

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS)
REGULATION, DIVISION OF ALCOHOLIC)
BEVERAGES AND TOBACCO,)
)
Petitioner,)
)
vs.) CASE NO. 91-7901
)
3673 BIRD, INC., d/b/a UNCLE)
CHARLIE'S,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on December 11, 1991, at Miami, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances for the parties were as follows:

APPEARANCES

For Petitioner: Nancy C. Waller, Esquire
Department of Business Regulation
The Johns Building
725 South Bronough Street
Tallahassee, Florida 32399-1007

For Respondent: Louis J. Terminello, Esquire
950 South Miami Avenue
Miami, Florida 33130

and

Sy Chadroff, Esquire
2700 S.W. 37th Avenue
Miami, Florida 33133

STATEMENT OF THE ISSUES

This is a license discipline case in which the Division of Alcoholic Beverages and Tobacco seeks to suspend, revoke, and otherwise take disciplinary action against the Respondent and its license on the basis of allegations that the Respondent has violated Section 561.29(1)(a), Florida Statutes, by permitting patrons to engage in illegal activities on the licensed premises and by allowing the licensed premises to be used for the illegal keeping, selling, or delivery of controlled substances. The Respondent contends that no disciplinary action should be taken because the Respondent has qualified as a "responsible vendor," and has taken reasonable steps to attempt to prevent the conduct complained of in the Notice To Show Cause.

PRELIMINARY STATEMENT

On December 6, 1991, the Respondent was served with an Emergency Order of Suspension, by means of which the Respondent's license was suspended. At the same time, the Respondent was served with a nineteen count Notice To Show Cause charging the Respondent with being in violation of Section 561.29(1)(a), Florida Statutes, and proposing to suspend, revoke, and otherwise discipline the Respondent and its license. The Respondent was offered and requested an emergency hearing on an expedited basis. A formal evidentiary hearing was held on December 11, 1991, at which time all parties were afforded an opportunity to present evidence and argument. The Petitioner presented the testimony of several witnesses, primarily law enforcement officers who described their activities and observations during the course of an undercover narcotics investigation at the licensed premises. The Petitioner also offered several exhibits which were received in evidence. The Respondent presented the testimony of several witnesses, including the owner of the licensed corporation, and employees who testified primarily as to the licensee's efforts to prevent illegal drug activity on the licensed premises and as to the absence of any observation by the employees of any illegal drug activity on the licensed premises. Following the presentation of the Respondent's evidence, the Petitioner sought to present rebuttal evidence by means of the testimony of an additional witness. Objection to the rebuttal testimony was sustained.

At the conclusion of the hearing, the Respondent requested that the normal deadline for proposed recommended orders be shortened. The parties were allowed seven days within which to file their proposed recommended orders. On December 18, 1991, both parties filed timely proposed recommended orders containing proposed findings of fact and conclusions of law. The parties' proposals have been carefully considered during the preparation of this Recommended Order. Specific rulings on all proposed findings of fact submitted by all parties are contained in the attached Appendix.

FINDINGS OF FACT

1. At all times relevant and material to this proceeding, a corporation named 3673 Bird, Inc. (hereinafter referred to as "the Respondent corporation"), has been the holder of alcoholic beverage license number 23-01224, series 4-COP, for licensed premises known as Uncle Charlie's, which premises are located at 3673 Bird Road, Miami, Dade County, Florida.

2. The Respondent is owned by Robert Sloate, who is also the sole officer of the Respondent corporation. Mr. Sloate does not take an active part in the day-to-day management of the licensed premises. Mr. Sloate makes only rare or occasional visits to the licensed premises. During November of 1991 and during the first few days of December of 1991, Mr. Sloate was hardly ever on the licensed premises. Mr. Sloate did not have personal knowledge of the events described in Paragraphs 5, 6, and 7 of these Findings of Fact.

3. The business of the licensed premises is managed by a group of four managers. The Respondent corporation has a total of twenty-six employees, including the four managers. The Respondent corporation has performed the actions necessary to qualify as a "responsible vendor" within the meaning of Section 561.705, Florida Statutes, as amended by Chapter 91-60, Laws of Florida. 1/ Those actions include training and instruction sessions for managers and employees, meetings of employees, and the posting of signs to discourage underage sales and illegal activity involving controlled substances.

