

9-24-04

Final Order No. BPR-2005-00162 Date: 1-13-05
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon M. Nichols

**Department of Business and Professional Regulation
Division of Alcoholic Beverages and Tobacco
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1020**

2005 JAN 19 A 11:47

FILED

Department of Business and Professional Regulation
Division of Alcoholic Beverages and Tobacco
PETITIONER

AT

vs.

DBPR CASE NO. 2003-071145
DOAH CASE NO. 03-4681
LICENSE NO. 23-20655
SERIES: 4COP

mmp
CWS

Old Cutler Oyster Company, Inc.
d/b/a Old Cutler Oyster Company
RESPONDENT

FINAL ORDER

This matter comes before me for final Agency Order.

The issue before me is whether and to what extent Respondent's alcoholic beverage license is subject to penalties pursuant to Sections 561.29 and 386.207(3), Florida Statutes. Whether this Alcoholic Beverage License is subject to revocation pursuant to Section 561.29, Florida Statutes.

PRELIMINARY STATEMENT

1. On December 5, 2003, the Division filed a First Amended Administrative Complaint (DBPR case number 2003-071145) against Respondent. The Division charged Respondent with having violated Section 386.204, Florida Statutes, by and through Section 386.207(3) Florida Statutes, by allowing patrons to smoke in an enclosed indoor workplace.
2. Respondent filed a timely request for hearing, citing disputed issues of fact, and the matter was referred to the Division of Administrative Hearings (DOAH) for a formal hearing.

3. Prior to the scheduled hearing date, the parties agreed to waive the evidentiary hearing and to submit the case for preparation of a Recommended Order on stipulated facts and on written and oral arguments.

4. A Recommended Order was issued by the Administrative Law Judge on September 24, 2004.

5. On October 5, 2004, Petitioner submitted a Motion for Extension of Time to File Exceptions to Recommended Order which was granted by Division Director Pat Parmer on October 8, 2004.

6. Petitioner filed its Exceptions to Recommended Order on November 5, 2004.

7. On November 18, 2004, Respondent filed a motion to extend the time in which to file a response to Petitioner's Exceptions to Recommended Order.

8. On December 13, 2004, the parties filed a Stipulated Motion to Extend the Filing of the Final Order. The Motion provided that Respondent would file his response to Petitioner's Exceptions on December 20, 2004. The motion also provided that, pursuant to Section 120.569(2)(1)2., Florida Statutes, the parties agreed to waive the requirement that the Division enter its Final Order within 90 days of the issuance of the Recommended Order and further stipulated that the Final Order would be entered on or before January 14, 2005.

9. On December 16, 2004, Director Parmer entered an Order granting the parties Stipulated Motion to Extend the Filing of the Final Order.

FINDINGS OF FACT

10. A thorough review of the entire record of this matter reveals that the findings of fact contained in the recommended order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law.

11. The Division hereby adopts and incorporates by reference the Findings of Fact as set forth in the Recommended Order.

CONCLUSIONS OF LAW

12. A thorough review of the entire record in this matter indicates that paragraphs 15, 16, 17, 18, 19, 20, and 21 of the Conclusions of Law contained in the Recommended Order are reasonable and correct interpretations of the law based on the Findings of Fact.

13. The Division hereby adopts and incorporates by reference paragraphs 15, 16, 17, 18, 19, 20, and 21 of the Conclusions of Law as set forth in the Recommended Order.

14. Paragraph 22 of the Conclusions of Law is adopted in part and rejected only to the extent that it states that Petitioner's theory of the case is problematic in at least two regards. The Division agrees that Petitioner's theory is problematic as there is nothing in the applicable statutes, specifically Sections 386.204 and 386.207(3), Florida Statutes, that specifies what, if anything, must be done by a "proprietor or other person in charge of an enclosed indoor workplace" when such person witnesses or is made aware of a violation of Section 386.204, Florida Statutes. Therefore, paragraph 23 of the Conclusions of Law which provides that the violation charged in the First Amended Administrative Complaint should be dismissed is adopted and incorporated by reference. However, the Division disagrees with the conclusion that had a violation been established that the penalties described in Section 386.207(3), Florida Statutes, could not be imposed against Respondent because Respondent is a corporate entity.

