

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) CASE NO. 89-1096
)
OCEAN DRIVE HOTEL CORPORATION,)
d/b/a OCEAN HAVEN RESTAURANT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on March 7, 1989, at Miami, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances for the parties at the hearing were as follows:

APPEARANCES

For Petitioner: Katherine A. Emrich, Esquire
Assistant General Counsel
Department of Business Regulation
The Johns Building
725 South Bronough Street
Tallahassee, Florida 32399-1000

For Respondent: Gino P. Negretti, Esquire
44 West Flagler Street
Miami, Florida 33130

ISSUES AND INTRODUCTION

This is a case in which the Petitioner seeks to suspend, revoke, and/or take other disciplinary action against the Respondent's alcoholic beverage license. The primary grounds for the proposed disciplinary action are that the licensee has permitted patrons on the licensed premises to sell cocaine on numerous occasions in violation of various statutory provisions. The specific allegations are set forth in a Notice To Show Cause dated February 27, 1989.

An Emergency Order Of Suspension was served on the Respondent on February 27, 1989. The Respondent requested an emergency hearing, which was conducted on March 7, 1989. Both parties offered evidence at the hearing. Following the hearing the parties requested and were allowed until March 17, 1989, within which to file their proposed recommended orders. The Petitioner filed a timely proposed recommended order. The Respondent has not filed any post-hearing documents. The proposed findings of fact submitted by the Petitioner are specifically addressed in the appendix to this recommended order.

FINDINGS OF FACT

Based on the stipulations of the parties and on the evidence received at the final hearing, I make the following findings of fact:

1. The Respondent, Ocean Drive Hotel Corporation, d/b/a/ Ocean Haven Restaurant, is the holder of Alcoholic Beverage License Number 23-3568, Series 2-COP, for a licensed premises known as Ocean Haven Restaurant, which is located at 155 Ocean Drive, Miami Beach, Dade County, Florida.

2. The licensed premises are located in a neighborhood which is somewhat less than wholesome; a neighborhood in which there is a substantial amount of illegal drug related activity. It is a neighborhood in which it is not uncommon for police officers to observe people who have been previously arrested for drug violations.

3. The Respondent corporation owns the licensed premises, as well as the hotel premises of which the licensed premises are a part. The Respondent corporation is owned by Mr. Heriberto Velasco. Mr. Velasco is the president of the Respondent corporation and he is the manager of both the hotel and the restaurant businesses. Mr. Velasco lives in the hotel with his wife, his mother, and one of his sons. Mr. Velasco takes most of his meals in the restaurant which comprises the licensed premises, and usually visits the licensed premises at least three times a day for that purpose. There is no evidence that he regularly spends any other time supervising activities in the restaurant.

4. There are four employees in the restaurant that comprises the licensed premises. Two of those employees are Gloria E. Berlioz and Antonia Rodriguez de Alcina. The latter is also known by the name of Nora. Ms. Berlioz and Ms. Alcina have both been employees on the licensed premises for a year or two. Ms. Alcina is employed as a waitress. Ms. Berlioz is employed as a cook.

5. During the course of an undercover investigation during the months of January and February of 1989, the following transactions involving controlled substances took place within the licensed premises:

(a) On January 10, 1989, a patron known as Loraine sold cocaine to Investigator Huguet.

(b) On January 18, 1989, a patron named Roberto Cantero sold cocaine to Investigator Huguet.

(c) On January 19, 1989, an unknown white Latin male patron sold cocaine to a patron named Tommy.

(d) On January 25, 1989, a patron named Roberto Cantero again sold cocaine to Investigator Huguet.

(e) On January 26, 1989, an unknown Latin male patron sold cocaine to Investigator Huguet.

(f) On February 6, 1989, a patron named Roberto Cantero again sold cocaine to Investigator Huguet.

(g) On February 7, 1989, a patron named Roberto Cantero again sold cocaine to Investigator Huguet.

(h) On February 10, 1989, a patron named Roberto Cantero again sold cocaine to Investigator Huguet in two separate transactions.

(i) On February 10, 1989, a patron named Roberto Cantero also sold cocaine to Investigator Lerra.

(j) On February 17, 1989, a patron named Roberto Cantero again sold cocaine to Investigator Huguet, in two separate transactions.

(k) On February 17, 1989, a patron named Roberto Cantero also delivered cocaine to an unknown white male patron.

(l) On February 22, 1989, a patron named Roberto Cantero again sold cocaine to Investigator Huguet.

6. During the course of the vast majority of the drug transactions described in the preceding paragraph, the people involved in the transactions discussed the subject of drug transactions in normal conversational tones of voice. During the majority of those conversations, either Ms. Berlioz or Ms. Alcina was standing close enough to have heard the conversations. During some of the conversations, Ms. Berlioz or Ms. Alcina was standing immediately on the other side of the lunch counter, within two or three feet from the conversations.

7. During the course of the vast majority of the drug transactions described in Paragraph 5, above, the drugs involved in the transactions were openly displayed on the table top or on the counter top in front of the participants to the transactions. In each of the transactions involving purchases by Investigator Huguet, the investigator attempted to be obvious about what he was doing by holding the drugs in front of his face to inspect them before putting the drugs in his pocket. During the vast majority of those transactions, Ms. Berlioz or Ms. Alcina was standing close enough to have observed the transactions. During some of the transactions, Ms. Berlioz or Ms. Alcina was standing immediately on the other side of the lunch counter within two or three feet from the drug transactions. One of the drug transactions took place while Mr. Heriberto Velasco was standing several feet away.

