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

In the Matter of	)	
	)	
FANTASIES ON 5TH AVENUE, LLC	)	OAH No. 16-0898-ABC
	)	Agency No. 16-17

DECISION

I. Introduction

Fantasies on 5th Avenue LLC, operates a "bar and pole dancing establishment" in Anchorage. When the LLC applied to renew its beverage dispensary license for 2016-2017, the Alcoholic Beverage Control Board received multiple public objections to that renewal. After considering the matter at three Board meetings over the course of six months, the Board voted unanimously to deny the club's renewal application on the basis that renewal of the license would not be in the best interest of the public. Fantasies requested a hearing to challenge that denial. After a multiday evidentiary hearing and briefing by both parties, this decision agrees that renewal of Fantasies' beverage dispensary license would not be in the best interest of the public. Because the Board's statutes and regulations vest it with broad discretion to determine whether renewal is in the public interest, and because there has been ample evidence presented that Fantasies is not operating in the public interest, the Board's initial decision to deny the renewal application is affirmed.

II. Factual and Procedural History

A. Background of the club and the LLC

"Fantasies on 5th Avenue" ("the club") is a "bar and pole dancing establishment" located at 1911 East Fifth Avenue in Anchorage. The club has existed at that location for a number of years, being operated at various times by different limited liability companies with (sometimes) different members and/or owners.[1]

The club is currently owned and operated by Fantasies on 5th Avenue LLC ("the LLC"), which was created in August 2012 with Kathy Hartman and Eugene Greaves as its two members.[2] Ms. Hartman has been involved in the operation of adult entertainment establishments in

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[1] *See* R. 103 (Ms. Hartman: "It's basically the same business it is now called Fantasies. We've just changed names through the years. It's been ongoing since '89."); Tatarinova testimony.

[2] In an attempt at clarity, Fantasies on 5th Avenue LLC, the licensee, is referred to as "the LLC," and "Fantasies on 5th Avenue," the establishment at which the license is operated, is referred to as "the club."

Anchorage, including the club, since the late 1980s.[3] Travis Gravelle, Ms. Hartman's son, has been the sole member of the LLC since July 2013.

The real property at 1911 E. 5th Avenue is owned by Ms. Hartman through a living trust.[4] The club purportedly occupies the premises under a commercial lease, although the lessor is Ms. Hartman herself, not the actual owner of the property (the trust).[5]

In June 2012, a judgment was entered against Ms. Hartman and other defendants in a federal wage and hour lawsuit. The court in that case found that Ms. Hartman and the club, along with other adult entertainment establishments in Anchorage, had violated wage and hour laws by misclassifying dancers as "independent contractors."

By the time the judgment was entered, the club was being run by "Debco," which was owned by Ms. Hartman's sister, Carol Hartman, and was using Debco's beverage dispensary License No. 561.[6] However, the Hartman sisters had a falling out regarding the operation of the club.[7] In August 2012, six weeks after the wage-hour judgment was entered, Kathy Hartman and Mr. Greaves created the LLC.[8]

B. Transfer of the LLC to Travis Gravelle

On July 17, 2013, one year after creating the LLC, Ms. Hartman transferred a 100 percent interest in the LLC to her son, Mr. Gravelle.[9] At the time that Ms. Hartman transferred the LLC to Mr. Gravelle, the LLC was still not yet operating the club. However, Ms. Hartman, Mr. Greaves, and club manager Logan Rammell were exploring options to secure a new beverage dispensary license for the club, with the larger plan that Mr. Rammell would then purchase both the club and the real property.[10]

Ms. Hartman testified in an April 2015 deposition that she transferred the LLC to Mr. Gravelle to help insure his future – essentially, providing his inheritance early – and also that she felt compelled to do so because she used funds from a life insurance policy (for which Mr.

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3 Hartman testimony. Ms. Hartman has previously been a member or owner of at least two other corporate entities – "Sands North" and "Debco" – that have owned and/or operated the Club at various times.

4 R. 138.

5 Ex. 1; R. 531-532.

6 *See* R. 144-148.

7 *See* R. 158-161.

8 *See* Division of Corporations, Business and Professional Licensing, Initial Report of Fantasies on 5th Avenue LLC. Accessed online through https://www.commerce.alaska.gov/cbp/Main/CorporationDetail.aspx?id=10006543 (accessed 11/8/2016). As discussed on the record at the evidentiary hearing, I may take official notice of publicly filed documents pursuant to 2 AAC 64.300.

9 Ex. A, pp. 2-6.

10 *See* R. 105, 161.

Gravelle is a beneficiary) to purchase the beverage dispensary license at issue in this dispute.[11] Additionally, however, Ms. Hartman also conceded at that deposition that she "very well may have" told Mr. Rammell that she wanted the liquor license to be in Mr. Gravelle's name "because if there were a lawsuit, he didn't have any assets."[12]

In an April 2015 deposition, Mr. Gravelle testified he did not know why his mother had given him the LLC, and that he had received no money from the club.[13] At the evidentiary hearing, Ms. Hartman said she did it "because I'm his mother," and because, at age 69, she has "no interest in running or owning a club."[14]

C. Purchase of License No. 1078

Around the same time that she transferred the LLC to Mr. Gravelle, Ms. Hartman and Mr. Greaves were actively involved in a series of transactions with Mr. Rammell to purchase a different beverage dispensary license – No. 1078 – from another licensee, Wicked Wrister Enterprises, for operation at the club. When those transactions began, the parties hoped that Mr. Rammell would purchase both the club and the property.

In May 2013, Wicked Wrister and Mr. Rammell's corporation, Club Vega Investments, had applied to transfer License No. 1078 to Club Vega to be operated at the club.[15] On July 22, 2013 – five days *after* Mrs. Hartman transferred the LLC to Mr. Gravelle – Mr. Greaves signed a contract, on behalf of the LLC, for the LLC to purchase License No. 1078 from Club Vega and Wicked Wrister.[16]

Of note, the contract identifies Mr. Greaves as a "member" (which he was not) of "Fantasies on Fifth, LLC" (which was not the actual LLC name, but was the name used in the purchase agreement).[17] On the same day, Mr. Greaves also signed an indemnification agreement with Mr. Rammell and Club Vega on behalf of "Fantasies on Fifth, LLC."[18] Mr. Greaves signed that agreement on his own behalf, and also signed for Ms. Hartman with a notation that he was doing so under a power of attorney.[19] Again, the agreement identified both Mr. Hartman and Mr. Greaves as members of the LLC, which by this time they were not.

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11 R. 111; Hartman testimony.

12 R. 119. To the extent Fantasies objects to the admission of this statement, it is admissible as a prior inconsistent statement. Evid. R.801(d)(1).

13 R. 95-96.

14 Hartman testimony.

15 R. 525-526.

16 R. 374-376.

17 R. 376.

18 R. 377-378.

19 R. 378.

Between July 5, 2013 (which was before both the transfer of the LLC and the execution of the contract for the LLC to purchase license No. 1078) and September 4, 2013 (which was after both the transfer and the execution of the contract), Ms. Hartman and Mr. Greaves paid $265,000 ($250,000 from the LLC's bank account, and $15,000 from "the Kathy Hartman Living Trust") to purchase License No. 1078.[20] At all times during this process, Ms. Hartman and Mr. Greaves had full access to the LLC's bank accounts, while Mr. Gravelle – the 100 percent owner of the LLC – did not.[21]

Club Vega was issued license No. 1078 in August 2013, at which point the club, being operated by Club Vega, began selling alcohol under license No. 1078.[22] The business relationship between Club Vega and the LLC soured almost immediately.[23] After considerable conflict, License No. 1078 was eventually transferred from Club Vega to the LLC in March 2014.[24] The LLC then operated license No. 1078 at the club until the circumstances that led to this appeal.

D. The LLC's operation of the club

As noted, Mr. Greaves has been heavily involved in the business aspects of the club since well before Ms. Hartman transferred the LLC to Mr. Gravelle. Mr. Greaves's significant level of involvement has continued during Mr. Gravelle's ownership. While Mr. Gravelle is the 100 percent owner of the LLC that owns the club, he has virtually no involvement in its operations at any level, leaving all operational details large and small to Mr. Greaves. The management structure and operations of the club, as could be discerned from the testimony and record evidence, is described below.[25]

1. Mr. Greaves's role[26]

Mr. Greaves is a former Suffolk County (New York) police detective who at one point ran a "sanitation and security" business, but has been retired since 1995.[27] Mr. Greaves met Ms. Hartman in 2007, and has since been heavily involved in the management of the club. Mr.

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20 R. 379, 380, 381.

21 *See* R. 0079-0087.

22 R. 105, 114, 516. At some point, Club Vega began doing business as "Fantasies on 5th." R. 517, 468, 471.

23 *See* R. 122, 139, 156-157.

24 R. 136-137; 465; 467.

25 The club ceased operations after the Board denied its renewal application in July 2016. However, because virtually all testimony about how the club has operated was given in the present tense (e.g. descriptions of how things "are done," not descriptions of how they once were done), and because the club contends that the cessation of operations is solely a function of the licensing action being challenged, which turned on how the club was operating before it shut down, the operations are largely described here in the present tense.

