

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC)
BEVERAGES AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 99-3434
)
JOHNNY DEWAYNE BARTLETT,)
d/b/a M & M GENERAL,)
)
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 October 26, 1999, in Bonifay, Florida.

APPEARANCES

For Petitioner: Ruth Nicole Selfridge, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Mark D. Davis, Esquire
684 Baldwin Avenue, Suite One
DeFuniak Springs, Florida 32433-1938

STATEMENT OF THE ISSUE

The issue is whether Respondent's beverage license should be disciplined for selling alcoholic beverages to a minor on a

Sunday, as alleged in the Administrative Action served by Petitioner on March 3, 1998.

PRELIMINARY STATEMENT

This matter began on March 3, 1998, when Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, served an Administrative Action against Respondent, Johnny DeWayne Bartlett, doing business under the name of M & M General, alleging that on March 1, 1998, Respondent unlawfully sold alcoholic beverages to a person under 21 years of age, and by making the sale on a Sunday, he had also violated a Holmes County ordinance. 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 August 10, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

By Notice of Hearing dated August 26, 1999, a final hearing was scheduled on October 26, 1999, in Bonifay, Florida. At the final hearing, Petitioner presented the testimony of Clinton I. Williams, an electrician; Harry Hamilton, an investigator with the Holmes County Sheriff's Department; and Frederick Miller, a former agency investigator. Also, it offered Petitioner's Exhibits 1-5. All exhibits were received in evidence. Respondent testified on his own behalf and offered Respondent's Exhibits 1-3, which were 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, the 1998 calendar, and Holmes County Ordinance No. 80-7.

The Transcript of the hearing was filed on November 23, 1999. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and Respondent on December 3 and 7, 1999, respectively, and they 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, Johnny DeWayne Bartlett, doing business as M & M General, on the ground that on Sunday, March 1, 1998, he violated state law and a local ordinance by selling alcoholic beverages on his licensed premises to a person under 21 years of age. Respondent has denied the charge and requested a formal hearing to contest this allegation.

2. Respondent is subject to the regulatory jurisdiction of the Division, having been issued license no. 40-00312/1APS. That license allows Respondent to make packaged beer sales at his convenience store located on County Road 181 and Highway 185 in

Leonia, a small community in the northwestern section of Holmes County, Florida. By virtue of Holmes County Ordinance No. 80-7, however, Respondent is prohibited from making such sales on Sundays.

3. On Sunday, March 1, 1998, Clinton I. Williams, then nineteen years of age, was employed as a paid "volunteer" for the Division for the purpose of attempting to purchase beer at Respondent's store. For his services, Williams was paid \$20.00 by the Division.

4. Williams was given instructions by a Division investigator to attempt to purchase a six-pack of beer. Williams was also told that if the clerk asked for an identification card (ID), he should politely set the beer down and leave the premises.

5. Around 9:30 a.m. on March 1, 1998, Williams entered the store and walked to the rear where the coolers were located. Because it was a Sunday, the doors to the coolers where the beer was on display "were chained up." Even though there was a "NO TRESPASSING VIOLATORS WILL BE PROSECUTED" sign on an unlocked side door which led to the rear of the coolers, Williams proceeded through the side door and was able to gain access to the coolers. He then "got a six pack of Natural Light, turned around and walked back to the counter."

6. Respondent was on duty at the front check-out counter. When Williams placed the beer on the counter, Respondent asked

him where he got the beer. Williams replied that he took it out of the cooler, and Respondent admonished him not to do that anymore.

7. Williams handed Respondent a ten dollar bill, and Respondent took the money, bagged the beer, and handed Williams his change. The sale was not rung up on the cash register, and Williams was not asked for an ID to prove that he was at least 21 years old. Williams then carried the beer to a Division agent and an investigator for the Holmes County Sheriff's Department, who were waiting across the street in a parked vehicle. Respondent was arrested a short time later.

8. In mitigation, Respondent says that he is a diabetic, and this was not disputed. Respondent maintained that he was extremely upset a week earlier when "a young man" entered the store, walked inside his cooler as Williams did, and got a six pack of beer. When Respondent asked him what he was doing, the customer "went beserk," threw down the beer, and "took off," causing Respondent to become extremely frightened. When Williams approached him a week later wanting to purchase beer, Respondent says that he feared a similar confrontation, that his "sugar went through the floor," and that he just "blank[ed] out." Although Respondent acknowledges that he may have put the beer in the bag, taken the money, and given change, he "can't say for sure" that this occurred due to his diabetic condition. Assuming this scenario to be true, which the undersigned finds highly unlikely,

it only constitutes a mitigating consideration in assessing an appropriate penalty and does not excuse Respondent from complying with the law.

9. At hearing, Respondent introduced into evidence the cash register tapes for sales made on March 1, 1998. They do not reflect a sale of beer in the amount of \$3.54 on the morning when the event occurred. However, this merely confirms that the sale was not rung up on the cash register.

10. In his post-hearing filing, Respondent also maintains that Petitioner has failed to establish that the sale actually occurred in Holmes County, Florida. This contention is rejected since the evidence clearly and convincingly shows that Respondent is licensed to do business at "C181 & Hwy 185, Leonia, FL," which lies in Holmes County, Florida, and that the illicit sale occurred at the "M and M Grocery" at the "intersection of [1]81 and 185."

11. There is no evidence that Respondent has ever been charged with, or convicted of, violating any other regulations or statutes while operating his store over the past 4 years.

CONCLUSIONS OF LAW

12. 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.

13. 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).

14. The Administrative Action alleges that Respondent violated Section 562.11(1)(a), Florida Statutes (1997), by selling alcoholic beverages to a person under the age of 21, and that he violated Section 561.29(1)(a), Florida Statutes (1997), by contravening a county regulation which prohibits the sale of beer on Sundays.

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

16. 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 562.11(1)(a), Florida Statutes, the rule calls for a \$1,000.00 fine and a 7-day suspension of the license. For the first-time violation of Section 561.29(1)(a), Florida Statutes, involving the commission of a misdemeanor by the licensee, the rule calls for a \$250.00 fine. Subsection (9) of the same rule provides, however, that "[n]o stipulation or order may exceed \$1,000 for violations arising out of a single transaction." In other words, where the licensee is involved in a single illicit

transaction which constitutes a violation of more than one statute, as is the case here, the Division will not impose a fine exceeding \$1,000.00. Finally, unlike those adopted by some other agencies, the Division's rule does not identify any aggravating and mitigating considerations which may be taken into account in assessing a penalty. In this case, other than a blemish-free record on the part of Respondent since receiving his license, there are no other considerations.

15. In its proposed order, Petitioner suggests that the imposition of a fine totaling \$1,250.00 is appropriate, together with a 7-day suspension of Respondent's license, as called for by the rule. The suggested fine, however, exceeds the \$1,000.00 limitation prescribed in Subsection (9) of the rule. Therefore, a \$1,000.00 fine and 7-day suspension are appropriate.

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 Sections 561.29(1)(a) and 562.11(1)(a), Florida Statutes, as charged in the Administrative Action, and that his license no. 40-00312/1APS be suspended for 7 days and that he pay a \$1,000.00 fine.

DONE AND ENTERED this 14th day of December, 1999, in
Tallahassee, Leon County, Florida.

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 14th 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.