STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEVERAGE HOSPITALITY, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-4576RU
	)	
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to Notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Fred L. Buckine, held a formal hearing in this case in Tallahassee, Florida, on January 28, 2002.

APPEARANCES

For Petitioner: Harold F.X. Purnell, Esquire
Rutledge, Ecenia, Underwood,
Purnell & Hoffman
Post Office Box 551
Tallahassee, Florida 32302-0551

For Respondent: Sherrie J. Barnes, Esquire
Atheseus Lockhart, Agency Representative
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

The issue is whether Respondent's Policy Statement, that the inclusion of revoked quota licenses in Section 561.19, Florida Statutes, double-random selection by public drawing, constitutes an unpromulgated rule contrary to Sections 120.54 and 120.56(4), Florida Statutes.

PRELIMINARY STATEMENT

On November 30, 2001, Petitioner, Beverage Hospitality, Inc. (BHI), filed its petition challenging Respondent's, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco's (Agency), statement defined as a rule.

On December 17, 2001, a Notice of Hearing and an Order of Pre-Hearing Instructions were issued. On December 28, 2001, Respondent filed an objection to Pre-Hearing Instruction modifying time to respond to discovery.

On January 2, 2002, Respondent filed a Motion to extend time for response to discovery in accordance with a Stipulation to continue the final hearing. An Order granting Respondent's Motion was entered and an Amended Notice of Hearing, scheduling the final hearing for January 28, 2002, was entered.

On January 15, 2002, Respondent filed its Notice of Agency Representation Deposition, naming Atheseus R. Lockhart, as an Agency Representative. On January 25, 2002, the parties filed a joint Pre-Hearing Stipulation, and Respondent filed a Motion to accept Qualified Representative.

Official recognition of the following provisions was taken: Sections 561.02, 561.17, 561.18, 561.19, 120.52, 120.54, and 120.56, Florida Statutes, and Rule 61A-5.105, Florida Administrative Code.

At the final hearing, on January 28, 2002, Petitioner presented the testimony of Horace Moody, President of Beverage Hospitality, Inc., and introduced thirteen exhibits (P-1 through P-13) which were accepted into evidence. Respondent presented no testimony and had one exhibit (R-A) accepted into evidence. Petitioner and Respondent filed Proposed Final Orders on February 25 and 27, 2002, respectively, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based upon observation of the witness and his demeanor while testifying, the documentary materials received in evidence, stipulations by the parties, and the entire record complied herein, the following relevant and material facts are found.

1. The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, is the state Agency responsible for implementation of Chapter 561, Florida Statutes, Beverage Law Administration.

2. In July 2001, Petitioner (BHI) made applications to the Agency for four quota alcoholic beverage licenses made available by revocation. Among those licenses, BHI made application for license number 47-00190, a quota license, initially issued before 1980 pursuant to the Leon County Special Act governing quota licenses; Chapters 63-1561 and 63-1976, Laws of Florida. License number 47-00190, a quota license revoked by the Agency approximately two years before BHI's application in 2001, became and remained available for reissuance at the time BHI filed its petition. The Agency denied BHI's application for revoked quota license no. 47-00190 in Leon County.

3. A quota license is an alcoholic beverage license issued in a county whose population count, at the time of issuance, supports its issuance. In 1979, the Florida Legislature determined each county's population count to be 2,500 persons per quota license. In 2000, the Legislature determined each county's population count to be 7,500 persons per quota license. However, Section 561.19, Florida Statutes (2000), does not specifically direct the Agency to conduct a county's population re-count of 7,500 persons before the reissuance of a revoked

quota license issued under the prior population count of 2,500 persons per county.

4. The double-random selection drawing conducted by the Agency pursuant to Section 561.19, Florida Statutes, on October 31, 2001, included an alcoholic beverage license for use in Leon County that became available by virtue of the revocation of that alcoholic beverage license bearing license number 47-00190, which was issued before the change in the population count and the random selection method now contained in Section 561.19, Florida Statutes.

5. The Agency based its denial of Leon County quota license 47-00190 in its Policy Statement of general applicability. The injury to BHI related to the denial of that quota license is within the zone of interest to be regulated and protected under Chapter 561, Florida Statutes, and Petitioner has standing to initiate and prosecute this proceeding.

