

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRENT A. MOODY,)
)
 Petitioner,)
)
 vs.) Case No. 06-0260RX
)
 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 March 7, 2006.

APPEARANCES

For Petitioner: Harold F. X. Purnell, Esquire
Maggie Schultz, Esquire
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For Respondent: John Merritt Lockwood, Qualified
Representative
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Office of the General Counsel
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STATEMENT OF THE ISSUE

Whether the age requirement for entry into the double random drawing for general liquor licenses is an invalid rule.

PRELIMINARY STATEMENT

This matter was initiated on January 18, 2006, when Petitioner filed a Petition Challenging Agency Statement Defined as a Rule (Petition). Regardless of the title of the pleading, the Petition alleges that the Division's existing Rules 615A-5.0105(2), 61A-5.747, and 61A-2.019, regarding an age cutoff for applications to enter a double random drawing for general liquor licenses, constitute an invalid exercise of delegated legislative authority as defined in Section 120.52(8), Florida Statutes (2005).

At the hearing, Petitioner offered 12 exhibits into evidence. Respondent presented the testimony of one witness and offered one exhibit into evidence.

After the hearing, Petitioner filed a Proposed Final Order on April 3, 2006. Respondent filed a Proposed Final Order on April 4, 2006.

FINDINGS OF FACT

1. The Division of Alcoholic Beverages and Tobacco (Division) is vested with general regulatory authority over the alcoholic beverage industry within the state and the creation of

double random selection drawings for beverage licenses.

§ 561.11, Fla. Stat (2005).

2. The Division issues both general and special alcoholic beverage licenses. See Chapter 561-565, Fla. Stat. and §§ 561.11, 561.17, and 561.19, Fla. Stat. (2005).

3. General licenses, also known as quota licenses permit the sale or consumption of various types of beer, wine or distilled spirits on the licensed premises. General licenses are 1-COP licenses, 2-COP licenses and 4-COP licenses. Ultimately licenses are issued after an application for licensure has been filed and investigated by the Division. §§ 561.17 and 561.18, Fla. Stat. (2005). Section 561.17, Florida Statutes, only requires an "applicant" to be a person or legal entity. The section does not place an age limitation on the applicant.

4. The Beverage Law bars the issuance of an alcoholic beverage license to a person less than 21 years old. § 561.15(1), Fla. Stat. (2005). The statute also prohibits the issuance of a license to people who have committed certain crimes, violated the beverage law or have had their beverage license revoked or suspended. Similarly law enforcement officers cannot be issued a liquor license. Section 561.15(1), Florida Statutes (2005), applies only to the issuance of a beverage license. The statutes do not specifically bar a person

under 21 years of age from entering the double random drawing process or applying for a beverage license.

5. General beverage licenses are issued under a quota system based on the population of the county and are limited in number. § 561.20(1), Fla. Stat. (2005). To issue a quota license, the Division conducts a double random drawing pursuant to Section 561.19(2), Florida Statutes (2005). The drawing determines the order in which individuals may apply for issuance of available licenses in each county. Section 561.19 does not use the term "entrant," but only uses the term "applicant."

6. Florida Administrative Code Rule 61A-5.0105 establishes a list of procedures that shall be followed when entry forms are accepted for the issuance of new state liquor licenses.

7. This rule outlines time deadlines, what forms shall be utilized for making an application for an alcoholic beverage license, how notification of winners will be conducted, how alternates are selected, and defines certain terms.

8. Subsection (2) of Rule 61A-5.0105 provides for the use of DBPR Form 4000-033L, titled "Quota License Entry Form," and the instructions that accompany it. This form and the accompanying instructions state that an applicant must be 21 years of age in order to gain entry into the quota license drawing. This form is not the form used to apply for a quota

license. This form is simply an entry form to the quota license drawing.

9. Under the system established by the Division, when additional quota licenses become available by reason of an increase in the population of a county or by reason of existing licenses being revoked and re-included in the available license pool, the Division annually publishes a notice in the Florida Law Weekly of the number of licenses available and establishes the 90-day application period for entry into the double random drawing. Entry into the double random drawing does not mean that the entrant has applied for or may receive a quota license. The entry form only permits the applicant to participate in the drawing to determine the order of the entrants that will later receive the opportunity to apply for a quota license. If a person or entity files a properly completed entry form and pays a nonrefundable \$100.00 entry fee, the entrant is included in the quota drawing if the entry application does not disclose on its face any matter rendering the entrant ineligible.

