

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) CASE NO. 94-5882
)
MCKOWN'S, INC., d/b/a THE CABIN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case in Tampa, Florida on April 5 and 6, 1995, before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard D. Courtemanche, Esquire
Department of Business and
Professional Regulation, Division
of Alcoholic Beverages and Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-1020

For Respondent: J. Thomas Wright, Esquire
2508 Tampa Bay Boulevard, Suite A
Tampa, Florida 33607

STATEMENT OF THE ISSUES

The issue for consideration in this hearing is whether Respondent's beverage license, Series 14BC, No. 39-03729, should be disciplined because of the matters outlined in the Notice to Show Cause filed herein.

PRELIMINARY MATTERS

By Notice To Show Cause in this case dated September 27, 1994, made a part of and served simultaneous with an Emergency Order of Suspension of even date on Respondent, the Respondent was charged by the Department of Business and Professional Regulation's Division of Alcoholic Beverages and Tobacco, (Division), with eight counts alleging various violations of Section 561.29(1), Florida Statutes, by (1) allowing a patron on the premises to possess, sell or deliver cocaine, (2) unlawfully keeping a place used for the possession, sale or delivery of cocaine, (3) permitting employees to possess, sell or deliver cocaine on the premises, (4) maintaining a nuisance on the premises, and (5)

unlawfully selling alcoholic beverages in a manner not permitted by the license. Respondent thereafter demanded formal hearing on the allegations and this hearing ensued.

At the hearing, Petitioner presented the testimony of Captain Bruce E. Ashley, District Supervisor for the Petitioner's Tampa District office; Jennifer Lynn Akins, currently an investigator with the State Fire Marshall's office and formerly a special agent with the Division; Ashley Murray and George W. Miller, special agents with the Division; Corporal Raymond C. Koenig, a member of the Florida Highway Patrol's K-9 Division; James B. Silbert, a crime laboratory analyst supervisor with the Florida Department of Law Enforcement's Tampa Regional Crime Lab; Debra Caplinger, an agent trainee with the Division; and Sergeant Woodrow Allen Ray, a supervising agent with the Division. Petitioner also introduced Petitioner's Exhibits 1 through 3, and 5 through 7. Petitioner's Exhibit 4 was offered but not admitted.

Respondent presented the testimony of George Leal, Kathryn Katz and Byron Lee Bailey, formerly employees at The Cabin; Duncan McKown, Secretary-Treasurer of McKown's Inc., the license holder; and Marco Zonni, Guido Tiozzo, Eddie Caballero, James P. Rainey, Angelo Puccinello, Dr. Jeffry S. Poritz, and David W. Queen, all long-standing patrons of The Cabin and friends of Mr. McKown.

A transcript of the proceedings was provided. Subsequent to the hearing, only counsel for the Petitioner submitted Proposed Findings of Fact which have been ruled upon in the Appendix to this Recommended Order. However, counsel for Respondent submitted comments on the facts and law and his analysis of the sufficiency of proof which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Division was the state agency responsible for the licensing of establishments for the dispensing and sale of alcoholic beverages and enforcement of the beverage laws of the State of Florida. McKown's, Inc., a corporation whose sole stockholders are Duncan and Gloria McKown, holds 14ABC license number 39-03729, located at The Cabin, an establishment situated at 8205 North Dale Mabry Highway in Tampa.

2. This license is a license to operate a bottle club on the premises, and allows patrons to bring their own bottles into the club to drink from. Patrons may either bring their bottle each time they come, or they may leave it at the club to be used each time they visit. Patrons must drink from their own bottle or as the guest of another bottle holder, but cannot buy alcoholic drinks from the licensed establishment. The establishment may sell only ice, setups and food - no alcohol.

3. Mr. McKown is Secretary-Treasurer of McKown's, Inc., the licensee in issue here. He has been in the restaurant and service business since 1937. He opened a large restaurant and lounge in Dunedin, Florida in the early 1960's, and opened The Cabin approximately fifteen years ago with a county bottle club license. When state licensure became required, approximately three years ago, he secured one of those as well.

4. Mr. McKown claims he was open every day from 2 to 7 AM. His clientele was mostly made up of people in the service industry - people who work at night and get off early in the morning. These are people such as waitresses, cooks, restaurant and bar managers. Many of his patrons work at or manage high quality

restaurants, and the interior of The Cabin is decorated with T-shirts from many of them. He believes that as a general rule, his clientele is of good quality and is law abiding.

