

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND )  
CONSUMER SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 95-5126  
 )  
S. BRUCE BEATTIE, II, )  
d/b/a PARADISE GYM, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this case on December 11, 1995, via video teleconference in Miami, Florida, and Tallahassee, Florida, before Patricia Hart Malono, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lawrence J. Davis, Senior Attorney  
Department of Agriculture and  
Consumer Services  
515 Mayo Building  
Tallahassee, Florida 32399-0800

For Respondent: S. Bruce Beattie, II, Owner  
Paradise Gym  
1236 South Dixie Highway  
Coral Gables, Florida 33146

STATEMENT OF THE ISSUE

Whether the respondent is guilty of the violations alleged in the Notice of Intent to Impose Administrative Fine, and, if so, the amount of the fine which should be imposed.

PRELIMINARY STATEMENT

In a Notice of Intent to Impose Administrative Fine dated June 13, 1995, the Department of Agriculture and Consumer Services ("Department"), notified Bruce S. Beattie, II, 1/ that it intended to impose an administrative fine against the Paradise Gym for operating as a health studio without being registered as required by section 501.015, Florida Statutes. Mr. Beattie requested a formal administrative hearing, and the case was forwarded to the Division of Administrative Hearings for formal proceedings. By Notice of Hearing, this case was set for final hearing on December 11, 1995, via video teleconference.

The Department was present in the video conference room at the Division of Administrative Hearings in Tallahassee, Florida. The Department called four witnesses: Joe Alexionok, a consumer consultant analyst with the Department; James R. Kelly, Director of the Division of Consumer Services; Gloria Van Treese, Chief of the Bureau of Consumer Protection; and Douglas Jennings, an investigator for the Department. The Department's Exhibits 1 through 29 were received into evidence. Mr. Beattie was present in the video conference room in the Ruth Rohde Building in Miami, Florida; a court reporter was also present at that location. Mr. Beattie testified in behalf of the Paradise Gym, as part owner. Respondent's Exhibit 1 was received into evidence.

The transcript was filed, and the Department timely submitted a proposed recommended order. Rulings on the Department's proposed findings of fact are contained in the Appendix to this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency charged with the administration of sections 501.012-.019, Florida Statutes, and is responsible for registering health studios. The Division of Consumer Services carries out this function.

2. Mr. Beattie and his brother, Tim, are owners of the Paradise Gym, a health studio located at 1236 South Dixie Highway, Coral Gables, Florida. The gym has been in business since 1976 and in its present location for over six years.

3. The Department contacted the Paradise Gym several times in 1992 regarding the statutory requirement that it register as a health studio. The gym continued to operate without being registered, however. In the spring of 1993, the Department obtained an injunction from the circuit court in Dade County, Florida, barring the gym from operating until it registered with the Department.

4. On July 9, 1993, the Department conducted an on-site undercover investigation at the Paradise Gym and found that it was operating as a health studio in violation of the injunction. After the Department scheduled a contempt hearing, the Paradise Gym finally submitted a completed registration application. The gym was registered with the Department on December 6, 1993, and assigned registration number 02370.

5. The annual registration for the Paradise Gym expired on December 6, 1994. The Department sent the Paradise Gym a registration packet enclosed with a letter dated October 24, 1994. The packet contained a registration form, and the letter contained instructions to send the completed form to the Department "together with a copy of the membership contract currently in use and the annual registration fee of \$300." (Emphasis in original.) The Department did not receive a response to the October 24 letter.

6. In a letter dated December 2, 1994, the Department notified the Paradise Gym that it must send the completed registration form and other documents within fifteen days of the date of the letter. The December 2 letter contained the warning that the gym must immediately cease "all non-exempt

activities" until it came into compliance with the statutes governing health studios. The Department did not receive a response to the December 2 letter.

7. On January 24, 1995, an employee of the Department telephoned Mr. Beattie and was told that the registration packet would be sent by January 27, 1995, and that the application had not been mailed sooner because the gym's offices had flooded and suffered serious damage. The Department did not hear from Mr. Beattie until February 20, 1995, when it received the Paradise Gym's Application for Registration; Affidavit of Exemption from the requirement that a bond, Certificate of Deposit, or letter of credit be posted; and check in the amount of \$300 for the annual registration fee. These documents were signed by Mr. Beattie on February 6, 1995.

