STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 01-1613
DINOSAUR'S RESTAURANT, INC., d/b/a DINOSAUR'S CAFÉ AND SPORTS BAR,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on July 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: Ralf E. Michels, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: No appearance

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On November 16, 1999, 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 the following:

> 1. On or about September 28, 1999, you, Dinosaur's Restaurant Inc., DBA Dinosaur's Café and Sports Bar, through your agent, servant, or employee, did fail to maintain 150 seats for service of full course meals, in violation of FSS 561.20(2)(a)(4).
>
> 2. On or about September 28, 1999, you, Dinosaur's Restaurant Inc., DBA Dinosaur's Café and Sports Bar, did fail to maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages, in violation of FAC 61A-3.0141 within FSS 561.20(2)(a)(4).
>
> 3. On or about November 16, 1999, you, Dinosaur's Restaurant Inc., DBA Dinosaur's Café and Sports Bar, did fail to pay surcharges in the amount of $16.75 in violation of FAC 61A-4.063 and FSS 561.501.

Through the submission of a completed Request for Hearing form dated December 8, 1999, accompanied by an "attachment," Respondent disputed the factual allegations made in numbered

paragraphs 2 and 3 of the Administrative Action and requested an administrative hearing. The "attachment" read as follows:

> The Licensee disputes the following issues of fact, and states the reasons as follows:
>
> 1. Issue of Fact No. 1 is disputed.
>
> A. The prior owner of the stock of the above corporation maintained the establishment with appropriate seating for the license, by maintaining 151 seat[s].
>
> B. At the time the current shareholders became the owner of the corporation, the seating was maintained at 151, [and] they have maintained the proper seating from the date of purchase.
>
> C. On or about September 28, 1999, there was maintained on the premises at least 150 seats for service of full course meals.
>
> 2. Issue of Fact No. 2 is disputed.
>
> A. On or about September 28, 1999, the corporation did, and continues to, maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages.
>
> B. The individual who maintains said records, Mr. Bob Sevard, is a handicapped person. As a result of hospitalizations, the breakdown of the items, as required, may not have been available, because said computations are done by him at his residence, while he awaits lung transplant availability.
>
> C. Licensee requests permission to keep the original paperwork at his home, because of his severe handicap, and maintain copies at the place of business.

> 3. Licensee does not dispute the $16.75, and intends to pay same within the next few days.

On April 30, 2001, 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. 1/

The hearing was scheduled for July 26, 2001. DABT and Respondent were provided with written notice of the scheduled hearing in accordance with Section 120.569(2)(b), Florida Statutes. Such notice was in the form of a Notice of Hearing by Video Teleconference (Notice) mailed on May 14, 2001, to DABT's counsel of record, Ralf E. Michels, Esquire, and Respondent's then counsel of record, Kenneth Crenshaw, Esquire, of the Crenshaw Law Firm. See M. E. v. Department of Children and Family Services, 728 So. 2d 367, 368 (Fla. 3d DCA 1999)("Notice to counsel [in termination of parental rights court proceeding) is notice to the parent."); Woodard v. Florida State University, 518 So. 2d 336, 337 (Fla. 1st DCA 1987)("Notice to his attorney and agent is notice to Woodard, and receipt by his attorney [of the notice of his termination] is receipt by Woodard [for purposes of determining when the 21-day period for requesting a hearing on his termination began to run]"); and State v. Grooms, 389 So. 2d 313, 314 (Fla. 2d DCA 1980)("The issue before us simply stated is whether notice to a defendant's attorney of the

date he is scheduled for trial is notice to the defendant. We answer the question in the affirmative."). 2/

On May 24, 2001, Mr. Crenshaw and the Crenshaw Law Firm filed a motion requesting leave to withdraw as counsel of record for Respondent in the instant case. The motion's certificate of service reflected that a copy of the motion had been served on May 22, 2001, by United States Mail, on Respondent and counsel for Petitioner. Not having received any response to the motion, the undersigned, on June 6, 2001, issued an Order granting Mr. Crenshaw's and the Crenshaw Law Firm's motion for leave to withdraw.

