

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TARGET CORPORATION, TOPGOLF
INTERNATIONAL, INC., AND WALMART
INC.,

Petitioners,

vs.

Case No. 18-5116RX

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Respondent,

and

ABC FINE WINE AND SPIRITS,
FLORIDA INDEPENDENT SPIRITS
ASSOCIATION, AND PUBLIX
SUPERMARKETS,

Intervenors.

_____ /

FINAL ORDER

Administrative Law Judge John D. C. Newton, II, of the
Division of Administrative Hearings (DOAH) conducted the final
hearing in this cause on October 26, 2018, in Tallahassee,
Florida.

APPEARANCES

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For Respondent: Daniel Johnathon McGinn, Esquire
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For Intervenor: William D. Hall, Esquire
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STATEMENT OF THE ISSUES

- A. Does Petitioner, Target Corporation (Target), have standing to bring this rule challenge?
- B. Does Petitioner, Walmart, Inc. (Walmart), have standing to bring this rule challenge?
- C. Does Intervenor, ABC Fine Wine & Spirits (ABC), have standing to participate in this rule challenge?
- D. Does Intervenor, Florida Independent Spirits Association (Independent Spirits), have standing to participate in this rule challenge?
- E. Does Intervenor, Publix Supermarkets (Publix), have standing to participate in this rule challenge?
- F. Is Florida Administrative Code Rule 61A-3.055 (Restaurant Rule or the rule) an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes (2018)?^{1/}

PRELIMINARY STATEMENT

Petitioners, Target, Walmart, and Topgolf International, Inc. (Topgolf), challenge the validity of the Restaurant Rule, under the authority of section 120.56(1) and (3), Florida Statutes. The challenged rule explicates the position of Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division), on what "items customarily sold in a restaurant," as used in section 565.045, Florida Statutes, means. Intervenors support the rule's validity.

The pertinent parts of the statute provide:

(1) Vendors licensed under s. 565.02(1)(b)-(f) shall provide seats for the use of their customers. Such vendors may sell alcoholic beverages by the drink or in sealed containers for consumption on or off the premises where sold.

(2)(a) There shall not be sold at such places of business anything other than the beverages permitted, home bar and party supplies and equipment (including but not limited to glassware and party-type foods), cigarettes, and what is customarily sold in a restaurant.

The Restaurant Rule identifies seven categories of items as customarily sold in restaurants that licensed vendors may sell. It also allows licensees to petition for permission to sell other products. The rule affects the authority of merchants to sell alcoholic beverages.

To proceed, Target and Walmart must prove standing by establishing that they are substantially affected by the rule. § 120.56(1)(a), Fla. Stat. The Division and Intervenors do not dispute the standing of Topgolf. The Joint Prehearing Stipulation establishes the basis for Topgolf's standing. Intervenors must prove their standing to participate further in this rule challenge proceeding.

At the final hearing, Petitioners presented testimony from John Harris and Thomas Philpot. Petitioners' Exhibits 1 through 3 were entered into evidence. (Petitioner's Exhibit 2 is Respondent's Exhibit 4. Petitioner's Exhibit 3 is Respondent's Exhibit 5.) The Division also presented testimony from Mr. Harris and Mr. Philpot. Division Exhibits 1 through 5, 7, and 8 were entered into evidence.

The Transcript of the hearing was filed on November 9, 2018. The parties filed proposed final orders on November 19, 2018. They have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Legislature has charged the Division with administration of Florida's alcoholic beverage and tobacco laws. This charge includes licensing and regulation, as well as enforcement of the governing laws and rules.

2. The Division promulgated rule 61A-3.055 in 1994. It has not been amended since. The rule states:

61A-3.055 Items Customarily Sold in a Restaurant.

(1) As used in Section 565.045, F.S., items customarily sold in a restaurant shall only include the following:

- (a) Ready to eat appetizer items; or
- (b) Ready to eat salad items; or
- (c) Ready to eat entree items; or
- (d) Ready to eat vegetable items; or
- (e) Ready to eat dessert items; or
- (f) Ready to eat fruit items; or
- (g) Hot or cold beverages.

