

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF ALCOHOLIC BEVERAGES AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 97-2228
)
MANOS, INC., d/b/a SEA PORT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to Notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Mary Clark, conducted a formal hearing in the above-styled case on May 24, 2000, in Viera, Brevard County, Florida. The hearing was also conducted by telephone on June 13, 2000, for testimony of a single witness.

APPEARANCES

For Petitioner: James D. Martin, Esquire
Department of Business and
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1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Allen C. D. Scott, II, Esquire
Scott & Sheppard, P.A.
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STATEMENT OF THE ISSUES

The issues for resolution in this proceeding are whether the Respondent committed the violations alleged in an administrative complaint, as amended, and if so, what discipline is appropriate.

PRELIMINARY STATEMENT

On March 31, 1997, Petitioner, Division of Alcoholic Beverages and Tobacco (DABT) issued its 2-count administrative complaint alleging that Respondent, Mano's Inc., doing business as Seaport (Mano's):

(a) on or about September 30, 1996 - February 28, 1997, failed to maintain separate records of all purchases and gross sales of all alcoholic beverages and non-alcoholic beverages and food contrary to Section 61A-3.0141, Florida Administrative Code, and Sections 561.20(2)(a)4. and 561.29, Florida Statutes; and

(b) on or about March 8, 1997, refused to admit authorized law enforcement officers and Division employees into licensed premises while in the lawful performance of their duties, contrary to Sections 562.41(3) and 561.29, Florida Statutes.

After Respondent's request for formal evidentiary hearing, DABT referred the case to the Division of Administrative Hearings where it was assigned to an Administrative Law Judge and was scheduled for hearing. With leave of the Administrative Law Judge and without objection by Respondent, DABT amended its Administrative Complaint in November 1997 to clarify Count 2 and to add a third Count. Count 2 now alleges that on March 8, 1997,

Mano's unlawfully prohibited a Division employee from performing an inspection of the licensed premises, pursuant to Section 561.07, Florida Statutes, contrary to and in violation of Section 562.41(3), within Section 561.29(1), Florida Statutes.

Count 3 alleges that on or about March 8, 1997, Mano's unlawfully obstructed a law enforcement officer in the performance of his duties, contrary to and in violation of Sections 370.021(5)(a), 843.02, and 561.29(1), Florida Statutes.

After several continuances and abeyance the hearing proceeded as described above.

At the hearing, DABT presented the testimony of Sam Brewer and Josh Hooper and offered six exhibits, received in evidence as Petitioner's Exhibits Nos. 1-6.

Respondent presented the testimony of its president and sole corporate officer, Raymond Cascella; David Sargeant; and Jane Davis. Respondent offered 11 exhibits, all of which have been received in evidence with the exception of Exhibit No. 8, rejected and marked for identification only, as irrelevant. Respondent's Exhibit No. 11 was taken under advisement at the hearing. This is videotape from surveillance cameras at Mano's from March 8, 1997, when DABT and other law enforcement officers inspected the premises. The audio, and sometimes the video, quality of the tape is poor but the Administrative Law Judge has viewed it in its entirety and has considered it in the preparation of this Recommended Order.

The parties also stipulated to Joint Exhibit No. 1, a letter from Respondent's counsel to Josh Hooper, DABT regional director in Brevard County.

The Transcript was filed on June 13 and July 3, 2000. The parties' Proposed Recommended Orders were filed on July 31, 2000.

FINDINGS OF FACT

1. Respondent, Mano's, Inc., doing business as Sea Port (Mano's) is now and has at all relevant times been a licensee of the Division of Alcoholic Beverages and Tobacco (DABT) holding a 4 COP SRX special restaurant license. Mano's operates a restaurant and lounge located in Cape Canaveral, Brevard County, Florida.

2. Mano's license requires that at least 51 of its gross retail sales be served from food and non-alcoholic beverages. Mano's license application clearly acknowledges this and the requirement that it maintain a bona fide restaurant with 4000 square feet of floor space and seating for 200 patrons.

3. Raymond Joseph Cascella is the president, sole corporate officer, and sole stockholder of Mano's. Attached to his license application dated May 14, 1991, is his sketch of the licensed premises. The instructions on the application provide that the sketch must include all specific areas which are part of the premises sought to be licensed. The sketch provided by Mr. Cascella includes the bar, restrooms, dining rooms, and kitchen.

4. On September 10, 1996, Sam Brewer, then a special agent with DABT, conducted an inspection of Mano's licensed premises. Special Agent Brewer found several violations on his visit; he spoke with Mr. Cascella and gave Mr. Cascella a copy of the inspection report and three notices related to the violations.

5. The violations observed and noted by Special Agent Brewer were improper display of the facility license (in the office rather than conspicuously displayed), insufficient seating (160 seats rather than 200), and failure to maintain sales receipts or other records to document that the 51 percent non-alcoholic beverages and food requirement was met.

6. One of the notices provided to Mr. Cascella stated that no later than September 25, 1996, he must bring to the Rockledge DABT office records pertaining to total sales of food, non-alcoholic, and alcoholic beverages for the period June 1, 1996, through September 10, 1996.