5. The Cabin is made up of one building and a patio. It has one front door, which is manned by a security guard, and there is a sign posted on the inside of the front door which indicates the facility is a private club, non-members of which must pay a service charge. Though it once was private, it is now open to anyone of legal age. If the door is closed, an individual approaching from the outside can not see the sign. Security is designed to keep out minors and to insure that persons admitted have a bottle with them or already inside. The two Messrs. Bailey are the security guards. They wear uniforms similar to those worn by law enforcement people and carry firearms. McKown claims this is because a firearm was discharged on the premises some time ago and the guards' firearms and uniforms tend to dissuade drunks.

6. Many companies have bottles for their employees. It is Mr. McKown's policy, which he believes is consistent with state law, that two or more people can come into a bottle club and drink from one bottle. It is also a practice of his to allow people to leave their bottles on the premises for future use.

7. Many of his customers are repeat customers who are recognized by security and other employees. If the patron is known to the security guard, he or she might not be checked. Each entrance requires the payment of a \$7.00 service fee which authorizes the patron two setup chips. When the patron comes in with a bottle, the cashier puts the patron's name on it using a role of waterproof tape on which is marked the name in color-coded pen, depending on what month it is. Bottles are discarded after three months, whether empty or not. Once a bottle is brought in and given to the bartender, it is kept on the service island behind the bar.

8. At one time, the licensee maintained a membership list. The practice was abandoned when it was decided to seek patrons from the service industry. The inside of the bar is lighted but dark. Music is provided by a jukebox which plays continuously. If patrons do not put money in, the machine comes on automatically after twelve minutes, and the volume is loud, though Akins did not think so. There are speakers both at the jukebox and in the ceiling.

9. The men's room has one stall and two urinals. Mr. McKown removed the door to the stall to keep illegal activity, such as drug sales or homosexual activity, from going on inside. By removing the door, he can readily check to determine that nothing improper is going on inside the stall. The ladies' room has two stalls with cafe doors. He put that type of door in at the same time he removed the men's stall door for the same reason. Both restrooms are to be checked periodically by the manager, by Mr. McKown or the cashiers, as available.

10. The Cabin is busier on weekends than during the week and the staff is adjusted accordingly. On the weekends, there are two cashiers as opposed to one during the week. By the same token, on the weekend, three bartenders are on duty as opposed to two during the week. A maintenance man is also employed.

11. At all times pertinent to the issues herein, Special Agent Jennifer Akins was a special agent with the Division and had been since December, 1989. She was a certified law enforcement officer and, prior to May, 1994, had been involved in between fifteen and twenty undercover operations, of which at least ten involved narcotics. She was trained in the identification of narcotics and

street level narcotics activities by the Drug Enforcement Agency, and has taken other professional courses in the subject. Prior to the institution of this undercover operation, Akins had been in The Cabin four or five times. S/A Murray is also an experienced agent with twenty-five to thirty undercover investigations to her credit. At least half involved narcotics. She, too, had been at The Cabin prior to the onset of this investigation.

12. On January 12, 1994 Akins went to The Cabin where she was stopped outside the door by the security guard, Mr. Bailey. He advised her it was a bottle club and inquired if she had a bottle. When she said she had, he also told her that her name would be placed on it and it would be kept behind the bar and drunk from when she was there. She gave over the bottle of rum she had brought. She was not required to fill out an application form nor to pay a membership fee.

13. Akins went back to The Cabin with S/A Murray at approximately 5:15 AM on May 10, 1994. They were met at the door by Mr. Bailey and paid a \$7.00 per person cover charge to Mr. Sparks, an employee, who was stationed inside the door. This cover charge entitled them to two drink chips which they would exchange for setups. Additional chips could be bought at \$3.50 each. Once inside, they gave their bottle of rum to Mr. Sparks who, after placing a piece of tape with Murray's name on it on the bottle, gave it to the bartender. Akins asked where the bottle of rum was she had brought in on January 12, 1994, and was told it was gone. Bottles are disposed of after ninety days if not consumed first. Consequently, the only bottle the agents had on May 10, 1994 was the bottle they brought that visit.

14. That night, Akins and Murray sat at the bar and were served one or two drinks each from the bottle they had brought in. Later on that evening, Akins was served a drink made with vodka by Mr. Strauss, a bartender. Akins saw Strauss make the drink and knows he did not use the bottle they brought in. Besides, when she tasted it, she recognized it was vodka, not rum. She paid for the drink with one of the chips she got upon entering. She drank only a small part of the drink in order to comply with Division policy that undercover agents will not drink enough to become impaired.