4. The licensed premises were also equipped with TV cameras that cover both doors, the front bar, and the back bar. However, the TV cameras do not make a tape recording of what they cover, and there is no evidence that the TV monitors are watched by employees of the Respondent corporation on any regular basis.

5. During the course of an undercover investigation that began on or about November 13, 1991, and continued until the licensed premises were raided on December 6, 1991, the following transactions involving controlled substances took place within the licensed premises:

(a) On or about November 14, 1991, a patron known as Mark sold two baggies, each containing approximately one-half gram of cocaine, to a confidential informant who was cooperating with the undercover investigation. 2/

(b) On or about November 14, 1991, a patron known as Gus sold cocaine to a confidential informant who was cooperating with the undercover investigation.

(c) On or about November 14, 1991, a patron known as Mark sold cocaine to Detective Bales.

(d) On or about November 15, 1991, a patron known as Sergio sold cocaine to Detective Rivera.

(e) On or about November 15, 1991, a patron known as Clint sold cocaine to Agent Lopez.

(f) On or about November 15, 1991, a patron known as Sergio sold cocaine to Detective Bales.

(g) On or about November 15, 1991, a patron known as Mark sold cocaine to Detective Bales.

(h) On or about November 15, 1991, a patron known as Mike sold cocaine to Detective Rivera.

(i) On or about November 15, 1991, a patron known as Sergio sold cocaine to Agent Lopez.

(j) On or about November 15, 1991, a patron known as Mike sold cocaine to Detective Fernandez.

(k) On or about November 21, 1991, a patron known as Sergio sold cocaine to Detective Bales.

(l) On or about November 21, 1991, a patron known as Sergio sold cocaine to a confidential informant who was cooperating with the undercover investigation.

(m) On or about November 22, 1991, a patron known as Sergio sold cocaine to Agent Lopez.

(n) Or or about November 22, 1991, a patron known as Wesley sold cocaine to Detective Bales.

(o) On or about November 22, 1991, a patron known as David sold cocaine to a confidential informant who was cooperating with the undercover investigation.

(p) On or about November 22, 1991, a patron known as Clint sold cocaine to Agent Lopez.

(q) On or about December 4, 1991, a patron known as Clint sold cocaine to Agent Lopez.

(r) On or about December 4, 1991, a patron known as Charles Garcia sold cocaine to Detectives Villanueva and Feria.

6. The vast majority of the drug transactions described in the preceding paragraph were conducted in an open and casual manner, with no effort by either party to conceal the transaction. Most of the drug transactions described above took place when the licensed premises were quite crowded and noisy, which would have made it difficult for some of the transactions to be noticed by employees of the Respondent corporation. However, many of the transactions took place near employees of the Respondent corporation, and from the open nature of the transactions, it should have been obvious to the employees of the Respondent corporation what was going on.

7. The flagrant nature of the illegal drug transactions taking place in the licensed premises during the period of the undercover investigation is illustrated by the following:

(a) The patron Sergio, who made several sales of cocaine to the undercover police officers and to the confidential informant, was so flagrant about his illegal activities that he carried a tambourine with him and would shake the tambourine to advise all who were interested that he had cocaine available for sale. At least one of the managers was aware of Sergio's tambourine shaking, because he testified that it annoyed him. It was obvious to anyone who troubled to look that Sergio was dealing in something, because after he shook his tambourine there would be several people who would approach him, hand him money, and receive from him small plastic baggies containing white powder. Sergio's cocaine sale activity was so casual that on at least one occasion he took a twenty dollar bill and delivered a baggie containing cocaine without even being specifically asked for cocaine. The casual nature of Sergio's activity is also indicated by the fact that he was not concerned about being asked for cocaine in the presence of two other people, and he carried numerous baggies of cocaine in his pockets.

(b) The patron Charles Garcia attempted to promote the ingestion of cocaine inside the licensed premises after he delivered cocaine to Detectives Villanueva and Feria.