8. The gym's membership contract was not included with the registration materials, and the Department sent a letter to the Paradise Gym dated February 21, 1995, stating that the Department could not process the application for registration until it received a copy of the contract. The Department received no response to the February 21 letter.

9. In a letter dated March 21, 1995, the Department notified Mr. Beattie that the application for registration of the Paradise Gym was denied because the Department had not received a copy of the gym's membership contract. The letter contained a Notice of Rights and was sent via certified mail.

10. The letter was received at the Paradise Gym, and the return receipt signed, on March 27, 1995. The Department did not receive a response to the letter, either in writing or by telephone, and the denial became final agency action 21 days after it was received at the gym.

11. On May 5, 1995, an investigator for the Department conducted an on-site undercover inspection of the Paradise Gym. The inspection revealed that the gym was operating as a health studio and was offering memberships payable annually or by down payment and monthly installments.

12. On June 13, 1995, the Department issued the Notice of Intent to Impose Administrative Fine at issue in this case and sent it to Mr. Beattie via certified mail. The notice included an offer to settle the matter upon payment of an administrative fine of \$3500. The Department did not receive a response to the notice and did not receive a return receipt indicating that the notice had been delivered.

13. In late July, 1995, Douglas Jennings, an employee of the Department, telephoned Mr. Beattie to inquire about his failure to respond to the notice. Mr. Beattie stated that he had not received it, and Mr. Jennings sent him a copy via certified mail. The notice was received at the Paradise Gym on August 3, 1995, and the Department granted the request for hearing dated August 21, 1995.

14. On September 19, 1995, Mr. Jennings received a telephone call from Mr. Beattie in which he asked if the Department would drop the fine; on September 22, 1995, the Department received a copy of a document bearing the logo of the Paradise Gym and entitled "Waiver and Release from Liability and Indemnity Agreement." The contents of this document were substantially different from the contents of the document of the same title submitted in 1993 with the gym's initial application for registration, although the consumer disclosures required by statute remained the same.

15. At hearing, Mr. Beattie explained his failure to submit the Paradise Gym's membership contract until September 22, 1995. He asserted on the one hand that there was no "membership contract" for the gym, just a waiver of liability, and on the other hand that the Department had a copy of the Waiver and Release from Liability and Indemnity Agreement he provided in 1993 with the gym's original application for registration. He did not explain why the Paradise Gym continued to operate after being notified in December 1994 that the gym could not continue operating until it had registered with the Department or why the gym continued to operate after March 21, 1995, when its application for registration was denied.

16. The Department has proven by clear and convincing evidence that the Paradise Gym operated as a health studio without being registered with the Department.

#### CONCLUSIONS OF LAW

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

18. Sections 501.014 and .015, Florida Statutes, give the Department responsibility for licensing and regulating health studios. Pursuant to the grant of rulemaking authority in section 501.014(2)(a), the Department has promulgated rules "to implement, enforce, and interpret" its duties under sections 501.012-.019, Florida Statutes.

19. Section 501.015, Florida Statutes, states in pertinent part:

501.015 Health studios; registration requirement and fees.--Each health studio shall:

(1) Register each of its business locations with the department in a form and manner as required by the department.

The Department has promulgated rule 5J-4.004, Florida Administrative Code, which provides:

5J-4.004 Registration. Any person who intends to open or operate as a health studio shall, prior to engaging in such activities, register with the Department using Form 10300, Health Studio Registration. . . .

20. Section 501.019, Florida Statutes, authorizes the Department to impose penalties on health studios which are not in compliance with the requirements of sections 501.012-.019. Section 501.019 provides in pertinent part:

(4) The department may impose administrative fines as prescribed below:

\* \* \*

(c) For a violation of s. 501.015, a fine not to exceed \$100 per violation.

The Department has not promulgated any rules interpreting this statutory provision.

