STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEVERAGE HOSPITALITY, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4052RP
	)	
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a formal administrative hearing was held in this case in Tallahassee, Florida, before Diane Cleavinger, Administrative Law Judge of the Division of Administrative Hearings, on November 18, 2002.

APPEARANCES

For Petitioner: Harold F. X. Purnell, Esquire
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For Respondent: Michael A. Martinez, Esquire
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STATEMENT OF THE ISSUES

The issue in this case is whether the proposed amendments to existing Rule 61A-5.0105, Florida Administrative Code, constitute a valid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

Petitioner, Beverage Hospitality, Inc., filed an application for several pre-1981 quota liquor licenses that had previously been revoked by Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Respondent or Division). Respondent refused to accept these applications. Petitioner then filed a Writ of Mandamus to force Respondent to accept said applications. Thereafter, Respondent was ordered to accept the quota license applications. After acceptance of the applications, Respondent advised Petitioner that pre-1981 quota licenses would be issued pursuant to the double random drawing process used for post-1981 quota licenses. Respondent had no rule on the issuance of pre-1981 quota licenses and Petitioner, subsequently, successfully challenged, as an unpromulgated rule, Respondent's policy of placing revoked quota licenses in the double random drawing process used for post-1981 quota licenses. Respondent, then proposed an amendment to Rule 61A-5.0105, Florida Administrative Code, to include revoked pre-1981 quota licenses in the double random drawing process. On October 18, 2002, Petitioner filed a

Petition Challenging Proposed Agency Rule 61A-5.0105, Florida Administrative Code, pursuant to Section 120.54, Florida Statutes.

The parties, by prehearing stipulation, agreed that Petitioner had standing to bring this challenge and that, relative to the merits thereof, there were no disputed issues of material fact and the question of the validity of the proposed rule was solely a question of law.

At the hearing, Respondent presented the testimony of four witnesses. Petitioner did not call any witnesses. Neither party offered exhibits into evidence.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on December 13, 2002.

FINDINGS OF FACT

1. The Division, on October 11, 2002, in Volume 28, No. 41 of the Florida Administrative Weekly noticed a proposed amendment to Rule 61A-5.0105, Florida Administrative Code, concerning the conduct of Section 561.19(2), Florida Statutes, in double random selection drawings for revoked pre-1981 quota alcoholic beverage licenses. The proposed amendment states, in the portion relevant to this challenge, as follows:

> The division will follow the below listed procedures when entry forms are accepted for issuance of new state liquor licenses authorized by Florida Law, when they become available by reason of an increase in the

> population of a county ~~or city, or a county~~ voting to permit the sale of intoxicating beverages when such sale had previously been prohibited, or by revocation of a license under 565.02(1)(a)-(f), inclusive issued by Special Act prior to 1981 ~~quota~~:[1]

2. Respondent cited as specific authority for the rule its general rulemaking powers contained in Section 561.11, Florida Statutes. The laws implemented by the proposed amendment included, in relevant part, Sections 561.19 and 561.20, Florida Statutes.

3. Section 561.19, Florida Statutes, is the statutory authority for granting or denying applications for all liquor licenses and quota liquor licenses. Section 561.19(2)(a), Florida Statutes, establishes the double random selection drawing process for quota liquor licenses. Section 561.19, Florida Statutes, states in relevant part:

> (1) Upon the completion of the investigation of an application, the division shall approve or disapprove the application. If approved, the license shall be issued upon payment to the division of the license tax hereinafter provided.
>
> (2)(a) When beverage licenses become available by reason of an increase in the population of a county or by reason of a county permitting the sale of intoxicating beverages when such sale had been prohibited, 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. The

> double random selection drawing method shall allow each applicant whose application is complete and does not disclose on its face any matter rendering the applicant ineligible an equal opportunity of obtaining an available license. After all applications are filed with the director, the director shall then determine by random selection drawing the order in which each applicant's name shall be matched with a number selected by random drawing, and that number shall determine the order in which the applicant will be considered for a license. (Emphasis supplied.)

4. In general, quota liquor licenses are issued in a limited number based on the population of a county or the increase, if any, in the population of a county. The licenses can also be issued when a county initially changes from a county which does not permit the sale of intoxicating liquor to one that does permit the sale of intoxicating liquor. The quota license is the only liquor license which is numerically limited; all other types of liquor licenses are available without numerical limitation. Because quota licenses are numerically limited, applications for such licenses can exceed the number of available licenses.

