

MINUTES

ALCOHOL AND TOBACCO COMMISSION

June 24, 2014

CALL TO ORDER/NOTING OF QUORUM

Chairman Huskey called the meeting to order and noted the quorum and the attendance. Present were Vice Chairman Johnson, Commissioner Coxey and Commissioner Grubb. Also in attendance were Executive Secretary Rothenberg, Staff Attorney Allen, Prosecutor Mader, Superintendent Strittmatter.

Chip Garver, Mark Webb, Marc Carmichael, Jim Purucker, Peter Rusthoven, Steve Badger, Paul Manweiler, Matt Brase, Travis Barnes, Connie Vickery, Alex Intermill, Bart Herriman, Mike Maxwell, Greg Genrich, Diane Masariu, Keith Johnson and Jeff McKean were present as observers.

DISPOSITION OF MINUTES

Commissioner Grubb moved to approve the minutes for the June 3, 2014 meeting. Commissioner Coxey seconded. The motion was unanimously approved.

PROSECUTOR'S RECOMMENDATIONS

PARTIES' AGREED DISPOSITIONS – Prosecutor Mader recommended the Commission approve the Parties' Agreed Dispositions that were submitted.

Commissioner Coxey moved to approve the PAD forms that were submitted for the June 24, 2014 meeting, with the exception of Complaint #EX13017447, EX13017444, EX13015705 and EX13015703. She would like more time for review. Vice Chairman Johnson seconded. The motion was unanimously approved.

HEARING JUDGE'S RECOMMENDATIONS

No Hearing Judge's Recommendations

CONSIDERATION OF APPLICATIONS

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permits for renewal, either with or without a quorum at the local board meeting, which have been recommended by local boards and reviewed by our staff with the authority of the Commission. Commissioner Grubb seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permit applications for a new permit, or applications for changes in location or ownership or both of existing permits, which were either recommended by local boards or where a quorum was not present, and reviewed by at least two Commissioners. Commissioner Grubb seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permit applications for catering. Commissioner Grubb seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permits to be placed in escrow for not more than five years, which have been reviewed and recommended by a Commissioner as appropriate for escrow. Commissioner Grubb seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve one permit to be placed in sixth year escrow. Commissioner Grubb seconded. The motion was unanimously approved.

Nine hundred sixty-six (966) renewals approved, ninety (90) new and/or transfer applications approved, fifteen (15) permits approved for catering, five (5) permits approved for first year escrow, four (4) permits approved for second year escrow, three (3) permits approved for third year escrow, two (2) permits approved for fourth year escrow and one (1) permit approved for sixth year escrow.

RENEWAL LETTERS AND WAIVER OF FEES

Commissioner Grubb moved to approve the renewal and fee waived letters of extension for the preceding weeks. Commissioner Coxey seconded. The motion was unanimously approved.

APPLICATIONS FOR DISCUSSION

W 49-27964 SOUTHERN WINE AND SPIRITS OF INDIANA, INC. – See attached transcript.

DL18-27519 SUNNY AND JUGAD FOOD MART, INC. – Vice Chairman Johnson noted this is a renewal with the local board voting 4-0 to disapprove.

Vice Chairman Johnson moved to uphold the local board and deny the renewal. Commissioner Grubb seconded. The motion was unanimously approved.

DL43-30142 FREEDOM OIL LLC – Vice Chairman Johnson noted this is a new application with the local board voting 3-1 to disapprove.

Vice Chairman Johnson stated there were no remonstrators present. The Excise officer recommended approval of the permit. The other local board members stated there was no need for services at this location. They feel there are enough establishments.

Vice Chairman Johnson moved to uphold the local board and deny the new permit. Commissioner Grubb seconded. The motion was unanimously approved.

HD64-29929 ANGUIANO, LLC – Vice Chairman Johnson noted this is a transfer application with the local board voting 4-0 to disapprove.

Vice Chairman Johnson moved to uphold the local board and deny the transfer. Commissioner Grubb seconded. The motion was unanimously approved.

WH43-29941 FABIANO BROTHERS - See attached transcript.

W 49-09133 REPUBLIC NATIONAL DISTRIBUTING COMPANY OF INDIANA LLC – See attached transcript.

INACTIVE FILES

Commissioner Grubb moved to make sixty-two (62) permits inactive. Eight permits are subject to auction and fifty-four are not subject to auction. Vice Chairman Johnson seconded. The motion was unanimously approved.

OLD BUSINESS

WH49-29931 SPIRITED SALES LLC – See attached transcript.

