

Payette County Bd. Of County Comm'rs, 131 Idaho 426, 429, 958 P.2d 586 (1998);

Bennett v. State, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct.App. 2009).

Agency action must be affirmed on appeal unless the court determines that the agency's findings, inferences, conclusions or decision are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.2d at 506. The party attacking the agency's decision bears the burden of demonstrating that the agency erred in a manner specified in section 67-6279(3) and that a substantial right has been prejudiced. *Price*, 131 Idaho at 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.2d at 506.

II. UNDISPUTED MATERIAL FACTS.

The following undisputed material facts are derived from the Agency Record, which was filed with the Court on February 22, 2011.

1. On July 7, 2010, ABC received Petitioner's Alcohol Beverage License Renewal Application. The applicant was Sagebrush Inn, Inc., dba, The Lincoln Inn. The license number was 3367 for premises number 2G-22 and up for renewal in June of 2010 for issuance of a 2011 license. The application was signed by James Hohnhorst, President, and Penny Hohnhorst, Director, of Sagebrush Inn, Inc. Agency Record ("AR"), n.

2. The renewal fee for Petitioner's license was \$820.00. AR, n.

3. Petitioner included a personal check for the renewal fee, which was returned "NSF" on July 21, 2010. AR, m.

ORDER DISMISSING AMENDED PETITION FOR JUDICIAL REVIEW
and REQUEST FOR STAY- 2

RECEIVED

MAY 16 2011

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

4. On July 21, 2010, the same day ABC learned of Petitioner's NSF check, ABC employee Nichole Harvey sent a letter to Petitioner advising of the NSF check and instructing Petitioner to submit a money order or cashier's check by July 31, 2010. AR, l.

5. Ms. Harvey sent the letter to Petitioner by certified mail, but it was returned to ABC "Return to Sender, Unclaimed, Unable to Forward" on August 9, 2010. AR, k.

6. On September 8, 2010, Lt. Robert Clements, the Bureau Chief for ABC, sent a letter to Petitioner advising that "the liquor license which was issued to The Sagebrush Inn, Inc., doing business as The Lincoln Inn...has been cancelled due to the non-renewal of the license within the allowed time frame. See IDAHO CODE § 23-908." AR, j.

7. Lt. Clements' letter to Petitioner also recited the series of events that led to the cancellation of the license and advised further: "All alcohol sales on the premises must immediately cease." He instructed Petitioner: "You are to immediately return the original 2011 license to my office within five (5) business days of receipt of this letter." AR, j.

8. Lt. Clements' letter was also sent by certified mail; and as with Ms. Harvey's letter, it was returned: "Return to Sender, Unclaimed, Unable to Forward." AR, i.

9. On December 17, 2010, ABC employee Jaimy L. Adams submitted an Idaho State Police Incident Report. This Incident Report summarized the events set forth in paragraphs 1-8, *supra*, and reported further that between August 9 and September 8, 2010, Mr. Adams "attempted numerous times to contact the licensee via telephone but each time he was unable to talk to an officer of Sagebrush Inn, Inc. Numerous messages were left requesting a return call but nothing was received." AR, h.

RECEIVED

MAY 16 2011

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

10. Mr. Adams' report stated further: "The 2010 license issued to Sagebrush Inn, Inc., expired on June 30, 2010. On July 1, 2010 Sagebrush Inn, Inc. began the 31-day grace period in which to renew the license before it was cancelled at the end of the grace period. On July 31, 2010 the 31-day grace period expired. Since Sagebrush Inn, Inc. failed to completely renew the alcohol license by paying for the renewal of the license, as required by Idaho Code [sic] ?23-908(1) which states in relevant part 'Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before the first day of the designated renewal month.' To date; ABC has not received a replacement check from the licensee." AR, h.

11. ABC issued the actual Retail Alcohol Beverage License in good faith to Petitioner before learning that Petitioner's check was returned "NSF." AR, g.

