

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

In the Matter of)	
)	
SLF INTERNATIONAL, DBA STEVE'S)	
SPORTS BAR AND GRILL)	OAH No. 19-0205-ABC
_____)	Agency No. 1566

DECISION

I. Introduction

Alaska law requires that a liquor license be operated at least 240 hours in a calendar year unless the licensee obtains a waiver of this operating requirement.¹ SLF International, doing business as Steve's Sports Bar and Grill (“SLF”), had previously received three consecutive operating waivers for its beverage dispensary license – License #1566.² SLF submitted a fourth application for waiver of the operational requirement in 2018 for License #1566 on November 27, 2018. The Alcohol Beverage Control Board (“Board”) took the matter up at its meeting on February 19, 2019 and denied SLF’s application for a fourth waiver. SLF has appealed this denial.

Because SLF failed to establish that it was not at fault for failing to operate License #1566 in 2018, the application for a fourth waiver should be denied.

II. Background

A. Framework for the Waiver Request at Issue

Steve Fibranz is the president and sole owner of SLF (collectively, Mr. Fibranz and SLF are referred to as the “Licensee”).³ The Licensee operated Alaska Beverage Dispensary Liquor License #1566 for over 17 years.⁴ After his business on Fireweed Lane in Anchorage closed in 2014, Mr. Fibranz held onto the license in a “no premises” status, hoping to find a new location or perhaps a buyer.⁵ Since the liquor licenses must be attached to a specific premises in order to be operated, a license cannot be operated in a “no premises” status.⁶

¹ Agency Record (AR), p. 100; *see also* AR, p. 22; AS 04.11.330(a)(3); 3 AAC 304.170(B).

² These waivers were for 2015, 2016, and 2017. *See* AR, p. 18.

³ Respondent’s Brief, at p. 1; AR, p. 84.

⁴ Respondent’s Brief, at p. 1. A beverage dispensary license allows the licensee “to sell or serve on the licensed premises alcoholic beverages for consumption on the licensed premises only.” *See* AS 04.11.090(a).

⁵ Respondent’s Brief, at pp.4-5; *see also* AS 04.11.260(a)(2)(requiring a license to be located at a specific premises); AS 04.11.430(b).

⁶ *See Rollins v. State of Alaska, Alcoholic Beverage Control Board*, 991 P. 2d 202, 209 & n. 21(Alaska 1999)(liquor licenses must be attached to specific premises in accordance with AS 04.11.260(a)(2)).

By statute, a liquor license must be operated for a certain amount of time every year.⁷ However, if a liquor license is not being used, a licensee may request that the Board waive the operating requirement of AS 04.11.330(a)(3).⁸ Unless the licensee applies to the Board and requests a waiver of the yearly operating requirement, a liquor license will not be renewed if the applicant has not operated the licensed premise for at least 240 hours during each of the two preceding years.⁹ SFL applied for, and was granted, a first and second waiver of operation for 2015 and 2016.¹⁰

B. SLF Seeks a Third Waiver

On November 8, 2017, SLF submitted its third consecutive waiver application, signed by Steve Fibranz, on Form AB-29 to the Board.¹¹ Mr. Fibranz had no idea of the requirements for a third waiver.¹² The waiver application stated, in pertinent part, that: “The ABC Board may impose conditions along with the approval of an application for waiver, and it may deny a third or subsequent waiver.”¹³ The Licensee noted in the waiver application that the premises at 2306 Spenard Road was “not [r]eady in 2017” and further stated “buying [p]remise in 2018 (to open April 2018).”¹⁴ This property was known as the Carousel Lounge. According to Mr. Fibranz, the owner of the Carousel was remodeling and by November it was apparent that the premises would not be ready in time Mr. Fibranz to operate his license in 2017.¹⁵

The Board exercised its discretion and approved the Licensee’s third waiver application at its public meeting held on January 23, 2018.¹⁶ The minutes for that meeting state:

Ellen Ganley moves to approve the (third waiver) request *with the caveat that a fourth waiver will not be granted*. Bobby Evans seconds the motion. Motion carries unanimously.¹⁷

⁷ See AS 04.11.330(a). At the time SFL’s first three waivers were granted, a liquor license had to be operated for 30 eight-hour days in a calendar year. See AR, p. 100; see also <https://www.commerce.alaska.gov/web/amco/ABCMeetingDocuments.aspx> (January 23, 2018 meeting, Tab 70, p. 1). However, there was a change in 2018 converting the minimum yearly operating requirements from 30 days to 240 hours. See AR, p. 100; see also AR, p. 22.

⁸ 3 AAC 304.170(b).

⁹ AS 04.11.330(a)(3).

¹⁰ Respondent’s Brief, at p. 5.

¹¹ See Exh. A. The third waiver application refers to SLF International Inc. and Steve Fibranz variously as the “licensee.”

¹² Testimony of Mr. Fibranz.

¹³ See Exh. A; see also 3 AAC 304.170(e).

¹⁴ See Exh. A, at p. 2. According to the chronology that Mr. Fibranz prepared, he had “to apply for a waiver since [the] deal fell through in November 2017.” See AR, p. 36; see also Testimony of Mr. Fibranz.

¹⁵ See Testimony of Mr. Fibranz.

¹⁶ AR, pp. 20-21; see also <https://www.commerce.alaska.gov/web/amco/ABCMeetingDocuments.aspx> (January 23, 2018 meeting).

¹⁷ AR, pp. 20-21 (emphasis added).

The Board’s action – *i.e.*, granting a third waiver with the proviso that there would be no fourth waiver – was consistent with its treatment of similar requests since approximately 2013.¹⁸ Mr. Fibranz thought the Alcohol & Marijuana Control Office (AMCO) just took his money for the waiver and granted it, so he did not attend the meeting.¹⁹ Since License #1566 was still in a “no premises” status, because Mr. Fibranz had not found a premises where he could place his license, the Board used its discretion to grant the third waiver.²⁰

The Board did not send, and was not asked by Mr. Fibranz to send, written confirmation or notice of the Board’s actions at its January 23, 2018 meeting.²¹ The Board also did not provide Mr. Fibranz with written notice of its action on the third waiver (including the caveat). The Board finally provided verbal notice of the caveat on September 27, 2018.²² However, the Board’s minutes for its January 23, 2018 meeting, including the caveat related to the third waiver granted to SLF, were posted online on March 28, 2019.²³

Mr. Fibranz admitted that he “learned online of third waiver” in March of 2018 in the chronology he prepared concerning his efforts to place License #1566 into operation in 2018.²⁴

C. Licensee Seeks to Transfer License #1566

1. The License Transfer Process

A liquor license may not be transferred to a new location without the written consent of the Board.²⁵ The Board’s license transfer process takes a *minimum* of 2-3 months. Moreover, if the process involves both the Board and the MOA, as is the case here, transferring a beverage dispensary license takes between 4-6 months.²⁶ Unfortunately, Mr. Fibranz was “completely

¹⁸ Respondent’s Brief, at p. 5. According to Director McConnell, during her two-and-a-half-year tenure with AMCO, there has been a similar caveat accompanying third waivers which were granted. *See* Testimony of Ms. McConnell.