5. Prior to 1981, quota licenses were issued based on an application. The evidence did not reveal the method used by the Division or the Governor in awarding quota licenses to qualified applicants when the applications for such exceeded the number of available licenses. Clearly, such decisions were made since

quota licenses were issued prior to 1981. The evidence did indicate that in 1981 the Governor did not wish to be involved in the process of determining which applicants received quota liquor licenses and developed legislation establishing a double random drawing process. The legislation eventually became Section 561.19(2)(a), Florida Statutes. At some point, the number of licenses which could be issued was reduced from one license per 2,500 residents in a county to one license per 7,500 residents in a county. See Section 561.20, Florida Statutes (2002). Moreover, the Beverage Law comprised of Chapters 561, 562, 563, 564, 565, 567 and 568, Florida Statutes, establishes that quota licenses exist as un-issued licenses at the time the statutory criteria by county vote or population are met. See Beverly v. Division of Beverages, 282 So. 2d 657 (Fla. 1st DCA 1973). Indeed, the Division has the duty to issue these licenses to qualified applicants once they become available for issuance. The effect of revocation of a license is to revoke the current licensee's privilege to use a certain license at a certain location. Revocation under the Beverage Law simply returns a license to the possession of Respondent which again has the duty to issue the license if the population of the county supports its re-issuance. See Section 561.20(3), Florida Statutes, and Beverly v. Division of Beverages, 282 So. 2d 657 (Fla. 1st DCA 1973).

6. In general, the double random drawing process provides a method for notifying the public of the availability of quota licenses and a method for selecting applications for further investigation and possible award of a quota license when those licenses are available. There is currently no administrative rule which gives Respondent guidance on what procedure to follow with regard to the award of pre-1981 quota licenses that have come back into the possession of Respondent by reason of revocation. There is also no rule which governs the re-issuance of post-1981 revoked quota licenses. Historically, Respondent has re-issued these revoked pre-1981 and post-1981 quota licenses through the double random drawing process. The pre-1981 revoked quota licenses issued through the double random drawings were never issued in excess of the population limits; however, they were issued in excess of the population increase for the prior year, if the total population supported the number of licenses issued. Respondent's long-standing policy was not challenged until the recent multiple litigation on this issue involving Petitioner as outlined above.

7. Petitioner has applied for approximately 57 previously-revoked quota licenses. There was no evidence whether these licenses were initially created based on an increase in county population.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.54, Florida Statutes.

9. A hypothetical is helpful in order to analyze the issue involved in this proceeding. Assume that a county's population is 75,000 and it has a special act authorizing one license for each 7,500 persons. Assume also that the county's population has not increased for a number of years and all ten authorized licenses based upon the population have been issued. Assume next that one such issued license is revoked. The county is authorized to have ten licenses but only nine are now issued; thus, one license is available. The one license, irrespective of whether it is considered "new," has become available, even though no population increase in the county has occurred for a number of years. The issue is whether the re-issuance of this license should occur by application or through the double random drawing process.

10. Consideration of the validity of a proposed rule must necessarily commence with an analysis of Respondent's rulemaking authority in accordance with the legislative mandate set forth in the twin provisions of Sections 120.52(8)(g) and 120.536(1), Florida Statutes. The Legislature, culminating in the 1999 amendments to Chapter 120, Florida Statutes, substantially

restricted agency rulemaking authority. Section 120.52(8), Florida Statutes, states:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious;
> (f) The rule is not supported by competent substantial evidence; or
> (g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general

> legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute. (Emphasis supplied.)

11. Section 120.536(1), Florida Statutes, states:

> (1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

12. Section 561.11, Florida Statutes, does provide a general grant of rulemaking authority. Statutes prior to passage of Chapter 120, Florida Statutes, contained more specific rulemaking authority. However, upon the inception of Chapter 120, Florida Statutes, and prior to the 1999 specificity requirements added to Chapter 120, Florida Statutes, Section 561.11, Florida Statutes, was amended to contain less specific

rulemaking authority in order to avoid redundancy with the rulemaking requirements of Chapter 120, Florida Statutes. Section 561.11, Florida Statutes, provides:

> (1) The division has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of the Beverage Law.
> (2) The division shall have full power and authority to provide for the continuous training and upgrading of all division personnel in their respective positions with the division. This training shall include the attendance of division personnel at workshops, seminars, or special schools established by the division or other organizations when attendance at such educational programs shall in the opinion of the division be deemed appropriate to the particular position which the employee holds.

13. The language contained in Section 561.11(1), Florida Statutes, includes more than a general grant of rulemaking authority. The statute specifically references the "Beverage Law." Section 561.01, Florida Statutes, defines the Beverage Law as Chapters 561, 562, 563, 564, 565, 567, and 568, Florida Statutes.

14. In this case, the specific law to be implemented is Section 561.19, Florida Statutes. Section 561.19(2)(a), Florida Statutes, is the only statute that authorizes the Division to conduct double random drawings for quota licenses. It limits the Division's authority to conduct such drawings to two circumstances, "when licenses become available by reason of an

increase in population in the county" or by reason of a formerly dry county permitting the sale of alcoholic beverages. There is no authority to issue licenses which fall outside these two categories to be issued by a double random drawing process. All other licenses are issued by application. See Section 561.19(1), Florida Statutes.

15. Section 561.20(3), Florida Statutes, provides

> The limitation upon the number of such licenses to be issued as herein provided does not apply to existing licenses or to the renewal or transfer of such licenses; but upon the revocation of any existing license, no renewal thereof or new license therefor shall be issued contrary to the limitation herein prescribed.

