STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 98-0049
M & W ENTERPRISES OF KEY WEST, INC., d/b/a STICK N STEIN,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on May 6, 1998, in Key West, Florida.

APPEARANCES

For Petitioner: George G. Lewis, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Stephen R. DeGrave, Vice President
M & W Enterprises of Key West, Inc.
2922 North Roosevelt Boulevard
Key West, Florida 33040

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent committed the offense set forth in the Administrative Action and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 23, 1997, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Department), filed an Administrative Action against the Respondent, the holder of a 5COP alcoholic beverage license, which charged that "[d]uring the period of September 1, 1992, through October 29, 1996, you, M & W Enterprises of [Key West], Inc. d/b/a Stick and Stein, failed to pay the audit performed on above dates for the tax liability of $11,641.64, penalty of $52,512.93, and interest of $2,549.10 for a total liability of $66,703.67, which has not been paid to the Florida Department of Business [and Professional] Regulation, contrary to section 561.501, Florida Statutes." Based on such allegations, the Department proposes to impose penalties against Respondent under the provisions of Section 561.29, Florida Statutes.

Respondent disputed the Department's charges, including the accuracy of the Department's audit, and the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

At hearing, Petitioner called Raquel Silvosa, a tax auditor employed by the Department, and Petitioner's Exhibits 1 through 4 were received into evidence. Respondent called Stephen R. DeGrave, Jack Moyer, and Bettina Brumwell as witnesses, and Respondent's Exhibits 1 and 2 were received into evidence.

The transcript of the hearing was not ordered. Therefore,

at the conclusion of the hearing, it was announced on the record that the parties were accorded ten days from the date of hearing to file proposed recommended orders. Petitioner elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

1. At all times material hereto, Respondent, M & W Enterprises of Key West, Inc., held license number 54-00200, series 5COP, authorizing the sale of alcoholic beverages for consumption on and off the premises known as Stick N Stein, located at 1126 C & D Key Plaza, Key West, Florida (hereinafter "the licensed premises").

2. In October 1996, the Department undertook a beverage surcharge audit of the licensed premises for the period of September 1, 1992, through October 29, 1996.[1] At the time, the premises had elected the "sales method"[2] of reporting, and the Department proposed to determine whether the monthly reports submitted by the vendor were accurate by application of the "sales depletion method," as prescribed by Rule 61A-4.063(9), Florida Administrative Code. This formula uses beginning inventory, plus purchases for the period, less ending inventory, less spillage allowance, prescribed by Rule 61A-4.063(6), Florida Administrative Code, to ascertain sales for the period.

3. Application of the formula to this vendor was complicated by a number of factors, including the nature of the vendor's business, the vendor's inventory practices, and the

vendor's failure to maintain appropriate records. In this regard, the proof demonstrates that the licensed premises includes a liquor store, where alcoholic beverages are sold for consumption off-premises, and a bar area, where alcoholic beverages are sold for consumption on-premises. Alcoholic beverages are purchased for the premises in bulk, and stored in the liquor store or the storeroom (also referred to as the beer room or cooler). As need dictates, alcoholic beverages are transferred from the liquor store or the storeroom to replenish the bar's stock; however, no record is made to reflect this transfer or addition to the bar's inventory. Consequently, there are no records from which one can derive the data needed to drive the Department's formula or, stated otherwise, there are no records from which the quantities of alcoholic beverages sold for consumption on or off the premises may be reliably calculated.

4. Notwithstanding the vendor's failure to maintain appropriate records, the Department agreed to accept the vendor's estimate of the percentage of each class of alcoholic beverage purchased during the audit period that it would attribute to NON-COP (non-consumption on premises) sales, and subtract those volumes from the volumes purchased during the audit period to derive the total gallons available for sale under the formula. Here, the deduction (credit) accorded the vendor for NON-COP sales as a percentage of purchases was, as follows: draft beer, 10 percent; bottle/can beer, 15 percent; wine coolers, 50

percent; wine, 90 percent; and liquor, 70 percent.[3]

5. To further drive the formula, the Department did an audit on October 29, 1996, to calculate the vendor's ending inventory. Notably, that audit (Petitioner's Exhibit 4)

encompassed only the alcoholic beverages in the bar area, and failed to include an inventory of the alcoholic beverages in the liquor store and storeroom.

6. By letter of June 24, 1997, Respondent was advised of the results of the audit, and the Department's conclusion that it owed $14,960.82, as beverage surcharge, penalties, and interest. Respondent, because the audit did not include the liquor store and storeroom inventory as part of the ending inventory calculation, disputed the results of the audit.[4]

7. Given the failing of the first audit, the Department performed an additional audit of Respondent's inventory on August 1, 1997. (Petitioner's Exhibit 3). That audit was restricted to the inventory in the liquor store and the storeroom, and did not include an inventory of the bar area.