7. Mr. Cascella came to the Rockledge office on September 25, 1996, but the records he brought were computerized summaries of credit card transactions and did not reflect a break-out of sales of alcoholic beverages and non-alcoholic beverages and food. There were no guest receipts nor register tapes (also called "z-tapes") provided.

8. On September 30, 1996, Special Agency Brewer issued another notice to Mano's. The notice, signed by Mr. Cascella, directs the licensee to produce these records to the Rockledge

DABT district office no later than October 15, 1996, or administrative changes would be brought against the alcoholic beverage license:

1) All records relating to gross retail sales of food and non-A/B and all records relating to gross retail sales of A/B (including source documents) (i.e., Z-tapes, waitress order checks), for the period June 1, 1996 thru September 10, 1996.

2) All records relating to purchases of food and non-A/B and all records relating to purchases of A/B, for the period June 1, 1996, thru September 10, 1996. (Petitioner's Exhibit No. 4)

9. Mr. Cascella returned to the Rockledge office on October 15, 1996, with a box of papers. These papers were records of purchases made from different vendors but there were no records of any retail sales by Mano's.

10. In spite of letters to Special Agent Brewer from Mano's counsel promising full compliance and in spite of Mr. Cascella's several efforts, Mr. Cascella never produced all of the required records for the relevant period (June 1, 1996 through September 10, 1996).

11. At the hearing in this proceeding Mr. Cascella submitted a large plastic ziplock bag stuffed with register receipts from June 1, 1996, through September 10, 1996. Mr. Cascella thought he had shown these or copies to Special Agent Brewer but was not sure. Mr. Cascella also conceded that the tapes were not complete, as they were only from the cash register at the bar, and none were from the register in the restaurant.

Thus, the receipts reflected mostly liquor sales for each day, and very little food. (Transcript pp. 231-238)

12. On February 7, 1997, Special Agent Brewer sent an official notice to Mano's informing the licensee that DABT intended to file administrative charges for failure to produce records as requested, in violation of Section 561.29(1)(j), Florida Statutes.

13. On March 8, 1997, Special Agent Brewer, two other DABT agents, and several officers or agents from other law enforcement agencies appeared at Mano's licensed premises in Cape Canaveral. Mr. Cascella, who lived upstairs with his wife, was summoned by the bartender and came downstairs immediately.

14. Mr. Cascella was very upset and told the officers that they had no right to be there without a search warrant. Throughout the inspection he remained very vocal and argumentative. Special Agent Brewer was looking for food items as part of his inspection and he requested that Mr. Cascella grant access to a locked area within the kitchen, a walk-in cooler or freezer. When Mr. Cascella refused, Special Agent Brewer informed him that the refusal was a violation of the law and he could be arrested.

15. Eventually during the inspection the agents gained access to the area only after they cut the lock. Mr. Cascella was arrested for his refusal to stop interfering with the

inspection and for his persistent and obstreperous comments during the agents' questioning of the bartender.

16. Between October 1996, and December 1996, Jane Davis, an auditor with DABT conducted a surcharge audit of Mano's for the period July 1, 1993, through June 30, 1996. Mr. Cascella was cooperative and had the records available for Ms. Davis' review. She did not conduct an SRX audit requested by Special Agent Brewer, as she was being transferred from Rockledge to Lakeland and she could not take on the task of reviewing all of the Z-tapes for a long period of time. The surcharge audit Ms. Davis conducted was for a purpose different from the determination of percentage of alcohol sales and non-alcohol sales; her audit period, and consequently the records she reviewed, were not the June 1, 1996, through September 10, 1996, period addressed in the notices of violation issued by Special Agent Brewer.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

18. In license discipline cases such as this the agency must prove the allegations of its complaint by evidence that is clear and convincing. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne, Stern & Company, 670 So. 2d 932 (Fla. 1996).

19. Section 561.20(2)(a)4, Florida Statutes, requires that special restaurant licensees must derive at least 51 percent of their gross revenue from the sale of food and non-alcoholic beverages.

20. Rule 61A-3.0141, Florida Administrative Code, provides in pertinent part:

(1) Special restaurant licenses in excess of the quota limitation set forth in subsection 561.20(1), Florida Statutes, shall be issued to otherwise qualified applicants for establishments that are bona fide restaurants engaged primarily in the service of food and non-alcoholic beverages, if they qualify as special restaurant licensees as set forth in subsection (2) of this rule. Special restaurant licensees must continually comply with each and every requirement of both subsections (2) and (3) of this rule as a condition of holding a license. Qualifying restaurants must meet the requirements of this rule in addition to any other requirements of the beverage law. The suffix "SRX" shall be made a part of the license numbers of all such licenses issued after January 1, 1958.

(2) Special restaurant licenses shall be issued only to applicants for licenses in restaurants meeting the criteria set forth herein.

