

INVESTIGATIVE REPORT

Final Finding and Closure -- Public Version

The complainant's name in this report is used with his permission.

Alaska Ombudsman Complaint A097-0341

September 2, 1999

SUMMARY OF THE COMPLAINT

In late 1996, Mitchell Majtyka, a small business owner living in Wasilla, contacted the Ombudsman's office to complain that the Division of Banking, Securities and Corporations (DBSC), Department of Commerce and Economic Development, had unfairly allowed a competitor to deceptively use his business name. In Alaska, businesses that are not incorporated can register their names with DBSC for five years by paying \$25 filing fee. A name can only be registered if it has not been registered by another business entity operating in Alaska. This investigation focused on the following allegation:

Unreasonable: DBSC's decision to allow Mr. Majtyka's business rival to register a deceptively similar name was inconsistent with agency policy and thereby places the complainant at a disadvantage to all others.

Assistant Ombudsman Tom Webster and Associate Ombudsman Vernon Metcalfe investigated this complaint. Mr. Majtyka gave the Ombudsman permission to use his name in the public record of this investigation.

INTRODUCTION

When Mr. Majtyka registered the business name "Explore Alaska" with DBSC on April 29, 1996, he believed that he was gaining exclusive rights to the name as defined in AS 10.35.40. Later, after another Wasilla businessman registered the name "Explore Alaska Tour Company," Mr. Majtyka asked DBSC to deny his business rival the right to use the name because it was "deceptively similar" to his business name. "Deceptively similar" is a legal principle used in a number of Alaska statutes that determine name availability for businesses. The statutes include 10.06, 10.20 10.35 and 32.11.

In January 1997, William Hensley, then commissioner of the Department of Commerce and Economic Development (DCED), rejected Majtyka's request, finding that the two business names were not deceptively similar. Commissioner Hensley said that the words "Tour Company" in "Explore Alaska Tour Company" were by DBSC regulations key words, and this made the two business names distinguishable, not deceptively similar. Commissioner Hensley based his decision on division guidelines established in 1991 by Mike Monagle, then the records and licensing supervisor for DBSC. Dissatisfied with this decision, Mr. Majtyka complained to the Ombudsman.

BACKGROUND

During the summer of 1998, Deanna Orris, who does business under the name "The Wild Iris," a bed and breakfast, complained that another business, "The Wild Iris Café," was using a deceptively similar name and asked the state to withdraw the registered name. In August 1998, DBSC denied Ms. Orris' complaint saying, as with the Majtyka case, that the name was not deceptively similar because it contained a key distinguishing word, "Café."

Ms. Orris hired a lawyer and appealed the state's decision to the Superior Court of the Fourth Judicial District. The appeal stated that DBSC had not followed standards expressed in AS 10.35.040. Ms. Orris' attorney also pointed out that the guidelines used by the division to interpret AS 10.35.040 were unpromulgated and therefore had no legal standing.

By this time, Mr. Hensley was no longer commissioner of DCED. In response to the lawsuit, Vince Usera, an Assistant Attorney General who advises DCED on legal issues, recommended that the division rule that the name "The Wild Iris Café" was deceptively similar. In November 1998, the division issued a letter withdrawing the name "The Wild Iris Café" saying it was deceptively similar. The owner of "The Wild Iris Café" agreed to drop the name.

When the Ombudsman investigator learned about the Orris case, the investigator pointed out the similarities between it and Mr. Majtyka's complaint. DBSC reviewed the Majtyka case and decided that former Commissioner Hensley had been wrong. The policy guidelines used by Mr. Hensley to make his decision had never been promulgated, said Dawn Holland-Williams, records and licensing supervisor for DBSC. "Nowhere in our statutes, where a name entity is concerned, are we allowed to adopt regulations to implement that section," said Ms.

Holland-Williams.

The division decided to cancel the registration of “Explore Alaska Tour Company.” But before the order could be issued, it was discovered that AS10.6.895 did not allow the cancellation of a business name after it had been registered for one year. The agency decided not to renew the name registration after it expires in January 1, 2001.

INVESTIGATION

The investigators interviewed the following individuals in the course of the investigation:

Dawn Holland-Williams, records and licensing supervisor for DBSC, was interviewed in March and April 1999.

Mitchell Majtyka, owner of “Explore Alaska,” was interviewed in December 1996 and in March of 1999.