(c) The undercover police officers observed numerous transactions during which a patron would approach another patron, deliver money to the other patron, and then receive a small plastic baggie from the person who took the money. These observations included the observation of numerous such transactions involving Sergio (the tambourine man) and several involving the patron known as Mike.

(d) On one occasion during the investigation, Detective Rivera observed a patron exiting the restroom with white powder beneath his nose.

(e) When Detectives Villanueva and Fiera were purchasing cocaine from Charles Garcia on December 4, 1991, a patron named Ray asked Detective Fiera to join him in the restroom. In the restroom, Ray ingested a white powder that appeared to be cocaine in front of both Detective Fiera and the restroom attendant.

8. All of the drug transactions described in Paragraphs 5, 6, and 7 of these Findings of Fact 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. The Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, and the Metro-Dade Police Department executed a raid on December 6, 1991, at the licensed premises. After the raid was completed, thirty-four packets of unclaimed cocaine were found on the floor, as were several pills and several packets of marijuana. An unclaimed pen knife with cocaine on the tip was also found.

10. On the night of the raid, one of the bartenders tossed a baggie of cocaine over the bar. That bartender was arrested for possession of cocaine.

11. On the night of the raid, Sergio was found to be in possession of three baggies of cocaine, as well as other controlled substances.

12. The investigative expenses incurred in the course of the undercover investigation of the Respondent corporation's premises totaled one thousand one hundred forty-eight dollars (\$1,148.00).

13. In brief summary, the vast majority of the drug transactions described in Paragraphs 5, 6, and 7 of these Findings of Fact, took place in plain view. The open exchanges of drugs and money, the casualness with which those selling drugs on the licensed premises went about their business, and the frequency of the drug transactions, all demonstrate a pattern of flagrant, persistent, repeated, and recurring violations. The nature and frequency of the subject drug transactions were such that they would have been noticed by a reasonably diligent licensee.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See Section 120.57, Florida Statutes.

15. Section 561.29, reads as follows, in pertinent part:

(1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing 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, or 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; except that whether or not the licensee or his or its agents, officers, servants, or employees have been convicted in any criminal court of any violation as set forth in this paragraph shall not be considered in proceedings before the division for suspension or revocation of a license except as permitted by chapter 92 or the rules of evidence.

(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.

16. Section 823.10, Florida Statutes, provides as follows with respect to places where illegal activity involving controlled substances takes place:

Any store, shop, warehouse, dwelling house, building, vehicle, ship, boat, vessel, or aircraft, or any place whatever which is visited by persons for the purpose of unlawfully using any substance controlled under chapter 893 or any drugs as described in chapter 499, or which is used for the illegal keeping, selling, or delivering of the same, shall be deemed a public nuisance. No person shall keep or maintain such public nuisance or aid and abet another in keeping or maintaining such public nuisance.

17. Section 893.13(2)(a), Florida Statutes, reads as follows:

(2)(a) It is unlawful for any person:

* * *

5. 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.

18. Cocaine is a controlled substance. It is a violation of state law to sell, use, deliver, or possess cocaine. See Section 892.13, Florida Statutes.

19. 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 April 29, 1988), the Hearing Officer concluded, on the basis of facts remarkably similar to the facts in this case:

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.

The above-quoted conclusion from the Mora and Aristides case was also quoted with approval and followed in Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Ocean Drive Hotel Corporation, d/b/a Ocean Haven Restaurant, DOAH Case No. 89-1096 (RO issued April 19, 1989). The facts in the Ocean Drive Hotel case are also remarkably similar to the facts in this case.

20. Here, as in the two cases cited in the preceding paragraph, the flagrant, persistent, repeated, and recurring violations of the drug laws on the licensed premises give rise to a presumption that such activity was at least negligently overlooked by the licensee, if not actually fostered and condoned. Normally, such negligence warrants revocation of the license, but here the Respondent corporation argues that because it has complied with the responsible vendor statute it is insulated from suspension or revocation of its license. In this regard, Section 561.706, Florida Statutes, as amended by Chapter 91-60, Laws of Florida, provides that the license of a vendor who has qualified as a responsible vendor may not be suspended or revoked.