6. As alluded to before, BHI also made applications in July 2001 for revoked quota license number 26-00921 and revoked quota license number 26-00208 in Duval County; application for revoked quota license number 63-00525 in Polk County; and application for revoked quota license number 45-00073 in Lake County. Each revoked quota license was issued pursuant to the special act applicable to each county and was issued before the 1980 Amendment to Section 561.19, Florida Statutes.

7. The Agency argues in its Proposed Final Order that Duval County (2) and Lake County (1) have exceeded their respective quota license limits, but does not address the quota license limits of the Polk County and the Leon County revoked quota licenses. It is assumed, based upon the fact the revoked quota licenses in those two counties were made available for reissuance, those quota licenses did not exceed the current quota limit of the 7,500 population count.

8. The quota licenses above were revoked several years ago by the Agency and became available for reissuance. Regarding each application filed, BHI received a notice from the Agency stating that:

> There is no license currently available for issuance in a (specific) County. When licenses become available by reason of increase in population or revocation of a quota license, these licenses are re-issued pursuant to a double-random selection by public drawing. (Emphasis added)

9. The parties entered into a stipulation concerning

> . . . the Division's policy statement that revoked alcoholic beverage licenses are to be included in drawings conducted pursuant to Florida Statutes, 561.19. . . .

10. BHI challenged the Agency's Policy Statement of general applicability that revoked quota alcoholic beverage licenses are required to be included in a random drawing pursuant to Section 561.19, Florida Statutes.

11. BHI argues that Section 561.19, Florida Statutes, authorizes double-random selection drawings for issuance of alcoholic beverage licenses in only two situations: (a) where licenses become available by an increase in population of a county; or (b) where a dry county, by special act, becomes a wet county. The Agency has embarked on a stated policy, not adopted as a rule, in which, contrary to Section 561.19, Florida Statutes, it includes all revoked quota licenses in the double-random selection drawing. The Agency has thus instituted an unwritten rule policy contrary to Sections 120.54 and 120.56(4), Florida Statutes.

12. The policy statement was applied to BHI's applications for revoked licenses by letters from the Agency denying BHI's four applications for revoked quota licenses stating revoked quota licenses are to be placed in a random selection drawing pursuant to Subsection 561.19(2), Florida Statutes.

13. The Agency, in its pubic legal notice, concerning a double-random selection drawing, set forth the total number of licenses available in each county that are to be awarded by the random selection drawing. Several of the counties listed in the legal notice have an asterisk next to the total licenses available for that county. The explanation by the Agency for the public notice asterisk is to identify those revoked quota licenses included in the total number of available licenses.

The following findings of fact are based, in part, on the stipulation of the parties concerning this dispute.

14. The Agency does not have an adopted rule that addresses inclusion of all revoked license in double-random selection drawings.

15. The Agency agreed that the above Policy Statement had not been adopted as a rule by appropriate rulemaking procedures as defined in Sections 120.54 and 120.56(4), Florida Statutes. The Agency takes the position that Section 561.19, Florida Statutes, authorizes double-random selection by public drawing to be used when a quota license becomes available by an increase of 7,500 in a county's population.

16. The Agency's position is that Section 561.02, Florida Statutes, grants the Division Director discretionary authority to enforce the Alcoholic Beverage Law, Chapter 561, Florida Statutes, in accordance with the Legislative intent.

17. Accordingly, Section 561.19, Florida Statutes, is the grant of authority for the Agency's Policy Statement herein challenged. Additionally, the Legislative intent of Section 561.19, Florida Statutes, argues the Agency, is twofold: (1) it removed sole discretion from the Division Director to issue quota licenses, and (2) created a system to ensure licenses issued after 1980 would be in a fair and equitable manner to all applicants.

18. The answer to the threshold question, of whether the Agency's Policy Statement at issue is intended to have the effect of law, is in the affirmative.

19. Prior to the 1980 Amendment to Section 561.19, Florida Statutes, revoked quota license were reissued in accordance with Section 561.02, Florida Statutes (1979). An application was made for a specific revoked license; the application was reviewed and investigated, and if found in compliance with statutory requirements by the Agency, the Director issued the quota license to the approved applicant. The parties agreed that in the event that two applications were made for one license, the first application filed and approved would be granted the license.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.56(4)(a), Florida Statutes.

21. Section 120.56(4), Florida Statutes, allows any person that is "substantially affected by an agency's statement" to institute a proceeding to determine whether the policy statement violates Section 120.54(1)(a), Florida Statutes.