NEW BUSINESS

REVOCAION OF EMPLOYEE PERMITS

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Scott J. Stillson, permit #BR1765892. Mr. Stillson will not be eligible to hold an employee permit until March 10, 2017.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Morgan B. Rozack, permit #BR1579005. Ms. Rozack will not be eligible to hold an employee permit until June 5, 2017.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Ryan N. McClintick, permit #BR1734179. Mr. McClintick will not be eligible to hold an employee permit until June 17, 2016.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Brooke A. Hicks, permit #BR1454269. Ms. Hicks will not be eligible to hold an employee permit until April 10, 2017.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxe seconded. The motion was unanimously approved.

POLICY DETERMINATIONS

No Policy Determinations

ANNOUNCEMENTS

No Announcements

ADJOURNMENT

Commissioner Grubb moved to adjourn the meeting. Commissioner Coxe seconded. The motion was unanimously approved.

Approved this 17th day of July, 2014.


ALEX HUSKEY, CHAIRMAN


DAVID JOHNSON, VICE CHAIRMAN


DALE GRUBB, COMMISSIONER


MELISSA COXEY, COMMISSIONER

VC Johnson First on the list is Southern Wine, permit #W 49-27964. It's an application for renewal. Having reviewed all the information supplied by both sides of the issue, the residency issue, at this time I would move to approve the application for renewal.

Comm Grubb Second.

Chair Huskey Motion by Mr. Johnson to approve the application for renewal.
Seconded by Mr. Grubb. Further discussion needed?

Comm Coxey Yes, Chairman. I just want to make a statement to the effect that I am personally bothered by the fact that we have taken two contrary positions recently as it relates to residency. In our...the Attorney General Opinion we received in 2009, they state that residency with respect to wholesalers violates the Commerce Clause. In the chilled beer case, they said, "In any event, residency requirements at levels other than the producer tier are constitutional." To me those are contrary statements. I personally would like to have more time to discuss it with the Attorney General so that they can explain to me the different opinions and also explain any distinguishing factors.

Huskey Mr. Johnson, did you have any addition?

Johnson The only thing I would have to say about it is we do not if or when there will be another explanation by the Attorney General's Office. If that comes, I'm sure we'll have plenty of opportunity to readdress the issue. So, I think the renewal should be approved at this time.

Coxey With respect to that, we were certainly able to delay Nelson Brothers long enough to get an Attorney General opinion. So, I

don't see this as any different, particularly in light of the fact that there would be no harm to the applicants. These applicant's would be able to continue to operate pending an advisory opinion from the Attorney General. So, that's why I don't see it as an issue.

Grubb I don't see how that differs from approval of the renewal and that process could go ahead and play out if one so desired for another opinion. They are going to be allowed to operate in either situation, so I'm not sure how Commission approval of the renewal changes the dynamic.

Coxey So are you saying that then the Commission could unilaterally seek the revocation of a permit, if the Attorney General gave us a different opinion?

Grubb I'm not a student of Title 7, but I would imagine that there is an opportunity that if someone's operating outside the purview of the definition of legality, that this commission probably has broad enough authority, or certainly the Chairman would take action.

Coxey Well, I disagree with you on that.

Grubb Well, I may be wrong.

Coxey Prior to a renewal, I believe the only method would be to go through the prosecutor and the Commission doesn't have the authority to tell the prosecutor what to do.

Grubb Worst case scenario would be one year. That's all the renewal is for.

Huskey Yes. Is there further discussion needed? This certainly has been the subject of much discussion. In fact, Mr. Rothenberg and I recently attended a NCSLA Conference. It was a residency was a subject of discussion there in one of the legal update sections. There's a lot of varying opinions about residency as it relates to anything other than the...as it relates to wholesalers and primary source. But, dealers and those retailers, certainly it seems that there is a lot of discussion that we can see that can easily be enforced there. So we've had an opportunity to review all of the matters that are before us at this particular time. Is...are we ready for a vote? All those in favor of approving this permit...

Johnson Aye.

Grubb Aye.

Huskey Opposed?

Coxey Aye.

Huskey Okay. Three ayes and one opposed. Motion carries.

Johnson Next on the list is Fabiano Brothers. It's an application for a new wholesaler's permit. The defining issue is the permit definition issue. I have reviewed all matters that were submitted. Having done so, at this time I move that we grant the application for this new permit.

Coxey Second.

Huskey Motion by Mr. Johnson to grant this application. Second by Ms. Coxey. Is there further discussion needed? Seeing there is none, all those in favor...

Johnson Aye.

Coxey Aye.

Grubb Aye.

Huskey Opposed? Motion carries.

Johnson National Republic. It's a renewal application for a wholesale permit. It has the same residency issue as did the Southern Wine file. At this time I would move to approve this application for renewal.

Grubb Second.