(2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can show the item is customarily sold in a restaurant. This petition shall be submitted to the director of the division at Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 2601 Blair Stone Road, Tallahassee, Florida 32399-1020, and must be approved prior to selling or offering the item for sale.

(3) For the purpose of consumption on premises regulations set forth in Section 565.045, F.S., items customarily sold in a restaurant shall include services or sales authorized in the "Florida Public Lottery Act", Section 24.122(4), F.S.

3. The effect of the rule is that any vendor with a license to sell alcoholic beverages for consumption on premises (COP) may not sell any items other than those listed in subsection (1) unless individually authorized to sell specific items by the Division.^{2/}

4. Rule 61A-3.055 identifies section 565.045, as the law that it implements.

5. The Restaurant Rule regulates all establishments holding a COP license.

6. Topgolf operates four COP licensed establishments in Florida. Every Topgolf venue features dozens of high-tech, climate-controlled, golf hitting bays, food and beverage choices, and employs a staff of associates to provide patrons with a golf-themed food, beverage, and entertainment experience.

7. The Division has also issued Topgolf a temporary COP license for its location at Topgolf Doral, 11850 Northwest 22nd Street, Miami, Florida 33182.

8. On July 31, 2018, the Division inspected Topgolf Doral as part of the licensing process for issuance of the permanent liquor license.

9. The Division's Inspection Report notes that the Topgolf Doral (Doral) location may be in violation of section 565.045, because it offers items for sale other than those enumerated in rule 61A-3.055. The items offered include Topgolf-branded and/or golf-themed T-shirts, caps, visors, golf balls, cups, key chains, gloves and other trinkets.

10. All of Topgolf's Florida locations sell items similar to those sold in its Doral location. In addition to possible denial of its Doral application, Topgolf faces potential administrative and/or criminal penalties for the purported

violation of the Restaurant Rule at each of its Florida locations.

11. Topgolf has also petitioned the Division for permission to sell products other than those listed in rule 61A-3.055(1).

12. Walmart operates a chain of retail stores, warehouse clubs, and ecommerce websites. It operates almost 400 locations in Florida. The Florida Department of Agriculture and Consumer Services licenses Walmart's retail locations in Florida as food establishments. Walmart seeks to obtain, but has not yet applied for, COP licenses for some of its Florida retail locations.

13. ABC is a retailer of alcoholic beverages in Florida. It operates a number of establishments that hold COP licenses. It holds 26 COP licenses. Rule 61A-3.055 applies to ABC's operation of its licensed establishments.

14. Independent Spirits is an independent association of alcoholic beverage retailers holding COP licenses. It exists to represent the interests of its members before the Division, in the Legislature, and otherwise. ABC is an Independent Spirits member. Including ABC, Independent Spirits members hold 61 COP licenses.

15. Publix is a supermarket chain. It also operates a number of liquor stores throughout the state. Publix holds a number of COP licenses (beer and wine only).

16. Publix relied on the requirements of statute and rule (including section 565.045 and the Restaurant Rule) in crafting its liquor-related business plans and building its separate liquor stores.

17. Division inspections of licensed vendors include examination for violations of the Restaurant Rule. Since June 28, 2010, the Division has issued 14 notices of violation of the Restaurant Rule. The record does not establish what, if any, further action, such as fines or license revocation, that the Division has taken.

18. The Division recently denied an application by Costco for a COP license for failure to comply with the Restaurant Rule. This is the only known instance of the Division denying a license application for failure to comply with the rule.

19. Restaurants customarily sell items other than those listed in the Restaurant Rule. At a minimum, they sell T-Shirts and branded souvenir items.

20. The Division adopted the Restaurant Rule in 1994. The review from the Joint Administrative Procedures Committee at the time included this observation: "Absent explanatory criteria, use of the word 'customarily' vests unbridled discretion in the department."

21. The Division responded: "As mentioned in our meeting, all of Proposed Rule 61A-3.055 is, in itself, the division's

attempt to define the admittedly vague phrase 'items customarily sold in a restaurant', as used in s. 565.045."

