

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF ALCOHOLIC BEVERAGES AND)
TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 99-2320
)
EASY WAY OF LEE COUNTY INC., d/b/a)
HOLLYWOOD UNDERGROUND,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, held a formal hearing on November 1, 1999, by video teleconference between Tallahassee and Ft. Myers, Florida.

APPEARANCES

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

For Respondent: Julius F. Parker, Esquire
Pennington, Moore, Wilkinson, Bell
and Dunbar, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32801

STATEMENT OF THE ISSUES

The issues for determination are: (1) Whether Respondent violated Section 562.12(1), Florida Statutes, by selling

alcoholic beverages in a manner not authorized by law and/or maintaining a place where alcoholic beverages were sold unlawfully; (2) Whether Respondent violated Section 561.29, Florida Statutes, by failing to comply with the terms set forth in a prior Final Order of the Division of Alcoholic Beverages and Tobacco; and (3) If so, what sanctions should be imposed against Respondent's alcoholic beverage licenses.

PRELIMINARY STATEMENT

On February 26, 1999, Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, served Respondent, Easy Way of Lee County, Inc., d/b/a Hollywood Underground, with an Administrative Action, alleging two counts of violating alcoholic beverage laws. In Count I, Respondent was charged with selling or possessing alcoholic beverages in a manner not authorized by law, and/or maintaining a place where alcoholic beverages were sold unlawfully, in violation of Section 562.12, Florida Statutes. In Count II, Respondent was charged with failure to comply with the terms set forth in a prior Final Order of the Division, dated October 19, 1998, in case number FT-46-97-0890, in violation of Section 561.29, Florida Statutes. Respondent challenged the charges and requested a formal hearing. On May 29, 1999, the matter was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the proceeding.

At hearing, Petitioner presented the testimony of seven witnesses and offered three exhibits into evidence, all of which were accepted. Respondent presented the testimony of one witness and offered no exhibits into evidence.

A Transcript of the proceeding was filed on November 18, 1999. Both parties filed Proposed Recommended Orders.

FINDINGS OF FACT

1. Respondent, Easy Way of Lee County, Inc., d/b/a Hollywood Underground, holds a bottle club license number 46-03606, issued by the Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Department/Division) and has held such license since June 1995. Under this license, Respondent operates a bottle club known as Hollywood Underground (the licensed premises/the premises or Hollywood Underground) located at 16440 South Tamiami Trail, Unit 1, Fort Myers, Florida.

2. At all times relevant to this action, Mattheos Milonas was the director, president, secretary, and treasurer of Easy Way of Lee County, Inc., d/b/a Hollywood Underground, and the holder of the above-referenced alcoholic beverage license.

3. On or about February 12, 1999, Peggy Duffala, a special agent with the Department, organized an undercover on-site investigation of Hollywood Underground, based on a complaint that Respondent was in violation of certain laws pertaining to the sale of alcoholic beverages without a proper license.

4. On February 12, 1999, Agent Duffala, and two other special agents of the Department, Agent David Perez and Agent Patrick McEnroe, went to the licensed premises to further the investigation. When Agent Duffala arrived, she conducted surveillance in the parking lot of the licensed premises for approximately one and a half hours. During that time, Agent Duffala observed patrons entering and exiting the premises, but saw no patrons entering the premises carrying alcoholic beverages or containers of any kind in their hands.

5. On February 12, 1999, at or near 2:30 a.m., acting in an undercover capacity, Agent Perez and Agent McEnroe entered the licensed premises. Upon entering the premises, Agent Perez paid a \$5.00 cover charge and received a wristband. Perez brought no alcohol into the premises with him on that evening.

6. Once inside the licensed premises, Agent Perez went to the bar where he was approached by bartender Norman Vanderbiest. After Vanderbiest asked him what he would like, Agent Perez ordered a Budweiser beer. Vanderbiest retrieved the beer from the cooler behind the bar and gave Agent Perez the beer. After Perez asked how much the Budweiser cost, Vanderbiest responded, "\$3.00." Agent Perez then gave \$3.00 to Vanderbiest, who subsequently rang up the sale and placed the money in the cash register.

7. At no time during the transaction described in paragraph 6 did Vanderbiest ask Agent Perez if he had brought any

alcoholic beverages with him to the licensed premises. In fact, Agent Perez had not brought any alcoholic beverages into the licensed premises on August 12, 1999. Furthermore, prior to February 12, 1999, Agent Perez had never visited the licensed premises, and thus, had never taken any alcoholic beverages there.

8. After Agent Perez purchased the Budweiser beer, he moved from the main bar area to the west end of the bar where he remained for about ten minutes. While situated at the west end of the bar, Agent Perez observed several patrons approach the bar and speak with Vanderbiest. Agent Perez was unable to hear what was being said but he observed Vanderbiest serve each patron an alcoholic beverage. After receiving the alcoholic beverages, each patron would then give Vanderbiest money. At no time during these transactions did Agent Perez observe patrons present cards to Vanderbiest to punch. Furthermore, Agent Perez did not see Vanderbiest check a logbook before he served alcoholic beverages to those patrons.

