

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEVEN RAY WAGNER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 00-4010  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 DIVISION OF ALCOHOLIC BEVERAGES )  
 AND TOBACCO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing on December 15, 2000, in Lakeland, Florida.

APPEARANCES

For Petitioner: Phillip E. Kuhn, Esquire  
1533 Tomahawk Trail  
Lakeland, Florida 33813-3748

For Respondent: Michael Martinez, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 60  
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

Did the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Department) act within its authority, pursuant to Sections 561.17 and 561.19(2), Florida Statutes, and Rule 61A-5.0105,

Florida Administrative Code, in issuing the Notice of Intent to Deny Petitioner's application for an alcoholic beverage license on the basis that Petitioner had failed to timely file a completed application?

PRELIMINARY STATEMENT

By a Notice of Disapproval dated April 10, 2000, the Department advised Petitioner that his failure to timely file an application for a new quota liquor license in Polk County, Florida, had resulted in the disapproval of his entitlement to apply for a new quota liquor license. This notice also advised Petitioner of his right to a formal hearing under Chapter 120, Florida Statutes. By a Petition for Formal Administrative Hearing Pursuant to Florida Statutes 120.57 dated April 27, 2000, the Petitioner requested, among other things, that the matter be referred to the Division of Administrative Hearings (Division) for a formal administrative hearing. By letter dated September 27, 2000, the Department referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

At the hearing, Petitioner testified in his own behalf and presented the testimony of Eileen Klinger. Petitioner's Exhibits 5 and 6 were admitted in evidence. The Department did not offer any witnesses for testimony. Department's

Exhibits 1 through 3 were admitted in evidence. Sections 561.17 and 561.19, Florida Statutes, and Rule 61A-5.015, Florida Administrative Code, were officially recognized.

The one-volume Transcript of this proceeding was filed with the Division on January 22, 2001. The parties timely filed their Proposed Recommended Orders.

#### 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 of the State of Florida charged with the responsibility of issuing new quota liquor licenses.

2. In 1994, the Department held a lottery drawing for new quota liquor licenses in Polk County, Florida. Petitioner was an applicant for a new quota liquor license in Polk County, Florida in the 1994 lottery. Petitioner was not a successful applicant in the 1994 lottery but was an alternate in the event one or more of the successful applicants in the 1994 lottery failed to qualify for a new quota liquor license.

3. The Department sent a Notice of Selection dated February 10, 2000, by Certified Mail through the U. S. Postal Service, to Petitioner at 3636 Dranefield Road, Lakeland, Florida 33811, the address Petitioner had on file with the

Department. The Notice of Selection was returned to the Department undelivered with the notation "no such number." Petitioner's new address (not on file with the Department) was 3200 Flightline Drive, Lakeland, Florida 32811. Petitioner failed to advise the Department that he had moved to a new address

4. The Notice of Selection advised Petitioner that one or more of the successful applicants of the 1994 lottery drawing had failed to qualify or to file the proper application for a new quota liquor license and, as a result, the Department was proceeding with the next eligible applicant in accordance with rankings based on the drawings.

5. The Notice of Selection advised Petitioner that he was now eligible to apply for a new quota liquor license but that he must file a full and complete application for the issuance of the license within 45 days of the date of the Notice of Selection. The deadline stated in the Notice of Selection for filing the application for issuance of the license was March 28, 2000.

6. On March 31, 2000, the Department mailed a Final Warning Notice to Petitioner advising him that the Department intended to deny Petitioner's entitlement to apply for a new quota liquor license in Polk County. Petitioner received the

Final Warning Notice even though it was mailed to the same address as the Notice of Selection.

7. The Final Warning Notice gave Petitioner until April 10, 2000, to furnish the Department additional information as to why he should not be disapproved due to his failure to timely file a full and complete application for the issuance of a new quota liquor license in Polk County.

8. The Final Warning Notice also advised Petitioner that "[t]his time period" (April 10, 2000) "should not be considered as an extension of time originally granted to file an application for licensure."

9. Petitioner's testimony was that he interpreted the Final Warning Notice as giving him until April 10, 2000, to file a full and complete application for licensure. As a result, Petitioner made a telephone call on April 4, 2000, to the Division of Alcoholic Beverages and Tobacco (DABT) using the telephone number listed on the Final Warning Notice in an attempt to get an application for licensure. Petitioner does not remember the person's name at DABT that he spoke with on April 4, 2000. In essence, Petitioner testified that this person told him that it was too late to apply and that he would be getting a denial letter and he would have the opportunity to appeal at that time.

