STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 03-4681
OLD CUTLER OYSTER CO., INC., d/b/a OLD CUTLER OYSTER CO.,	)	
Respondent.	)	

RECOMMENDED ORDER

The parties to this case have waived an evidentiary hearing and have stipulated to the issuance of a Recommended Order on the basis of stipulated facts.

APPEARANCES

For Petitioner: Michael J. Wheeler, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Gregg J. Ormond, Esquire
Law Office of Greeg J. Ormond, P.A.
330 Alhambra Circle
Coral Gables, Florida 33134-5004

STATEMENT OF THE ISSUE

This is a license discipline proceeding in which, on the basis of facts alleged in a First Amended Administrative

Complaint, Petitioner seeks to take disciplinary action against Respondent. It is alleged that Respondent 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.

PRELIMINARY STATEMENT

Respondent timely requested an evidentiary hearing to challenge the alleged violations, and in due course the case was referred to the Division of Administrative Hearings, where it was scheduled for an evidentiary hearing. 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.[1]

FINDINGS OF FACT

The parties have stipulated to the fourteen paragraphs of findings of fact which follow.

1. Petitioner is the State of Florida, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco.

2. Respondent is Old Cutler Oyster Company, Inc., d/b/a Old Cutler Oyster Company.

3. Respondent holds license number 22-20655, Series 4-COP, issued by Petitioner.

4. Michael Pace is the President of Respondent and holds 100 percent of the stock of Respondent.

5. Lisa Tyrell was the manager and person in charge at Respondent's licensed premises on July 9, 2003.

6. Ms. Tyrell is currently employed by Respondent as a manager.

7. Ms. Tyrell called Michael Pace on the telephone, then gave the receiver to Fernandez (Special Agent), who explained to Mr. Pace that violations of the Florida Clean Indoor Air Act were occurring on the licensed premises.

8. On July 9, 2003, Special Agent Fernandez issued an Official Notice of Warning to Ms. Tyrell as a result of observing patrons smoking which, he claimed, was in violation of the Florida Clean Indoor Air Act.

9. On August 15, 2003, Special Agent Fernandez issued a Notice to Comply to Mr. Pace and told him that he had thirty days to comply with the notice or administrative charges would be filed. The notice alleged a violation of the Florida Clean Indoor Air Act by "allowing patron to smoke cigarettes on 4-COP SRX licensed premises."

10. Special Agent Fernandez visited the licensee a third time on September 18, 2003.

11. At all times material hereto, Respondent held a valid retail tobacco products dealer permit issued by Petitioner.

12. At no time did Special Agent Fernandez observe any of Respondent's employees smoking within Respondent's business premises.

13. No patron received a citation for violating the Florida Clear Indoor Air Act.

14. On July 9, on August 15, and on September 18 of 2003, Special Agent Fernandez observed patrons smoking tobacco products within Respondent's licensed premises.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case. §§ 120.569 and 120.57(1), Fla. Stat.

16. Petitioner argues that, pursuant to Sections 386.204 and 386.207(3), Florida Statutes, it is authorized to take disciplinary action against Respondent on the basis of the events described in the stipulated facts. Respondent argues that the applicable statutory provisions do not authorize Petitioner to take disciplinary action against Respondent on the basis of conduct by patrons on the licensed premises.

17. Section 386.204, Florida Statutes, reads: "A person may not smoke in an enclosed indoor workplace, except as otherwise provided in s. 386.2045." None of the exceptions described in Section 386.2045, Florida Statutes, apply to Respondent or to Respondent's licensed premises.

18. Section 386.206(2), Florida Statutes, reads as follows:

> (2) 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. (Emphasis added.)

19. Section 386.207(3), Florida Statutes, reads as follows:

> (3) The department or the Division of Hotels and Restaurants or the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation, upon notification of observed violations of this part, shall issue to the proprietor or other person in charge of such enclosed indoor workplace a notice to comply with this part. If the person fails to comply within 30 days after receipt of the notice, the department or the Division of Hotels and Restaurants or the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation shall assess a civil penalty against the person of not less than $250 and not to exceed $750 for the first violation and not less than $500 and not to exceed $2,000 for each subsequent violation. The imposition of the fine must be in accordance with chapter 120. If a person refuses to comply with this part, after

> having been assessed such penalty, the department or the Division of Hotels and Restaurants or the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation may file a complaint in the circuit court of the county in which the enclosed indoor workplace is located to require compliance. (Emphasis added.)

20. In determining whether the violations asserted in the charging instrument have been established, it is necessary to evaluate the stipulated facts in light of the specific factual allegations made in the charging instrument. Due process prohibits an agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the charging instrument. See Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

21. Furthermore, "the conduct proved [or stipulated to] must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance

and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977). "Furthermore, if there are any ambiguities included such must be construed in favor of the applicant or licensee." Lester, at 925.

