

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE )  
AND CONSUMER SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 94-5426  
 )  
MARTIN A. RIVERA, )  
 )  
Respondent. )  
\_\_\_\_\_)

RECOMMENDED ORDER

Upon due notice, William R. Cave, Hearing Officer, Division of Administrative Hearings, held a formal hearing in this matter on February 21, 1995, in Sarasota, Florida.

APPEARANCES

For Petitioner: John S. Koda, Esquire  
Department of Agriculture  
and Consumer Services  
Room 515, Mayo Building  
Tallahassee, Florida 32399-0800

For Respondent: Martin A. Rivera, Pro se  
Post Office Box 657  
Oneco, Florida 34264

STATEMENT OF THE ISSUE

Did Respondent Martin A. Rivera operate a "ballroom dance studio" as defined in Section 501.143(2)(a), Florida Statutes, without being registered in accordance with Section 501.143(3), Florida Statutes, and thereby violate Section 501.143(6)(a), Florida Statutes?

PRELIMINARY STATEMENT

By letter dated July 26, 1994, the Department of Agriculture and Consumer Services (Department) advised the Respondent of its intent to impose an administrative fine for Respondent's failure to register Dance Concepts, Stardust Ballroom (Dance Concepts) in accordance with Section 501.143(3), Florida Statutes, and required the Respondent to register in accordance with Section 501.143(3), Florida Statutes.

By letter dated September 2, 1994, the Respondent denied the allegations in the Notice of Intent and advised the Department that Dance Concepts was no longer in existence and was not doing business in the State of Florida. The Respondent requested a hearing on the matter.

On September 28, 1994, the Department referred this matter to the Division of Administrative Hearings (Division) for the assignment of a hearing officer and the conduct of a formal hearing.

In support of the allegations contained in the Notice Of Intent To Impose Administrative fine, the Department presented the testimony of Joseph Nicolosi. Department's composite exhibit 1 was received as evidence. Respondent also presented the testimony of Joseph Nicolosi. Respondent did not offer any documentary evidence. The Respondent objected on religious grounds to taking an oath before testifying. The undersigned explained that the Respondent could testify if he affirmed to the truthfulness of the testimony to be given rather than swearing under oath to tell the truth. Although the Respondent indicated his desire to testify, he refused to declare that he would testify truthfully by oath or affirmation as required by Section 90.605(1), Florida Statutes. Therefore, the Respondent was not allowed to testify since he was incompetent to testify.

The Respondent filed a Motion to Dismiss with the undersigned at the beginning of the hearing. However, due to the lateness of filing the motion the undersigned reserved ruling on the motion so as to give the Department and the undersigned an opportunity to properly consider the motion. After reviewing the motion, it is clear that the grounds alleged in support of the motion are insufficient to support a dismissal. Therefore, the Respondent's Motion to Dismiss is denied.

A transcript of the proceeding was filed with the Division on March 13, 1995. The Petitioner and Department timely filed their Proposed Recommended Orders. A ruling on each proposed finding of fact submitted by the Petitioner and Department has been made as reflected in an Appendix to the Recommended Order.

#### FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Department is the agency charged with the responsibility of investigating and enforcing the provisions of Section 501.143, Florida Statutes, and is delegated the authority to promulgate rules as may be necessary to carry out the provisions of Section 501.143, Florida Statutes.

2. At all times material to this proceeding, Respondent Martin A. Rivera owned and operated Dance Concepts located at 4818-14th Street W., Bradenton, Florida.

3. Dance Concepts is situated in a shopping center type setting with a large lighted sign indicating its name. Inside the building there is a foyer area with a counter and a large room with an empty floor space similar to a dance floor.

4. Dance Concepts did not have an occupational license and was not required by Manatee County or the city of Bradenton to have an occupational license.

5. Dance Concepts was not registered as a "ballroom dance studio" with the Department under Section 501.143(3), Florida Statutes, at any time material to this proceeding.

6. Lance Tomlin, Dance Studio Consultant, with the Department made an on-site visit at Dance Concepts on January 28, 1994. Tomlin's report indicates that Dance Concepts had been notified twice before concerning registration without any response from Dance Concepts in regard to registration.

7. On March 14, 1994, Joseph Nicolosi, Investigator with the Department, made an on-site visit at Dance Concepts to "shop the business" - not identify himself so as to obtain information as a customer about what Dance Concepts offered to the public.

