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## GOVERNMENT AND ADMINISTRATIVE LAW NEWS

### Administrative Sanctions Against Colorado Liquor Licenses

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by Kurt G. Stiegelmeier

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*This column provides information to attorneys dealing with the various state and federal administrative agencies, as well as attorneys representing public or private clients in the areas of municipal, county, and school or special district law.*

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Violations of the Colorado Liquor Code ("Liquor Code") and its regulations<sup>1</sup> ("Liquor Regulations") may give rise to criminal charges,<sup>2</sup> civil liability,<sup>3</sup> and administrative sanctions against the liquor license.<sup>4</sup> This article discusses the administrative sanctions that may be imposed against the liquor license and the legal issues surrounding these sanctions, including the effects of transferring or surrendering the liquor license, determining the appropriate sanction, and administrative and judicial review of the sanction.<sup>5</sup>

### **Types of Sanctions**

There are four types of sanctions that can be imposed against a liquor license. Each is discussed below.

#### **Suspension**

The Liquor Code authorizes the liquor licensing authority to suspend any liquor license for up to six months.<sup>6</sup> The Liquor Code does not expressly authorize licensing authorities to suspend or "hold in

abeyance" any part of the license suspension on condition that the licensee refrain from or perform certain acts. However, the Liquor Regulations imply that there is authority to hold a portion of the suspension in abeyance.<sup>7</sup> Holding some part of the suspension in abeyance has become a common practice.<sup>8</sup> In many cases, some part of the suspension is held in abeyance on condition that the licensee have no further violations for from one to two years. In some cases, a part of the suspension is held in abeyance on condition that the licensee or its employees complete certain remedial training.

The Liquor Code does not dictate when or how the suspension must be served. Suspensions are sometimes structured so that they are served in increments rather than for a continuous period. In addition, suspensions are sometimes delayed to give the licensee time to prepare for the suspension. Suspension of the liquor license deprives the licensee of the right to sell, serve, and host consumption of alcohol beverages.<sup>9</sup> However, suspension does not necessarily require the licensee to close or vacate the licensed premises. Unless otherwise ordered, a liquor store licensee may still occupy the premises to clean, stock, accept new inventory, and perform other tasks as long as alcohol beverages are not sold. Unless otherwise ordered, a restaurant or tavern licensee may remain open to serve food and provide entertainment as long as alcohol beverages are not sold, served, or consumed on the premises.

## ***Fine in Lieu of Suspension***

The state or local liquor licensing authority may impose a fine in lieu of all or part of the suspension if:

1. the decision has been made final;
2. the fine in lieu of suspension is imposed before the operative date of the suspension;
3. the suspension imposed is fourteen days or less;
4. the licensee petitions for the fine in lieu of the suspension;
5. the state or local authority finds that public welfare and morals will not be harmed and a fine will serve the purposes of the discipline;
6. the licensee's records are in sufficient order so that the loss of sales that the licensee would have experienced under the suspension can be determined with reasonable accuracy;
7. the licensee has not had his or her license suspended or revoked, nor paid a fine in lieu of suspension during the two years preceding the complaint to suspend the license; and
8. if the sanction is imposed by a local licensing authority, the governing body of the city or county has first adopted a resolution or ordinance accepting the practice of imposing fines in lieu of suspension.<sup>10</sup>

The Liquor Code and Liquor Regulations do not indicate whether this fourteen-day limit refers to the total number of days in suspension or only to the active days of suspension, which does not include the number of days held in abeyance. The Colorado Department of Revenue, Liquor Enforcement Division ("Division of Liquor Enforcement"), has stated that the fourteen-day limit refers only to the number of active suspension days and does not include the number of days held in abeyance.<sup>11</sup> Thus, under the Division of Liquor Enforcement's interpretation, a licensee who has his or her license suspended for thirty days, with sixteen days held in abeyance and fourteen days of active suspension imposed, would still qualify for a fine in lieu of suspension.

