

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC)
BEVERAGES AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 03-0381
)
KEEN & KEEN, INC.,)
d/b/a KABUKI JAPANESE)
STEAKHOUSE)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings on May 20, 2003, in Yulee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Christina Pardieck, Esquire
Assistant General Counsel
Division of Alcoholic Beverages and
Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Gary Barker, Esquire
Post Office Box 1177
Callahan, Florida 32011

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern

whether the Respondent's beverage licensure should be subjected to sanctions for allegedly selling alcoholic beverages to a minor and what if any penalties should be imposed.

PRELIMINARY STATEMENT

This cause arose on November 4, 2002, when the Petitioner, Department of Business and Profession Regulation, Division of Alcoholic Beverages and Tobacco (Department) served a complaint upon the Respondent, Keen & Keen, Inc., doing business as Kabuki Japanese Steakhouse, alleging that on October 22, 2002, the Respondent unlawfully sold alcoholic beverages to a person under 21 years of age in violation of Florida law. The Respondent denied the charges and requested a formal hearing to contest the matter. The case was referred to the Division of Administrative Hearings and the undersigned administrative law judge for conduct of a formal proceeding.

The cause came on for hearing as noticed. The hearing was conducted on May 20, 2003, in Yulee, Florida. The Petitioner presented the testimony of special agents Veronica Edwards and Debra Riley, of the Division of Alcoholic Beverages and Tobacco (Division) and Deidre Miller, and investigative aid(IA) employed by the Petitioner to assist in identifying businesses who sell alcoholic beverages to minors. The Petitioner offered the Petitioner's Exhibits one through five, all of which were received into evidence, except for exhibit three. The

Respondent presented the testimony of Mr. Keen L. Wong, vice president, secretary, and 49 percent shareholder of the Respondent corporation. The Respondent offered Exhibits one through four. The Respondent's Exhibits one through three were received into evidence. The parties requested a transcript of the proceeding and availed themselves of the right to submit proposed recommended orders. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida charged with regulating licensure, and practice under that licensure, of alcoholic beverage-selling entities in the State of Florida, including administration of the laws and rules related to the selling of alcoholic beverages by restaurant businesses.

2. The Respondent is an entity licensed and domiciled in the State of Florida and authorized to sell alcoholic beverages under license number 55-00306, Series 2-COP. The Respondent is subject to the Division's regulatory jurisdiction. The subject license allows the Respondent to make sales "by the drink" for consumption on the premises at the restaurant business located at 1766 S. Eighth Street, Fernandina Beach, Florida.

3. On October 22, 2002, Ms. Deidre Kaye Miller, then 18 years of age, was employed as an I.A. by the Petitioner Agency

for the purpose of attempting to purchase beer at the Respondent's restaurant. She was paid a total of \$35.00 for her services as an undercover operative that day by the Division. She was given instructions by Agent Edwards and Agent Maxwell to attempt to purchase an alcoholic beverage from the Respondent. Ms. Miller was told that if asked for identification she was to show her valid Florida Driver's License, if asked her age to tell her correct age and not to engage in any extensive conversation with anyone.

4. On October 22, 2002, Ms. Miller entered the restaurant and walked to the left of the entrance where the bar was located. A waitress asked what she wanted and she told her she wanted a Corona (Beer).

5. After Ms. Miller ordered the beer from the waitress the owner and Respondent Mr. Wong came over and asked for her identification. She provided her driver's license as an I.D. to Mr. Wong. As he was checking her driver's license the waitress, Tabitha Cornett, opened the Corona and set it on the counter so that it would be ready when Mr. Wong approved giving Ms. Miller the beer. The point on the bar where the beer was placed was approximately 16 feet away from where Mr. Wong and Ms. Miller were having the conversation about her I.D.

6. Mr. Wong viewed Ms. Miller's Driver License I.D. for 30 or 45 seconds. The driver's license had her correct name and

date of birth, which was in 1984, and a statement printed on the license which said "Under 21 until 09-02-05."

