

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF ALCOHOLIC BEVERAGES)	
AND TOBACCO,)	
)	
Petitioner,)	
vs.)	CASE NO. 94-4695
)	
HOLLY HILL AERIE #4033 FOE INC.)	
d/b/a FRATERNAL ORDER OF EAGLES)	
#4033,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Daniel M. Kilbride, held a formal hearing in this cause at Tallahassee, Florida, with video conferencing from Orlando, Florida, on December 1, 1994. The following appearances were entered:

APPEARANCES

For Petitioner:	John F. Gilroy, Esquire Assistant General Counsel Department of Business and Professional Regulation 1940 North Monroe Street Tallahassee, Florida 32399-1007
For Respondent:	Michael Dukeshier Post Office Box 821 Holly Hill, Florida 32117 Designated non-attorney representative

STATEMENT OF THE ISSUES

Whether Respondent was deficient in reporting and remitting alcoholic beverage surcharges required for the audit period July 1, 1990 through October 31, 1993.

PRELIMINARY STATEMENT

By a one count Notice to Show Cause, dated April 4, 1994, against Respondent the Division alleged underpayment of the alcoholic beverage surcharge tax resulting in a liability of \$14,691.79 and a penalty of \$3,672.96, constituting a violation of Section 561.501, Florida Statutes. Respondent indicated there were no disputed issues of material fact and requested an informal hearing. It was subsequently determined that disputed issues of fact did exist and the matter was referred to the Division of Administrative Hearings

for a formal hearing on August 23, 1994. On September 13, 1994, this matter was transferred to the undersigned Hearing Officer and set for hearing.

At the hearing, the parties submitted a Pre-Hearing Stipulation containing nine stipulated findings of fact as well as the statements of the parties' positions.

Petitioner contends that the stated surcharge and penalty liability was accurately determined by a Division audit, and that the total liability is owed by Respondent. Respondent has stipulated that the Division's audit accurately states the difference between the gallonage sold as reported by the Respondent and the inventory depleted by Respondent during the audit period. Respondent therefore does not contest the actual audit figures, but contends that the Division's actions in auditing Respondent by an inventory depletion method after Respondent had chosen to report on a sales method are in violation of the law. Respondent contends that the difference between the gallonage reported and the gallonage determined by audit to have been "sold" is attributable to: 1. overpouring beverages; 2. complimentary drinks provided to Eagles' members; and 3. theft.

Petitioner presented the pre-hearing stipulation as its only exhibit, and offered the testimony of Richard Schlusemeyer, an auditor with the Division. Respondent offered three exhibits which were accepted into evidence, and presented the testimony of Michael Dukeshier, Secretary of Respondent's fraternal organization.

A transcript was not prepared. Petitioner submitted a proposed recommended order on December 12, 1994. Respondent has not submitted proposed findings of fact. My specific rulings on Petitioner's proposals are found in the Appendix attached hereto.

FINDINGS OF FACT

1. Respondent is Fraternal Order of Eagles #4033, whose address is 615 Ridgewood Ave., Holly Hill, Fl. 32117 and holds license number 74-01574, Series 11C from the Division.

2. The Division of Alcoholic Beverages and Tobacco had adopted rules which allow licensees to submit monthly surcharge reports based on either a "sales method" or a "purchase method," both of which are defined in Rule 61A-4.063(4), F.A.C.

3. The purchase method is described as taxing the alcoholic beverages as they come in the door, and the sales method as taxing them as they go out the door. The only significant difference between the two is that current inventory is not subject to tax under the sales method until it is actually sold. Otherwise, the sales depletion method of auditing is applied similarly under either method of reporting.

4. On or about January, 1994, the Division conducted an audit of Respondent's records to determine alcoholic beverage surcharge payment compliance during the period July 1, 1990 through October 31, 1993. The audit method used is commonly referred to a "inventory depletion," or "sales depletion."

5. Respondent selected the sales method of reporting surcharges due, and timely submitted a surcharge report and payment during each month of the audit period.

6. Respondent's reports are based on cash register records which indicate the number of units of each type of beverage sold, i.e., mixed drink, beer or wine by the glass.

