

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF COMMERCE,  
COMMUNITY AND ECONOMIC DEVELOPMENT

In the Matter of )  
 )  
Houston Lodge, Incorporated. ) OAH No. 05-0402-TOB  
 ) Agency Case No. 0501-05-062

NOTICE TRANSMITTING FINAL DECISION

Attached is the Department of Commerce, Community and Economic Development's (DCCED's) final decision in this matter, which the Commissioner's designee adopted on August 24, 2006.

A party may request reconsideration of the decision by filing a petition under 12 AAC 12.845 within 20 days after issuance of the decision. Send the motion for reconsideration to the following address:

Office of Administrative Hearings  
Attn. DCCED  
P.O. Box 110231  
Juneau, Alaska 99811-0231

At the same time, send a copy of the petition to the opposing party's legal counsel, or to the opposing party if not represented by counsel.

Judicial review of DCCED's decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 25<sup>th</sup> day of August, 2006.

By: \_\_\_\_\_  
Kim Rechin  
Office of Administrative Hearings

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

AAE Drinkwater  
D. Burton  
A. Lee Peterson

Signature

Date

8.25.06

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL FROM THE COMMISSIONER OF THE DEPARTMENT OF COMMERCE,  
COMMUNITY AND ECONOMIC DEVELOPMENT**

IN THE MATTER OF )  
 )  
HOUSTON LODGE, INCORPORATED) )  
 )  
\_\_\_\_\_ )

Case No. OAH 05-0402-TOB  
Agency Case Nos. 0501-05-052  
0501-05-062

**FINAL ORDER**

In a decision and recommended order, the administrative law judge recommended that a \$5000 civil penalty be assessed, but that, due to mitigated circumstances, the entire amount except for \$250 be suspended for one year on the condition that Houston Lodge, Inc. comply with all laws regarding the sale of tobacco for a period of one year.

The commissioner hereby adopts the findings of fact and conclusions of law contained in the administrative law judge's decision. However, because of the mitigated circumstances outlined in the decision of the administrative law judge, the commissioner finds that under the circumstances of this case, the entire monetary penalty should be suspended. Therefore,

IT IS HEREBY ORDERED that Houston Lodge, Inc. is subject to a civil penalty in the amount of \$5000. The entire amount of this civil penalty shall be suspended on the condition that Houston Lodge, Inc. maintain a current tobacco endorsement for so long as it sells tobacco or allows a vending machine on its location to sell tobacco, and that it comply with all laws regarding tobacco sales, including sales of tobacco to minors. The suspended fine need not be paid if Houston Lodge, Inc. complies with these conditions for a period of one year from the date this order becomes final.

IT IS FURTHER ORDERED that Houston Lodge, Inc. may not sell tobacco or allow a tobacco vending machine to operate at the premises located at Mile 57.1 Parks Highway, Houston, Alaska for a period of forty-five days to be specified by the division, to run concurrently with any period imposed on Lashbrooks's Ranch, Inc. regarding the same location.

DATED this 24<sup>th</sup> day of August, 2006.

By: \_\_\_\_\_  
ALBERT CLOUGH  
Deputy Commissioner

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
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Case No. OAH 05-0402-TOB  
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0501-05-062

**DECISION AND ORDER**

**I. Introduction**

Houston Lodge Incorporated (“Houston Lodge”) appeals from an Amended Notice of Suspension of Tobacco Endorsement and Imposition of Civil Penalty issued by the Division of Corporations, Business and Professional Licensing (“the division”). This case was joined with an existing case for Lashbrooks’ Ranch, Inc. because many of the facts were the same. Both cases arise from the alleged allowance of a vending machine selling tobacco in a particular restaurant and lounge along the Parks Highway. A hearing was scheduled for February 13, 2006. Before the hearing, Houston Lodge announced that it no longer disputed the facts alleged in the notice of suspension, and it withdrew its request for an evidentiary hearing. Houston Lodge did request permission to submit written argument in favor of a lower penalty, and this request was granted.