12. On December 12, 2010, Lt. Clements issued an "Order to Cease and Desist and Notice of Cancelled Retail Alcohol Beverage License" against Petitioner. Lt. Clements' Order carefully identified the authority under which he issued the order, explained the factual basis for the order, entered his conclusion of law based on the facts and applicable law, and ordered Petitioner to cease and desist selling alcoholic beverages in the state of Idaho. AR, f.

13. On January 6, 2011, ABC received Petitioner's Request for Reconsideration. The Request for Reconsideration was based on Mr. Hohnhorst's assertions that he was not aware that the renewal fee check had been returned for non-sufficient funds, that he was not aware that certified letters had been mailed but not claimed or accepted, that there had been a substantial lack of communication between Mr. Hohnhorst and his bookkeeper, and that he was not aware of the lack of communication until he received Lt.

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Clements' Order to Cease and Desist and Notice of Cancelled Retail Alcohol Beverage License. AR, d.

14. Mr. Hohnhorst's Request for Reconsideration was accompanied by a money order payable to ABC "in the sum of \$840 for the renewal fee amount of \$820 and a separate money order payable to [ABC] in the sum of \$20 to cover the non-sufficient funds handling fee." Mr. Hohnhorst apologized for the "inconvenience his lack of communication with his bookkeeper has caused" and asked that "his Retail Alcohol Beverage License be reinstated without delay." AR, b, c and d.

15. Lt. Clements responded to Mr. Hohnhorst's Request for Reconsideration by letter dated January 7, 2011. Lt. Clements explained: "the renewal fees for license number 3376 which expired on 06/30/2010 were not paid as the result of your returned check due to non-sufficient funds. Once a license expires, a thirty-one (31) day grace period is permitted to renew the license with required fees. However, no alcoholic beverages may be sold or served until the license is renewed (Idaho Code 23-908). Once this grace period has passed the license cannot be renewed. The grace period to renew this license passed on 07/31/2010. Under Idaho Code 23-908, this license cannot be renewed and ABC must offer the available license to the next applicant on the priority list for Gooding as required in IDAPA 11.05.01.013.02. Therefore, your request for reconsideration is denied. Enclosed are your returned checks." AR, a.

RECEIVED

MAY 16 2011

ORDER DISMISSING AMENDED PETITION FOR JUDICIAL REVIEW
and REQUEST FOR STAY- 5

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

III. ANALYSIS.

The Twenty-First Amendment to the United States Constitution confers broad powers upon the states over the sale of liquor. This police power is the most comprehensive and least limitable of governmental powers. *Rowe v. City of Pocatello*, 70 Idaho 343 P.2d 695 (1950). Police power may be defined generally as the state's power to make laws and regulations, within the bounds of constitutional restrictions, to govern, restrict, and regulate the conduct of individuals, and businesses for the promotion and protection of the public health, safety, morals and welfare. *Winther v. Village of Weippe*, 91 Idaho 798, 430 P.2d 698 (1967). Police power inheres in the state, without the necessity of constitutional grant or reservation, *Foster's Inv. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), and is exclusive to the state. *Crazy Horse, Inc., v. Department of Law Enforcement*, 98 Idaho 762, 572 P.2d 865 (1977). It is well settled that the matter of liquor control is within the powers of the states. *Adams Express Co. v. Commonwealth of Kentucky*, 214 U.S. 218, 29 S. Ct. 633, 53 L.Ed. 972 (1909).

The state's police power with respect to intoxicating liquors exists as a correlative of the state's duty to support paupers, to protect the community from crime, and to confine and maintain the criminal, since the liquor traffic is frequently a source of pauperism and crime. *45 Am. Jur. 2nd Intoxicating Liquors § 19*. In *State v. Calloway*, 112 Idaho 719, 84 P.27 (1906), the Idaho Supreme Court stated:

The business of selling intoxicating liquors is not considered as of equal dignity, respectability, and necessity as that of the grocery, dry goods, or clothing business, or many other occupations that might be mentioned, and from time immemorial its prohibition or regulation has been to be within legislative power under what is known as police power.

