FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5311

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

Appellant,

v.

TARGET CORPORATION; TOPGOLF INTERNATIONAL, INC.; and WALMART, INC., and ABC FINE WINES & SPIRITS, INC., FLORIDA INDEPENDENT SPIRITS ASSOCIATION; and PUBLIX SUPERMARKETS, INC.,

Appellees.

On appeal from a Final Order of the Division of Administrative Hearings.
John D.C. Newton, II, Administrative Law Judge.

May 19, 2021

M.K. THOMAS, J.

Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the Division),

appeals a final order declaring Florida Administrative Code Rule 61A-3.055 (the existing rule) invalid. The existing rule attempts to define items "customarily sold in a restaurant" as that term is used in section 565.045, Florida Statutes, for the purpose of issuing Consumption on Premises (COP) liquor licenses. We agree with the Administrative Law Judge (ALJ) that the existing rule is an invalid exercise of delegated legislative authority and that Petitioners had standing to bring the challenge. Thus, the order on appeal is affirmed as to the issues raised in this appeal.[1]

I. Facts

Petitioners argued the existing rule (commonly referred to as the "Restaurant Rule") is an invalid exercise of delegated legislative authority because:

> (i) the rule impermissibly enlarges, modifies or contravenes the specific provisions of the statute it purports to implement by restricting the meaning of the phrase "customarily sold in a restaurant" as used in the statute, and by purporting to require applicants or licensees to petition the Division to establish their rights to sell other items customarily sold in a restaurant, a requirement not found in the statute;
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> (ii) the rule is vague, fails to establish adequate standards for Division decisions, and vests unbridled discretion in the Division as it purports to allow the Division, on a case-by-case basis, to decide, with no standards or guidance, what items will be considered to be "customarily sold in a restaurant";

[1] In Case 1D18-5309, ABC Fine Wine & Spirits, Florida Independent Spirits Association, and Publix (Intervenors), who intervened in the rule challenge proceedings, also appeal the ALJ's final order. In that case, we reversed the ALJ's conclusion that Intervenors lacked standing to intervene. *ABC Fine Wine & Spirits v. Target Corp.*, No. 1D18-5309 (Fla. 1st DCA May 19, 2021).

> (iii) the rule is arbitrary and capricious because it directly conflicts with the Division's longstanding interpretation and application of the requirements of the statute, including specifically the meaning of "customarily sold in a restaurant"; and
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> (iv) the Division has exceeded its grant of rulemaking authority by attributing meaning to the statutory phrase when no authority has been given to the Division to adopt a rule determining what items will be considered as "customarily sold in a restaurant."[2]

Petitioners claim they are substantially affected by the rule because each have locations that are licensed as restaurants, and they "seek to obtain a license allowing for consumption of alcoholic beverages on the premises." They acknowledge that the existing rule restricts the items that may be sold by a holder of a COP license and prevents them from obtaining the COP license. Petitioners argue, in part, that the rule impermissibly enlarges, modifies, or contravenes the enabling statute because their locations in Florida are "restaurants" or "food service establishments"; accordingly, the items they "customarily" sell identify the categories of items that can be sold by a restaurant under its COP license. Thus, it is error to place limitations beyond those established in the statute.

After a final hearing and accepting the parties' testimony and evidence, the ALJ found that Petitioners, as prospective applicants, had standing to challenge the existing rule because they desire a COP license but have not applied because of the existing rule. The ALJ further concluded: 1) that the existing rule is vague and vests unbridled discretion in the Division because it provides no standard for what, if any, other items may be

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[2] We recognize that Petitioner's challenge to the existing rule is likely an attempt to circumvent the "liquor wall" law, which requires package store licensees to sell liquor at a separate location with a separate opening/entrance from their main store. A bill to revoke the law was vetoed by Governor Rick Scott.

permitted to be sold in addition to those listed in subsection (1); and 2) the rule is arbitrary and capricious because restaurants customarily sell at least t-shirts and branded souvenirs, and excluding an item customarily sold in restaurants from a list of items customarily sold in restaurants is illogical. Based on the foregoing, the ALJ held that the existing rule is an invalid exercise of delegated legislative authority. The Division now appeals the ALJ's conclusions.

II. Analysis

On appeal, findings of fact will be affirmed if supported by competent, substantial evidence. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 359 (Fla. 1st DCA 2005). However, questions of law are subject to de novo review. *SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000). Whether a rule is an invalid exercise of legislative power is a question of law. *Id.*; *see also Orlando Health Cent., Inc. v. Agency for Healthcare Admin.*, 252 So. 3d 849, 852 (Fla. 1st DCA 2018). A rule is an invalid exercise of delegated legislative authority where it "goes beyond the powers, functions, and duties delegated by the Legislature . . . ." § 120.52(8), Fla. Stat. A rule is an invalid exercise of delegated legislative authority if it is arbitrary or capricious. *Id.*

Pursuant to section 565.045, a COP licensee may not sell "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*." § 565.045(2)(a), Fla. Stat. (emphasis added). The existing rule attempts to clarify what "is customarily sold in a restaurant." It provides:

> (1) As used in section 565.045, F.S., items customarily sold in a restaurant shall only include the following:
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> (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 product 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 . . . and must be approved prior to selling or offering the item for sale.

Fla. Admin. Code R. 61A-3.055(1)–(2) (emphasis added).

A. Arbitrary and Capricious

The Division first argues the ALJ erred when he found subsection (1) of the existing rule to be arbitrary and capricious, making it an invalid exercise of delegated legislative authority, because it does not include t-shirts and branded souvenirs. "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[.]" § 120.52(8)(e), Fla. Stat. A plain reading of the existing rule reveals that subsection (1) provides an exclusive list of items customarily sold in a restaurant. But if there is an item that is proven to be customarily sold in a restaurant which is absent from this exclusive list, then the list itself is not supported by the necessary facts and does not operate according to reason. This supports a finding that subsection (1) of the existing rule is arbitrary and capricious.