The hearing proceeded as scheduled in regard to Lashbrooks’ Ranch, Inc. Counsel for Houston Lodge did not appear at the hearing. Rosemary Burnett, principal officer and shareholder of Houston Lodge, did appear as a witness in the matter of Lashbrooks’ Ranch. The division was denied the opportunity at the hearing to present evidence regarding Houston Lodge, and questioning was limited to matters relevant to Lashbrooks’ Ranch. Although Houston Lodge indicated that it would file its written argument by Friday, February 10, 2006 before the hearing, it did not file its argument until Wednesday, February 15, 2006, which was after the hearing. In a flurry of pleadings, Houston Lodge and the division dispute whether Houston Lodge’s submission should be considered.

**II. Facts**

The proposed decision in this case is based on the following facts, which the administrative law judge believes to be undisputed.

For many years, Houston Lodge has allowed a vending machine to sell tobacco in its premises. From 2002 up until recently, Houston Lodge did not have a business license tobacco

endorsement. The owner of the vending machine did have a tobacco endorsement. In March, 2005, Lashbrooks' Ranch, Inc. took over management of the premises, but Houston Lodge and Ms. Burnett did maintain some role in operating the establishment, mostly regarding matters pertaining to Houston Lodge's liquor license. In a separate decision, this administrative law judge recommended a substantial monetary penalty against Lashbrooks' Ranch, Inc., with no amount suspended. That decision was based in part on findings that Lashbrooks' Ranch, Inc. was the primary entity in charge of day-to-day operations at the establishment, and that during this period it had continued to sell tobacco even after being notified that it was not in compliance with the law requiring a tobacco endorsement. That decision was also based on a finding that Lashbrooks' Ranch, Inc. was terminating its ongoing involvement with the establishment, and that suspended fines and rights to sell tobacco would therefore have no effect on that entity. After the hearing, Houston Lodge again took over operation of the establishment, with Ms. Burnett being the principal person managing the enterprise.

Over the years, Houston Lodge has never received a substantial amount of income from the sale of cigarettes. Houston Lodge did benefit indirectly from the presence of the vending machine, as it was a convenience for the establishment's patrons.

Prior to his death in 2002, Ms. Burnett's husband was actively involved in running Houston Lodge. Some time after his passing, Houston Lodge's business license lapsed, and it was not renewed after Lashbrooks' Ranch, Inc. began managing the establishment. Houston Lodge has recently renewed its license and applied for a tobacco endorsement.

The following evidence will not be considered. Ms. Burnett testified at the hearing. Ms. Burnett was a very credible witness. Ms. Burnett's testimony, tone, and demeanor evinced sincere desire to comply with all applicable laws to the best of her ability. Her testimony regarding her conduct in regard to her liquor license further demonstrated sincere concern for her patrons and the community; besides wanting to remain on good terms with the ABC Board to preserve her valuable license, Ms. Burnett was concerned about over-serving of patrons, she personally gave rides home to patrons she felt were unfit to drive, and she was aware of and concerned about any auto accidents in the area related to alcohol served by this establishment. At the time of the hearing, Ms. Burnett had been ready to take action to terminate Houston Lodge's agreement with Lashbrooks' Ranch, Inc. for cause. Houston Lodge argues that this evidence should not be considered because the corporation was not represented as such at the hearing. Though correct, this argument carries little weight because the evidence was mostly favorable to Houston Lodge. The division argues that this

evidence should not be considered because the division was specifically prohibited from cross-examining Ms. Burnett and presenting any other evidence, including impeachment evidence, which was not relevant to the case against Lashbrooks' Ranch, Inc. The division is correct on this point.

The division objects to the entire submission presented by Houston Lodge after the hearing. Houston Lodge correctly asserts that, to the extent the submission is merely argument based on undisputed facts, the division is not prejudiced by a delay of a few days. The division is correct, however, that because Houston Lodge withdrew its request for an evidentiary hearing and indicated that it would not be presenting more evidence, the division is prejudiced by the inability to effectively address anything in the submission regarded as evidence. Thus, Houston Lodge's submission will be considered as an argument for mitigated penalties based on undisputed facts; nothing in the submission, including the attached exhibits, will be considered for its evidentiary value.