26 Unless otherwise noted, this description is derived from Mr. Greaves's testimony.

27 Greaves testimony; R. 112.

Greaves holds himself out as the club's "general manager" – a role he claims to perform without compensation because of his relationship with Ms. Hartman.

Mr. Greaves spends significant time outside of Alaska, but comes periodically (for approximately a week every month or two) to conduct "surprise visits" of the club's operations in order "to verify things were being run as [he] saw fit."[28]

According to Mr. Greaves, he oversees the general operation of the club and the business, but has appointed others to be responsible for various "departments" within the business. These individuals report to him, either orally or in writing, and provide Mr. Greaves with a weekly report on "the club's financials." When the club enters into contracts with managers, it is Mr. Greaves who signs – and possibly drafts – those contracts.[29] Mr. Greaves does not discuss managerial issues with Mr. Gravelle, because Mr. Gravelle "never expressed an interest."

Some of Mr. Greaves's involvement during Mr. Gravelle's ownership has been pursuant to a written power of attorney, but most has not. In October 2013, Mr. Gravelle signed a "General Power of Attorney for transactions and business of Fantasies on 5th Avenue LLC."[30] The document gives Mr. Greaves such authority for a period of one year.[31] Mr. Greaves testified that he "might" have drafted the POA form based on something he found on the internet. Apparently neither Mr. Greaves nor Mr. Gravelle noticed when the POA expired in October 2014.[32] Mr. Gravelle testified he was unaware of the one-year limitation, even though the specific period of time had been hand-written into the document.[33] Regardless, Mr. Gravelle considers Mr. Greaves to continue to have full authority to conduct business on his behalf, explaining that he trusts Mr. Greaves completely because "he is a great man."[34]

Unlike Mr. Gravelle, who at all pertinent times had no access to the LLC's bank accounts, Mr. Greaves had full authority over those accounts. The LLC pays $120,000 per year to Ms. Hartman in rent for the premises.[35] This payment is made via direct deposit that Ms. Hartman believes was "probably set up" by Mr. Greaves.[36] Despite Mr. Greaves's all-encompassing exercise of authority over both the club and the LLC, he claims to have had no part in filing taxes

28 Greaves testimony; R. 69.
29 *See* Greaves testimony; Ex. 8.
30 R. 174-178.
31 Ex. 4. Ms. Hartman is listed as an alternate POA. Ex, 4, p. 4.
32 Greaves testimony; Gravelle testimony.
33 Ex. 4, p. 3.
34 Gravelle testimony.
35 R. 488-490.
36 Hartman testimony.

for the LLC, in ensuring that a tax return is filed for the LLC, or in providing any records to the LLC's accountant for tax purposes.

While the club was operating its former liquor license, during the transfer of license No. 1078, and since that transfer, its main if not exclusive contacts with ABC Board staff were through Mr. Greaves.[37] Mr. Greaves's contacts with Board staff were extensive. Licensing program coordinator Sarah Oates interacted with Mr. Greaves more than with any of the thousands of licensees for which she is responsible.[38] During 2013-2014, and particularly during the transfer of the license to the LLC, Mr. Greaves called and visited Ms. Oates's office dozens of times.[39] Likewise, every single piece of paperwork Ms. Oates received relating to the club came from Mr. Greaves.[40] Ms. Oates was concerned about the extent and circumstances of Mr. Greaves's involvement. She considered it a "huge red flag" that Mr. Greaves was signing submissions to the Board under a power of attorney, while the actual licensee was not involved with the direct operation of the license.

Mr. Gravelle, Mr. Greaves, and Ms. Hartman all deny that Mr. Greaves receives any compensation for his extensive involvement in the management of the club.[41] Mr. Greaves does not claim any income from Fantasies on his personal tax returns.[42] According to Ms. Hartman, "he just likes doing this stuff."[43]

2. Mr. Gravelle's role[44]

It is undisputed that Mr. Gravelle is not involved in the day-to-day operation of the club. It is an understatement, however, to simply say that Mr. Gravelle is not involved in the day-to-day operation of the club. It is more accurate to say that Mr. Gravelle is not involved in the club at all. Although he is the legal owner, Mr. Gravelle leaves every aspect of the club's operation to Mr. Greaves.

Mr. Gravelle could not clearly identify when this arrangement with Mr. Greaves began, saying that Mr. Greaves has "always" had authority to act on his behalf, but also suggesting that

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37 Oates testimony.
38 Oates testimony.
39 Oates testimony.
40 Oates testimony.
41 Gravelle testimony; Greaves testimony. DOL wage hour investigator Donna Nass testified that it is a violation of wage and hour laws for a for-profit business to employ a manager without compensation. Nass testimony; R. 301 ("There is also nothing under Alaska wage law that allows for unpaid, volunteer labor that supports a for-profit business.").
42 Greaves testimony; Ex. 3.
43 Hartman testimony.
44 Unless otherwise noted, the description herein is derived from Mr. Gravelle's testimony.

Mr. Greaves was acting pursuant to a specific request that either Mr. Gravelle or his mother made "day one, when I took over," which he described as being in 2014, "when Logan Rammell gave it back up." (Again, Mr. Gravelle has been a 100 percent owner of the LLC since July 2013, and Mr. Greaves signed contracts on the LLC's behalf throughout the summer and fall of 2013.)

Unlike Mr. Greaves's monthly inspections, Mr. Gravelle visits the club infrequently – he estimated he's made four or five visits there during operating hours in the last two to three years. Mr. Gravelle does not set the club's policies. He does not know with any certainty how many employees it has. (However, he knows that "dancers are not employees" because "that's how it's been since I've been there.")

Before his mother gave him a 100 percent interest in the LLC, Mr. Gravelle had never run an LLC – or any business – before. Mr. Gravelle does not know what an LLC is, other than that "it's a company." Mr. Gravelle signed the LLC operating agreement, but doesn't "know anything about" it, and did not ask anyone why he was signing the 84-page document.

Mr. Gravelle does not know if the club operates under "management agreements" with various employees, or whether it has ever done so.[45] He does not know whether the club has an operating agreement with Mr. Greaves. He did not know that the POA he signed for Mr. Greaves was time-limited to one year, expiring on its own terms more than two years ago.

Until the Board action giving rise to this administrative appeal, Mr. Gravelle did not have access to the LLC's bank accounts.[46] He does not know what the club grosses in a week.[47] He does not know how much money either the club or he personally earns in a year. He believes that the club has generated income that is going into his retirement account, but he has no idea whether or how this is actually happening, and never checks on it.[48] He also does not know whether the club keeps the various income records that its contracts with dancers obligate it to keep (or whether those contracts in fact "bind anyone").[49]

Although his mother's accountant files personal income tax returns on his behalf listing income from Fantasies (and, apparently, omits to file any separate tax return for the LLC), Mr.

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45 Gravelle testimony ("You'd have to ask Mr. Greaves.").

46 Gravelle testimony. Mr. Gravelle was not credible in his description of when and how he finally got access to the LLC's accounts. He testified that adding himself to the account was his idea, that he thought it would be a good idea for him to be on the account, and that this occurred to him "maybe a year ago." Given Mr. Gravelle's utter lack of involvement in any aspect of the club or the LLC, it is simply not credible that he had this idea outside the context of this appeal. Moreover, Mr. Gravelle did not have signing authority when the LLC's banking records were subpoenaed in January 2016.

47 Gravelle testimony ("You'd have to ask Mr. Greaves.").

48 Gravelle testimony (that he believes Mr. Greaves makes these arrangements).

49 Gravelle testimony ("You'd have to ask Mr. Greaves.").

Gravelle does not know what information was used to prepare the 2014 return in the evidentiary record, "did not exactly review" that return, does not know why the return lists him as a "restaurant bar manager," does not know what any of the various identified business income amounts refer to, does not know what any of the hundreds of thousands of dollars of listed business expenses refer to, and does not know why the return – after comingling Mr. Gravelle's personal income with that of the LLC – lists a business loss of $53,375, and an adjusted gross income of negative $27,594.[50]

In short, not only does Mr. Gravelle rely on Mr. Greaves to manage the club, he exercises literally no oversight over that management. Nor has Mr. Gravelle been involved in the management of the liquor license. In contrast to Mr. Greaves's "countless" phone calls to Ms. Oates, Ms. Oates had never heard Mr. Gravelle's voice before the February 2016 Board meeting.[51] Mr. Gravelle's involvement in the license appears to be limited to signing forms – such as the 2016-2017 renewal application – when they are brought to him for his signature.[52]

3. Management agreements

While Mr. Greaves has held general managerial control over the club for some time, its day-to-day operations have been carried out by a series of "managers," which have included Logan Rammell, then Joe Ramirez and Yana Andreychuk, and, most recently, Claudine Chapman. For at least some of these individuals, the LLC – through Mr. Greaves – has signed a management agreement setting out the terms of the parties' relationship.

The use of management agreements at the club predates the LLC's ownership of the club. The evidentiary record includes a 2012 management agreement between Debco and Logan Rammell. That agreement transferred "day to day operating control" of the club to Mr. Rammell "subject only to the direction and control of the [Debco] as required by Title 4 and the regulations of the ABC Board," but with Debco "retaining overall control and management of the liquor license," "pending the sale of the business and the transfer of the liquor license" to Mr. Rammell, who was paid $2,000 per month to manage the business.[53] The agreement, signed by Debco President Carol Hartman and Mr. Rammell, indicates it was drafted by a law firm, and appears to have been filed for review with Board staff.[54]

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50 Gravelle testimony; Ex. 3, p. 7.
51 Oates testimony.
52 Gravelle testimony; Greaves testimony.
53 R. 144-148.
54 *See* R. 148.

