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2022

**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

Maniac Mac's/Mac's Market, Petitioner, V. Indiana Department of Homeland Security, Respondent.	Administrative Cause No.: DHS-0521-001138 Underlying Agency Action No.: FR102310
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Subject to the Ultimate Authority: Indiana Fire Prevention and Building Safety Commission

RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to IC 4-21.5 this Recommended Order is not final and shall be presented to the ultimate authority for issuance of a final order.

JURISDICTION & PROCEDURAL HISTORY

On July 8, 2021, this matter was remanded from the Fire Prevention and Building Safety Commission to the Office of Administrative Law Proceedings ("OALP"), and in response, the OALP Director assigned ALJ Caroline A. Stephens Ryker to preside over this matter. On May 20, 2021, Petitioner filed a Petition for Review appealing Respondent's May 6, 2021 denial of Petitioner's request for an unlimited certificate of compliance to operate as a retailer of consumer fireworks ("fireworks certificate").¹ The Indiana Fire Prevention and Building Safety Commission sent Petitioner's Petition for Review to OALP on May 21, 2021. Petitioner's Petition for Review was filed pursuant to Indiana Code 4-21.5-3-7 of the Indiana Administrative Orders and Procedures Act (IC 4-21-3, *et. seq.*), and accordingly, OALP has jurisdiction to hear this matter. IND. CODE § 4-15-10.5-12; IND. CODE § 4-15-10.5-13.

On January 10, 2022, Respondent filed Respondent's Motion for Summary Judgment ("RMSJ"), and on March 7, 2020, Petitioner filed Petitioner's Response to Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment, which Petitioner amended the next day ("PAMSJ"). In response, Respondent filed Respondent's Reply to Petitioner's Response to Respondent's Motion for Summary Judgment ("Reply"). Although a deadline for a Reply was not set by the undersigned ALJ, the undersigned ALJ grants Respondent leave to file a Reply in light of Petitioner's Cross Motion for Summary Judgment.

¹ This Recommended Order uses the term "limited fireworks certificate" to refer to a fireworks certificate issued under Indiana Code 22-11-14-4.5(b)(4) and the term "unlimited fireworks certificate" to refer to a fireworks certificate issued under Indiana Code 22-11-14-4.5(b)(1) or Indiana Code 22-11-14-4.5(b)(2).

BURDEN & STANDARD OF REVIEW

“...[A]t any time after a matter is assigned to an administrative law judge...,” a Party to an administrative proceeding can “...move for a summary judgment...,” which an ALJ must consider under Indiana Rule of Trial Procedure 56 (“Rule 56”). IND. CODE § 4-21.5-3-23. Summary judgment is only appropriate where “...there is no genuine issue as to any material fact...” and “...the moving party is entitled to a judgment as a matter of law.” IND. R. TR. PRO. 56(c). Material facts “...affect the outcome of the case...,” and genuine issues are disputes in narrative or conflicts in inferences that must be resolved before one Party’s version of events can be credited over the other Party’s. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). When considering a motion for summary judgment, an ALJ draws all reasonable inferences in favor of the nonmoving Party. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Importantly, “[I]ndiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.” *Id.* at 1004. To succeed on a motion for summary judgment, the moving Party must “...affirmatively negate...” the nonmoving party’s case. *Id.* at 1003.

Proceedings before an OALP ALJ under Indiana Code 4-21.5-3, *et. seq.* are conducted de novo. IND. CODE § 4-21.5-3-14(d). As the Party requesting the agency action (the approval of an application for an unlimited fireworks certificate), Petitioner has the burden of proving that Petitioner is entitled to the requested unlimited fireworks certificate. IND. CODE § 4-21.5-3-14(c).