9. From the west end of the bar, Agent Perez saw 10 to 15 patrons entering the licensed premises. During that time, Agent Perez observed that none of the patrons entering the premises brought alcoholic beverages with them.

10. Agent Patrick McEnroe entered the premises on February 12, 1999, at about 2:30 a.m. Upon entering the premises, Agent McEnroe paid a \$5.00 cover charge. Agent McEnroe

brought no alcoholic beverages into the licensed premises with him nor did he receive a ticket or card to be punched.

11. Once inside the premises, Agent McEnroe went to the bar and ordered a Bud Light beer from bartender, Norman Vanderbiest. Vanderbiest informed Agent McEnroe that the cost was \$3.00, then retrieved a Bud Light beer from the cooler and handed it to Agent McEnroe. Agent McEnroe gave the bartender \$3.00 for the beer. Agent McEnroe purchased three bottles of beer that evening. In none of these transactions did Vanderbiest ask Agent McEnroe if he brought any beer with him nor did he ask Agent McEnroe for a card to be punched.

12. Later that evening, after Agents Perez and McEnroe exited the premises, Division agents, assisted by the Lee County Sheriff's Office, entered and raided the premises. During the raid, agents seized 571 containers of alcoholic beverages, \$315.00 in cash from the cash register, and two notebooks.

13. One of the notebooks seized was a log book containing entries listing alleged patrons' names along with an alcoholic beverage type, a number assigned to the beverage, and a date. The last entry in the log book was made on February 6, 1999, six days prior to the raid. Neither Agent Perez nor Agent McEnroe was listed in the logbooks.

14. During the raid, Division agents entered the premises and arrested the manager of the club. Subsequently, the manager pled guilty in the Lee County Circuit Court to the criminal

charge of keeping or maintaining a place, the licensed premises, that sold alcoholic beverages without a proper license on February 12, 1999.

15. The licensed premises had procedures that governed how employees of Hollywood Underground were to accept and distribute beer and liquor brought into the premises by patrons. When a patron brought beer into the licensed premises, an employee of the club was to write on a card the number and kind of beer that the patron brought to the premises. Once this information was recorded on the card, the employee would give the card to the patron.

16. After the club employee accepted the beer from and issued the card to the patron, in order for the patron to retrieve one or more of the beers, the patron was to present the card to the bartender. The bartender was to then give the patron the requested number of beers and punch the card the corresponding number of times, thereby indicating to both the bartender and patron the number of beers the patron had been given and how many remained.

17. To facilitate ease in the dispensing of the beer, like brands of beer were commingled and placed in a cooler with other containers of identical brands. No attempt was made to designate or label containers of beer by the patrons who brought them into the premises.

18. With regard to liquor, the policy of Hollywood Underground was that bottles of liquor brought in by patrons were to be identified in a manner to ensure that patrons were served liquor only from the bottles that they brought to the premises. In accordance with this policy, when a patron brought a bottle of liquor into the licensed premises, an employee of the club was to put a label on each bottle and write a number on the label. Next, in a log book, the employee was to write the number designated on the club's label, the kind of liquor, and the name of the patron who brought in that bottle of liquor.

19. On February 12, 1999, these policies were not implemented by employees of the licensed premises as evidenced by the transactions involving Agents Perez and McEnroe.

20. In the fall of 1998, Tom Lloyd, a videographer for Channel 6 television, followed Division agents into the licensed premises for purposes of an undercover television news story regarding illegal sale of alcoholic beverages by Respondent. Lloyd did not bring any alcoholic beverages with him to the licensed premises. Nevertheless, while sitting at the bar, Lloyd was approached by a bartender who solicited an order from Lloyd for an alcoholic beverage. Lloyd requested a rum and coke and was sold a rum and coke for \$4.00 by the bartender.

21. Prior to the Administrative Action which is the subject of this proceeding, three other administrative actions have been filed against Hollywood Underground for violations of Section

562.12, Florida Statutes. All of the three previously filed administrative actions resulted in disciplinary action against Respondent's license.

22. Respondent was charged in two separate administrative actions (DBPR Case Nos. 46-95-0582 and 46-95-0089) with selling alcoholic beverages in a manner not permitted by license, in violation of Section 562.12, Florida Statutes. These two cases were resolved by combined Consent Order (Final Order No. BPR-96-02540), wherein Respondent paid a \$5,000 civil penalty and agreed that its "agents, servants, or employees would not sell or supply alcoholic beverages to any person other than the patron who brought such alcoholic beverages onto the premises." Respondent also agreed to diligently "ensure that no alcoholic beverage would be dispensed to any person that did not bring such alcoholic beverage onto the premises."