22. The evidence in this case proved that the Agency applied an unpromulgated rule to Petitioner's application for

the revoked quota license in Leon County. Petitioner was denied the license it sought from the Agency.

23. Petitioner, therefore, was "substantially affected" by the Agency's Policy Statement and has standing to institute this proceeding. See State Department of Administration v. Harvey, 356 So. 2d 325 (Fla. 1st DCA 1977), and Televisual Communication v. Department of Labor, 667 So. 2d 372 (Fla. 1st DCA 1995).

24. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative in a Chapter 120, Florida Statutes, proceeding. Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 249 (Fla. 1st DCA 1977).

25. The initial burden of proof in a proceeding instituted pursuant to Section 120.56, Florida Statutes, is placed on the Petitioner. Section 120.56(4)(a), Florida Statutes, includes the following allegations: (a) what the alleged "Policy Statement" is; (b) that the Policy Statement constitutes a rule under Section 120.52, Florida Statutes; and (c) that the Agency has not adopted the statement by the rulemaking procedures of Section 120.54, Florida Statutes.

26. Section 120.56(4)(c), Florida Statutes, provides that burden shifts to the Agency to prove that "rulemaking is not

feasible and practicable under Section 120.54(1)(a), Florida Statutes," if Petitioner proves the allegations required to be included in the petition.

27. Based upon the foregoing, Petitioner was required to prove the allegations of its petition and the Agency was required to prove that rulemaking was not feasible and practicable, as provided in Section 120.56(4)(c), Florida Statutes.

28. BHI met its burden of proof and the Agency conceded that the Challenged Policy Statement was not promulgated as a rule and had the effect of law by interpreting Legislative intent found in Section 561.19, Florida Statutes. The Agency did not address, in the hearing or in its proposed final order, the issue of whether rulemaking was feasible and practicable.

29. The evidence in this case proved that the Challenged Policy Statement is a "rule" as defined in Section 120.52(15), Florida Statutes.

> "Rule" means each Agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

30. The Agency has not adopted the Challenged Policy Statement by the rulemaking procedures provided in

Section 120.54, Florida Statutes. The parties stipulated to this fact.

31. The Agency did not offer evidence to meet its burden that rulemaking was not feasible and practicable under Section 120.54(1)(a), Florida Statutes.

32. Based upon the foregoing, the Challenged Policy Statement violates Section 120.54(1)(a), Florida Statutes.

33. Section 120.56(4)(c), Florida Statutes, provides that the Administrative Law Judge is to make the following determination, which is considered "final," in a challenge brought pursuant to Section 120.56(4)(a), Florida Statutes:

> (c) The Administrative Law Judge may determine whether all or part of a statement violates s. 120.54(1)(a).

34. Pursuant to Section 120.56(4)(d), Florida Statutes, if a final order is entered finding all or part of a policy to violate Section 120.54(1)(a), Florida Statutes, the Agency is required to "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." Pursuant to this provision, any person to whom an Agency attempts to apply a statement found to be an unpromulgated rule by Final Order may rely upon the Final Order in a Section 120.57(1), Florida Statutes, proceeding to avoid application of the policy.

35. Section 120.56(4)(d), Florida Statutes, is self-executing. To take effect, it does not require any order of the Administrative Law Judge other than the order the Administrative Law Judge is called upon in Section 120.56(4)(c), Florida Statutes, to make.

36. Section 120.56(4)(e), Florida Statutes, provides an exception to the consequences of Section 120.56(4)(e), Florida Statutes. Pursuant to Section 120.56(4)(e), Florida Statutes, an Agency may rely upon a policy statement despite a determination that the policy is an unpromulgated rule in violation of Section 120.54(1)(a), Florida Statutes, if the following conditions are met:

> a. Prior to entry of the final order, the Agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement;
> b. The Agency proceeds expeditiously and in good faith to adopt rules which address the statement; and
> c. The statement or substantially similar statement meets the requirements of s. 120.57(1)(e).

37. The Agency has taken none of the above prescribed regarding the Challenged Policy Statement.

38. The Petitioner proved, by a preponderance of the evidence, that the Agency's Policy Statement is a rule. Once Petitioner has met that requirement, the burden shifts to the Agency to overcome the statutory requirement that rulemaking is

feasible and practicable, thus showing that it can continue to rely on the Policy Statement.

