

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MB DORAL, LLC, D/B/A MARTINI BAR,

Petitioner,

vs.

Case No. 19-6579F

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

Respondent.

_____ /

FINAL ORDER

This cause arises from Petitioner M.B. Doral, LLC, d/b/a Martini Bar's (MB Doral) Motion for Attorneys' Fees and Costs, filed December 3, 2019, concerning an unadopted rule challenge. Administrative Law Judge Robert J. Telfer III of the Florida Division of Administrative Hearings (Division), bifurcated MB Doral's unadopted rule challenge from an existing rule challenge, DOAH Case No. 18-6768RX. This proceeding to determine entitlement, and if necessary, amount of attorneys' fees and costs to be paid by Respondent to Petitioner in that unadopted rule challenge was set for hearing on February 21, 2020. However, no hearing is necessary, because the parties have agreed to the amount of attorneys' fees and costs to be assessed, pursuant to a Joint Stipulation for Attorneys' Fees and Costs, filed February 11, 2020.

APPEARANCES

For Petitioner: Michael Martinez, Esquire
Greenspoon Marder, P.A.
215 South Monroe Street, Suite 530
Tallahassee, Florida 32301

For Respondent: Megan Kachur, Esquire
Department of Business and Professional Regulation,
Division of Alcoholic Beverages and Tobacco
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Petitioner, M.B. Doral, is entitled to attorneys' fees and costs pursuant to section 120.595(4), Florida Statutes (2019); and, if so, the amount.

PRELIMINARY STATEMENT

On December 21, 2018, Petitioner MB Doral filed a Petition Challenging Validity of Existing Rule 61A-4.020 and Determination Regarding Unadopted Rule. With respect to the unadopted rule challenge, MB Doral contended that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco's (Department) "ABT Form 6017 Application and Inspection Report for Off-Premises Storage Permit" (ABT Form 6017), constituted an unpromulgated rule. On January 23, 2019, the Department filed a Motion to Bifurcate and Stay Proceedings, in which it stated that the Department had commenced the rulemaking process to revise Florida Administrative Code Rule 61A-4.020 (which was the subject of the existing rule challenge) to, inter alia, promulgate ABT Form 6017. On January 25, 2019, the undersigned entered an Order Granting Respondent's Motion to Bifurcate and Stay Proceedings, which: (1) stayed MB Doral's unadopted rule challenge pending the proposed rulemaking, pursuant to section 120.56(4)(b); (2) bifurcated DOAH Case Number 18-6768RX, so that the parties could proceed on MB Doral's existing rule challenge; and (3) ordered the Department to provide the undersigned with a status report within 30 days.¹

¹ The undersigned conducted a final hearing on MB Doral's existing rule challenge, and issued a Final Order on February 21, 2019, that concluded that rule 61A-4.020 was a valid

Thereafter, the Department provided six separate status reports on the proposed rulemaking for rule 61A-4.020, spanning a period of time between February through October 2019. In its Sixth Status Report on Proposed Rulemaking for Rule 61A-4.020, Florida Administrative Code, filed October 11, 2019, the Department indicated the amendments to rule 61A-4.020, which included promulgating ABT Form 6017, would become effective October 16, 2019. On October 24, 2019, the undersigned entered an Order to Show Cause, noting that a new version of rule 61A-4.020 became effective on October 16, 2019, that promulgated ABT Form 6017, and ordering the parties to show cause why the undersigned should not dismiss MB Doral's remaining unadopted rule challenge. After reviewing MB Doral's response to the Order to Show Cause, the undersigned, on November 6, 2019, entered an Order Dismissing Unadopted Rule Challenge and Retaining Jurisdiction, which dismissed MB Doral's remaining unadopted rule challenge, and retained jurisdiction to consider a request for attorneys' fees and costs pursuant to section 120.595(4)(b).

MB Doral then filed a Motion for Award of Attorneys' Fees and Costs on December 3, 2019, and on December 10, 2019, the Department filed its Response in Opposition to Petitioner's Motion for an Order Awarding Attorneys' Fees and Costs. The undersigned thereafter noticed this matter for final hearing for February 21, 2020. On February 11, 2020, the Department filed a Notice of Filing of Joint Stipulation for Attorneys' Fees and Costs (Joint Stipulation). The Joint Stipulation includes the following: "The parties jointly request entry of an order directing Respondent to pay Petitioner the sum of \$7,500.00 (SEVEN THOUSAND FIVE HUNDRED AND 00/100 DOLLARS) in attorneys' fees and costs[.]"

exercise of delegated legislative authority. M.B. Doral has appealed the Final Order to the First District Court of Appeal, Case Number 1D19-0820, which remains pending.