On November 26, 2014, Mr. Greaves, acting on behalf of the LLC, signed a six-month-long management agreement with Yana Andreychuk.[55] Mirroring Debco's earlier agreement with Mr. Rammell, the agreement transferred "day to day operating control" of the club to Ms. Andreychuk, promised Ms. Andreychuk $2,000 per month to manage the business, and provided for the LLC "retaining overall control and management of the liquor license. . . pending the sale of the business and the transfer of the liquor license" to Ms. Andreychuk.[56]

Unlike the Rammell agreement, however, the Andreychuk agreement (1) does not reflect it was drafted by counsel (Mr. Greaves testified he "might have" drafted it), and (2) contained the following "incentive" clause:

> As an added incentive for the Manager, where the daily gross revenue exceeds two thousand dollars, the Manager shall receive seventy per cent of that amount above two thousand dollars, and the Owner shall receive thirty per cent of that amount over two thousand dollars.[57]

Also unlike the Rammell agreement, the Andreychuk agreement was never filed with Board staff, who were unaware of it until the Board meetings that led to this appeal.[58]

4. The club's relationship with dancers

As noted, a prior iteration of the club was a defendant in a federal wage and hour lawsuit, and was found to have violated wage-hour laws by misclassifying dancers as "independent contractors."[59] A judgment was entered against the defendants, including Kathy Hartman, in June 2012 – six weeks before Ms. Hartman created the LLC, and one year before she transferred it to Mr. Gravelle.

At some point prior to the transfer to Mr. Gravelle, the club abandoned the independent contractor label in favor of now classifying dancers as "tenants."[60] Dancers at the club now sign an "entertainer performance lease," stating that the LLC, as "landlord/owner," is "leasing" to the dancer "the exclusive right during normal business hours to use the stage and other portions of the

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55 Ex. 8. This agreement was part of the Board packet for the April 26 meeting. See https://www.commerce.alaska.gov/web/Portals/9/pub/ABC/Minutes/2016/4.26/Tab22e.pdf (accessed Nov. 2, 2016).

56 Ex. 8.

57 Ex. 8, pp. 2-3.

58 *See* Ex. B (colloquy between Director Franklin and Mr. Stibitz).

59 *Thornton et al v. Crazy Horse et al.*, 2012 WL 2175753 (D. Alaska 2012) at *7 ("The dancer compensation system at Fantasies was intentionally structured to shift the risk of poor business to, and impose the expense of running the business on, the individual dancers as if they were independent contractors as opposed to employees and evade the requirements of the FLSA and the AWHA.").

60 Ex. 14; Ex. F; Ex. G; Nass testimony; Greaves testimony; Gravelle testimony.

Premises so designated by [the LLC] for the performing of live topless/nude entertainment," at an agreed upon "rent."[61]

As "tenants," the dancers are paid nothing by the club, the only money they earn comes from tips, and they must pay "floor rent" to "the house" in order to work.[62] Dancers who do not earn enough in tips to cover their "floor rent" must withdraw money from the club's ATM machine to pay the club their "rent."[63]

The "lease" goes out of its way both to disclaim any employment relationship between Fantasies and its dancers, and to identify that relationship as that of "Owner/Landlord" and "Tenant/Entertainer." Section 7 of the "lease" is three full pages long, and devoted to the topic of "Status of Parties (sic) Relationship."[64] It begins with Paragraph 7(a)

> The parties acknowledge that the status created between Owner/Landlord and Tenant/Entertainer is that of a lease for joint use of the Premises, and that this status is a material element of this Lease. Both parties specifically negate any employment relationship.[65]

Ms. Tatarinova, who is not a native English speaker, denied knowing what this provision actually meant.[66] Ms. Tatarinova also described the "entertainer performance lease" as non-negotiable – "if you want to work there, you sign it."[67]

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61 *See* Ex. 14; Ex. F. The parties disagree about which version of the "entertainer performance lease" was most recently in use. It is undisputed that at one point, the club was using a version of the "lease" containing a page labeled "Entertainers Business/Relationship Selection Form," which described its purpose as "for [dancers] to choose between being a 'Tenant/Entertainer,' which is considered self-employed, or for [them] to choose to be an 'Entertainer/Employee' of the Club." Ex. 14, p. 3; Tatarinova testimony. The form purported to identify various "pros and cons for either choice," with "pros" of the "tenant" option listed as: "pick your own set schedule; keep all net dance income; control income capability; freedom of choice," and "cons" of the "employee" listed as "less income potential; club keeps all dance fees; cannot choose set schedule; must wear approved costumes." Ex. 14, p. 3. Ms. Tatarinova testified that this form was an older form and not currently in use, and that, in the more recent iteration of the lease agreement, dancers are automatically classified as "tenants" without being given a choice. Tatarinova testimony; Ex. F. Ms. Tatarinova's testimony about Exhibit 14 being an older version of the "lease agreement" is bolstered by the fact that this version of the "lease" lists the "Landlord/Owner" as "FANTASIES," whereas the version Ms. Tatarinova says is more recent – Exhibit F – lists the Landlord/Owner as "Fantasies on Fifth Ave, LLC." While the club being operated at 1911 E. Fifth Avenue has been known as "Fantasies" for years, the LLC is a far newer creation. Thus Exhibit F is more likely than not the version of the agreement most recently in use.

62 Ex. F; Tatarinova testimony.

63 Tatarinova testimony.

64 Ex. F, pp. 8-10.

65 Ex. F, p. 8.

66 Tatarinova testimony. Ms. Tatarinova's confusion is understandable, since the paragraph seems, inexplicably, to say that the parties' "status . . . is that of a lease." Ex. F, p. 8.

67 Tatarinova testimony. Dancers are also given a packet of "Rules and Regulations," dated 2014 and labelled "Examined, accepted, and approved [by] Gene Greaves, General Manager." Ex. G. Rules include that a dancer who misses her turn to go on stage will be fined $50, "which be (sic) collected at the end of the night along with your rent." Ex. G, p. 3. Other rules include that dancers "may head upstairs to change when 'last call' is announced," but "cannot come downstairs in [their] casual clothes till all customers are gone"; may smoke on an upstairs patio but "are not allowed to go outside period!"; may take breaks of "not more than 15 min." for "eating outside food"; may "not leave without paying [their] rent"; and "must have security walk [them] out." Ex. G, p. 4.

As described further below, the Alaska Department of Labor (DOL) has concluded that Fantasies' classification of dancers as "tenants" is invalid, legally unjustifiable, and a violation of wage and hour laws.[68] DOL also takes the position that Fantasies has also misclassified other types of employees – DJs, janitorial and cleaning services, security, and certain other professional services – as "contract" employees, and has failed to keep required records as to those employees.[69]

5. Safety issues

Both before the Board in July 2016, and again during the evidentiary hearing, former Fantasies dancer Yana Tatarinova – one of the individuals who had complained to the Department of Labor – testified that managers at the club prohibited or dissuaded other employees from calling 911 in situations where a 911 call would be an appropriate response. Ms. Tatarinova was under the impression that this practice arose out of concerns during prior iterations of Fantasies' existence, during which the club (while owned and operated by entities other than the LLC) perceived a risk to its beverage dispensary license due to frequent 911 calls. It was Ms. Tatarinova's understanding and experience that the club, while now under a different ownership structure, retained that practice.

Ms. Tatarinova described two specific occasions on which this occurred. In one instance, a patron appeared to be extremely intoxicated and began having a seizure. No one from the club called 911. Ms. Tatarinova wanted to call 911 but club manager Claudine Chapman "refused" to allow her to do so. Ms. Tatarinova believes the patron left the club with friends. In another instance, a dancer performing a routine fell approximately six feet, and hit her head. Again, Ms. Tatarinova wanted to call 911 but was discouraged from doing so. In that case, the dancer herself declined to seek medical attention and returned to work.

E. 2015-2016 Department of Labor investigation

In September 2015, three individuals complained to the Alaska Department of Labor (DOL) about Fantasies "not paying wages."[70] As a result of information they provided, and because of the club's prior history, DOL opened an investigation into the possible violation of wage and hour laws through the misclassification of employees.[71]

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68 Nass testimony; Ex. 10, p. 2.

