

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ABKEY, LTD, d/b/a FUDDRUCKERS)
RESTAURANT,)
)
Petitioner,)

vs.)

Case No. 07-2508

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Respondent.)

NICK MANEROS, II, INC., d/b/a)
MANEROS OF HALLANDALE,)
)
Petitioner,)

vs.)

Case No. 07-4602

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Respondent.)

AMY CAT, INC., d/b/a CYPRESS)
MANOR,)
)
Petitioner,)

vs.)

Case No. 07-4692

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Respondent.)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in these consolidated cases pursuant to Sections 120.569 and 120.57(1), Florida Statutes,¹ before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on January 25, 2008, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Michael J. Wheeler, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioners' applications for the delinquent renewal of their special restaurant licenses pursuant to Section 561.27(2), Florida Statutes, should be denied for the reasons set forth in the Notices of Intent to Deny.

PRELIMINARY STATEMENT

On April 2, 2007, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DABT) issued a Notice of Intent to Deny the application that Abkey, Ltd., d/b/a Fuddruckers (Abkey) had filed on February 21, 2007, seeking the delinquent renewal of its special

restaurant license. On or about April 23, 2007, Abkey filed with DABT a request for an administrative hearing on the proposed denial of its application. The matter was referred to DOAH on June 5, 2007, and docketed as DOAH Case No. 07-2508.

On June 8, 2007, DABT issued a Notice of Intent to Deny the application that Nick Maneros, II, Inc., d/b/a Maneros of Hallandale (Maneros) had filed on June 4, 2007, seeking the delinquent renewal of its special restaurant license. On or about June 21, 2007, Maneros filed with DABT a request for an administrative hearing on the proposed denial of its application. The matter was referred to DOAH on October 5, 2007, and docketed as DOAH Case No. 07-4602.

On June 8, 2007, DABT issued a Notice of Intent to Deny the application that Amy Cat, Inc. d/b/a Cypress Manor (Amy Cat) had filed on December 6, 2006, seeking the delinquent renewal of its special restaurant license. On or about July 9, 2007, Amy Cat filed with DABT a request for an administrative hearing on the proposed denial of its application. The matter was referred to DOAH on October 11, 2007, and docketed as DOAH Case No. 07-4692.

On December 5, 2007, DABT, on behalf of itself, Abkey, Maneros, and Amy Cat, filed a motion requesting that DOAH Case Nos. 07-2508, 07-4602, and 07-4692 be consolidated. By order issued that same day, the motion was granted.

On January 10, 2008, Maneros filed an opposed motion in DOAH Case No. 07-4602 requesting that jurisdiction of the matter "be relinquished to [DABT] for recommended issuance of an order approving [Maneros'] delinquent renewal application," with "jurisdiction be[ing] retained for the sole purpose of the filing and consideration of a motion for attorney fees by [Maneros]." Argument on the motion was heard by telephone conference call on January 14, 2008. On January 15, 2008, the undersigned issued an order denying the motion because there remained disputed issues of material fact in DOAH Case No. 07-4602 that needed to be resolved.

On January 10, 2008, Abkey and Amy Cat filed a petition with DOAH pursuant to Section 120.56(4), Florida Statutes, challenging as violative of Section 120.54(1)(a), Florida Statutes, the statement "interpreting [S]ection 561.20(5), [Florida Statutes]" made in DABT's notices announcing its intention to deny Amy Cat's and Abkey's requests for the delinquent renewal of their special restaurant licenses. The matter was docketed as DOAH Case No. 08-0212RU. On January 14, 2008, Amy Cat and Abkey filed a motion requesting that DOAH Case No. 08-0212RU be consolidated with DOAH Case Nos. 07-2508, 07-4602, and 07-4692 (which had previously been consolidated). On January 16, 2008, DABT filed a response to the motion, in which it stated the following:

For the purpose of judicial economy and being that the parties and issues are similar, the Respondent defers to the discretion of the Court regarding [the] pending motion [to consolidate].

On January 18, 2008, the undersigned issued an order, which provided as follows:

1. DOAH Case No. 07-0212RU is consolidated, for purposes of hearing, with DOAH Case Nos. 07-2508, 07-4602, and 07-4692 pursuant to Florida Administrative Code 28-106.108.
2. The hearing in these four consolidated cases will be held on January 25, 2008, as more specifically described in the Notice of Hearing issued in DOAH Case Nos. 07-2508, 07-4602, and 07-4692 on December 5, 2007.