RECEIVED

MAY 16 2011

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

It is universally accepted that no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors. *Uptick Corporation v. Ahiln*, 103 Idaho 364, 647 P.2d 1236 (1982); *Gartland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951). The terms and conditions under which a liquor license is granted are subject to the pleasure of the legislature. *State of Idaho, Department of Law Enforcement v. Pierandozzi*, 117 Idaho 1, 784 P.2d 331 (1989). A liquor license is a grant or permission under government authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful. *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951).

Article III of the Idaho Constitution charges the state legislature to direct "efforts for the promotion of temperance and morality." IDAHO CONSTITUTION, Article III, § 26. The Idaho legislature has "full power and authority to permit, control and regulate or prohibit the manufacture, sale and transportation for sale of intoxicating liquors for beverage purposes." *Id.*

Pursuant to its constitution authority, the Idaho legislature passed the initial "Idaho Liquor Act" in 1934 in the exercise of the police power of the state. IDAHO CODE § 23-102. Also pursuant to its constitutional authority and responsibility for the enforcement of the police powers of the state of Idaho, the Idaho legislature exercised its authority when it enacted IDAHO CODE § 23-908, the statute that primarily controls the outcome of the present case.

The Idaho legislature established a quota system for issuance of incorporated city liquor licenses. "No license shall be issued for the sale of liquor on any premises outside the incorporated limits of any city except as provided in this chapter and the number of

ORDER DISMISSING AMENDED PETITION FOR JUDICIAL REVIEW MAY 16 2011
and REQUEST FOR STAY- 7

RECEIVED

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

licenses so issued for any city shall not exceed one (1) license for each one thousand five hundred (1,500) of population of said city or fraction thereof..." IDAHO CODE § 23-903.

The license at issue in this case is an incorporated city license for the city of Gooding.

The Idaho legislature also established liquor licensing requirements.

Under IDAHO CODE § 23-903:

The director of the Idaho state police is hereby empowered, authorized, and directed to issue licenses to qualified applicants, as herein provided, whereby the licensee shall be authorized and permitted to sell liquor by the drink at retail and, upon the issuance of such license, the licensee therein named shall be authorized to sell liquor at retail by the drink, but only in accordance with the rules promulgated by the director and the provisions of this chapter.

IDAHO CODE § 23-904 sets forth the fees for liquor licensing:

Each licensee licensed under the provisions of this act shall pay an annual license fee to the director as follows:

(3) For each license in a city having a population of more than three thousand (3,000), seven hundred fifty dollars (\$750) per annum.

IDAHO CODE § 23-907 addresses investigation into license applicants and how the Director of the Idaho State Police is to determine whether to issue a license and what he is to do if he finds a applicant is not qualified for some reason:

If the director shall determine that the contents of the application are true, that such applicant is qualified to receive a license, that his premises are suitable for the carrying on of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, he shall issue such license; otherwise the application shall be denied and the license fee, less the costs and expenses of investigation, returned to the applicant.

Licenses expire on the first day of their renewal month and are subject to renewal upon proper application. IDAHO CODE § 23-908. The renewal month is determined by

ORDER DISMISSING AMENDED PETITION FOR JUDICIAL REVIEW
and REQUEST FOR STAY- 8

RECEIVED

MAY 16 2011

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

the Director¹ of the Idaho State Police by administrative rule, which the Director has done. IDAPA 11.05.01.011.03. License renewals occur annually on their renewal month.

The Idaho legislature obviously anticipated that on occasion, a licensee may miss the renewal deadline because it also provided a 31-day grace period for a licensee who fails to file his renewal application on or before the first day of his renewal month.

IDAHO CODE § 23-908. If the licensee does not renew the license by the end of the 31-day grace period, and if the license is an incorporated city liquor license, which the license at issue here is, the license then becomes available and ABC offers it in writing to the applicant whose name appears first on the priority list for that city, which in this case is the city of Gooding. IDAPA 11.05.01.013.02.