69 Ex. 10, pp. 1-2.

70 Nass testimony.

71 Nass testimony. The misclassification of employees is an area of concern to DOL and to the U.S. Department of Labor. As explained by Ms. Nass, DOL's concern with misclassification is that it deprives employees of benefits they deserve. Misclassification concerns are not unique to Fantasies, nor to "adult entertainment" clubs

DOL's investigation was conducted by Donna Nass, an experienced investigator who has worked on numerous wage and hour investigations and enforcement matters involving Anchorage strip clubs, including Fantasies.[72] On November 5, 2015, Ms. Nass sent a letter to Mr. Gravelle and Mr. Greaves informing them that the Department's Wage and Hour Office "intends to conduct an investigation to determine [Fantasies'] compliance with" Alaska's minimum wage and overtime laws.[73]

Ms. Nass's November 5 letter directed Fantasies to submit certain required documentation, including payroll records, "time and earnings records for all labor," and "all employee handbooks," prior to an "opening conference" scheduled for late November.[74] The letter explained that information needed to be provided for anyone who had worked at the club in the last 24 months, regardless of how the club had classified those individuals.[75] The day after the opening conference meeting, Mr. Greaves sent Ms. Nass a letter denying that dancers at Fantasies were either employees or outside contractors: "Please understand that our dancers are neither employees nor outside contractors. The dancers are tenant/entertainers, and sign a lease agreement to this effect."[76]

The documentation the LLC provided in response to the November 5 letter was significantly less than what DOL had requested.[77] Accordingly, in January 2016, DOL issued administrative subpoenas to obtain records from Fantasies and its bank.[78] In response to the January 15, 2016, subpoena, counsel for the LLC sent a letter and additional records, including a list of dancers and the dates on which they had signed contracts, some of the signed contracts, and the LLC's 84-page operating agreement.[79] However, Ms. Nass concluded that Fantasies still had

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generally. Nass testimony. DOL works cooperatively with multiple state and federal agencies in investigating misclassification. Where a DOL investigation reveals information that would be pertinent to the work of another agency, DOL's practice is to share the information it finds. Nass testimony.

72 Nass testimony.

73 R. 72-73.

74 R. 72.

75 R. 73. (requesting documents for "all labor employed by [Fantasies] during the last 24 months," and explaining that "labor is defined as all individuals regardless of whether they are current or former workers, employed on a part-time, full-time, or volunteer basis, whether temporary or permanent, under contract, or employed as independent contractors").

76 R. 88-89.

77 Nass testimony.

78 Greaves testimony; Nass testimony; Ex, 10, p. 2.

79 Nass testimony; R. 78-87; Ex. 2. Ms. Nass had sought to obtain a copy of the LLC's operating agreement at the start of the DOL investigation, but it was not provided to her. When she specifically inquired about the operating agreement at the opening meeting, she was left with the impression that neither Mr. Greaves nor Mr. Gravelle appeared to know what an LLC operating agreement was. (According to Ms. Nass, Mr. Greaves responded to the request by giving her a copy of the club's business license.) The operating agreement provided by counsel in January 2016 is dated March 14, 2014, signed by Mr. Gravelle, and notarized. Ms. Nass was surprised by and skeptical about

not produced all the records in its possession and control.[80] Specifically, the DOL complainants had previously provided DOL with samples of financial records – such as dancer payout sheets, and an actual budget for the club – but the club had not produced these categories of records to DOL's investigators.[81] Ms. Nass also testified that she had also learned about other club documents during a dancer's worker's compensation hearing, and concluded that Fantasies had not been fully forthcoming with DOL.[82] Additionally, some of the records being sought – and which DOL indicates employers are required by law to maintain – were apparently not records that Fantasies was maintaining.[83]

As discussed further below, DOL continued its investigation into the spring of 2016, ultimately concluding in May 2016 that Fantasies had committed wage and hour violations.[84]

F. Renewal application for 2016-2017

In the meantime, shortly after DOL began its investigation, Fantasies submitted a 2016-2017 renewal application for beverage dispensary license No. 1078.[85] The notarized application, dated November 30, 2015, was signed by Mr. Gravelle.[86]

The renewal application form includes a declaration, under penalty of perjury, that the licensee has "examined this application [and that] to the best of [his] knowledge and belief it is true, correct, and complete."[87] The form also contains a declaration certifying that the licensee "ha[s] read and [is] familiar with Title 4 of the Alaska statutes and its regulations, and that in accordance with AS 04.11.450, no person other than the licensee(s) has any direct or indirect financial interest in the licensed business."[88]

Unknown by Board staff at the time of submission, but now undisputed, is that Mr. Gravelle did not actually fill out the renewal application form. Rather, while Mr. Gravelle signed the form, it was filled out by Mr. Greaves.

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the operating agreement in light of her November 2015 conversation with Mr. Greaves and Mr. Gravelle, in which neither acknowledged that the LLC had an operating agreement, nor even seemed to know what an LLC operating agreement was. In her testimony, Ms. Nass speculated – based on the response to her initial inquiries and the timing of the later production – that the operating agreement may have been back-dated. There is insufficient evidence in the record to conclude that the operating agreement was not signed on the date listed.

80 Nass testimony ("Fantasies has hidden documents and not produced documents."). R. 300-301.

81 Nass testimony; R. 301.

82 Nass testimony; Ex. D, part 3.

83 Nass testimony.

84 R. 300-302. Fantasies has alleged that Ms. Nass engaged in inappropriate conduct during the investigation. The evidence presented does not support that allegation.

85 R. 456-457.

86 R. 457.

87 *See* R. 457.

88 R. 457.

Board staff noticed irregularities in the renewal application. Specifically, the application form contains two separate sections for "Ownership" – one for licenses held by corporate entities, and one for licenses held by individuals. The renewal application for license No. 1078 had both sections filled out, first identifying the owner as "Fantasies on 5th Avenue, LLC," wholly owned by Mr. Gravelle, and on the next page identifying Mr. Gravelle as an "individual licensee/ applicant."[89]

On December 31, 2015, Director Franklin wrote to Mr. Gravelle, noting the irregularities in the renewal application and requesting further information about ownership and operation of the LLC – specifically, (1) proof of bank signatories and all changes thereto since 2012, and (2) the Current Operating Agreement of the LLC and all changes thereto since 2012.[90]

Mr. Gravelle responded on January 6, 2016, as follows:

> Please be advised that there is no change in ownership of Fantasies on 5th license. I had been out of town when the license renewal was completed by a friend. He obviously made an error in the renewal application. Again, there are no changes to Fantasies on 5th license.[91]

Mr. Gravelle's report that "a friend" had prepared the application for him did not explain why his own signature was on the application, accompanied by a declaration certifying that he had "examined this application [and that] to the best of [his] knowledge and belief it is true, correct, and complete."[92]

To Director Franklin, this sequence of events was "a huge red flag."[93] Board staff responded to Mr. Gravelle's letter on January 7, 2016, explaining that the LLC still needed to provide the requested documentation in support of the renewal application.[94]

G. Objections to renewal application

In the meantime, in addition to what Board staff saw as "red flags" about the renewal application, staff also received five written objections to the application – four from private individuals and one from the Department of Labor, Wage and Hour Administration, through its investigator, Donna Nass – as well as a municipal protest from the City of Anchorage.

89 R. 456-457.
90 R. 170, 347.
91 R. 346.
92 *See* R. 457
93 Franklin testimony.
94 R. 345.

1. Individual objections

The four private individual objections were each identical other than the handwritten name, address, and signature of the individual objector.[95] Each was dated January 5, 2016, and identified three bases for objection, as follows.

- 3 AAC 304.105 (b)(3) (application requires "a statement that no one other than the applicant has a financial interest in the business to be licensed."). As to this regulation, each of the four individual objections contained this statement:

> I contend that not only was this section of the application falsely filled out regarding financial interest. But the current Licensee was forbidden to drink on the property because of his alcohol related issues. Employees were threatened to be terminated if he was allowed to drink at the bar. When he was allowed to drink on the premises, it resulted in very awkward situations for both employees and patrons.[96]

- AS 04.21.030 ("responsibility of the licensee's agent's and employees"). As to this statute, each of the four individual objections read:

> I contend both sections (1) [and] (2) are being violated for the simple fact that the licensee is only a figurehead or nominal owner. That financial management is directly and indirectly controlled by Kathy Hartman and her boyfriend, Eugene Greaves.[97]

- AS 04.11.330 (renewal shall be denied if Board finds renewal is not in the best interest of the public). As to this statute, each of the four individual objections read:

> Federal and State wage and hour laws continue to be broken even after an Alaska District Court judgment was rendered against this establishment and their wage practices. Additionally, current state Wage and Hour investigation is underway. It is unconscionably (sic) that this establishment continues to reap the financial benefits of the liquor license while violating employee rights, theft of worker's wages, in blatant disregard of a district court's judgment, and in direct violation of Alaska's Alcoholic Beverage Control laws.[98]

2. DOL's objection

The Department of Labor sometimes submits objections to licensing applications where it believes that the licensee or applicant owes worker's compensation debt or is otherwise in violation of state labor laws.[99] Ms. Nass also serves on a state task force working with other state and federal agencies to address misclassification of employees as independent contractors,

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95 R. 341-344.
96 R. 341-344 (grammatical errors in original).
97 R. 341-344 (grammatical errors in original).
98 R. 341-344 (grammatical errors in original).
99 *See* Franklin Affidavit, p. 2; Franklin testimony; Nass testimony.

including referring findings of misclassification to other state and federal agencies.[100] In this case, DOL submitted an objection on January 19, 2016, averring that:

> The Department is conducting a wage compliance investigation into unpaid wages of workers and has ascertained credible information that: (1) there has been a misrepresentation of material fact on the application; (2) renewal of the license is contrary to the best interest of the public; and (3) a person(s) other than the licensee has direct and indirect financial interest in the business.[101]

DOL's objection was supported by affidavits from Ms. Nass and from DOL investigator Charlotte Hughes, which described their interactions with Mr. Gravelle and Mr. Greaves during the initiation of the Department's wage compliance audit; explained that banking records subpoenaed by DOL showed Mr. Gravelle to not have access to the business's funds; and described the Department's ongoing investigation into unfair wage practices.[102] Ms. Nass's affidavit addressed Fantasies' assertion that its dancers are "tenants" not covered by wage and hour laws, explaining: "The Department does not find this defense persuasive, and holds the position that Fantasies dancers are employees."[103]

3. Municipal protest

Lastly, the Municipality of Anchorage submitted a protest based on the letter of objection from the Department of Labor.[104]

H. Board meetings to consider the renewal application

The receipt of objections and a protest led the staff to place the renewal application on the Board's agenda for an AS 04.11.510(b)(2) hearing at its February 2016 meeting. Ultimately, the Board considered Fantasies' renewal application at three separate meetings before voting to deny the application.