¹⁹ Testimony of Mr. Fibranz; Respondent’s Brief, at p. 5. Mr. Fibranz testified that although he had held a liquor license for many years, he had never attended a meeting involving his license until he accompanied his attorney to the Board Meeting in February of 2019 when his fourth waiver application was on the agenda. *See* Testimony of Mr. Fibranz. Although it would have been prudent for Mr. Fibranz to attend the Board meeting when his third waiver application was on the agenda, the regulation covering waivers does not require such attendance. *See* 3 AAC 304.170; *cf.* Director’s Brief, at p. 6 (stating that Mr. Fibranz chose not to be at the meeting and describing it as his “willful decision to not attend the meeting”).

²⁰ The regulation pertaining to waivers states that “a third or subsequent consecutive application for waiver that does not identify a licensed premises location will, in the board’s discretion, be denied.” *See* 3 AAC 304.170(e).

²¹ Respondent’s Brief, at p. 5; *see also* AR, pp. 19, 68 & 114.

²² Director’s Brief, at p. 3; Respondent’s Brief, at p. 2.

²³ *See* Director’s Brief, at p. 2 & Attachment A; *see also* Testimony of Ms. McConnell; <https://www.commerce.alaska.gov/web/amco/ABCMeetingDocuments.aspx> (January 23, 2018 meeting minutes).

²⁴ AR, p. 13; Testimony of Mr. Fibranz.

²⁵ AS 04.11.040(b).

²⁶ AR, p. 9.

unaware of these timelines.”²⁷ Instead, he believed it would only take two months to transfer his license.²⁸

Between January and March of 2018, Mr. Fibranz kept “drifting around” looking for a spot suitable to operate his license.²⁹ He was doing this search on his own and was not successful in identifying a new premises for his license for more than eight months (January through August).³⁰

2. SLF Attempts to Transfer Its License

On August 13, 2018, Mikal Milton (Martin) – the record and licensing supervisor at AMCO – received a call from a real estate agent who said that Mr. Fibranz had asked her to help him find a “place to hang his license for 30 days.”³¹ Sometime in August, Mr. Fibranz identified TK Korean restaurant as a possible site for placing his liquor license for at least 30 days.³² On September 11, 2018, Chong Sanders (TK Korean restaurant) and Mr. Fibranz entered into a written agreement whereby the Licensee would pay \$4,000 in rent for 30 days following the transfer of the liquor license. In addition, the Licensee agreed to pay for the utilities.³³ This agreement was to commence when the liquor license transferred.³⁴

After signing this agreement, the Licensee prepared an application to transfer the location of his beverage dispensary license and began advertising this as an “Application for New Liquor License” on September 5, 2018.³⁵ He completed this application on his own, without the assistance of AMCO staff or counsel.³⁶ On September 24, 2019, SLF filed a Transfer License Application (Form AB-01) with AMCO. Included with the Form AB-01 was the Public Notice Posting Affidavit (Form AB-02) signed by Mr. Fibranz; a copy of the public notice accompanied this form.³⁷

²⁷ AR, p. 9.

²⁸ Testimony of Mr. Fibranz.

²⁹ Testimony of Mr. Fibranz.

³⁰ Testimony of Mr. Fibranz; AR, pp. 36-38.

³¹ AR, p. 71.

³² See AR, p 38.

³³ There are two fully executed copies of this agreement in the Agency Record: one is dated and one is not. Compare AR, p. 58 (agreement dated September 11, 2018) with AR, p. 104 (undated agreement).

³⁴ See AR, pp. 58 & 104. The undated version of the agreement states that it starts “when [the] liquor license transfers on approval of [the] ABC Board.” See AR, p. 104. The dated version states that it “will start when liquor license transfers in September/October of 2018.” See AR, p. 58.

³⁵ See AR, p. 87.

³⁶ AR, p. 49.

³⁷ AR, pp. 86-87.

On September 24, 2018, Mr. Fibranz received an e-mail from AMCO staff advising him that his liquor license transfer application was incomplete.³⁸ Accompanying this e-mail was a letter from Carrie Craig – an occupational licensing examiner with AMCO – explaining why the Transfer License Application was being deemed incomplete. Ms. Craig’s letter listed numerous errors in that application and the supporting documentation.³⁹ One such error related to the content of the public notice posting, and SLF was informed that a new advertisement needed to be published once a week for three weeks with the language specified in Ms. Craig’s letter.⁴⁰ SLF was also advised that AMCO would need to receive a transfer application from Ms. Sanders, d/b/a TK Korean restaurant, to “No Premises,” or a written notice from Ms. Sanders to expire her license when License #1566 was transferred.⁴¹

Because he had failed to complete the initial Transfer License Application correctly and was required to re-advertise the application for three weeks, this delayed the Board’s consideration of the Transfer License Application.⁴² These circumstances “made it impossible for the License to secure the Board’s approval of the relocation at its October Board meeting.”⁴³

Mr. Fibranz came into the AMCO office on September 27, 2018. At that time, that he was informed by AMCO staff about the Board action concerning his third waiver – *i.e.*, that the third waiver had been granted with the caveat that there would be no fourth waiver.⁴⁴ He also discussed his options – based on his possible inability to meet minimum operating requirements for 2018 – with Mikal Milton and Carrie Craig, AMCO staff members.⁴⁵ One possibility discussed was a temporary license which could be granted at the Director’s discretion when the

³⁸ AR, p. 78.

³⁹ AR, pp. 79-81.

⁴⁰ AR, p. 80. The Transfer License Application includes a “Publisher’s Affidavit” which contains a copy of the public posting and the dates of publication. *See* AR, pp. 80 & 87,

⁴¹ *See* AR, pp. 76-77. On September 25, 2018, Ms. Sanders executed a Notice to Expire license #5680 for TK Korean upon the transfer of License #1566. *See* AR, p. 244. This was consistent with the Board’s policy that a premises have only one liquor license. *See* AR, pp. 19 & 44-47.

⁴² AR, p. 9 (Licensee’s failure “to properly complete the initial application correctly, being required to re-advertise the location transfer application and not knowing of the Municipalities requirement for a Special Land Use permit made it impossible” for the Licensee to “secure the Board’s approval of the relocation at its October Board meeting).

⁴³ AR, p. 9; *see* <https://www.commerce.alaska.gov/web/amco/ABCMeetingDocuments.aspx> (listing October Board meeting as occurring on October 15, 2018).

⁴⁴ AR, p. 124.

⁴⁵ *See* AR, pp. 93-94. At that point, Mr. Fibranz had two options: (1) apply for a waiver of operations upon payment of a non-refundable \$10,000 fee, although the Board had previously indicated that a fourth waiver would not be granted; or (2) move forward with the transfer with the possibility of a temporary license being granted at the Director’s discretion after his application was deemed complete and he had received the necessary approvals. *See id.*

transfer application was complete and the necessary approvals were obtained. Mr. Fibranz opted to pursue that route.⁴⁶ He re-advertised the transfer application and the affidavit of publication was re-filed on October 16, 2018, just after the Board's October meeting.⁴⁷

3. MOA Requirements Further Delay the Transfer Application

An additional problem plagued Mr. Fibranz's attempt to transfer his liquor license to TK Korean restaurant. At the time he entered into the rental agreement with Ms. Sanders, Mr. Fibranz was unaware that TK Korean restaurant had a land use permit which only permitted the sale of beer and wine on the premises.⁴⁸ This meant that Mr. Fibranz would have to secure a Special Land Use permit for a beverage dispensary licensed operation from the Municipality of Anchorage (MOA) in order to serve alcoholic beverages on the premises. This was *in addition to* obtaining the Board's approval to transfer his license to the new premises.⁴⁹ At some point, Mr. Fibranz became aware of this MOA requirement after he was contacted by the MOA's Planning Commission.⁵⁰

In mid-October, MOA staff advised Mr. Fibranz that the MOA would be unable to review and approve a new Special Land Use permit for a Beverage Dispensary license at the proposed location until January of 2019.⁵¹ Upon learning this news, Mr. Fibranz realized that the liquor license could not be placed in timely manner before the end of 2018.⁵² Consequently, he advised Ms. Sanders that he could not proceed with their agreement concerning his rental of 3826 Spenard Road (TK Korean restaurant).⁵³ Because the Licensee no longer had any right, title or interest in 3826 Spenard Road, AMCO staff notified Mr. Fibranz that his transfer

⁴⁶ AR, p. 94.