7. Respondent's surcharge reports calculated gallonage of liquor based upon a factor of one ounce per drink.

8. Respondent did not maintain records of any "complimentary" drinks served.

9. Respondent did not file any police or casualty reports regarding alcoholic beverages which it contends are attributable to theft during the audit period.

10. The Eagles' well ordered weekly sales records understate the amount of alcoholic beverages sold, due primarily to the existence of overpouring, wherein the actual amount of liquor sold exceeds the one ounce per drink estimate relied upon by Respondent in compiling its monthly reports.

11. Respondent did not conduct an internal audit to determine whether its sales records were accurate, or take some other significant action over the 39 months of the audit period to attempt to determine whether its primary assumption of one ounce per drink was accurately reflecting actual sales.

12. Respondent's cash register tapes comprise an estimate of the amount of gallonage actually sold.

13. The Division made no representations to Respondent which it might reasonably have relied in expecting that the accuracy of its monthly estimates of gallonage used, based on a one ounce per drink assumption, would not be subject to confirmation by audit.

14. Respondent presented only anecdotal evidence to attempt to explain the admitted discrepancy between the actual gallonage used and the estimates contained in its sales tapes. The contention that some portion of the gallonage deficiency was attributable to pilferage by Eagles members or others, and an unspecified quantity of complimentary drinks for members or others, was not supported by any competent records or other evidence.

15. The deficiency for Respondent Holly Hill Eagles represents thirty nine and eight tenths percent (39.8 percent) of the total surcharge paid during the audit period, which was \$36,861.97.

16. Since the completion of this audit and filing of the administrative action, Respondent has adjusted its assumption to reflect an administrative sale of one and a quarter (1.25) ounces per drink served. Respondent did not, however, present any evidence as to whether that assumption is any more accurate than the previous assumption.

17. Based on this audit methodology, a surcharge liability of \$14,691.83 exists.

18. Respondent was aware of the Division's rule providing that surcharges are calculated based upon gallonage of alcoholic beverages sold, which states:

If the vendor chooses the sales method, the vendor will bear the burden of proof that the method used accurately reflects actual sales.

19. The surcharge deficiency determined by the Division to be owed in this case includes consideration of all applicable allowances, including spillage allowance of ten percent (10 percent) for draft beer and liquor, and five percent (5 percent) for all other alcoholic beverage products, which was applied and credited at the time of audit prior to stating the amounts owed.

20. Based on this surcharge liability, the applicable penalty is \$3,672.96.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Section 120.57(1), Florida Statutes (1994).

22. This is not a case of first impression before the Division of Administrative Hearings or the Division of Alcoholic Beverages and Tobacco. In Division of Administrative Hearings consolidated Cases Nos. 93-0322 and 93-0329, DABT v. Southeast Central, Inc. d/b/a The Pirates Den Seafood Cafe, and DABT v. Central Restaurants, Inc. d/b/a The Seafood Place, Final Order dated September 1993, the Division applied the sales depletion audit method to a licensee/respondent reporting by the sales method. The audit procedures applied by the Division in the instant case are the same in all relevant respects as those applied in the above cases.

23. Section 561.501, Florida Statutes (1991), imposes a surcharge on beer, wine and liquor ". . . sold at retail for consumption on premises licensed by the division as an alcoholic beverage vendor."

24. "Sale" and "sell" are defined in Section 561.01(9), Florida Statutes (1991), to ". . . mean any transfer of an alcoholic beverage for consideration, any gift of an alcoholic beverage in connection with, or as a part of, a transfer of property other than an alcoholic beverage for a consideration, or the serving of an alcoholic beverage by a club licensed under the beverage law." "Sale" as used in Section 561.501, Florida Statutes, shall occur at the serving of any alcoholic beverage for consumption on premises. Rule 61A-4.063(1)(b), F.A.C.

25. Emergency Rule 7AER90-5, effective on July 1, 1990, contained provisions for election of surcharge payment methods, spillage allowances, and definitions of the terms "purchase" and "sale." The rule also required vendors to maintain records for three years and made suggestions on what type of records may be used to determine sales, as well as other reporting requirements, and provided that the vendor will bear the burden of proof that its method of reporting accurately reflects actual sales, which requirement was carried forward into the current rule, as cited above. The emergency rule satisfied the requirements in Section 561.501, F.S., that ". . . [t]he division shall establish, by rule, the required reporting, collection, and accounting procedures."

