

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

Case No. 20-1360PL

vs.

ROBERT K. LEE,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in Tallahassee, Florida, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings (“DOAH”), on September 18, 2020.

APPEARANCES

For Petitioner: Allan J. Charles, Esquire
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For Respondent: Robert Kevin Lee, pro se
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STATEMENT OF THE ISSUES

The issues are whether Respondent committed the violations alleged in Petitioner's Second Amended Administrative Complaint; and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

The Department of Agriculture and Consumer Services ("the Department") issued an Amended Administrative Complaint on November 14, 2019, alleging that Robert K. Lee ("Mr. Lee") violated the following provisions of the Florida Administrative Code on approximately August 23, 2019¹: (1) rule 5L-1.007(2) by failing to affix a harvester tag to containers of shellstock before leaving the harvesting location; (2) rule 5L-1.008(7) by failing to timely deliver oysters to a certified processing facility; and (3) rules 5L-1.008(5)(a) and 5L-3.007(8)(c) by harvesting and replanting wild shellfish stock on submerged lands leased from the Board of Trustees of the Internal Improvement Trust Fund. The Department's Amended Administrative Complaint also alleged that Mr. Lee failed to sort and wash shellfish as required by Aquaculture Best Management Practices when he attempted to transport oysters to a private residence for those purposes rather than sorting and washing the oysters over his lease or at a certified processing facility.

Mr. Lee requested a formal administrative hearing, and the Department referred this matter to DOAH on March 16, 2020. The undersigned issued a notice on March 30, 2020, scheduling the final hearing for June 24, 2020. In order to accommodate Mr. Lee's circumstances, the final hearing was

¹ Unless stated otherwise, all statutory references shall be to the 2019 version of the Florida Statutes. In disciplinary proceedings such as the instant case, a tribunal applies the statutes and rules that were in effect during the conduct at issue. *Childers v. Dep't of Envtl. Prot.*, 696 So. 2d 962, 964 (Fla. 1st DCA 1997).

scheduled outside the 30 to 70 day window during which final hearings are normally scheduled.

After convening a telephonic status conference on June 17, 2020, the undersigned issued an Order on June 19, 2020, continuing the final hearing to July 20, 2020, because Mr. Lee needed more time to prepare for the final hearing.

On July 15, 2020, the Department filed a Motion to Amend seeking to add a fifth count to its Amended Administrative Complaint. Specifically, the Department wished to further allege that Mr. Lee was adjudicated guilty on June 15, 2017, of the criminal offenses of possessing untagged oysters in violation of section 597.0041(4), Florida Statutes, and rule 5L-3.007(8)(c)9. The Department also requested that the final hearing scheduled for July 20, 2020, be continued.

Via an Order issued on July 17, 2020, the undersigned granted the Department's Motion to Amend and specified that the instant case would henceforth proceed based on the Department's Second Amended Administrative Complaint. The aforementioned Order also canceled the final hearing and gave the parties until July 22, 2020, to provide mutual dates of availability for a rescheduled final hearing.

On July 22, 2020, the undersigned issued an Order rescheduling the final hearing for September 18, 2020.

The final hearing proceeded as scheduled. The Department presented testimony from Charles Culpepper, III, Mr. Lee, and Officer David Travis of

the Florida Fish and Wildlife Conservation Commission. The Department introduced Exhibits A through G² into evidence.

Mr. Lee testified on his own behalf and did not introduce any exhibits into evidence.

The Transcript from the final hearing was filed on October 6, 2020. Both parties filed proposed recommended orders that were considering in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, the record as a whole, the stipulated facts, and matters subject to official recognition, the following Findings of Fact are made:

The Parties and the Events of August 24, 2019

1. The Department is the state agency charged with encouraging the development of aquaculture³ in Florida. § 597.003(1), Fla. Stat. “When any qualified person desires to lease a part of the bottom, water column, or bed of any [state waters] for the purpose of growing oysters or clams . . . , he or she shall present to [the Department] a written application” § 597.010(1), Fla. Stat.