39. As a threshold requirement, Petitioner has established that the Agency Policy Statement constitutes a rule as defined in Section 120.52(15), Florida Statutes.

40. The plain reading of Section 120.52(15), Florida Statutes, requires an analysis of whether the Agency's Policy Statement complies with the definition of a rule; and, if so, whether the Policy Statement can be said to be one of general applicability.

41. By stipulation of the parties the challenged Agency Policy Statement has general applicability to alcoholic beverage licenses. The Policy Statement includes revoked quota licenses and the renewal of existing quota licenses.

42. Petitioner relies on Andrew M. Beverly v. Division of Beverage, Department of Business Regulations, 282 So. 2d 657 (Fla. 1st DCA 1973) as legal support for this position. In Beverly, the Plaintiff wished to obtain a license that had previously been revoked, at a time of enactment of statute, which changed the number of authorized licenses, but which grand-fathered in existing licenses and was available for issuance. The Agency considered the revoked quota license as non-existent. The First District Court of Appeal decided that

the Legislature did not intend to eliminate the revoked license but only to restrict the issuance of a new license.

43. Respondent relies on Division of Beverage, Department of Business Regulations v. DAV-ED, INC., 324 So. 2d 682 (Fla. 4th DCA 1976) for the legal position that the Beverly holding is contrary to Section 561.20, Florida Statutes.

44. In DAV-ED the Court limited its ruling to the circumstances where no beverage quota licenses were available for issuance in a county. In that case, the applicant sought a revoked quota license and the application was denied by the Agency. The court held that where quota license allotment for a county was 248 and there were 287 outstanding licenses, issuance of a license which had earlier been revoked violated the statute providing that, upon revocation of an existing license, no renewal thereof or new license should be issued contrary to quota limitation; Section 561.20(3), Florida Statutes (1976). In its decision the court pointed to the following words in (1976), Section 561.20(3), of the Florida Statutes:

> . . . upon the revocation of any existing license no renewal thereof or new license therefore shall be issued contrary to the limitation herein prescribed.

45. Petitioner's position that the Agency's Policy Statement is a rule not properly promulgated finds support from both the First District Court of Appeal and the Fourth District

Court of Appeal's decisions. Under Beverly, if the revoked quota licenses in question were not, in fact, "over the quota," they are not dead and they should be available for issuance without being subject to a new population count and random drawing selection. Conversely, under DAV-ED, if the revoked quota licenses in question were, in fact, "over the quota," they would not be available to be issued and thus should not have been published as being available for a random selection drawing. In either set of circumstances, the Agency's policy statement of subjecting all revoked quota licenses to first a population count and then random selection, before determining whether said license is over quota or under quota in the issuing county, is a rule.

46. The Agency's position that its policy statement implements and interprets Section 561.19, Florida Statutes, which removes all discretion from the Division's Director and equalizes opportunity of every applicant to acquire an available license, is without support in the record.

47. The word "policy" used by the Agency in its Prehearing Stipulation is not a term of art. It has a commonly understood meaning. The American Heritage Dictionary of the English Language, 1114 (4th ed. 1981), defined the term as "(A)ny plan adopted by a government, political party, business organization,

or the like, designed to influence and determine decisions, actions, and other matters."

48. The Agency's Policy Statement complies with the definition of a rule contained in Section 120.52(15), Florida Statutes. The Policy Statement is one of general applicability that prescribes the Agency's procedure and practice pertaining to the issuance of revoked quota alcoholic beverage licenses.

49. Once, as herein, Petitioner has met its burden of proving, by a preponderance of the evidence, that the Agency statement is a rule, the burden is upon the Agency to overcome the statutory presumption that rulemaking is feasible and practicable; thus, showing that it can continue to rely on the statement. Pete Spear v. Department of Highway Safety and Motor Vehicles, DOAH Case No. 92-4816RU (10/29/92).

50. In addition to the general rulemaking requirement, pursuant to Section 561.11(1), Florida Statutes, the Agency has the authority to:

> . . . adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of the Beverage Law.
> In the matter of alcoholic beverage license, subsection 561.26, requires mandatory rules for license renewals. In those situations the Agency:
>
> . . . shall adopt an appropriate rule establishing the schedule for license renewals, which may provide for a semiannual schedule based on a division of the state into two geographic regions.

51. In this case, the Agency has consistently subjected all applicants, including those seeking renewal of their quota license, to the population count and random drawing selection process.