8. Upon entering the foyer area Nicolosi noticed there were several Dance Concepts business cards and Dance Concepts calendars of events for the month of March, 1994, (calendar of events) located on the counter. Nicolosi picked up a business card and a calendar of events. Nicolosi noticed that there were several persons in large room. Before Nicolosi left Dance Concepts those persons observed earlier in the large room were dancing on what appeared to be a large dance floor. Nicolosi did not determine from any of those persons whether they had purchased dance studio lessons or dance studio services from the Respondent.

9. After picking up the business card and calendar of events, Nicolosi identified himself and asked to speak with the Respondent. Nicolosi explained to Respondent the need to register Dance Concepts as a ballroom dance studio. The un rebutted testimony of Nicolosi was that Respondent denied the need for Dance Concepts to register with the Department as a ballroom dance studio, explaining that Respondent only charged enough to pay the rent and that Respondent did not advertise. Nicolosi left a Department registration packet with the Respondent and advised the Respondent to register Dance Concepts with the Department.

10. Respondent did not register Dance Concepts with the Department. On July 26, 1994, the Department issued a Notice of Intent to Impose Administrative Fine.

11. The calendar of events, indicates that Dance Concepts offers the Cha Cha, Mambo, Samba, and the Paso Doble which are dances that are included in the definition of "ballroom dance" as defined in Rule 5J-8.002(1), Florida Administrative Code. In addition, the calendar of events indicates that there is a "Newcomers Group" for Cha Cha, Mambo and Paso Doble dances and a "Advanced Group" for Samba, Cha Cha, Mambo and Paso Doble dances.

12. The calendar of events also indicates that on each Thursday evening of the month of March, 1994 (3rd, 10th, 17th, 24th and 31st), from 8:30 p.m. until 10:30 p.m. that there would be a public dance party for which there was a charge of \$7.00. Additionally, the calendar of events indicates that there would be a "Student Party" each Friday evening from 8:30 p.m. until 10:00 p.m.

13. While the calendar of events is insufficient, in and of itself, to show that Respondent had, at any time material to this proceeding, engaged in the sale of ballroom "dance studio lessons" as that term is defined in Section 501.143(2)(b), Florida Statutes, the un rebutted testimony of Nicolosi establishes that Respondent engages in the sale of "dance studio lessons" as that term is defined in Section 501.143(2)(b), Florida Statutes, even if the amount charged is only enough to pay the rent. In addition, the calendar of events establishes that Respondent had, at times material to this proceeding, engaged in the sale of dance studio services as that term is defined in Section

501.143(2)(c), Florida Statutes, by the Respondent's participation in the Public Dance Party for which there was a charge of \$7.00.

14. There was sufficient evidence to establish facts to show that Respondent: (a) had engaged in the sale of dance studio lessons and dance studio services as those terms are defined in Section 501.143(2)(b)(c), Florida Statutes. However, there was no evidence that Respondent had entered into contracts for future dance studio lessons or dance studio services as those terms are defined in Section 501.143(2)(b) and (c), Florida Statutes, with any person.

15. The Respondent does not come within the exemptions set forth in Section 501.143(11), Florida Statutes.

16. Dance Concepts' location is specifically used for dance studio lessons and dance studio services and whatever dance studio lessons or dance studio services that are provided by Dance Concepts are provided at Dance Concepts' location.

#### CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

18. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 2d DCA 1981). To meet this burden the Department must establish facts upon which the allegations of misconduct are based by a preponderance of the evidence. The Department has met its burden in this regard.

19. Pertinent to this case, Section 501.143(2),(3),(4),(6),(7),(11) and (12), Florida Statutes, provide:

(2) DEFINITIONS. - For purposes of this section, the term:

(a) "Ballroom dance studio" means any person that:

1. Engages in the sale of ballroom dance studio lessons or services which are provided at a location specifically used for dance studio lessons or services; or

2. Secures floor space at a registered ballroom dance facility or other facility which is not used primarily for rendering dance studio lessons or services and enters into contracts for future dance studio lessons or services.

(b) "Dance studio lessons" include instruction, training, or assistance in dancing and the use of ballroom dance studio facilities.

(c) "Dance studio services" include membership in any group, club, or association formed by a ballroom dance studio, participation in dance competitions, dance showcases, trips, tours, parties, and other organized events.

(d) "Department" means the Department of Agriculture and Consumer Services.

(e) "Enforcing authority" means the Department of Agriculture and Consumer Services or the Department of Legal Affairs.

\* \* \*

(3) REGISTRATION OF BALLROOM DANCE STUDIOS. -

(a) Each owner or operator of a ballroom dance studio shall annually register with the department no later than October 1, . . .