The amount of the fine is 20 percent "of the licensee's estimated gross revenues from sale of alcohol beverages during the period of suspension."<sup>12</sup> The Liquor Code and Liquor Regulations do not explain how this fine is to be estimated. In Denver, the practice is to examine the licensee's books for the preceding 180-day period, sum up gross revenues from all sales of alcohol beverages, divide by 180 to obtain an average gross daily revenue figure, multiply that figure by the number of days of suspension that the fine is taken in lieu of, and take 20 percent of that figure.<sup>13</sup>

*For example:* gross revenues for 180 days = \$108,000 ÷ 180 = \$600 x 14-day suspension = \$8,400.

The fine can be no less than \$200 and no more than \$5,000.<sup>14</sup> The Liquor Code and Regulations do not indicate whether these dollar limits should be applied per case or per count. The City of Denver has interpreted the dollar limits as a per count, rather than a per case limitation.<sup>15</sup>

## ***Imposition of New Conditions***

The Liquor Code does not expressly state that the licensing authority may impose new conditions on the license as a sanction. However, the Liquor Code contains language that strongly implies this authority. CRS § 12-47-103(9)(b) states that the licensing authority may refuse to renew a license on the ground that the licensee violated a special term or condition placed on the license in prior disciplinary proceedings.

## ***Revocation or Denial Of Renewal***

In CRS § 12-47-601(1), the Liquor Code authorizes the liquor licensing authority to revoke any liquor license. The licensing authority may accomplish the same thing by waiting until the license comes up for its annual renewal and then denying renewal for the violation.<sup>16</sup>

## **Effect of Transferring The License**

Licensees frequently attempt to avoid more severe sanctions by transferring the liquor license to a third person. The Liquor Code and Liquor Regulations do not speak to this issue. In some Colorado jurisdictions, transfer to a new licensee approved by the local licensing authority is treated as an acceptable solution, and the disciplinary action may be dismissed. This policy is designed to resolve the problem quickly when the problem is particular to the licensee.

In other Colorado jurisdictions, including Denver, the local licensing authority has taken the position that no transfer will be considered while a disciplinary action is pending. The license may be transferred after the sanction has been imposed, but the transferee will take the license subject to existing sanctions. This policy is designed to prevent the avoidance of sanctions through transfers, which would render sanctions for the worst violations ineffective and eliminate deterrence of serious violations. This policy also allows the transfer to go forward, which may be in the public interest, but forces the licensee to bear the penalty by decreasing the market value of the license. This eliminates the problem licensee, but also ensures that the goal of deterrence is served.

## **Effect of Surrendering The License**

Licensees sometimes seek to surrender their liquor license before the disciplinary hearing is held, rather than face the hearing and sanction. Surrender of the license offers the licensee some advantages where the licensing authority is likely to impose a severe sanction. First, surrendering the license avoids an adjudication that the violation actually occurred. This prevents the use of the findings to determine that the licensee is a person whose character, record, and reputation are not satisfactory to hold a liquor license in future applications in the same or other jurisdictions.<sup>17</sup> Second, avoiding an adjudication prevents the use of the findings for collateral estoppel<sup>18</sup> in civil forfeiture and personal injury actions.

The Liquor Code and Liquor Regulations do not address surrender of the license or whether the licensing authority must accept a surrender of the license. In the context of dental and law licenses, the Colorado Court of Appeals and Colorado Supreme Court have held that a licensee does not have a right to surrender his or her license while a disciplinary action is pending.<sup>19</sup> The licensing authority has

discretion to accept or decline the surrender.<sup>20</sup> If presented with the issue in the context of a liquor license, it appears the Colorado Supreme Court would adopt the same rule as to surrender of liquor licenses because the policy considerations are similar. Licensing authorities should consider carefully the tactical effects of surrendering the license and refuse to accept a surrender where it does not serve the public interest.

## **Determining the Appropriate Sanction**

Licensing authorities must determine the appropriate type and degree of sanction to impose against a license. This responsibility calls for a careful examination of many factors and the exercise of sound discretion.

### ***Guidelines on "Compliance Check" Sanctions***

The Liquor Regulations contain guidelines for sanctions in cases involving sale of alcohol beverages to a minor where the violation was detected using a "compliance check" or "sting."<sup>21</sup> A compliance check involves an investigator using a person under the age of twenty-one (usually a police cadet) to purchase an alcohol beverage, rather than detecting such violations as they naturally occur in the course of business.<sup>22</sup> These guidelines establish a range of penalties for the first, second, third, and fourth such offense within two years. However, these guidelines are advisory, not mandatory. The Regulations state that the licensing authority "may consider" these penalties, but does not require the licensing authority to follow them.