21. "Because the imposition of administrative fines . . . , like license revocation proceedings, are penal in nature and implicate significant property rights," the Department has the burden of proving the violation alleged in the Notice of Intent to Impose Administrative Fine by clear and convincing evidence. Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 21 Fla. L. Weekly S142, S143 (Fla. March 28, 1996).

22. The Department has met its burden in this case by proving by clear and convincing evidence that the Paradise Gym was operating in May 1995 without being registered by the Department as required by section 501.015(1). 2/

23. The Department presented considerable evidence detailing the difficulties it has had over the years with the Paradise Gym. It has come forward with persuasive evidence that Mr. Beattie d/b/a Paradise Gym has flouted the registration requirements of sections 501.012-.019 both in 1992-1993 with regard to the gym's initial registration and in 1994-1995 with regard to its registration for 1994. The evidence demonstrates that Mr. Beattie submitted the completed application for the gym's initial registration in 1993 only when the gym was in jeopardy of being held in contempt of court for violating an injunction barring it from operating without being registered; the evidence also demonstrates that Mr. Beattie submitted the gym's membership contract in September 1995 when the gym was in jeopardy of having an administrative fine imposed for operating without being registered. The evidence is uncontroverted that the Paradise Gym has operated as a health studio without being registered and that Mr. Beattie has steadfastly refused to provide the Department with the documents necessary for registration. Mr. Beattie offered no justification for the gym's continuing to operate without being registered, and his explanation of why he failed to provide the gym's membership contract to complete the 1994 registration application is not credible.

24. The history of the Paradise Gym's relationship with the Department justifies imposition of the maximum statutory penalty for operating without being registered. The Department is authorized to impose an administrative fine for the failure of a health studio to register in an amount "not to exceed \$100 per violation," section 501.019(4)(c), Fla. Stat., and it may not impose a penalty in excess of that specified by statute. See Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 412 (Fla. 1st DCA 1991)(penalty imposed by agency must be supported by competent substantial evidence and "within the statutory range as prescribed by law"). A health studio which operates without being registered with the Department, in violation of section 501.015(1), has committed one violation of section 501.015. The maximum fine which can be imposed is \$100. 3/

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that the Department of Agriculture and Consumer Services enter a Final Order finding that the Paradise Gym violated section 501.015(1) by operating without being registered with the Department and imposing an administrative fine in the amount of \$100.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 11th day of April 1996.

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PATRICIA HART MALONO  
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 11th day of April 1996.

ENDNOTES

1/ On December 7, 1995, the Department filed a Motion to Amend Pleading to correct Mr. Beattie's name from Bruce S. Beattie to S. Bruce Beattie. The motion was unopposed and was granted at the hearing.

2/ The Department notified Mr. Beattie in the June 13, 1995, Notice of Intent to Impose Administrative Fine that it intended to impose an administrative fine against the Paradise Gym because, "[a]s a result of its investigation, the Department has determined that you are operating as a health studio without being registered as required by Section 501.015, Florida Statutes." In its Proposed Recommended Order, however, the Department states that the Paradise Gym should be found guilty of violating section 501.015(1) because it was operating without being registered, section 501.015(5) because it did not post a current registration certificate in a prominent place in the facility, and section 501.015(6) because it did not include a registration number on its membership contracts.

The Paradise Gym may be found guilty only of the offense alleged by the Department in its charging document, that is, of operating as a health studio without being registered. See *Maddox v. Department of Professional Regulation*, 592 So. 2d 717, 720 (Fla. 1st DCA 1991)(complaint must "make clear the nature of the alleged violations and the statutory provisions allegedly violated"); see also *Kinney v. Department of State, Division of Licensing*, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); *Wray v. Department of Professional Regulation, Board of Medical Examiners*, 435 So. 2d 312, 315 (Fla. 1st DCA 1983). The Department did not specify in the Notice of Intent to Impose Administrative Fine any violations of section 501.015 except the failure to register, and it did not request at the hearing that it be allowed to amend the Notice to include violations of sections 501.015(5) and 501.015(6).