1. February 10, 2016 Board meeting[105]

Board staff sent out notices for an AS 04.11.510(b)(2) hearing to be held on February 10, 2016. Mr. Gravelle and Fantasies' attorney attended that meeting, as did Ms. Nass, Deputy Municipal Attorney Todd Sherwood, and Director Franklin.

Ms. Nass testified about the status of the DOL investigation and her interactions with Mr. Gravelle and Mr. Greaves. She recounted that, in their meeting, Mr. Gravelle had been unable to

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100 Nass testimony.
101 R. 462.
102 R. 69-71, 90-92.
103 R. 71.
104 R. 461-462.
105 These descriptions are based on Exhibit B, the recording of the February 2016 Board meeting.

answer any questions about the business, and had relied exclusively on Mr. Greaves.[106] Ms. Nass also discussed the history of the 2012 wage-and-hour case against Ms. Hartman, Fantasies, and others, and opined that the club's response to that decision had been to simply change its characterization of dancers from "independent contractors" to "tenants." Ms. Nass explained that while DOL's investigation was still ongoing, DOL rejected Fantasies' characterization of dancers as "tenants," stating: "[t]he Department's position is that [the dancers] are employees, and that's where we intend to enforce."[107]

The Board also heard from Mr. Stibitz, counsel for Fantasies, who urged that DOL was "way out of bounds" in protesting renewal of the club's liquor license, and characterized DOL's allegations of wage-hour violations as "unfounded." Taking the position that "it shouldn't concern the ABC Board whether there's a wage-hour violation," Mr. Stibitz focused his attention on the ownership issue, arguing that Mr. Gravelle's lack of daily participation in the business didn't negate his ownership status, and that Title 4 does not require a licensee to manage the business "on a day to day basis." Mr. Stibitz testified that the LLC governance documents show no other owners, and that tax returns showed no income to anyone but Mr. Gravelle. He argued that Mr. Greaves's status as general manager was permissible under Title 4.

Director Franklin told the Board that her staff had investigated "the license ownership issue," and expressed to the Board a concern that Mr. Greaves was "running the license" under a power of attorney.

Board member Marvin Yoder then raised the issue of whether Fantasies was employing management agreements, an issue that has been of general concern to the Board. Director Franklin recounted that Mr. Greaves had told the Division's investigator that there were no written management agreements.[108] Mr. Stibitz indicated that he was aware of written management agreements with both Logan Rammel and Yana Andreychuk, but he did not know whether there was a written agreement with Mr. Greaves. Director Franklin expressed concern about the conflicting information the LLC had provided about whether it was using management agreements, noting: "If there are some, we're entitled to see them."

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106 Ms. Nass also shared that Mr. Greaves had represented to her that Kathy Hartman had hired a realtor and was trying to sell both the building and the company. Mr. Greaves denies making this statement.

107 Nine days after Ms. Nass's February appearance before the Board, counsel for Fantasies sent a letter to DOL Commissioner Drygas, threatening to sue DOL – and Ms. Nass "personally" – if DOL did not "withdraw its objection to License 1078 and refrain from making further objections to the renewal of the license." Ex. H. DOL did not withdraw its objection.

108 See R. 193.

After further discussion, the Board elected to table its consideration of the renewal application, with the chair noting that there was a constellation of concerns – including the ongoing DOL investigation and "the condition of the management agreement and whether or not it really exists" – warranting further exploration.

2. April 26, 2016 Board meeting[109]

The Board took up the renewal application again at its next meeting in April 2016. Several of the individual objectors were present, as well as Mr. Gravelle, Mr. Stibitz, Ms. Nass, Deputy Municipal Attorney Todd Sherwood, and Director Franklin.

The Board heard from Yana Tatarinova, who indicated she was speaking on behalf of herself and the other individual objectors. Ms. Tatarinova argued that renewal was not in the public's best interests because the club was continuing to violate wage hour laws "despite the judge's ruling." Ms. Tatarinova also opined that Mr. Gravelle was just a "figurehead," noting he was almost never at the club (three times in two years), and that he was not allowed to drink there.

The Board also heard from Deputy Municipal Attorney Todd Sherwood about the status of the municipal protest. Mr. Sherwood told the board that counsel for Fantasies had just requested a continuance of the Assembly hearing that had been scheduled for later that day. In discussions of whether to table the matter, Mr. Sherwood told the Board the protest hearing would likely be held before its next meeting. With the expectation that the municipal hearing would be held before the next meeting, the Board agreed to table the club's renewal application a second time.

3. July 20, 2016 Board meeting[110]

The Board took up the renewal application for a third time at its July 2016 meeting. In her memorandum to Board members prior to that meeting, Director Franklin provided an update on various issues related to the renewal application.[111] These included that DOL had now finished its investigation, and had concluded that Fantasies had violated wage and hour laws. Attached to Director Franklin's memorandum was DOL's May 10, 2016 letter informing Fantasies of its determination that Fantasies was in violation of wage-hour laws.[112] That letter read in pertinent part:

> A review of records submitted by Fantasies shows that DJ services, janitorial and cleaning services, and certain security and professional services were misclassified as contract labor, and it appears that no records of hours worked

109 These descriptions are based on Exhibit C, the recording of the April 2016 Board meeting.
110 The descriptions herein are based on Exhibit D, the recording of the July 2016 Board meeting.
111 Ex. 11
112 Ex. 10.

> were kept. Additionally, Fantasies has asserted that dancers are tenants, not paid employees. Fantasies paid no wages at all to dancers but instead required dancers to kick back a portion of their tips to Fantasies as 'rent.' . . . Therefore, **the Department finds that Fantasies' pay practices and failure to maintain records are in violation of Alaska Wage and Hour laws**[.]"[113]

Director Franklin's July 13 memorandum had recommended tabling the application a third time pending an Assembly hearing on the municipal protest, now scheduled for August 23.[114] Shortly before the meeting, however, Director Franklin learned that Fantasies had sought and received yet another extension of the Assembly's hearing.[115]

At the July meeting, DOL's Donna Nass confirmed to the Board that DOL had now concluded its investigation other than determining the amount of monetary damages owed. DOL had determined that the classification of Fantasies' dancers as "tenants" was invalid, that Fantasies' dancers were employees who should have been classified as such, and that Fantasies had not treated any dancers as employees. She summarized that Fantasies "admits they haven't paid them and won't paid them."

Mr. Stibitz argued that the Board should continue to table the issue, arguing that the Board should table its decision until Fantasies had had an opportunity to defend itself against the allegations of labor violations.

But Director Franklin suggested to the Board that its determination about the license renewal did not need to trail behind either the DOL audit or the Assembly hearing. Director Franklin summarized for the Board the procedural history of the matter, including that the Board had held an AS 04.11.510(b)(2) hearing in February, and had heard from the various objectors. The Director, and the Board's counsel, both reminded the Board that it had discretion to determine, based on the information before it over the past three meetings, whether renewal of the license was in the public interest. The Board then voted unanimously to deny renewal based on the license not being operated in the public interest.

I. Procedural history of appeal

In a letter dated July 21, 2016, Director Franklin formally informed Fantasies that its renewal application had been denied, writing:

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113 Ex. 10, p. 2 (emphasis added). The letter went on to say that Fantasies would be liable for damages – specifically, "for unpaid minimum wage and overtime, and an equal amount in liquidated damages" – but that the Department had not yet calculated the actual amount it believed was owing. *Id*.

114 Franklin testimony; Ex. 11.

115 Franklin testimony.

> At the July 20, 2016 meeting of the Alcoholic Beverage Control Board in Fairbanks, Alaska, the board voted to deny the renewal application for you Beverage Dispensary license, per AS 04.11.330(a)(1), that the renewal of the license would not be in the best interest of the public. The board held a hearing on the objections received to the renewal of the license pursuant to AS 04.11.510(b)(2) at the April 26, 2016 meeting, and the board had a preliminary discussion of the issues related to the license renewal at its February 10, 2016 board meeting.[116]

The Director's letter informed Fantasies of its right to an informal conference and to appeal the decision to the Office of Administrative Hearings.[117]

Fantasies did not immediately file an appeal with OAH. Instead, Fantasies filed a motion for preliminary injunction in Anchorage Superior Court.[118] The Division opposed, noting, *inter alia*, that Fantasies had not yet exhausted its administrative remedies.[119] On August 2, 2016, Superior Court Judge Dani Crosby granted the Division's motion to dismiss.[120]

On August 3, 2016, Fantasies, through counsel, submitted a Notice of Defense and request for hearing, as follows:[121]

> Fantasies disputes the ABC Board finding that renewal would not be in the best interests of the public. Fantasies disputes that anyone other than the named licensee holds a direct or indirect financial interest in the license. Fantasies disputes that it committed wage and hour violations, and asserts that even if such violations existed, they would not be grounds for non-renewal.[122]

Fantasies' transmittal letter indicated the club wanted a hearing scheduled "as expeditiously as possible."[123] The hearing was scheduled on an expedited basis over the objections of the Division.