There is no other means or mechanism by which a liquor license can be renewed outside the 31-day grace period. In other words, ABC has no agency discretion to renew a liquor license after the 31-day grace period following a license's expiration. The relevant text of IDAHO CODE § 23-908, is very clear in this regard:

All licenses shall expire at 1:00 o'clock a.m. on the first day of the renewal month which shall be determined by the director by administrative rule and shall be subject to annual renewal upon proper application. The director will determine the renewal month by county based on the number of current licenses within each county, distributing renewals throughout the licensing year. The director may adjust the renewal month to accommodate population increases. Each licensee will be issued a temporary license to operate until their renewal month has been determined. Thereafter, renewals will occur annually on their renewal month. Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before the first day of the designated renewal month. Any licensee holding a valid license

¹ The Director of the Idaho State Police has delegated his authority to the Alcohol Beverage Control Bureau and all applications and inquiries concerning alcoholic beverage licenses must be directed to the Alcohol Beverage Control Bureau. IDAPA 11.05.01.011.02.



who fails to file an application for renewal of his current license on or before the first day of the designated renewal month shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of the license. The licensee shall not be permitted to sell and dispense liquor by the drink at retail during the thirty-one (31) day extended time period unless and until the license is renewed.

Agency action must be affirmed on appeal unless the court determines that the agency's findings, inferences, conclusions or decision are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3). In this case, the Court finds that subsections (a) – (d) do not apply. If there is any application, it would be subsection (e). With that in mind, the Court turns to *Cheerleaders Sports Bar & Grill, Inc. v. The State of Idaho, Department of Idaho State Police, G. Jerry Russell*,² in which District Judge Kathryn A. Sticklen analyzed a failure to timely renew case on judicial review. Although this Court is not bound by Judge Sticklen's decision, the Court finds it instructive. She concluded: "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...Also, the fact that the Director may have discretion in some instances does not mean that there are not strict deadlines that he must honor and enforce." *Id.*, p. 5. Judge Sticklen also found that: "Because the Director did not have the authority or discretion to renew an expired license after the thirty-one (31) day grace period, the Director's decision to not renew Cheerleaders'

² Case No. CV-OC0814425, Fourth Judicial District of the State of Idaho, Ada County, Memorandum Decision and Order (November 13, 2009). Respondent includes a true and correct copy of this decision and asks that the Court take judicial notice of the same, pursuant to IRE 201(d).

ORDER DISMISSING AMENDED PETITION FOR JUDICIAL REVIEW
and REQUEST FOR STAY- 10

RECEIVED
MAY 16 2011
IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL

expired license for this very reason was not arbitrary, capricious, or an abuse of discretion.” *Id.*, p 8.

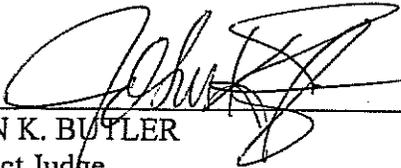
From this Court’s perspective, the Director cannot be found to have abused his discretion because in the context of timelines to renew the liquor license at issue, he simply had no discretion to abuse. The legislature enacted renewal requirements that are mandatory, and if not, the Director cannot renew the license.

Petitioner’s renewal application accompanied by the required fee mandated by law was not filed with the ABC on or before its renewal month nor within the 31-day grace period. His check was NSF, ABC tried to advise him of the problem to no avail, and the fee was not tendered again until approximately four months after the license expired and the 31-day grace period had run. For those reasons, the license has been lost and cancelled as to Petitioner and cannot be reinstated.

IV. CONCLUSION.

Based on the foregoing, the Court having carefully considered this matter and being fully advised in the premises, IT IS HEREBY ORDERED that the Amended Petition for Judicial Review and Request for Stay in this matter be, and hereby is, DISMISSED.

Dated this 10 day of May 2011.



JOHN K. BUTLER
District Judge