

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 08-1085
)
RICK'S OF SOUTH FLORIDA, INC.,)
d/b/a TUBBY'S,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 17, 2008, by way of video teleconference, with sites in Tallahassee and Ft. Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Joshua B. Moyer, Esquire
Sarah Naf, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Richard Goulet, pro se
12931 Parkline Drive
Fort Myers, Florida 33913

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent unlawfully conducted gambling operations at its licensed business establishment, and, if so, what penalty is warranted.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation (the "Department"), filed an Administrative Action against Respondent dated October 27, 2007. The Administrative Action alleges in pertinent part that Respondent:

[D]id unlawfully on your licensed premises permit, allow, or possess gambling machines . . . which upon insertion of any piece of money . . . is caused to operate such machines or devices and the user, by reason of any element of chance or any other outcome of such operation unpredictable may receive money, credit, allowance or other of value. . . .

Upon receipt of the Administrative Action, Respondent disputed the issues of fact and requested a formal administrative hearing. At the final hearing, the Department offered exhibits identified as 1 through 11 into evidence, each of which was admitted.¹ Respondent offered for admission into evidence one exhibit, which was accepted. The Department called three witnesses to testify at the final hearing: Special Agent Michael Chandler, investigator for the Department; Special Agent Robert Baggett; and Richard Goulet, representative of Respondent. Respondent called one witness, Mr. Goulet.

Official recognition was taken of Section 849.12 and Subsections 849.16(1), 849.35(5), and 849.36(4), Florida Statutes (2007).²

At the close of the final hearing, the parties advised the undersigned that a transcript of the proceeding would be ordered. The parties were advised that proposed recommended orders would be due ten days after the transcript was filed at DOAH. The transcript was filed on May 2, 2008. The Department timely submitted a Proposed Recommended Order; Respondent's Proposed Recommended Order was filed two days late, but each was duly-considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for, inter alia, licensing and monitoring businesses licensed under the Florida Beverage and Tobacco laws. Department headquarters are in Tallahassee, Florida.

2. Respondent is a duly-licensed business monitored by the Department. The business, known as Tubby's, is a small bar or pub that serves alcohol pursuant to its license. The business has five video games with names such as Stone Age, Cherry Master, and Haunted House. The games allow customers to accumulate points as they play. The points are then registered on a written slip of paper printed by the video game after each period of play.

3. There are a number of video surveillance cameras in Tubby's which are used to monitor the hallway, bathroom, and bartenders. The bar has experienced trouble in the past with drug deals and installed the cameras to prevent such activities from re-occurring. One of the video cameras, the one pointed toward the video game area, was in fact not actually a working camera according to Tubby's representative.³

4. On October 19, 2007, two agents employed by the Department conducted an investigation of Tubby's to ascertain whether illegal gambling was going on in the establishment. Special Agent Michael Chandler sat at one of the video machines and played approximately \$5.00 worth of currency. Upon completion, he had accumulated 4 points as evidenced by a game slip which printed from the machine. The game slip had the following information printed on it: "TUBBY'S GAME 1; NO CASH VALUE; 1/20/07 01:17:37 1404."⁴ Chandler gave the slip to the bartender, and it was placed on a red diary or log kept behind the bar.

5. When the slip was later recovered by Chandler, his undercover name (Mike Boone) had been written on the slip. Also written across the top of the slip were the words, "Not Paid. Same guy as last night."

6. Special Agent Robert Baggett also played one of the games. He played \$30.00 worth of coins and won 100 points as

indicated on his game slips.⁵ Baggett says another patron told him that he could get actual money for the slips, but that testimony was not confirmed by non-hearsay evidence.

7. Baggett gave his slips to the bartender and asked what he could receive for them. This exchange between Baggett and his counsel at final hearing addressed what happened next:

Q: And did the bartender do anything with the game slips?

A: He asked me my name, and I gave him my alias. And he advised me that the scores will be tabulated at the end of the week, and that if I got the highest score my name would be placed on the electronic scoreboard that hung next to the bar area.

Q: To your understanding, do the game slips have any value?

A: Based upon my previous education, training and experience, these points are redeemable for monetary items. Because we have conducted several investigations in the past where we actually were paid out in the form of bar tabs or actual money.

There was no mention by the bartender of cash payments being available for the game slips that Baggett acquired at Tubby's. In fact, in contrast to what Baggett had experienced in other investigations, this establishment specifically applied earned points to a non-monetary function, i.e., listing the winners' names on a game board.

8. Based on their determination that illegal gambling was occurring, Chandler and Baggett seized a number of lottery

tickets, a bank bag filled with cash, and the game slips from the log book. The cash was primarily twenty-dollar bills wrapped in bundles of \$1,000 each for a total of \$3,049.00. Each night, the Automatic Teller Machine (ATM) was replenished with cash. The register report produced at final hearing by Respondent clearly indicates a daily deposit of cash into the ATM. Goulet's testimony that the cash in the bank bag was used to replenish the ATM on site at Tubby's is credible.