### **III. Discussion**

Count II of the Amended Notice of Suspension of Tobacco Endorsement is based on AS 43.70.075, which reads in part:

(a) unless a person has a business license endorsement issued under this section for each location or outlet in a location where the person offers tobacco products for sale, a person may not sell or allow a vending machine to sell in its location or outlet cigarettes, cigars, tobacco or other products containing tobacco as a retailer at that location or outlet. Each endorsement required under this section is in addition to any other license or endorsement required by law....

\* \* \* \* \*

(k) if a person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violates a provision of (a)...of this section, the department may suspend the person business license endorsement or right to obtain a business license endorsement for a period of not more than

(1) 45 days....

\* \* \* \* \*

(s) if a person violates (a) of this section, the department may impose a civil penalty not to exceed \$250 for each day of the violation. The total civil penalty imposed under this subsection for each violation may not exceed \$5,000. The civil penalty described in this subsection may be imposed in addition to a suspension of a business license endorsement or the right to obtain a business license endorsement ordered by the department under (k) or (o) of this section.

Houston Lodge asserts that it did not obtain a tobacco endorsement because the business license application form asks only if the applicant will be selling tobacco products as a retailer, and that it understood the retailer to be the owner of the vending machine. While it does not plead ignorance as an excuse, Houston Lodge claims that it has acted in good faith after the passing of Mr. Burnett to keep the business in compliance with all laws, and it has since applied for the necessary endorsement and will keep it current in the future.

I find no reason to disbelieve Houston Lodge's assertions. There is no evidence that Houston Lodge has previously been notified of its noncompliance with the tobacco endorsement requirement, or of sales having been made to minors. In the matter of Lashbrooks' Ranch, Inc. I found that Lashbrooks' Ranch bore the principal responsibility for running the establishment during most of 2005, and I recommended the maximum monetary penalty in that case, partly because future compliance was not an issue and partly because Lashbrooks' Ranch continued to sell tobacco to some extent even after it was notified of noncompliance with the tobacco endorsement requirement. In this case, I find the greatest concern to be future compliance, as Houston Lodge is now running the establishment and appears to be dedicated to keeping the business in compliance with the law.

Houston Lodge argues that the failure to obtain an endorsement should be regarded as a mistake that was made once. The division argues that each day that the business did not have a tobacco endorsement should be regarded as a new violation. The correct balance of these two arguments is to set the penalty at the highest amount, \$5000, but to suspend the majority of the penalty on the condition that Houston Lodge remain in compliance with all laws regarding tobacco sales for a period of one year. Houston Lodge argues that "the penalty should be mitigated to the lowest possible amount, i.e. a total civil penalty of \$250." The amount of \$250 is not the lowest possible amount; it is in fact the highest possible amount for one day's violation. Under the circumstances of this case, a \$5000 fine with \$4750 suspended for one year on the condition that Houston Lodge remain in compliance with all tobacco laws is an appropriate monetary penalty. Suspension of Houston Lodge's right to sell tobacco for forty-five days, to run concurrently with the suspension of Lashbrooks' Ranch, Inc.'s right to sell tobacco is also appropriate.

#### **V. Recommended Order**

IT IS HEREBY ORDERED that Houston Lodge, Inc. pay a civil penalty of \$250.00 within thirty days of the day this decision becomes final, or before an alternative time that may be determined by the division. An additional \$4750.00 fine shall be suspended on the condition that

Houston Lodge, Inc. maintain a current tobacco endorsement for so long as it sells tobacco or allows a vending machine on its location to sell tobacco, and that it comply with all laws regarding tobacco sales, including sales of tobacco to minors. The suspended portion of the fine need not be paid if Houston Lodge, Inc. complies with these conditions for a period of one year from the date this order becomes final.

IT IS FURTHER ORDERED that Houston Lodge, Inc. may not sell tobacco or allow a tobacco vending machine to operate at the premises located at Mile 57.1 Parks Highway, Houston, Alaska for a period of forty-five days to be specified by the division, to run concurrently with any period imposed on Lashbrooks's Ranch, Inc. regarding the same location.

DATED this 12 day of July, 2006.

By!

DALE WHITNEY  
Administrative Law Judge