8. On August 8, 1997, the Department issued a new retail beverage surcharge audit report for the licensed premises. (Petitioner's Exhibit 2). That report reflected a total tax liability (beverage surcharge, penalties, and interest) of $12,279.76. Notably, the report was based on the August 1, 1997, inventory and not the vendor's inventory at the end of the audit period (October 29, 1996). Moreover, the audit that was used considered only liquor store and storeroom inventory, and omitted bar inventory. Respondent again disputed the results of the audit.

9. Since the report did not apply the vendor's inventory at

the end of the audit period (October 29, 1996) to drive the formula, the result reached could not be an accurate reflection of sales or surcharge liability for the audit period. Moreover, by omitting bar inventory as a component of ending inventory, the report overstated sales, and, therefore, overstated surcharge liability. Consequently, as Respondent argues, the audit does not provide a reliable indication of what, if any, surcharge is due.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

11. Where, as here, the Department proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

12. Pertinent to this case, Section 561.29, Florida Statutes, provides the Division of Alcoholic Beverages and

Tobacco with full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, or to 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, when it is determined that, inter alia, the licensee or, if a corporation, any officers thereof, have violated any laws of this state. Section 561.29(1)(b), Florida Statutes.

13. Pertinent to the perceived violation of Section 561.29(1)(b), Florida Statutes, are the provisions of Section 561.501, Florida Statutes, which impose a surcharge on the sale of alcoholic beverages for consumption on the premises. That provision of law provides:

> (1) . . . a surcharge of 10 cents is imposed upon each ounce of liquor and each 4 ounces of wine, a surcharge of 6 cents is imposed on each 12 ounces of cider, and a surcharge of 4 cents is imposed on each 12 ounces of beer sold at retail for consumption on premises licensed by the division as an alcoholic beverage vendor.
> (2) The vendor shall report and remit payments to the division each month by the 15th of the month following the month in which the surcharges are imposed. For purposes of compensating the retailer for the keeping of prescribed records and the proper accounting and remitting of surcharges imposed under this section, the retailer shall be allowed to deduct from the payment due the state 1 percent of the amount of the surcharge due. Retail records shall be kept on the quantities of all liquor, wine, and beer purchased, inventories, and sales. . . Failure to accurately and timely remit

> surcharges imposed under this section is a violation of the Beverage Law.

14. The Department has adopted Rule 61A-4.063, Florida Administrative Code, to implement the beverage surcharge imposed by section 561.501. Pertinent to this case, the rule provides:

(4) The surcharge calculation methods are as follows:

(a) Sales method -- Each month, the vendor shall determine the amount of alcoholic beverages sold by using sales records or any alternate method approved in writing by the Division of Alcoholic Beverages and Tobacco. Requests for an alternate sales method must be submitted within 20 days after the issuance of a new license or transfer of an existing license. The surcharge is calculated by multiplying the units of alcoholic beverages sold times the applicable surcharge rate. . . .

* * *

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

* * *

(8) Each vendor licensed in any manner for consumption on premises shall maintain complete and accurate records on the quantities of all alcoholic beverage purchases, inventories, and sales. Records include purchase invoices, inventory records, receiving records, cash register tapes, computer records generated from automatic dispensing devices, and any other record used in determining sales. . . . All records must be maintained for a period of 3 years.

(9) Employees of the division shall have access to and shall have the right to examine the accounting records, invoices, or any other source documents used to determine a vendor's compliance with this rule. Each vendor is required to give the division the means, facilities and opportunity to verify the accuracy of the surcharge imposed by section 561.501, Florida Statutes. In order to determine whether the monthly reports submitted by the vendor are accurate, the division shall use the formula of beginning inventory plus purchases for the period, less ending inventory, less the spillage allowance, to ascertain sales for the period.

> Adjustments made to this formula in favor of the licensee will be based on factual, substantiated evidence. The results of the formula will represent sales transactions as defined herein and in section 561.01(9), Florida Statutes, for the period under review.
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> (15) When the division performs an audit on the vendor, it shall determine the surcharge due. If the division determines that any amount of gross surcharge is due from the vendor, it shall notify the vendor in writing by personal service or U.S. Mail, return receipt requested, stating that the vendor has 30 days from the receipt of written notification in which to correct the findings of the audit and remit payment. If the vendor does not correct the findings of the audit or remit payment within the allotted time then the division will notify the vendor in writing by personal service or U.S. Mail, return receipt requested, that it intends to assess the proper amount due including applicable penalties and begin administrative proceedings.