⁴⁷ AR, p. 62.

⁴⁸ AR, p. 8. Mr. Fibranz testified that when he had visited TK Korean restaurant, he had noticed that the restaurant had a restaurant liquor license. However, a "restaurant" license allows a restaurant to sell beer and wine for consumption only on the premises and is different from Mr. Fibranz's beverage dispensary license. *Compare* AS 04.11.100(a)(restaurant license) *with* AS 04.11.090(a)(beverage dispensary license, which permits the sale of alcoholic beverages for consumption the licensed premises only). The record establishes that Mr. Fibranz was unaware of this critical distinction at the time he filed his application to transfer License #1566 to TK Korean Restaurant. *See* AR, at pp. 7, 9 & 28-29.

⁴⁹ AR, p. 8. The Special Land Use permits are issued by the MOA. *See* Anchorage Mun. Code 21.03.040.

⁵⁰ *See* Testimony of Mr. Fibranz (stating that he became aware of the MOA requirements after he was on the Board's docket for October and was contacted by the MOA's Planning Commission).

⁵¹ AR, p. 9; *see also* AR, pp. 162-163.

⁵² AR, p. 38. The MOA requires a special land use permit for the sale of alcohol which must be approved by the Assembly. *See* Anchorage Mun. Code 21.03.040 (C)(4)(a). Because TK Korean was a restaurant selling beer and wine for consumption on the premises, it had a special land use permit from the MOA which only required approval by the director. *See* Anchorage Mun. Code 21.03.040(C)(4)(b). Accordingly, Mr. Fibranz had to obtain a different special use permit from the MOA in order to transfer his license to the TK Korean restaurant premises.

⁵³ AR, pp. 9 & 27; *see also* AR, pp. 101 & 103.

application for license #1566 was incomplete and would not be considered by the Board at its December 18, 2018 meeting.⁵⁴

Out of other options, the Licensee hired counsel and requested a fourth waiver of the operating requirements on November 27, 2018.⁵⁵

D. Licensee’s Fourth Waiver Request

Licensee’s fourth consecutive waiver request was an “extraordinary request,” in the words of Licensee’s counsel.⁵⁶ If the Board denied the fourth waiver, the Licensee would lose an asset worth at least \$225,000 because his license would eventually expire and it would be unable to be renewed.⁵⁷ As his counsel noted, difficulties in finding a location, mistakes in the initial transfer process, and a lack of understanding of the MOA’s processes resulted in the Licensee being unable to operate in 2018.⁵⁸ SLF’s counsel further opined in his memorandum to the Board dated November 27, 2018 that loss of License #1566 would be a very severe penalty for a combination of ignorance and mistakes.⁵⁹

On November 28, 2018, the Licensee entered into a letter of intent with the Woodshed, Inc. to lease its premises, which was submitted to the Board at its December 2018 meeting in connection with the Licensee’s fourth waiver application.⁶⁰ Unlike TK Korean restaurant, the Woodshed was at a location with an approved land use permit from the MOA for the sale of alcoholic beverages.⁶¹ Licensee entered into an Option to Lease the Woodshed on January 29, 2019 in order to:

occupy the premises on a month to month basis for a term sufficient in 2019 to accomplish the minimum hourly requirements set forth in the regulations of the ABC Board.⁶²

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⁵⁴ AR, p. 102; *see also* AS 04.11.430(stating that a specific location must be indicated on the license).
⁵⁵ AR, pp. 5 & 121.
⁵⁶ AR, p. 8.
⁵⁷ AR, pp. 10 & 25; *see also* 3 AAC 304.170(g).
⁵⁸ AR, p. 11. Mr. Fibranz did not find a new location (TK Korean restaurant) until August of 2018 and did not file his initial transfer application for License # 1566 until September 24, 2018. *See* AR, pp. 8, 13, 38 & 79-82. Because the Licensee had to re-advertise the transfer application for three more weeks due to errors in the initial public posting, the Board could not consider his application at its October 15, 2018 meeting because it was not yet complete. The advertising was not completed until October 14, 2018 and the affidavit of publication was not filed until October 16, 2018. *See* AR, pp. 8 & 80.
⁵⁹ AR, pp. 52 & 65.
⁶⁰ AR, p. 29.
⁶¹ AR, p. 29.
⁶² AR, p. 39.

In a memorandum dated December 17, 2018, AMCO’s Director, Erika McConnell, recommended to the Board that Licensee’s fourth waiver request be denied. Ms. McConnell noted that the license had not been operated for four years and that the Board had granted the third waiver “with the caveat that a fourth waiver will not be granted.”⁶³

At the request of Licensee’s counsel, the Board did not take up the issue of Licensee’s fourth waiver application at its December 17, 2018 Board.⁶⁴ Accordingly, consideration of Licensee’s fourth waiver application was deferred until the Board’s meeting in February of 2019.⁶⁵

1. Licensee’s Counsel Raises A Due Process Claim

On January 30, 2019, the Licensee’s counsel submitted additional information to the Board regarding the Licensee’s request for a fourth waiver of the operating requirements.⁶⁶ In this submission, Licensee’s counsel argued that the Licensee had not received notice from AMCO staff about the Board’s granting of the third waiver with the caveat concerning the fourth waiver on January 23, 2018 until September 27, 2019.⁶⁷ Licensee’s counsel maintained that by failing to provide notice at the time the third waiver was granted that there would be no further waivers and due to “*other mistakes*,” Licensee was not able to operate in 2018. Licensee’s counsel also argued that the Licensee had made diligent efforts to find a new location, claiming that his failure to do so “was a result of circumstances beyond his control.”⁶⁸

2. AMCO’s Director Addresses the Due Process Claim

AMCO’s Director prepared another Memorandum to the Board on February 19, 2019 and again recommended that Licensee’s fourth waiver application be denied.⁶⁹ The Director noted that the “board has made no secret of its policy not to approve fourth waivers and has been consistent in applying this policy.”⁷⁰ The Director’s memorandum further noted that it is the Board’s general intent that a license be in “no premises status” for only two years, and that the Board had used its discretion to approve the third waiver.⁷¹

⁶³ AR, p. 2.

⁶⁴ AR, pp. 17 & 19; *see also* AR, p. 203 (stating that this item was tabled at the applicant’s request).

⁶⁵ AR, p. 17.

⁶⁶ AR, p. 25.

⁶⁷ AR, p. 26.

⁶⁸ AR, pp. 26-27 (emphasis added).

⁶⁹ AR, p. 18-19.

⁷⁰ AR, p. 19.

⁷¹ AR, p. 19.