DABT appeared at the hearing, which was held as scheduled on July 26, 2001, through its counsel of record, Mr. Michels. Respondent, on the other hand, did not make an appearance at the hearing, either in person or through counsel or any other authorized representative.

DABT presented the testimony of Captain Deborah Beck, the district supervisor of its West Palm Beach office. In addition, it offered four exhibits (Petitioner's Exhibits 1, 2, 3, and 4) into evidence. All four 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 August 6, 2001.

On August 10, 2001, Petitioner filed a Motion to Extend Time to File Proposed Recommended Order (Motion) in the instant case. By Order issued August 13, 2001, the Motion was granted, and the deadline for filing proposed recommended orders was extended to August 17, 2001.

On August 17, 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, Dinosaur's Café and Sports Bar, located in Boynton Beach, Florida.

2. Respondent is now, and has been at all times material to the instant case, the holder of a Special Restaurant License (license number 60-11570 4COP SRX) authorizing it to sell alcoholic beverages on the premises of Dinosaur's Café and Sports Bar.

3. On September 28, 1999, DABT Special Agent Jennifer DeGidio conducted an inspection of the premises of Dinosaur's Café and Sports Bar. Her inspection revealed that the premises had available seating for less than 150 patrons and that there were no records on the premises regarding the purchase and sale of food, alcoholic beverages, and non-alcoholic beverages. At no time had DABT given Respondent written approval to maintain these records at a designated off-premises location.

4. During her September 28, 1999, inspection, Special Agent DeGidio issued and served on Respondent notices advising Respondent that its failure to have seating for at least 150 patrons and to maintain food and beverage records on the premises for a minimum of three years from the date of sale was in violation of the law and that, if these violations were not remedied within 14 days, administrative charges would be brought against Respondent.

5. Special Agent DiGidio returned to the premises of Dinosaur's Café and Sports Bar on October 12, 1999, to find that the noticed violations had not been corrected. There were still fewer than 150 seats for patrons, and Respondent was again unable to produce the required records on the premises.

6. The Administrative Action that is the subject of the instant controversy was issued on November 16, 1999.

7. As of that date, Respondent had failed to timely remit to DABT $16.75 in surcharge monies that Respondent owed DABT for alcoholic beverages it had sold at retail for on-premises consumption at Dinosaur's Café and Sports Bar.

CONCLUSIONS OF LAW

8. 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.

9. 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.

10. 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.")

11. 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.

12. Rule 61A-3.0141, Florida Administrative Code, requires, among other things, that:

> (2) Special restaurant licenses shall be issued only to applicants for licenses in restaurants meeting the criteria set forth herein.
>
> (a) . . . [A] qualifying restaurant must have a service area occupying 2,500 or more square feet of floor space.
>
> 1. The required square footage shall not include any space contained in an uncovered or not permanently covered area adjacent to the premises because food service is not available at all times. . . .
>
> (b) . . . [A] qualifying restaurant must have accommodations for the service and seating of 150 or more patrons at tables at one time.
>
> 1. The tables and seating must be located within the floor space provided for in paragraph (2)(a) of this rule.
>
> 2. The tables must be of adequate size to accommodate the service of full course meals in accordance with the number of chairs or other seating facilities provided at the table.

3. Seating at counters used to serve food shall be included in the minimum seating requirements. . . .

(e) A qualifying restaurant must comply with all fire safety laws relating to the operation of a restaurant.

(3) 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.