9. The game slips from customers were shredded or otherwise disposed of at the end of each week because there was no reason to keep them. This explanation is credible. The Department's concern and position that the slips should be maintained in case some customer questioned his or her point total is speculative and not supported by the facts.

10. Also confiscated from the establishment by Chandler and Baggett was a hand-written list of professional football teams. The list contained the first names or nicknames of 13 individuals, along with a statement of each player's record from the prior week. This sheet was obviously representative of some sort of football pool, but there is no evidence whatsoever that it was used for gambling purposes or involved the payment or exchange of money.

11. The video camera in the gaming area of Tubby's was, as previously discussed, not a working camera. The game area was

purposely set up by Tubby's management to look like a casino gambling area. This was meant to enhance the enjoyment of playing the video machines.

12. Goulet testified that Tubby's is an alternative lifestyle bar and that its clientele is fairly regular, i.e., they see the same people over and over. Due to its location off the main thoroughfares, there are not a lot of folks who just drop in to the bar.

CONCLUSIONS OF LAW

13. 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.

14. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. § 120.57(1)(h), Fla. Stat.; Department of Banking and Finance, Division of Securities and Investor Protection v. Osbourne, Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989).

15. Subsection 561.29(1)(a), Florida Statutes, states that the Division of Alcoholic Beverages and Tobacco may suspend or revoke a license when the following occurs:

Violation by the licensee or his or her or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment, of any of the laws of this state or of the United States, or violation of any municipal or county regulation in regard to the hours of sale, service, or consumption of alcoholic beverages or license requirements of special licenses issued under s. 561.20, or engaging in or permitting disorderly conduct on the licensed premises, or permitting another on the licensed premises to violate any of the laws of this state or the United States. A conviction of the licensee or his or her or its agents, officers, servants, or employees in any criminal court of any violation as set forth in this paragraph shall not be considered in proceedings before the division for suspension or revocation of a license except as permitted by chapter 92 or the rules of evidence.

16. Section 849.16, Florida Statutes, states:

(1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or any other outcome of such operation unpredictable by him or her, may:

(a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value or which may be given in trade; or

(b) Secure additional chances or rights to use such machine, apparatus, or device, even

though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.^[6]

17. The bulk of the Department's case relied on circumstantial evidence to prove the allegations. As stated in Davis v. State, 90 So. 2d 629, 631 (Fla. 1956):

Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. The conclusion as to the ultimate facts must be one which in the common experience of man may reasonably be made on the basis of the known facts and circumstances.

18. Or, as stated in Procacci Commercial Realty v. DHRS, 690 So. 2d 603, 608 (Fla. 1st DCA 1997):

The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." Pelletier v. Zweifel, 921 F. 2d 1465, 1515 (11th Cir. 1991).

19. Based upon a review of the evidence presented, the circumstantial evidence was not sufficient to infer that the ultimate fact (illegal gambling within the establishment) actually occurred. Furthermore, the ultimate fact is clearly

refuted by the special agent's own discussions with Tubby's bartender.

20. The evidence shows that the game slips accrued by customers when playing the video games were not exchanged for cash or anything of value. Rather, the "winners" were listed on a board each week for consideration by other bar patrons.

21. The Department essentially concludes that "if it looks like gambling, it must be gambling." However, there is no clear evidence that gambling occurred at Tubby's under the evidence presented. Petitioner has not met its burden of proof in this matter.

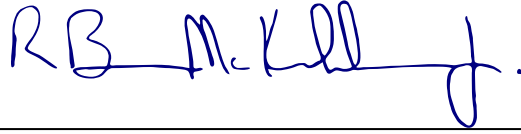
RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation finding that Respondent, Rick's of South Florida, Inc., d/b/a Tubby's, is not guilty of conducting illegal gambling at its business site.

Based upon the foregoing recommendation, it is further RECOMMENDED that Exhibits 5, 8, and 10 be returned to Respondent.

DONE AND ENTERED this 29th day of May, 2008, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2008.

ENDNOTES

^{1/} Exhibits 5, 8, and 10 were physical exhibits (A blue money bag; A black money bag; and \$3,049 in cash, respectively). These exhibits were retained by Petitioner pending the outcome of this proceeding.

^{2/} Unless specifically stated otherwise herein, all references to Florida Statutes and Florida Administrative Rules shall be to the 2007 version.

^{3/} One of the special agents investigating Tubby's said that the video camera did have an electric wire running to it. However, there was no evidence that the camera actually worked.

^{4/} Other game slips confiscated and photographed by Petitioner contained similar language, i.e., "TUBY'S [sic] II; FOR AMUSEMENTS ONLY; YOU WON X POINTS."

^{5/} Baggett testified that he received "\$100" in game slips, but the slips do not indicate a dollar amount, only a number of points followed by the words NO CASH VALUE.

^{6/} This is apparently the statutory language the Department paraphrased in its Administrative Action document, although the language in that document is an incomplete recitation of the Statute.

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.