15. Here, the Department proposes to take disciplinary action against Respondent based on its allegation that Respondent failed to pay a surcharge liability "for the audit period beginning September 1, 1992, and ending October 29, 1996." (Petitioner's Exhibit 2).

16. To determine whether Respondent's monthly reports were accurate and, therefore, whether Respondent paid the appropriate surcharge, the Department sought to apply the formula mandated by Rule 61A-4.063(9), Florida Administrative Code. Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977), (Agency must apply its rule, as written, until amended or abrogated). Accord,

Decarion v. Martinez, 537 So. 2d 1083 (Fla. 1st DCA 1989). However, the Department's audit did not comply with the formula established by rule since it failed to subtract the vendor's inventory at the end of the audit period (October 29, 1996), and, moreover, the figure it did utilize for ending inventory failed to include bar inventory. Consequently, the tax liability calculated and assessed by the Department's beverage surcharge audit report of August 8, 1997, is not a reliable assessment of Respondent's liability, if any, for a surcharge deficiency.[5] Such being the case, it can not be concluded that, by failing to pay the tax assessment, Respondent violated the provisions of Section 561.501(2), Florida Statutes, and, therefore, Section 561.29(1)(b), Florida Statutes, as alleged in the Administrative Action.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered dismissing the Administrative Action.

DONE AND ENTERED this 26th day of May, 1998, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 1998.

ENDNOTES

1/ The surcharge is imposed on the volume (calculated in ounces) of liquor, wine, and beer sold for consumption in the licensed premises. Section 561.501(1), Florida Statutes.

2/ In general, a licensed vendor may elect one of two methods for calculation of the surcharge, the sales method or the purchase method. Under the sales method, the vendor calculates the surcharge by multiplying the volume (stated in ounces) of alcoholic beverages sold for consumption on the premises times the applicable surcharge rate. Under the purchase method, the vendor calculates the surcharge by multiplying the volume (stated in ounces) of all alcoholic beverages purchased during the month times the applicable surcharge rate, less the applicable spillage allowance. Vendors reporting under the sales method are not allowed any allowance for spillage. Rule 61A-4.063(4) and (6), Florida Administrative Code.

3/ To derive the estimate, the Department's auditor, Raquel Silvosa, asked Stephen DeGrave, Respondent's vice-president and chief operating officer, what his best estimates were. According to Ms. Silvosa, Mr. DeGrave initially advised her that his estimate of NON-COP sales as a percentage of purchases was, as follows: draft beer, 10 percent; bottled/can beer, 15 percent; wine coolers, 50 percent; and wine, 90 percent. As for liquor, Mr. DeGrave first estimated 50 percent, but then changed his mind to 70 percent, as representing NON-COP sales. Subsequently, Mr. DeGrave telephoned the auditor and suggested 90 to 95 percent for liquor, and 25 percent for bottled/can beer, as an estimate of the NON-COP percentage of purchases. The auditor advised Mr. DeGrave that she was accepting his first estimate, absent documentation or other proof to the contrary. Here, apart from some anecdotal observations offered at hearing, Respondent offered no proof to show, more likely than not, that a percentage rate other than the one accepted by the Department more accurately reflected off-premises sales. Under such circumstances, Respondent has not demonstrated that the figures accepted by the Department are unreasonable or, stated otherwise, that it is entitled to any further credit for off-premises sales. See Rule 61A-4.063(4)(c), Florida Administrative Code, ("If the vendor chooses the sales method, the vendor will bear the burden of proof that the method used accurately reflects actual sales."), and Section 561.501(2), Florida Statutes, ("Retail records shall be kept on the quantities of all liquor, wine, and beer purchased, inventories and sales.").

At hearing, Respondent also contended that its deductions (credits) for NON-COP sales should be larger because of charitable contributions, free liquor accorded business associates, and other

off-premises uses. Respondent failed, however, to offer any documentation or other competent proof that would permit a value or volume to be placed on such transfers.

4/ By excluding the liquor store and storeroom inventory from the ending inventory calculation, total gallons available for sale, and, therefore, the surcharge on sales, was artificially inflated.

5/ Moreover, one could not simply add the audit of October 29, 1996, (for the bar area) and the audit of August 1, 1997, (for the liquor store and storage room) to derive ending inventory because they relate to two different time periods and, but for chance, would not be expected to accurately reflect ending inventory as of October 29, 1996. Moreover, Mr. DeGrave observed, and there is no proof to the contrary, that inventory of the liquor store and storeroom for October 1996 was much higher than in August 1997.

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.