

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF ALCOHOLIC BEVERAGES )  
AND TOBACCO, )  
 )  
Petitioner, ) Case No. 02-2737  
 )  
vs. )  
 )  
LAKE SUPERMARKET, INC., d/b/a )  
LAKE SUPERMARKET, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held by video teleconference in this case on October 8, 2002, at connecting sites in West Palm Beach and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Valentin Rodriguez, Jr., Esquire  
Valentin Rodriguez, P.A.  
318 Ninth Street  
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses set forth in the Administrative Action and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Petitioner), filed a one-count Administrative Action against Lake Supermarket, Inc., d/b/a Lake Supermarket (Respondent). Petitioner charged Respondent with violating Subsection 562.11(1)(a), Florida Statutes, as follows: "On or about 4-17-02, you, Lake Supermarket, Inc. d/b/a Lake Supermarket Inc., or your agent, employee, Armando Rodriguez, did sell, serve, or give an alcoholic beverage on your licensed premises to Investigative Aide #99, a person under the age of 21." Respondent disputed the allegations of fact in the Administrative Action and requested a hearing. This matter was referred to the Division of Administrative Hearings on July 10, 2002.

At the hearing, Petitioner presented the testimony of two witnesses and entered five exhibits (Petitioner's Exhibits numbered 1 through 4, and 6) into evidence. Respondent presented the testimony of its owner, Armando Rodriguez, and entered one exhibit (Respondent's Exhibit numbered 2) into evidence.

A transcript of the hearing was ordered. At the parties' request, the time for filing post-hearing submissions was set for

more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on October 16, 2002. Both parties timely filed post-hearing submissions, which were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material hereto, Respondent was licensed by Petitioner, having been issued license number 60-01280, Series 1-APS. No dispute exists that such license permits Respondent to make packaged sales of beer and wine at its establishment.

2. Respondent's last known address is 148 West Avenue A, Belle Glade, Florida. Respondent's establishment is a convenience store.

3. On or about April 17, 2002, Jeremiah Alexander Maxie went to Respondent's establishment for the specific purpose of attempting to purchase beer.

4. Mr. Maxie is employed as an investigative aide for Petitioner. At the time that he visited Respondent's establishment, Mr. Maxie was under 21 years of age; he was 17 years of age, having been born on August 10, 1984. Mr. Maxie did nothing to alter his appearance in an attempt to affect his age.

5. Mr. Maxie attempted to purchase beer at twelve other locations on April 17, 2002. He was paid \$35 by Petitioner for that day.

6. Mr. Maxie entered Respondent's establishment at approximately 4:50 p.m. Shortly thereafter, approximately 20 seconds later, Petitioner's Special Agent Danny Stoops, who was undercover, entered Respondent's establishment. Agent Stoops observed the actions of Mr. Maxie.

7. Agent Stoops is a 24-year veteran with Petitioner. He gave Mr. Maxie instructions as to what to do. Agent Stoops instructed Mr. Maxie to attempt to purchase a Budweiser product and, if the clerk requested identification, for Mr. Maxie to politely set the beer down and leave.

8. Mr. Maxie proceeded to the rear of Respondent's establishment to the coolers. He removed a can of beer, a Budweiser product, and proceeded to the cash register. At the time of hearing, Mr. Maxie could not recall the particular type of Budweiser product.

9. Agent Stoops observed Mr. Maxie proceed from the coolers to the cash register although he did not observe the product that Mr. Maxie had obtained.

10. Mr. Maxie gave the cashier/clerk, Armando Rodriguez, who is Respondent's owner, U.S. Currency as payment for the beer. Mr. Rodriguez placed the Budweiser product in a paper bag and gave Mr. Maxie a receipt, but Mr. Maxie did not look at the receipt. Mr. Maxie departed Respondent's establishment.

11. At the time of hearing, Mr. Maxie could not recall the denomination of currency that he gave to Mr. Rodriguez or the amount that he had paid for the beer.