15. Akins and Murray left The Cabin about 6:50 AM without taking the rum bottle they had brought, but while there, Akins observed a white male she recognized as Victor near the women's restroom talking with a white couple. Victor received money from the male in the couple, counted it, and gave the man something in return. This procedure is consistent with what she had observed in other drug transactions. Later on that evening, she again saw Victor near the men's restroom. Victor approached a black male who, after entering and exiting the restroom, handed Victor a small package and received something in return. While this was going on, both were furtively looking around. Akins didn't see what was transferred. Even later, Akins saw Victor exchange something with a black male near the front door. Again, she could not see what it was. S/A Murray also observed this activity and it appeared to be drug activity to her as well.

16. Akins and Murray went back to The Cabin about 5:00 AM on May 11, 1994. As they approached the door they were met by two employees who let them in, and they paid a white female cashier upon entry. On this occasion they did not have a bottle with them. When asked, they said they had a bottle there from the previous visit and were allowed in. Akins ordered two or three drinks from Mr. Sparks, who was behind the bar that evening. The first drink she had was rum, but she does not know from which bottle it was poured. She later ordered a

vodka drink which Sparks poured without asking if she had a vodka bottle there. She paid for the vodka with a chip.

17. Later that evening, Mr. Leal, also an employee of The Cabin, offered her a drink. He had called out that the police were outside and that everyone had to stay inside. He sweetened the call by saying he would buy a drink for everyone. At this time, Akins asked for a Zambuca, which they did not have, and they gave her Amaretto instead. Though she saw Mr. Sparks make the drink, she could not tell if there was a name on the bottle or not. Leal offered Murray a drink as well. All this time, Mr. McKown, whom she knew, was present in the facility, going in and out from the back office talking to people. He had done this the previous night as well.

18. Akins left the premises at 7:00 AM and returned again at 5:00 AM the following day, May 12, 1994, accompanied by S/A Murray. They did not bring a bottle this time because they had not taken their bottle with them the previous night. They went through the usual routine of passing the guard, who asked what bottle they would be drinking from. When they said they had one inside, the guard went to check and thereafter allowed them. After paying the cover charge, they were admitted.

19. Inside, Akins saw two black males and a white male exchanging something outside the men's restroom. They were looking around and speaking quietly, and she did not see what was exchanged. That evening, she spoke with the Bartender, Lee, and with Mr. McKown. She also spoke with a patron, Mr. LaRuso, who approached her and commented that she was either a cop or seeking cocaine. In response, she said she wasn't a cop.

20. The two agents both ordered rum from the bartender who poured the drinks from a bottle with their name on it. The rum ran out while the drinks were being poured, so the bartender finished pouring from another bottle which was not theirs. Mr. McKown was in and out of the back office all during this period and would stop and talk with patrons. He appeared quite normal and was not drinking at the time.

21. They returned on May 17, 1994 at 5:20 AM. Mr. Bailey was the security guard who admitted them. On this occasion they had a bottle of rum with them and paid the cover charge. Their bottle was marked by the bartender and Akins ordered a drink from him which was made from their bottle. Later on she also ordered and was served a vodka drink by the bartender who did not inquire from whose bottle he should pour it. S/A Murray was also served a vodka. Akins paid for the vodka drink with a chip even though neither she nor Murray had ever brought a bottle of vodka to the establishment.

22. That evening, she spoke with Mr. Sparks, Mr. Mille and Mr. McKown. Sparks and Mille were both employees. Sparks said he had been divorced because he used too much cocaine. Mille said he had been arrested for cocaine. These discussions took place at the bar or at the cashier stand and were carried on in a normal tone of voice.

23. The agents went back to The Cabin on May 24, 1994 at 4:45 AM with a confidential informant, (CI). They were met at the door by a white male who allowed them to enter. When they did, they paid the cover charge to Mr. Sparks. They brought a bottle of scotch with them even though they had previously brought in at least two bottles of rum. At that point, Akins did not know if the last rum bottle they had brought on May 17, 1994 was still there, so they

brought the scotch to be sure they would be admitted. The bottle of scotch was marked and placed behind the bar by Mr. Sparks. Mr. Strauss and a white female were tending bar.

24. Akins approached Strauss who asked if she wanted what she had just brought in or rum instead. When she replied she preferred rum, Strauss went to look for some in the back. When he came back, he said he could find none, but would give her vodka instead. Akins agreed and Strauss made a vodka drink for her. It was, in fact, vodka, and she paid for it. She also had another vodka drink that evening, made for her by Mr. Strauss, who did not use any of the bottles the agents had brought in.