8. All of the drug transactions described in Paragraph 5, above, took place within the licensed premises during business hours when employees and patrons were present on the licensed premises. None of the employees ever called the police or asked any of the parties to the drug transactions to leave the licensed premises.

9. Mr. Heriberto Velasco was aware that the licensed premises are located in a neighborhood in which there is a high level of illegal drug activity. Nevertheless, he did not take any special precautions to prevent or detect drug activity on the licensed premises other than to tell the employees to let him know if they saw any drug activity. Mr. Heriberto Velasco has never asked the Division of Alcoholic Beverages and Tobacco for assistance or suggestions with respect to preventing or eliminating drug activity on the licensed premises, even though the Division of Alcoholic Beverages and Tobacco advises all licensees of the availability of such assistance.

10. Mr. Heriberto Velasco did not have actual knowledge that drug transactions were taking place on the licensed premises. He is opposed to drug trafficking and he has not knowingly permitted sales of drugs in his hotel or on the licensed premises. He has instructed his employees in the hotel and in the restaurant to call him if they observe any drug related activity so that he can throw out anyone involved in such activity. He has thrown people out of the hotel when he suspected they were involved in drug related activities. The employees in the licensed premises never told him about any drug related activity on the premises. Mr. Velasco never observed any activity on the licensed premises that he thought was drug related activity. Mr. Velasco does not know what crack cocaine looks like.

11. Mr. Eric Velasco is the 20-year-old son of Mr. Heriberto Velasco. The son lives at the hotel with his parents and helps with the management of the hotel and restaurant to the extent he can between going to college and working at another near-by job. Mr. Eric Velasco has never observed any activity in the licensed premises that appeared to him to be drug related activity. He does not know what crack cocaine looks like.

12. In brief summary, the vast majority of the drug transactions described in Paragraph 5, above, took place in plain view within the licensed premises. The open exchanges of drugs and money in conjunction with the open conversations about drug transactions demonstrate a persistent pattern of open and flagrant drug activity. The subject drug transactions were sufficiently open that they would have been noticed by a reasonably diligent licensee.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and on the applicable legal principles, I make the following conclusions of law:

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

14. Section 561.29(1), Florida Statutes, authorizes the Division of Alcoholic Beverages and Tobacco to revoke or suspend a beverage license upon a showing of:

(a) Violation by the licensee or his or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment, of any of the laws of this state or of the United States, or violation of any municipal or county regulation in regard to the hours of sale, service, or consumption of alcoholic beverages, or engaging in or permitting disorderly conduct on the licensed premises, or permitting another on the licensed premises to violate any of the laws of this state or of the United States; ...

(b) Violation by the licensee or, if a corporation, by any officers thereof, of any laws of this state or any state

or territory of the United States.

(c) Maintaining a nuisance on the licensed premises.

15. Section 823.10, Florida Statutes, declares a place or building where controlled substances are illegally kept, sold, or used, to be a nuisance. Section 893.13(2)(a)5, Florida Statutes, makes it unlawful for any person:

To keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

16. Cocaine is a controlled substance. It is a violation of state law to sell, use, deliver, or possess cocaine. Sec. 893.13, Fla. Stat.

17. In the recommended order in Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Alejandrine Mora and Felix Aristides, d/b/a/ Las Tunas Market and Cafeteria, DOAH Case Nos. 88-1604 and 88-1608 (RO issued 4/29/88), with regard to facts remarkably similar to the facts in this case, the Hearing Officer concluded:

The proof is clear and convincing that patrons of the licensed premises possessed, sold, and delivered controlled substances on the licensed premises in violation of the law. In the instant case, the violations of law were so numerous and flagrant as to compel the conclusion that respondents fostered, condoned or negligently overlooked them. Lash, Inc. v. State, Department of Business Regulation, 411 So.2d 276 (Fla. 3d DCA 1982), and Pauline v. Lee, 147 So.2d 359 (Fla. 2d DCA 1962). Under such circumstances, the evidence supports the revocation of respondents' licenses.

18. The same conclusion is warranted by the evidence in this case. The repeated and flagrant violation of the drug laws on the licensed premises in this case gives rise to a presumption that such activity was at least negligently overlooked by the licensee.

RECOMMENDATION

On the basis of all of the foregoing, it is recommended that the Division of Alcoholic Beverages and Tobacco enter a final order in this case revoking the Respondent's alcoholic beverage license number 23-3568, series 2-COP, for the premises located at 155 Ocean Drive, Miami Beach, Dade County, Florida.

DONE AND ENTERED this 19th day of April, 1988, at Tallahassee, Florida.

MICHAEL M. PARRISH
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 1988.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 88-1096

The following are my specific rulings on all of the proposed findings of fact submitted by all parties.

Findings proposed by Petitioner

Paragraph 1: Accepted.

Paragraph 2: Rejected as subordinate and unnecessary details.

Paragraph 3: Rejected as constituting subordinate and unnecessary details.

Further, some details proposed in this paragraph are not supported by clear and convincing evidence.

Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19: Accepted in substance, with many subordinate and unnecessary details omitted.

Paragraph 20: Rejected as irrelevant.

Paragraph 21: Accepted in substance.

Findings proposed by Respondent

(None)

COPIES FURNISHED:

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