

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case Nos. 03-0217
) 03-0431
BARGHOUTH ENTERPRISES, INC.,)
d/b/a FOWLER LIQUOR STORE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held by video teleconference in this case on March 7, 2003, at connecting sites in Fort Myers and Tallahassee, Florida, before Lawrence P. Stevenson, 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, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: John Kyle Shoemaker, Esquire
Post Office Box 1601
Fort Myers, Florida 33902

STATEMENT OF THE ISSUES

Whether Respondent committed the offenses set forth in the Administrative Actions in these consolidated cases, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 11, 2002, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the "Division"), filed a one-count Administrative Action against Barghouthi Enterprises, Inc., d/b/a Fowler Liquor Store ("Fowler Liquors"). The Division charged Fowler Liquors as follows: "On or about 06/17/2002, you, Barghouthi Enterprises, Inc., d/b/a Fowler Liquor Store, or your agent, employee to wit: Samer Barghouthi did sell, serve, or give an alcoholic beverage on your licensed premises to a person under the age of 21, contrary to Section 562.11(1)(a), Florida Statutes." Fowler Liquors disputed the allegations of fact in the Administrative Action and requested a hearing. This matter was referred to the Division of Administrative Hearings ("DOAH") on January 22, 2003, and assigned DOAH Case No. 03-0217.

On September 6, 2002, the Division filed a second one-count Administrative Action against Fowler Liquors. The Division charged Fowler Liquors as follows: "That on or about 06/15/2002, you, Barghouthi Enterprises, Inc., d/b/a Fowler Liquor Store, a vendor licensed under the Beverage Laws of the

State of Florida, through your agents, servants, or employees did sell, give, serve, or allow to consume, alcoholic beverages on your licensed premises to a person under the age of 21. These acts are in violation of 562.11(1)(a), Florida Statutes." Fowler Liquors disputed the allegations of fact in the Administrative Action and requested a hearing. This matter was referred to DOAH on February 11, 2003, and assigned DOAH Case No. 03-0431. Also on February 11, 2003, the Division filed a motion to consolidate the cases, which was granted by Order dated February 13, 2003.

At the hearing, the Division presented the testimony of Justin C. Bender; David P. Green; Chief Anthony J. Smith, chief of law enforcement for the Division; Captain Tania Pendarakis, district supervisor for the Fort Myers office of the Division; Agent Brian D. Sauls of the Division; Officers Bradley J. Ades, Melvin D. Perry, and Cecil Pendergrass of the Fort Myers Police Department; and Reverend Anthony Cubello. The Division's Exhibits 1 through 4 were admitted into evidence. Fowler Liquors presented no testimony. Fowler Liquors' Exhibit 1 was admitted into evidence.

The one-volume Transcript of the hearing was filed on April 11, 2003. The Division filed its Proposed Recommended Order on April 21, 2003. Fowler Liquors did not file a proposed recommended order. On May 8, 2003, Fowler Liquors filed a

document styled "Exceptions to Recommended Order," which consists of argument in response to the Division's Proposed Recommended Order. No leave was given to Fowler Liquors to file such a response. However, the Division has not objected to the response. In an effort to provide Fowler Liquors every opportunity to answer the charges brought in these proceedings, the undersigned has fully considered the "Exceptions to Recommended Order" in arriving at the findings and conclusions set forth below.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. At all times material hereto, Fowler Liquors was licensed by the Division, having been issued license number 46-04643, Series 3-PS. The license permits Fowler Liquors to make packaged sales of beer, wine, and liquor at its convenience store located at 3450 Fowler Street in Fort Myers.

2. In an Administrative Action dated July 11, 2002, the Division charged Samer Barghouthi, the majority owner and principal officer of Fowler Liquors, with selling alcoholic beverages to a person under the age of 21 on May 19, 2002. Fowler Liquors conceded there were no disputed issues of fact and requested that the matter be resolved in an informal

hearing. In a Final Order dated October 25, 2002, the Division ordered Fowler Liquors to pay a fine of \$1,000 and serve a seven-day license suspension.

3. The Administrative Action regarding the May 19, 2002, sale arose from an incident in which 20-year-old Tony Cubello was beaten, robbed, and shot to death in the parking lot of Fowler Liquors after making a purchase in the liquor store. The murder of Mr. Cubello was the subject of articles in the Fort Myers newspaper.

4. The Fort Myers Police Department investigated Mr. Cubello's murder and came to believe that Samer Barghouthi could identify the killers but was refusing to cooperate. The Fort Myers police requested the assistance of the Division in securing Mr. Barghouthi's cooperation.