25. Agent Akins, in a conversation with Mr. Sparks that evening, asked him if he had any more cocaine like that which she had purchased on May 17, 1994. This conversation took place near the juke box which was playing, but not loudly. Their conversation was in a normal tone. Strauss walked away after her question and she went up to the cashier's booth and was talking with some people when Sparks returned. He handed her a small package in front of Mr. Bailey and Agent Murray. It consisted of a small cellophane wrapper containing a white powder for which Sparks would not take any money. Akins put the package in her pocket and it was later analyzed at the Florida Department of Law Enforcement, (FDLE), laboratory and determined to be cocaine.

26. After that purchase was made by Akins, the CI purchased a substance from a lady known as Michelle, who Akins described as an employee of The Cabin. Mr. McKown denies this, however, and it is found that she was not an employee. Prior to the purchase, the CI had informed the agents he thought he could make a purchase and Agent Murray searched him before he approached Michelle. Determining he had no cocaine on his person, he was released to make the buy, which he did, on the premises. Michelle gave him a package of a substance, later determined to be cocaine, for which he paid with \$30.00 given him previously by Murray. He then delivered the substance to Murray who in turn gave it to Akins for evaluation. It was later tested and determined to be cocaine.

27. That same evening, Akins also saw three white males in a corner of the bar making what she considered a suspicious transaction. They were looking around and acting furtively. There was a big crowd in the bar that evening - at least 35 people. The lighting was good and Akins had no problem seeing. Mr. McKown was also in and out that evening.

28. The two agents returned to the Cabin on June 27, 1994 at about 3:50 AM. When they arrived, they were met at the door by the security guard who asked them who they were, where they worked, and other similar questions. Akins got the impression that he did not want to let them in even though she had indicated that they had a bottle of scotch inside. While this was going on, Mr. Sparks came out and vouched for them and they were admitted. After paying the cover charge, Akins ordered a scotch. The drink was poured from her bottle by the bartender, Ms. Hart, but she noticed at the time that the bottle was almost empty even though she and Agent Murray had had few drinks from it. Akins paid for the drink with one of her chips. Because Akins did not drink the scotch, she was offered another drink by Ms. Hart and asked for a rum drink. The bottles of rum which she and Murray had brought in on May 10 and 17, 1994, had previously been used up, and she noted that there was no ownership label on the bottle from which her drink, and that for Murray, were poured. In any event, they paid for the drinks and when they tasted them, determined they were made from rum.

29. That same morning, Akins saw a black male enter the bar without paying the cover charge. He bypassed the cashier and went toward the restrooms where he was approached by Mr. Strauss, to whom he passed something and got something in return. At this point, Akins was approximately 12 feet away, and though she could not see what was actually passed, she saw Strauss put what he had received into his pocket. Strauss then went back to the bar and the black male left. Shortly thereafter, Mr. McKown entered the bar. He seemed normal and walked around, talking with his customers. Akins left soon thereafter without taking her bottle of scotch.

30. On July 27, 1994, Akins and Murray arrived at The Cabin at approximately 3:30 AM and were admitted by Mr. Bailey. This time they brought a bottle of rum. The scotch, which they had brought previously, was gone even though neither agent had had more than one or two drinks out of it. At this time, a female bartender asked her what she wanted and Akins ordered a peppermint schnapps. Without any questions regarding whose bottle it should be poured from, the bartender poured the requested drink from a bottle which bore a name that Akins could not see. It was not hers, however. She tasted the drink and found it was, in fact, peppermint schnapps.

31. That same evening, Akins and Murray were approached at the bar by a white female, Ronnie, who asked them to split an 8-ball of cocaine. An 8-ball is one eighth of an ounce. No effort was made by Ronnie to hide her solicitation. In response, Akins said she didn't have any cocaine with her, but if Ronnie could find some, she, Akins, would go in with her. With that, Ronnie spoke with several customers but did not come back that evening. Mr. McKown was present but was not a participant in the conversation. When Akins left the bar that morning, she did not take the bottle of rum she brought in with her.

32. The agents went back to The Cabin on August 9, 1994, at approximately 3:05 AM, and met three men, Beltran, Ramos and Encena, in the parking lot. As the five approached the door, they were met by Bailey and Sparks and were admitted, even though they did not have any alcohol with them. Once inside, Akins ordered from Ms. Hart a tequila drink which was poured from a bottle with no name on it. She had first asked for rum, but all that was available was spiced rum. When she tasted the drink, she found that it was tequila. Later on, she ordered a Kamikaze, which contained vodka, from Ms. Hart. Hart did not ask her whose bottle she should pour it from but poured from a bottle with no name tag on it. The drink was vodka. She paid for both drinks she ordered that evening with chips purchased at the door.