12. Agent Stoops observed Mr. Maxie give Mr. Rodriguez the currency but did not observe the denomination.

13. Agent Stoops departed Respondent's establishment approximately 15 to 20 feet behind Mr. Maxie. When they were outside, the purchased Budweiser product was given to Agent Stoops by Mr. Maxie.

14. Both Agent Stoops and Mr. Maxie initialed the paper bag into which Mr. Rodriguez had placed the Budweiser product. Agent Stoops placed the Budweiser product in an evidence bag, tagged it with an evidence receipt bearing a control number, and secured the bagged evidence in the trunk of his vehicle. Agent Stoops removed the bagged evidence from the trunk of his vehicle and placed it in Petitioner's evidence vault.

15. For hearing, Agent Stoops retrieved the bagged evidence from the evidence vault. The Budweiser product presented at hearing was a can of Bud Light Beer, which was still in the paper bag in which the beer was placed at the time of purchase.

16. No challenge to the chain of custody of the can of beer was made and no problem exists as to the chain of custody of the can of beer.

17. No receipt for the purchase of the Budweiser product was included in the bagged evidence. Agent Stoops could not independently recall that a receipt was presented to him by Mr. Maxie.

18. Respondent entered into evidence cash register receipts for April 17, 2002, which do not reflect the purchase of any alcoholic beverage. However, the cash register receipts reflect, among other things, "taxable" and "grocery" items, not the particular items themselves, and "meat"; thereby, the cash register receipts differentiate only between "grocery" and "taxable" and "meat" items.

19. Further, the cash register receipts are numbered 058616 through 058619, with times of day reflecting 16:05 through 16:09, and 058624 through 058627, with times of day reflecting 16:46 through 16:52. Not included in the cash register receipts are receipts numbered 058620 through 058623, with times of day reflecting 16:10 through 16:45. With the missing numbered-cash register receipts included, a total of 12 transactions were completed, but only eight transactions were offered and admitted into evidence. No explanation was presented for the missing eight transactions.

20. Taking into consideration the overwhelming evidence of the purchase of the Budweiser product by Mr. Maxie, not having a receipt is insufficient to show that the beer-purchase

transaction did not occur. Moreover, the evidence is clear and convincing that the beer-purchase transaction did occur.

21. The product purchased at Respondent's establishment by Mr. Maxie was a can of beer, a Budweiser product, a Bud Light.

22. At the time of hearing, Mr. Rodriguez was 76 years of age and had owned Respondent's establishment for 36 years. He is Respondent's agent.

23. Mr. Rodriguez speaks Spanish. At the time of hearing, an interpreter was provided for him.

24. Mr. Rodriguez denies that he saw Mr. Maxie in Respondent's establishment and denies that he sold any beer to Mr. Maxie.

25. Mr. Rodriguez failed to realize to whom he sold the can of beer. At the time Mr. Maxie purchased the can of beer from Respondent's establishment, Mr. Rodriguez was engaged in a conversation with another gentleman. Mr. Rodriguez did not ask Mr. Maxie any questions or ask for his identification. Mr. Maxie said nothing to suggest that he was 21 years of age or older. As a matter of fact, no evidence was presented that any conversation took place between Mr. Maxie and Mr. Rodriguez. The evidence further suggests that Mr. Rodriguez paid very little attention to Mr. Maxie even at the time of the purchase of the beer.

26. Mr. Rodriguez did not knowingly and willfully sell the can of beer to a minor, i.e., Mr. Maxie.

27. Mr. Rodriguez was negligent and failed to exercise reasonable diligence in preventing the sale of the can of beer to Mr. Maxie.

28. No prior disciplinary action has been taken against Respondent by Petitioner.

#### CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

30. License revocation proceedings and proceedings involving the levying of administrative fines are penal in nature. The burden of proof is on the Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the Administrative Complaints. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).



32. Section 562.11, Florida Statutes, provides in pertinent part:

(1)(a) It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises. Anyone convicted of violation of the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(b) A licensee who violates paragraph (a) shall have a complete defense to any civil action therefor, except for any administrative action by the division under the Beverage Law, if, at the time the alcoholic beverage was sold, given, served, or permitted to be served, the person . . . .

