

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC)
BEVERAGES AND TOBACCO,)
)
Petitioner,)
) Case Nos. 98-5046
vs.) 98-5518
)
)
KINDRED, INC., d/b/a)
RACEWAY CAFE,)
)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 16, 1999, a formal administrative hearing was held in this case in St. Petersburg, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Miriam S. Wilkinson
Assistant General Counsel
Department of Business and
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Tallahassee, Florida 32399-1007

For Respondent: Joseph N. Perlman, Esquire
Belcher Place
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STATEMENT OF THE ISSUES

The issues in these cases are whether the Respondent, Kindred, Inc., d/b/a Raceway Café, should be disciplined for: in Case No. 98-5046 (DBPR Administrative Action Case No. CL-62-

980016), alleged failure to maintain a bona fide restaurant as required of special restaurant (SRX) licensees by Section 561.20(2)(a)(4), Florida Statutes (1997), and Florida Administrative Code Rule 61A-3.0141; and, in Case No. 98-5515 (DBPR Administrative Action Case No. CL-62-9800159), alleged failure to produce records as required of SRX licensees by Florida Administrative Code Rule 61A-3.014.

PRELIMINARY STATEMENT

The Respondent requested formal administrative proceedings on DBPR Administrative Action Case No. CL-62-980016. The matter was referred to the Division of Administrative Hearings (DOAH) on November 12, 1998, given DOAH Case No. 98-5046, and set for final hearing on March 16, 1999.

The Respondent also requested formal administrative proceedings on DBPR Administrative Action Case No. CL-62-9800159. The matter was referred to DOAH on December 17, 1998, given DOAH Case No. 98-5518, and consolidated with DOAH Case No. 98-5046.

At final hearing, the Petitioner, the Department of Business and Professional Regulation (DBPR), Division of Alcoholic Beverages and Tobacco (DABT), called one witness and had Petitioner's Exhibits 1 through 3 admitted in evidence. The Respondent called two witnesses and had Respondent's Exhibits 1 through 7 admitted in evidence.

DABT requested a transcript of the final hearing, and the parties were given ten days from the filing of the Transcript in

which to file proposed recommended orders. DABT filed the Transcript on April 29, 1999, after filing its proposed recommended order, and the highlighting and notations on the Transcript are DABT's. The Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. On or about June 26, 1998, the Respondent, Kindred, Inc., applied for a series 4-COP (consumption on premises) special restaurant alcoholic beverage (SRX) license and obtained a temporary 4-COP SRX license (number 62-09319) for the Raceway Café, located at 12670 Starkey Road, Largo, Pinellas County, Florida. The Respondent opened for business on July 2, 1998.

2. On July 13, 1998, at approximately 1:30 p.m., DABT Special Agent Paul Cohen entered licensed premises to inspect and verify compliance with SRX license requirements. It was Cohen's impression that the Raceway Café had adequate service area (over 2,500 square feet) but that there were not enough seating and table settings to serve 150 diners at one time and that the Raceway Café was not a bona fide restaurant. Cohen left and returned at approximately 4:00 p.m. with an intern and a camcorder to video the premises and inspect in detail--i.e., count tables, chairs, plates, and eating utensils.

3. The Respondent's sole owner, Marouane Elhajoui, was present in the premises at the time of the detailed inspection. The evidence was clear that Elhajoui knew the purpose of Cohen's

inspection and completely understood the SRX requirements. (He had another SRX license for other premises.)

4. Cohen first videotaped the outside and inside of the licensed premises. Cohen and the intern then counted tables and chairs and found that the licensed premises contained seating for a maximum of 122 people. Of these seats, approximately 80% were bar stools, and there was not enough table space to serve full-course meals at all 122 seats. Several of the bar stools were at the bar counter, which was cluttered with video game machines, and several cocktail tables were too small to accommodate full-course meals for all four or five bar stools placed at those tables.

5. Elhajoui told Cohen about a grand opening celebration that had taken place on the premises on July 11 and 12, 1998. Elhajoui explained that restaurant tables and chairs had been removed from the premises and stored in an adjacent, empty storefront to accommodate a live band and dance floor for the grand opening. Elhajoui told Cohen that, if Cohen would wait, Elhajoui could replace the tables and chairs and have adequate seating in a matter of minutes. Cohen did not dispute Elhajoui's claim or ask to see the stored tables and chairs. He declined the request to wait a few minutes and Elhajoui's offer to replace the tables and chairs.