§ 561.19(2)(d), Fla. Stat. (2005).

10. After the 90-day application period ends, the Division publishes notice in the Florida Administrative Weekly of the date scheduled for the quota drawing. There is no set time after the application period that the Division holds the quota drawing. The interim period is used to process the various

entry applications. Drawings held during the last three years have been delayed from 7 to 10 months after the close of the application period. In this case, the drawing has not been held.

11. After the drawing, the Division notifies the person selected first of their entitlement to apply for a quota license. Under Section 561.19(2)(c), Florida Statutes (2005), the selected person has 45 days from the date of the Division's mailing of the notice of selection to file an application for a quota license. At this point, the Division investigates the person's eligibility to possess a quota license and either grants or denies the application. Depending on the action taken, the Division proceeds down the list, notifying each entrant of his or her right to apply for a quota license.

12. For example, a felony conviction does not necessarily render an applicant ineligible to hold an alcoholic beverage license. Thus the simple disclosure of such would not render the application ineligible on its face. There are circumstances in which an individual with a felony conviction may hold an alcoholic beverage license. Such a person may enter the quota drawing.

13. Likewise, a previously revoked alcoholic beverage license would also not necessarily render the application

ineligible on its face. The determination would be based on the type of license revoked, and the date of the revocation.

14. On August 12, 2005, the Division published notice in Volume 31, Number 32 of the Florida Administrative Weekly that quota licenses were available in several Counties. The entry period was established from August 15, 2005 through November 12, 2005. Entry could only be made using DBPR Form ABT 4000-033L. The instructions to this form prohibit a person who is under 21 years old at the close of the application period from entering the quota drawing.

15. The Petitioner, Brent A. Moody, is a resident of Tallahassee, Florida. He was born on December 11, 1984.

16. On November 1, 2005, the Petitioner properly completed and filed entry applications with the Division for the year 2006 quota license drawings for Bay, Duval, Franklin, Indian River, Lee, Lake, Manatee, Polk, Walton, Volusia, Sarasota, St. Johns, Palm Beach, Orange, Martin, Leon, Broward, Dave, Collier, Hillsborough, Hernando, and Brevard.

17. At the end of the application period for the 2006 quota license drawing, the Petitioner was 29 days shy of his 21st birthday. He is now over 21 years old.

18. The applications filed by the Petitioner were rejected for the year 2006 quota license drawing because he would not be 21 years old by the close of the entry period. There is no

dispute that the Petitioner would have been 21 years old by the time any opportunity to apply for a 2006 quota license might have been extended to him.

19. The Division relies upon an in pari materia reading of Sections 561.15, 561.17 and 561.19, Florida Statutes (2005), for the authority to require an individual to be 21 years of age in order to submit an application for entry into the quota license drawing.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56, Fla. Stat. (2005).

21. The Petitioner has challenged as an invalid exercise of delegated legislative authority, the Division's Florida Administrative Code Rule 61A-5.0105(2), which adopts form ABT 4000-033L, entitled Quota License Entry Form, based upon the form's adopted instruction sheet that requires an applicant for inclusion in the Section 561.19 quota drawing to be 21 years of age by the end of the drawing application period.

22. In order to establish that the existing rule is invalid, the Petitioner bears the burden of proving by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority. § 120.56(3)(a), Fla. Stat. (2005).

23. The Petitioner's burden to establish an invalid exercise of delegated legislative authority "is a stringent one." Cortes v. State Bd. Of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995) quoting Agrico Chemical Co. v. State Dep't of Env'tl. Regulation, 365 So. 2d 759, 763 (Fla. 1979) cert. denied, 376 So. 2d 74 (Fla. 1979). Great weight will be given to rules which have been in effect over an extended period and the meaning assigned to them by officials charged with their administration unless such construction is clearly erroneous. State, Dept. of Commerce, Div. Of Labor v. Matthews Corp., 358 So. 2d 256, 260 (Fla. 1st DCA 1978).

