STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 98-4360
LOROCO, INC., d/b/a JESTERS BAR & GRILL,	)	
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 June 17, 1999, by videoteleconference, with sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Miriam L. Wilkinson, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Julius H. Browner, Esquire
1915 Northeast 45th Street, Suite 210
Fort Lauderdale, Florida 33308

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 June 5, 1998, 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 4COP alcoholic beverage license, which charged that "[d]uring the period of January 1, 1995, through December 31, 1997, you Loroco, Inc. d/b/a Jesters Bar & Grill [Respondent] failed to pay the audit performed on the above dates for the tax liability of $44,421.05 and penalty of $15,352.33 and interest of $4,384.48 for a total liability of $64,157.86, 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 "intends to revoke; suspend; annul; impose administrative fines, investigative cost, and late penalties; or any combination of these authorized penalties."

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 an evidentiary hearing.

At hearing, Petitioner called Julio Torres, Marvin Ruskin, and Austin Findlater as witnesses, and Petitioner's Exhibits 1, 2, 3, 5, 6, 7, and 8 were received into evidence. Respondent called William Carey and Joel Marcus as witnesses, and Respondent's Exhibit 1 was received into evidence.

The transcript of the hearing was filed July 29, 1999, and the parties were accorded ten days from that date to file proposed recommended orders. Petitioner elected to file a proposed recommended order on August 6, 1999, and Respondent filed written argument by letter dated August 9, 1999 (filed August 12, 1999). The parties' post-hearing submittals have been duly-considered.

FINDINGS OF FACT

1. At all times material hereto, Respondent Loroco, Inc., held license number 16-01137, series 4COP, authorizing the sale of alcoholic beverages for consumption on and off the premises known as Jesters Bar & Grill, located at 801 Northeast 62nd Street, Fort Lauderdale, Florida (the "licensed premises").

2. In December 1996, the Department randomly selected Respondent for a beverage surcharge audit.[1] The purpose of such audit was to resolve whether the monthly reports submitted and the surcharges remitted by the vendor since January 1, 1995, were accurate or, stated differently, whether such submittals were supported by retail records maintained by the vendor.

3. In April 1997, the Department's auditor met with Respondent's accountant (Joel Marcus) to inform him of the audit procedures and to request the documentation required for the audit. Subsequently, Respondent confirmed that it had elected the "purchase method" of reporting, and that it claimed a deduction (adjustment) for alcoholic beverages sold in their original containers for consumption off premises (package sales).[2] Respondent further advised the Department that it had documentation to support the deduction it claimed for package sales; however, it failed to produce (or account for the absence of) any such documentation during the course of the audit or at anytime thereafter.[3]

4. Since Respondent was unable to produce any documentation to support its package sales deduction, the Department offered to delay the audit for six months (rather than concluding the audit and denying Respondent's claim for the package sales deduction) to allow Respondent an opportunity to maintain records of package sales for a six-month period (referred to as a six-month prospective audit) and, if those records produced a reliable result, apply that percentage of package sales to the entire audit period. As for the records to be kept during the prospective audit period, the Department requested that Respondent maintain, inter alia, a beginning and ending inventory for all alcoholic beverages in the package store; a price list identifying each product by name, bottle size, and category

(i.e., beer, wine, or liquor), which would permit specific identification of the product on cash register tapes when a package sale was made; and a daily cash register tape (reflecting each package sale), as well as a daily summary showing the date and gallonage by category and the bank deposit made for each day's activities. Respondent's accountant acknowledged agreement with such procedures, and the prospective audit period began July 1, 1997, and extended through December 31, 1997.

