

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

ELIZABETH H. ROLLINS, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STATE OF ALASKA, DEPT. OF PUBLIC )  
 SAFETY, ALCOHOLIC BEVERAGE )  
 CONTROL BOARD, )  
 )  
 Appellee. )  
 )

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Appeal Case No. 4FA-11-1678 CI

**DECISION ON APPEAL**

**I. Introduction**

This matter is before the court on appeal from the Department of Public Safety, Alcoholic Beverage Control Board (“Board”). Appellant Elizabeth Rollins (“Rollins”) applied for a waiver of the requirement to operate her alcoholic beverage dispensary license in 2009 for 30 eight hour days.<sup>1</sup> The Board denied Rollins request for a waiver. Rollins appealed the Board’s denial of the request and requested a formal hearing in front of an administrative law judge. The hearing took place on 10 November 2010. The administrative law judge affirmed the Board’s decision on 10 March 2011. Rollins filed this appeal on 6 September 2011.

Appellant, Rollins, argues many points on appeal. The arguments boil down to the following issues: (1) whether an agreement Rollins made with the Board is clear; (2) whether this was a first waiver or a sixth waiver, (3) whether the Board participated in selective enforcement; (3) whether she failed to operate through no fault of her own; (4) whether a license

<sup>1</sup> AS 04.11.330.

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resets upon operation; and (5) whether she had a fair opportunity to present her case. Appellee, the Board, argues that (1) substantial evidence supports the Board's decision, and (2) Rollins was not denied due process.

## **II. Facts<sup>2</sup>**

In late 1990 Rollins applied to the Alcoholic Beverage Control Board to transfer a beverage dispensary license (liquor license) to herself. Rollins indicated she had "no premises" on the application as it was her intention to open an "early era" restaurant when she found the right location. The Board approved the transfer in September 1991. In December 1991 the Board granted Rollins a waiver of the 30-day annual operating requirement for the 1991 calendar year, and shortly thereafter granted Rollins's application for a renewal of her license without premises for 1992.

Rollins applied to transfer the license to a property she owned at 1403 Old Richardson Highway in North Pole in October 1992. On her application, she stated it was her intent to open a temporary facility called the "Alaska 1910" until she could find a better location. Upon notification by Board staff that she would need to apply for another waiver from the annual operating requirement if the license had not been operated for 30 days in 1992, she submitted a second waiver request. The Board approved the location transfer and waiver in March 1993; it also renewed her license for 1993. Shortly thereafter, Rollins was informed by Board staff that she would be issued a full license to operate when her premises were approved by the Department of Environmental Conservation (DEC) and the Fire Marshal's Office.

In May 1993, Rollins began renovations on the structure at 1403 Old Richardson

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<sup>2</sup> The facts that occurred between 1990 and 1995 are taken directly from *Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control Bd.*, 991 P.2d 202, 205-206 (Alaska 1999).

Highway to prepare for its opening as a bar. She had the premises inspected by an employee of DEC on November 3, 1993. The inspector informed Rollins that the premises needed certain improvements prior to receiving the Department's approval to operate, including new surfaces for the walls, ceilings, and floor, additional sinks, separate male and female restrooms, and handicap access to comply with the Americans with Disabilities Act.

In November Rollins submitted another waiver request of the 30-day operating requirement for the 1993 calendar year. In her request, she indicated that she placed the license on the Old Richardson Highway building with the intention to estimate the cost of a possible rehabilitation of the building, and that she continued to seek a more suitable location. She further indicated that she had mistakenly thought she could obtain a temporary permit to operate from DEC and would not have to meet all of the building requirements. The Board approved her third waiver and the renewal of her license for 1994-95.

Rollins did not open her bar in 1994. She stated she had anticipated purchasing another location in the summer of 1994 but the purchase fell through, so she again decided to open the bar at 1403 Old Richardson Highway. However, the Richardson Highway building was burglarized and a new boiler was stripped, causing the pipes to freeze. In addition, new sinks, a new urinal, and new door were stolen. According to police reports, the property had a history of being vandalized and burglarized. Rollins could not locate new equipment and was unable to meet the necessary health and sanitation requirements in time to open the bar by December 1. In December 1994 Rollins requested her fourth waiver of the 30-day operating requirement, and in her request indicated that she intended to open the bar before the end of 1995. The Board granted this waiver.

Rollins did not open her bar in 1995. In April of 1995 her building was again burglarized and Rollins stated the heat and water systems were damaged when the burglars tried to remove

the boiler. She decided to sell the building and liquor license and found a purchaser.