23. In DBPR Case No. 46-97-0890, Respondent was charged for the third time with selling alcoholic beverages in a manner not permitted by license, a violation of Section 562.12, Florida Statutes. This case was resolved by Consent Order (Final Order No. BPR-98-06888), wherein Respondent paid a \$7,500 civil penalty and agreed to take corrective action regarding the unlawful sale of alcohol on the premises. Respondent agreed to prevent further occurrences of violations of Section 562.12, Florida Statutes. In paragraph 6 of the Consent Order, Respondent agreed and acknowledged that revocation of its alcoholic beverage license

would be the appropriate sanction for any subsequent administrative action against the Respondent's license alleging failure of the Respondent to comply with the beverage laws.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Section 120.57(1), Florida Statutes.

25. The Division of Alcoholic Beverages and Tobacco is empowered by Section 561.29(1), Florida Statutes, to discipline a beverage license when the licensee is found to have committed one or more violations enumerated in that section.

26. That section provides in relevant part the following:

(1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

(a) Violation by the licensee or his or her or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment, of any of the laws of this state or of the United States, or violation of any municipal or county regulation in regard to the hours of sale, service, or consumption of alcoholic beverages. . . .

27. In the instant case, the Administrative Action charges Respondent with violating Section 562.12, Florida Statutes, which states:

(1) It is unlawful for any person to sell alcoholic beverages without a license, and it is unlawful for any licensee to sell alcoholic beverages except as permitted by

her or his license, or to sell such beverages in any manner except that permitted by her or his license; and any licensee or other person who keeps or possesses alcoholic beverages not permitted to be sold by her or his license, or not permitted to be sold without a license, with intent to sell or dispose of same unlawfully, or who keeps and maintains a place where alcoholic beverages are sold unlawfully, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

28. In order to prevail in this proceeding, the Department must prove the allegations by clear and convincing evidence.

Department of Banking and Finance vs. Osborne Stern, 670 So. 2d 932 (Fla. 1996) and Ferris vs. Turlington, 510 So. 2d 292 (Fla. 1987).

29. Respondent holds a bottle club license, and, thus, is subject to the prohibition that it may not sell alcohol in any manner except that permitted by its license.

30. A bottle club is defined as follows:

[A] commercial establishment, operated for a profit, whether or not a profit is actually made, wherein patrons consume alcoholic beverages which are brought onto the premises and not sold or supplied to the patrons by the establishment, whether the patrons bring in and maintain custody of their own alcoholic beverages or surrender custody to the establishment for dispensing on the premises, and which is located in a building or other enclosed permanent structure

Section 561.01(15), Florida Statutes (1997).

31. Section 561.11(1), Florida Statutes, authorizes the Division to adopt rules and regulations and administrative orders to carry out the purposes of the Beverage Law. Pursuant to that

authority, the Division adopted Rule 61A-3.049(1)(c), Florida Administrative Code, that provides that a bottle club is "a premises where alcoholic beverages are not sold but where patrons are allowed to consume alcoholic beverages on the premises." Subsection (5) of that same rule mandates that "bottle club licensees may not . . . sell alcoholic beverages to patrons."

32. Section 561.01 (9), Florida Statutes, defines "sale" or "sell" as follows:

[A]ny transfer of an alcoholic beverage for a consideration, any gift of an alcoholic beverage in connection with, or as a part of, a transfer of property other than an alcoholic beverage for a consideration, or the serving of an alcoholic beverage by a club licensed under the Beverage Law.

33. The Beverage Law makes it clear that a bottle club is a business where patrons bring their own alcoholic beverages with them to the premises. The patron may either retain control of those beverages or turn them over to the business for later consumption by that patron and that patron's guest while the patron is on the premises. In both instances, ownership of the alcoholic beverage always remains with the patron.

34. If a patron chooses to surrender custody of the alcoholic beverage to the licensed premises, the premises may serve that beverage back to the patron for a "set up" fee. A "set up" fee is a fee that is charged by a bottle club for either the service of mixing a drink or serving a beer back to the

patron who brought the alcoholic beverages to the premises.
However, bottle clubs may not sell alcoholic beverage to patrons.

35. In this case, the evidence established that Respondent sold alcoholic beverages four times to Division Agents Perez and McEnroe on February 12, 1999. Moreover, the undisputed evidence established that this is the fourth time that Respondent has been charged with the same offense of unlawful sale in a manner not permitted by license.

36. Based on the language of the Consent Orders in the three previous cases, Respondent was clearly on notice that the Division would seek revocation of its license for a fourth violation of Section 562.12, Florida Statutes. Moreover, Respondent agreed in the last Consent Order that revocation would be the appropriate penalty for any further violations of Section 562.12, Florida Statutes.

37. Petitioner has shown by clear and convincing evidence that on February 12, 1999, Respondent unlawfully sold alcoholic beverages to patrons in a manner not permitted by license.

38. Pursuant to Rule 61A-2.022, Florida Administrative Code, the penalty for a fourth occurrence of selling alcoholic beverages in a manner not permitted by license is revocation of license.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Respondent committed the offenses alleged in the Administrative Action; that Respondent's alcoholic beverage license number 39-01181 be revoked; and that Respondent be assessed a civil penalty of \$1,000 per count for a total of \$2,000.

DONE AND ENTERED this 16th day of February, 2000, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 16th day of February, 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.