

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ITALIAN CLUB CANTEEN,)
)
 Petitioner,)
)
 vs.) Case No. 06-1476
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 DIVISION OF ALCOHOLIC BEVERAGES)
 AND TOBACCO,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings, on June 28, 2006, by video teleconference at sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Maggie M. Schultz, Esquire
Rutledge, Ezeni, Purnell,
& Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32302-0551

For Respondent: Christina B. Norman, Esquire
Department of Business and
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1940 North Monroe Street
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Italian Club Canteen ("Petitioner" or "Italian Club Canteen"), remains eligible to apply for a new quota liquor license in Hillsborough County, Florida.

PRELIMINARY STATEMENT

In a Notice of Disapproval, dated December 12, 2005, Respondent, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("the Division" or "Respondent"), advised Petitioner that its failure to timely file an application for a new quota liquor license in Hillsborough County, Florida, had resulted in the disapproval of its entitlement to apply for a new quota liquor license. This Notice also advised Petitioner of its right to a formal hearing under Chapter 120, Florida Statutes. Petitioner timely challenged the Division's Notice of Disapproval and requested a formal administrative hearing. On April 25, 2006, the Division referred this matter to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct the hearing.

At hearing, Petitioner presented the testimony of Eileen Klinger, the bureau chief of Licensing for the Division, and James Granell, Petitioner's corporate representative. Petitioner's Exhibits 1 through 3 were admitted into evidence.

Respondent also presented the testimony of Eileen Klinger. Respondent's Exhibit 1 was admitted into evidence. At the request of the parties, the undersigned took official recognition of Florida Administrative Code Rule 61A-5.0105.

The hearing Transcript was filed on July 12, 2006. Both parties timely filed Proposed Recommended Orders, which have been carefully considered in preparation of this Order.

FINDINGS OF FACT

1. Petitioner, Italian Club Canteen, formerly was incorporated under the name, Italian Club Canteen, Inc. That corporation was established in 1976 and was administratively dissolved in 1997.

2. Even though Petitioner's corporation was dissolved, it still could have been eligible to apply for the quota license it seeks.¹

3. The parties stipulated that Petitioner has standing in this case.

4. The Division is the agency vested with general regulatory authority over the alcoholic beverage industry within the state, including the issuance of quota licenses through double random selection drawing. See § 561.19(2), Fla. Stat. (2006).

5. On March 15, 1990, the Division held a double random quota lottery drawing for new quota liquor licenses in Hillsborough County, Florida.

6. Petitioner filed a preliminary application for a quota license with the Division on December 12, 1989. This application entitled Petitioner to be considered in the 1990 random selection public drawing held by the Division.

7. The preliminary application filed by Petitioner listed the applicant as "The Italian Club Canteen, Inc."

8. Petitioner was not the initial successful applicant in the 1990 quota drawing but was an alternate applicant. Alternate applicants become eligible to apply for a new quota license in the event one or more of the prior successful applicants in the drawing fail to qualify for a new quota liquor license.

9. The Division notified the original winners in the 1990 quota drawing within a few days of the drawing. However, not all of the original winners ultimately were issued licenses, due to their failure to submit applications or the Division's disapproving the applications.

10. After original winners in the drawing were deemed disapproved for licenses, the Division subsequently began notifying alternate applicants of their entitlement to apply for

the new quota licensed. However, there was a significant delay in such notification being provided.²

11. On August 8, 2005, the Division sent to the Petitioner, by certified mail, a Notice of Selection letter ("Notice of Selection"), attempting to notify Petitioner of its standing as an alternate applicant.

12. The Notice of Selection stated that, pursuant to Subsection 561.19(2), Florida Statutes (2004), and Florida Administrative Code Rule 61A-5.0105, Petitioner "must file a full and complete application for issuance of the license within 45 days of this letter." The Notice of Selection also provided that failure to file a complete application within the 45-day period would be deemed as a waiver of Petitioner's right to file for a new quota license.

13. The Notice of Selection, dated August 8, 2005, was mailed to the same address, a post office box, that was on Petitioner's preliminary application.