2. Mr. Lee and his father, Robert J. Lee, jointly hold Aquaculture Certificate of Registration No. AQ1529074. On January 5, 2016, they applied to the Department for a state owned submerged land aquaculture lease in the

² Petitioner’s Exhibit G is a flash drive containing video footage of Officer Travis’s traffic stop and subsequent arrest of Mr. Lee.

³ Section 597.0015(1), defines “aquaculture” as “the cultivation of aquatic organisms.” Section 597.0015(3), defines “aquaculture products” as “aquatic organisms and any product derived from aquatic organisms that are owned and propagated, grown, or produced under controlled conditions.”

vicinity of Alligator Harbor in Franklin County, Florida. The lease was to be used for the commercial cultivation of oysters and clams.

3. The Department issued a ten-year lease, Sovereignty Submerged Land Aquaculture Lease No. 19-AQ-1465, to Mr. Lee and his father on February 3, 2016. One provision therein required the lessee to be bound by the current and future versions of the Florida Statutes and the Florida Administrative Code. Another provision stated that a violation of chapter 597 and/or chapter 5L-1 “may be cause for this lease to be terminated without further notice to the lessee and shall result in the forfeiture to lessor of the works, improvements, and shellfish in and upon the leased premises.”

4. On June 15, 2017, Mr. Lee pled nolo contendere to several charges filed in Franklin County, Florida. Two of the aforementioned charges pertained to the criminal offenses of possessing untagged and undersized oysters, and Mr. Lee was adjudicated guilty of all charges.

5. At approximately 3:00 a.m., on August 24, 2019, Officer David Travis of the Florida Fish and Wildlife Conservation Commission was on patrol in Carrabelle, Florida, and traveling west on US-98, 25 miles from Alligator Harbor. He observed a Chevrolet Tahoe pulling a boat⁴ that had no trailer lights. A Ford Fusion was closely following the Tahoe. Officer Travis then made a U-turn in order to initiate a traffic stop based on the lack of trailer lights and the failure of both vehicles to use their blinkers prior to making two turns. Mr. Lee was driving the Fusion, and a friend of Mr. Lee’s was driving the Tahoe.

6. Upon inspecting the boat, Officer Travis saw four untagged baskets, one blue and three orange. The blue basket was completely full with at least 40

⁴ The boat was registered to Mr. Lee’s father.

pounds of uncultured⁵ oysters. The orange baskets were approximately the same size as the blue basket, and two of the orange baskets were at least 75 percent full with uncultured oysters. The third orange basket contained 15 to 20 culled oysters.

7. The boat and the contents therein were wet. Officer Travis found multiple pairs of wet gloves and one pair of wet socks inside a yellow oyster sack at the boat's stern. At the bow, he found several casting nets that were soaking wet and containing fresh grass, mud, sand, and live crustaceans. Officer Travis also found a mullet in a cooler that appeared to have been recently caught.

8. During an inspection of the Tahoe, Officer Travis found a large, white cooler with a large quantity of culled oysters in a bed of ice. According to Mr. Lee, those oysters were harvested from his Alligator Harbor lease on August 22, 2019, and were intended for personal consumption.

9. Mr. Lee told Officer Travis during the traffic stop that he had taken the oysters described in paragraph 6 from his lease in Alligator Harbor on August 23, 2019, between 10:00 a.m. and 6:00 p.m. Mr. Lee further stated to Officer Travis that he had transported the oysters at issue to his girlfriend's house in Carrabelle where he had begun to cull some of them. According to Mr. Lee, he and his girlfriend had gotten into an argument, and Mr. Lee decided to take the oysters to his father's home in order to finish culling them. Mr. Lee and his friend were supposedly driving to Robert J. Lee's home when Officer Travis pulled them over.