24. The ultimate question in an existing rule challenge is whether the rule is "an invalid exercise of delegated legislative authority." § 120.56(1), Fla. Stat. (2005). Section 120.52(8), Florida Statutes, defines an invalid exercise of delegated legislative authority as an "action which goes beyond the powers, functions, and duties delegated by the Legislature," by enlarging or modifying specific statutes or by being arbitrary or capricious. A rule is arbitrary or capricious if it is adopted without thought or reason or is irrational. Id.

25. To be valid a rule must comply with Section 120.52(8), Florida Statutes. Section 120.52(8), provides:

A grant of rulemaking authority is necessary but no sufficient to allow an agency to adopt a rule; a specified 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 reasonable 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 provision setting fort the general legislative intent or policy. Statutory language granting rulemaking authority or generally describing 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.

§ 120.52(8), Fla. Stat (2005) (emphasis supplied). See Bd. Of Trustees of the Internal Improvement Trust Fund v. Day Cruise, 794 So. 2d 696 (Fla. 1st DCA 2001); see also Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).

26. The test for invalid delegation of legislative authority is whether a rule gives effect to a "specific law to be implemented," and whether the rule implements or interprets "specific powers and duties." Day Cruise, 794 So. 2d 15 704.

27. The court in Day Cruise discussed the 1999 Administrative Procedure Act ("Act") amendments as follows:

Under the 1996 and 1999 amendments to the APA, it 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 . . . 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.

Day Cruise, 794 So. 2d at 700. See generally Save the Manatee Club, Inc., 773 So. 2d at 598-599.

28. The court in Save the Manatee Club, Inc., found that a rule that "implements or interprets" will necessarily contain language that is more specific and detailed than the language that is used in the directive itself. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

29. In this case, the Division has the general and specific authority to create rules governing a double random drawing process. §§ 561.11 and 561.19, Fla. Stat. (2005). Section 561.19(2) is the sole statutory authority governing the legislative criteria for double random selection drawings by the Division. The Section provides:

(a) When beverage licenses become available by reason of an increase in the population of a county, by reason of a county permitting the sale of intoxicating beverages when such sale had been prohibited, or by reason of the revocation of a quota beverage license, the division, if there are more applicants than the number of available license, 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. . . .

(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 applicant is found by the division to be qualified, a license shall be issued. The application shall be filed pursuant to s. 561.17, and the license shall be issued upon the payment of the applicable license fees. If the applicant is not prepared to use the license at a business location, the license shall be held in an inactive status by the division, and the licensee shall be required to activate the license at a location in accordance with s. 561.29. Nothing contained herein, however, shall prohibit the division from revoking a license issued to a person, firm, or corporation that would not qualify for the issuance of a new license or the transfer of an exiting license. (Emphasis added)

(d) The director shall not include more than one application from any one person, firm, or corporation in the random selection process, nor may she or he consider more than one application for any one person,

firm, or corporation when there are fewer applications than available licenses.

(e) Each applicant for inclusion in the drawing shall pay to the division a filing fee of \$100.

(3) In the event that the number of applications does not exceed the number of licenses available, the drawing provided in subsection (2) shall not be held, but the licenses shall be issued in accordance with the provisions of subsection (2).

(4) The issuance of licenses pursuant to subsection (2) or subsection (3) shall not be governed by the provision of s. 120.60. The issuance of any such license shall occur no later than 180 days after a drawing is held pursuant to notice in the Florida Administrative Weekly or, in the event no drawing is held, within 180 days of the final date for filing applications. Any applicant who is not included in the pool for drawing to determine priority shall file, within 30 days of the date of mailing of notice to such applicant, a challenge to such action pursuant to ss.120.569 and 120.57, or the right to file any action as to such matter shall be forever lost. Any applicant whose name is included in the pool for drawing to determine priority but who is not issued a license shall be entitled to request a hearing on the denial pursuant to ss. 120.569 and 120.57 only on the grounds that the selection process was not conducted in accordance with law or that the licensee selected does not possess the qualifications required by law.

30. Florida Administrative Code Rule 61A-5.0105(2), provides that:

All persons seeking to apply for a new license shall file DBPR form ABT 4000-033L, Quota License Entry Form, effective 1/98 and

incorporated herein, together with the non-refundable filing fee stated on the form. .

. .