33. During the morning, Akins spoke with Mr. Beltran, one of the men she had come in with, who was a patron at the bar. While they were still outside, however, before entering, Beltran had asked the two agents if they used cocaine. When they replied that they did, he said he would have to go inside to get it. When Akins later spoke with him at the bar, he told her to get her friend and that he had obtained the cocaine. Beltran and Ramos had the two agents follow them outside and to Beltran's car where the substance, later tested and identified as cocaine, was produced by Beltran and Ramos and given to the two agents. After Ramos ingested some of the substance, they went back inside and Akins put the substance she had received into her purse for later testing.

34. After the parties went back inside to the bar, the men were ejected because they annoyed Ms. Hart. Mr. McKown was there at the time. After the men were ejected, Akins and Murray had a discussion with a patron named Guinta who said Akins had white stuff under her nose. Akins wiped her nose and denied the

allegation. Guinta then asked Murray and Akins if they had any cocaine. Akins said she did not but would see if she could get some. She spoke with Mr. Sparks who said he had none available. All this was in a regular tone of voice, and all during this conversation, Mr. McKown was within three to five feet of them. Later on, there was a quite loud conversation between Guinta and another individual about cocaine. Afterwards, the parties went outside to Murray's car where Guinta gave them a substance later tested and identified as cocaine.

35. Both agents went back to The Cabin on August 16, 1994 at approximately 3:30 AM. On this visit they had no alcohol with them. Mr. Bailey was on duty as the security guard and Strauss and Hart were the bartenders. Akins ordered a vodka Kamikaze from Hart. Later on, Hart asked her if she wanted another drink. When Akins agreed, Hart offered to make it with tequila instead of vodka. She made the drink from a bottle not marked with an owner's name, and when Akins tasted the drink, she found it was tequila. Murray also had two rum drinks which were poured from a bottle with no name on it. Akins spoke with Charles Bailey that evening at the bar. She asked him for some cocaine, and he said he could give her a "bump", (a small amount of cocaine), but could not sell her any.

36. Akins and Murray went back to The Cabin on August 26, 1994. On that occasion, again, they had no alcohol with them. The bottle of scotch and the rum they had brought on two separate prior occasions was gone. They met three other patrons outside. Mr. Bailey, the security guard, let them in and after paying the cover charge, Akins spoke with Mr. Mille and thanked him for the cocaine she had received previously from Mr. Guinta. At first Mille seemed confused, but when she explained, he seemed to understand, but denied he had any more available.

37. Akins had several drinks that evening. The first was made with tequila which she got from Ms. Hart. Neither Akins nor Murray had ever brought tequila to the bar. The tag on the bottle said "Killian's", but Akins did not know anyone by that name or where the bottle came from. Nonetheless, she paid for the drink, tasted it, and determined it was tequila. She also had a drink made with Amaretto that evening which she bought from Mr. Strauss. In this case, also, she was served a drink made with a beverage she had not brought in. Murray was served a rum drink from a bottle marked "hooters". She did not work for or know anybody from Hooters.

38. Apparently, that same evening, Akins was looking quite tired as she sat at the bar. She was approached by Julio Pabone who said he could get her something that would wake her up. He then spoke with Mr. Leal, after which he came back to Akins and asked for money. She gave him \$20.00 to add to what he already had, and he returned to Leal, gave him the money, and received a baggy with white powder in it in return. Returning to Akins, Pabone gave the baggy to her. The substance in the bag was later tested and identified as cocaine. Leal is an employee of the licensee. That same evening, Murray saw two women in the restroom use what appeared to her to be cocaine near the sink.

39. On September 9, 1994, the agents again went to The Cabin and were admitted by Charles Bailey. After paying the cover charge, and while sitting at the bar, Akins saw a patron identified as Manuel pull out a wrapper containing a white substance and give it to another male who gave him money in return for it. At the time of this transaction, Mr. McKown was standing approximately five feet away. Later on, a male identified as Julio approached Akins and said he needed \$30.00 for cocaine. She gave him the money and he went into the men's room followed by Leal and another individual. When Julio came out, he gave Akins a

package with white powder in it which was subsequently tested and identified as cocaine. Mr. McKown was present in the bar at the time, but Akins cannot say whether he observed this transaction.