Huskey Motion by Mr. Johnson to move for approval. Second by Mr. Grubb. Is there further discussion needed? Seeing there is none, all those in favor...

Johnson Aye.

Grubb Aye.

Huskey Opposed?

Coxey Aye.

Huskey Thank you. Three yays and one nay. Motion carries.

Ex Sec Rothenberg Mr. Chairman, as of now, Spirited Sales is set for hearing on July 15th. Just a brief history as to what has been going on and the basis for bringing this up, as they requested a continuance. Just to bring everybody up to date as to what has gone on. We had hearings set in May and in June. Those were continued. On April 3rd, there was a public records' request sent from Spirited Sales. This request consisted of 30 different points, some of those having subsections. So far we have copied files. We've redacted files. We filled the requests. What is still being worked on though are emails that they requested over the last 10 years. On June 18th, Carolyn Bradley, of IOT, informed Spirited Sales that it would take three to four weeks to get those. After we receive those, we will have to go through, redact any information, search for the terms they are looking for and decide what is disclosable or not. That could take another one to two months. So this could take another two to three months. On June 19th, Mr. Laramore, who represents Spirited Sales, requested another continuance for this hearing. The previous continuances were requested due to not having all of the information that they needed yet. This was based upon the fact that these emails would not be ready yet. On June 20th, Mr. Maxwell filed an answer on behalf of Wine and Spirits, arguing against the continuance. He based this on the fact that in his statement the emails that Spirited Sales are waiting for are irrelevant to the Commission's decision on the matter. Past motives concerning similar voting issues are irrelevant and

questioning the motives behind a decision that has not yet been made is premature. His feeling, in general, I believe, at least his email stated that they are already questioning your decision that you have not made yet, one way or another. On June 23rd, Mr. Laramore responded to Mr. Maxwell's email, citing a string of cases, which basically stand for requiring agencies to use ascertainable standards to maintain consistency in administrative adjudications. In addition, he stated that under AOPA rule 4-21.5-5-12, they, Spirited Sales, may be precluded from probing the mental process of the Commission after the Commission has made a decision. In other words, if it would go to judicial review, if that's the way the decision went and the path that you went down, they would only be limited to what's on the record, and; therefore, to make a decision before that they had all that material that would preclude that material being used. In the end, I think the Commission is...in the end, the Commission's going to need to vote whether or not to grant this continuance and I'll give you my recommendation and my opinion and what it's based on. The purpose of the hearing really is to allow the Commission to decide whether or not there is a prohibited interest. The Commission has stated that. The Commission has stated that they would like to have a hearing and hear really all sides of the story there. You're decision, the Commission's decision, should be based on the facts that are presented. This includes any information that is turned in ahead of time, briefs, case citings, all of those things, as well as any

information that is presented at the actual hearing, which would be evidence, testimony, etc., etc., etc. This is what everybody is focusing on. Unfortunately, and I have forwarded everything I have gotten that has been submitted from everybody to the Commission, unfortunately, that's not what everybody is focusing on at all. We're focusing on other issues. The delays so far and the continuances have been caused by, I don't want to use the word "discovery" request, because it's not formal discovery, but information requests. That is why we have continued it. The key, and I think that a point on one of the emails is right, the purpose of the hearing is not to build a case against the decision that you haven't, the Commission hasn't made yet. That's what seems to be going on. Additionally, if you look at AOPA rule 4-21.5-12(b)(2), that rule states that, "A court could remand the matter back to the agency before the final disposition of the petition for review with the directions that the agency conduct further fact finding if the agency improperly admitted or excluded evidence from the record." So, they could, the court could, come back and go, "Commission, you need to make this decision based on this additional information that was gotten after you made your decision." That's what I believe that AOPA rule says. I don't think that this would preclude that. My recommendation, therefore, is to go ahead and have the hearing on July 15th. We've pushed it back several times. I don't think that any information that is not had by that date through all these emails,

which will take months and months to receive and then go through, will preclude that from being used if the Commission makes a decision to deny at judicial review, because of that AOPA rule I suggested. Again, a record has been made. All the emails are being gathered. They will be put in a file, all the requests that have been made, so there is a record of asking for continuances, etc., etc., etc. I do not think that...I do personally not believe what they are asking for, your past decisions, is necessarily going to be relevant to your decision that will be made on Spirited Sales. And your decision that needs to be made right now needs to be made based on the facts that are presented to you, not on past conversations that you may have had---and, you, meaning the Commission, past and present. Therefore, I would recommend denying the continuance. But, again, that's a voting issue by the Commission.

Coxey

I have a question.

Rothenberg

Sure.

Coxey

Who is harmed by granting the continuance?