Unfortunately, the intended buyer backed out of the agreement upon learning from a *Fairbanks Daily News Miner* article that Rollins's property was located within a two-square mile area that the DEC had declared a public health alert area due to groundwater contamination.

After the deal fell through, Rollins once again decided to open the bar at that location and began to repair the heating system damaged in the April 1995 break-in and to meet other health and safety requirements. However, she asserted that she put the renovation on hold when her son was diagnosed with cancer.

In December 1995 Rollins requested her fifth waiver of the 30-day annual operating requirement for the 1995 calendar year. In her request she indicated that she made an attempt to ready her structure but DEC would not issue her a health permit. She asserted that new equipment installations required by DEC involved extensive plumbing renovations and she would not be able to complete this work prior to December 1.

The Board denied this request. Additionally, because the waiver of the annual operating requirement was necessary for the renewal of Rollins's liquor license, the Board also denied Rollins's license renewal. Rollins met with the Board at an informal conference in April 1996. No settlement was reached at this meeting and the Board affirmed its earlier decision to deny Rollins's waiver. A formal hearing was then held in Fairbanks in October 1996, at which Rollins represented herself *pro se*.

In November 1996 the hearing officer submitted his proposed decision to the Board, affirming the Board's earlier action. The Board adopted the decision. Rollins appealed to the superior court, which affirmed the Board's decision. In February 1998 Rollins filed a Civ. R.

60(b)(2) motion for relief from judgment, apparently based on new evidence, which was denied on March 17, 1998. Rollins then appealed to the Alaska Supreme Court.

The Alaska Supreme Court affirmed the superior court's order, which upheld the denial of the fifth waiver request, but remanded the case to the superior court to allow Rollins to seek relief pursuant to Alaska Civil Rule 60(b). The superior court granted Rollins relief from its earlier judgment and issued a decision reversing the Board's denial of the waiver application.

The Board and Rollins subsequently entered into a settlement agreement. The parties agreed that the Board would not appeal the most recent ruling of the superior court and would grant the sought after fifth waiver "with the express warning that it is a final waiver of the operating requirements and no future waivers will be granted for this license."<sup>3</sup> The Board approved the settlement at its 19 November 2003 meeting.

In 2004 Rollins leased facilities at 4625 Airport Road. Tracey Hester ("Hester") and her boyfriend Jim Goard ("Goard") managed Showboat which occupied the same building. In 2005 Hester purchased Rollins' license, with Rollins retaining a security in the license in the event Hester failed to make the agreed upon payments.<sup>4</sup> The license was therefore transferred to Hester who operated it in 2006.

Between early March and early June 2006 Hester informed Rollins of problems between herself and Goard and the building owner Terry Stahlman ("Stahlman") regarding the operation of the license. Hester stopped making payments in June<sup>5</sup> and Rollins was informed that Hester was in Mexico.<sup>6</sup> Rollins served paperwork on Hester and Stahlman. Hester resurfaced in August 2006. In October 2006 Rollins attempted to cash a make-up payment check from Hester,

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<sup>3</sup> Record p 33-35.

<sup>4</sup> Record p 130-132, 135-140.

<sup>5</sup> Record p 93.

<sup>6</sup> Record p 94.

but it came back as insufficient funds.<sup>7</sup> Hester had not renewed the license and was several months delinquent in local alcohol taxes, so Rollins renewed the license and paid the taxes in order to protect the license. Rollins subsequently foreclosed on the license.<sup>8</sup> In February 2007 Stahlman attempted to gain control of the license through legal action.<sup>9</sup>

Rollins filed an application with the Board to transfer the license from Hester back to herself. The Board approved the transfer in July 2007. Rollins operated the license for three months in 2007 and up to the spring of 2008 back at 4625 Airport Road. However, Rollins had problems operating there, alcohol was missing and Rollins received reports that Stahlman had opened the bar after closing. Rollins therefore left the establishment in June of 2008.

Rollins subsequently negotiated again with Hester and Goard for sale of the license, however an agreement was never reached. In 2009 Rollins filed an application to transfer the license from its then existing location to “no premises” after learning that the 49er club’s license had been transferred to the 4625 Airport Road premise.

Rollins subsequently went to Mt. McKinley Bank for a commercial loan to operate the bar she originally attended but stated she was denied due to economic conditions in Fairbanks. Rollins pursued leasing the 49er club, but it was ultimately leased to someone else and Rollins did not want to pursue a sub-lease.<sup>10</sup>

At some point the Board received a letter from Goard stating, “I own the property at 4625 Old Airport Way Fairbanks, Alaska 99709. October of 2007 Betty Rollins owner of Alaska liquor license #4446 opened her bar on my property. We had a month to month agreement for her occupancy. She closed her bar and was completely vacated off the property by May 1, 2008.

