

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF ALCOHOLIC )  
BEVERAGES AND TOBACCO, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 99-3065  
 )  
POLPO MARIO, INC., d/b/a )  
POLPO MARIO RISTORANTE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on December 15, 1999, in Sarasota, Florida.

APPEARANCES

For Petitioner: Charles D. Peters, Esquire  
Department of Business  
and Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Joseph Casadio, pro se  
3131 Clark Road, Suite 103  
Sarasota, Florida 34231

STATEMENT OF THE ISSUE

The issue is whether an administrative fine should be imposed on Respondent for unlawfully selling "spirituous

beverages" on its licensed premises, as alleged in the Administrative Action served by Petitioner on March 17, 1999.

PRELIMINARY STATEMENT

This matter began on March 17, 1999, when Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, served an Administrative Action against Respondent, Polpo Mario, Inc., doing business under the name of Polpo Mario Ristorante, alleging that on February 24, 1999, one of Respondent's employees unlawfully sold "spirituous beverages" on the licensed premises when its license authorized only the sale of beer and wine. Respondent denied the allegation and requested a formal hearing to contest the preliminary action. The matter was referred by Petitioner to the Division of Administrative Hearings on July 16, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

By Notice of Hearing dated July 27, 1999, a final hearing was scheduled on October 7, 1999, in Sarasota, Florida. At Respondent's request, the matter was rescheduled to December 15, 1999, at the same location. On December 13, 1999, the case was transferred from Administrative Law Judge Arnold H. Pollock to the undersigned.

At the final hearing, Petitioner presented the testimony of Elaine Norring, a licensing specialist; Samuel J. Funaro, a special agent; and Eileen O'Shea, an auditor. Also, it offered Petitioner's Exhibits 1-3 and 5. All exhibits were received in

evidence. Respondent was represented by, and presented the testimony of its president, Joseph Casadio. Also, it offered Respondent's Composite Exhibit 1, which was received in evidence. Finally, at Petitioner's request, the undersigned took official notice of the statutes which govern this dispute, Rule 61A-2.022, Florida Administrative Code, Respondent's request for a hearing, and Respondent's answers to a Request for Admissions.

There is no transcript of the hearing. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner on December 22, 1999, and Respondent filed a paper styled as Summary of Hearing on December 28, 1999. Both have been considered by the undersigned in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this disciplinary action, Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division), seeks to impose penal sanctions on the license of Respondent, Polpo Mario, Inc., doing business as Polpo Mario Ristorante, on the ground that on February 24, 1999, an employee of the establishment served a Division special agent a shot of vodka and a shot glass containing a mixture of vodka and amaretto, none of which could be lawfully sold under Respondent's license. After this proceeding began, the restaurant was voluntarily closed by the owner.

2. Respondent has denied the charge and requested a formal hearing to contest this allegation. In his request for a hearing, Respondent contended that the employee who served the drinks was actually a bus boy and had no authority to wait on customers; that the bus boy was pressured into making the sale; that the employee was "slightly retarded"; and that the chef occasionally used amaretto in preparing a special dessert. Except for the latter assertion, none of these defenses was established at the final hearing.

3. Respondent is subject to the regulatory jurisdiction of the Division, having been issued license no. 68-01763, Series 2COP. That license allows Respondent to make sales of beer and wine for consumption on the premises of its restaurant located at 3131 Clark Road, Sarasota, Florida. The license does not, however, authorize the sale of "spirituous beverages," such as vodka, whiskey, and liquors, which contain more than six percent of alcohol by volume.

4. Besides the above license, Respondent also holds licenses from the Division for three other restaurants, including a Series 4COP, SRX license, which authorizes the sale of all types of alcoholic beverages in conjunction with food sales. This type of license has an annual fee of \$1,820.00.

5. On November 6, 1998, a Division auditor, Eileen O'Shea (O'Shea), performed a routine audit of Respondent's corporate

offices. Such audits are required to be performed at least once every three years.

6. During the course of the audit, O'Shea examined various invoices from liquor dealers, including one which suggested that liquor may have been transferred from one of the restaurants holding a Series 4COP, SRX license to Polpo Mario Ristorante. O'Shea cautioned Respondent's president, Joseph Casadio (Casadio), and his wife, that under a Series 2COP license, they were not authorized to sell or have alcoholic beverages on the licensed premises. She also gave them a copy of the state statutes which contained this restriction, and O'Shea suggested that if any liquor was kept in the kitchen for food preparation purposes, that the bottle be marked with a "K." She further advised them that if they intended to use alcoholic beverages for preparing certain special dishes, they must obtain written approval from the Division to do so. There is, however, no statutory or rule authority for this requirement. Finally, she referred her findings to a Division special agent.

7. Both Casadio and his wife acknowledged to O'Shea that they now understood the requirements and that no laws were being violated. Casadio also told her that he had once served customers an after dinner espresso with Sambuca (a liquor) without charge, but he no longer did so.

8. Around 6:15 p.m. on February 24, 1999, and presumably in response to O'Shea's referral, Division special agent Samuel J.