FINDINGS OF FACT

1. Since at least 1981, Petitioner has operated out of a building located at 2083 Michigan Road, Plymouth, IN (“building”) that complies with the rules for a B-2 or M occupancy classification as set out in the Indiana building code adopted by the Fire Prevention and Building Safety Commission. (PAMSJ at Ex. 1, 2.)
2. Petitioner sold fireworks at Petitioner’s building between 1981 and 2003. (PAMSJ at Ex. 1; RMSJ at Ex. 11)
3. Although Petitioner did not sell fireworks between 2003 and 2020, Petitioner stored fireworks in its building during that time. (RMSJ at Ex. 11, 12.)
4. On May 9, 2020, Respondent approved Petitioner for an unlimited fireworks certificate that expired on December 31, 2020, and Petitioner sold fireworks pursuant to the 2020 unlimited fireworks certificate. (PAMSJ at Ex. 1, 2.)
5. Petitioner’s business does not primarily focus on the sale of fireworks, and since 2003, Petitioner’s building has been used to sell products other than fireworks in Petitioner’s grocery and produce market. (RMSJ at Ex. 11, 12.)
6. Petitioner was not registered as a wholesaler in 2005. (RMSJ at Ex. 1).

7. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such, and this Order's statement of Procedural History is incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Petitioner argues that Petitioner is entitled to an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1) and Indiana Code 22-11-14-4.5(b)(2).
2. Both Indiana Code 22-11-14-4.5(b)(1) and Indiana Code 22-11-14-4.5(b)(2) govern Class 1 structures that complied with the rules for a B-2 or M building occupancy classification before July 4, 2003 pursuant to the Fire Prevention and Building Safety Commission's Indiana building code. IND. CODE § 22-11-14-4.5(b)(1), (b)(2). Accordingly, Respondent's application for an unlimited fireworks certificate is governed by Indiana Code 22-11-14-4.5(b)(1) and Indiana Code 22-11-14-4.5(b)(2).

Indiana Code 22-11-14-4.5(b)(1)

3. To be issued an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1), the building that the applicant intends to use to sell fireworks must meet two requirements: 1) it must have been used to sell or store fireworks before July 4, 2003, and 2) it must not have been used to sell or store nonfirework products between July 4, 2003, and the date of the applicant's application. IND. CODE § 22-11-14-4.5(b)(1).
4. The Parties disagree as to whether the continuous storage of fireworks in Respondent's building meets the second requirement in Indiana Code 22-11-14-4.5(b)(1). Specifically, the second requirement of Indiana Code 22-11-14-4.5(b)(1) reads: "...in which no subsequent intervening nonfireworks sales or storage use has occurred." IND. CODE § 22-11-14-4.5(b)(1). The Parties' dispute focuses on the meaning of the phrase "sales or storage."
5. When words or phrases are undefined in a statute, then the "[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense; technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." IND. CODE § 1-1-4-1.
6. In the second requirement of Indiana Code 22-11-14-4.5(b)(1), the word "or" is used as a conjunction, which means that it indicates an alternative, indicates that two options are equivalent, or indicates uncertainty.² IND. CODE § 22-11-14-4.5(b)(1). As used in Indiana Code 22-11-14-4.5(b)(1), the word "or" indicates alternatives. *Id.*
7. Ultimately, the plain language of Indiana Code 22-11-14-4.5(b)(1) means that an applicant is not qualified for an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1) if

² The Merriam-Webster dictionary provides that "or conjunction" means the following: "[u]sed as a function word to indicate an alternative // coffee or tea // sink or swim, the equivalent or substitutive character of two words or phrases // lessen or abate, or approximation or uncertainty // in five or six days."

Or, MERRIAM WEBSTER, last visited Apr. 28, 2022, https://www.merriam-webster.com/dictionary/or?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

the applicant has used the applicant's building to do one of more of the following after July 4, 2003: 1) sell nonfireworks products or 2) store nonfireworks products. *Id.*

8. Importantly, either the sale or the storage of nonfireworks products creates an intervening break in an applicant's storage or sale of fireworks products such that the applicant would no longer qualify for an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1). *Id.*
9. As a result, if an applicant uses its building to sell nonfireworks products between July 4, 2003, and the date of the applicant's application, then the applicant does not meet the second requirement of Indiana Code 22-11-14-4.5(b)(1), even if the applicant never stopped storing fireworks in the applicant's building. *Id.*
10. Petitioner sold and stored fireworks in Petitioner's building prior to July 4, 2003. However, Petitioner's building was used to sell other products between July 4, 2003, and the date of Petitioner's application. Accordingly, Petitioner does not qualify for an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1).