### ***Absence of Standards for Other Sanctions: Due Process***

Other than the guidelines for certain compliance check penalties, the Liquor Code and Liquor Regulations contain no guidelines, standards, or even criteria to consider in determining the appropriate sanction for any violation. This is in stark contrast to the detailed criteria that must be considered when determining whether probation should be granted in criminal cases,<sup>23</sup> the length of imprisonment in criminal cases,<sup>24</sup> and the length of drivers' license suspensions.<sup>25</sup>

The absence of standards or criteria to consider in determining the sanction is sometimes attacked as a violation of substantive due process or as an unconstitutional delegation of authority. In *Brownlee v. Department of Revenue*,<sup>26</sup> the Colorado Court of Appeals rejected these arguments, holding that judicial review under Colorado Rules of Civil Procedure ("C.R.C.P.") 106 provides a check against abuse of discretion that satisfies due process.<sup>27</sup>

The Colorado Supreme Court has not reviewed the holding in *Brownlee*, but the holding is supported by two similar decisions by that Court. In *Kibler v. State*<sup>28</sup> and *People v. Morley*,<sup>29</sup> the Court upheld sanctions imposed against law and nursing licenses where the regulatory scheme did not provide guidelines or criteria to consider in determining the sanction. In both cases, the Court held that due process is satisfied if the licensing statute sets forth the possible penalties for violations, even if the statute does not establish guidelines or even criteria to consider in determining the sanction. Because the licensing schemes set forth the possible penalties as suspension or revocation, the Court held that they complied with due process. The Liquor Code sets forth the possible penalties as suspension, revocation, denial, fines in lieu of suspension, and imposition of new conditions. Therefore, the absence of standards as to the sanction does not violate due process.

### ***Factors Considered in Determining the Sanction***

Factors considered when imposing sanctions in liquor license cases are somewhat different than in criminal cases. Punishment and retribution are not appropriate considerations in license disciplinary cases; instead, the proceeding is remedial and focuses on protection of the public.<sup>30</sup> It is essential that punishment and retribution not become considerations because focusing on these factors could convert the action into a quasi-criminal action, thereby implicating double jeopardy<sup>31</sup> and other criminal protections, such as the Eighth Amendment prohibition of excessive fines.<sup>32</sup> However, general and specific deterrence are appropriate considerations,<sup>33</sup> and these do not convert the action into a quasi-criminal action.<sup>34</sup>

The licensee's past violations as a liquor licensee are highly relevant because the licensee must maintain a good record to maintain the license.<sup>35</sup> Past violations outside the context of the liquor license are relevant only if they are crimes of moral turpitude or demonstrate an inability to comply with the Liquor Code and Liquor Regulations.<sup>36</sup> The facts that the licensee has no criminal record and a good reputation in the community are not especially relevant because they are basic requirements that every licensee must satisfy just to obtain and maintain the license.<sup>37</sup>

Whether the licensee has already been punished through a criminal action is not relevant. The criminal action is designed as punishment, whereas the liquor license sanction is not designed to punish, but to remedy the problem, deter others, and protect the public.<sup>38</sup> Similarly, the fact that the licensee has suffered a civil forfeiture as a result of the same violation is not particularly relevant because the forfeiture is primarily designed to remove assets from criminal use and fund law enforcement efforts against crime.<sup>39</sup>

Some of the other factors usually considered relevant include the number and frequency of violations under past and present liquor licenses; the severity of the violation; how long the violation continued; whether the violation was committed intentionally, knowingly, or negligently; whether the violation was accompanied by falsehood or fraud; efforts taken to voluntarily correct the problem; promptness in correcting the problem; and public perception that the Liquor Code is adequately enforced through the licensing system.

## **Administrative and Judicial Review of Sanctions**

Sanctions imposed against liquor licenses are subject to two levels of review: administrative and judicial. Administrative review involves the agency reviewing the decision of its own board, hearing officer, or Administrative Law Judge ("ALJ"). Judicial review involves a district court sitting as an appellate court reviewing the record for errors of law or abuse of discretion.

