

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC)
BEVERAGES AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 01-0530
)
TIM OF TAMPA, INC., d/b/a)
GENE'S BAR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on April 10, 2001.

APPEARANCES

For Petitioner: Michael Martinez
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Thomas A. Smith
800 West Platt, Suite 3
Tampa, Florida 33606

STATEMENT OF THE ISSUES

The issues are whether Respondent has incurred and failed to pay Petitioner a surcharge of \$38,218.31 plus a penalty of

\$25,946.18, in violation of Section 561.501, Florida Statutes, and whether Respondent has failed to maintain the records required by Section 561.501(2), Florida Statutes, and Rule 61A-4.063(8), Florida Administrative Code.

PRELIMINARY STATEMENT

By Administrative Action dated March 10, 2000, Petitioner alleged that, from January 31, 1996, through December 31, 1998, Respondent incurred and failed to pay a surcharge of \$38,218.31 plus a penalty of \$25,946.18, in violation of Section 561.501, Florida Statutes.

By Motion to Amend Administrative Action filed February 26, 2001, Petitioner requested leave to add the allegation that, from September 1 through December 31, 1998, Respondent failed to maintain the records required by Section 561.501(2), Florida Statutes, and Rule 61A-4.063(8), Florida Administrative Code. On March 13, 2001, the Administrative Law Judge granted the motion.

By Request for Hearing dated March 29, 2000, Respondent disputed the material allegations and requested a formal hearing.

At the hearing, Petitioner called two witnesses and offered into evidence seven exhibits. Respondent called four witnesses and offered into evidence one exhibit. All exhibits were admitted.

The court reporter filed the transcript on April 16, 2001.

FINDINGS OF FACT

1. Respondent holds license number 39-04047 4COP.

Respondent owns and operates Gene's Bar located at 2932 North 22nd Street in Tampa.

2. Respondent sells alcoholic beverages, but is not a "pouring bar." In other words, Respondent's employees sell the alcoholic beverages, but never open and pour the alcoholic beverage into a glass. Respondent sells mostly liquor and beer, and lesser amounts of wine.

3. In the typical transaction, Respondent sells a bottle or six-pack of alcoholic beverages to a patron, who may also purchase from Respondent a nonalcoholic beverage to mix with his alcoholic beverage, as well as cups and stirrers. Sometimes, the patrons remain in the bar after the purchase, often sitting at the half-dozen tables that Respondent provides for this purpose, and consume their alcoholic beverages in the bar.

4. A sign on the premises prohibits patrons from taking open containers of alcoholic beverages out of the bar. Respondent has hired a security guard to enforce this prohibition on busy nights.

5. Respondent's accounting system is fairly simple. Placing labels on each bottle, Respondent's employees remove the label each time that a bottle is sold. If a patron chooses to

consume his drink on the premises, the bartender is supposed to record this fact on a piece of paper. Either the bartender or Respondent's manager records sales information on a daily sheet; however, during the time period in question, if not also at present, Respondent's manager discarded this sheet after he transferred the information to a weekly sheet.

6. Respondent also uses a two-tape cash register, but it shows only the sale amount and is not computerized. Neither tape reveals individual sales or whether the patron purchased his alcoholic beverage for consumption on the premises. Respondent's manager uses the tape with the more detailed information to reconcile any shortages. After doing so, or if no shortages arise, the manager discards the more detailed tape.

7. During the audit, Respondent took the position that all of its wine sales and 78 percent of its beer and liquor sales were for off-premises consumption. However, despite repeated requests from Petitioner's auditor, Respondent never produced a daily log or any documentation of individual transactions. Instead, Respondent produced only highly summarized information supporting its position. Respondent delayed providing the auditor with copies of its purchase invoices for the alcoholic beverages, although it eventually did so.

8. Petitioner's auditor agreed to allow Respondent to provide a detailed sample of sales from February to April, 2000.

When the auditor requested the documentation from this sampling period, she received nothing.