5. In January 1998, after the prospective audit period ended, the Department's auditor sought Respondent's records so that he could conclude the audit; however, it was not until around April 1998 that any records were produced. Notably, the only record produced by Respondent was a log book, which ostensibly recorded the daily package sales. Sales were variously described by brand name or generic name (i.e., vodka, gin, rum, tequila, chardonnay), and the number of items sold was identified by the number of bottles, with or without reference to bottle size. Stapled to each page of the log book was what was represented to be a cash register tape which showed daily gross sales in dollars. Notably, there was no beginning and ending inventory; the log book contained no price reference; Respondent produced no price list identifying each product by name, bottle size, and category; and there was no daily case register tape which itemized (identified) each product sold.

6. Notwithstanding the failings of Respondent's record keeping, the Department's auditor attempted to accommodate Respondent by speaking with its manager to secure the quantity (gallonage) and price of each item sold so that he could discern whether the prospective audit would support a package sale deduction. However, such additional information merely reinforced the inadequacy or unreliability of Respondent's record keeping, and demonstrated that there was no record basis or, stated differently, no "factual, substantial evidence" to support a package sales deduction. Rule 61A-4.063(9), Florida Administrative Code. In so concluding, it is observed that Respondent's records were not only woefully inadequate, but were also inherently unreliable. Such unreliability is evident from the fact that the cash register tape, which purported to represent daily gross sales in dollars, failed to match the total of daily sales in the log book; the actual monthly reports submitted (and surcharge paid) to the state during the period of the prospective audit (July 1, 1997, through December 31, 1997) claimed a package sales deduction that was, without explanation, at material variance from the package sales reported in the log book; and the package sales reported in the log book bore no rational relationship to any package sales deduction claimed by Respondent for any of the audit period. Consequently, it must be concluded that Respondent failed to demonstrate its entitlement to a package sales deduction for the audit period of January 1,

1995, through December 31, 1997, and that, as alleged by the Department, Respondent has an outstanding tax liability of $64,157.86 (surcharge due of $44,421.05, penalties due of $15,352.33, and interest due of $4,384.48), as of April 15, 1998.[4]

CONCLUSIONS OF LAW

7. 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.

8. 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).

9. 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.

10. 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.
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> (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. . . . Records must be maintained for 3 years. Failure to accurately and timely remit surcharges imposed under this section is a violation of the Beverage Law.

11. 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:
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> (b) Purchase method -- Vendors who select the purchases method shall calculate the surcharge by multiplying the units of all alcoholic beverages purchased during the month times the applicable surcharge rate, less applicable spillage allowances specified in subsection (6) of this rule. . . .
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> c) . . . If the vendor uses the purchases method, the vendor will bear the burden of proof that purchases are accurately recorded.
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> (5) The surcharge rates are as follows:
> (a) Ten cents for each 1 ounce of liquor;
> (b) Ten cents for each 4 ounces of wine;
> (c) Four cents for each 12 ounces of beer; and
> (d) Commercially produced coolers served in a sealed container, whether beer, wine or liquor-based shall be assessed a surcharge of 4 cents per 12 ounce container.
> (6) Vendors reporting under the purchases method are allowed a standard monthly allowance for spillage which may be applied as a deduction from the units of each type of product purchased. Spillage shall include loss from evaporation, breakage and other incidental losses prior to sale. The rate of spillage allowance is 10 percent for draft beer and liquor and 5 percent for all other alcoholic beverage products. Vendors reporting under the sales method are not allowed any monthly allowance for spillage.
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> * * *

(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 records 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.

* * *

(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.
> (Emphasis added.)

12. 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 January 1, 1995, and ending December 31, 1997. That audit revealed a surcharge due of $44,421.05, penalties of $15,352.33, and interest of $4,384.48, for a total liability of $64,157.86 (as of April 15, 1998), and was derived by the Department's disallowance of Respondent's claim of a package sale deduction during the audit period. According to the Department, Respondent failed to produce any "factual, substantial evidence," as required by Rule 61A-4.063(9), Florida Administrative Code, to support the deduction. The Department's position has merit.