22. The Division is presently conducting rulemaking proceedings to consider amending the Restaurant Rule.

CONCLUSIONS OF LAW

Jurisdiction, Standards, and Burden

23. Sections 120.56, 120.569 and 120.57(1) grant DOAH jurisdiction over the parties to and subject matter of this proceeding.

24. Petitioners maintain that the Restaurant Rule is an invalid exercise of delegated legislative authority. Section 120.52(8), defines invalid exercise of delegated legislative authority. In pertinent part, it provides:

"Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific 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 reasonably 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 provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the 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 enabling statute.

25. Petitioners must prove their claims by a preponderance of the evidence. § 120.56(3)(a), Fla. Stat.

Standing

26. Section 120.56(1)(a) provides:

Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

27. A party's substantial interests are determined if: (1) the party will suffer injury in fact that is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) the injury is within the zone of interest to be regulated or protected. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005). Topgolf holds COP licenses. Rule 61A-3.055 applies to Topgolf. In addition, the Division is investigating Topgolf for violation of the Restaurant Rule. Topgolf easily satisfies the standing requirements.

28. Target and Walmart desire to obtain licenses. They have not because of the Restaurant Rule. Both premise their standing on a desire to seek a license. As genuine prospective applicants, they have standing to challenge the rule that will affect disposition of their application.^{3/} Jacoby v. Fla. Bd. of Med., Id.

29. ABC and Publix are subject to the Restaurant Rule. Members of Independent Spirits hold licenses and are subject to the Restaurant Rule. Independent Spirits exists to represent the interests of its members before the Division, in the Legislature, and otherwise. In this proceeding, Independent Spirits standing rationale rests upon its members. If the Restaurant Rule is not valid, the effect upon the Intervenors would only be to remove a restriction upon what they could sell. The sparse record here does not prove that this is a real or immediate injury. See K.M.

v. Fla. Dep't of Health, 237 So. 3d 1084, 1088 (Fla. 3d DCA 2017).

Rulemaking Authority

30. A rule is valid "only if adopted under a proper delegation of legislative authority." SW. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 598 (Fla. 1st DCA 2000). To be valid, a rule may only implement or interpret specific powers and duties granted by the agency's enabling statute. There must be an explicit and specific grant of authority. United Faculty of Fla. v. Fla. State Bd. of Educ., 157 So. 3d 514, 517 (Fla. 1st DCA 2015).

31. Rule 565.045 identifies section 561.11, Florida Statutes, as its rulemaking authority. Section 561.11(1) reads: "The division has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of the Beverage Law." Section 561.01(6) defines the Beverage Law as chapters 561 through 568.

32. Chapter 561 generally governs administration of the Beverage Law, including licensing and registration. Section 561.02 of Chapter 561 creates the Division of Alcoholic Beverages and Tobacco, within the Department of Business and Professional Regulation. The section charges the Division with supervising "the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of all

alcoholic beverages.” It also charges the Division with enforcing the Beverage Law.

33. Chapter 565 is the part of the Beverage Law governing sale of liquor. It includes the directive of section 565.045, the statute that the Division says the rule implements. The grant of rulemaking authority is explicit and specific.

34. The rule also does not exceed the grant of rulemaking authority. The Restaurant Rule is a permitted effort to implement or carry out the statute’s directive with more detail. Save the Manatee Club, Inc., 773 So. 2d at 599.^{4/} Compare Lamar Outdoor Adver. v. Fla. DOT, 17 So. 3d 799 (Fla. 1st DCA 2009) (Statute authorizing regulation of size, lighting, and spacing of highway signs did not authorize regulation of height).

35. The rule also does not enlarge, modify or contravene the specific provisions of the law implemented.

Vagueness and Unbridled Discretion

36. Section 565.045 limits license holders to selling specific items and “what is customarily sold in a restaurant.” It implicitly prohibits the sale of any other items. This is broad language. Subsection (1) of the Restaurant Rule provides specific guidance about what “customarily sold in a restaurant” means by listing seven food items. Subsection (2) provides an open-ended exception to subsection (1). It reverts to the phrase “customarily sold in a restaurant,” which the Division told the

Joint Administrative Procedures Committee that it was trying to clarify. Subsection (2) permits a licensee to petition the Division for permission to sell other products, if the licensee can show the products are customarily sold in a restaurant.