(b) Each person applying for or renewing a local occupational license to engage in business as a ballroom studio must exhibit an active registration certificate from the department before the local occupational license may be issued or reissued under Chapter 205.

(4) CONTRACT REQUIREMENTS. - Every contract for ballroom dance studio services or lessons shall be in writing and shall be subject to this section. . . .

(6) PROHIBITED PRACTICES. - It is a violation of this section for any person:

(a) To conduct business as a ballroom dance studio without registering annually with the department.

\* \* \*

The department may employ investigators and conduct investigations of violations of this section.

(7) PENALTIES; REMEDIES. - The following penalties and remedies are available for enforcement of the provisions of this section.

\* \* \*

(b) The department may impose an administrative fine not to exceed \$5,000 per violation.

(11) EXEMPTIONS. - This section does not apply to:

(a) Governmental and bona fide tax-exempt not-for-profit entities.

(b) Contracts for ballroom dance studio services or lessons entered into prior to October 1, 1992.

(12) RULEMAKING AUTHORITY. - The department shall promulgate such rules as may be necessary to carry out the provisions of this section. (Emphasis supplied)

20. In furtherance of its legislative delegated authority under Section 501.143(12), Florida Statutes, the Department adopted Rules 5J-8.002 and 5J-8.003, Florida Administrative Code, which provide:

5J-8.002 Definitions. The definitions contained in Section 501.143(2), Florida Statutes, and the following shall apply:

(1) Ballroom dance - includes, but is not limited to, one or more of the following dances:

Bolero, Cha Cha, Foxtrot, Mambo, Merengue, Paso Doble, Polka, Quickstep, Rumba, Swing, Viennese Waltz, Waltz.

\* \* \*

(3) Person - means any individual, group of individual, firm, independent contractor, association, corporation, partnership, joint venture, sole proprietorship or any other entity.

5J-8.003 Registration.

(1) Any person who intends to open or operate as a dance studio, shall prior to engaging in such activity, register with the Department. . . .

\* \* \*

(4) No person shall engage in the sale of any ballroom dance studio activities or provide ballroom dance studio services in this state prior to obtaining written authorization issued by the Department to conduct such activity or provide such service.

21. It is clear that Respondent did offer dance studio lessons and dance studio services as those terms are defined in Section 501.143(2)(b)(c), Florida Statutes. It is equally clear that the Respondent had engaged in the sale of dance studio lessons and dance studio services under Section 501.143(2)(a)1., Florida Statutes. Therefore, since the Respondent is not exempt from registering under Section 501.143(11), Florida Statutes, his failure to register under Section 501.143(3), Florida Statutes, and Rule 5J-8.003, Florida Administrative Code, is a violation of Section 501.143(6)(a), Florida Statutes, and subject to an administrative fine in accordance with Section 501.143(7)(b), Florida Statutes.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a Final Order finding that Respondent Martin A. Rivera violated Section 501.143(6)(a), Florida Statutes, and imposing an administrative fine of \$500 upon the Respondent for such violation. In reaching the conclusion that a \$500 administrative fine was sufficient for the violation, the undersigned takes into consideration that Dance Concepts is no longer in business, only one registration year was involved, there was no monetary loss suffered by any consumer (customer) and that the purpose of imposing a fine is to bring about compliance, not retaliation.

RECOMMENDED this day 27th of March, 1995, at Tallahassee, Florida.

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WILLIAM R. CAVE  
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 27th day of March, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-5426

The following constitutes my specific rulings, pursuant to Section 120.59(2), Florida Statutes, on all of the proposed findings of fact submitted by the parties in this case.

Department's Proposed Findings of Fact.

1. Proposed findings of fact 1 through 9 are adopted in substance as modified in Findings of Fact 1 through 16.

Respondent's Proposed Findings of Fact.

1. Proposed findings of fact 1 through 3 are a mixture of fact and argument which Respondent alleged in his Motion to Dismiss, which was denied. These proposed findings of fact are rejected as not being relevant or material or unnecessary along with being rejected as argument.

2. Proposed finding of fact 4 is neither material nor relevant.

3. Proposed finding of fact 5 is rejected as legal argument, but see paragraph 19 under Conclusions of Law.

4. Proposed finding of fact 6 is neither material nor relevant.

5. Proposed finding of fact 7 is not supported by the record.

6. Proposed findings of fact 8 and 10 are neither material nor relevant.

7. Proposed findings of fact 9 and 11 are rejected as being argument.

COPIES FURNISHED:

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#### NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the 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 consult with the agency that will issue the final order in this case concerning their 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.