13. In resolving that the Department accurately calculated Respondent's liability for the audit period of January 1, 1995, and ending December 31, 1997, and properly disallowed Respondent's claim to a package sale deduction, it is observed that, contrary to the requirements of law, Respondent failed to maintain or produce any records for the audit period and, consequently, failed to offer any "factual, substantial evidence" to support the adjustment claimed. It is further observed that, notwithstanding such failure, Respondent was accorded the opportunity to participate in a six-month prospective audit to

substantiate its claim for a package sale adjustment, but again failed to maintain any reliable records to support the deduction. Finally, at hearing, Respondent offered no additional proof or record from which it could be resolved, with any sense of confidence, what adjustment, if any, Respondent should receive. Consequently, it must be concluded that the Department accurately assessed Respondent's liability and that Respondent is guilty of violating the provisions of Section 561.29(1)(b), Florida Statutes, as alleged in the Administrative Action.

14. Having reached the foregoing conclusion, it remains to resolve the appropriate penalty for Respondent's offense. Pertinent to this issue, Rule 61A-2.022, Florida Administrative Code, establishes the penalty guidelines to be considered by the Department when it elects to take disciplinary action against a licensee. Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977)(Agencies must honor their own substantive rules until they are amended or abrogated). C.f. Williams v. Department of Transportation, 531 So. 2d 994 (Fla. 1st DCA 1988)(Agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees.) For a violation of Section 561.501(2), Florida Statutes, and, therefore, Subsection 561.29(1)(b), Florida Statutes, the table which follows Rule 61A-2.002(11), Florida Administrative Code, provides the following penalty for a "first occurrence" of "late surcharge payments": "Corrective action and 25 percent of the total late surcharge

principal payments if licensee is current with surcharge reports. . . ." Here, the Department, by its proposed recommended order, suggests, as a penalty, that "Respondent be ordered to pay to the Division its outstanding tax liability of $44,421.05, including penalties of $15,352.33 and interest of $4,384.48, for a total of $64,157.86."

15. Giving due consideration to the circumstances, as well as the Department's disciplinary guidelines, the appropriate penalty in this case is the satisfaction of the debt to the Department or the execution of a mutually-agreeable payment plan within 30 days of the entry of the final order, failing which Respondent's license should be suspended until such time as the debt is satisfied or a payment plan is approved.

RECOMMENDATION

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

RECOMMENDED that a final order be entered which finds Respondent guilty of violating the provisions of Section 561.29(1)(b), Florida Statutes, as alleged in the Administrative Action.

It is further RECOMMENDED that for such violation the final order require the satisfaction of the debt to the Department or the execution of a mutually-agreeable payment plan within 30 days of the entry of the final order, failing which Respondent's satisfied or a payment plan is approved.

DONE AND ENTERED this 23rd day of August, 1999, 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 23rd day of August, 1999.

ENDNOTES

1/ The surcharge is a tax imposed on the volume (calculated in ounces) of liquor, wine, and beer sold for consumption on 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. Rule 61A-4.063(4), Florida Administrative Code. Vendors may also be entitled to claim a deduction (adjustment) for alcoholic beverages used for cooking, for alcoholic beverages offered free of any charge, and for any alcoholic beverages sold for consumption off premises (package sales). However, any such adjustment must be based on "factual, substantial evidence." Rule 61A-4.063(9), Florida Administrative Code. Such evidence, one would reasonably expect, would consist of the retail records on the quantities of all liquor, wine, and beer purchased; inventories; and sales each vendor is required to maintain. Section 561.501(2), Florida Statutes, and Rule 61A-4.063(8), Florida Administrative Code.

3/ Indeed, the only records ever produced by Respondent were those records ostensibly maintained during the course of a six-month prospective audit, discussed infra.

4/ In so concluding, it is not suggested that Respondent had no package sales. Rather, it is concluded that, while it may have had package sales, Respondent failed to reliably document them and that it would be pure speculation to attribute a figure (gallonage or otherwise) to package sales.

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.