

MINUTES

ALCOHOL AND TOBACCO COMMISSION

MARCH 18, 2014

CALL TO ORDER/NOTING OF QUORUM

Chairman Huskey called the meeting to order and noted the quorum and the attendance. Present were Vice Chairman Johnson, Commissioner Coxey and Commissioner Grubb. Also in attendance were Executive Secretary Rothenberg, Prosecutor Mader, Superintendent Strittmatter and Officer Bedwell.

Jenny Drewry, Diane Masariu, Mark Palmer, Travis Barnes, Marc Carmichael, Matt Brase, Connie Vickery, Lisa McKinney, Greg Genrich, Bart Herriman, Jeff McKean, Alex Intermill, and Mark Webb were present as observers.

DISPOSITION OF MINUTES

Commissioner Grubb moved to approve the minutes for the March 4, 2014 meeting. Commissioner Coxey seconded. The motion was unanimously approved.

PROSECUTOR'S RECOMMENDATIONS

PARTIES' AGREED DISPOSITIONS – Prosecutor Mader recommended the Commission approve the Parties' Agreed Dispositions that were submitted.

Commissioner Grubb moved to approve the PAD forms that were submitted for the March 18, 2014 meeting. Commissioner Coxey seconded. The motion was unanimously approved.

HEARING JUDGE'S RECOMMENDATIONS

DL83-29091 DOLGENCORP, LLC – Hearing Judge Rothenberg stated this is an appeal that was heard by Doug Kowalski, for a new permit that was denied and an appeal filed. A review of the entire record was completed and it was noted the only remonstrators present were either competitors, or relatives of competitors and no other testimony or evidence was presented. Hearing Judge Rothenberg now submits his proposed findings of fact and conclusions of law for recommendation to the Commission.

Commissioner Coxey moved to uphold the findings of the hearing judge and overturn the denial and approve the new permit. Vice Chairman Johnson seconded. The motion was unanimously approved.

DL18-27519 SUNNY & JUGAD – Commissioner Coxey stated this was a denial of a renewal. An appeal was filed and heard by the Commissioner. The denial was based on the fact that the permittee did not appear at the local board hearing (appeared late after the vote was taken). No remonstrators were present and no evidence was submitted against the permit. Commissioner Coxey now submits her proposed findings of fact and conclusions of law for recommendation to the Commission.

Commissioner Grubb moved to uphold the findings of the Commissioner and approve the renewal. Vice Chairman Johnson seconded and the Chairman voted to approve. Commissioner Coxey abstained.

CONSIDERATION OF APPLICATIONS

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permits for renewal, either with or without a quorum at the local board meeting, which have been recommended by local boards and reviewed by our staff with the authority of the Commission. Commissioner Coxey seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permit applications for a new permit, or applications for changes in location or ownership or both of existing permits, which were either recommended by local boards or where a quorum was not present, and reviewed by at least two Commissioners. Commissioner Grubb seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permit applications for catering. Commissioner Grubb seconded. The motion was unanimously approved.

Vice Chairman Johnson moved to approve and incorporate by reference these lists of permits to be placed in escrow for not more than five years, which have been reviewed and recommended by a Commissioner as appropriate for escrow. Commissioner Grubb seconded. The motion was unanimously approved.

Four hundred twenty (420) renewals approved, forty-six (46) new and/or transfer applications approved, six (6) permits approved for catering, six (6) permits approved for first year escrow, four (4) permits approved for second year escrow, three (3) permits approved for third year escrow, and one (1) permit approved for sixth year escrow.

RENEWAL LETTERS AND WAIVER OF FEES

Commissioner Grubb moved to approve the renewal and fee waived letters of extension for the preceding weeks. Commissioner Coxey seconded. The motion was unanimously approved.

APPLICATIONS FOR DISCUSSION

RR45-23063 WINE DOWN, LLC – Commissioner Coxey moved to continue this matter. Commissioner Grubb seconded. The motion was unanimously approved.

RR20-28242 WEOC, INC. - Vice Chairman Johnson stated the location of this permit was annexed into the city limits of Elkhart. Permittee requests the permit be converted from a type 209 to a type 210 permit.

Commissioner Coxey moved to deny the conversion of the permit because the business has not continuously operated and sold alcoholic beverages for 2 years. Commissioner Grubb seconded. The motion was unanimously approved.

DL45-30053 SSS PETROLEUM, INC. – Commissioner Coxey stated this is a new grocery permit with the local board voting 4-0 to disapprove.

Commissioner Coxey moved to uphold the local board and deny the new permit. Vice Chairman Johnson seconded. The motion was unanimously approved.

RR49-30136 LOS MICHOACANOS MEXICAN RESTAURANT, LLC – Commissioner Coxey stated this is a new permit application. The local board forwarded this to the Commission because the applicant failed to appear.

Commissioner Coxey moved to disapprove the new permit. Commissioner Grubb seconded. The motion was unanimously approved.