7. Mr. Wong allowed the beer to be served to Ms. Miller. Ms. Miller took the beer and placed it on a table near the bar. She then indicated to the waitress that she was going to call friends to meet her and walked outside the restaurant, leaving the beer on the table.

8. In restaurant sales situations, IAs are instructed to depart the premises once they have been served alcohol. Generally payment will not be tendered because, in restaurant situations, the law and licensure calls for consumption on the premises and it is customary to consume the alcohol and pay for at the end of one's stay at the restaurant. In the instant situation neither Ms. Miller nor anyone else ever paid for the beer in question. Mr. Wong acknowledged in a due diligence statement taken at 5:30 p.m., on the day in question October 22, 2002 (in evidence as Petitioner's Exhibit four) that he checked the I.D. but he wasn't wearing his glasses and he thought it said that Ms. Miller was born in 1964. He asked her, "You were born in 64?" He said in his statement that Ms. Miller did not reply to him and then he states (in his due diligence statement) that he told her that she was too young for that I.D. and again she said nothing. He again asked her if this was her I.D. and she said nothing. He handed it back to

her. He then said in the statement: "I did not want to insult someone so I allowed it served." In other words he questioned whether she was old enough based upon the I.D. he saw; believing it to say 1964 because he did not have his glasses on, but also believing that she appeared too young for that I.D.

9. Ms. Miller left the premises and Agent Edwards and Agent Maxwell entered the premises and informed Mr. Wong that he had just allowed service of alcohol to a minor. Thereafter Mr. Wong was placed under arrest handcuffed, and taken to the Nassau County Jail. Mr. Wong had never had any beverage-related offense on his record prior to that time. No investigation or prosecution concerning his business had ever occurred up to that point. A criminal prosecution was instituted against him concerning this same incident and facts, which resulted in a jury verdict of acquittal.

10. The totality of the evidence shows that although Mr. Wong did not actually serve Ms. Miller, he did allow a beer to be served to her. She was under 21 years of age.

11. Mr. Wong testified that even though one person checks identification, any employee can open a beer and place it on the counter or service bar. Ms. Cornett did so in this case, placing the beer at the far end of the service bar from where Mr. Wong and Ms. Miller were conversing concerning her I.D. This allows the beer to be ready once the person checking the

I.D. authorizes the sale. In the situation at hand, Ms. Cornett opened the beer, placed in on the bar and Mr. Wong then went through the door away from the bar into the main part of the restaurant. Ms. Miller, the I.A., then took the beer from the bar and placed it on the table and told Ms. Cornett that she was going outside to meet her friends or to call her friends. After that occurrence the other agents named above came in, explained the situation to Mr. Wong, and arrested him during the course of which discussion he made the above-referenced statement.

Mr. Wong never touched the beer in question and Ms. Cornett never actually physically handed it to Ms. Miller, but both Mr. Wong and Ms. Cornett allowed Ms. Miller to take the beer from the bar and place it on her table, thus taking the beer into her own custody and control at least temporarily, even though no money was exchanged in return for the beer.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties hereto. Sections 120.569 and 120.57(1), Florida Statutes.

13. The Petitioner Agency has the burden in attempting to impose penal sanctions on the Respondent's license, to prove its allegations by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987), Pic N' Save Central Florida, Inc., v. Department of Business and Professional

Regulation, Division of Alcoholic Beverages and Tobacco, 601 So. 2d 245, 249 (Fla. 1st DCA 1992).

14. It is the responsibility of the licensee or his agents to determine the age of all patrons prior to selling alcoholic beverages to them. Lash, Inc., v. Department of Business and Professional Regulation, 411 So. 2d 276 (Fla. 3d DCA 1982).

When engaging in such transactions, the licensee or his agents must exercise a reasonable standard of diligence to ensure that alcoholic beverages are not sold to minors. Id. However, the fact that a licensee or agent sold an alcoholic beverage to a underage person is not sufficient, on its own, to subject the licensee or its agent to sanctions. The sale must appear to have been made "knowingly and willfully, or that it was made negligently, without care to diligently attempt to prevent such sales." Trader Jon, Inc., v. State Beverage Department, 119 So. 2d 735, 739-40 (Fla. 1st DCA 1960).