The Memorandum also addressed the due process claim raised by Licensee’s counsel, asserting that AMCO staff had no obligation to notify the Licensee concerning the Board’s action on the third waiver application. AMCO’s Director explained that this was because the third waiver had been granted, and the only statutory or regulatory requirement for staff to notify a licensee of the Board’s action on an application is *if the application is denied*.⁷² AMCO’s Director further argued that it was the Licensee’s “responsibility to track the board’s action on their request, either by paying attention to the board meeting, contacting the office after the meeting for information, or reviewing the meeting minutes once they are available.”⁷³

3. The Board Denies Licensee’s Application for a 4th Waiver

Licensee’s counsel and the Director each submitted a memorandum to the Board prior to the February 19-20, 2019 meeting articulating their respective positions on Licensee’s fourth waiver application.⁷⁴ The Board met on February 19, 2019 to consider Licensee’s fourth waiver application.

At that meeting, Licensee’s counsel admitted that he had never “seen a fourth waiver being approved.”⁷⁵ The Board did not simply deny the fourth waiver on the basis of the caveat accompanying the third waiver because there was some discussion concerning the merits of Licensee’s fourth waiver application.⁷⁶ One Board member said he found the reasons for the fourth waiver “insufficient” and another Board member stated that he did not find “extenuating circumstances” so as to justify a fourth waiver. The Board also expressed its reservations concerning fourth waivers generally. One Board member characterized fourth waivers as “a very sensitive topic” and a “slippery slope,” and stated the “the board must have a line.”⁷⁷ Another Board member observed that he did “not find a reason to go against the practice of not granting fourth waivers.”⁷⁸ The Board denied Licensee’s request for a fourth waiver by a four to one vote.⁷⁹

⁷² AR, p. 19 (emphasis added).

⁷³ AR, p. 19. In addition, the Director’s memo argued that the Board would be encouraging non-operation of a license if it allowed an existing license at a premise to be temporarily surrendered while a different license was operated at the same premises. *See id.*

⁷⁴ Both of those submissions discussed the Licensee’s due process argument. *See* AR, pp. 19 & 26-27.

⁷⁵ Exh. B, p. 18.

⁷⁶ Despite the caveat to the third waiver, the Board did not categorically deny the fourth waiver.

⁷⁷ *See* Exh. B, at pp. 18-19 (minutes of February 19-20 Alcohol Beverage Control Board meeting).

⁷⁸ *See* Exh. B, at pp. 18-19 (minutes of February 19-20 Alcohol Beverage Control Board meeting). Although the issue of lack of notice was raised in submissions to the Board, only one Board member addressed that concern, stating that he felt “notice not being given is not a reason to not operate.” *See* Exh. B, p. 18,

⁷⁹ AR, pp. 247-248; *see also* Exh. B, p. 19.

Since the Licensee did not operate License #1566 in 2018 and did not receive a waiver of the operating requirements, License #1566 expires at the end of 2019 and cannot be renewed.⁸⁰ Because there was a denial of his fourth waiver application and the concomitant expiration of License #1566 at the end of the biennial license period, Mr. Fibranz was provided with written notice of the Board's action.⁸¹

Under the Alaska Administrative Procedure Act (APA), the Licensee was entitled to request and receive a *de novo* hearing.⁸² On March 1, 2019, the Licensee filed this appeal of the Board's decision to deny his fourth waiver.

E. Adjudicative Hearing

Both the AMCO staff and the Licensee believed that there was one issue in this appeal: Was AMCO required to provide verbal or written notice directly to the respondent that his third waiver of the operating requirement would be his last, and if so, did the fact that no such notice was provided until September of 2018 work a denial of due process sufficient to warrant reversal of the board's decision to deny the respondent's application for a fourth waiver?⁸³ The parties agreed to waive a hearing before the Office of Administrative Hearings (OAH), choosing instead to have the matter decided upon the Agency Record and briefing from each party. However, due to certain gaps in the record, a hearing session was held on October 23, 2019 to clarify certain portions of the Agency Record. Assistant Attorney General Joan Wilson represented the Board and Sherman Ernouff represented the Licensee. Testimony was given by Steven Fibranz on SLF's behalf. Mikal Milton Martin, who is a Records and Licensing Supervisor at AMCO, and Erika McConnell, the Director of AMCO, provided testimony on the Board's behalf.

⁸⁰ Testimony of Ms. McConnell; *see also* <https://www.commerce.alaska.gov/web/amco/OtherAlcoholResources.aspx> (list of expired licenses, listing License #1566 as expiring in 2019); AS 04.11.680; 3 AAC 304.170(g). *But cf.* AR, pp. 247-248 (incorrectly stating that License #1566 had expired because the board had not approved the fourth waiver).

⁸¹ Director's Brief, at p. 4. The notice that the Director provided to Mr. Fibranz stating his fourth waiver had been denied and his *license had expired* was in error. *See* AR, pp. 247-248. Rather, the notice should have advised the Licensee that License #1566 would expire at the end of its term (2019) and that any application for license renewal would be denied by the Board. *See* AAC 304.170(b).

⁸² *See* AR, p. 248; *see also* AS 44.62.390; AS 44.62.390 & 44.62.450-.460.

⁸³ Director's Brief, p. 1. As discussed elsewhere, counsel has failed to recognize that the notice provided when the fourth waiver was denied in February of 2019 and this *de novo* hearing affords Licensee due process. Because the Board discussed the fourth waiver application at its February 19, 2019 meeting and did not simply deny it based on the caveat to the fourth waiver, the issue that the parties have asked this tribunal to decide is not germane to this appeal.

1. The Director's Position in the Appeal

Counsel for the Director in briefing argued that the statute and the regulations put the Licensee on fair notice of what would happen if the Licensee did not meet the operating requirement in 2018.⁸⁴ The Director's counsel further argued that nothing in the statute, regulations, or the APA requires that notice of future actions on fourth waivers be delivered in any particular form.⁸⁵ The Director's Brief also noted that "the only customary notice of board decisions regarding future actions on waivers is public announcement at a properly noticed meeting, and that notice was given." Accordingly, the Director's Brief argued that Mr. Fibranz's failure to attend the January 23, 2018 meeting "cannot be transformed into a viable due process claim." In addition, the Director's Brief stated that Mr. Fibranz had actual notice of the Board's policy on fourth waivers "shortly after the Board's January 29, 2018 meeting" and that this would cure any defect regarding notice.⁸⁶ In the view of Director McConnell, it is a licensee's responsibility to track the license, which is very valuable.⁸⁷

2. Licensee's Position in the Appeal

Licensee through counsel has argued that Licensee's right to due process was violated by the ABC Board's failure to give prompt notice of their January 2018 action, which approved the third waiver of operation but contained a "no fourth waiver would be granted" proviso.⁸⁸ Licensee's counsel further maintains that Mr. Fibranz only received notice of the Board's statement that "no fourth waiver would be granted" in late September of 2018.⁸⁹ According to Licensee's counsel, this failure to give the Licensee timely notice of the Board's proviso or caveat accompanying the granting of the third waiver "nearly assured that Respondent's liquor license would expire" at the end of 2018.⁹⁰

⁸⁴ Director's Brief, p. 5.

⁸⁵ Director's Brief, p. 6.

⁸⁶ Director's Brief, pp. 6-7. However, notice of the Board's actions at its January 23, 2018 meeting was not placed on the Board's website until the minutes were placed online on March 28, 2018, about *two months* after that meeting. According to testimony from Ms. McConnell, this is the only way the Licensee could have learned online about what transpired at that Board meeting if he did not attend the meeting or did not contact AMCO staff. *See* Director's Brief, at Attachment A; Testimony of Ms. McConnell.