The evidentiary hearing was held on September 28, 29, and 30, 2016. Both parties were represented by counsel. The Division presented the testimony of Yana Tatarinova, DOL Investigator Donna Nass, DCCED Records and Licensing Supervisor Sarah Oates, and Director Cynthia Franklin. Fantasies presented the testimony of Travis Gravelle, Kathy Hartman, and Eugene Greaves. Exhibits A through I, and 1 through 14, were admitted.[124] Both parties also

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116 R. 464. This letter slightly mischaracterizes the events. The AS 04.11.510(b)(2) hearing was held on February 10, 2016, and the April 26 meeting was a briefer discussion about tabling the matter. See R. 194; Ex. B, C.

117 R. 464.

118 Ex. 1 to Division's prehearing brief.

119 Ex. 2 to Division's prehearing brief.

120 Ex. 3 to Division's prehearing brief.

121 R. 309-310.

122 R. 310.

123 R. 309.

124 The Division offered as its first exhibit the entire 614-page agency record. At a prehearing conference, and at various times during the evidentiary hearing, Fantasies objected to hearsay contained in that record. Fantasies

submitted post-hearing briefing on the scope of the Board's authority to take a licensing action based on a proven or alleged violation of a law, when the cited law is not specifically identified in Title 4. The record closed on October 10, 2016.

III. Discussion

The Division takes the position that the totality of the circumstances supports non-renewal of Fantasies' beverage dispensary license. The Division's specific concerns and objections include: DOL's finding of ongoing wage-hour violations; public safety concerns related to suppression of 911 calls; Mr. Gravelle's complete lack of knowledge of or involvement in the business; Mr. Greaves's role in "running" the business and the license; an alleged undisclosed financial interest by Mr. Greaves and Ms. Hartman; and alleged undisclosed financial interests through management agreements.

Fantasies responds that the Board cannot properly consider the wage and hour issues. Fantasies further argues that there is nothing untoward about a licensee maintaining a hands-off approach and delegating authority to a manager, that there is no evidence of undisclosed financial interests, that there is no "totality of the circumstances" test, and that the catch-all exception to the public interest regulation is unconstitutional as applied.

A. Legal framework and standard of review

Licenses issued under Title 4 are issued for two-year periods, after which the licensee must reapply.[125] Just as with an initial application, any person "may object to an application for . . . renewal . . . by serving upon the applicant and the board the reasons for the objection."[126] When the Board has received an objection – or on its own initiative – it may hold a public hearing to assess the public's reaction to an application.[127]

Alaska Statute 04.11.330 sets out nine broad categories under which the Board "shall" deny a renewal application. The very first requires that "[a]n application requesting renewal of a license shall be denied if . . . the board finds, after review of all relevant information, that renewal

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specifically objected to hearsay contained in the affidavit of Donna Nass, the written objections submitted by the individual objectors, and an email from Division investigator Joe Hamilton. As noted above, where such hearsay statements have been considered, they have been used to supplement or explain non-hearsay evidence. *See* AS 44.62.460(d).

125 *See* AS 04.11.210(b); AS 04.11.270.

126 AS 04.11.470. Likewise, a local governing body may protest a renewal. AS 04.11.480.

127 AS 04.11.470; AS 04.11.510(b)(2). In pleadings and testimony, the Division has taken the position that the Board is *required* to hold a public hearing whenever an objection is received. This is not quite right. The Board's regulations only require it to *consider* whether to hold such a hearing. *See* 3 AAC 304.150. In any event, the Board undisputedly did hold multiple hearings to ascertain the reaction of the public to the application.

of the license would not be in the best interests of the public[.]"[128] 3 AAC 304.180, "Refusal to renew. . . in the public interest," then provides in relevant part as follows:

> (a) The factors the board will, in its discretion, consider in determining whether it is in the public interest to . . . refuse to renew . . . a license include
>
> (1) the applicant's [or] the applicant's affiliates' . . . histories of commission of
>
> …
>
> (B) a violation of AS 04 or regulations adopted by the board;
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> …
>
> (2) whether the applicant, the applicant's affiliates, the transferee, or the transferee's affiliates are untrustworthy, unfit to conduct a licensed business, or a potential source of harm to the public;
>
> … and
>
> (4) all other factors the board in its discretion determines relevant to the public interest.

The Board is permitted to review a renewal application without notice or hearing.[129] However, if the Board votes to deny a renewal of a license, as it did here, the licensee is then entitled to an administrative hearing conducted under Alaska's Administrative Procedure Act.[130] Because such a hearing concerns the denial of a renewal of a license, it is treated as the equivalent of taking away a license and the Director bears the burden of proof.[131] Following the hearing, unless there is a delegation (which has not occurred here), the matter then returns to the Board for a final decision.[132]

> The decision at the end of the second round will be a more rigorously tested version of the first decision. If it differs from the first, the difference may not stem from any 'errors' in the initial round. Instead, it is simply a new decision made with a different and more complete body of evidence. The task is to make the best decision possible at the executive branch level.[133]

The final decisionmaker in such cases – here, the Board – may defer to judgments made by agency staff, but is not required to do so.[134]

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128 AS 04.11.330(a)(1).

129 AS 04.05.510(b).

130 AS 04.11.510(b)(1).

131 *Alaska Alcoholic Beverage Control Board v. Malcolm, Inc*., 391 P.2d 441, 444 (Alaska 1964).

132 Of note, the July 21, 2016 Notice of a Right to Hearing issued by the Director informed the licensee that the Board's decision to deny renewal would become final within 15 days of that notice unless the licensee timely requested a hearing. Because a hearing was timely requested, the Board's decision on renewal will not become final until the conclusion of proceedings. *See* AS 44.62.520(a)(2).

133 *See In re Palmer,* OAH No. 09-0133-INS (Director of Insurance 2009), at pp. 6-7 (describing this decision-making paradigm in the context of professional licensing cases).

134 *Id*. at 7, citing *In re Alaska Medical Development – Fairbanks, LLC,* OAH No. 06-0744-DHS, Decision & Order at 5-6 (issued April 18, 2007; adopted by Commissioner of Health & Social Services in relevant part, Decision After Remand, Oct. 9, 2007).

B. Notice and due process issues

In its prehearing briefing and throughout the hearing, Fantasies argued that it was being denied due process due to a lack of clarity of the basis for the assertion that renewal was not in the public interest. The Division's counsel has steadfastly insisted that Fantasies and its counsel were well aware of the various concerns that had led to a best interest determination, noting that counsel attended all three Board hearings at which many varied concerns about the license were expressed.

When it filed its administrative appeal in August 2016, Fantasies requested a hearing scheduled "as expeditiously as possible."[135] Accordingly, the hearing was set on a fairly expedited basis – over the Division's objections. On September 22, 2016, as part of an order addressing a separate issue, the administrative law judge also addressed concerns about whether Fantasies had received sufficient notice under the APA:

> [F]antasies' motion raises concerns about the sufficiency of Director Franklin's letter, and, specifically, its compliance with AS 44.62.370. This matter is being held on an expedited schedule at Fantasies' request. The prehearing scheduling order set out a date (September 7) by which the parties could seek assistance with unresolved discovery disputes, and another by which parties could file procedural motions or motions in limine (September 16). Fantasies did not raise the issue of sufficiency of notice before either of those deadlines, and now only raises it in support of an argument that it should be allowed to call the final decisionmakers as witnesses.
>
> The Director argues that the July 21 letter "was legally and factually sufficient under the APA to inform Fantasies of the reason for the board's decision to deny renewal of its license."[136] But the letter provides no factual description other than a conclusory statement that renewal is "not in the best interest of the public." And at the prehearing conference, counsel for the Director indicated that she may intend to elicit testimony about issues beyond the scope of those raised in the objections and protest and acknowledged by Fantasies in its request for hearing.
>
> Expedited hearing or not, Fantasies is unquestionably entitled to fair notice of the factual basis for the Director's position that renewal is "not in the best interest of the public." Fantasies has notice of the matters raised in the objections and protest and during testimony at the Board's hearings on its renewal application. Fantasies does not have fair notice of any other issues.
>
> The Director will not be permitted to raise any other issues as a basis for nonrenewal unless the Director files a statement of issues compliant with AS 44.62.370(a) that identifies such issues. The deadline for such a filing will be the close of business on Friday, September 23, 2016.

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135 R. 309.

136 Opposition, p. 1.

> . . . [I]f the Director intends to rely on allegations outside of those matters raised in the objections and protest and/or in public testimony presented already before the Board, she must file an updated Statement of Issues no later than the close of business on Friday, September 23, 2016, identifying the "particular matters" that form the basis of the allegation that non-renewal is not in the public interest.