37. The Restaurant Rule provides no guidance on how the Division will determine what is "customarily sold in a restaurant." The Division's representative, testifying in a party deposition taken pursuant to Florida Rule of Civil Procedure 1.310(b)(6), could not provide a definition of "customarily sold" or "restaurant" as used in the rule. The Division representative also could not describe the standards the Division uses to determine whether an item is customarily sold in a restaurant. The representative's response was only that he would have to consult with counsel. The Division's inability to articulate the standards of the rule demonstrates the vagueness of the rule and the breadth of the discretion it vests in the Division.

38. The result of the rule's vagueness and discretion is a rule that prohibits the sale of all but seven items with no standards for what, if any, other items may be permitted. "An administrative rule is invalid under section 120.52(8)(d), if it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application." State v. Peter R.

Brown Constr., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013).

The Restaurant Rule is a straightforward example of a rule that establishes no standards and vests unbridled discretion in an agency.

39. The principle that a rule which reiterates a statute does not interpret a statute does not avoid the determination of invalidity. This is because the petition requirement and the burden of "showing" an item is customarily sold in a restaurant is not part of the statute. Cf. St. Francis Hosp., Inc. v. Dep't of Health & Rehab. Servs., 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989) (applying the principle to determine an agency's interpretation of a statute was not an unpromulgated rule.)

40. The rule is also not just a repetition of the "waiver and variance" process created by section 120.542. That is an individualized process for relief from a rule requirement leading to unreasonable, unintended, or unfair results in a specific factual situation.

Arbitrary and Capricious

41. A rule is arbitrary if it is not supported by logic or necessary facts and is capricious if irrational. Dep't of Health v. Bayfront Med. Ctr., Inc., 134 So. 3d 1017 (Fla. 1st DCA 2012). Despite the Division representative's best efforts at deposition to avoid answering direct questions, the record proved that restaurants customarily sell at least T-Shirts and branded

souvenirs. The Division, through the deposition testimony of its representative, acknowledged this.

42. The record offers no explanation why subsection (1) of the Restaurant Rule does not include these items. Excluding an item that the Division acknowledges is customarily sold in restaurants from a list of items customarily sold in restaurants is illogical. Rule 61A-3.055 is arbitrary and capricious.

ORDER

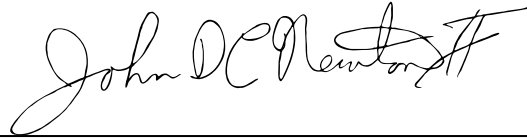
Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

A. The Petition to Intervene of ABC Fine Wine & Spirits, Florida Independent Spirits Association, and Publix Supermarkets is Dismissed.

B. Florida Administrative Code Rule 61A-3.055 is an invalid exercise of delegated legislative authority.

C. Jurisdiction is retained for the purpose of determining entitlement to attorney's fees and costs, and the amount, if appropriate.

DONE AND ORDERED this 30th day of November, 2018, in
Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2018.

ENDNOTES

^{1/} All citations to the Florida Statutes are to the 2018 compilation unless otherwise noted.

^{2/} Title XXIV of the Florida Statutes governs sale of alcoholic beverages and tobacco. It includes chapters regulating beer (chapter 563), wine (chapter 564), and Liquor (chapter 565). Among other things, these similarly structured chapters impose license fees, with the amounts determined by the population of the county where the business is located. Chapter 565 governs sales of liquor. Section 565.02, however, creates fee categories for "vendors who are permitted to sell any alcoholic beverages regardless of alcoholic content." Section 565.02(1)(b)-(f) establishes the license fees for places of business where consumption on premises is permitted based upon county population for liquor licenses. These are referred to as "COP" licenses.

^{3/} It is important to note that there is no dispute about the intent of Target and Walmart to obtain a license. Due to the stipulation to this fact, this is not a case where the evidence demonstrates that a petitioner's interest in a rule's validity is speculative, academic, or conjectural.

^{4/} "A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself."
SW. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

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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.