Michael Monagle, former records and licensing supervisor of DBSC, was interviewed in December 1996, and contacted again in March and April 1999.

Vince Usera, Assistant Attorney General who handles legal issues for DECD, was contacted in March 1999.

Additionally, the investigators reviewed DBSC Internet pages describing the business registration program, proposed legislation by DBSC to change the Alaska Business Entity Names Act, state statutes governing registration of business names, DBSC policy memorandum to staff, dated 11-18-91, letters exchanged between the complainant and the commissioner of DCED, and reviewed court documents, letters and memoranda involved in the “The Wild Iris” case.

The investigators reviewed the following statutes:

AS 10.06.105. Corporate name. The corporate name may not be the same as, or deceptively similar to, the name of a domestic corporation existing under the laws of this state.

AS 10.06.115. Applications to reserve corporate name. Reservation of a corporate name is made by filing an application with the commissioner. If the commissioner finds that the name is available for cooperate use and not a reserved or registered business name as set out in AS 10.35 the commissioner shall reserve it for the exclusive use of

the applicant for a period of 120 days.

AS 10.35.020. Application to reserve name. A name is not available which is the same as, or deceptively similar to the name of a domestic corporation.

AS 10.35.040. Registration of name. Registration of the name gives the exclusive right to the use of the name and the person who has registered the name may enjoin the use of the same name or a deceptively similar name and has a cause of action for damages against anyone who uses the same name or a deceptively similar name.

AS 32.11.810 Name. The name may not be the same as, or deceptively similar to, the name of a corporation or limited partnership organized under the laws of this state or licensed or registered as a foreign corporation or limited partnership in Alaska.

STANDARDS

According to the Ombudsman policy, an “unreasonable “ administrative act is:

(B) a procedure that defeats the complainant’s valid application for a right or program benefit, or

(C) an act that is inconsistent with agency policy and thereby places the complainant at a disadvantage to all others.

ANALYSIS AND FINDINGS

Allegation: DBSC unreasonably decided to allow Mr. Majtyka’s business rival to use a deceptively similar name which was inconsistent with agency policy and thereby placed the complainant at a disadvantage to all others.

Mr. Hensley’s decision prevented Mr. Majtyka from gaining exclusive rights for his registered business name, a program benefit. Mr. Hensley’s decision was also inconsistent with what later became the division’s policy after its decision on the “The Wild Iris” case.

When the Ombudsman’s investigator pointed out the inconsistencies between the two cases, DBSC quickly corrected the mistake and moved to provide Mr. Majtyka with the program benefits he asked for.

Therefore, the Ombudsman finds this allegation *justified* and *rectified*.

It appears that the “The Wild Iris” lawsuit pushed DBSC into recognizing that the laws governing name registration were untenable. In a 1999 report to the legislature, DBSC officials wrote that the state was expending “scarce resources when it must be party to a lawsuit resulting from ‘ conflicting’ registered names.” The guideline that gives rise to almost all of these conflicts, the report said, is the standard “the same as or deceptively similar to.” The report recommended eliminating “deceptively similar” and replacing it with “distinguishable on the record.” The 21st Legislature subsequently passed legislation making these recommended changes.

The new legal concept “distinguishable on the record” allows the state to register almost any name unless it is absolutely identical to one already registered. The law also gives the department the authority to promulgate regulations that will provide guidelines for judging what names can be registered. Courts, not the state, will decide conflicts over rights to a name. The courts use common law, a much different standard than “deceptively similar,” to make decisions about rights to a name. Under common law, rights to a name are obtained solely through usage. Name registration with the state will be just one example of prior use, just as advertising a business name in a newspaper can be evidence of prior use.

The new law (and the law’s proposed regulations) wholly revises the nature of business name registration with the state. Therefore, the Ombudsman closes the investigation with no recommendations.

AGENCY RESPONSE TO THE PRELIMINARY REPORT

On August 31, 1999, Ms. Holland Williams responded on behalf of DBSC to the Ombudsman’s preliminary report. Ms. Holland-Williams wrote:

Your facts and findings were right in line with this Division’s. We have no objections to your report, and we appreciate your final determination.

The agency agreed with the Ombudsman findings and took remedial actions as we made no recommendations. As a consequence, the Ombudsman closed this complaint as *justified* and *rectified*.