The Director did not file an amended statement of issues. Instead, the assistant attorney general representing the Division submitted the following emailed response:

> The Director will not be filing an amended statement of issues. The Director reaffirms her position that the one and only issue in this matter is the board's denial of renewal based on the public's best interests, pursuant to AS 04.11.330(a)(1). The Director does not plan to raise any other issues as a basis for nonrenewal. The factual basis for the [B]oard's position is as has been explored at three AS 04.11.510(b)(2) hearings, and as will continue to be explored at the upcoming hearing before ALJ Mandala. Because it is an evidentiary hearing, it is to be expected that the parties will be "allowed to introduce new evidence and arguments, and thoroughly examine the other side's evidence and arguments." [137]

The APA requires that a "statement of issues" must specify, in writing, not only "the statute and regulation with which the respondent must show compliance by producing proof at the hearing," but also "particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought."[138] The Director's letter identified the statute at issue (denial of renewal based on the public interest), but limited its explanation to identifying the dates on which the Board had heard testimony about the license renewal.

Certainly a preferable approach to that taken by the Director would be to either (1) include in the letter a factual statement identifying with further specificity the actual factual allegations underlying the agency action, or (2) file a separate, stand-alone statement of issues. That being said, Fantasies was not denied due process in this appeal. Director Franklin's letter incorporates by reference the three Board meetings at which the license renewal application was discussed. Those meetings were attended both by the licensee and by counsel. Issues specifically raised in the written objections and at the three Board meetings included: alleged wage-hour violations;[139] whether Fantasies was interfering in DOL's investigation;[140] dancers allegedly being prohibited from calling 911;[141] whether there are management agreements and, if so, whether those comply

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137 Director's Response to Order Denying Motion for Reconsideration, Sept. 23, 2016 (quoting *ITMO Deering*, OAH No. 14-0830-ABC, at 7-8).

138 AS 44.62.370(a)

139 This issue was raised in individual objections and the DOL objection, and at all three Board meetings.

140 This issue was raised by Ms. Nass in the DOL objection and at the July Board meeting.

141 This issue was raised by Ms. Tatarinova at the July Board meeting.

with Title 4;[142] whether someone other than Mr. Gravelle has an undisclosed financial interest in the business;[143] whether Mr. Gravelle was the true owner of the LLC and/or the license; [144] and the propriety of Mr. Greaves seeming to be "running the license."[145] With Mr. Gravelle and his counsel having attended all three meetings, it is disingenuous for Fantasies to suggest that it was somehow in the dark about the basis for the Board's decision.

The practice of "incorporating by reference" is not an ideal way to comply with APA notice requirements. And it is certainly not the case, as counsel for the Division suggested, that the Division could raise at the hearing entirely new factual issues without first filing an amended statement of issues. On balance, however, this decision concludes that Fantasies had sufficient notice of the allegations against it to meaningfully, and indeed vigorously, participate in the hearing. Its allegations of due process violations are therefore rejected.

C. Did the Division meet its burden of showing that renewal of Fantasies' beverage dispensary license in not the public interest?

1. Scope of the Board's inquiry and discretion

Under the Board's regulation, determination of whether renewal is in the public interest is a discretionary endeavor in which the Board considers numerous factors, including those specifically enumerated in the regulation – such as violations of Title 4 and its regulations; the applicant and affiliates' trustworthiness, fitness to conduct a licensed business, and potential as a source of public harm – and also "all other factors the board in its discretion determines relevant to the public interest."[146]

The Division argues that there was ample evidence presented to the Board that Fantasies was not operating in the public interest, and that there has likewise been ample evidence during the evidentiary hearing to support the same conclusion. The Division argues that this evidence, collectively, forms a more than sufficient basis upon which to determine that renewal of beverage dispensary license No. 1078 is not in the public interest. The Division urges a broad reading of 3 AAC 304.180, consistent with the broad language of the regulation itself, as well as with the Alaska Supreme Court's recognition of the unusual breadth of the Board's discretion.[147]

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142 This issue was raised by a Board member– and was discussed by Director Franklin and Fantasies' counsel – at the February 2016 Board meeting.

143 This issue was raised in individual objections and the DOL objection, and at the February Board meeting.

144 This issue was raised in individual objections and the DOL objection, and at the February Board meeting.

145 This issue was raised by Director Franklin at the February Board meeting.

146 3 AAC 304.180(a)(1), (2), (4).

147 *See Rollins v. Dept. of Revenue*, 991 P.2d 202, 207 (Alaska 1999); *State, ABC Board v. Decker*, 700 P.2d 483, 487 (Alaska 1985); *Boehl v. Sabre Jet Room, Inc*., 349 P.2d 585, 589 (Alaska 1960).

Fantasies argues that the Board may only make a "not in the public interest" finding if it finds that Fantasies has specifically violated some provision of Title 4. But this argument would render the "public interest" provision of AS 04.11.330(a)(1) superfluous. The Board already has authority to deny renewal for various violations of Title 4. For example, AS 04.11.330(a)(5) requires nonrenewal where "the requirements of AS 04.11.420-04.11.450 relating to zoning, ownership of the license, and financing of the license have not been met."[148] And AS 04.11.330(a)(6) requires non-renewal where "renewal would violate the restrictions pertaining to the particular license under this title[.]"[149] The legislature then *additionally* gave the Board discretion to deny renewal if it concludes that renewal would not be in the best interests of the public.[150] And, unlike other subsections of AS 04.11.330(a), subsection (a)(1), on the best interests of the public, does not specifically reference any part of Title 4.

Read in harmony with the rest of the statute, then, and in light of the broad discretion vested to the Board, this provision gives the Board authority to determine whether renewal is in the best interest of the public. Further, this inquiry is best understood in light of the Board's stated charge of carrying out the purpose of Title 4 "in a manner that will protect the public health, safety, and welfare."[151]

2. Factual findings relevant to whether renewal is in the public interest

The evidence presented supports the following findings:

- The Department of Labor, the agency responsible for identifying violations of and enforcing wage-hour laws, has made a determination that the LLC is misclassifying dancers, and other workers, to evade those laws.
- Managerial employees have discouraged dancers from calling 911 during apparent medical emergencies.
- The owner of the LLC has very little, if any, meaningful knowledge about how the club is being operated.
- The owner of the LLC has zero knowledge of or understanding about either (1) the actual requirements of Title 4, or (2) how the license is being operated. The owner of the LLC likewise has zero insight into or concern about how the license is being operated.
- The club is being "managed" by a shifting patchwork combination of individuals, sometimes under written management agreements.

148 AS 04.11.330(a)(5)
149 AS 04.11.330(a)(6)
150 AS 04.11.330(a)(1).
151 AS 04.06.100(a). To the extent Fantasies contends that the catch-all provision of 3 AAC 304.180(a)(4) is unconstitutionally vague, or otherwise exceeds the scope of the Board's authority, that argument is outside the scope of these proceedings.

- The management agreements most recently in use by the club give the manager a direct financial interest in the license.

As discussed further below, each of these findings may be appropriately considered by the Board in determining whether renewal is in the public interest.

a. DOL's finding of a wage-hour violation supports the conclusion that the license is not being operated in the public interest.

To the extent Fantasies argues that the Board cannot consider its alleged wage-hour violations in making its best-interest determination, this argument fails. To be clear, the Board is not adjudicating the wage-hour claim through this proceeding. But the Board is charged with ensuring that Title Four is being carried out – and, therefore, to ensure that licensed premises are being operated – in a manner that protects "the public health, safety, and welfare."[152] In carrying out that responsibility, it is appropriate for the Board to consider information from other agencies to the extent that information sheds light on the manner in which the license is being operated.

As a threshold factual matter, Fantasies' assertion that DOL filed its objection before there had been an allegation of wage-hour violations is incorrect. The DOL objection indicated that DOL had found "credible information" of wage-hour violations. The objection was accompanied by Ms. Nass's affidavit, in which she testified (1) that DOL rejects Fantasies' assertion about dancers being tenants, and instead "holds the position that Fantasies dancers are employees," and (2) that, "based on information received thus far," DOL believed "that from the period of December 2013 through November 2015, thirty or more workers did not receive minimum wage, or any wage, to which they were entitled under AS 23.10.065."[153] Likewise, Fantasies' claim that DOL has not yet made a determination of a wage-hour violation is also flatly incorrect. DOL's May 2016 letter expressly made that determination.[154] Additionally, while Fantasies' attorney stated during the evidentiary hearing that the club views the dancers as "independent contractors," and views that term as synonymous with "tenants" for purposes of classifying the dancers, the LLC's documents stake out a different position, repeatedly and emphatically characterizing the parties as "owner/landlord" and "tenant/entertainer."[155]

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152 *See* AS 04.06.100(a).

153 R. 71.

154 R. 300-302. The Director's memo to the Board in advance of the July hearing also expressly noted this finding: "DOL has finished its investigation and concluded that labor violations were committed. The only matter left for DOL is determining the monetary fine and/or restitution." R. 299.

155 *See. e.g.* Ex. F, pp. 8-10. One particularly troubling portion of the "lease" is a section purporting to provide for liquidated damages as well as "actual reasonable attorney's fees" in the event that a dancer, in a court action, even one brought by somebody else, ever "asserts that the relationship between the parties was other than that of landlord/tenant." Ex. F, pp. 9-10. Similar provisions have been held unenforceable by at least some federal courts.