14. The address listed by Petitioner on its preliminary application form is shared with several other businesses, including the Italian Club of Tampa.

15. Arnold Vaske signed the certification card for the Notice of Selection, dated August 8, 2005, and, presumably, received the notice.

16. Mr. Vaske is not nor has he ever been an employee, officer, or otherwise connected with Petitioner.

17. Mr. Vaske picked up the mail from the post office box at the request of Sal Guagiardo, president of the Italian Club of Tampa.

18. It is unclear what happened to the Notice of Selection sent to Italian Club Canteen, Inc., after Mr. Vaske signed for and picked up the notice. However, typically, the mail is put on Mr. Guagiardo's desk and is sorted by Mr. Guagiardo or his secretary.

19. Prior to the dissolution of the Italian Canteen Club, Inc., an officer of the Italian Club Canteen or the club administrator picked up the mail for the corporation. However, there is no indication that any officer, director, or anyone else associated with Petitioner made any arrangements as to how mail addressed to "Italian Club Canteen, Inc.," and sent to the post office box was to be handled.

20. After the corporation was dissolved, mail addressed to "Italian Club Canteen, Inc.," and sent to the post office box was usually considered "solicitation" or "junk mail" and "probably" stayed on Mr. Guagiardo's desk longer than other mail.

21. Petitioner never received the Notice of Selection letter that was mailed by the Division on August 8, 2005.

Therefore, Petitioner did not respond within the 45-day statutory deadline.

22. After Petitioner failed to file an application within the 45-day deadline, on October 31, 2005, the Division sent Petitioner, by certified mail, a Final Warning Notice (Final Warning). The Final Warning provided that the Division intended to deny Petitioner's entitlement to apply for a new quota license in Hillsborough County. The Final Warning also advised Petitioner that it had until November 10, 2005, to respond with additional information as to why the Division should not deny Petitioner's entitlement to a new quota license.

23. The Final Warning was sent to the address listed in Petitioner's initial application. Mr. Vaske signed the certification card, indicating that he picked up the Final Warning.

24. Petitioner received and timely responded to the Division's Final Warning.

25. By letter dated November 10, 2005, Petitioner requested an extension of time in which to file an application for a quota license. According to the letter, Petitioner did not receive the notice of its entitlement to apply for the new quota license for more than 15 years. The letter further provided that during this time period, "personnel changes have naturally occurred with the original applicant" and "the person

who signed for the Division's Notice of Selection . . . is not an officer of the applicant who was wholly unaware of the matter, including the application filed more than 15 years previously."

26. The Division is authorized to grant an extension of time, if it finds there is "good cause" and "no negligence" on the part of the person or entity seeking the extension.

27. The Division reviewed Petitioner's request for an extension of time to apply for the new quota license, but found that there was not good cause to grant the request.

28. The Division denied Petitioner's request for an extension of time to apply for a quota license after it determined (1) that the Notice of Selection was mailed to the address listed on Petitioner's preliminary application and (2) that someone signed the certification card, thereby indicating that someone at that address had picked up the letter. Based on the foregoing, the Division reasonably concluded that Petitioner received the Notice of Selection and simply neglected to file the application.

29. Petitioner makes three assertions as to why it should be granted an extension of time in which to file its application. First, it claims that it never received the Notice of Selection. Second, Petitioner asserts in August 2005, when the Notice of Selection was mailed, none of the current officers

of the Italian Club of Tampa, the entity which shared the post office box with Petitioner, knew Petitioner was an applicant in the 1990 drawing. Thus, even though the Division's envelope in which the Notice of Selection was sent had the word, "quota," written on it, this information would not put any officer of the Italian Club of Tampa on notice of the content of the information in the envelope. Third, Petitioner asserts that at the time Petitioner's corporation dissolved in 1997, it had no reason to expect that a new quota license from the 1990 drawing was still available for issuance.