### ***Internal Administrative Review***

When the state liquor licensing authority imposes sanctions, the decision is subject to internal review by the Director of the Department of Revenue under the Colorado Administrative Procedures Act ("APA").<sup>40</sup> The parties may submit objections to the ALJ's findings. The agency then reviews the sanction imposed by the ALJ and considers the objections.<sup>41</sup> The APA does not apply to the local liquor licensing authorities.<sup>42</sup> However, some cities and counties have adopted an analogous procedure for internal administrative review.<sup>43</sup>

The individual or body conducting the internal administrative review may increase, decrease, or re-structure the sanction. The sanction is an "ultimate finding," rather than an evidentiary or factual finding because it is the conclusion that determines the rights and liabilities of the parties based on the factual findings.<sup>44</sup>

A reviewing administrative agency can overrule its own ALJ or hearing officer on ultimate findings as long as there is a reasonable basis in the law and evidence for the decision to overrule.<sup>45</sup> This practice

does not violate due process.<sup>46</sup> The Colorado courts have specifically held that an administrative agency may properly overrule its own ALJ or hearing officer on the sanction that should be imposed.<sup>47</sup>

## **Judicial Review**

Judicial review of sanctions imposed by the local licensing authority may be obtained by filing an action in district court under C.R.C.P. 106(a)(IV). A local liquor licensing authority's sanction cannot be reviewed under the APA.<sup>48</sup> However, judicial review of a sanction imposed by the state licensing authority may be obtained by filing an action in district court under the APA.<sup>49</sup>

The Colorado Court of Appeals has adopted the abuse of discretion standard for review of sanctions imposed against liquor licenses. The sanction will be upheld unless it is so excessive that it constitutes an abuse of discretion.<sup>50</sup> All doubts as to the propriety of the licensing agency's decision should be resolved in favor of the licensing authority.<sup>51</sup> The abuse of discretion standard has been applied to sanctions against liquor licenses in many other states as well.<sup>52</sup>

The Colorado Supreme Court has not specifically held what standard of review applies to liquor license sanctions. In the context of other licenses, the court has held that a licensing body has wide discretion in determining the sanction, and the licensing body's choice of sanction will be upheld on appeal unless it bears no relation to the conduct, is a gross abuse of discretion, or is manifestly excessive in relation to the needs of the public.<sup>53</sup> Although the phrasing of this test is slightly different than the abuse of discretion standard, in practice, it appears to be virtually the same. However, this test may have some additional value in forcing reviewing courts to consider the abuse of discretion issue in a more articulate three-part way.

The licensing authority should state on the record or in its written decision why it chose the particular sanction. Failure to at least state the reasons for the sanction deprives the reviewing court of the ability to determine whether there has been an abuse of discretion and deprives the licensee of the opportunity for judicial review.<sup>54</sup> This may result in reversal<sup>55</sup> or a remand for the licensing authority to make such findings.<sup>56</sup>

## **Conclusion**

The Liquor Code and Liquor Regulations provide a variety of sanctions against liquor licenses. The courts have given licensing authorities ample discretion to apply these sanctions judicially for the protection of the public and to ensure the integrity of the liquor industry.

## **NOTES**

1. See CRS §§ 12-47-101 *et seq.* and 1 C.C.R. § 203-2.
2. CRS § 12-47-901; *People v. Bagby*, 734 P.2d 1059, 1062 (Colo. 1987).
3. CRS §§ 12-47-801 and 13-21-103; *Largo Corp. v. Crespin*, 727 P.2d 1098, 1108 (Colo. 1986).
4. CRS § 12-47-601; *A.D. Jones and Co. v. Parsons*, 319 P.2d 480, 483 (Colo. 1958).
5. This article does not delve into the grounds for sanctions or the procedure for imposing them. *But see* Stiegelmeier, "Suspension or Revocation of Liquor Licenses for Offensive Conduct," 29 *The Colorado Lawyer* 77 (Sept. 2000).
6. CRS §§ 12-47-601(1) and -901.