DL50-13354 JJ&M, LLC – Commissioner Coxey stated this is a renewal with the local board voting 2-2.

The local board referenced four violations. Two of the violations were compliance checks from 2009 and 2010. In 2011, there was a no employee permit. The only violation since 2011 was a no employee permit in 2013.

Commissioner Coxey moved to approve the renewal, due to the fact that the local board did not give a recommendation and there was not sufficient evidence presented to deny. Commissioner Grubb seconded. The motion was unanimously approved.

W FABIANO BROTHERS - See attached transcript

INACTIVE FILES

No Inactive Files

OLD BUSINESS

No Old Business

NEW BUSINESS

REVOCATION OF EMPLOYEE PERMITS

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Heather A. Hrdy, permit #BR1722626. Ms. Hrdy will not be eligible to hold an employee permit until March 12, 2017.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: David R. Ross, permit #BR1661465. Mr. Ross will not be eligible to hold an employee permit until March 12, 2015.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Jeremy A. Zumwalt, permit #BR1663328. Mr. Zumwalt will not be eligible to hold an employee permit until March 11, 2017.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Laura L. Jacobs, permit #BR1764222. Ms. Jacobs will not be eligible to hold an employee permit until March 10, 2015.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Drew C. Lawhead, permit #BR1768403. Mr. Lawhead will not be eligible to hold an employee permit until March 10, 2017.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Sandra K. Avery, permit #BR1728422. Ms. Avery will not be eligible to hold an employee permit until September 16, 2014.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

--- Commissioner Grubb stated the following permittee was convicted of a disqualifying crime after this employee permit was issued: Tianna L. Mueller, permit #BR1630245. Ms. Mueller will not be eligible to hold an employee permit until August 22, 2016.

Commissioner Grubb stated after conducting an investigation of the permittee, Senior Officer Rich Swallow recommended the Commission revoke the permit.

Commissioner Grubb moved to uphold the recommendation of Officer Swallow and revoke the employee permit. Commissioner Coxey seconded. The motion was unanimously approved.

POLICY DETERMINATIONS

No Policy Determinations

ANNOUNCEMENTS

SPIRITED SALES – Chairman Huskey stated the hearing scheduled for April 1, 2014 regarding Spirited Sales has been changed to a prehearing conference, by request of counsel.

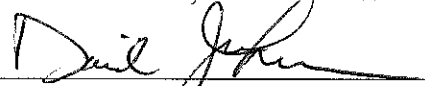
ADJOURNMENT

Commissioner Grubb moved to adjourn the meeting. Commissioner Coxey seconded. The motion was unanimously approved.

Approved this 1st day of April, 2014.



ALEX HUSKEY, CHAIRMAN



DAVID JOHNSON, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER

MELISSA COXEY, COMMISSIONER

Chairman Huskey One other matter that's missing from most of your agendas that needs to be discussed is WH43-29932 and 29933, known as the Fabiano Brothers. Ms. Coxey?

Comm. Coxey After review of the information provided to the commission and two Excise investigations related to complaints, there isn't evidence to support that the applicant is not qualified to hold the permit, so I would move to approve the pending application.

Comm. Grubb Second.

Huskey Motion by Ms. Coxey to approve the pending application. Second by Mr. Grubb. Further discussion of this matter?

Grubb Mr. Chairman, I think the debate is very close on this issue as I read the attorney's opinions. One way and the other I find merit, actually in both arguments. As I try to weigh out what's right under current Indiana law, I find it difficult to understand why the General Assembly would disadvantage an Indiana business under statute to the advantage of an out-of-state wholesaler. That's my reasoning for believing that my intent would be to vote to deny.

Coxey So, are we voting on intent then?

Huskey Well, the motion was to approve the application.

Grubb Oh, it was?

Huskey Um hum.

Grubb Excuse me. I guess I seconded that. But the vote's not...

Huskey You approved the motion. That's all. The further discussion is where we have discussion about the processes.

Grubb The motion, if I may clarify again, was to approve the transfer?

Coxey It was.

Huskey Further discussion needed?

Comm. Johnson Do we feel like we have all of the input we are going to get on the issue?

Huskey Based on...I think with this particular matter, there is constant input into the matter and constant argument on both sides of the aisle as Mr. Grubb has stated. One of the things that you look at when you look at the statute, one of the primary arguments has been that, 1) the statute...part of the statute governing these types of permits...there's two statutes that state permits "under this title" and one statute that language is not present. If you wanted to know the exact statutes that have been used in the argument is 7.1-5-9-3, where the language states explicitly, "any type under this title", and that language is also found in 5-9-6, "any type under this title". 5-9-4, which deals with "Applicants for beer wholesaler's permit - Interest in alcoholic beverages prohibited", where there is belief that they have interest in other permits. That language is not stated. So the argument on that has been either way. One of the things that's unique that I find is that these wholesalers with relationship to the primary sources. The primary sources exercise quite a bit of authority in some of these business relationships. And in this case, if the permit is denied based on first right of refusal, and anyone can certainly correct me if I'm wrong on this, the primary source thing gets to weigh in and can buy their permit and can transfer it to whomever they so choose to do, which

seems to be an in run around even some of the processes that we would have as a commission---in a sense as a business relationship. So...