40. On the evening of September 30, 1994, Sergeant Woodrow A. Ray, a longtime employee of the Division, was the supervisor of the raid conducted at The Cabin. When he arrived, he entered the establishment to insure that all other agents were in place. Sometime thereafter, Agent Miller, also a long time employee of the Division, arrived to serve an Emergency Order of Suspension on the licensee. Miller contacted Mr. McKown, read the Search Warrant and the Emergency Order of Suspension to him, and advised him of his rights against self-incrimination. While this was being done, Mr. McKown expressed surprise regarding the narcotics allegations but admitted he may have sold some alcohol. He stated this four times in different ways. He stated, "We may have sold some alcohol but no drugs"; "Maybe my people sold liquor, but I don't know about drugs"; "We sell a few drinks to help the guys, but no drugs"; and "If drugs were sold, I never knew it - maybe drinks but no drugs."

41. Agent Miller helped with the ensuing search, in the course of which he went into the office to seize the license. He also searched the adjoining storage area in which he discovered a black bag. He asked McKown if the bag was his, which McKown denied. McKown indicated that only himself, Mr. Leal, and Charles Bailey had access to this room. Miller then went to get Bailey, who had been detained on the patio, advised him of his rights, and asked if the bag was his. Bailey acknowledged it was. Miller took Bailey back inside where he placed him in a chair under guard. Miller had Bailey identify the bag and when he did, Miller asked if there was anything in it he should know about. Bailey thereafter gave his permission to search the bag. Before the bag was opened, however, Miller had it taken outside to be sniffed by the narcotics detection dog on the scene who alerted on it. Miller then opened the bag, and inside, in an ammunition box, found drug paraphernalia and approximately 98.6 grams of a white powder which was subsequently tested and identified as cocaine.

42. On or about February 4, 1993, Gene Leal, who was the manager of The Cabin, cashed a check there for Julio Pabone in the amount of \$120.00 which was subsequently dishonored. When contacted about this, Pabone agreed to pay off the check in periodic cash payments, and in fact, did so, making a payment of \$20.00 on August 26, 1994. The payment which Leal received on that date was not for cocaine but in repayment of a portion of the dishonored check.

43. Company policy regarding illegal drugs is simple. If seen going on, the activity is to be stopped and the individual expelled from the facility forever. Mr. McKown recalls this as having happened at least six times in the year prior to closing. He claims he has no use for drugs and never has. He has a "no tolerance" policy for any drug activity he knew about, and his employees knew that. This policy is not in writing, however. Mr. McKown has not had any of his employees trained in drug identification, and even though he is aware of the state's responsible vendor program, neither he nor any of his employees have participated in it.

44. Mr. Leal has worked for The Cabin for approximately eight years, as has Mr. Sparks. Both were instructed regarding the company's drug policy. Most of The Cabin employees have been on staff for between eight and fifteen years. Mr. McKown claims he would have periodic meetings with employees to inform them of his policy and to solicit reports of illegal activity. In addition to these instructions, employees are furnished with trespass warning slips which are to

be issued when patrons are expelled for drug use. Two of these were introduced into evidence.

45. Byron L. Bailey, one of the security guards, confirms this. Though usually stationed at the front door, he would make between four and five checks per night of the restrooms to be sure they were not being used for drug activity or for drinking. He did not, however, look to see what was going on in the lounge. Kathryn Katz, also formerly an employee of The Cabin, was instructed in the company's policy when hired. Not only was the use or transfer of drugs prohibited but so was the sale of alcohol. She was told that only those individuals who had a bottle with them or already inside could be admitted. It is possible that some people lied about this, but she had to take their word. If they said they had a bottle inside, she would admit them. She also checked the ladies' restroom periodically.

46. The Cabin welcomes law enforcement officers as patrons. When deputies from the sheriff's office periodically come out and park in the lot of the neighboring Steak and Ale, they are always welcome. Approximately a year prior to the hearing, Mr. McKown was reportedly told that a van was in his lot from which drugs were being sold. He claims he called 911 and an arrest was made. However, over the fifteen years he's operated The Cabin, Mr. McKown claims there has never been an arrest made inside the club.

47. Concerning the "admissions" he made to Agent Miller at the time of the service of the warrant and the Order of Suspension, Mr. McKown was reading a copy of the affidavit as Miller was reading it to him. As he read it, he was shocked to discover that his own people, whom he felt were family, were doing such things. He admits that perhaps his employees made a mistake in selling drinks. He does not condone it and he definitely does not condone any sales of illegal drugs. His admissions were not meant to specific dates or incidents but were rhetorical more than actual. He admitted his employees had the opportunity to sell unlawful drinks. He does not believe, in his heart, however, that they made any drug sales. He is wrong.