Rothenberg

That's the same question you asked about, on Southern Wine, as well. Correct?

Coxey

Well, there is no harm with Southern Wine. That is sort of my same question here is who is harmed by granting the continuance?

Rothenberg

Well, when this all began, when this all began, we were receiving emails, I don't know, emails probably it got to the point where it was legally pushing for this thing to be heard

quickly---more and more quickly. I don't know if there's harm, but it's not going to be of any benefit either. I don't want to delve too much into what I think the case law says regarding past decisions, or deliberations of the Commission regarding previous permits. I have forwarded that on to the Commission, so you are all aware of the arguments that have been made on both sides. I just do not believe that there is any benefit into dragging this out any longer than it needs to be. If the court disagrees with that, then it will remand it back to the Commission and then you can take into consideration whatever the results of those...and there's an estimate because in the Monarch case, they made a similar request. They estimated over 20,000 emails would have to be combed over. You can take into account whatever the result is of filtering of those estimated 20,000 emails.

Coxey So let me ask you this.

Rothenberg Um hum.

Coxey Could they withdraw their application?

Rothenberg Anybody can...I, I...now you are asking my opinion, not the Commission's opinion?

Coxey Sure.

Rothenberg I think anybody can withdraw their application.

Coxey Could they reapply then, once they had the information that they needed?

Rothenberg I assume so. Nothing prohibits...

Coxey So, then what's the difference? What's the difference between just granting the continuance?

Rothenberg Let me ask you this. Why don't they just do that?

Coxey I'm asking you what your opinion is. I don't know what they are going to do.

Rothenberg My opinion is that the things they are waiting for are irrelevant to the decision that the Commission is going to make and this has been pushed back far enough. It's time to make a decision.

Huskey Do we have anyone making a motion?

Coxey Well, I'm actually...I've recused myself from the substance of the case, so I will recuse myself from the continuance, as well.

Johnson Would you tell me again what the request is for?

Rothenberg The request is to continue...

Johnson I mean, what are they asking in the latest request?

Rothenberg Oh, the request of the...well the request entails, again, there's 30 items. I don't have the request in front of me. We've fulfilled some of those because some of those were copies of files. So, we spent time going through files. What they are asking for are communications between the Commission, officers, myself, Commissioner Coxey, when she was staff attorney, any attorneys, agents of the Commission, that have to do with various things---prohibited interests, various sections of 7.1, anything mentioning Monarch, E F Transit, Spirited Sales. There's a long list.

Johnson Are you saying no to any of these requests?

Rothenberg No. It's just going to take...some of the requests they asked for we don't index our files that it would be over-burdensome to fulfill their request on some of these. My reply to them is that we need more specifics. We need them to be more specific, as far as their request. I don't think we've denied any requests. We've either fulfilled their request, we're waiting for these emails, or we've sent replies saying we need a more specific request. We can't access the information that you are asking for in a way you are asking for it.

Johnson To date, we haven't had any discussions about refusing any of their requests, then, with the Commission, at least. Is that correct?

Rothenberg Correct. I don't think that we have refused any of their requests. We have come back and say that we need something more specific because we can't access the data that you are asking for in the way that you are asking for it.

Johnson Well, maybe this is not the place, but it makes me wonder is a communication by email from one commissioner to another discoverable information?

Rothenberg There are exceptions to what's...I don't want to use discoverable. I'd rather use disclosable, because it's not exactly from discovery. It depends on what those communications are. For instance, one communication from one commissioner to another saying, "I think it's my opinion that XYZ..." That's not discoverable. A communication from one commissioner to another saying, "I just received a letter from John Smith." That

is discoverable because that's a fact. That's not a deliberative opinion. So there are categories that make things non-disclosable.

Johnson How long of a continuance are they asking for?

Rothenberg There was no specific timeframe.

Grubb If we do not grant the extension and we go to the hearing and at some point the point is made by Spirited Sales that there is forthcoming information they need a little more time on, that hearing could certainly be adjourned, or delayed, or put into recess for that time necessary, if they make a valid point.

Rothenberg Sure. You could bifurcate the hearing. I know that on some appeals I, myself, bifurcated hearings, waiting for more information that I didn't have at that specific hearing.

Grubb You seek a motion and then your recommendation is a motion to deny extended request for the hearing date.

Rothenberg My recommendation is to deny the continuance.

Huskey I'm seeking a motion.

Grubb So moved.

Huskey So moved to....

Grubb to deny the request for delay.

Huskey Motion to deny the request to delay. Is there a second?

Johnson Second.

Huskey Motion and second. All those in favor...

Johnson Aye.

Grubb Aye.

Huskey Opposed? Motion carries.