33. Section 561.01, Florida Statutes, provides in pertinent part:

(4)(a) "Alcoholic beverages" means distilled spirits and all beverages containing one-half of 1 percent or more alcohol by volume.

(b) The percentage of alcohol by volume shall be determined by measuring the volume of the standard ethyl alcohol in the beverage and comparing it with the volume of the remainder of the ingredients as though said remainder ingredients were distilled water.

(5) "Intoxicating beverage" and "intoxicating liquor" mean only those alcoholic beverages containing more than 4.007 percent of alcohol by volume.

34. Section 562.47, Florida Statutes, provides in pertinent part:

In all prosecutions for violations of the Beverage Law:

\* \* \*

(2) Proof that the beverage in question was contained in a container labeled as "beer," "ale," "malt liquor," "malt beverage," "wine," or "distilled spirits" or with other similar name; and which bears the manufacturer's insignia, name, or trademark is prima facie evidence that such beverage is an alcoholic beverage as defined in s. 561.01.

(3) Any person or persons who by experience in the past in the handling or use of intoxicating liquors, or who by taste, smell, or the drinking of such liquors has knowledge as to the intoxicating nature thereof, may testify as to his or her opinion whether such beverage or liquor is or is not intoxicating, and a verdict based upon such testimony shall be valid.

35. The evidence is clear and convincing that the can of beer, a Budweiser product, was an alcoholic beverage as defined by Subsection 561.01(4), Florida Statutes.

36. Further, the evidence is clear and convincing that Mr. Rodriguez, Respondent's agent, sold an alcoholic beverage, i.e., a can of beer, to a person under 21 years of age.

37. The mere selling of the alcoholic beverage to a person under 21 years of age is insufficient, in and of itself, for revocation or suspension of a beverage license. Lash, Inc. v.

Department of Business Regulation, 411 So. 2d 276 (Fla. 3d DCA 1982); Trader Jon, Inc. v. State Beverage Department, 119 So. 2d 735, 738-740 (Fla. 1st DCA 1960).

38. The evidence is not clear and convincing that Mr. Rodriguez knowingly and willfully sold the can of beer to a minor.

39. However, the evidence is clear and convincing that Mr. Rodriguez was negligent and failed to exercise reasonable diligence in preventing the sale of the alcoholic beverage to Mr. Maxie. Such conduct by Respondent's agent is subject to discipline by Petitioner. Lash, supra; Trader Jon, supra.

40. As to penalty, Section 561.29, Florida Statutes, provides in pertinent part:

(1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

(a) Violation by the licensee or his or her or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment, of any of the laws of this state or of the United States, or violation of any municipal or county regulation in regard to the hours of sale, service, or consumption of alcoholic beverages or license requirements of special licenses issued under s. 561.20, or engaging in or permitting disorderly conduct on the licensed premises, or permitting another on the licensed premises to violate any of the laws of this state or of the United States.

A conviction of the licensee or his or her or its agents, officers, servants, or employees in any criminal court of any violation as set forth in this paragraph shall not be considered in proceedings before the division for suspension or revocation of a license except as permitted by chapter 92 or the rules of evidence.

41. For the sale of alcoholic beverages by a licensee or its agent to a person under 21 years of age, Rule 61A-2.022(11), Florida Administrative Code, prescribes a penalty of a \$1,000 fine and a 7-day license suspension for first time offenders. Petitioner's guidelines do not provide for mitigating or aggravating circumstances.

42. Petitioner suggests the penalty for first time offenders.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco enter a final order:

1. Finding that Lake Supermarket, Inc., d/b/a Lake Supermarket, violated Subsection 562.11(1)(a), Florida Statutes;
2. Imposing a fine of \$1,000.00 payable within a time deemed appropriate; and

3. Suspending the license of Lake Supermarket, Inc., d/b/a Lake Supermarket, for seven days.

DONE AND ENTERED this 31st day of December, 2002, in Tallahassee, Leon County, Florida.

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ERROL H. POWELL  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of December, 2002.

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.