26. Rule 7A-4.063, Florida Administrative Code, is also consistent with the requirements in Chapter 561. This Rule became effective on January 15, 1991. Respondent has not identified any provision of these rules which support its contention that the Division acted unlawfully by auditing Respondent's surcharge account by a sales depletion method after having allowed Respondent to submit reports based on a sales method. Respondent's contention that it was misled by the Division in this regard is not supported by the evidence.

27. Respondent kept records of units of alcoholic beverages, particularly liquor drinks sold, but failed to take any adequate steps to insure that its recordkeeping was accurately reflecting actual sales. It would be irrational and ineffective for the Division to ultimately rely on a licensee's sales records, stated simply in units sold, and based upon an assumption adopted unilaterally by the licensee that each drink contained no more than one ounce of liquor. This is particularly true when the licensee's assumptions have been acknowledged by the licensee to understate actual sales, and the only factual dispute is the extent of that understatement.

28. The issue is not whether the licensee accurately counted in units the number of drinks which were rung up at its cash register, or whether those totals were accurately and timely reported to the Division on a monthly basis. The law provides for surcharge liability to be determined based upon actual volumes in ounces, converted to gallonages for reporting purposes. Respondent failed to accurately report its actual sales by a factor of close to 40 percent.

29. Respondent's sales records do not disprove either the accuracy of the audit or the propriety of the procedures used. Respondent failed to meet its burden to either document that the audit method was inappropriate or that the method was not correctly administered.

30. Respondent asserts that the surcharge would not be applied to stolen inventory. It is not contested that the surcharge would not apply to alcoholic beverages found missing as a result of theft, as provided for in Rule 61A-4.063(7), F.A.C. However, Respondent did not present any evidence of theft. If the Respondent wishes to account for unreported alcoholic beverages by claiming that they were stolen, it is not unreasonable to require that they produce documentation to establish a bona fide report of such theft or loss. Without such a report, the unpaid surcharge cannot be excused on that basis. It is not the Petitioner's burden to prove or explain what happened to the unreported alcoholic beverages.

31. Failure to report and remit surcharges, pursuant to Section 561.501, F.S., results in a \$250 civil penalty if the account is current at the time. Section 561.501(1), F.S., requires the Division to ". . . assess a late penalty of up to \$10 per day or 1 percent of the amount due per day for each day after the 20th of the month, whichever is greater." The Division may impose a civil penalty not exceeding \$1,000 for violations arising from a single transaction. Section 561.29(3), F.S. Failure to pay the civil penalty shall result in a suspension for such period of time as the division may specify. Section 561.29(3), Florida Statutes.

32. The Division exercised its discretion in choosing the method or system of auditing which would be used, and absent a showing that the Division's exercise of authority was beyond the intent of the legislative mandate in the enabling statute, or a showing that the decision was arbitrary and capricious, the Division's decision must be respected. *Grove Isle, Ltd., v. Florida Department of Environmental Regulation*, 454 So.2d 571 (Fla. 1st DCA 1984). It

was not demonstrated at the hearing that the sales depletion method of auditing was beyond the scope of the Division's powers relevant to surcharge or that the audit method was arbitrary or capricious or even unreasonable.

33. Petitioner presented clear and convincing proof that the Respondent, Holly Hill Eagles, underreported its surcharge liability by \$14,691.79 during the period July 1, 1990 through October 31, 1993, contrary to Section 561.501, F.S., and as alleged in the Notice to Show Cause, and on that basis is subject to a penalty of \$3,672.96.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Respondent Holly Hill Eagles be ordered to pay overdue surcharges in the amount of \$14,691.83 and a penalty of \$3,672.96, and a civil penalty of \$250.00 suspended upon payment of the surcharge and penalty within 90 days of the entry of a Final Order in this matter.

DONE AND ENTERED this 31th day of January, 1995, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
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 31th day of January, 1995.

APPENDIX

Petitioner's Proposed findings of facts.

Accepted in substance: paragraphs 1-20

Respondent did not submit proposed findings of fact.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the 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 consult with the agency that will issue the final order in this case concerning their 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.