On January 17, 2008, a Pre-Hearing Stipulation was filed in DOAH Case Nos. 07-2508, 07-4602, and 07-4692.

As noted above, the final hearing in DOAH Case Nos. 07-2508, 07-4602, 07-4692, and 08-0212RU was held on January 25, 2008, as scheduled. One witness, Eileen Klinger, the chief of DABT's Bureau of Licensing, testified at the hearing. In addition to Ms. Klinger's testimony, 20 exhibits (Petitioners' Exhibits 1 through 19, and Respondent's Exhibit 1) were offered and received into evidence.

The deadline for the filing of proposed recommended orders in DOAH Case Nos. 07-2508, 07-4602, and 07-4692 was set at 15 days from the date of the filing with DOAH of the hearing transcript.

The hearing Transcript (consisting of one volume) was filed with DOAH on February 8, 2008.

On February 22, 2008, Abkey, Maneros, and Amy Cat (hereinafter referred to collectively as "Petitioners") filed an unopposed motion requesting an extension of the deadline for the filing of proposed recommended orders. By order issued February 25, 2008, the motion was granted, and the parties were given until March 14, 2008, to file proposed recommended orders.

Petitioners and DABT timely filed their Proposed Recommended Orders on March 14, 2008.² They also, on that same date, filed a post-hearing stipulation, agreeing that "Petitioners' SR licenses in the above cases are per general law and not pursuant to any special or local act."

The parties were subsequently given the opportunity to present oral argument in support of their respective positions in these cases. Such argument was presented by telephone conference call on April 14, 2008.

The parties were also given the opportunity to file post-oral argument supplements to their Proposed Recommended Orders, provided they did so no later than April 29, 2008. Abkey filed a Supplemental Proposed Recommended Order on August 29, 2008. No other post-oral argument pleading has been filed.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. There are various types of DABT-issued licenses authorizing the retail sale of alcoholic beverages. Among them are quota licenses, SRX licenses, and SR licenses. All three of these licenses allow the licensee to sell liquor, as well as beer and wine.

2. Quota licenses, as their name suggests, are limited in number. The number of quota licenses available in each county is based upon that county's population.

3. SRX and SR licenses are "special" licenses authorizing the retail sale of beer, wine, and liquor by restaurants. There are no restrictions on the number of these "special" licenses that may be in effect (countywide or statewide) at any one time.

4. SRX licenses are "special restaurant" licenses that were originally issued in or after 1958.³

5. SR licenses are "special restaurant" licenses that were originally issued prior to 1958.

6. For restaurants originally licensed after April 18, 1972, at least 51 percent of the licensed restaurant's total gross revenues must be from the retail sale of food and non-alcoholic beverages.⁴

7. Restaurants for which an SR license has been obtained, on the other hand, do not have to derive any set percentage or amount of their total gross revenues from the retail sale of food and non-alcoholic beverages.

8. DABT-issued alcoholic beverage licenses are subject to annual renewal.⁵

9. License holders who have not timely renewed their licenses, but wish to remain licensed, may file an Application for Delinquent Renewal (on DABT Form 6015).

10. Until recently, it was DABT's longstanding policy and practice to routinely grant applications for the delinquent renewal of SR and other alcoholic beverage licenses, regardless of the reason for the delinquency.

11. DABT still routinely grants applications to delinquently renew alcoholic beverage licenses other than SR licenses, but it now has a "new policy" in place with respect to applications for the delinquent renewal of SR licenses. The "new policy" is to deny all such applications based upon these SR licenses' not having been in "continuous operation," action that, according to DABT, is dictated by operation of Section 561.20(5), Florida Statutes, a statutory provision DABT now claims it had previously misinterpreted when it was routinely granting these applications.

12. Relying on Section 561.20(5), Florida Statutes, to blanketly deny all applications for the delinquent renewal of SR licenses was the idea of Eileen Klinger, the head of DABT's Bureau of Licensing. She directed her licensing staff to implement the "new policy" after being told by agency attorneys that this "was the appropriate thing [from a legal perspective] to do."