* * *

Specific Authority 561.11 FS. Law
Implemented 120.57, 561.14, 561.17, 561.18,
561.19, 561.20 FS. History-New 1-20-97,
Amended 1-8-98.

The general instructions included as part of the adopted form, provide that:

An application must be typed or legibly printed in ink and all questions must be answered. Incomplete applications will be denied. Only completed applications will be accepted for filing with the Division. All applicants listed on the application must be 21 years of age by the end of the application period in order for the application to be accepting for filing. If the application is accepted for filing, you will be included in the drawing.

31. Section 561.17, Florida Statutes, only requires "applicants" to be a "legal or business entity, person or persons. . . ." Section 561.15(1), Florida Statutes, lists the requirements a person or entity must meet to receive a beverage license. Section 561.15 provides that:

[l]licenses shall be issued only to persons of good moral character who are not less than 21 years of age. (emphasis supplied)

32. In addition to the requisite age requirement to be issued a liquor license, Section 561.15(2), Florida Statutes, provides that liquor licenses shall not be issued to persons who have had a prior conviction of certain crimes:

[A]ny person who has been convicted within the last past 5 years of any offense against the beverage laws of this state, the United States, or any other state; who has been convicted within the last past 5 years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, or keeping a disorderly place or of any criminal violation of chapter 893 or the controlled substance act of any other state or the Federal Government; or who has been convicted in the last past 15 years of any felony in this state or the United States. . . .

33. However, an applicant's qualifications to be issued a quota liquor license are not determined until the Section 561.17 liquor license application is filed with the Division. Indeed, a police officer can enter the quota drawing and be issued a liquor license if he or she resigns his or her position as a police officer after the drawing but before the Section 561.17 application is filed. A convicted felon can enter the drawing and be issued a liquor license, if the period of ineligibility lapses or if he or she has a restoration of civil rights after the drawing but before the Section 561.17 application is filed. Age however, is not treated the same as other eligibility criteria. The Division, through an in pari materia reading of its statutes, has interpreted those statutes to mean that a person not yet 21 by the end of the application period, but who will be 21 by the time of filing the Section 561.17 application

is ineligible to apply for a liquor license because he or she is ineligible for the issuance of a liquor license.

34. The First District Court of Appeal in Day Cruise and Save the Manatee Club Inc. was consistent in invalidating rules because the enabling statutes were void of language that contained a specific grant of legislative authority and not because the enabling statute was not specific enough. See Save the Manatee Club Inc., 773 So. 2d at 599 ("The question is whether the statute contains a specific grant of authority is specific enough"). See also Day Cruise, 794 So. 2d at 704 ("in the absence of a specific power or duty enabling or requiring the Trustees to regulate gambling or to regulate on the basis of activities occurring aboard vessels after they leave sovereignty submerged lands and adjacent waters, the Trustees' proposed rule exceeds the Trustees' rulemaking authority and is an invalid exercise of delegated legislative authority as defined in Section 120.52(8)(c)").

35. Section 561.01, Florida Statutes, relating to definitions, does not expressly define what an applicant in the quota drawing is. In the absence of a statutory definition, the Division is allowed to resort to related statutory provisions and read them in pari materia in order to ascertain the proper meaning. See State v. Christie, 2005 WL 2861101, 2 (Fla. 3rd DCA 2005) ("[W]hile the legislature may direct that statutes be

read in pari materia, the absence of such a directive does not bar construing two statutes in that manner.") quoting DuFresne v. State, 826 So. 2d 272, 275 (Fla. 2002). However, the Division's interpretation must flow logically from those statutes and the reading thereof.

36. The problem is that the Division's interpretation varies because it does not treat all eligibility requirements the same. The distinction between an eligibility requirement of age, that is changeable over time, and the other eligibility requirements, that are likewise changeable over time, is not logical. Nor did the evidence demonstrate that the differing treatment of such changeable eligibility requirements is either integral to and/or necessary for the quota license drawing system developed by the Division. Given this illogical and inconsistent interpretation, the age requirement for entry into the quota license drawing is not a valid exercise of delegated legislative authority.

ORDER

Based on the forgoing, it is hereby determined that the Department of Business and Professional Regulation Rule 61A-5.0105 is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 9th day of June, 2006, in
Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.