15. It is further important to note that Section 386.206(2), Florida Statutes, provides:

The proprietor or other person in charge of an enclosed indoor workplace must develop and implement a policy regarding the smoking prohibitions established in this part. The policy may include, but is not limited to, procedures to be taken when the proprietor or other person in charge witnesses or is made aware of a violation of s. 386.204 in the enclosed indoor workplace and must include a policy which prohibits an employee from smoking in the enclosed indoor workplace. In order to increase public awareness, the person in charge of an

enclosed indoor workplace may, at his or her discretion, post "No Smoking" signs as deemed appropriate.

16. The Division agrees with the conclusion that there is no statutory requirement that the proprietor or other person in charge of an enclosed indoor workplace take any specific action when such proprietor or other person in charge observes a patron (or other non-employee) smoking tobacco products in an enclosed indoor workplace. Therefore, to have been able to withstand a dismissal of its administrative action, Petitioner should have charged Respondent with having violated Section 386.206(2), Florida Statutes, by having failed to develop and implement a policy regarding the smoking prohibitions established in this part. If Respondent had been charged with having violated Section 386.206(2), Florida Statute, and Petitioner had been able to establish that in fact, Respondent had not developed or implemented a policy regarding the smoking prohibitions established by the Florida Clean Indoor Air Act, then Petitioner would have been able to impose the civil penalty authorized by Section 386.207(3), Florida Statutes.

17. In Paragraph 24, the Administrative Law Judge found that in the context in which the term "the person" is used in Section 386.207(3), Florida Statutes, that it appears that the meaning of the term is limited to an individual human being and that it is, at best, ambiguous as to whether the term "the person," includes corporate or other non-human juridical entities. Paragraph 24 of the Recommended Order is rejected.

18. Section 1.01, Florida Statutes, provides:

1.01 **Definitions.** – In construing these statutes and each and every word, phrase, or part hereof, where the context will permit:

(3) The word "person" includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

19. Section 101(3), Florida Statutes, clearly includes corporations within the meaning of the word "person." Therefore, it is equitable and reasonable to find that the Division could impose the civil penalties authorized by Section 386.207(3), Florida Statutes, against Respondent, Old Cutler Oyster

Company, Inc., a Florida corporation licensed under the Beverage Law, through a properly charged administrative action.

This Final Order is entered after a review of the complete record.

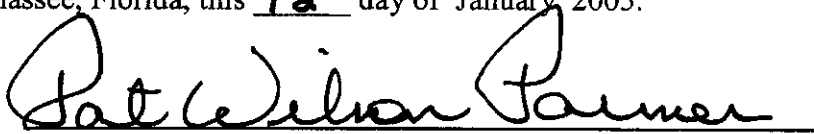
ORDER

Having fully considered the complete record of this case, the Recommended Order of the administrative law judge, Petitioner's Exceptions to the Recommended Order, and Respondent's Response to Petitioner's Exceptions to the Recommended Order, I hereby adopt the Findings of Fact and Conclusions of Law in the Recommended Order as described above and adopt the Recommendation of the administrative law judge.

It is ORDERED that the charges in the First Amended Administrative Complaint filed on December 5, 2003, are hereby dismissed.

DONE and ORDERED at Tallahassee, Florida, this 12th day of January 2005.




PAT WILSON PARMER, Director
Division of Alcoholic Beverages and Tobacco

This *Order* of the Director of the Division of Alcoholic Beverages and Tobacco will become final unless judicial review is initiated within 30 days of the date of rendition. The rendition date is the date the *Order* is filed by the Agency Indexing Clerk. Judicial review may be commenced by filing an original *Notice of Appeal* with the Clerk of the Division of Alcoholic Beverages and Tobacco and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal, pursuant to Section 120.68, Florida Statutes and Rule 9.110, F.R.A.P. A transcript of the informal hearing may be obtained upon written request received no later than 60 days from the rendition date of this *Order*.

Mail Certification: This Final Order was sent by Certified Mail to:

7001 2510 0006 1126 3348

Gregg J. Ormond, Esquire

330 Alhambra Circle

Coral Gables, Florida 33134-5004

By: Rosalind K. Fields Mail Date: January 14, 2005

Additional copies mailed to:

Michael M. Parrish
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

John F. Cosgrove, Esquire
Cosgrove Law Offices
201 West Flagler Street
Miami, FL 33130

Leon Biegalski, General Counsel
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-2202

District Enforcement Office

Michael Wheeler
Assistant General Counsel
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399