48. No bottles of alcohol were seized by law enforcement officials at the time of the raid. Approximately two weeks after the closing, Mr. McKown conducted an inventory of the bottles on the premises. At that time, there were approximately one hundred fifty bottles, all of which, he insists, had patrons' names on them. Of that number, thirty to forty were establishment bottles. The balance were owned by individuals.

49. Several prominent restaurant owners and managers who patronize The Cabin have known Mr. McKown for several years. None has ever observed any illegal drug activity inside the establishment and had they done so, would have left and not returned. Mr. Caballero, a former Tampa City Councilman, has patronized The Cabin since it was opened. Because of his public position, he was very sensitive to any possibility of illegal activity in his presence, and though he would be at the club once or twice a month, never saw any such conduct. All of these individuals claim to be friends of Mr. McKown.

50. Dr. Poritz and Mr. Queen, a chiropractor and private investigator, respectively, have also patronized The Cabin periodically for several years. Neither has ever seen any illegal activity in there. Mr. Queen, while a member of the Tampa Police Department's Narcotics Division, would patronize the establishment periodically and was always comfortable there. Had he seen any illegal activity on the premises, he would taken appropriate action as a law enforcement officer and would have reported what he saw.

51. A previous Administrative Complaint was filed against the Respondent in 1993 for violation of liquor sales laws. At that time, the Respondent and the Division entered into a Consent Agreement which called for Respondent to pay a civil penalty of \$500.00 plus investigative costs of \$14.50, and to provide a letter of corrective action. This letter, dated July 31, 1993, and signed by Mr. McKown and several of his employees, such as Mr. Bailey, Mr. Leal, Mr. Strauss and Ms. Hart, all of whom are referenced in the instant action, indicated the signatories had come up with a good system "to keep people without a bottle from coming in" which should "tighten it up and not break down as it did." From the evidence presented, it appears they were wrong and that their system did not work.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

53. Under the provisions of Section 561.29(1)(a), Florida Statutes, an alcoholic beverage license is subject to suspension or revocation because of violations by the licensee or his employees of any law of the State of Florida or of the United States, or if the licensee permits another, on the licensee's premises, to violate any law of this state or the United States.

54. Section 561.29(1)(c), Florida Statutes, authorizes discipline of an alcoholic beverage license where the licensee maintains a nuisance on the licensed premises. Under the provisions of Section 823.10, Florida Statutes, any store, shop or building which is visited for the purpose of unlawfully using any substance controlled under Chapter 893, or which is used for the illegal keeping, selling or delivery of such substance, is deemed to be a public nuisance. In addition, Section 813.13(2)(a)5, Florida Statutes, makes it unlawful to keep or maintain any store, shop, warehouse, dwelling or building which is resorted to by any persons using controlled substances in violation of Chapter 893. Section 893.13(1)(a), Florida Statutes, makes it unlawful to sell, manufacture, deliver or possess with intent to sell, manufacture, or deliver a controlled substance. Section 893.03, designates cocaine as a controlled substance.

55. In addition, Section 562.12, Florida Statutes, makes it unlawful for a licensee to sell alcoholic beverages except as permitted by his license, or to sell such beverages in any manner except that permitted by his license. In that regard, Rule 61A-3.049, F.A.C., defines the activity permitted under a bottle club license as is held by the licensee here. Subsection (5) of that rule states:

Bottle club licensees may not purchase alcoholic beverages for subsequent resale to patrons nor may they sell alcoholic beverages to patrons.

56. In the instant case, there can be little doubt the licensee, through his employees, sold alcoholic beverages in violation of the Division's rule. The testimony of both Agents Akins and Murray, to the effect that they were repeatedly served alcoholic drinks made of a beverage which they had not brought into the club and provided to the bartender, clearly establishes that the licensee was repeatedly selling alcohol to his patrons. The issue of sale is

clarified by the fact that each drink, from either the agents' bottle, (legitimate), or from house bottles or bottles of other patrons, was paid for by a chip received by the patron upon entry upon the payment of a \$7.00 charge. Even the licensee admits the "possibility" of his employees engaging in this prohibited practice, and the fact that he was present in the club every night and mingled in the bar, and was disciplined for this very practice in the past establishes he was aware of the very real possibility it would happen again. In essence, however, it is clear that the licensee well understood what his employees were doing and condoned it.

57. The issue of the cocaine activity is another matter, however. The evidence is undoubtable that the licensee's employees dealt in cocaine in the establishment. In addition, it is clear that other employees possessed cocaine in the establishment. Further, it is also clear that patrons possessed and dealt in narcotics traffic within the licensed premises. Mr. McKown categorically denied being aware of any of this activity, and for the purposes of this action his protestation is accepted. However, the misconduct was blatant, and there was little evidence to show that Respondent's efforts, through education or dictate, were either substantial or effective.