- [7.](#) Reg. 47-604(A)(1), 1 C.C.R. § 203-2.
- [8.](#) See, e.g., *DiManna v. Kalbin*, 646 P.2d 403 (Colo.App. 1982).
- [9.](#) CRS § 12-47-901(1)(f)(g).
- [10.](#) CRS § 12-47-601(3)(a)(7); see, e.g., Denver Revised Municipal Code, §§ 6-14 and 6-96.
- [11.](#) Division of Liquor Enforcement letter to Denver Director of Excise and Licenses, Sept. 24, 1997. This document is available from the Denver City Attorney's Office.
- [12.](#) CRS § 12-47-601(3)(b).
- [13.](#) Denver Department of Excise and Licenses Policies, Fine in Lieu of Suspension, ¶ 1.
- [14.](#) CRS § 12-47-601(3)(b).
- [15.](#) *In Re Levy and Aramark*, Denver Department of Excise and Licenses (Aug. 20, 2001). This document is available from the Denver City Attorney's Office.
- [16.](#) CRS §§ 12-47-302(1) and 12-47-103(9).
- [17.](#) CRS § 12-47-307(1)(a)(II)(VI); see Widener, "Moral Character of the Liquor Licensee or Applicant," 25 *The Colorado Lawyer* 79 (Feb. 1996).
- [18.](#) *Dale v. Guaranty National Insurance*, 948 P.2d 545, 549 (Colo. 1997); *Industrial Commission v. Moffat County School District*, 732 P.2d 616, 620 (Colo. 1987).
- [19.](#) *Cross v. State Board of Medical Examiners*, 552 P.2d 38, 42 (Colo.App. 1976); *People v. Schaefer*, 944 P.2d 78, 80 n.1 (Colo. 1997); *People v. Hebenstreit*, 823 P.2d 125, 128 n.3 (Colo. 1992).
- [20.](#) *Cross*, *supra*, note 19 at 42.
- [21.](#) Reg. 47-604, 1 C.C.R. § 203-2.
- [22.](#) See, e.g., *DiManna*, *supra*, note 8.
- [23.](#) CRS § 16-11-203.
- [24.](#) CRS § 18-1-105.
- [25.](#) *Elkins v. Charnes*, 682 P.2d 70, 72 (Colo. 1984).
- [26.](#) 86 P.2d 1372, 1374 (Colo.App. 1984).
- [27.](#) See also *Chroma Corp. v. Campbell*, 619 P.2d 74 (Colo.App. 1980); *Peterson v. Colorado Racing Comm.*, 677 P.2d 412, 414 (Colo.App. 1983).
- [28.](#) 718 P.2d 531, 535 (Colo. 1986).
- [29.](#) 725 P.2d 510, 516-517 (Colo. 1986).

