

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TWO FOUR NINE, LLC, d/b/a )  
CENTRAL AVENUE SEAFOOD COMPANY, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-6219F  
 )  
DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF ALCOHOLIC BEVERAGES )  
AND TOBACCO, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

On February 9, 2012, an administrative hearing was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Harold Purnell, Esquire  
Rutledge, Ecenia and Purnell, P.A.  
Post Office Box 551  
119 South Monroe Street, Suite 202  
Tallahassee, Florida 32302

For Respondent: Thomas J. Morton, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 40  
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STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner is entitled to an award of attorney's fees and costs pursuant to section 57.111, Florida Statutes (2011).<sup>1/</sup>

PRELIMINARY STATEMENT

Two Four Nine, LLC, d/b/a Central Avenue Seafood Company (Petitioner), filed an application to transfer an alcoholic beverage license from the licensee to the Petitioner in 2010. In connection with the transfer, the Petitioner paid a \$5,000 fee that was calculated by the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Respondent), but the Petitioner disagreed with the Respondent's computation of the fee and subsequently requested a partial refund of the transfer fee.

The Petitioner also paid an additional \$50 tobacco sales fee that was not disputed.

The Respondent denied the Petitioner's refund request, and the Petitioner filed a Petition for Hearing to challenge the denial.

The Respondent forwarded the Petition to the Division of Administrative Hearings and the case (DOAH Case No. 11-4637) was scheduled for hearing. Prior to the hearing, the parties resolved the dispute with the Petitioner receiving a partial

refund of the transfer fee, though not in the amount originally requested.

On December 12, 2011, the Petitioner filed a Motion for Attorney's Fees pursuant to section 57.111. A hearing on the Motion took place on February 8, 2012. Neither party presented testimony at the hearing. The Petitioner had Exhibits 1 through 15 admitted into evidence.

The hearing Transcript was filed on February 28, 2012. Pursuant to the schedule adopted by the parties at the hearing, Proposed Final Orders were filed on March 19, 2012.

#### FINDINGS OF FACT

1. The parties have stipulated that the Petitioner is a "small business party" as the term is defined at section 57.111(3) (d).

2. On June 21, 2010, the Petitioner applied to acquire an existing alcoholic beverage "quota" license from another licensee.

3. The Petitioner had to pay a fee to transfer the license pursuant to section 561.32(3) (a), Florida Statutes (2010), which provides as follows:

Before the issuance of any transfer of license herein provided, the transferee shall pay a transfer fee of 10 percent of the annual license tax to the division, except for those licenses issued pursuant to s. 565.02(1) and subject to the limitation imposed in s. 561.20(1), for which the

transfer fee shall be assessed on the average annual value of gross sales of alcoholic beverages for the 3 years immediately preceding transfer and levied at the rate of 4 mills, except that such transfer fee shall not exceed \$5,000; in lieu of the 4-mill assessment, the transferor may elect to pay \$5,000. Further, the maximum fee shall be applied with respect to any such license which has been inactive for the 3-year period. Records establishing the value of such gross sales shall accompany the application for transfer of the license, and falsification of such records shall be punishable as provided in s. 562.45. All transfer fees collected by the division on the transfer of licenses issued pursuant to s. 565.02(1) and subject to the limitation imposed in s. 561.20(1) shall be returned by the division to the municipality in which such transferred license is operated or, if operated in the unincorporated area of the county, to the county in which such transferred license is operated. (emphasis added).

4. License transfer applicants are required to provide gross sales records pursuant to Florida Administrative Code Rule 61A-5.010(2)(b), which provides as follows:

An applicant for a transfer of a quota liquor license shall provide records of gross sales for the past 3 years or for the period of time current licensee has held license in order that the division may compute the transfer fee. An applicant may, in lieu of providing these records, elect to pay the applicable transfer fee as provided by general law.

5. The gross sales records provided to the Respondent by the Petitioner were for the five-month period between January 21 and June 21, 2010, and totaled \$573,948.94 for the period.

6. To compute the transfer fee, the Respondent divided the reported gross sales (\$573,948.94) by five to estimate an average monthly gross sales figure of \$114,789.79.<sup>2/</sup> The Respondent multiplied the estimated average monthly gross sales by 12, to estimate annual gross sales of \$1,377,477.48. The Respondent then applied the 4-mill rate to the estimated annual gross sales and determined the transfer fee to be \$5,509.91.

7. The Respondent also calculated the transfer fee through a formula set forth on a form that had been challenged as an unadopted rule by an applicant in a 2008 proceeding. While the 2008 rule challenge was pending, the Respondent commenced to adopt the form as a rule, but the dispute was ultimately resolved without a hearing, after which the Respondent discontinued the process to adopt the rule. According to the formula on the form, the transfer fee was \$5,599.50.

8. Because both of the Respondent's calculations resulted in transfer fees in excess of \$5,000, the Respondent required the Petitioner to pay the statutory maximum of \$5,000.

9. The Petitioner paid the \$5,000 transfer fee under protest. The Petitioner asserted that the appropriate transfer fee should have been \$765.27. The Petitioner's calculation used the reported five months of gross sales (\$573,948.94) as the total annual gross sales for the licensee. The Petitioner divided the \$573,948.94 by three to determine a three-year

average of \$191,316.31 and then applied the 4-mill rate to the three-year average to compute a transfer fee of \$765.27.