10. It was the Department's position that the Final Warning Notice was to advise Petitioner that there was no record of the Department having received Petitioner's full and complete application for licensure. Also, it was to give Petitioner an opportunity to prove to the Department, no later than April 10, 2000, that he had in fact filed the application with the Department no later than March 28, 2000.

11. By a Notice of Disapproval dated April 10, 2000, the Department advised Petitioner that it had disapproved his entitlement to apply for a new quota liquor license in Polk County due to Petitioner's failure to timely file a full and complete application for a new quota liquor license in Polk County. This notice also advised Petitioner of his right to a hearing under Chapter 120, Florida Statutes, to contest this decision.

12. Petitioner has never filed a full and complete application for a new quota liquor license with the Department.

#### CONCLUSIONS OF LAW

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

14. 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. 1st DCA 1981). To meet this burden, Petitioner must establish facts upon which Petitioner's allegations for entitlement to apply for a new quota liquor license are based by a preponderance of the evidence. Section 120.57(1)(h), Florida Statutes, and See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996).

15. Section 561.19(2)(a), Florida Statutes, provides in pertinent part as follows:

(2)(a) When beverage licenses become available by reason of an increase in the population of a county . . . the division, if there are more applicants than the number of available licenses, shall provide a method of double random selection by public drawing to determine which applicants shall be considered for issuance of licenses. . . .

16. In 1994, the Department held a lottery for Polk County to determine which applicants would be entitled to apply for a new quota liquor license. Although Petitioner did not make the initial cut for entitlement to apply for a new quota liquor license, he was selected as an alternate in the event one or more of those applicants chosen in the initial cut failed to file or qualify for the issuance of a new quota liquor license.

17. Rule 61A-5.0105(4), Florida Administrative Code, provides as follows

(4) The Division shall notify those applicants who are selected as a result of the double random selection drawing by certified mail. Such notification will be sent to the mailing address listed on the entry form or subsequently filed with the division. It shall be the applicant's responsibility to maintain a correct mailing address with the division. (Emphasis furnished.)

18. Subsequently, one or more of those applicants selected by the lottery as eligible to apply for a new quota liquor license either failed to apply or failed to qualify. Thereafter, the Department attempted to notify Petitioner that he was now eligible to apply for a new quota liquor license. However, Petitioner's address on file with the Department was incorrect and the Notice of Selection dated February 10, 2000, sent by Certified Mail to Petitioner was returned by the US Postal Service with the notation "no such address."

19. Section 561.19(2)(c), Florida Statutes, provides in pertinent part as follows:

(c) Subject to this selection process, an applicant shall, after a drawing is held, have 45 days from the date the division mails the notice of selection to file an application on forms provided by the division and if such applicant is found by the division to be qualified, a license shall be issued. . . .

20. Rule 61A-5.0105(5), Florida Administrative Code, provides in pertinent part as follows:

(5) Failure to file a completed application package within 45 days of the date on the selection notice shall result in denial of the application filed.

Clearly, Petitioner failed to timely file his application for a new quota liquor license. In fact, Petitioner has never filed an application. Under the facts of this case, there is no authority for the Department to extend the deadline for filing an application for the issuance of new quota liquor license. Petitioner has failed to meet his burden to show an entitlement to apply for a new quota liquor license.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order denying Petitioner's request for relief.

DONE AND ENTERED this 9th of February, 2001, in  
Tallahassee, Leon County, Florida.

---

WILLIAM R. CAVE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6947  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of February, 2001.

COPIES FURNISHED:

Phillip A. Kuhn, Esquire  
1533 Tomahawk Trail  
Lakeland, Florida 33813-3748

Michael Martinez, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 60  
Tallahassee, Florida 32399-2202

Joseph Martelli, Director  
Division of Alcoholic Beverages  
and Tobacco  
Department of Business and  
Professional Regulation  
Northwood Centre, 1940 North Monroe Street  
Tallahassee, Florida 32399-0792

Barbara D. Auger, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre, 1940 North Monroe Street  
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.