

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF ALCOHOLIC BEVERAGES)	
AND TOBACCO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 00-5010
)	
THERRAINNES REX, INC., d/b/a)	
ATLANTIC STREET STATION,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on January 26, 2001, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael Martinez, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: No appearance

STATEMENT OF THE ISSUES

Whether Respondent committed the violation alleged in the Administrative Action, and, if so, what disciplinary action should be taken.

PRELIMINARY STATEMENT

On April 25, 2000, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DABT), issued an Administrative Action against Respondent, the holder of a DABT-issued 4COP SRX license, alleging that, "[d]uring the period of 1/2000 through 2/2000, [Respondent] failed to derive at least 51% of [its] gross revenue from sales of food and non-alcoholic beverages contrary to Section 561.20(2)(a)4., Florida Statutes." Through the submission of a completed Request for Hearing form dated May 20, 2000, Respondent disputed the factual allegations made in the Administrative Action and requested an administrative hearing. On December 13, 2000, the matter was referred to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct the hearing Respondent had requested.

The hearing was scheduled for January 26, 2001. DABT and Respondent were provided with written notice of the scheduled hearing in accordance with Section 120.569(2)(b), Florida Statutes 1/ DABT appeared at the hearing, which was held as

scheduled on January 26, 2001, through its counsel of record, Michael Martinez, Esquire. Respondent, on the other hand, did not make an appearance at the hearing, either in person or through counsel or an authorized representative.

DABT presented the testimony of Captain Deborah Beck, the district supervisor of its West Palm Beach and Fort Pierce offices. In addition, it offered three exhibits (Petitioner's Exhibits 1, 2, and 3) into evidence. All three exhibits were received by the undersigned.

At the close of the evidentiary portion of the hearing the undersigned established a deadline (ten days from the date of the filing of the hearing transcript with the Division) for the filing of proposed recommended orders.

A transcript of final hearing (consisting of one volume) was filed with the Division on February 5, 2001. On that same date (February 5, 2001), DABT filed its Proposed Recommended Order, which the undersigned has carefully considered. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at the final hearing and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, Respondent operated a restaurant, Atlantic Street Station, located in Delray Beach, Florida.

2. Since 1998, Respondent has held a Special Restaurant License (license number 60-11520 4COP SRX), authorizing it to sell alcoholic beverages on the premises of Atlantic Street Station.

3. During the months of January and February 2000, \$66,729.49, or slightly less than 33% of Atlantic Street Station's total gross revenues of \$205,679.76, came from the retail sale on the licensed premises of food and non-alcoholic beverages.

CONCLUSIONS OF LAW

4. DABT is the unit of state government responsible for "supervis[ing] the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of all alcoholic beverages." Section 561.02, Florida Statutes.

5. Any person, before engaging in the business of manufacturing, bottling, distributing, selling, or in any way dealing in alcoholic beverages, must apply for and obtain an appropriate license from DABT. See Sections 561.17, 561.181, and 561.19, Florida Statutes.

6. Section 561.20(1), Florida Statutes, imposes limitations on the number of licenses DABT may issue to vendors in each county authorizing the retail sale and on-premises consumption of alcoholic beverages (which licenses are referred to as "quota licenses.")

7. Section 561.20(2)(a)4., Florida Statutes, authorizes DABT to issue a special license authorizing the retail sale and on-premises consumption of alcoholic beverages to "[a]ny 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 beverage," regardless of the number of "quota licenses" that have been issued to other business establishments in the county where the qualifying restaurant is located.

8. Rule 61A-3.0141(3), Florida Administrative Code, requires, among other things, that:

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. . . .

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. . . .

(e) For purposes of determining required percentages, an alcoholic beverage means the retail price of a serving of beer, wine, straight distilled spirits, or a mixed drink.

9. Section 561.29, Florida Statutes, authorizes DABT to suspend or revoke any alcoholic beverage license, and to also impose a civil penalty against a licensee not to exceed \$1,000 per single transaction, for a:

Violation by the licensee . . . of any of the laws of this state . . . or license requirements of special licenses issued under s. 561.20 [or a]

Violation by the licensee . . . of any rule or rules promulgated by the division in accordance with the provisions of this chapter

10. "No revocation [or] suspension . . . of any license is lawful unless, prior to the entry of a final order, [DABT]

has served, by personal service or certified mail, an administrative complaint [or action] which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

11. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint [or action]. Sections 120.569(1) and 120.57, Florida Statutes.