30. Petitioner's assertions, even if true, do not constitute good cause for granting an extension.

31. Petitioner took no action when it dissolved the corporation to determine if a new quota license from the 1990 drawing was still available. Rather, because seven years had lapsed between the drawing and the time the corporation dissolved, it merely assumed that no license from that drawing was available. Based on that erroneous assumption, in 1997 when Petitioner's corporation was dissolved, none of the officers or any one associated with Italian Club Canteen checked with the Division to determine if there were licenses from the 1990 quota drawing still available for issuance.

32. Petitioner's corporate representative testified that if the Division had addressed the Notice of Selection to the

attention of a specific individual associated with the corporation, and not simply to "Italian Club Canteen, Inc.," it would have been more likely that Petitioner would have received the notice. Notwithstanding this claim, Petitioner never notified the Division that the corporation was dissolved or that the Division should address any correspondence to the "Italian Club Canteen, Inc.," to the attention of a specifically named individual associated with the corporation.

33. Petitioner failed to show that it had good cause and no negligence for failing to timely submit the application for the quota license. Therefore, the Division properly denied Petitioner's request for an extension.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2006).

35. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). To meet this burden, Petitioner must establish facts upon which Petitioner's allegations for entitlement to apply for a new quota liquor license are based by a preponderance of the evidence. See

§ 120.57(1)(h), Fla. Stat. (2004), and Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996).

36. Subsection 561.19(2)(c), Florida Statutes (2004), states, in pertinent part, “. . . an applicant shall, after a drawing is held, have 45 days from the date the division mails the notice of selection to file an application on forms provided by the division and if such applicant is found by the division to be qualified, a license shall be issued.”

37. Florida Administrative Code Rule 61A-5.0105 provides, in pertinent part, the following:

(4) The division shall notify those applicants who are selected as a result of the double random selection drawing by certified mail. Such notification will be sent to the mailing address listed on the entry form or subsequently filed with the division. It shall be the applicant's responsibility to maintain a correct mailing address with the division.

(5) All applicants selected for licenses shall file a completed application, . . . Failure to file a completed application package within 45 days of the date of the selection notice, shall result in the denial of the application filed. (Emphasis added)

38. Florida Administrative Code Rule 61A-5.0105(2) provides that “Applicants shall not be granted extensions for filing applications except by petition showing good cause and no negligence by the applicant.”

39. In accordance with Subsection 561.19(2)(c), Florida Statutes (2004), and Florida Administrative Code Rule 61A-5.0105(4), the Division properly notified Petitioner, by Notice of Selection, sent by certified mail, of its standing as an alternate applicant.

40. Petitioner failed to respond to the Division within the 45-day statutory deadline, thereby waiving its eligibility to file an application for the quota license, pursuant to Subsection 561.19(2), Florida Statutes (2004).

41. On December 12, 2005, after concluding that Petitioner was negligent and failed to provide good cause for an extension of time, the Division properly disapproved Petitioner's eligibility to file an application for a quota license.

42. Petitioner failed to establish, by a preponderance of the evidence, that it was not negligent in failing to respond to the Division within the 45-day statutory deadline. Testimony by Petitioner clearly established that the Notice of Selection reached the address given by Petitioner, but was unaccounted for, for at least 45 days.

43. Petitioner failed to establish, by a preponderance of the evidence, that good cause exists to grant an extension of time. Petitioner provided no evidence of good cause to the Division or at the hearing.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, issue a final order denying Petitioner's request for an extension of time to file an application for a quota liquor license.

DONE AND ENTERED this 28th day of September, 2006, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2006.

ENDNOTES

1/ The dissolution of the corporation does not preclude Petitioner's entitlement to apply for the liquor license. The Division's representative testified that a selected corporation has "the choice of either going back to the Secretary of State and reactivating that corporation if they can do so, or they can form a new corporation, but they have to reference the old corporation."

2/ According to the Division, the delays were the result of several factors including the Division's staffing problems, changes in the Division's administration, the time required to send out notices and receive responses to the required notices, and the time necessary to complete administrative proceedings and appeals.

COPIES FURNISHED:

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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.