10. On March 17, 2011, the Petitioner filed an Application for Refund of \$4,234.73, the difference between the \$5,000 paid and the \$765.27 that the Petitioner calculated as the appropriate fee.

11. The Application for Refund was filed pursuant to section 215.26, Florida Statutes, which governs requests for repayment of funds paid through error into the State Treasury, including overpayment of license fees. Section 215.26(2) requires that in denying an application for a tax refund, an agency's notice of denial must state the reasons for the denial.

12. As authorized by section 72.11(2)(b)3, Florida Statutes, the Respondent has adopted rules that govern the process used to notify an applicant that a request for refund has been denied. Florida Administrative Code Rule 61-16.002(3) states as follows:

Any tax refund denial issued by the Department of Business and Professional Regulation becomes final for purposes of Section 72.011, Florida Statutes, when final agency action is taken by the Department concerning the refund request and taxpayer is notified of this decision and advised of alternatives available to the taxpayer for contesting the action taken by the agency.

13. By letter dated May 9, 2011, the Respondent notified the Petitioner that the request for refund had been denied and

stated only that "[w]e reviewed the documentation presented and determined that a refund is not due." The Respondent's notice did not advise that the Petitioner could contest the decision.

14. On May 16, 2011, the Petitioner submitted a Request for Hearing to the Respondent, asserting that the Respondent improperly calculated the transfer fee by projecting sales figures for months when there were no reported sales.

15. On August 4, 2011, the Respondent issued a letter identified as an "Amended Notice of Denial" again advising that the Petitioner's refund request had been denied. The letter also stated as follows:

The Division cannot process your refund application due to the fact that the transferee has not provided the Division records which show the average annual value of gross sales of alcoholic beverages for the three years immediately preceding the transfer.

16. On September 14, 2011, the Respondent forwarded the Petitioner's Request for Hearing to the Division of Administrative Hearings (DOAH Case No. 11-4637).

17. By letter dated October 10, 2011, the Respondent issued a "Second Amended Notice of Denial" which stated as follows:

We regret to inform you that pursuant to Section 561.23(3)(a), Florida Statutes, your request for refund . . . in the amount of \$4,234.73 is denied. However, the Division has computed the transfer fee and based upon the records submitted by you pursuant to Rule 61A-5.010(2)(b), F.A.C., the Division will

issue the Applicant a refund in the amount of \$2,704.20.

18. The records referenced in the letter were submitted with the original application for transfer that was filed by the Petitioner on March 17, 2011.

19. The Respondent's recalculated transfer fee was the result of applying the 4-mill levy directly to the reported five months of gross sales reported in the transfer application, resulting in a revised transfer fee of \$2,295.80 and a refund of \$2,704.20.

20. On October 11, 2011, the Respondent filed a Motion for Leave to Amend the Amended Notice of Denial, which was granted, over the Petitioner's opposition, on October 21, 2011.

21. DOAH Case No. 11-4637 was resolved by execution of a Consent Order wherein the parties agreed to the refund of \$2,704.20 "solely to preclude additional legal fees and costs," but the Consent Order also stated that the "Petitioner expressly does not waive any claim for attorneys' fees in this matter pursuant to F.S. 57.111."

22. The Petitioner is seeking an award of attorney's fees of \$8,278.75 and costs of \$75, for a total award of \$8,353.75.

23. The parties have stipulated that the amount of the attorney's fees and costs sought by the Petitioner are reasonable.



24. The Respondent failed to establish that the original calculation of the applicable transfer fee was substantially justified.

25. The evidence fails to establish that there are special circumstances that would make an award unjust.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 57.111, 120.569, and 120.57(1), Fla. Stat.

27. Section 57.111 provides in relevant part as follows:

57.111 Civil actions and administrative proceedings initiated by state agencies; attorneys' fees and costs.--

(1) This section may be cited as the "Florida Equal Access to Justice Act."

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

(3) As used in this section:

(a) The term "attorney's fees and costs" means the reasonable and necessary attorney's

fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding.

(b) The term "initiated by a state agency" means that the state agency:

\* \* \*

3. Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

(c) A small business party is a "prevailing small business party" when:

\* \* \*

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding: . . .

\* \* \*

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

\* \* \*

(4) (a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

28. The parties have stipulated that the fees and costs sought in this case are reasonable.

29. The underlying proceeding was initiated by the Respondent when the Respondent denied the Petitioner's refund request, after which the Petitioner filed a Request for Hearing.

30. The Petitioner is a prevailing small business party. The primary issue in the underlying case was the Petitioner's assertion that the Respondent improperly calculated the transfer fee by including sales figures for months when there were no reported sales. The settlement of the case reflected calculation of a transfer fee based only upon the gross sales figures reported by the Petitioner.

31. The evidence fails to establish that the Petitioner's original calculation of the transfer fee had a substantial basis in law or fact at the time the calculation occurred. The Petitioner offered no credible evidence to support the original calculation of the fee.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petitioner is awarded fees in the amount of \$8,278.75 and costs of \$75, for a total award of \$8,353.75.

DONE AND ORDERED this 26th day of April, 2012, in  
Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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WILLIAM F. QUATTLEBAUM  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of April, 2012.

ENDNOTES

<sup>1/</sup> Unless other indicated, all statutory references are to  
Florida Statutes (2011).

<sup>2/</sup> Oddly enough, \$114,789.79 was also the exact sales figure  
reported by the Petitioner for the month of March 2010.

COPIES FURNISHED:

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.