13. Abkey and Amy Cat have SR licenses that were originally issued in 1956 "per general law and not pursuant to any special or local act."

14. Maneros has an SR license that was originally issued in 1952 "per general law and not pursuant to any special or local act."

15. As applicants applying to delinquently renew their SR licenses, Petitioners are substantially affected by DABT's "new policy" that SR licenses cannot be delinquently renewed because they have not been in "continuous operation," as that term is used in Section 561.20(5), Florida Statutes. Their applications for the delinquent renewal of their licenses would have been approved had the status quo been maintained and this "new policy" not been implemented.

16. Abkey filed its application (on DABT Form 6015) for the delinquent renewal of its SR license (which had been due for renewal on March 31, 2005) on February 21, 2007. On the

application form, Abkey gave the following "explanation for not having renewed during the renewal period": "Building was sold. Lost our lease."

17. On April 2, 2007, DABT issued a Notice of Intent to Deny Abkey's application. DABT's notice gave the following reason for its intended action:

The request for delinquent renewal of this license is denied. Florida Statute 561.20(5) exempted restaurant licenses issued prior to January 1, 1958 from operating under the provisions in 561.20(4) as long as the place of business was in continuous operation. This business failed to renew its license on or before March 31, 2005, therefore it did not comply with the requirements and is no longer valid.

18. Maneros filed its application (on DABT Form 6015) for the delinquent renewal of its SR license (which had been due for renewal on March 31, 2005) on June 4, 2007. On the application form, Maneros gave no "explanation for not having renewed during the renewal period"; however, the application was accompanied by a letter from a Maneros representative, which read, in pertinent part, as follows:

I am today submitting a delinquent renewal application for the above-referenced alcoholic beverage license. The building has been demolished, and there is a vacant lot at the site at this time. Redevelopment is scheduled for this area, and I expect new construction to begin shortly. The license was first issued to this location 55 years ago. I have inquired with the City of Hallandale Beach, Florida, and there remains

a question as to whether zoning approval for this type of alcoholic beverage license would be permitted under current uses once reconstruction is complete. The licensee of record wishes to reinstate and possibly use or transfer the license. . . .

19. On June 8, 2007, DABT issued a Notice of Intent to Deny Maneros' application. DABT's notice gave the following reason for its intended action:

The request for delinquent renewal of this license is denied. Florida Statute 561.20(5) exempted restaurant licenses issued prior to January 1, 1958 from operating under the provisions in 561.20(4) as long as the place of business was in continuous operation. This business failed to renew its license on or before March 31, 2005, therefore it did not comply with the requirements and is no longer valid.

SR licenses will not be allowed to be moved from the location where the license was originally issued.

20. Amy Cat filed its application (on DABT Form 6015) for the delinquent renewal of its SR license (which had been due for renewal on March 31, 1999) on December 6, 2006. On the application form, Amy Cat gave the following "explanation for not having renewed during the renewal period": "Building was closed."

21. On June 8, 2007, DABT issued a Notice of Intent to Deny Amy Cat's application. DABT's notice gave the following reason for its intended action:

The request for delinquent renewal of this license is denied. Florida Statute 561.20(5) exempted restaurant licenses issued prior to January 1, 1958 from operating under the provisions in 561.20(4) as long as the place of business was in continuous operation. This business failed to renew its license on or before March 31, 1999, therefore it did not comply with the requirements and is no longer valid.

SR licenses will not be allowed to be moved from the location where the license was originally issued.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

23. Petitioners are seeking to delinquenty renew their SR licenses pursuant to Section 561.27, Florida Statutes, which provides as follows:

(1) A licensee under the Beverage Law shall be entitled to a renewal of his or her annual license from year to year, as a matter of course, in accordance with a schedule of license renewals as established by [DABT] and by paying the annual license tax and giving any bond required of such licensee under the Beverage Law.

(2) A license may be renewed subsequent to expiration each year upon payment of a penalty of \$5 for each month or fraction of a month of delinquency, or upon payment of a penalty of 5 percent of the license fee, whichever amount is the greater. Any license not renewed within 60 days of expiration will be canceled by [DABT] unless such license is involved in litigation or an administrative action; however, [DABT] may

allow a licensee to renew the license subsequent to the 60-day period after good and sufficient cause for the delinquency has been shown to [DABT] by the licensee.