58. The holder of a liquor license is not an absolute insurer against violations of the law committed by his employees on his premises. However, when it is seen that the misconduct of a licensee's employees is continuing and persistent, the inference may be drawn that the licensee either fostered, condoned or negligently overlooked that misconduct. *Pic N' Save v. Division of Alcoholic Beverages and Tobacco*, 601 So.2d 245, 251-252 (Fla. 1st DCA 1992).

59. Where, as here, there is substantial evidence to show flagrant, persistent and recurring violations, the trier of fact may infer that the licensee failed to supervise the premises in a reasonably diligent manner and, thus, was culpable. *Lash v. Division of Alcoholic Beverages and Tobacco*, 411 So.2d 276 (Fla. 3rd DCA 1982); *Simmons v. Division of Alcoholic Beverages and Tobacco*, 465 So.2d 578, 580 (Fla. 1st DCA 1985). The *Lash* case permits the stated inference to be drawn even where the evidence shows the licensee is absent at the time of the violation. In the instant case, by his own admission, the licensee was present on the premises, even to sleep, at all times it was open. Accepting his protestations that he was unaware of his employees' and patron's drug activity, clearly his failure to notice it and take appropriate steps to curb it constitutes negligence sufficient to support disciplinary action.

60. Adding weight to that conclusion is the fact that the licensee took few, if any, steps to prevent misconduct of the type alleged here. He was aware of the available training programs designed to curb drug activity in public facilities but took no advantage of it. There is no evidence, in fact, of any reasonable and substantial effort being made by the licensee to train his employees or to impress upon them that this activity was unacceptable. The testimony of his employees that the licensee's policy on narcotics was strict and harsh is not persuasive. The testimony of the licensee's friends and associates to the effect that they had never seen narcotics activity on the licensed premises was considered but was not considered determinative of any material issue of fact.

61. The Division seeks to revoke the Respondent's license supporting its proposed action by reference to the penalty guidelines promulgated in Rule 61A-2.022, F.A.C. This rule provides that the penalty for a violation involving the sale of alcohol in a manner not permitted by the license is, in this instance, a

fine of \$1,000. For a violation of Chapter 893, Florida Statutes, the penalty is revocation, as is the penalty for a violation of Section 561.29(1)(c) by maintaining a nuisance on the licensed premises.

62. In this case, the Division has clearly established that for the second time, the licensee sold alcohol in a manner not permitted by his license. It has also established that the licensee maintained a nuisance on the licensed premises, and at least negligently overlooked the fact that employees and patrons possessed and transferred cocaine on the licensed premises. The maximum penalty allowed under the rule, therefore, is revocation of the license and an administrative fine. The imposition of an administrative fine as a part of the Division's action would serve no purpose.

RECOMMENDATION

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

RECOMMENDED that Respondent's alcoholic beverage license No. 39-3729, Series 14BC, be revoked.

RECOMMENDED this 31st day of May, 1995, in Tallahassee, Florida.

ARNOLD H. POLLOCK, 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 31st day of May, 1995.

APPENDIX TO RECOMMENDED ORDER IN CASE NO. 94-5882

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

FOR THE PETITIONER:

1. - 4. Accepted and incorporated herein.
5. Accepted and incorporated herein, except that the evidence indicates the January 12, 1994 visit occurred prior to the commencement of the instant investigation.
6. Accepted and incorporated herein.
7. - 9. Accepted and in substance incorporated herein.
10. & 11. Accepted and in substance incorporated herein.
12. - 14. Accepted and in substance incorporated herein.
15. & 16. Accepted and in substance incorporated herein.
17. - 21. Accepted and in substance incorporated herein.

- 22. - 24. Accepted and in substance incorporated herein.
- 25. & 26. Accepted and in substance incorporated herein.
- 27. - 29. Accepted and in substance incorporated herein.
- 30. & 31. Accepted and in substance incorporated herein.
- 32. - 34. Accepted and in substance incorporated herein.
- 35. - 37. Accepted and in substance incorporated herein.
- 38. Accepted and incorporated herein.
- 39. & 40. Accepted and incorporated herein.
- 41. Accepted but not probative of any material issue.
- 42. Accepted and incorporated herein.
- 43. Accepted and incorporated herein.
- 44. & 45. Accepted and incorporated herein.
- 46. & 47. Accepted.

FOR THE RESPONDENT:

None submitted.

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 consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing

exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.