As to whether and how the wage and hour issues factor into the Board's analysis, there is certainly sufficient information in the record from which the Board can conclude that Fantasies is engaging in labor practices that may not be in the best interest of the public. DOL has determined that the LLC – like its predecessor in operating the club – is purposefully misclassifying workers to shift to those workers the costs of doing business.[156] Ms. Nass explained that, from the point of view of the Department of Labor, misclassification of dancers "is another form of evasion of the statutes and regulations. It's a wage plan that is intended – outside of circumventing the laws – [to] deprive employees of benefits they deserve, like unemployment, workers' compensation, social security[.]"[157] Ms. Nass further noted that certain provisions in Fantasies' "Rules and Regulations" – such as the requirement that dancers who are not able to work during the course of the week are required to pay "the house" for missing their shift, "so that they have to come in and they have to start working just to pay off a debt and they're not earning any money" – are particularly problematic.[158]

Specialized wage and hour law experience or jurisdiction is not required to determine that the practices being described may not be in the best interest of the public. The Board may appropriately consider the expertise of another state agency in making its determination, and could certainly conclude based on this evidence alone that renewal of Fantasies' beverage dispensary license would not be in the best interest of the public. As described below, however, significant evidence about other practices further support the same conclusion.

b. Evidence about 911 calls support the conclusion that the license is not being operated in the public interest.

There is sparse but credible evidence that managerial employees have discouraged dancers from calling 911 during medical emergencies. Ms. Tatarinova credibly described two instances of being intimidated out of calling 911 when such a call would have been appropriate.

See, e.g., Wagoner v. NYNY, Inc., 2015 WL 1468526, at * 6 (S.D. Ohio 2015) ("Individuals may not contract away the right to be classified and compensated properly or the right to be free from retaliation for enforcing those statutory rights"); *Desio v. Russell Road Food and Beverage, LLC*, 2016 WL 4721099 (D. Nevada 2016) at * 3-5 ("this alleged provision of the Agreement is invalid since it operates as an impermissible waiver of Plaintiff's rights under federal wage laws."). At a minimum, given the significant potential for this clause to incentivize dishonest testimony, it was particularly concerning when counsel for Fantasies directed Ms. Tatarinova to review that clause during her hearing testimony, cautioning: "I just want to make sure you're aware of this paragraph before I ask you the question I'm going to ask you."

156 Nass testimony; Ex. 10. DOL has made a determination that the club is misclassifying workers. That DOL's audit is not yet complete vis-à-vis determining damages is not material for this Board's purposes.

157 Nass testimony.

158 Ex. G, p. 3; Nass testimony (referring to this practice as "borderline labor trafficking;" noting "that's one of the signs of labor trafficking when somebody has to work just to pay off a debt and not earn any money").

Fantasies did not call any witnesses with actual knowledge of the club's day-to-day operations to dispute Ms. Tatarinova's testimony about these events. Mr. Greaves denied any knowledge of a practice regarding 911 calls, stating that such a policy would be "asinine." Mr. Gravelle, the licensee, was not asked about the issue.

Based on the evidence presented, it is more likely true than not true the events occurred as Ms. Tatarinova described them. What is unclear is whether this practice is being implemented by careless day-to-day managerial staff, without the knowledge of the LLC – signaling a profound lack of oversight of the club's day-to-day operations – or whether it is happening at the direction of the LLC – signaling a profound lack of trustworthiness by those operating the license. Under either scenario, a practice of intimidating employees from seeking emergency assistance poses a significant threat to public health and safety, and supports the conclusion that renewal is not in the best interest of the public.

c. The licensee's complete lack of involvement in the business supports the conclusion that the license is not being operated in the public interest.

Alaska Statute 04.21.030 provides that a 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."[159] Here, the evidence presented does not support a finding that Mr. Gravelle has exercised such reasonable care. There is significant evidence in the record that the licensee (Mr. Gravelle) has nothing to do with the business – or the license – other than signing forms that others have prepared for him. In the meantime, the business – and the license – are being run by Mr. Greaves and by a hodge-podge of "managers" he has hired, all with no oversight whatsoever by Mr. Gravelle. Under the particular facts of this case, the licensee's complete lack of involvement in any aspect of the business or the license further supports a finding that renewal is not in the public's best interest.

Mr. Gravelle's lack of involvement was highlighted in the events that led Board staff to begin investigating the renewal application – specifically, Mr. Gravelle not only not filling out the renewal application himself, but apparently not reviewing it, and then engaging in deception about the circumstances under which it was filled out. At the hearing, Mr. Gravelle denied that Mr. Greaves had filled the form out after he signed it – that is, he denied signing a blank form. Whether the form was blank or complete before his signature, Mr. Gravelle's testimony (and the application's signed declaration) that he actually reviewed the application's contents before

[159] AS 04.21.030. This provision was expressly cited in the four individual objections submitted to the Board.

signing it are not credible in light of (1) the conflicting information on the form, (2) his letter stating that the error was due to being out of town when a friend filled out the application, and (3) his general lack of involvement in or awareness surrounding either the business or the license. These events surrounding the renewal application go to Mr. Greaves's and Mr. Gravelle's trustworthiness and fitness to operate a licensed business.[160]

Likewise, Mr. Gravelle's complete lack of knowledge regarding the club's policies and finances implicate his fitness to operate a licensed business. On the topic of taxes, it is troubling that Mr. Gravelle and Mr. Greaves both deny being involved in the preparation of the tax return. Mr. Gravelle appeared to have no personal knowledge of where the accountant got the information from which to prepare the tax return, and testified that he assumed it came from Mr. Greaves. Mr. Greaves denied being involved in that process. Given the sheer scope of Mr. Greaves's overarching control over the business, his testimony on this point is simply not believable. Conversely, Mr. Gravelle's apparent lack of knowledge or understanding of any part of the business, his lack of actual access to the business's financial accounts, and his willingness to cede all manner of control to Mr. Greaves all make his denial of being involved in the tax returns credible. In any event, the impression left is that Mr. Greaves and/or Mr. Gravelle are not being fully forthcoming about the financial situation at the club, while the LLC, for which no one takes responsibility, plays fast and loose with various laws.

In the midst of all of this, and coming back to whether Mr. Gravelle can be said to be exercising reasonable care in the operation of the license, there is simply no credible evidence of any intentional delegation by Mr. Gravelle. From the time that the LLC was transferred to him, others have continued to operate it without his involvement. The business and the license appear to be things that have happened to Mr. Gravelle, and from which he is totally disengaged.

Ms. Oates noted that this level of disengagement by a licensee is "unheard of."[161] Ms. Oates opined that, given his complete lack of involvement with the license, Mr. Gravelle is "not exercising his duty to make sure the day-to-day operations are being lawfully conducted."[162] It is Mr. Gravelle's willingness to delegate all aspects without any oversight – or even any awareness of what it is he is delegating – that most significantly underscores his unfitness to operate a licensed business. To be clear, this decision does not stand for the proposition that a beverage

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160 3 AAC 304.180(a)(2).

161 The one exception would be licenses held by "major corporations" or cruise ships, in which case the licensee typically interfaces with board staff through counsel. Oates testimony. Such a situation is not analogous to this one.

162 Oates testimony.

dispensary licensee cannot hire a manager, or must necessarily be involved in the day-to-day operations of the licensed premises. But the situation here went far, far beyond a businessperson's reasonable delegation of managerial duties.

d. The club's use of incentivized management agreements supports the conclusion that the license is not being operated in the public interest.

Finally, the management agreements themselves improperly confer a financial interest in the license – in plain violation of Title 4. Alaska Statute 04.11.450(a) provides that "[a] person other than a licensee may not have a direct or indirect financial interest in the business for which a license is issued." In the course of investigating the renewal application, Board staff learned that the LLC was using management agreements that specifically run afoul of this provision. The agreement with Ms. Andreychuk expressly directs a portion of profits to the manager when revenues exceed a certain threshold. The practical implication of this provision is to give the manager a direct financial interest in the business. Meanwhile, the licensee is unaware of this provision, or any other aspect of the management structure, because he has completely abdicated his own responsibilities with respect to ensuring compliance with Title 4. The use of agreements that violate Title 4 are plainly an appropriate factor for the Board to consider under 3 AAC 304.180 (a)(1)(B), and support the conclusion that renewal is not in the best interest of the public.

3. Viewed as a whole, the totality of the evidence supports the conclusion that renewal of license No. 1078 would not be in the best interests of the public.

The evidence in the record established clearly that Mr. Gravelle has unreasonably delegated his authority over the beverage dispensary license to Mr. Greaves. Mr. Gravelle, through his own volition, chooses to know nothing about how the business generally, or the license specifically, are being run. And – between the misclassification of employees, the lack of responsible day-to-day supervision, the evidence of safety violations, and the improper financial incentives built into the club's management agreements – the evidence establishes that renewal of license No. 1078 would not be in the best interest of the public.

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IV. Conclusion

The Division met its burden of showing that renewal of Fantasies' beverage dispensary license would not be in the best interest of the public. The Board's decision is, accordingly, affirmed.

DATED: November 21, 2016.

By: *Signed*
Cheryl Mandala
Administrative Law Judge

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 1 day of February, 2017.

By: *Signed*
Signature
Robert Klein
Name
Board Chair
Title

[This document has been modified to conform to the technical standards for publication.]