Indiana Code 22-11-14-4.5(b)(2)

11. To be issued an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(2), the building that the applicant intends to use to sell fireworks must meet three requirements: 1) it must have been used to sell or store fireworks before July 4, 2003, 2) it must be a location at which the applicant was registered as a resident wholesaler in 2005, and 3) it must be used for a business that does not primarily focus on the sale fireworks. IND. CODE § 22-11-14-4.5(b)(2).
12. Petitioner sold and stored fireworks in Petitioner's building prior to July 4, 2003, and Petitioner's business is not primarily focused on the sale of fireworks. However, Petitioner was not registered as a wholesaler at Petitioner's building in 2005.
13. Although Petitioner designated some evidence concerning Petitioner's status as a registered wholesaler, the designated evidence does not give rise to a reasonable inference that Petitioner was a registered wholesaler at Petitioner's building in 2005. "The reasonableness of an inference is determined by whether the inferred fact is a probable hypothesis from the proven facts and circumstances in light of common knowledge and experience." *Fowler v. Campbell*, 612 N.E.2d 596, 602 (Ind. Ct. App. 1993). Petitioner's first set of affidavits assert that Petitioner was registered as a wholesaler in 2005; however, Petitioner's Exhibits 1 and 2 state that the first sets of affidavits included errors, and Petitioner's second set of affidavits do not reassert that Petitioner was registered as a wholesaler in 2005. Similarly, while the affidavits that Petitioner filed in support of Petitioner's Motion for Summary Judgment assert that Petitioner was a registered wholesaler at Petitioner's building "...in the years before 2006..." the affidavits do not indicate that 2005 was one of the years before 2006 during which Petitioner was registered as a wholesaler at Petitioner's building. As a result, Petitioner's designated evidence has not raised an issue of fact as to whether Petitioner was a registered wholesaler at Petitioner's building in 2005. (PAMSJ at Ex. 1.)

14. Accordingly, Respondent does not qualify for an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(2).

Conclusion

15. Petitioner is not entitled to an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1) or Indiana Code 22-11-14-4.5(b)(2).
16. Petitioner argues that the past approval of Petitioner's 2020 application for an unlimited fireworks certificate indicates that Petitioner's 2021 application for an unlimited fireworks certificate should similarly be approved by Respondent. However, as a state agency, Respondent only has the authority to grant an unlimited fireworks certificate under the statute as it is written. *Fishers Adolescent Cath. Enrichment Soc'y, Inc. v. Elizabeth Bridgewater ex rel. Bridgewater*, 23 N.E.3d 1, 3 (Ind. 2015). Given that Petitioner does not currently qualify for an unlimited fireworks certificate under Indiana Code 22-11-14-4.5(b)(1) or Indiana Code 22-11-14-4.5(b)(2), Petitioner's application cannot be approved, regardless of Respondent's past practices.
17. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such, and this Order's Statement of Jurisdiction is incorporated into these Conclusions of Law.

DECISION

Having duly considered the above, the undersigned Administrative Law Judge ("ALJ") for the Office of Administrative Law Proceedings ("OALP") hereby orders as follows:

1. Respondent's Motion for Summary Judgment is GRANTED.
2. Petitioner's Motion for Summary Judgment is DENIED.
3. Petitioner's Petition for Review and application for an unlimited fireworks certificate are DENIED.

Administrative Review

Administrative review of this Recommended Order may be obtained by Parties not in default by filing a writing with the Indiana Fire Prevention and Building Safety Commission within fifteen (15) days after the date that this Recommended Order was served that identifies with reasonable particularity each basis of each objection. IND. CODE § 4-21.5-3-29(d). A Party shall serve copies of any filed item on all Parties. Ind. Code § 4-21.5-3-17(c). Objections can be filed by email at buildingcommission@dhs.in.gov or by mail at 302 W. Washington Street, Room E-208, Indianapolis, IN 46204.

SO ORDERED: April 28, 2022



Hon. Caroline A. Stephens Ryker, Administrative Law Judge
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