24. When presented with an application for the delinquent renewal of an SR license, DABT is required by Section 120.60(3), Florida Statutes, to give the applicant "written notice either personally or by mail that [it] intends to grant or deny, or has granted or denied, the application. . . . The notice must state with particularity the grounds or basis for the issuance or denial of the license"

25. If DABT notifies an applicant that it intends to deny the applicant's application and there are disputed issues of material fact, the applicant is entitled, at its request, to an evidentiary administrative hearing conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on such proposed action before DABT takes any final action on the application. See Silver Show, Inc. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 706 So. 2d 386, 389 (Fla. 4th DCA 1998)("[F]ormal hearings under sections 120.569 and 120.57 are part of the application process--particularly, as here, where an applicant seeks to contest facts relied on by [DABT] to deny an application. . . . When a formal hearing has been requested under sections 120.569 and 120.57, as here, the definitive act

of denial will not occur until [DABT] enters a final order at the conclusion of the formal hearing. That will happen only when the evidence has been heard, the hearing officer has filed a recommended order, and the agency has entered its final order. Anything before the entry of the final order in contested license hearings is tentative and thus merely proposed.").

26. The hearing is "a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily." Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19, 23 (Fla. 1st DCA 1990). The applicant has the opportunity at the hearing, through its presentation, to attempt to persuade DABT to change its mind and issue a final order granting its application to delinquently renew its license. See Capeletti Brothers Inc. v. Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983)("Capeletti misconceives the purpose of the [Section] 120.57 hearing. The rejection of bids never became final agency action. As we have previously held, APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind."); and Couch Construction Company Inc. v. Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978)("APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind.").

27. Any final order denying renewal of the applicant's license must be based solely on the grounds asserted in the notice of intent to deny given the applicant. See M. H. v. Department of Children and Family Services, No. 2D07-1006, 2008 Fla. App. LEXIS 4391 *6 (Fla. 2d DCA March 28, 2008)("[T]he notice's exclusive focus on 'significant pulling force' as causing a nonaccidental injury precluded DCF from urging negligence as an alternative ground for denying the renewal of the license at the administrative proceeding.").

28. In the instant consolidated cases, Petitioners received Section 120.60(3)-required notices advising them of DABT's intent to deny their applications for the delinquent renewal of their SR licenses. The notices reflected that the proposed denials of Petitioners' applications were based solely on DABT's "new policy" (described above) of treating SR licenses that have not remained in "continuous operation," within the meaning of Section 561.20(5), Florida Statutes, as invalid and nonrenewable under all circumstances.

29. In the Final Order he has issued this date in DOAH Case No. 08-0212RU, the undersigned has determined that the existence of this "new policy" violates Section 120.54(1)(a), Florida Statutes. Accordingly, pursuant to Section 120.56(4)(d), Florida Statutes, which provides as follows, DABT may not rely on this "new policy" or "any substantially similar

statement as a basis for agency action" in these consolidated cases:

When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

30. Inasmuch as DABT did not cite in the notices it provided Petitioners in accordance with Section 120.60(3), Florida Statutes, any other ground as a basis for denying Petitioners' applications for the delinquent renewal of their SR licenses, these applications must be granted (as they initially would have been had DABT not changed its policy concerning the delinquent renewal of SR licenses).

RECOMMENDATION

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

RECOMMENDED that the Department issue a Final Order granting Petitioners' applications for the delinquent renewal of their SR licenses.

DONE AND ENTERED this 30th day of April, 2008, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2008.

ENDNOTES

¹ Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2007).

² In Petitioners' Proposed Recommended Order, Amy Cat, for the first time in this proceeding, argues that because DABT failed to act on its delinquent renewal application "within 90 days of receipt of the application," the application "is deemed approved pursuant to [S]ection 120.60(1), [Florida Statutes]," which provides as follows:

Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all

requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license that is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and shall not take any action based upon the default license until after receipt of such notice by the agency clerk.

³ See Fla. Admin. Code R. 61A-3.0141(1) ("The suffix 'SRX' shall be made a part of the license numbers of all such [special restaurant] licenses issued after January 1, 1958.").

⁴ See Fla. Admin. Code R. 61A-3.0141(3).

⁵ See Fla. Admin. Code R. 61A-3.0101(1).

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 these cases.