* * *

(3) Qualifying restaurants receiving a special restaurant license after April 18, 1972 must, in addition to continuing to comply with the requirements set forth for initial licensure, also maintain the required percentage, as set forth in paragraph (a) or (b) below, on a bi-monthly basis. Additionally, qualifying restaurants must meet at all times the following operating requirements:

(a) At least 51 percent of total gross revenues must come from retail sale on the

licensed premises of food and non-alcoholic beverages. Proceeds of catering sales shall not be included in the calculation of total gross revenues. Catering sales include food or non-alcoholic beverage sales prepared by the licensee on the licensed premises for service by the licensee outside the licensed premises.

1. Qualifying restaurants must maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages and all purchases and gross retail sales of alcoholic beverages.

2. The records required in subparagraph (3)(a)1. of this rule must be maintained on the premises, or other designated place approved in writing by the division for a period of 3 years and shall be made available within 14 days upon demand by an officer of the division. The division shall approve written requests to maintain the aforementioned records off the premises when the place to be designated is the business office, open 8 hours per work day, of a corporate officer, attorney, or accountant; the place to be designated is located in the State of Florida; and the place to be designated is precisely identified by complete mailing address.

3. Since the burden is on the holder of the special restaurant license to demonstrate compliance with the requirements for the license, the records required to be kept shall be legible, clear, and in the English language.

4. The required percentage shall be computed by adding all gross sales of food, non-alcoholic beverages, and alcoholic beverages and thereafter dividing that sum into the

total of the gross sales of food plus non-alcoholic beverages.

* * *

(d) Full course meals must be available at all times when the restaurant is serving alcoholic beverages except alcoholic beverage service may continue until food service is completed to the final seating of restaurant

patrons for full course meals. A full course meal as required by this rule must include the following:

1. Salad or vegetable;
2. Entree;
3. Beverage; and
4. Bread.

(e) For purposes of determining required percentages, an alcoholic beverage means the retail price of a serving of beer, wine, straight distilled spirits, or a mixed drink.

21. DABT met its burden of proving the violation of the above-described records requirement. The requirement that records be made available within 14 days on demand rebuts Respondent's argument that the rule only requires the records be maintained, not that they be produced. Respondent had ample notice of the period for which the records were sought, June 1 through September 10, 1996. The period referenced in the administrative complaint, September 30, 1996, to February 28, 1997, plainly establishes the period during which Respondent failed to make all of the requested records available. Specifically, Respondent failed to produce register receipts for the restaurant register or other receipts adequate to compute compliance with the 51 percent rule.

22. Subsections 562.41(3) and (5), Florida Statutes, provide:

(3) Any owner of such premises or person having the agency, superintendency, or possession of same, who refuses to admit such officer or to suffer her or him to examine such beverages, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

* * *

(5) Licensees, by the acceptance of their license, agree that their places of business shall always be subject to be inspected and searched without search warrants by the authorized employees of the division and also by sheriffs, deputy sheriffs, and police officers during business hours or at any other time such premises are occupied by the licensee or other persons.

23. By Mr. Cascella's refusal of DABT's access to the cooler or freezer on his premises, Respondent violated Section 562.41(3), Florida Statutes. As argued by counsel for Respondent, with support from the cases cited in his Proposed Recommended Order, the warrentless search must still be reasonable and in this case it was. Whether the area was a cooler or a freezer with no alcohol stored within, DABT's agents were entitled to access as part of their inspection to determine compliance with, among other requirements, the 51 percent rule. For example, the quantity of food stored on the premises could reveal whether or not an SRX license is capable of serving full-course meals.

24. Counsel for DABT did not address the elements of the third alleged violation in his Proposed Order and that allegation is deemed abandoned. Moreover, Mr. Cascella's resistance was merely verbal and obnoxious and was insufficient to establish a violation of Section 843.02, Florida Statutes, the misdemeanor offense of resisting an officer without violence. See In the Interest of R.S. v. State, 531 So. 2d 1026 (Fla. 1st DCA 1988);

L.A.T. v. State 650 So. 2d 214 (Fla. 3d DCA 1995); and B.L.M. v. State, 684 So. 2d 853 (Fla. 5th DCA 1996).

25. Section 561.29(3), Florida Statutes, provides:

(3) The division may impose a civil penalty against a licensee for any violation mentioned in the Beverage Law, or any rule issued pursuant thereto, not to exceed \$1,000 for violations arising out of a single transaction. If the licensee fails to pay the civil penalty, his or her license shall be suspended for such period of time as the division may specify. The funds so collected as civil penalties shall be deposited in the state General Revenue Fund.

The penalty of \$1,250 suggested by Petitioner is within the penalty guidelines of Rule 61A-2.022, Florida Administrative Code.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the agency enter its final order finding that Respondent violated Rule 61A-3.0141, Florida Administrative Code, and Section 562.41(3), Florida Statutes, and imposing civil penalties of \$250 and \$1,000, respectively, for a total of \$1,250.

DONE AND ENTERED this 29th day of August, 2000, in
Tallahassee, Leon County, Florida.

MARY CLARK
Administrative Law Judge
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Filed with the Clerk of the
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this 29th day of August, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.