5. The Division commenced an investigation, interviewing young people who had known Mr. Cubello. During the course of these interviews, the Division became aware that Fowler Liquors was widely reputed as a place where underage people could buy alcoholic beverages. During its investigation, the Division also learned that the Department of Revenue had a tax warrant against Fowler Liquors, and that the City of Fort Myers had issued citations against Fowler Liquors for hours-of-sale violations.

6. During its investigation, the Division sent an underage operative into Fowler Liquors to attempt to purchase alcoholic beverages. The operative was wearing a hidden microphone, allowing the Division's officers to hear what transpired in the liquor store. As the sale was about to be completed, a van full of construction workers pulled up outside the store. The person working behind the counter at Fowler Liquors said that there were "cops" in the van, and declined to complete the sale to the operative.

7. On June 14, 2002, Captain Tania Pendarakis, district supervisor for the Division's Fort Myers office, met with Samer Barghouthi. She informed Mr. Barghouthi that the Division might consider filing administrative charges rather than criminal charges against Fowler Liquors, if Mr. Barghouthi would cooperate with the Fort Myers Police Department's murder investigation.

8. During this conversation, Mr. Barghouthi assured Captain Pendarakis that he was going to start checking identifications and stop selling alcoholic beverages to underage children.

9. The next day, June 15, 2002, David P. Green, then sixteen years old, entered Fowler Liquors early in the evening to buy beer. In the liquor store, Mr. Green recognized other people whom he knew from his high school. Mr. Green testified

that it was widely known at his school that underage people could purchase alcohol at Fowler Liquors.

10. Mr. Green purchased a twelve-pack of Budweiser Light beer. He tendered ten dollars cash to the cashier and asked if the store sold "dip," i.e., finely ground tobacco. The cashier told him no, but offered to sell Mr. Green cigarettes.

11. The cashier did not ask Mr. Green his age, nor request any identification from Mr. Green to prove that he was at least 21 years of age. At the hearing in this matter, conducted nearly nine months after the fact, Mr. Green looked no older than sixteen. When he purchased the beer at Fowler Liquors, Mr. Green made no attempt to alter his appearance or otherwise disguise the fact that he was only sixteen years old.

12. When Mr. Green exited Fowler Liquors, he saw a police officer parked in a police cruiser directly in front of him. Mr. Green put his twelve-pack of beer down next to a garbage can, then got into his car and drove away. Several of Mr. Green's friends were also in his car.

13. The police officer who witnessed this scene, Officer Bradley J. Ades of the Fort Myers Police Department, testified at the hearing. Officer Ades testified that, because of the ongoing problems the police were having with Fowler Liquors, he stopped by there to check it out as part of his normal duties. As he pulled into the parking lot, he saw a "very young white

male" walking out the front door of Fowler Liquors. The boy was carrying a twelve-pack of Budweiser Light beer. Officer Ades stated that he was surprised not to see the boy's father follow him out of the store, because the boy looked so young. The boy got into his car and drove away. Officer Ades followed him for a little more than one block, then pulled him over.

14. Officer Ades interviewed Mr. Green and photographed him. Mr. Green admitted that he bought the beer in Fowler Liquors, and that he and the other boys in his car intended to drink it.

15. Because the sale of alcohol to a minor is a misdemeanor, and he did not witness the sale, Officer Ades could not make an arrest. The next day, he forwarded to the Division the information concerning his stop of Mr. Green.

16. Agent Brian D. Sauls of the Division contacted Mr. Green and asked him to come to the Division's offices for an interview. Mr. Green agreed. Agent Sauls conducted a photographic suspect lineup, and Mr. Green identified Samer Barghouthi as having been behind the counter at Fowler Liquors at the time he purchased the twelve-pack of Budweiser Light on June 15, 2002.

17. The incident involving the sale to Mr. Green formed the basis of the Administrative Action that led to DOAH Case No. 03-0431. Fowler Liquors did not contest the evidence that a

sale was made by Fowler Liquors to Mr. Green, an underage person, on June 15, 2002, or that Samer Barghouthi was present at the counter when the sale was made.

18. On the evening of June 17, 2002, Justin C. Bender, then eighteen years of age, entered Fowler Liquors to buy beer. Mr. Bender testified that he had purchased alcohol at Fowler Liquors more than 40 times and had never been asked for any identification. Mr. Bender stated that he has seen friends and other people whom he knew from school inside Fowler Liquor Store. Mr. Bender also testified that he had discussions with other people about Fowler Liquors being a place where underage people could purchase alcoholic beverages.