The limitation referenced in the above-quoted section is the limitation of licenses based on one license for every 7,500 residents in a county contained in Section 561.20(1), Florida Statutes. Section 561.20, Florida Statutes, does not limit issuance or re-issuance of a license to circumstances where there is an increase in the population of a county. A county with a static population is entitled to have a certain number of licenses based on its population. Use of the term "no renewal thereof or new license therefor," refers to re-issuance of a revoked license. Also see Beverly v. Division of Beverages, 282 So. 2d 657 (Fla. 1st DCA 1973). Thus, whether a revoked license is labeled "new" or "old," is irrelevant to the issue in this

proceeding. A re-issued license cannot be issued in excess of the population limitation contained in Section 561.20, Florida Statutes. The statute does not provide support for the proposed rule.

16. Since a county which has commenced permitting the sale of alcoholic beverages where such sale had previously been prohibited would not have any previously issued licenses that could be revoked, that category of quota licenses is necessarily inapplicable. Such a county is entitled to at least three licenses regardless of its population. See Section 561.20(1), Florida Statutes. However, the same argument for revoked new wet county-issued licenses can be made unless those licenses once revoked retain the characteristics of an initial wet county license after revocation.

17. The other category, an increase in population of the county, may or may not apply to a license made available because of revocation. The resolution depends on the reason for issuance of the license when it was initially created since quota licenses do not die and are subject to re-issuance as limited by a county's population. There was no evidence in this case which demonstrated the initial reason for the issuance of these pre-1981 revoked licenses at issue here or the various bases before 1981 for the issuance of quota licenses.

18. In short, the Division has not been granted the necessary rulemaking authority to subject to the double random drawing process licenses which have become available by means other than an increase in a county's population or by a previously dry county permitting the sale of intoxicating liquor. The proposed rule because it covers all types of revoked pre-1981 quota licenses purports to expand the Division's authority beyond the scope of its governing statutes and constitutes an invalid rule pursuant to Section 120.52(8)(b), Florida Statutes.

19. In State, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), the 1999 amendments to Sections 120.52(8)(g) and 120.536(1), Florida Statutes, were reviewed. The court expressly noted:

> [I]t is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.
>
> * * *
>
> [A]dministrative agencies are creatures of statute and have only such powers as the statutes confer . . . . The statutory provisions governing rulemaking must be

> interpreted in light of the Legislature's stated intent to clarify significant restrictions on agencies' exercise of rulemaking authority, and to reject the "class of powers and duties analysis employed in Consolidated-Tomoka. If reasonable doubt exists as to the "lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." (supra at 700-1)

20. In Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000), the court, also construing the same 1999 legislative changes, noted:

> The ordinary meaning of the term "specific" is "limiting or limited; specifying or specified; precise, definite, [or] explicit." See Webster's New World College Dictionary 1287 (3rd Ed. 1996). "Specific" is used as an adjective in the 1999 version of section 120.52(8) to modify the phrase "powers and duties."
>
> In the context of the entire sentence, it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority.

21. The Legislature has not granted to the Division the specific power or duty which the proposed rule seeks to implement. Thus, the proposed rule constitutes an invalid delegation of legislative authority pursuant to Section 120.52(8)(c), Florida Statutes. The only statute which provides the specific power or duty for the Division to conduct a double

random selection drawing for beverage licenses is Section 561.19(2)(a), Florida Statutes. Such power is, however, limited to two situations: an increase in population and a dry county becoming wet. Indeed, the Division has candidly admitted in the Prehearing Stipulation that it seeks by the proposed rule to include Section 561.19(2), Florida Statutes, drawing licenses "which have become available in ways not provided for in the statute."

22. While the Division has asserted that utilizing the Section 561.19(2)(a), Florida Statutes, double random selection drawing is a better method for awarding previously revoked licenses, the "necessity for, or the desirability of, an administrative rule does not, of itself, bring into existence authority to promulgate such rule." 4245 Corporation v. Division of Beverage, 371 So. 2d 1032, 1033 (Fla. 1st DCA 1978).

23. A revoked license may or may not be a license which falls into one of the categories contained in Section 561.19(2), Florida Statutes. Such licenses may also be those that were initially created for reasons outside the two categories contained in Section 561.19(2)(a), Florida Statutes, and are not available "by reason of any increase in the population of a county or by a reason of a county permitting the sale of intoxicating beverages when such sale had been prohibited." See Section 561.19(2)(a), Florida Statutes. The Division has no

authority to include the latter licenses in the double random drawing process. Respondent's efforts would be better directed to the Legislature. Consequently, because the Division's proposed rule includes all revoked pre-1981 quota licenses, Section 561.19, Florida Statutes, cannot, as a matter of law, serve as the authority for the proposed rule because it enlarges, modifies, and contravenes the specific provisions of Section 561.19, Florida Statutes.

RECOMMENDATION

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

ORDERED that the Petition Challenging a Proposed Agency Rule challenging the proposed amendment to Rule 61A-5.0105, Florida Administrative Code, is granted. The proposed amendment is declared invalid.

DONE AND ORDERED this 27th day of January, 2003, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2003.

ENDNOTE

1/ On Line 7, the work "inclusive" should be underlined since it is not in the current version of the rule and the word "~~quota~~" should not be included since it is not contained in the current version of the rule.

COPIES FURNISHED:

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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.