⁸⁷ Testimony of Ms. McConnell.

⁸⁸ Respondent's Brief, at p. 3.

⁸⁹ Respondent's Brief, at p. 2.

⁹⁰ Respondent's Brief, at p. 4; *see also* Respondent's Brief, p. 3 (stating that because it took 3-6 months to transfer a liquor license, Respondent was "doomed to have his license expire because it was not possible to get a municipal land use permit, complete a liquor license transfer, and then operate the license for 30 eight hour days" when the Licensee did not get notice until late September); *see also* AR, p. 247.

Licensee’s counsel also asserts that the expiration of License #1566 is a forfeiture because the license is permanently taken from the Licensee.⁹¹ Contending that the failure to give notice of the Board’s action in January of 2018 has a very serious consequence for Licensee’s liquor license, the Licensee’s counsel argues that the remedy should be that Licensee is given “a full 12 months to place the license and operate it.” Accordingly, Licensee through counsel has requested that the Board be directed to issue a fourth waiver.

III. Discussion

A. Nature of a Formal Administrative Hearing

This matter is before the Office of Administrative Hearings (OAH) on a *de novo* review of the Board’s decision to deny the fourth waiver. A formal hearing before OAH resulting from the Board’s denial of an application is conducted under the Administrative Procedure Act (APA).⁹²

The first round of decision-making, which resulted in the February 19, 2019 denial of the Licensee’s fourth waiver application, was informal. In many instances, the first decision on an application will be the last, because the applicant will not request a hearing. When a *de novo* hearing is requested and granted, it is not simply a repeat of the first round. Instead, evidence is taken under oath and a more complete body of evidence may be collected, allowing a more rigorous testing of factual matters that, allegedly, may have been present or understood inaccurately in the first round.⁹³

The purpose of offering a *de novo* hearing under the APA is to give the Board a full record on which to make a fresh and final exercise of any discretion it has under the law.⁹⁴ The proposed decision from OAH at the end of the *de novo* hearing is a more rigorously tested version of the first decision. It is a new decision made with a more complete body of evidence to enable the Board to make the best decision possible concerning this matter.⁹⁵ The Board is then free to adopt the proposed decision, remand it, or revise it as its final decision. The final decision supplants the informal, initial decision by the Board.

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⁹¹ Respondent’s Brief, at pp. 3-4. A forfeiture is defined as the divestiture of property without compensation. See Black’s Law Dictionary (9th ed.)

⁹² AS 04.11.510(b)(1).

⁹³ See *In re Alaska Green Glaciers Garden, LLC*, OAH No. 17-0444-MCB, at p. 4; *In re Ronald Rockstad*, OAH No. 08-0282-DEC, at p. 5; *In re John W. Palmer*, OAH No. 09-0133-INS, at p. 6.

⁹⁴ *In re Jose Espinosa*, OAH No. 16-0716-REC, at p. 1.

⁹⁵ *In re Palmer*, OAH No. 09-0133-INS, at p. 6; *In re Ronald Rockstad*, OAH No. 08-0282-DEC, at p. 5.

B. Burden of Proof

The Licensee bears the burden of proof by a preponderance of the evidence in this *de novo* hearing, because the Licensee is seeing a change to the *status quo*.⁹⁶ At the time of the Board meeting in 2019, License #1566 was subject to the operational requirement for 2018. The Licensee sought a change in the status quo by requesting a waiver from the operating requirement for 2018. Under the Administrative Procedure Act, the burden of proof is on the Licensee pursuant to AS 44.62.460(e)(2) because the Licensee’s request for a waiver was an initial denied.⁹⁷

C. The Waiver Process

1. The Operating Requirement for Liquor Licenses

As noted above, there is a statutory requirement in AS 04.330(a) that liquor license be operated for a certain amount of time every year.⁹⁸ The purpose of the statutory operational requirement is to prevent a licensee from holding onto one of a limited number of licenses without operating it within a reasonable time necessary to construct or otherwise establish premises.⁹⁹ An application requesting renewal of a license shall be denied if:

the applicant has not operated the licensed premises for at least 240 hours during each of the two proceeding calendar years, unless the Board determines that the licensed premises are under construction or cannot be operated *through no fault of the applicant*.¹⁰⁰

The statutory scheme for liquor license also requires that a Licensee identify a premises in order to operate the liquor license.¹⁰¹

⁹⁶ *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *see also In re Elisabeth Rollins, d/b/a Alaska 1910*, OAH No. 10-0262-ABC (ABC Board), at p. 6.

⁹⁷ AS 44.62.460(e)(2) states that the “respondent has the burden of proof . . . if a right, authority, license has initially been denied or not issued.”

⁹⁸ *See* AS 04.11.330(a).

⁹⁹ Director’s Brief, p. 1 n. 1 (the operational requirement serves two purposes: to insure alcohol licenses are put to use and to prevent hoarding licenses without operating them to increase demand and value on the secondary market); *see also Rollins*, 991 P. 2d 202, 209 & n. 21 (Alaska 1999).

¹⁰⁰ AS 04.11.330(a)(3) (emphasis added); *see also* 3 AAC 304.170(a)-(b). Although the statute and the regulation both use the term “licensed premises,” this has been interpreted to include liquor licenses in “no premises” status for which a waiver of the operating requirement is being sought. *See Rollins*, 991 P. 2d at 208-209 (rejecting the argument that the operating requirement only applies to “licensed premises”).

¹⁰¹ *Cf. Rollins*, 991 P. 2d at 208-209 & n. 21 (Alaska 1999) (liquor licenses must be attached to specific premises in accordance with AS 04.11.260(a)(2) but opining that the operating requirement also encompasses premises for which a license may be issued).

2. A Licensee May Request a Waiver of the Operating Requirement

Under 3 AAC 304.170, a licensee may request that the Board waive the operating requirement in AS 04.11.330(a)(3) by applying in writing for a waiver. In determining whether such a waiver should be granted, the Board will determine whether, “*through no fault of the licensee* or because the premises were under construction,” the licensed premises could not be operated for the required time during the preceding calendar year.¹⁰² An application for a waiver for a calendar year must be accompanied by a non-refundable application fee of “double the amount of the fee paid for the previous year’s waiver application.”¹⁰³

The statutory and regulatory scheme makes it more difficult for a licensee to obtain a third waiver. This is consistent with the legislature’s objective to ensure that a liquor license is used to conduct business, rather than be purely a financial asset, because there are a limited number of licenses in a community.¹⁰⁴ The Board has the discretion to deny a third or subsequent consecutive application for waiver unless the licensee clearly shows that the licensed premises were not operated because they were condemned or substantially destroyed.¹⁰⁵ Moreover, if the premises identified on an applicant’s license are not owned or leased by the licensee, the Board may, in its discretion, deny a third or subsequent waiver application.¹⁰⁶ Additionally, a third or subsequent consecutive application for waiver that does not identify a licensed premises will, in the board’s discretion, be denied.¹⁰⁷ As the Alaska Supreme Court noted in *Rollins v. State*, “it is clear that a waiver of operation is a privilege, and that the applicant must affirmatively prove the lack of fault.”¹⁰⁸

If an application for a waiver is denied, an application for license renewal for the succeeding license period will be denied by the Board.¹⁰⁹ Here, this means that because the Licensee’s fourth waiver application (for calendar year 2018) was denied, the Licensee will be unable to renew

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¹⁰² 3 AAC 304.170(b); *cf.* *Rollins*, 991 P. 2d 208-209 (the operating requirement also encompasses a premises for which a license may be issued, otherwise a licensee could hold a license indefinitely yet not operate it).