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<sup>7</sup> Record p 119.

<sup>8</sup> Record p 111, 116.

<sup>9</sup> *Stahlman v. Hester*, 4FA-06-03013.

<sup>10</sup> Record p 23.

I have not heard from her since. This letter is a formal request to release my property from this liquor license. Please do not hesitate to call me with any questions or concerns.”<sup>11</sup>

On 19 August 2009 the Board wrote a letter to Rollins stating that: “it has come to our attention that you lost the lease to the Airport Road location as of May 2008, based on the letter received from James Goad. Please be aware that your license must be operated for at least 30 eight hour days during each calendar per AS 04.11.330. If you are not able to operate your license for the prescribed period noted above during the 2009 calendar year, you will face loss of your liquor license. Based on the fact that you do not have a location at this time, you must find a suitable location and file a transfer application, and be able to operate the license for at least 30 eight-hour days in 2009. Upon review of the history of this license, I must remind you of the settlement agreement yourself and former Director Douglas Griffin, which was approved by the ABC Board on November 19 2003. Per the terms of the agreement, item #2 stated: ‘the fifth waiver request be granted with the express warning that it is the final waiver for the operating requirement and no future waivers will be granted for this license.’ Therefore, based on his previous agreement and the fact that you have not operated the license during 2009 (based on Mr. Goad’s letter), I must warn you that this license must be operated during calendar year 2009 for at least 30 eight hour days. If an application of transfer of location has not been received in this office, and a temporary approval cannot be issued for operation prior to December 1, 2009, this license will go to the Board for denial at its January/February 2010 meeting.”<sup>12</sup>

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<sup>11</sup> Record p 27.

<sup>12</sup> Record p 28.

Rollins did not operate the license in 2009. On 21 October 2009 Rollins filed an application for a waiver of operation for the license.<sup>13</sup> The hearing on the application before the Board occurred on 4 May 2012.<sup>14</sup>

On 4 May 2010 the Board considered Rollins application for a waiver of the operational requirement for the license. The Board voted 5-0 to deny the application.<sup>15</sup> Rollins subsequently exercised her right to a formal hearing.<sup>16</sup> Administrative Law Judge Andrew Hemenway was assigned to preside over the hearing.<sup>17</sup> He issued written prehearing orders and held prehearing status and scheduling hearings. The formal hearing occurred on 10 November 2011. Both parties additionally filed post evidentiary hearing written briefs.<sup>18</sup> The administrative law judge issued a proposed decision affirming the Board on 10 March 2011.<sup>19</sup> The Board adopted the decision on 24 March 2011.<sup>20</sup>

On 8 April 2011 Rollins filed a written request that the Board reconsider its decision to deny her request for a waiver of operation of the license.<sup>21</sup> The Board denied Rollins request for reconsideration on 19 April 2011.<sup>22</sup>

### **III. Legal Standard**

Courts review an administrative agency's factual findings under the substantial evidence test.<sup>23</sup> "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as

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<sup>13</sup> Record p 22.

<sup>14</sup> An excerpt of the hearing was filed with the court.

<sup>15</sup> Record p 2.

<sup>16</sup> Record p 1, 3.

<sup>17</sup> Record p 6.

<sup>18</sup> Record p 197-208.

<sup>19</sup> Record p 215-226.

<sup>20</sup> Record p 245.

<sup>21</sup> Record p 249-251.

<sup>22</sup> Record p 294.

<sup>23</sup> *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2002).



adequate to support a conclusion.”<sup>24</sup> An agency's decision “need not be the only possible solution to the problem, for it is not the function of the court to reweigh the evidence or choose between competing inferences, but only determine whether such evidence exists.”<sup>25</sup>

#### IV. Discussion

Even if the court were to conclude that the 2003 agreement between Rollins and the Board was unclear<sup>26</sup> and classify her waiver as a first waiver<sup>27</sup> instead of a sixth waiver, the court finds that substantial evidence exists to support the decision that Rollins did not establish an absence of fault in failing to operate the license. Under AS 04.11.330(a)(3) an application requesting renewal of a license shall be denied if the applicant has not operated the licensed premises for at least 30 eight-hour days during each of the two preceding calendar years, unless the board determines that the licensed premises are under construction or cannot be operated through no fault of the applicant.<sup>28</sup>

Rollins stopped operating at the airport location in June of 2008 due to problems with others at the location stealing her alcohol and operating her bar after hours. Therefore, in order to operate in 2009 Rollins knew she would have to lease/sublease from another establishment or purchase/renovate an establishment of her own. Rollins went to Mt. McKinley Bank for a commercial loan to operate the bar she originally intended, but stated she was denied due to

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<sup>24</sup> *Lindhag v. State, Dept. of Nat. Resources* 123 P.3d 948, 952 (Alaska 2005)(citing *Bradbury v. Chugach Elec. Assoc.*, 71 P.3d 901, 905 (Alaska 2003).