. . . for an employee's engaging in or permitting others to engage in the illegal sale, use of, or trafficking in controlled substances, if the employee had completed the applicable training prescribed by this act prior to committing such violation, unless the vendor had knowledge of the violation, should have known about such violation, or participated in or committed such violation. No vendor may use as a defense to suspension or revocation the fact that he was absent from the licensed premises at the time a violation of the Beverage Law occurred if the violations are flagrant, persistent, repeated, or recurring. (emphasis added)

21. In this case, as found in the findings of fact, the violations on the licensed premises were so flagrant, persistent, repeated, and recurring that the Respondent corporation, through its owner, should have known of the violations.

And as also found in the findings of fact, the owner was only rarely and occasionally on the licensed premises. Accordingly, Section 561.706, Florida Statutes, as amended by Chapter 91-60, Laws of Florida, does not protect the licensee in this case from suspension or revocation.

RECOMMENDATION

On the basis of all of the foregoing, it is recommended that the Division of Alcoholic Beverages issue a final order in this case revoking the Respondent corporation's alcoholic beverage license number 23-01224, series 4-COP, for the premises located at 3763 Bird Road, Miami, Dade County, Florida, and imposing an administrative fine in the total amount of \$18,000.00.

RECOMMENDED in Tallahassee, Leon County, Florida, this 24th day of December 1991.

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 24th
day of December 1991.

ENDNOTES

1/ Although the Respondent corporation has provided the courses of instruction and training required by Section 561.705, and has posted the required signs, the greater weight of the evidence is to the effect that the managers and employees were merely paying lip service to the requirements of the responsible vendor statute, and were not seriously committed to trying to detect and prevent illegal possession, transfer, or use of controlled substances on the licensed premises.

2/ Unless otherwise indicated, all sales of cocaine described in these findings of fact involved the sale of approximately one-half gram of cocaine delivered in a small plastic baggie.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 91-7901

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

Findings proposed by the Petitioner

Paragraph 1: Accepted.

Paragraphs 2 through 19: Accepted in substance, but with many details omitted as subordinate and unnecessary in view of the ultimate finding that the traffic

in controlled substances on the licensed premises was blatant, flagrant, and frequent.

Paragraph 20: First sentence is accepted. Second sentence is rejected because the "snorting" noise could have been caused by other activity that was not illegal. Last two sentences rejected as irrelevant.

Paragraphs 21 and 22: Rejected as subordinate and unnecessary details in view of other findings.

Paragraphs 23 through 25: Accepted in substance.

Paragraph 26: First sentence accepted. Second sentence rejected as somewhat exaggerated.

Paragraph 27: Rejected as subordinate and unnecessary details in view of other findings.

Paragraphs 28 and 29: Accepted in substance.

Paragraph 30: Rejected as subordinate and unnecessary details in view of other findings.

Paragraphs 31 through 34: Accepted in substance.

Paragraph 35: Rejected as not supported by persuasive evidence that the employee referred to "Sergio" as the "dope" man.

Paragraphs 36 through 38: Accepted in substance.

Paragraph 39: Rejected as subordinate and unnecessary details.

Paragraph 40: Accepted in substance.

Paragraphs 41 and 42: Rejected as irrelevant to issues in this case.

Paragraph 43: Rejected as not supported by competent substantial evidence.

Findings proposed by the Respondent

Paragraph 1: Accepted.

Paragraph 2: Accepted in substance, with some additional clarifying findings.

Paragraphs 3, 4, and 5: Rejected as constituting procedural details, rather than proposed findings of fact, but included in substance in the Statement of the Issues and the Preliminary Statement.

Paragraph 6(a): Accepted in substance.

Paragraph 6(b): First sentence accepted. Second sentence rejected as contrary to the greater weight of the evidence. The police officers involved in the undercover investigation observed numerous other narcotics transactions.

Paragraphs 6(c), (d), (e), and (f): Accepted in substance.

Paragraph 6(g): Rejected as contrary to the greater weight of the evidence.

Paragraph 6(h): Accepted in substance.

Paragraph 6(i): Rejected as irrelevant to the issues in this case.

Paragraph 6(j): First sentence accepted in substance. Second sentence rejected as not supported by persuasive evidence and as contrary to the greater weight of the evidence.

Paragraphs 6(k) and (l): Accepted in substance.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.