¹⁰³ 3 AAC 304.179(c). The fee for the first waiver is half of the applicable biennial license fee. Each successive waiver is double the amount of the fee for the previous year’s waiver, so that the fees for a third or fourth waiver application are significantly higher than the fees for a first or second waiver. *See* 3 AAC 304.179(c). The non-refundable application fee for Licensee’s fourth waiver was \$10,000. *See* AR, p. 6.

¹⁰⁴ *See Rollins*, 991 P. 2d at 209.

¹⁰⁵ 3 AAC 304.170(e).

¹⁰⁶ 3 AAC 304.170(e).

¹⁰⁷ 3 AAC 304.170(e).

¹⁰⁸ *Rollins v. State*, 312 P. 3d 1091, 1095 (Alaska 2013), *reh’g den.* (2014).

¹⁰⁹ 3 AAC 304.170(g).

License #1566 when it expires at the end of 2019.¹¹⁰

3. A Liquor License Requires that the Licensee Be Given Due Process

The Alaska Supreme Court has deemed a liquor license to be a property right, not merely a privilege subject to withdrawal or denial at the whim of the state, noting that it is of considerable value.¹¹¹ Procedural due process is defined as the minimal requirements of notice and a hearing guaranteed by the due process clauses of the 5th and 14th amendments of the United States Constitution, especially if the deprivation of a significant life, liberty or property interest may occur.¹¹² In addition, Alaska's constitution also contains a due process clause.¹¹³ Due process requires that any action involving the deprivation of a property right must be preceded by notice and that there must be a hearing appropriate to the nature of the case.¹¹⁴

Under AS.04.11.510, if a liquor license is denied, the notice of denial shall be furnished to the applicant *immediately in writing* stating the reason for the denial in clear and concise language. However, this statutory provision only addresses an application for the issuance, renewal, transfer of location or transfer to another person of the license.¹¹⁵ Consequently, it is the minimal requirements of due process, not a statute or regulation, which mandate the notice a Licensee should receive with regard to the Board's decision to deny a waiver application.¹¹⁶

Here, the Board did not deny Licensee's fourth waiver application at the January 23, 2018 meeting because no such application had been filed. After the fourth waiver application was filed, the Board considered that application but denied it on February 19, 2019. Licensee was provided notice of

¹¹⁰ See 3 AAC 304.170(g). The Director erroneously advised Mr. Fibranz that License #1566 had expired when the Board failed to grant the 2018 waiver because she was under the mistaken belief that the license had expired upon denial of the waiver. See AR, at pp. 247-248. As the Director admitted upon questioning at the hearing and further review of the statute, this was not accurate. License #1566 is a biennial license that will expire until the end of 2019. Thus, although the Licensee cannot not operate the License, the license has not yet expired. See Testimony of Ms. McConnell; see also AR, p. 174.

¹¹¹ See *Rollins*, 991 P. 2d, at 211; *Stevens v. State of Alaska, Alcoholic Beverage Control Board*, 257 P. 3d 1154, 1169 (Alaska 2011); but cf. AS 04.11.660(a)(a) liquor license is a personal privilege, not a property right."

¹¹² *Black's Law Dictionary* (7th ed. 1999); see also *Nozzi v. Housing Authority of City of Los Angeles*, 806 F. 3d 1178, 1192 (stating that once a substantive right has been created, it is the due process clause which provides the procedural minimums).

¹¹³ Alaska Const. art. I, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law.").

¹¹⁴ *Patrick v. Municipality of Anchorage*, 305 P. 3d 292, 299 (Alaska 2013). Due process does not require any specific type of hearing. See *id.*

¹¹⁵ AS 04.11.510. See Testimony of Ms. McConnell (although the statutes and regulations do not address providing notice for denied waiver applications, these are treated like other denied applications and notice is provided).

¹¹⁶ Cf. *Rollins*, 312 P. 3d at 1093 (waiver applicant advised in a letter from that the Board would grant a fifth consecutive waiver "with the express warning that it is a final waiver of the operating requirement and no future waivers will be granted for this license").

this denial in an e-mail and by a letter dated February 25, 2019. Licensee has now appealed that denial and is receiving a *de novo* hearing on the merits of the case. Consequently, the minimum requirements of due process have been met.¹¹⁷

D. The Board Should Exercise Its Discretion In Denying the Fourth Waiver

The Board has aptly characterized fourth waivers as a “slippery slope.” A caveat along the lines of the caveat to the third waiver is problematic if it automatically results in the subsequent denial of a fourth waiver. This is because the regulation contemplates that third and subsequent waivers may be granted in the Board’s discretion and a binding declaration that a fourth waiver will be denied prevents the Board from exercising that discretion. Consequently, the Board’s statement that a future waiver “would not be granted” as a caveat to Licensee’s third waiver if used as a basis for the present decision, arguably eliminates the Board’s discretion to grant a fourth waiver and conflicts with the discretionary language of 3 AAC 304.170(e). Similarly, a Board “policy” which is not a regulation but creates an absolute bar to fourth waivers would also violate 3 AAC 304.170(e), which makes third and subsequent waivers discretionary with the Board. While the Board can caution Licensee’s that a fourth waiver is unlikely to be granted unless special circumstances are present, it should not suggest that a fourth waiver will not be successful regardless of the circumstances. Instead, the Board should consider each waiver application by determining whether the application meets the criteria for granting waivers in 3 AAC 304.170.

1. The Board’s Authority to Deny a Waiver Application

In determining whether to grant a waiver from the operating requirements, the Board considers the factors listed in 3 AAC 304.170: (1) whether the failure to operate was “through no fault of the licensee;” (2) whether the premises being under construction or are condemned or substantially destroyed; and (3) whether the premises listed on the waiver application are not leased or owned by the licensee or do not identify a licensed premises location.¹¹⁸ The Board also has the discretion to deny a third or subsequent waiver unless “the licensee clearly shows

¹¹⁷ Counsel for both parties were off the mark by focusing this appeal on the caveat accompanying the third waiver rather than on the actual denial of the fourth waiver at the February 19, 2019 Board meeting when assessing whether Licensee was afforded due process. The Board discussed at some length whether to grant the fourth waiver application at its February meeting in 2019. It did not simply slavishly follow the dictates of the caveat or decline to hear or grant the application. Upon the denial of the fourth waiver, the written notice of the denial and the *de novo* review process afforded by the APA provides Licensee with due process.

¹¹⁸ 3 AAC 304.170(b) & (e).

that the licensed premises were not operated because they were condemned or substantially destroyed.¹¹⁹

Here, the only issue to be considered is whether Licensee's failure to operate in 2018 was due to "no fault of the licensee" since the other criteria are not present. The Board should deny Licensee's application for a waiver unless it decides that the license was not operated in 2018 through no fault of the Licensee.¹²⁰

a. Licensee Was Aware by March of 2018 That He Was Unlikely to Get Another Operating Waiver

Licensee's counsel has argued that Licensee was unaware that he would not get a fourth waiver until September 27, 2018. According to Licensee's counsel, this meant that Licensee had just over three months (late September through December) to accomplish a license transfer that normally takes four to six months.¹²¹ Licensee's counsel speculates that had the Board given Licensee prompt notice that a fourth waiver application would be unsuccessful, Licensee would have taken steps to ensure that License #1566 was in operation in 2018. This argument fails for two reasons. First, because the Board will exercise its discretion in this decision and will not apply the caveat as though it were a denial-in-advance, the caveat was nothing more than a gratuitous warning and lack of notice has no legal consequences. Mr. Fibranz should have known from simply reading the regulations that fourth waivers are far from guaranteed and that he needed to be diligent in using the reprieve given to him through the granting of the third waiver. Second, Licensee's claim of lack of notice advanced by his counsel is largely wrong, as explained below.