22. Petitioner's basic theory of the case is stated in paragraph 13 of the First Amended Administrative Complaint in which it alleges that ". . . Respondent violated §386.204, Florida Statutes, by and through §386.207(3), Florida Statutes, by actively allowing and encouraging persons to smoke inside the licensed premises." Consistent with this theory of the case, the Petitioner argues in its proposed recommended order that "Florida Statute 386.207(3) clearly prescribes that a civil penalty against a licensee shall be imposed for a first violation of not less that $250.00 and not to exceed $750.00." And the Notice to Comply issued to Mr. Pace on August 15, 2003, by Special Agent Fernandez alleged a violation of the Florida Clean Indoor Air Act by "allowing patron [sic] to smoke cigarettes on 4-COP SRX licensed premises." Petitioner's theory of the case is problematic in at least two regards. The first problem is that there is nothing in the applicable statutes that specifies what, if anything, must be done by a "proprietor or

other person in charge of an enclosed indoor workplace" when such a person witnesses or is made aware of a violation of Section 386.204. Section 386.206(2), Florida Statutes, requires the development and implementation of "a policy regarding the smoking prohibitions established in this part." That statutory provision goes on to mandate that the policy prohibit smoking by employees, but with regard to violations by others, including patrons, the statute provides, in its second sentence: "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. . . ." (Emphasis added.) As emphasized by the underscoring, a policy as to what should be done when violations of Section 386.204, Florida Statutes (by persons other than employees), come to the attention of the proprietor or person in charge is permissive, perhaps even encouraged, but not required. And again it is significant to note 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 person) smoking tobacco products in an enclosed indoor workplace.[2]

23. In view of the foregoing, it appears that the violation charged in the First Amended Administrative Complaint

in this case should be dismissed because there is no statutory provision that authorizes the imposition of fines or other penalties for merely "allowing" a patron to smoke cigarettes.

24. There is a further reason for which it appears that the violation charged in the First Amended Administrative Complaint should be dismissed. Respondent in this case is a corporation named Old Cutler Oyster Co., Inc., doing business under the name of Old Cutler Oyster Co. Respondent is a licensee under the "Florida Beverage Law," Chapters 561 through 569, Florida Statutes, having been issued SRX license number 22-20655, Series 4-COP. Petitioner seeks to impose against the Respondent corporation the civil penalties authorized by Section 386.207(3), Florida Statutes. By the terms of the statute those penalties are to be assessed against "the person" who fails to comply with a previously issued "notice to comply," and in the context in which the term "the person" is used in the statute, it appears that the meaning of the term is limited to an individual human being. It is, at best, ambiguous as to whether the term "the person," as used in Section 386.207(3), Florida Statutes, includes corporate or other non-human juridical entities. In a case in which Petitioner seeks to impose penalties, such an ambiguity must be resolved in favor of Respondent.[3]

RECOMMENDATION

On the basis of all of the foregoing it is RECOMMENDED that a final order be issued in this case dismissing the First Amended Administrative Complaint and denying all relief sought by the Petitioner.

DONE AND ENTERED this 24th day of September, 2004, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
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 24th day of September, 2004.

ENDNOTES

1/ In addition to the usual proposed recommended orders, the parties agreed to the submission of written responses to the proposed recommended orders and to oral argument, which was presented by means of a telephone conference call. The parties submitted the last of their written submissions on July 8, 2004, and oral argument was held on August 12, 2004.

2/ Absent one of the statutory exceptions listed in Section 386.204, Florida Statutes, a patron who smokes in an enclosed indoor workplace is in violation of Section 386.204, Florida

Statutes. And Section 386.208, Florida Statutes, states: "Any person who violates s. 386.204 commits a noncriminal violation as defined in s. 775.08(3), punishable by a fine of not more than $100 for the first violation and not more than $500 for each subsequent violation. Jurisdiction shall be with the appropriate county court." This would appear to authorize a law enforcement officer to issue a citation or complaint to a patron seen smoking in an enclosed indoor workplace, but it does not impose any duty on the proprietor or other person in charge of such a workplace to take any specific action when a patron is seen smoking in such a place.

3/ On the basis of the facts stipulated to in this case, Michael Pace (in his capacity as "proprietor") and Lisa Tyrell (in her capacity as "person in charge") would each appear to be a "person" within the meaning of Section 386.207(3), Florida Statutes, but they are not mentioned as Respondents in the First Amended Administrative Complaint in this case.

COPIES FURNISHED:

Jorge Fernandez
Augusta Building, Suite 100
8685 Northwest 53rd Terrace
Miami, Florida 33166

John Cosgrove, Esquire
Cosgrove Law Offices
201 West Flagler Street
Miami, Florida 33130

Gregg J. Ormond, Esquire
Law Office of Gregg J. Ormond, P.A.
330 Alhambra Circle
Coral Gables, Florida 33134-5004

Michael J. Wheeler, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written 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.