6. Cohen testified to having no recollection of any conversation with Elhajoui concerning a grand opening, the

removal of tables and chairs, or their storage in an empty storefront next door. While raising a question as to Cohen's truthfulness on this point, it could be that Cohen did not recall the conversation because he did not attach great importance to the circumstances explaining why there was inadequate seating at the time of his inspection.

7. After Elhajoui told Cohen that there were more than 150 place-settings in the restaurant, Cohen and the intern were able to count only approximately 75 forks, 96 spoons, and 75 plates.

8. Elhajoui testified that Cohen and the intern did not count either baskets or wooden plates also used to serve meals and did not count eating utensils in boxes in a cabinet under a counter in the kitchen. But Cohen specifically asked Elhajoui to show him all of the plates and eating utensils in the restaurant so that his count would be accurate and fair to the Respondent, and Cohen and the intern counted everything Elhajoui showed them. When Cohen told Elhajoui that he did not have enough plates and utensils, Elhajoui pointed to the "line" and asked if Cohen had counted what was there; Cohen indicated that he had counted those items. Elhajoui never specified any utensils in boxes in the cabinet under the counter. If they were there at the time, it is inexplicable that Elhajoui would not have made sure they were counted. Instead, upon completion of the inspection, Elhajoui read and signed without explanation or excuse an inspection

report indicating that there were inadequate plates and eating utensils. It is found that Cohen's count was accurate.

9. It can be inferred based on the facts on July 13, 1998, that the Raceway Café did not have capacity to serve 150 meals at one time at any time between opening on July 2 and July 13, 1998. No such inference can be drawn from the evidence after July 13, 1998.

10. Besides alleging inadequate seating and place settings, Cohen also alleged that the Respondent was not operating a bona fide restaurant. The question whether the Raceway Café is a bona fide restaurant cannot be answered simply by counting tables and chairs and place settings. This allegation raises the more nebulous question of when can a bar be a restaurant, and when does a restaurant become a bar?

11. Cohen based his allegation of "bad faith" on several factors. Starting from the outside, there was a temporary sign advertising drink specials but no food. (Elhajoui explained that the sign was owned and controlled by the shopping center and was advertising for the grand opening; he stated that it usually displayed meal specials.) A sign on the building seemed to describe the Raceway Café as a "Sports Lounge," but being (or having) a "sports lounge" may not necessarily turn a restaurant into a bar. There were neon beer signs in the windows, but they also are not uncommon in bona fide restaurants. Inside the building, there is a rather large bar, and Cohen perceived it to

be especially prominent on entering the premises; but there are two other entrances that are not so close to the bar. Cohen was not greeted by a host or hostess or, he thought, any instructions regarding restaurant seating, which he considered normal in a bona fide restaurant; but Cohen overlooked a theme-sign incorporated in a parking meter which stood near one of the other entrances and invited customers to seat themselves. Cohen also overlooked a "chalkboard" used to advertise daily specials common in restaurants. Cohen also noted that there were three dart boards in the bar area, juke boxes, and more theme decorations (a Harley Davidson motorcycle in a corner of the licensed premises, and plans to hang a race car--or at least the side panel of a race car body--from the ceiling), but none of those things in themselves are incompatible with a bona fide restaurant. Finally, Cohen only observed food consumption on one of his visits. But his only extended visit was at 4:00 p.m. on July 13, 1998, and none of the other visits were during normal meal times. Cohen made no mention of the full meal menu that has been used at Raceway Café since its opening. In truth, Cohen's allegation of "bad faith" probably was influenced by his finding of inadequate numbers of tables and chairs and place settings.

12. Cohen returned to the licensed premises on July 14, 1998, to serve DBPR Administrative Action Case No. CL-62-980016. He made no observations on July 14, 1998, that he could recall. Elhajoui and his witness testified without contradiction that the

Respondent had enough seating and place settings to serve at least 150 meals at one time on and after July 14, 1998. They also testified without contradiction that the signage advertised meal specials.

13. Cohen returned to the licensed premises on September 2, 1998, to serve a notice to produce all records documenting gross sales of alcoholic beverages and food and non-alcoholic beverages (including source documents--i.e., guest checks) for July and August 1998. Production was required to be made by September 12, 1998, at DABT offices in Clearwater, Florida. Cohen made no observations on September 2, 1998, that he could recall.

14. Elhajoui testified that he attempted to deliver the records on Monday, September 7, 1998, but that the DABT offices were closed for Labor Day. The next day, he telephoned DABT to advise that he had attempted to deliver the records and was told that DABT would be mailing him something he understood to be another administrative complaint. It is doubtful that such a conversation took place since there still were four days in which the Respondent could comply with the notice to produce.