Coxey Is someone going to testify to that? Are we going to take testimony?

Huskey No. That's my discussion to what I'm talking about right now. So, with that being said, and that's based on my research and findings. So that being said, I think that we just have to keep in fact that whatever evidence is there, I think we have all the evidence that's going to be presented. The commission has to make the decision based on what evidence has been presented in investigation. At this particular point, the officers have done the investigation. There is nothing in there that indicates prohibited interest at this level. So, I think the question would be are we prepared to approve this application, or are we prepared to make a different motion that you're not prepared to approve this application. If so, we need to act on the first motion.

Grubb Not having listened carefully as I should have, is it permissible to withdraw my second on that motion?

Huskey At this time, you would like to withdraw your second on that motion?

Grubb Yes. Let me make sure I understand the motion. The motion was to approve the transfer?

Coxey Yes.

Grubb I seconded, which allowed the discussion.

Coxey Well, but I'm not ready to close discussion.

Grubb That's fine.

Coxey So, if that would have the effect of closing discussion, then I would prefer that not happen. You know, without evidence of the business influence, or the undue influence by the primary source of supply, my rationale has been that there is a distinction between the two statutes. I don't know that I believe that it was the intent of the legislature to treat them differently. 7.1-5-9-3, has been amended far more often and more recently than the other statute. But, if you look at the definition of "permit", which I believe applies throughout 7.1, the definition of permit means, "A written authorization issued by the commission." So, that would not be permits issued in other states because we don't issue those permits. So, if we apply the definition of permit in this statute, 7.1-5-9-4, then that would not disqualify them from holding a permit.

Huskey Thank you.

Johnson How do we square that with Commissioner Grubb's position about how that disadvantages Indiana?

Coxey I don't know that it necessarily does. I mean, with...Indiana businesses can hold a permit in Indiana. An out of state entity can hold a permit in Indiana. I'm not sure I understand the logic that it is somehow disadvantaging Indiana permit holders. I mean, Indiana permit holders can hold permits in other states.

Huskey Again, not to close the discussion but certainly the motion can...we can act on this motion, or you can withdraw your

second and then we can motion to whether or not the commission plans to approve or deny the application. If it is the vote of the commission to approve the application, we can allow this motion to continue and finish the process, if it is the intent of the commission after hearing the testimony to deny the motion, we can make that statement and move to providing them an opportunity to have a hearing on the matter at which time testimony would be brought in on all sides of the matter.

Grubb It probably would make more sense to leave my second and vote this motion because if it fails, then we would go to the second one. But if it succeeds, then the matter is concluded. Whereas if I withdraw it, the motion to deny doesn't pass then you have to go back and entertain another motion to approve would seem logic, unless I'm missing something, Mr. Chairman.

Huskey The motion is already to approve.

Grubb Yes. But, if this one was withdrawn from my second, and then a motion to intent to deny fails, then you'd have to go back to this motion a second time, if I'm correct. Therefore, I'm going to leave in place my second.

Huskey Thank you.

Grubb You're welcome. I've got myself half confused here.

Huskey Don't do that. You might need yourself later.

Grubb I need to listen very carefully to the motion next time. I apologize.

Huskey All right. Any other discussion?

Johnson Well, I may be beating this to death and maybe we don't need any more input, but my position is that I'd rather put this into position where I have further input and the opportunity to discuss it further. I wasn't prepared to grant this today.

Huskey Okay.

Johnson So, if you take a vote on this motion, that's where I'm coming from.

Huskey So, at this time, all those in favor of granting this permit as submitted today...

Coxey Aye.

Huskey All those opposed to granting this permit as submitted today and allow for a hearing...

Johnson Aye.

Grubb Aye.

Dave Rothenberg Just as a matter of procedure, that's not what you are doing right now. What you are doing right now is just voting on her motion. That's it.

Huskey Right.

Rothenberg You'd have to then go back...

Huskey Right.

Rothenberg through and state that it would be your intent to deny to set that hearing motion in process.

Huskey Yes.

Johnson I understand.

Huskey So, the voting to approve this permit as motioned by Ms. Coxey...

Johnson I vote nay.

Grubb No.

Huskey That leaves it with me. I'm going to vote nay. Motion to...entertain a motion to give intent to the permittee for denial that they may apply for a hearing.

Grubb So moved.

Johnson Second.

Huskey All those in favor?

Johnson Aye.

Grubb Aye.

Coxey Aye.

Huskey Aye. So they get a chance for hearing. Would you work with the permittee to schedule that out?

Rothenberg Yes. Would you like sort of in light of what's going on with other matters just like this, would you like a prehearing conference to be scheduled first?

Huskey Yes.

Johnson To put this in action, however, the applicant must actually request this to be done.

Huskey Right.