52. The Agency argues that the Legislature, in Section 561.20(1), Florida Statutes, prohibits the Division Director from issuing a revoked license, and requires the Division Director to conduct a population count prior to issuing any license, including renewals of existing quota licenses.

53. Section 565.02(1), Florida Statutes, states, in pertinent part, that:

> (1) No license under s. 565.02(1)(a)-(f), inclusive, shall be issued so that the number of such licenses within the limits of the territory of any county exceeds one such license to each 7,500 residents within such county. Regardless of the number of quota licenses issued prior to October 1, 2000, on and after that date, a new license under Subsection 565.02(1)(a)-(f), inclusive, shall be issued for each population increase of 7,500 residents above the number of residents who resided in the county according to the April 1, 1999, Florida Estimate of Population as published by the Bureau of Economic and Business Research at the University of Florida, and thereafter, based on the last regular population estimate prepared pursuant to s. 186.901, for such county. Such population estimates shall be the basis for annual license issuance regardless of any local acts to the contrary. However, such limitation shall not prohibit the issuance of at least three licenses in any county that may approve the

> sale of intoxicating liquors in such county. (Emphasis added)

54. The word "regardless" in the above-quoted section of the statutes is not a term of art. It has a commonly understood meaning. The American Heritage Dictionary of the English Language, 1094 (4th ed. 1981), defined the term as "heedless; unmindful; in spite of everything; anyway."

55. Inserting the above-meaning of "regardless" into this section, the section states that "be unmindful of or in spite of" prior quota licenses issued before October 1, 2000, (only) new licenses are subject to a population count, and thus, the random selection drawing.

56. Section 120.595(4)(a), Florida Statutes, provides the following with regard to an award of attorney's fees and costs in a proceeding pursuant to Section 120.56(4), Florida Statutes:

> (a) Upon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable attorney's fees to the Petitioner. . . .

57. Based upon this provision, Petitioner is entitled to reasonable Attorney's Fees and Costs of this proceeding. Within 15 days after entry of this Final Order, the parties shall confer to resolve the attorney's fees and cost issue. Should the parties not agree on reasonable attorney's fees and cost, written notice, including one or more available dates for an

evidentiary hearing to be held not later than 29 days from the date of this Final Order, shall be given the undersigned.

FINAL ORDER

58. The Division's Policy Statement requiring revoked alcoholic beverages quota licenses in counties that have not exceeded their respective quota license limits are to be included in drawings conducted pursuant to Section 561.19(2), Florida Statutes, is an Agency Policy Statement of general applicability that constitutes a rule but which has not been adopted by rulemaking procedures. Therefore, the Policy Statement violates Section 120.54(1)(a), Florida Statutes. There was no evidence presented that rulemaking was not feasible and practicable under Section 120.54, Florida Statutes.

59. The Agency's Policy Statement as set forth herein above, as a matter of law, meets the definition of a rule as set forth in Section 120.52(1)(15), Florida Statutes.

60. With the Agency's Policy Statement requiring revoked quota licenses to be included in Section 561.19(2), Florida Statutes, random selection drawings is a rule that has not been adopted in accordance with Section 120.54, Florida Statutes, and as such, the Policy Statement violates Section 120.54(1), Florida Statutes.

61. As the prevailing party and in accordance with Section 120.595(4), Florida Statutes, Petitioner is entitled to an award of reasonable costs and reasonable attorney's fees to be determined as herein above ordered.

DONE AND ORDERED this 29th day of May, 2002, in Tallahassee, Leon County, Florida.

FRED L. BUCKINE
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) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2002.

COPIES FURNISHED:

Richard Turner, Director
Division of Alcoholic Beverages and Tobacco
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Hardy L. Roberts, III, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Harold F. X. Purnell, Esquire
Rutledge, Ecenia, Underwood,
  Purnell & Hoffman
Post Office Box 551
Tallahassee, Florida 32302-0551

Sherrie J. Barnes, Esquire
Atheseus Lockhart, Agency Representative
Department of Business and
  Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building, Room 201
Tallahassee, Florida 32399-0250

Carroll Webb, Executive Director
Joint Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

David Greenbaum
Legislative Research Director
Committee on Governmental Rules
  and Regulations
218 House Office Building
Tallahassee, Florida 32399

Tina D. White
Legislative Analyst
Senate Governmental Oversight
  and Productively Committee
525 Knott Building
Tallahassee, Florida 32399-1100

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.