Funaro (Funaro) visited the licensed premises of Respondent for the purpose of attempting to purchase spirituous beverages. Funaro was greeted by Gerard Woel (Woel), an employee who seated Funaro at a table near the bar and handed him a menu. Besides Woel, there were two other female waitresses on duty that evening, including Kim Mitchell (Mitchell). None of these former employees, or any others, testified at the final hearing; however, their out-of-court statements have been treated as admissions by employees of a party and therefore an exception to the hearsay rule.

9. Although there were several special entrees shown on a display board at the entrance to the restaurant, none were desserts. Funaro ordered an Eggplant Parmigiana as his entree and a bottle of Budweiser beer to drink. He also asked Woel for a whiskey chaser to go with his beer. Woel departed and returned from the kitchen a few minutes later with a shot glass containing a clear liquid. The parties have stipulated that the liquid was vodka. Woel remarked that the vodka came from a bottle kept by the chef in the kitchen. By serving that drink, Respondent exceeded the authority under its license.

10. At a later point in his meal, Funaro ordered a second bottle of beer and another whiskey chaser. A few minutes later, Woel returned with a shot glass containing a brownish colored liquid and explained that it represented the last vodka in the chef's bottle along with a small amount of amaretto, which was

the only other alcoholic beverage in the kitchen. Although Funaro did not retain a sample of the drink, based on his experience, he concluded that the shot glass did in fact contain vodka and amaretto. By serving the drink, Respondent exceeded the authority under its license.

11. Shortly before 8:00 p.m., Funaro completed his meal. Woel was busy with other customers, so the bill was presented by Mitchell, another waitress on duty. The bill totaled \$17.91, including tax, and besides the food charge, contained a charge for one beer (even though two had been ordered) and an item for \$5.50 entitled "2-Open Food Lunch." As to the latter item, Mitchell explained that this was the way liquor sales were rung up on the cash register because the cash register did not have a specific key for liquor sales.

12. On March 10, 1999, O'Shea and Funaro returned to Respondent's restaurant for the purpose of conducting an inspection of the premises. They found a bottle of Bols Amaretto in the kitchen used for preparing desserts. At that time, the chef on duty told them that after dinner drinks were served at one time but the practice was discontinued. He also stated that the previous chef had kept a bottle of vodka on the premises for preparing a pasta sauce.

13. On March 16, 1999, Funaro met with Casadio and explained the violations he had noted during his previous visit and inspection. Casadio explained again that he had once given a

complimentary after dinner drink to patrons but discontinued that practice after O'Shea had given him a verbal warning during her audit. He also explained that the amaretto found in the kitchen on the March 10 inspection was used to prepare desserts for patrons.

14. In mitigation, Casadio established that he had been in the restaurant business for some 20 years, and there is no evidence that he has ever been charged with, or convicted of, violating any Division regulations or state law. He pointed out that he would never risk his license for the price of two drinks (\$5.50), that he has always attempted to comply with all relevant requirements, and that he immediately fired Woel after learning of his actions. Given the extremely small amount of liquor involved, the minimal amounts kept on hand in the kitchen for cooking purposes, and the fact that Respondent was obviously not engaged in this conduct on a widespread, continuing basis, a reduction in the fine is appropriate.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

16. As the party seeking to impose penal sanctions on Respondent's license, Petitioner bears the burden of proving the allegations in the charging document by clear and convincing evidence. See, e.g., Pic N' Save Central Fla., Inc. v. Dep't of



Bus. And Prof. Reg., Div. of Alco. Bev. and Tobacco, 601 So. 2d 245, 249 (Fla. 1st DCA 1992).

17. The Administrative Action alleges that Respondent violated Section 562.12(1), Florida Statutes (1997), by selling alcoholic beverages not permitted by its license.

18. By clear and convincing evidence, Petitioner has established that Respondent has violated the cited statute, as alleged in the Administrative Action. This being so, it is necessary to determine an appropriate penalty.

19. Rule 61A-2.022(11), Florida Administrative Code, prescribes the penalty guidelines to be imposed upon alcoholic beverage licensees. For a first-time violation of Section 562.12(1), Florida Statutes, which is the case here, the rule calls for a \$500.00 fine or an amount equal to the correct license fee, whichever is greater. Here, the correct license fee would be \$1,820.00. Finally, unlike those adopted by most other licensing agencies, the Division's rule does not identify any aggravating and mitigating considerations which may be taken into account in assessing a penalty. However, for the reasons expressed in Finding of Fact 14, a reduction in the suggested penalty guideline is appropriate.

20. In its proposed order, Petitioner suggests that the imposition of a fine totaling \$1,820.00 is warranted, since that amount is called for by the rule. Given the mitigating factors discussed above, however, a more appropriate fine is \$750.00.

RECOMMENDATION

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

RECOMMENDED that the Division of Alcoholic Beverages and Tobacco enter a final order determining that Respondent has violated Section 562.12(1), Florida Statutes, as charged in the Administrative Action, and that an administrative fine in the amount of \$750.00 be imposed.

DONE AND ENTERED this 30th day of December, 1999, in Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of December, 1999.

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.