19. On June 17, 2002, Mr. Bender purchased a twelve-pack of Budweiser beer and a quart of Heineken beer, then left the store. Mr. Bender purchased the beer from Steve Barghouthi, the father of Samer Barghouthi. Steve Barghouthi did not ask Mr. Bender his age, nor request any identification to prove that he was at least 21 years of age. Mr. Bender had made no effort to alter his appearance or make himself look older than eighteen.

20. On June 17, 2002, Anthony J. Smith, the chief of law enforcement for the Division, visited the Fort Myers office. He asked Captain Pendarakis to inform him of cases her office was involved in, and the subject of Fowler Liquors was discussed.

After dinner that evening, Chief Smith drove by Fowler Liquors to take a look at the store.

21. As he drove through the parking lot, Chief Smith saw Mr. Bender exiting the store with his beer. Chief Smith stopped him to determine how old he was. Mr. Bender produced a valid driver's license that showed he was eighteen years old. Chief Smith searched Mr. Bender for fake identification, but found none.

22. Chief Smith asked Mr. Bender if he would be willing to return to Fowler Liquors and make another purchase that Chief Smith could observe. Mr. Bender agreed to do so.

23. Chief Smith telephoned Captain Pendarakis and asked her to bring marked cash for Mr. Bender to purchase beer. Captain Pendarakis arrived with the cash. She went into Fowler Liquors to ascertain whether it would be safe for Mr. Bender to return to the store. After Captain Pendarakis determined the store was safe, Mr. Bender entered the store.

24. Chief Smith and Captain Pendarakis watched the transaction from across the street. They had a clear view through the window of the liquor store. They observed Mr. Bender get a carton of beer, put it on the counter, pay for it, and walk out the door.

25. After Chief Smith and Captain Pendarakis viewed the sale to Mr. Bender, they went into the store to arrest the

person who had made the sale, Samer Barghouthi. Mr. Barghouthi was arrested and taken to the Lee County Jail.

26. The incident involving the sale to Mr. Bender formed the basis of the Administrative Action that led to DOAH Case No. 03-0217. Fowler Liquors did not contest the evidence that a sale was made by Fowler Liquors to Mr. Bender, an underage person, on June 17, 2002, or that Samer Barghouthi, the licensee, had made the sale.

27. In mitigation, counsel for Fowler Liquors argued that license revocation would be unfair because Samer Barghouthi is no longer involved in the operation of the business, having signed over his interest to his uncle, Shahir Daghara. Counsel contended that Mr. Daghara acted to remove Samer Barghouthi from the premises of Fowler Liquors as soon as he learned that Mr. Barghouthi was making sales to underage persons.

28. This contention is not credible. The two sales that are the subject of these proceedings occurred nearly one month after the murder of Mr. Cubello, which was widely known to have occurred after Mr. Cubello purchased alcoholic beverages in Fowler Liquors. The two sales also occurred after Mr. Barghouthi had been interviewed by Captain Pendarakis about sales of alcoholic beverages to minors. Moreover, Officer Cecil Pendergrass of the Fort Myers Police Department testified that Samer Barghouthi was still working at Fowler Liquors on July 1,

2002, two weeks after his arrest for selling alcoholic beverages to Justin Bender.

29. There is no record evidence that Mr. Barghouthi transferred his interest in the business to Mr. Daghara. At most, the Division's files indicate that at some point, Fowler Liquors represented to the Division that Mr. Daghara had taken a 49 percent interest in the business. The file also contains an undated "Current Licensee Update Data Sheet" on which Samer Barghouthi's name is crossed through, but Fowler Liquors offered no sworn testimony to explain the significance of this document.

30. Further, even if Mr. Daghara did take over the business, there is no evidence that he took any steps to remove Mr. Barghouthi from the premises of Fowler Liquors, or did anything else to address the problem of selling alcoholic beverages to minors.

31. Officer Pendergrass, who is the community coordinator for the area of Fort Myers that includes Fowler Liquors, also testified that he has been called to Fowler Liquors on a regular basis to deal with code enforcement problems, fights between family members, drug sales, robberies in the parking lot, and civil problems between the owners over refrigeration equipment. Officer Pendergrass testified that the police department's statistics establish that Fowler Liquors is the nucleus of criminal complaints in the area, and that in the last year, the

Fort Myers Police Department has had over 300 calls for service to Fowler Liquors.

CONCLUSIONS OF LAW

32. 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.