12. At the hearing, DABT bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint or action. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Pic N' Save of Central Florida v. Department of Business Regulation, 601 So. 2d 245, 249 (Fla. 1st DCA 1992); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in

penal or licensure disciplinary proceedings or except as otherwise provided by statute").

13. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

14. In determining whether DABT has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegations made in the administrative complaint or action. Due process prohibits an agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the agency's charging instrument. See Hamilton v. Department of

Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

15. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint or action] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by DABT, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

16. The Administrative Action issued in the instant case alleges that Respondent violated Section 561.20(2)(a)4., Florida Statutes, by failing, during the months of January and February 2000, "to derive at least 51% of [its] gross revenue from sales of food and non-alcoholic beverage."

17. The proof DABT presented at the final hearing in this case, which included Respondent's "daily sales" records for the months of January and February 2000, clearly and convincingly establishes that Respondent committed the violation of Section 561.20(2)(a)4., Florida Statutes, alleged in the Administrative Action, and thereby failed to meet the minimum requirements for holding a Special Restaurant License. Accordingly, disciplinary action may be taken against Respondent pursuant to Section 561.29, Florida Statutes.

18. In determining what disciplinary action DABT should take, it is necessary to consult the Board's "penalty guidelines," which impose restrictions and limitations on the exercise of the DABT's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of

Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

19. DABT's "penalty guidelines" are found in Rule 61A-2.022, Florida Administrative Code, which provides, in pertinent part, as follows:

(1) This rule sets forth the penalty guidelines which shall be imposed upon alcoholic beverage licensees and permittees who are supervised by the division. . . . The penalties provided below are based upon a single violation which the licensee committed or knew about;

(2) Businesses . . . issued alcoholic beverage licenses . . . by the division are subject to discipline (warnings, corrective action, civil penalties, suspensions, revocations, reimbursement of cost, and forfeiture). . . .

(9) No . . . order may exceed \$1,000 for violations arising out of a single transaction.

(10) Licensees may petition the division to amend any . . . final order by sending the petition to the Director, Division of Alcoholic Beverages and Tobacco, Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399-1020. Petitions filed shall not automatically stay any effective dates in the stipulation or order unless the director authorizes the stay or amendment requested in the petition.

(11) The penalty guidelines set forth in the table that follows are intended to provide field offices and licensees or permittees with penalties that will be routinely imposed by the division for

violations. The description of the violation in the table is intended to provide a brief description and not a complete statement of the statute. . . .

STATUTE: 561.20

VIOLATION: Failure to meet minimum qualifications of special license

FIRST OCCURRENCE: \$1000 and revocation without prejudice to obtain any other type of license, but with prejudice to obtain the same type of special license for 5 years. Note: For each 2 month period a special restaurant license failed to meet the required food percentage the civil penalty shall be increased by \$1000.

20. There being no apparent reason to deviate from the "routine" penalty prescribed by Rule 61A-2.022, Florida Administrative Code, for a licensee's "[f]ailure to meet minimum qualifications of [the licensee's] special licensee," DABT should penalize Respondent for committing the violation of Section 561.20(2)(a)4., Florida Statutes, alleged in the Administrative Action, by revoking Respondent's Special Restaurant License "without prejudice to obtain any other type of license, but with prejudice to obtain the same type of special license for 5 years," and by fining Respondent \$1,000.00.

RECOMMENDATION

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

RECOMMENDED that DABT enter a final order finding Respondent violated Section 561.20(2)(a)4., Florida Statutes, as alleged in the Administrative Action, and disciplining Respondent therefor by revoking its license "without prejudice to obtain any other type of license, but with prejudice to obtain the same type of special license for 5 years," and fining Respondent \$1,000.00.

DONE AND ENTERED this 16th day of February, 2001, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2001.

ENDNOTE

1/ Such notice was in the form of a Notice of Hearing by Video Teleconference (Notice) mailed on December 27, 2000, to Petitioner and to Respondent (at its last known address, as reflected in the Request for Hearing it executed on May 20, 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.