

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE)
AND CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) CASE NO. 94-4663
)
BARRY AMOS d/b/a CLOUD NINE)
TRAVEL,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated hearing officer, Mary Clark, held a formal hearing in the above-styled case on February 17, 1995. Petitioner's counsel and witnesses participated from the videoconference center in Tallahassee, Florida; Respondent participated from the videoconference center in Jacksonville, Florida; the hearing officer presided from the videoconference center in Tallahassee. The court reporter was with the respondent in Jacksonville.

APPEARANCES

For Petitioner: Joe Englander, Esquire
Department of Agriculture
and Consumer Services
Room 515, Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: Barry Amos (representing himself)
4312-101 Plaza Gate Lane
Jacksonville, Florida 32217

STATEMENT OF THE ISSUES

The issue for disposition is whether Barry Amos d/b/a Cloud Nine Travel violated section 559.927, F.S., by operating as a seller of travel without being registered, and if so, what remedial action is appropriate.

PRELIMINARY STATEMENT

In a letter dated July 26, 1994, Respondent was notified that the Department of Agriculture and Consumer Services (department) intended to impose an administrative fine and issue a cease and desist order as the result of the department's determination that he was operating as a seller of travel without being properly registered. Respondent promptly requested a formal hearing and the case was referred to the Division of Administrative Hearings.

At the hearing, the department presented two witnesses and a single exhibit, received in evidence as Petitioner's composite exhibit #1.

Mr. Amos testified in his own behalf and his letter dated January 24, 1995, to prior hearing officer, Ella Jane P. Davis, was received without objection as Respondent's exhibit #1.

The transcript was filed on March 8, 1995, and on March 13, 1995, the department filed its proposed recommended order. The findings of fact proposed therein are substantially adopted here.

FINDINGS OF FACT

1. At all times relevant to the issues here, Barry Amos operated a business at 4312-101 Plaza Gate Lane, Jacksonville, Florida.

2. In the latter months of 1993, Mr. Amos was interested in starting up a travel agency. He requested information from the department and was sent a registration packet with forms and a copy of the statute and rules. On December 29, 1993, Mr. Amos wrote to the department requesting an exemption from registration based on his understanding that he was entitled to such. His letter references a telephone conversation with "Melissa" at the department and states: "She informed me that since I would not be handling ticket stock or actual payments that I would not be required to register or post the surety bond with your department." (Petitioner's composite exhibit #1)

3. Mr. Amos did not receive his exemption; instead the department sent another letter on February 10, 1994 reiterating that the law required registration unless he provided proof that he was exempt.

4. Joseph Nicolosi is an investigator with the department's Division of Consumer Services. On July 19, 1994 he conducted what he calls an "on-site inspection" of Mr. Amos' business. He had the information on the business but did not have a proper phone number. He looked in the yellow pages and found a listing for "Cloud 9 Travel" with a telephone number.

5. The individual who answered Mr. Nicolosi's telephone call identified himself as Barry Amos. Mr. Nicolosi asked about coming to the office to look at brochures and to plan a trip from Jacksonville to Colorado. Mr. Amos told him that his wife would meet him someplace or send him the brochures. Mr. Amos also said that he would have to figure out the cost of the trip and call him back and that payment would be made by Mr. Nicolosi to him for the trip; he, Mr. Amos, would make the arrangements.

6. After the telephone call was terminated, Mr. Nicolosi called Mr. Amos back a few minutes later and asked if he would accept a check as payment. Mr. Amos replied that it would be better to use a credit card but he agreed that he would accept a check.

7. Mr. Amos concedes that when he was in business as Cloud 9, he accepted personal or cashier's checks from the public for ticket purchases. He did not accept payment from the public for what he called "services", like a commission. The checks he accepted for ticket purchases were made out to Cloud 9 Travel and were used to purchase tickets for the clients. Commissions were paid to Cloud 9 from the ticket sellers.

8. Barry Amos ceased operation as Cloud 9 Travel in January, 1995. He never registered as a seller of travel.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to section 120.57(1), F.S.

10. Section 559.927(2)(a), F.S., requires that "[e]ach seller of travel shall annually register with the [Department of Agriculture and Consumer Services]..."

11. "Seller of travel" is defined in section 559.927(1)(a) as:

. . . any resident or nonresident person, firm, corporation, or business entity maintaining or purporting to maintain a business location or branch office in this state who offers for sale, directly or indirectly, at wholesale or retail, prearranged travel, tourist-related services, or tour-guide services for individuals or groups, through vacation or tour packages, or through lodging or travel certificates in exchange for a fee, commission, or other valuable consideration. The term includes any business entity offering membership in a travel club or travel services for an advance fee or payment, even if no travel contracts or certificates or vacation or tour packages are sold by the business entity.
(Emphasis added)

12. "Offer for sale" is defined in section 559.927(1)(c), F.S. as:

. . . direct or indirect representation, claim, or statement or making an offer or undertaking by any means or method, to arrange for, provide, or acquire travel reservations or accommodations, tickets for domestic or foreign travel by air, rail, ship, or other medium of transportation, or hotel and motel accommodations or sightseeing tours.

13. Rule 5J-9.0015 provides, in pertinent part:

5J-9.0015 Definitions. The definitions contained in Section 559.927, Florida Statutes, and the following shall apply:

(1) Seller of travel does not include a person who acts as an independent or outside sales agent and who meets the following criteria:

(a) Has a written contract with a

seller(s) of travel that is operating in compliance with Section 559.927, Florida Statutes;

(b) Does not receive a fee, commission or other valuable consideration directly from the purchaser or traveler for the sale of travel;

(c) Does not at any time have any unissued ticket stock or travel documents in his or her possession; and

(d) Does not have the ability to issue tickets, lodging or vacation certificates, or any other travel documents. An agent will not fail to meet this criterion if it only delivers tickets or travel documents issued by a seller of travel operating in compliance with Section 559.927, Florida Statutes, and these rules.

* * *

14. Barry Amos claims that he was exempt from registration because he did not receive compensation from the client for his "services", but only received the payment for the tickets from the client. His interpretation is not supported by the text of the statute or rule cited above, and Mr. Amos produced no other authority for his interpretation. According to the facts and the statute and rules, Barry Amos d/b/a Cloud 9 Travel was a seller of travel subject to registration requirements.

15. Section 559.927(13), F.S., provides that the department may impose an administrative fine not to exceed \$5,000.00 and direct a seller of travel to cease and desist when a violation of the statute or implementing rules is found.

16. Counsel for the department, in his proposed recommended order suggests a penalty of \$1,000.00, a cease and desist order, and refusal to register Barry Amos or a business he owns until the fine is satisfied. It is undisputed that the business is no longer operating, and a less severe penalty is thus recommended.

RECOMMENDATION

Based on the foregoing, it is hereby,

RECOMMENDED:

That the Department of Agriculture and Consumer Services enter its final order finding that Respondent, Barry Amos d/b/a Cloud 9 Travel, violated section 559.927, F.S., imposing an administrative fine of \$250.00, requiring that Respondent continue to cease and desist until properly registered as a seller of travel and denying such registration until the administrative fine is paid.

DONE and ORDERED this 19th day of April, 1995, in Tallahassee, Leon County, Florida.

MARY W. CLARK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 1995.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.