The Division opened this separate “fee” case for the purpose of addressing attorneys’ fees and costs. The undersigned issues this Final Order based on the Joint Stipulation, which renders a hearing unnecessary.

FINDINGS OF FACT

1. On December 21, 2018, Petitioner MB Doral filed a Petition Challenging Validity of Existing Rule 61A-4.020 and Determination Regarding Unadopted Rule, in DOAH Case Number 18-6768RX.

2. On January 25, 2019, the undersigned entered an Order Granting Respondent’s Motion to Bifurcate and Stay Proceedings, which stayed MB Doral’s unadopted rule challenge pending the proposed rulemaking that would promulgate ABT Form 6017.

3. On October 16, 2019, amendments to rule 61A-4.020 became effective, which promulgated ABT Form 6017.

4. On November 6, 2019, the undersigned entered an Order Dismissing Unadopted Rule Challenge and Retaining Jurisdiction, which dismissed MB Doral’s remaining unadopted rule challenge and retained jurisdiction to consider a request for attorneys’ fees and costs, pursuant to section 120.595(4)(b).

5. On December 3, 2019, MB Doral filed a Motion for Attorneys’ Fees and Costs (Motion), seeking an award of attorneys’ fees and costs incurred in the unadopted rule challenge pursuant to section 120.595(4)(b). The Motion alleges that MB Doral advised the Department, in writing on at least seven occasions prior to filing the rule challenge petition, and beginning on May 19, 2015, that the Department’s failure to adopt ABT Form 6017 constituted an unadopted rule. The Motion also alleges that the Department did not file a notice of rulemaking until January 28, 2019. The Motion further alleges that the Department has never alleged that the federal government required ABT Form 6017 to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

6. On December 10, 2019, the Department filed its Response in Opposition to Petitioner's Motion for an Order Awarding Attorneys' Fees and Costs.

7. On February 11, 2020, the Department filed a Notice of Filing Joint Stipulation for Attorneys' Fees and Costs, which included the Joint Stipulation for Attorneys' Fees and Costs.

8. The Joint Stipulation states that the Department agrees to the entry of a final order assessing the sum of \$7,500.00 for attorneys' fees and costs in the unadopted rule challenge, which the undersigned bifurcated from the existing rule challenge in DOAH Case No. 18-6768RX, which is currently pending before the First District Court of Appeal in Case Number 1D19-0820.

9. The Joint Stipulation further states that the parties agree that this Final Order should direct the Department to seek immediate approval for payment within 30 days of this Final Order, and that the undersigned retains jurisdiction to enforce the terms of this Final Order.

CONCLUSIONS OF LAW

10. The Division has jurisdiction over the parties and subject matter pursuant to section 120.595.

11. MB Doral seeks attorneys' fees and costs in the bifurcated unadopted rule challenge pursuant to section 120.595(4)(b), which provides:

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves to

the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph ... shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7). An award of attorney's fees as provided by this paragraph may not exceed \$50,000.

12. Based on the Joint Stipulation, MB Doral and the Department have agreed to resolve the issue of entitlement and amount of attorneys' fees and costs as alleged in the Motion.

13. Neither the Joint Stipulation, nor this Final Order, shall have any effect or relevance regarding the February 21, 2019, Final Order entered in the existing rule challenge in DOAH Case No. 18-6768RX, which is currently pending before the First District Court of Appeal in Case Number 1D19-0820.

14. Based on the findings above, and the Joint Stipulation, the undersigned assesses the sum of \$7,500, in attorneys' fees and costs in the unadopted rule challenge, which the undersigned bifurcated from the existing rule challenge, against the Department, to be paid to MB Doral within 30 days of the date of this Final Order, in accordance with the Joint Stipulation.

ORDER

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

A. Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, shall pay Petitioner, M.B. Doral,

LLC, d/b/a MartiniBar, the sum of \$7,500.00, made payable directly to M.B. Doral, LLC, and provided to M.B. Doral, LLC, in care of Greenspoon Marder, P.A.

B. Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, shall seek immediate approval of payment, and shall render payment within 30 days of the date of this Final Order.

DONE AND ENTERED this 26th day of February, 2020, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2020.

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.