hours per year instead of 30 eight-hour days.

³⁸ 3 AAC 304.170(b).

³⁹ 3 AAC 304.170(e).

⁴⁰ AS 04.11.330(a)(3).

On factual issues, Triplets has the burden of proof in this case by a preponderance of the evidence.⁴¹ However, there are essentially no disputes of fact; the case presents issues of law and of the application of the Board’s discretion to undisputed facts.

A. Waiver

AMCO argues that there is no discretion in this matter: the Board is required to deny the applications for the 2016 and 2017 waiver, the third and fourth waiver applications, because the “premises were [not] condemned or substantially destroyed by any cause.” This construction does not take into account the entirety of the applicable regulation. The regulation distinguishes between licenses that have a premises and licenses which do not have a premises. The language that “[t]he board will, in its discretion, deny a third or subsequent consecutive application for waiver unless the licensee clearly shows that the licensed premises were not operated because the premises were condemned or substantially destroyed by any cause” applies to licensed premises. However, License 4733 does not and has not had a licensed premise since it was transferred to Triplets in 2014. The waiver of operations request would instead fall under the later portion of the same regulation, which provides “[a]dditionally, a third or subsequent consecutive application for waiver that does not identify a licensed premises location will, in the board’s discretion, be denied.”⁴² Because Triplets does not have a licensed premises location for License 4733, the waiver applications would fall under this provision allowing the Board discretion.

The facts of this case support the Board’s exercising its discretion to grant the waiver of operations for 2016 and 2017. When Triplets applied to transfer the license to Twins in 2016, the critical correspondence notifying Triplets of the additional step that needed to happen to complete the transfer was sent to an invalid email address. Because there had been multiple prior emails exchanged between AMCO staff and Ms. Joynes at correct address, the use of a wrong address was a staff error. Given the lack of any information, Ms. Joynes reasonably inferred that the transfer had successfully occurred.

It is undisputed that the transfer to Twins did not occur. If AMCO had followed up and informed Triplets that a premises inspection was required to complete the transfer, or if AMCO had notified Triplets that the transfer was denied due to the lack of an inspection, Triplets could have rectified the situation. Instead, Triplets thought the transfer had occurred and that Twins was operating License 4733 at The Grill.

⁴¹ *Rollins v. State, Dept. of Public Safety*, 312 P.3d 1091, 1095 (Alaska 2013).

⁴² 3 AAC 304.170(e).

It must be acknowledged that if Twins had taken a close look at the licenses in its possession, it would have noticed it only had License 4419 for The Grill, and not License 4733. Hence, the communication problem was not entirely on the AMCO side of the ledger. However, the Board’s director had been delegated authority to complete the transfer and effectively denied the transfer due to a failure to comply with a condition of the approval – the premises inspection. This denial occurred without notice and a hearing. It is undisputed that AMCO did not notify Triplets or Twins that the transfer was denied. AMCO therefore failed to comply with explicit statutory notice requirements:

(b) The board may review an application for the issuance, renewal, transfer of location, or transfer to another person of a license without affording the applicant notice or hearing, except

(1) if an application is denied, the notice of denial shall be furnished the applicant immediately in writing stating the reason for the denial in clear and concise language; the notice of denial must inform the applicant that the applicant is entitled to an informal conference with either the director or the board, and that, if not satisfied by the informal conference, the applicant is then entitled to a formal hearing ...⁴³

The lack of required notice supports exercising the Board’s discretion to give Triplets another chance to complete the transfer and deal with the license in the ordinary manner. This, in turn, justifies approval of its 2016 and 2017 waiver applications at this time. Because this case has been in hearing status since June of 2018, any operating requirement for 2018 should also be waived.

B. Renewal

The 2018 renewal of Licensee 4733 is also at issue. It is undisputed that License 4733 was not operated for 2016 and 2017. The statute that governs renewals would proscribe a renewal of License 4733 under those circumstances “unless the board determines that the licensed premises are under construction or cannot be operated through no fault of the applicant.”⁴⁴ While there is evidence showing that the premises where the licensee hopes to operate the license were under construction beginning in February 2018, the first exception does not apply because that construction did not begin until after the two non-operating years (2016 and 2017) had passed and after the application for a renewal was filed.

⁴³ AS 04.11.510(b).

⁴⁴ AS 04.11.330(a)(3).

The second exception “cannot be operated through no fault of the applicant” is the exception that controls in this case. As discussed at length above, the lack of operation was due to AMCO’s not notifying Triplets that the transfer to Twins was subject to premises inspection and the transfer was effectively denied due to the lack of an inspection. While Triplets should have noticed that there was no final approval and as such is not entirely blameless in the broad history of miscommunications, the key causative factor here was the lack of notice of the required condition and AMCO’s failure to comply with the statutory requirement that it notify the applicant that the transfer was denied. The licensee had no fault in this central causative factor. As such, the Board should, as with the waiver applications, approve the renewal.

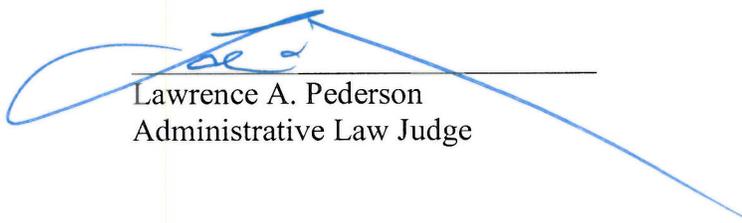
C. Remedy

The Board’s regulations allow the Board to “impose conditions along with the approval of an application for waiver.”⁴⁵ Given the facts of this case, including the multiple waivers of the yearly operational requirement, it is appropriate to require that this license be transferred to a licensed premises, which could be to a premises owned by Triplets – the current owner of the license, or by a transfer to Twins or some other entity, and operated for the required minimum amount of time in 2019. License 4733, regardless of who its owner is, should not be eligible for a waiver of the 2019 operational requirement. In other words, Triplets and Twins will have another chance to make use of the license, but one of only limited duration—they will have to make sure they take action promptly.

IV. Conclusion

The unique facts of this case support the Board’s exercise of discretion in this case. The waiver of operation applications for 2016 and 2017 and the 2018 renewal application are approved, subject to the condition that the license be transferred to a licensed premises and operated for the required amount of time in 2019. The operating requirement for 2018 is also waived since the License could not be operated during the pendency of this case. License 4733 is not eligible for a waiver of the 2019 operating requirement.

Dated: May 28, 2019



Lawrence A. Pederson
Administrative Law Judge

⁴⁵ 3 AAC 304.170(f).

Adoption

The ALCOHOLIC BEVERAGE CONTROL BOARD adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 19 day of July, 2019.

By:



Signature

ROBERT KLEIN

Name

CHAIR

Title