10. Officer Travis arrested Mr. Lee and his friend.

Ultimate Findings

11. Count I of the Department's Second Amended Administrative Complaint alleges that Mr. Lee violated rule 5L-1.007(2) on approximately

⁵ Wild oysters commonly grow together in clumps. "Culling" refers to the process by which wild oysters are separated from each other. The term can also encompass the cleaning, grading, and sorting of oysters.

August 23, 2019, by failing to label containers holding oysters. Neither Officer Travis's arrest report nor his testimony mentioned any tags on the baskets in the boat or the cooler in the Tahoe. Also, no tags are visible during the footage from Officer Travis's body camera. While Mr. Lee testified that he had a bulk tag that applied to all of the containers at issue, the undersigned does not find Mr. Lee's testimony to be credible. Accordingly, the Department proved Count I by clear and convincing evidence.

12. Count II of the Department's Second Amended Administrative Complaint alleges that Mr. Lee failed to timely deliver oysters to a certified processing facility on approximately August 23, 2019, as required by rule 5L-1.008(7). The aforementioned rule requires that "shellfish shall be harvested between sunrise and sunset as established by the U.S. Weather Service." As noted above, Officer Travis observed that the contents inside the boat were wet and fresh, and that evidence convincingly undermines Mr. Lee's assertion that the oysters at issue were harvested on August 23, 2019, prior to 6:00 p.m. While Mr. Lee asserted that the oysters in question were intended for personal consumption rather than for sale, that assertion is undermined by the large number of oysters Officer Travis observed in the boat during the August 24, 2019, traffic stop. Therefore, the Department proved Count II by clear and convincing evidence.

13. Count III of the Department's Second Amended Administrative Complaint alleges that Mr. Lee violated rule 5L-3.004 on approximately August 23, 2019, by attempting to transport oysters to a private residence for sorting and washing rather than performing those activities over his lease. As noted above, Officer Travis observed a large quantity of unculled oysters during the traffic stop. Those oysters had not been sorted and washed over Mr. Lee's lease. Also, the allegation in Count III is consistent with what Mr. Lee told Officer Travis during the traffic stop. Accordingly, the Department proved Count III by clear and convincing evidence.

14. Count IV of the Department's Second Amended Administrative Complaint alleges that Mr. Lee violated rules 5L-1.008(5)(a) and 5L-3.007(8)(c) in December of 2018 by harvesting and replanting wild shellfish stock on the submerged lands of his lease. However, the Department presented no clear and convincing evidence that Mr. Lee violated rules 5L-1.008(5)(a) and 5L-3.007(8)(c).

15. Count V of the Department's Second Amended Administrative Complaint alleges that Mr. Lee was convicted on June 15, 2017, of possessing untagged oysters in violation of section 597.0041(4). As noted above, Mr. Lee was adjudicated guilty on June 15, 2017, of possessing untagged and undersized oysters. The Department thus proved Count V by clear and convincing evidence.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1), Florida Statutes.

17. The Department is required to prove the allegations in its Second Amended Administrative Complaint by clear and convincing evidence. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

18. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The court in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), stated that:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence

must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

The First District Court of Appeal has followed the *Slomowitz* test and added the interpretive comment that “[a]lthough this standard of proof may be met where the evidence is in conflict . . . it seems to preclude evidence that is ambiguous.” *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

19. The Department alleges in Count I of the Second Amended Administrative Complaint that Mr. Lee violated rule 5L-1.007(2) on approximately August 23, 2019, by failing to label each container of oysters. The aforementioned rule requires, in pertinent part, that “[e]ach commercial harvester or each shellfish processor shall affix a durable, waterproof tag of minimal size – 1 5/8 by 5 1/4 inches – to each container of shellstock . . . regardless of capacity of container”

20. As for Count II of the Second Amended Administrative Complaint, the Department alleges that Mr. Lee failed to timely deliver oysters to a certified processing facility on approximately August 23, 2019, as required by rule 5L-1.008(7). The aforementioned rule requires that “shellfish shall be harvested between sunrise and sunset as established by the U.S. Weather Service. All shellfish shall be delivered, same day of harvest, by the harvester directly to a certified shellfish processing facility.”