33. License revocation proceedings and proceedings involving the levying of administrative fines are penal in nature. The burden of proof is on the Division to establish by clear and convincing evidence the truthfulness of the allegations in the Administrative Actions. 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).

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

35. 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 falsely evidenced that he or she was of legal age to purchase or consume the alcoholic beverage and the appearance of the person was such that an ordinarily prudent person would believe him or her to be of legal age to purchase or consume the alcoholic beverage and if the licensee carefully checked one of the following forms of identification with respect to the person: a driver's license, an identification card issued under the provisions of s. 322.051 or, if the person is physically handicapped as defined in s. 553.45(1), a comparable identification card issued by another state which indicates the person's age, a passport, or a United States Uniformed Services identification card, and acted in good faith and in reliance upon the representation and appearance of the person in the belief that he or she was of legal age to purchase or consume the alcoholic beverage. Nothing herein shall negate any cause of action which arose prior to June 2, 1978.

36. 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.

37. 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.

38. It is the responsibility of the licensee or his agents to determine the age of all patrons prior to selling alcoholic beverages to them. Woodbury v. State Beverage Department, 219

So. 2d 47, 48 (Fla. 1st DCA 1969). 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. Surf Attractions, Inc. v. Department of Business Regulation, 480 So. 2d 1354, 1355 (Fla. 1st DCA 1985), and cases cited therein.

39. However, the fact that a licensee or agent sold an alcoholic beverage to a underage person is not sufficient, on its own, to subject that licensee or agent to sanction. 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).

40. The evidence is clear and convincing that the products sold to David Green and Justin Bender were alcoholic beverages as defined by Subsection 561.01(4), Florida Statutes.

41. Further, the evidence is clear and convincing that licensee Samer Barghouthi sold alcoholic beverages to Justin Bender, a person under 21 years of age. The evidence is clear and convincing that Samer Barghouthi was present behind the counter of Fowler Liquors when alcoholic beverages were sold to David Green, a person under 21 years of age.

42. The evidence is clear and convincing that neither David Green nor Justin Bender falsely evidenced that he was of

legal age to purchase or consume alcoholic beverages. The evidence is clear and convincing that neither David Green nor Justin Bender had an appearance that would cause an ordinarily prudent person to believe him to be of legal age to purchase or consume alcoholic beverages. The evidence is clear and convincing that the licensee made no effort to check the identification of either David Green or Justin Bender.

43. The evidence is clear and convincing that Samer Barghouthi made or witnessed these sales within two days of his interview with Captain Pendarakis. In this interview, he acknowledged the problem of selling alcoholic beverages to minors and assured Captain Pendarakis that from that point forward, he would check identifications and cease selling alcoholic beverages to persons under the age of 21 years.

44. Based on the foregoing, the licensee Samer Barghouthi was clearly negligent and did not exercise a reasonable standard of diligence to prevent the sale to Mr. Green or Mr. Bender. This clearly merits a finding that Fowler Liquors violated Section 561.11(1)(a), Florida Statutes, and is subject to penalties pursuant to Section 561.29, Florida Statutes, which grants the Division authority to suspend or revoke a license.

45. Rule 61A-2.022, Florida Administrative Code, prescribes the penalty guidelines, as follows in relevant part:

(1) This rule sets forth the penalty guidelines which shall be imposed upon alcoholic beverage licensees and permittees who are supervised by the division. District supervisors, audit supervisors, and bureau chiefs are authorized to accept settlement offers that do not deviate from the penalty guidelines. The penalties provided below are based upon a single violation which the licensee committed or knew about; or a pattern of at least three violations on different dates within a 12-week period by employees, independent contractors, agents, or patrons on the licensed premises or in the scope of employment in which the licensee did not participate; or violations which were occurring in an open and notorious manner on the licensed premises.

46. Rule 61A-2.022(11), Florida Administrative Code, provides for a \$1,000.00 fine and a seven-day suspension of the license for a first-time violation of Section 562.11(1)(a), Florida Statutes. For a second violation, the rule provides for a \$3,000.00 fine and a 30-day license suspension. For a third violation, the rule provides for license revocation.

47. Fowler Liquors was found guilty of a first violation of Section 562.11(1)(a), Florida Statutes, by a Final Order of the Division dated October 25, 2002.

48. In the consolidated cases here at issue, the Division has proven the second and third violations by clear and convincing evidence. Revocation is the appropriate sanction.

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 revoking the license of Barghouthi Enterprises, Inc., d/b/a Fowler Liquor Store.

DONE AND ENTERED this 5th day of June, 2003, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of June, 2003.

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.