3/ The Department has recommended that a \$3500 administrative fine be imposed against the Paradise Gym. Mr. Kelly, Director of the Department's Division of Consumer Services, testified that this fine was within the range permitted by section 501.019(4)(c), as that section is interpreted by the Department. According to Mr. Kelly, the Department has "always interpreted \$100 per violation to [sic] \$100 per day, otherwise, there is no incentive for someone to get registered as required by law since the registration fee is \$300."

The Florida Supreme Court in *Osborne Stern* equated the imposition of an administrative fine to revocation of a license, holding that both are penal in

nature. 21 Fla. L. Weekly at S143. Therefore, statutes authorizing the imposition of administrative fines "must be strictly construed, with any ambiguity interpreted in favor of the licensee." *Elmariah v. Department of Professional Regulation, Board of Medicine*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

The maximum fine specified in section 501.019(4)(c) is \$100 "per violation" of section 501.015. There are several distinct provisions of section 501.015 which may be violated, and section 501.019(4)(c) could be strictly construed as implicitly limiting to \$100 the maximum fine which can be imposed on a health studio for a violation of section 501.015(1)(operating without being registered), and for a violation of section 501.015(5)(failing to post current registration certificate at the front desk), and for a violation of section 501.015(6)(failing to include registration number on membership contracts).

There is, however, no explicit guidance in the statute as to what constitutes a "violation" of section 501.015. If this lack causes section 501.019(4)(c) to be ambiguous, the ambiguity must be construed in favor of the health studio. Accordingly, the statute must be interpreted to mean that \$100 is the maximum administrative fine which may be imposed against a health studio for violating section 501.015(1) by operating without being registered. It must also be noted that a health studio is required to register and pay the \$300 registration fee in addition to paying the administrative fine and that the Department has available the alternative civil remedies set out in section 501.019(3), some of which it used against the Paradise Gym in 1993 when it was operating in violation of the section 501.015(1) registration requirement.

In support of its interpretation of section 501.019(4)(c) to allow the imposition of the maximum fine for each day a health studio operates without being registered, the Department relies on the interpretation of the statutes dealing with solicitation of charitable contributions contained in the Recommended Order in Department of Agriculture & Consumer Services v. United Rainbow Foundation, Inc., DOAH Case No. 92-5344 (April 26, 1993). In that case, the hearing officer construed the following provisions as permitting the imposition of a \$1,000 administrative fine for each day on which an unregistered charitable organization collected contributions:

496.419 Powers of the department [of Agriculture].--

\* \* \*

(4) The department may enter an order imposing one or more of the penalties set forth in subsection (5) if the department finds that a charitable organization, . . . has:

(a) Violated or is operating in violation of any of the provisions of ss. 496.401-496.424 or of the rules or orders issued thereunder;

\* \* \*

(5) Upon a finding as set forth in subsection (4), the department may enter an order doing one or more of the following:

(a) Imposing an administrative fine not to exceed \$1,000 for each act or omission which constitutes a violation of ss. 496.401-.424 or a rule or order.

The language in section 496.419(5) is substantially different from the language in section 501.019(4)(c), and the interpretation of section 496.419(5)(a) to permit imposition of the maximum fine for each day on which an unregistered charitable organization solicits contributions does not support the Department's interpretation that section 501.019(4)(c) likewise permits imposition of the maximum fine for each day on which a health studio operates without being registered.

APPENDIX

The following rulings are made on the petitioner's proposed findings of fact:

Paragraphs 1, 3-4, 8-14, 16-24, and 27-31: Adopted and incorporated in substance but not verbatim in paragraphs 2-14.

Paragraphs 6, 7, and 15: Accepted but not incorporated in the findings of facts because subordinate to the facts as found or unnecessary to resolution of the issues presented.

Paragraph 5: Rejected as not supported by competent evidence and as unnecessary.

Paragraphs 2, 25 and 26: Adopted and incorporated in substance but not verbatim in paragraphs 2, 11 and 12 except to the extent proposed findings of fact are subordinate or unnecessary.

The respondent did not submit proposed findings of fact and conclusions of law.

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 ten 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.