<sup>25</sup> *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

<sup>26</sup> The court notes that it does find the agreement to be clear that Rollins could not receive future waivers herself if she were to continue to hold on to the license. The court notes that the agreement gives warning to any potential purchaser of the license that the Board reviews the waiver history of the license (and the license obviously has previous waivers). Rollins' argument that the license reset when it was sold will be addressed later in the decision.

<sup>27</sup> Rollins' argument that if her waiver were classified as a first waiver, it must be granted by the Board must also fail. As the ALJ noted, “That the Board has never denied a first application for a waiver (an assertion that the executive director does not deny) does not mean that the Board lacks authority to do so. To the contrary, under AS 04.11.330(a)(3) and 13 ACC 104.107, the Board has express authority to deny even a first application for waiver, and indeed it must deny a first application for waiver unless it determines that the licensee is not at fault or the premises are under construction.”

<sup>28</sup> AS 04.11.330(a)(3).

economic conditions in Fairbanks. Rollins also pursued leasing the 49er club, but it was ultimately leased to someone else and Rollins did not want to pursue a sub-lease after her previous experience at the Showboat.

The burden of proof was on Rollins to show that her non operation was based on an absence of fault.<sup>29</sup> The facts discussed above show that Rollins was faced with business choices and ultimately found them to be unfavorable and chose non-operation. Rollins situation in 2009 was not similar to the previous situations where the Board found an absence of fault and granted her waivers, such as burglary of her location, or to allow her to renovate her building. The court finds that substantial evidence exists to support the Board's decision to not grant Rollins a waiver based on absence of fault.

Rollins argument that the license reset when she sold it to Hester also must fail. Again the 2003 agreement between Rollins and the Board warns Rollins that if the license is sold, the Board will review the waiver history by license. Rollins argument that Hester should have been warned is irrelevant because it is Rollins that is now requesting the waiver in 2009 and Rollins clearly had warning from the Board that it would review the waiver history. The Board additionally warned Rollins in 2009 that she needed to operate the license in 2009. Rollins was therefore put on notice that based on the agreement and history of the license that the sale had not reset Rollins obligation to operate the license.

Rollins claims of selective enforcement are also without merit. While Rollins spent a considerable time researching the amount of waivers granted to other licenses, she was not able to find a license that had the exact same waiver history as hers. The ALJ considered Rollins' research with respect to the waiver history of several licenses including Appleby's, Bonanza

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<sup>29</sup> *State, Alcoholic Beverage Control Bd. v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

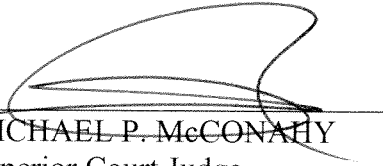
Grill, and Boston's, but concluded that Rollins' license was a case of first impression for the Board. In order to make a prima facie case that the Board selectively enforced the annual operating requirement in violation of Rollins's right to equal protection, Rollins would have to show that the Board intended to discriminate against her based on an arbitrary or unjustifiable classification.<sup>30</sup> Since other licenses did not have the same waiver history as Rollins, Rollins did not meet her initial burden of producing evidence demonstrating discriminatory intent.

The court finds that the Board also did not violate Rollins' right to procedural due process. The court finds that Rollins was warned by the Board in the agreement and again in 2009 that she needed to operate her license. The court has reviewed the entire record and also finds that Rollins was granted extensions when requested and had a fair opportunity to present her case.

## V. Conclusion

The Court having reviewed the Administrative Record holds: The determination of the Board is **AFFIRMED**.

**Dated** at Fairbanks, Alaska this 26<sup>th</sup> day of April, 2012.

  
MICHAEL P. McCONATHY  
Superior Court Judge

I certify that on 4/30/12  
copies of this form were sent to:

CLERK: DS

Rollins - mail  
AGC/Anch - mail

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<sup>30</sup> See *Gates v. City of Tenakee Springs*, 822 P.2d 455, 461 (Alaska 1991) (citing *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1040 (Alaska 1989)).