In his chronology, Mr. Fibranz stated he "learned online of [the] third waiver" in March of 2018.¹²² It is undisputed that these minutes were posted online on March 28, 2018.¹²³ However, Mr. Fibranz testified that he did not recall looking at the minutes for the January 23,

¹¹⁹ Since the license was in "no premises" status, there were no premises which were condemned or substantially destroyed, so the Board has the discretion to deny the fourth waiver application on these grounds. See 3 AAC 304.170(e). The regulation also states that the Board has the discretion to deny a third or subsequent license if the premises identified are not leased or owned by the licensee or the waiver does not identify a licensed premises location. See *id.* However, because Licensee had an option to lease the Woodshed at the time when the Board considered his fourth these other two reasons for the Board to exercise its discretion to deny the fourth waiver were not applicable. See AR, pp. 39-40.

¹²⁰ See 3 AAC 304.170(b)

¹²¹ Respondent's Brief, at p. 3.

¹²² AR, p. 13.

¹²³ Director's Brief, at Attachment A.

2018 meeting, which mentioned the caveat.¹²⁴ Instead, he testified thought he had found out about the third waiver by looking at the list of alcohol licenses on the AMCO website.

Mr. Fibranz's testimony regarding what he learned online about his waiver application in March of 2018 was flatly contradicted by Director McConnell, who testified that the online list of alcohol licenses does not contain any reference to waivers or actions taken on waivers.¹²⁵ She further testified that the only ways in which a licensee could find out about the Board's action on a waiver application was: (1) if the licensee attended the Board meeting; (2) the licensee received written or verbal notice from the Board that a decision had been made on the application; or (3) the licensee reviewed the minutes of the Board meeting.¹²⁶ It is undisputed that: (1) Mr. Fibranz did not attend the January 23, 2019 Board meeting;¹²⁷ (2) the Board did not provide him with written notice concerning the outcome of his third waiver application and its caveat;¹²⁸ and (3) AMCO staff did not tell him about the caveat accompanying the third waiver until September 27, 2019.¹²⁹ Thus, the *only* place online in which Mr. Fibranz could have learned about the outcome of his third waiver application in March of 2018 would be in the minutes for the January 23, 2018 meeting, which explicitly mentioned the caveat.¹³⁰

Mr. Fibranz, however, claims that he was unaware of the caveat accompanying the third waiver until his meeting with AMCO staff on September 27, 2019.¹³¹ Licensee's counsel has, therefore, argued that Mr. Fibranz had only three months from the date AMCO staff advised him of the caveat to the third waiver on September 27, 2018 to complete the transfer application process.¹³² Since this process normally takes four to six months, Licensee's counsel maintains that his client was prejudiced by the belated notice he received from AMCO staff -- *i.e.*, it was not Licensee's fault that he was unable to operate in 2018.

However, Mr. Fibranz's recollection about when he discovered that his third waiver application containing a caveat regarding a fourth waiver is not credible and is contradicted by his actions. His counsel stated that "*after learning of the Board's comment about no further*

¹²⁴ Testimony of Mr. Fibranz

¹²⁵ During the hearing, the list of expired and unexpired licenses was reviewed online with Ms. McConnell and this review corroborated Ms. McConnell's testimony that no information about waiver applications is contained on those lists. *See* Transcript of Hearing (Testimony of Ms. McConnell).

¹²⁶ Testimony of Ms. McConnell.

¹²⁷ Testimony of Mr. Fibranz; Director's Brief, at p. 2.

¹²⁸ Director's Brief, at p. 2.

¹²⁹ Testimony of Ms. Martin.

¹³⁰ Testimony of Ms. McConnell.

¹³¹ Testimony of Mr. Fibranz; *see also* AR, p. 124.

¹³² Exh. B, at p. 18; *see also* Respondent's Brief, at p. 9.

waivers at its January meeting, the Licensee doubled his efforts to find a new location.”¹³³

Indeed, Mr. Fibranz’s chronology of his efforts to place his license confirms that, beginning in March of 2018, Mr. Fibranz began searching aggressively for a new location to place his license during calendar year 2018. This would be consistent with Mr. Fibranz learning about the caveat accompanying the third waiver sometime in March of 2018.¹³⁴ In fact, Mr. Fibranz *quadrupled* his efforts to find a new location from March through August of 2018 and considered 20 different sites as a potential new location for his license.¹³⁵ Notably, he only found *one* potential new location – the Woodshed -- *after* September 27, 2018, so his counsel’s statement about the Licensee “doubling his efforts” can *only* refer to Mr. Fibranz’s efforts from March through September “after learning of the Board’s comment about no further waivers at its January meeting.”¹³⁶

At the hearing, Mr. Fibranz testified that he wanted to earn more money by operating his license and cited that as the reason for his increased efforts to place his license in March of 2018. However, there are other references in the record that Mr. Fibranz simply wanted to place his license someplace for 30 days simply to fulfill the operating requirement for a license he had not used for several years.¹³⁷ This evidence casts further doubt on Licensee’s explanation for his sudden effort to find a new premises.

Consequently, it is reasonable to infer that Mr. Fibranz reviewed the minutes of the January 23, 2018 Board meeting, which included the statement that a fourth waiver would be denied, in March of 2018 even if he did not recall doing so at the time of the hearing a year and a half later.¹³⁸ Accordingly, this decision concludes that Mr. Fibranz had *actual notice* of the caveat regarding a fourth waiver upon reviewing online the minutes of the January 23, 2019

¹³³ AR, p. 7 (emphasis added)

¹³⁴ The list shows that the licensee identified three potential locations in March and four potential locations in April, May, June, and August, and two potential locations in July. See AR, pp. 13 & 133; see also AR, pp. 36-38.

¹³⁵ AR, p. 133. By contrast, he only considered five sites during 2017. Compare AR, p. 36 (Mr. Fibranz’s efforts to relocate his license in 2017) with AR, pp. 13, 37-38 & 133 (Mr. Fibranz’s efforts to relocate his license in 2018). In a memo to the Board, Mr. Fibranz’s attorneys claim that there were over 25 different locations which the licensee “attempted to secure so as to operate the license in 2018.” See AR, p. 27. However, five of the locations involved sites considered between March and June of 2017. There were no additional sites considered between June of 2017 and March of 2018. See AR, pp. 36-27.

¹³⁶ AR, p. 7.

¹³⁷ AR, p. 71 (memorandum of a call from a realtor to AMCO staff on August 13, 2018 indicating that Mr. Fibranz had called the realtor to ask for a “place to hang his license for 30 days”); AR, p. 38 (noting that in August of 2018, Mr. Fibranz talked to the owner of Center Bowl about temporarily placing the liquor license there and talked to TK Korean restaurant about placing liquor license there for 30 day minimum); AR, p. 39 (Woodshed lease option was for a term which would allow Licensee to satisfy the minimum operating requirements); AR, p. 58 (lease agreement with TK Korean can be terminated after 30 days).