21. In Count III of the Second Amended Administrative Complaint, the Department alleges that Mr. Lee violated rule 5L-3.004 on approximately August 23, 2019, by attempting to transport oysters to a private residence for sorting and washing rather than performing those activities over his lease. Rule 5L-3.004 incorporates the November 2016 version of the Aquaculture Best Management Practices Manual (“the Manual”) by reference. The pertinent portion of the Manual provides that “sorting or washing of shellfish

may be performed by the aquaculturist over his lease (approved waters) or at a certified shellfish processing facility.”

22. The Department alleges in Count IV that Mr. Lee violated rules 5L-1.008(5)(a) and 5L-3.007(8)(c) in December of 2018 by harvesting and replanting wild shellfish stock on the submerged lands of his lease. The former rule mandates that “[a]qualcultured shellfish are the only shellfish allowed to be replanted/resubmerged.” The latter rule prohibits “commingling wild and aquaculture products.”

23. Count V of the Second Amended Administrative Complaint alleges that Mr. Lee was convicted on June 15, 2017, of possessing untagged and undersized oysters in violation of section 597.0041(4). The aforementioned statute provides that “[a]ny person who violates any provision of s. 597.010 or s. 597.020, or any rule adopted under those sections, commits a misdemeanor of the second degree . . .” Rule 5L-3.007(8)(c)9. subjects a certificate holder to discipline for failing “to properly tag aquacultured shellfish pursuant to Rule Chapter 5L-1, F.A.C.”

24. As noted above, the Department presented clear and convincing evidence that Mr. Lee committed the violations alleged in Counts I through III and V in the Second Amended Administrative Complaint. However, the Department presented no clear and convincing evidence that Mr. Lee violated rules 5L-1.008(5)(a) and 5L-3.007(8)(c) as alleged in Count IV of the Second Amended Administrative Complaint.

25. With regard to the penalty or penalties that should be imposed on Mr. Lee, section 597.0041(2)(a) states that:

[a] person who violates this chapter or any rule adopted under this chapter is subject to a suspension or revocation of his or her certificate of registration or license under this chapter. [The Department] may, in lieu of or in addition to the suspension or revocation, impose on the violator an administrative fine in the Class I category

pursuant to s. 570.971 for each violation, for each day the violation exists.

26. Section 570.971(1)(a), Florida Statutes, provides that the Department may impose a fine not to exceed \$1,000 for each violation in the Class I category. Also, rule 5L-3.007 implements section 597.0041 and provides that “[a]ny person who violates any provision of Chapter 597, F.S., or Rule Chapter 5L-3, F.A.C. . . . is subject to a suspension or revocation of his or her certificate of registration.”

27. A provision in Mr. Lee’s lease states that a violation of chapter 597 and/or chapter 5L-1 “may be cause for this lease to be terminated without further notice to the lessee and shall result in the forfeiture to lessor of the works, improvements, and shellfish in and upon the leased premises.”

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department impose a cumulative fine of \$4,000.00 (\$1,000.00 each) for Counts I through III and V. The undersigned also recommends that Aquaculture Certificate of Registration No. AQ1529074, jointly held by Mr. Lee and his father, be revoked. Finally, the undersigned recommends that Sovereignty Submerged Land Aquaculture Lease No. 19-AQ-1465 be terminated with Mr. Lee forfeiting all works, improvements, and shellfish in and upon the lease premises.⁶

⁶ Mr. Lee argued that his father’s interest in the Certificate of Registration and the lease at Alligator Harbor should not be extinguished because his father had no involvement with Mr. Lee’s violations. However, Mr. Lee offered no authority to support his argument, and the undersigned’s independent research did not find anything to support Mr. Lee’s position.

DONE AND ENTERED this 20th day of November, 2020, in Tallahassee,
Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
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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.