The Division also contends that the ALJ's finding that restaurants "at least" customarily sell t-shirts and branded souvenirs is not supported by competent, substantial evidence. We cannot agree. The Division's director acknowledged at the final hearing that in his travels he had seen t-shirts sold in restaurants. Additionally, the Petitioners' witness, Former Director Harris, testified that t-shirts are customarily sold in restaurants. Although the testimony is not significant, it does amount to competent, substantial evidence. Thus, we must affirm the ALJ's holding on appeal.

B. Vague and Vests Unbridled Discretion in the Division

The Division next claims that the ALJ erred when it held that subsection (2) of the existing rule is vague and vests unbridled discretion in the Division. "An administrative rule is invalid under section 120.52(8)(d), Florida Statutes, 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, Dep't of Fin. Servs. v. Peter R. Brown Const., Inc.*, 108 So. 3d 723, 728 (Fla. 1st DCA 2013).

Subsection (2) allows for businesses seeking a COP license to petition the Division to ask for items they sell that are not included in subsection (1) to be deemed as items customarily sold in a restaurant. The ALJ found that because the existing rule provides no standard for determining what, if any, items may be permitted to be sold other than those listed in subsection (1), the existing rule vests unbridled discretion in the Division. Indeed, the Division's Director testified that the Division has not set forth the standard for how to determine whether an item is "customarily sold in a restaurant" under subsection (2). Rather, the Director stated such a determination would be made in consultation with counsel.

In *Peter R. Brown Construction*, petitioners challenged the validity of a rule that prohibited the use of state funds for "[d]ecorative items (globes, statutes, potted plants, picture frames, etc.)." 108 So. 3d at 725. The enabling statute in question conferred broad powers to the CFO of the state to process day-to-day payments but did not explicitly authorize the CFO to reduce expenditures. *Id.* at 727. This Court adopted the findings of the ALJ which found that language of the rule was vague because "no qualifying language is available as a standard to determine what items are covered and what items are not based on the example. A wide range of things can be considered, and different people can guess at its meaning or come up with various interpretations for "decorative items." *Id.* at 728.

Similarly, here, no direction is given regarding what items the Division would consider as being "customarily sold in a restaurant." Thus, because no sufficient standard was provided, the existing rule "is subject to inconsistent application" and leaves the Division "with unbridled discretion." *See id.* Therefore, the

ALJ's finding that subsection (2) of the existing rule is vague and vests unbridled discretion in the Division is affirmed.

C. Standing

The Division also challenges the Petitioners' standing to challenge the existing rule. Standing is a question of law subject to de novo review. *See Office of Ins. Regulation v. Secure Enters., LLC*, 124 So. 3d 332, 336 (Fla. 1st DCA 2013) (citing *Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1077 (Fla. 4th DCA 2009)). Pursuant to section 120.56(1)(a), Florida Statutes, "Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the validity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." To establish standing under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and, (2) that the alleged interest is within the zone of interest to be protected or regulated. *Jacoby*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005). To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture. *Lenoue v. Fla. Dep't of Law Enforcement*, 751 So. 2d 94, 97 (Fla. 1st DCA 1999).

The ALJ determined that, as genuine prospective applicants, Petitioners had standing to challenge the rule because it will affect disposition of their application. The focus on appeal was whether Petitioners satisfied the immediate injury prong of the substantially affected test. In *Jacoby*, this Court held that a physician licensed in New York had standing to challenge the state of Florida's licensing rules which denied a license to anyone with a probationary license in another state. 917 So. 2d at 359–360. This Court held the physician satisfied the immediate injury prong of the substantially affected test because the physician was subject to the licensing rules and policies of the state as a "potential applicant," because he had been adversely impacted by the rules when his application was denied, and because he could apply again in the future. *Id.* at 360.

Under *Jacoby*, Petitioners were not required to have a pending application for the purposes of showing an immediate injury; rather, it is sufficient that a party is a potential applicant

for the purposes of standing. The Division does not debate this point. Instead, the Division argues that because the ALJ's ruling is much narrower than requested and would not result in Petitioners being able to obtain a COP license because they sell many more items than t-shirts and branded souvenirs, Petitioners lost their standing. But, standing in an administrative proceeding is a forward-looking concept and cannot disappear based on the ultimate outcome of the proceeding. *See Palm Beach Cty. Envtl. Coal.*, 14 So. 3d at 1078. It is sufficient that a petitioner proves that its interest "*could* reasonably be affected" by the rule. *Id.* Here, as potential applicants, Petitioners established that their interests could reasonably be affected by the rule. Therefore, as found by the ALJ, they had standing to challenge the validity of the existing rule.

III. Conclusion

We affirm the ALJ's order finding that Florida Administrative Code Rule 61A-3.055 is an invalid exercise of delegated legislative authority. We agree with the ALJ that the existing rule is both arbitrary and capricious, and that it is vague and vests unbridled discretion in the Division. We further find Petitioners had standing to challenge the existing rule. Therefore, the final order is AFFIRMED.

LEWIS, J., concurs; WINOKUR, J., concurs specially with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., concurring specially.

I agree that the existing rule, by allowing licensees to petition the Division for "permission" to sell products other than those listed in the rule, without any standard for guiding the Division's decisionmaking, vests unbridled discretion in the agency. For this

reason, I concur in the decision to affirm the invalidation of the existing rule.

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