9. Knowing that Respondent made some sales for consumption off premises, Petitioner's auditor allocated 20 percent of all sales of alcoholic beverages for consumption off premises. Applying this 20 percent factor, Petitioner's audit determined that, from January 1, 1996, through December 31, 1998, Respondent incurred a surcharge liability of \$38,218.31, as well as a penalty of \$25,946.18, for a total liability of \$64,164.49, taxes and penalty.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

11. Section 561.501(1) imposes a surcharge on the sale by licensed vendors of specified volumes of alcoholic beverages "sold at retail for consumption on premises." Section 561.501(2) requires that vendors pay the surcharge in the following month to Petitioner and requires the imposition of a penalty for late payments. Section 561.501(2) requires Petitioner to "assess a late penalty in the amount of 10 percent of the amount due per month for each 30 days, or fraction

thereof, after the 20th of the month, not to exceed a total penalty of 50 percent, in the aggregate, of any unpaid surcharges."

12. Rule 61A-4.063(1)(b) states that a "sale," under Section 561.501, "occur[s] at the serving of any alcoholic beverage for consumption on premises" and includes "any transfer of an alcoholic beverage for a consideration." Rule 61A-4.063(4)(c) states: "If the vendor chooses the sales method, the vendor will bear the burden of proof that the method used accurately reflects actual sales. If the vendor uses the purchases method, the vendor will bear the burden of proof that purchases are accurately recorded."

13. Rule 61A-4.063(8) provides:

Each vendor licensed in any manner for consumption on premises shall maintain complete and accurate records on the quantities of all alcoholic beverages purchases, inventories, and sales. Records include purchase invoices, inventory records, receiving records, cash register tapes, computer records generated from automatic dispensing devices, and any other records used in determining sales. In the event a licensee maintains an active consumption-on-premises license but has no surcharge sales for a specific period of time, the licensee must file monthly surcharge report DBR form 44-005, Retail Surcharge Report, showing no activity. Records may be maintained on optical or visual storage retrieval systems capable of being viewed, retrieved and reproduced upon request by the division. All records must be maintained for a period of 3 years.

14. Rule 61A-4.063(9) provides:

Employees of the division shall have access to and shall have the right to examine the accounting records, invoices, or any other source documents used to determine a vendor's compliance with this rule. Each vendor is required to give the division the means, facilities and opportunity to verify the accuracy of the surcharge imposed by section 561.501, Florida Statutes. In order to determine whether the monthly reports submitted by the vendor are accurate, the division shall use the formula of beginning inventory plus purchases for the period, less ending inventory, less the spillage allowance, to ascertain sales for the period. Adjustments made to this formula in favor of the licensee will be based on factual, substantiated evidence. The results of the formula will represent sales transactions as defined herein and in section 561.01(9), Florida Statutes, for the period under review.

15. Respondent has elected to account for its alcoholic beverages transactions through the sales method. By rule, Respondent bears the burden of proving that its sales are accurately recorded. Respondent has failed to satisfy its burden of proof in this regard because it has failed to maintain sufficiently detailed records to permit the reliable differentiation between retail sales for consumption on premises and all other sales.

16. Respondent's focus on the condition of the container when transferred to the customer is misplaced. Under the statute imposing the surcharge, the focus is on where the

customer consumes the beverage, not who opens the container. If the customer consumes the beverage on premises, the surcharge is due.

17. Petitioner has therefore proved the accuracy of its audit establishing that Respondent owes a surcharge of \$38,218.31. However, the statute limits the penalty to 50 percent of the surcharge deficiency, so the penalty may not exceed \$19,109.15, for a total liability of \$57,327.46.

18. This is the sole relief sought by Petitioner in its original and amended charging pleadings, as well as the prehearing stipulation, so it is unnecessary to consider further the inadequacy of Respondent's records.

RECOMMENDATION

It is

RECOMMENDED that the Division of Alcoholic Beverages and Tobacco enter a final order finding Respondent liable for \$38,218.31 in surcharge and \$19,109.15 in penalty, for a total liability of \$57,327.46.

DONE AND ENTERED this 13th day of June, 2001, in
Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June, 2001.

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 must be filed with the agency that will issue the final order in this case.