- [30.](#) *People v. Martin*, 897 P.2d 802, 804 (Colo. 1995); *People v. Abelman*, 804 P.2d 859, 863 (Colo. 1991); *People v. Deutschendorf*, 920 P.2d 53, 61 (Colo. 1996).
- [31.](#) *United States v. Ursery*, 518 U.S. 267 (1996); *Bennis v. Michigan*, 516 U.S. 442 (1996); *Deutschendorf*, *supra*, note 30 at 58.
- [32.](#) *Blue Cat Lounge Inc. v. License Appeal Comm.*, 667 N.E.2d 554 (Ill.App. 1996).
- [33.](#) *Martin*, *supra*, note 30 at 804.
- [34.](#) *Bennis*, *supra*, note 31 at 452; *Ursery*, *supra*, note 31; *Deutschendorf*, *supra*, note 30 at 61.
- [35.](#) CRS § 12-47-307(1)(a)(II)(VI); *Mr. Lucky's Inc. v. Dolan*, 591 P.2d 1021, 1023 (Colo. 1979).
- [36.](#) *Hartman v. Wadlow*, 545 P.2d 735, 737 (Colo.App. 1975).
- [37.](#) CRS § 12-47-07(1)(a)(II)(VI); *Mr. Lucky's*, *supra*, note 35 at 1023; see *Widener*, *supra*, note 17.
- [38.](#) *Abelman*, *supra*, note 30.
- [39.](#) CRS § 16-13-314; *Ursery*, *supra*, note 31 at 284.
- [40.](#) CRS §§ 24-4-101 *et seq.*; see, e.g., *Mr. Lucky's*, *supra*, note 35 at 1023.
- [41.](#) CRS § 24-4-105(14) and (15).
- [42.](#) *Chroma Corp v. Adams County*, 543 P.2d 83, 85 (Colo. 1975); *Continental Liquor v. Kalbin*, 608 P.2d 353, 355 (Colo. 1980).
- [43.](#) See, e.g., Denver City Charter §§ A9.8-A9.10 and Denver Revised Municipal Code, § 32-21(b).
- [44.](#) *Puls v. People ex rel. Woodard*, 722 P.2d 424, 426 (Colo.App. 1986).
- [45.](#) *Id.* at 426; *Halverstadt v. Dept. of Corrections*, 911 P.2d 654, 660 (Colo.App. 1995); *Davis v. Board of Medical Examiners*, 791 P.2d 1198, 1202 (Colo.App. 1994); *State Board of Medical Examiners v. McCroskey*, 880 P.2d 1188, 1193 (Colo. 1994).
- [46.](#) *Davis*, *supra*, note 45; *Matter of Perron*, 437 N.W.2d 92, 96 (Minn.App. 1989); *Stapleton v. Industrial Comm.*, 668 N.E.2d 15, 21 (Ill.App. 1996); *Lachenmyer v. Didrickson*, 636 N.E.2d 93, 98 (Ill.App. 1994); *Brock v. Police Board of Chicago*, 563 N.E.2d 970, 976-977 (Ill.App. 1990); *Homefinders Inc. v. City of Evanston*, 357 N.E.2d 785, 791 (Ill.App. 1976).
- [47.](#) *Puls*, *supra*, note 44 at 426 (agency properly overruled the hearing officer's suspension and imposed revocation); *Davis*, *supra*, note 45 at 1202 (agency properly overruled a two-year revocation and imposed a permanent revocation); see also *Perron*, *supra*, note 46 at 96 (agency properly overruled hearing officer and imposed a six-month suspension).
- [48.](#) *Two G's Inc. v. Kalbin*, 666 P.2d 129, 133 (Colo. 1983).
- [49.](#) CRS § 24-4-106; *Mr. Lucky's*, *supra*, note 35 at 1022.
- [50.](#) *Chroma Corp.*, *supra*, note 27; *Brownlee*, *supra*, note 26 at 1374.

51. *U-Totem of Colorado Inc. v. City of Greenwood Village*, 563 P.2d 373, 376 (Colo. 1977); *Bailey v. Board of County Comm'rs*, 376 P.2d 519, 520 (Colo. 1962).

52. See, e.g., *Ric v. Alcoholic Beverage Control Bd.*, 152 Cal.Rptr. 285 (Cal.App.3d 1979); *Lopez v. State Liquor Control Comm.*, 458 N.E.2d 599 (Ill.App. 1983); *Kelly v. Liquor Control Comm.*, 345 N.W.2d 697 (Mich.App. 1983); *In Re GTRT Inc.*, 467 A.2d 1233 (Pa. 1983); *Vaspocrakian Ltd. v. Alcoholic Bev. Control Comm.*, 516 N.E.2d 1153 (Mass. 1987); *Walker v. Supervisor of Liquor Control*, 781 S.W.2d 1113 (Mo. App. 1989).

53. *Colorado State Board of Nursing v. Lang*, 842 P.2d 1383, 1388 (Colo.App. 1992) (nursing license); *Colorado Real Estate Comm. v. Hanegan*, 947 P.2d 933, 936 (Colo. 1997) (real estate license); *Colorado State Board of Medical Examiners v. Reiner*, 786 P.2d 499, 500 (Colo.App. 1989) (physician's license); *People v. Brown*, 770 P.2d 1373, 1379 (Colo.App. 1989); *Davis, supra*, note 45 at 1202 (psychologist's license).

54. See *Geer v. Presto*, 313 P.2d 980, 981 (Colo. 1957); *Burns v. Board of Assessment Appeals*, 820 P.2d 1175, 1177 (Colo.App. 1991); *Sclavertis v. City of Cherry Hills*, 751 P.2d 661, 663 (Colo. App. 1988).

55. *Board of County Comm'rs v. Salardino*, 318 P.2d 596 (Colo. 1957); *Geer, supra*, note 54 at 981.

56. C.R.C.P. 106(a)(4)(IX).