15. The complaint alleges that Respondent violated Section 562.11(1)(a), Florida Statutes, by serving alcoholic beverages to a person under the age of 21 years. At all times material to this case, Section 562.11(1)(a), Florida Statutes, has made it unlawful, "for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age. . . on the licensed premises."

16. The evidence clearly and convincingly establishes that on the afternoon of October 22, 2002, on his licensed premises, Keen L. Wong, served or permitted to be served alcoholic beverages as defined in Section 561.01(4), Florida Statutes, by negligently permitting service of a beer by allowing it to be placed in front of a person under 21 years of age. This apparently occurred because Mr. Wong was not wearing his eye glasses at the time, could not properly read the I.D. and failed to properly read the correct date of birth on Ms. Miller's driver's license. He also allowed service because he did not wish to insult her by disallowing it.

17. The evidence is clear and convincing that the I.A. in question, Ms. Miller, did not falsely evidence that she was of legal age to purchase or consume alcoholic beverages. She did not have the appearance that would cause an ordinary prudent person to believe her to be of legal age to purchase or consume alcoholic beverages, which is why Mr. Wong probably initially chose to check her I.D.

18. Mr. Wong's waitress, Ms. Cornett, actually placed the beer in the reach of Ms. Miller on the bar so that it was ready for service while the I.D. was being checked. It is true that Mr. Wong himself did not serve the beer to Ms. Miller. However, a ". . . licensee's culpable responsibility is measured in terms of its own negligence and lack of diligence in supervising its

employees regarding illegal sales." Thus Mr. Wong's failure to recognize that Ms. Cornett had placed the beer in front of an underage individual or at least where the underage individual had possessory access to the beer, exemplifies a lack of adequate supervision of employees and therefore negligence.

19. The evidence clearly and convincingly demonstrates that Mr. Wong negligently allowed an underage person to have a beer placed in front of her or within her access and ability to possess. This act is contrary to the above-referenced beverage laws of Florida.

20. The Respondent was negligent and did not exercise a reasonable standard of diligence to prevent service to Ms Miller. Lash, Inc., supra. Thus it must be found that the Respondent violated Section 561.11(1)(a), Florida Statutes, for which he must be held accountable. Therefore an appropriate penalty must be determined.

21. Rule 61A-2.022(11), Florida Administrative Code, prescribes penalty guidelines to be imposed on alcoholic beverage licensee's when violations have been committed. For a first time violation of the above-referenced statutes, the Rule calls for a \$1,000.00 fine and a seven-day suspension of license. The Division's Rule, however, does not identify either aggravating or mitigating considerations which may be taken into account in assessing a penalty. The Rule does not preclude

mitigating considerations. In view of the fact that this was a first-time offense on the part of Mr. Wong; in view of Mr. Wong's candor and remorse at this having occurred and because the above-referenced transaction occurred through negligence and not through willfulness and intent, it is determined that a fine of \$250.00 should be assessed and that no other penalty be imposed.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties it is, therefore,

RECOMMENDED that a final order be entered by the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, finding that the Respondent violated Section 562.11(1)(a), Florida Statutes, and that he be required to pay a \$250.00 fine to the Division.

DONE AND ENTERED this 31st day of July, 2003, in
Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
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 Clerk of the
Division of Administrative Hearings
this 31st day of July, 2003.

COPIES FURNISHED:

Christina Pardieck,
Assistant General Counsel
Division of Alcoholic Beverage and Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Gary Barker, Esquire
Post Office Box 1177
Callahan, Florida 32011

Hardy L. Roberts, III, General Counsel
Division of Alcoholic Beverage and Tobacco
Department of Business and Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Peter Williams, Director
Division of Alcoholic Beverage and Tobacco
Department of Business and Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.