¹³⁸ See Testimony of Mr. Fibranz.

meeting shortly after they were posted online on March 28, 2019.¹³⁹ This meant that the Licensee lost approximately two months of time in finding a new premises for his license because AMCO did not provide him with written notice concerning the Board’s views on fourth waivers. He had 9 months (April through December), rather than 11 months (February through December), to find a new premises and operate his license for 240 hours in 2018. The transfer process normally takes four to six months.¹⁴⁰

b. Licensee Did Not Establish Absence of Fault

In the words of the Licensee’s counsel:

The situation in which the Licensee finds himself is, in part, *one of his own making* based on a lack of understanding of the time it currently takes to secure a location and to transfer the location of a license. . . . Couple that with the difficulties in finding a location and with [Licensee’s] mistakes in the initial transfer application process and a lack of understanding of the processes of the Municipality resulted in the Licensee being unable to operate in 2018.¹⁴¹

In his filings with the ABC Board, Licensee’s counsel observed:

[T]he Licensee now finds himself where he is forced to plead for a conditional 4th waiver *resulting mainly from his lack of understanding* of the regulatory circumstances that exist in Anchorage, Alaska in 2018.¹⁴²

The record also establishes that Licensee’s lack of knowledge about the license transfer process, which resulted in his being unable to operate in 2018 was largely self-inflicted. For example, the ABC Board’s website contains cautionary language in a blue box, prominently placed at the top of the page in the section relating to new **and transfer** licenses:

Applying for a . . . transfer liquor license is a long process, involving approval by from the ABC Board, Local Government and other state agencies. Applicants should plan for a 3 to 6 month application process.¹⁴³

¹³⁹ See AR, p. 13; Director’s Brief, at Attachment A.

¹⁴⁰ AR, p. 9. As his counsel noted, Mr. Fibranz made certain assumptions about the processes and procedures of the MOA which he should not have made, making it impossible for him to meet the minimum number of operating hours in 2018. See AR, p. 29.

¹⁴¹ AR, p. 52.

¹⁴² AR, p. 10 (emphasis added).

¹⁴³ Respondent’s Brief, at p.3 n. 2; *see also*

<https://www.commerce.alaska.gov/web/amco/AlcoholLicenseApplication> (stating that applying to transfer a liquor license “is a long process, involving approval from the ABC Board, Local Government and other state agencies”).

c. Licensee Did Not Take Reasonable Steps to Operate

Numerous references in the record demonstrate that Mr. Fibranz's conduct was a substantial contributing factor regarding his inability to operate his license in 2018:

- He didn't pursue the purchase of 302 G Street in April of 2018 because he felt the property was overpriced and the owners wouldn't "budge on the price;"¹⁴⁴
- He didn't pursue 4216 Spenard Road in June since he was "looking to rent;"¹⁴⁵
- He called and texted regarding 550 West 64th Street but did not send a letter (certified or otherwise) regarding his interest in the property when he had no response.¹⁴⁶
- He attempted to call and text the owner of 64th and Arctic three times in July and stopped by the property three time but never sent a letter (certified or otherwise) to the owner when he was unable to reach him by these other means;¹⁴⁷
- He didn't hire a realtor to assist him in locating a suitable property, choosing instead to "drift around" looking for a potential location;¹⁴⁸
- He was unaware that he would need approval from the MOA to operate a beverage dispensary license at TK Korean restaurant premises and thus was unable to proceed with that transfer;¹⁴⁹
- He did not file a license transfer application until late September, so that he had only three months to accomplish a process which normally takes 4-6 months as per the notice on the AMCO's website regarding new or transfer licenses;¹⁵⁰
- He did not consult with AMCO staff prior to filing his license transfer application and, as a result, the application he filed had multiple errors and he had to advertise the application again for three more weeks due to errors in his original advertising;¹⁵¹

¹⁴⁴ AR, p. 36.

¹⁴⁵ AR, p. 37. However, in his 2017 application for a 3rd waiver, the Licensee hadn't ruled out the possibility of buying the premises where he hoped to locate his license. *See* Exhibit A; Testimony of Mr. Fibranz.

¹⁴⁶ AR, p. 37.

¹⁴⁷ AR, p. 37.

¹⁴⁸ Testimony of Mr. Fibranz

¹⁴⁹ AR, p. 9.

¹⁵⁰ *See* <https://www.commerce.alaska.gov/web/amco/AlcoholLicenseApplication>.

¹⁵¹ AR, p. 3. Because of he had to redo publication of the public notice to transfer the license, Mr. Fibranz was unable to be on the Board's agenda for its October meeting in 2018.

- He did not hire counsel to assist him in what was a complicated process until November of 2018;¹⁵² and
- He assumed that the license transfer to TK Korean restaurant would only take a month.¹⁵³

By November 28, 2018, Mr. Fibranz had identified the Woodshed as a place where he could operate License #1566.¹⁵⁴ Even if he had he started on the transfer application process for this particular premises two months earlier – *i.e.*, on September 28, 2018, representing the two months between the Board’s decision in January of 2018 and the date when he had actual notice of the caveat -- Mr. Fibranz still would have been unable to operate at that location in 2018. This is because he had to do three weeks of advertising before filing his transfer application with the Board. Assuming that this application was free from errors, Mr. Fibranz still would miss getting his transfer application on the Board’s October 15, 2018 agenda and instead would have been on the December 17-18, 2018 agenda.¹⁵⁵ Had the Board approved the Licensee’s transfer application for the Woodshed in mid-December of 2018, the Licensee would not have enough time to operate for 240 hours during 2018 and still would have needed to request a fourth waiver. In other words, it was Licensee’s conduct which doomed his efforts to operate in 2018.

Mr. Fibranz’s efforts to place the license in operation in 2018 are best characterized as ineffective due to his misunderstanding of the license transfer process and were simply too late.¹⁵⁶ As he admitted at the hearing, in hindsight he should have hired experienced counsel at the outset to assist him with the process.¹⁵⁷

IV. Conclusion

The Licensee did not establish that non-operation of License #1566 in 2018 occurred through no fault of his own. Therefore, Licensee’s application for a fourth waiver should be denied.

Dated: November 19, 2019

Signed
 Kathleen A. Frederick
 Administrative Law Judge

¹⁵² At the hearing, Mr. Fibranz explained that he had previously handled all his matters involving his liquor license on his own. However, when asked what he might do differently in hindsight, he quickly responded that he should have hired counsel sooner. *See* Testimony of Mr. Fibranz.

¹⁵³ AR, p. 58.

¹⁵⁴ *See* AR, p. 57 (Letter of Intent to lease the Woodshed, dated November 28, 2018).

¹⁵⁵ *See infra*, at p. 5 (Mr. Fibranz was advised on September 25, 2018 that he needed to re-advertise his transfer application for TK Korean restaurant for three weeks and, as a result, could not be placed on the Board’s October 15, 2018 agenda).

¹⁵⁶ *Cf. In re Elizabeth Rollins*, OAH No. 10-0262-ABC (ABC Board 2011) (finding that Ms. Rollins’ efforts were too little and too late).

¹⁵⁷ Testimony of Mr. Fibranz; *see also* AR, p. 10 (indicating that counsel would have been aware of the lengthy time frames and delays that can occur during the licensing process).

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 22nd day of January, 2020.

By: Signed
Signature
Robert Klein
Name
Board Chair
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]