2. The records required in subparagraph (3)(a)1. of this rule must be maintained on the premises, or other designated place approved in writing by the division for a period of 3 years and shall be made available within 14 days upon demand by an officer of the division. The division shall approve written requests to maintain the aforementioned records off the premises when the place to be designated is the business office, open 8 hours per work day, of a

> corporate officer, attorney, or accountant; the place to be designated is located in the State of Florida; and the place to be designated is precisely identified by complete mailing address.
>
> 3. Since the burden is on the holder of the special restaurant license to demonstrate compliance with the requirements for the license, the records required to be kept shall be legible, clear, and in the English language.
>
> 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.
>
> 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.

13. Section 561.501, Florida Statutes, and Rule 61A-4.063, Florida Administrative Code, require vendors, like Respondent, to timely remit to DABT a surcharge for alcoholic beverages they sell at retail for on-premises consumption. Pursuant to Subsection (2) of Section 561.501, Florida Statutes, the vendor must "remit payments to [DABT] each month by the 15th of the month following the month in which the surcharges are imposed."

Pursuant to Rule 61A-4.063(10)(c), Florida Administrative Code, "[r]emittances received after the 20th day shall cause the licensee to be subject to late penalties of 10 cents per day or 1 percent of the amount due per day for each day after the 20th of the month, whichever is greater."

14. 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 . . . .

15. "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.

16. 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.

17. 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 . . . .").

18. 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).

19. 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); Lusskin 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).

20. 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).

21. The Administrative Action issued in the instant case alleges that disciplinary action should be taken against Respondent because Respondent "fail[ed] to maintain 150 seats for service of full course meals, in violation of FSS 561.20(2)(a)(4)"; "fail[ed] to maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages, in violation of FAC 61A-3.0141 within FSS 561.20(2)(a)(4)"; and "fail[ed] to pay surcharges in the amount of $16.75 in violation of FAC 61A-4.063 and FSS 561.501."

22. The proof DABT presented at the final hearing in this case clearly and convincingly establishes that Respondent committed these violations alleged in the Administrative Action. Accordingly, disciplinary action may be taken against Respondent pursuant to Section 561.29, Florida Statutes.

23. In determining what disciplinary action DABT should take, it is necessary to consult the DABT's "penalty guidelines," which impose restrictions and limitations on the

exercise of 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).

24. 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. . . .

STATUTE: 561.501

VIOLATION: Late surcharge payments or reports

> FIRST OCCURRENCE: Corrective action and 25 percent of total late surcharge principal payments if licensee is current with surcharge reports and payments, and did not willfully neglect compliance with surcharge law based on a written statement of mitigation.

25. There being no apparent reason to deviate from the "routine" penalties 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" and "late surcharge payments or reports," DABT should penalize Respondent for committing the violations 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"; fining Respondent $1,000.00; and requiring Respondent to pay the $16.75 in surcharge monies it owes DABT, plus applicable penalties and interest.

RECOMMENDATION

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

RECOMMENDED that DABT enter a final order finding Respondent committed the violations 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"; fining Respondent $1,000.00; and requiring Respondent to pay the $16.75 in surcharge monies it owes DABT, plus applicable penalties and interest.

DONE AND ENTERED this 21st day of August, 2001, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2001.

ENDNOTES

1/ It is not apparent from a review of the record why it took so long for the matter to be referred to the Division.

2/ It is the responsibility of a litigant to make a reasonable effort to stay in contact with the litigant's attorney and advise the attorney of any change of address or telephone number. See M. A. v. Department of Children and Family Services, 760 So. 2d 249, 250 (Fla. 3d DCA 2000).

COPIES FURNISHED:

Ralf E. Michels, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

Richard Turner, Director
Division of Alcoholic Beverages and Tobacco
Department of Business and
  Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Hardy L. Roberts, III, General Counsel
Department of Business and
  Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Captain Deborah Beck
Division of Alcoholic Beverages and Tobacco
Department of Business and
  Professional Regulation
400 North Congress Avenue, Suite 150
West Palm Beach, Florida 33401

Dinosaur's Café and Sports Bar
511 Northeast 4th Street
Boynton Beach, Florida 33435

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.