15. The Respondent never produced the requested documentation, and on September 30, 1998, returned to the licensed premises, to serve DBPR Administrative Action Case No. CL-62-9800159. Cohen made no observations on September 30, 1998, that he could recall.

16. The Respondent produced documentation at final hearing establishing that 51.63% of its gross sales in July 1998 and 51.28% of its gross sales in August 1998 were food and non-alcoholic beverages.

17. Based on all the evidence presented, it is found that DABT failed to prove that Raceway Café is not a bona fide restaurant except to the extent that its meal service capacity was inadequate from July 2 through July 13, 1998.

CONCLUSIONS OF LAW

18. Section 561.20(2)(a)(4), Florida Statutes (1997), provides in pertinent part for the issuance of a special alcoholic beverage license not subject to quota license limitations for:

Any restaurant having 2,500 square feet of service area and equipped to serve 150 persons full course meals at tables at one time, and deriving at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages; however, no restaurant granted a special license on or after January 1, 1958, pursuant to general or special law shall operate as a package store, nor shall intoxicating beverages be sold under such license after the hours of serving food have elapsed.

19. Florida Administrative Code Rule 61A-3.141 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.

* * *

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

(a) Except in [certain counties other than Pinellas], a qualifying restaurant must have a service area occupying 2,500 or more square feet of floor space.

1. The required square footage shall not include any space contained in an uncovered or not permanently covered area adjacent to the premises because food service is not available at all times.

2. The required square footage shall be contiguous and under the management and control of a single licensed restaurant establishment.

3. Kitchens, food service areas, pantries, storage rooms, offices, and toilets, used exclusively in the operation of the restaurant shall be included in the required square footage. Measurements will be taken from the outside of qualifying structures or areas.

(b) Except in [certain counties other than Pinellas], a qualifying restaurant must have accommodations for the service and seating of 150 or more patrons at tables at one time.

1. The tables and seating must be located within the floor space provided for in paragraph (2)(a) of this rule.

2. The tables must be of adequate size to accommodate the service of

full course meals in accordance with the number of chairs or other seating facilities provided at the table.

3. Seating at counters used to serve food shall be included in the minimum seating requirements.

(c) Except in those counties and municipalities controlled by general law or special act, as set forth in paragraph (2)(b) of this rule, a qualifying restaurant must have all equipment for the service of 150 full course meals on the premises at one time.

* * *

(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.

* * *

(4) Establishments obtaining and operating under a temporary initial license as provided in section 561.181(2), Florida Statutes, or

under a temporary transfer license as provided in section 561.331, Florida Statutes, shall be investigated by the division during said operation and prior to issuance of a permanent license to insure that the establishment is a bona fide restaurant primarily engaged in food and non-alcoholic beverage sales and service and that the requirements of this rule have been met. The failure of an establishment to operate as a bona fide restaurant during said period of time shall result in denial of the application for a special restaurant license. An application for a special restaurant license from an establishment which has had a prior application for a special restaurant license denied during the previous 30-day period will be accepted by the division. The recent denial of the prior application will, however, be deemed a disclosure on the face of the subsequent application of a reason to deny such subsequent application. Accordingly, in such cases, no temporary initial license will be issued for a period of 30 days to allow the division inspectors to ensure that the reason to deny has been abated.

20. The evidence proved that the Respondent did not meet the requirements of Florida Administrative Code Rule 61A-3.141(2)(b) from July 2 through July 13, 1998. The evidence did not prove that the rule was violated after July 13, 1998. But Florida Administrative Code Rule 61A-3.141(1) requires restaurants to "continually comply with each and every requirement of both subsections (2) and (3) of this rule as a condition of holding a license."

21. The evidence also proved that the Respondent did not meet the requirements of Florida Administrative Code Rule 61A-

3.141(3)(a)2. The Respondent failed to respond to the notice to produce within 14 days.

22. Florida Administrative Code Rule 61A-2.022 "sets forth penalty guidelines which shall be imposed upon alcoholic beverage licensees and permittees who are supervised by the division." Section (1) of the rule. The table after section (11) of the rule provides that the penalty "routinely imposed" for any "failure to meet minimum qualifications of special license" is "\$1000 and revocation without prejudice to obtain any other type license, but with prejudice to obtain the same type of special license for 5 years." While this penalty may seem harsh, it is designed to discourage and prevent circumvention of the quota license limitations through abuse of the SRX license.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation enter a final order imposing a \$1,000 fine and revoking the Respondent's temporary SRX license without prejudice to obtain any other type license, but with prejudice to obtain the same type of special license for 5 years.

DONE AND ENTERED this 2nd day of June, 1999, in Tallahassee,
Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.