

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 04-3166
)
CEBATIEN AND MARC DIERESTIL,)
d/b/a FOOD MARKET NO. 2,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 1, 2004, by video teleconference, with the Respondent appearing in Ft. Lauderdale, Florida, and the Petitioner appearing in Tallahassee, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Benjamin G. Snipes, Esquire
Department of Business and
Professional Regulation
Office of the General Counsel
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Cebastien Dierestil, pro se
2519 North Andrews Avenue
Wilton Manors, Florida 33311

STATEMENT OF THE ISSUE

Whether the Respondents committed the violations alleged in the Administrative Action dated June 22, 2004, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Action dated June 22, 2004, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Division") alleged in Count 1 that, on or about June 2, 2004, Cebastien and Marc Dierestil, d/b/a Food Mart No. 2 ("Food Mart"), permitted the possession of alcoholic beverages on the premises of the Food Mart, which could not be sold under the Food Mart's license; alleged in Count 2 that, on or about June 2, 2004, the Dierestil's offered for sale at the Food Mart unstamped cigarettes with the intent to willfully evade payment of the tax on the cigarettes; and alleged in Count 3 that, on or about June 2, 2004, the Dierestil's possessed cigarettes purchased from a person who did not hold a wholesale license permit to sell cigarettes. The Dierestil's timely disputed the material facts alleged in the Administrative Action and requested an administrative hearing. The Division forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law

judge. Pursuant to notice, the final hearing was held on November 1, 2004.

At the hearing, the Division presented the testimony of Cebastien Dierestil and Shawn Kehoe, and Petitioner's Exhibit 1 was offered and received into evidence. Mr. Dierestil testified on behalf of himself and Marc Dierestil, his partner; he did not offer any documents into evidence. At the Division's request, official recognition was taken of Sections 210.15, 210.18, 562.02, 564.02, 568.01, Florida Statutes (2004).¹

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings. Neither party filed proposed findings of fact or conclusions of law.

FINDINGS OF FACT

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

1. The Division is the state agency charged with administering Florida's alcoholic beverage and tobacco law. § 561.02, Fla. Stat. (2004).

2. The Food Mart holds a Series 2-APS license, numbered 16-13705.

3. On June 2, 2004, the Division conducted an inspection of the premises of the Food Mart. The inspector found six bottles filled with a cream-colored liquid. One bottle was on

the counter, next to the cash register, and the other five bottles were inside a cabinet behind the cash register, wrapped in newspaper.

4. The bottles contained a homemade Haitian beverage called cremasse. A friend made the beverage for Mr. Cebastien Dierestil, who intended to serve the beverage at a party at his home. The person who made the beverage took the six bottles to the Food Mart to give it to Mr. Dierestil, but Mr. Dierestil was not in the store at the time. A Food Mart employee placed the bottle of cremasse on the counter, even though it was for Mr. Dierestil's personal use.

5. Cremasse contains a small amount of alcohol, but Mr. Dierestil did not know the exact amount.

6. During the inspection of Food Mart on June 2, 2004, the Division found 97 packages of cigarettes offered for sale that did not carry the stamps indicating that the applicable taxes had been paid on the cigarettes. Some of the 79 unstamped packages of Newport cigarettes and of the 18 unstamped packages of Marlboro cigarettes were commingled with other packages of cigarettes displayed over the cash register, and others were in full cartons placed in the area where the extra inventory of cigarettes was kept.

7. The cigarettes were purchased from a person that came by the Food Mart, and the invoice for the cigarettes was not

among the invoices Mr. Dierestil provided to the Division's inspectors. Mr. Dierestil was not aware that the cigarette packages were supposed to carry tax stamps.

8. The Division failed to present evidence establishing the alcoholic content of the liquid inside the bottles found at the Food Mart.

CONCLUSIONS OF LAW

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

10. In its Administrative Action, the Department seeks to impose penalties against Cebastien and Marc Dierestil that include suspension or revocation of their alcoholic beverage license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that the Dierestils committed the violations alleged in the Administrative Action. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. Each of the three counts of the Administrative Action is predicated on a violation of a provision of the Florida Statutes. Such a violation can form the basis for the Division

to take disciplinary action against the holder of a license under Florida's Beverage Law, pursuant to Section 561.29, Florida Statutes, which 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.

* * *

(3) The division may impose a civil penalty against a licensee for any violation mentioned in the Beverage Law, or any rule issued pursuant thereto, not to exceed \$1,000 for violations arising out of a single transaction. If the licensee fails to pay the civil penalty, his or her license shall be suspended for such period of time

as the division may specify. The funds so collected as civil penalties shall be deposited in the state General Revenue Fund.

Count 1

12. In Count 1 of the Administrative Action, the Division charged that the Dierestil's violated Section 562.02, Florida Statutes, on the grounds that the six bottles found on the premises of the Food Mart contained an alcoholic beverage that could not be sold under the Food Mart Series 2-APS license.

Section 562.02, Florida Statutes, provides in pertinent part:

It is unlawful for a licensee under the Beverage Law or his or her agent to have in his or her possession, or permit anyone else to have in his or her possession, at or in the place of business of such licensee, alcoholic beverages not authorized by law to be sold by such licensee.

13. The Series 2-APS license held by Food Mart authorizes the package sale of beer and wine. See Fla. Admin. Code R 61A-1.013.

14. "Alcoholic beverages" are defined in 561.01, Florida Statutes, as follows:

(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.

15. Based on the findings of fact herein, the Division failed to prove by clear and convincing evidence that the Dierestils violated Section 562.02, Florida Statutes, because it failed to prove that the liquid in the bottles on the counter and in the cabinet of the Food Mart was an alcoholic beverage as defined in Section 561.01(4), Florida Statutes.

Counts 2 and 3

16. In Count 2 of the Administrative Action, the Division charged that the Dierestil's violated Section 210.18(1), Florida Statutes, by offering for sale unstamped packages of cigarettes and that such violation was "within 561.20(1)(a), Florida Statutes."

17. Section 210.18, Florida Statutes, provides in pertinent part:

(1) Any person who possesses or transports any unstamped packages of cigarettes upon the public highways, roads, or streets in the state for the purpose of sale; or who sells or offers for sale unstamped packages of cigarettes in violation of the provisions of this part; or who willfully attempts in any manner to evade or defeat any tax imposed by this part, or the payment thereof, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Any person who has been convicted of a violation of any provision of the cigarette tax law and who is thereafter convicted of a further

violation of the cigarette tax law is, upon conviction of such further offense, guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

18. In Count 3 of the Administrative Action, the Division charged that the Dierestil's violated Section 215(1)(b), Florida Statutes, by purchasing the 97 unstamped packages of cigarettes from a person other than one "holding a wholesale dealer permit" and that such violation was "within 561.20(1)(a), Florida Statutes."

19. Section 210.15, Florida Statutes, provides in pertinent part:

(1)(a) Every person, firm, or corporation desiring to deal in cigarettes as a distributing agent, wholesale dealer, or exporter within this state shall file an application for a cigarette permit for each place of business with the Division of Alcoholic Beverages and Tobacco. . . .

* * *

(h) . . . Cigarettes may be purchased for retail purposes only from a person holding a wholesale dealer permit. The invoice for the purchase of cigarettes must show the place of business for which the purchase is made and the cigarettes cannot be transferred to any other place of business for the purpose of resale.

20. Cebastien Dierestil admitted that the unstamped packages of cigarettes found in the Food Mart during the inspection on June 2, 2004, were offered for sale and were

purchased from an unidentified person who stopped by the Food Mart. He was unable to provide the Division with a receipt for the purchase of the cigarettes. The clear and convincing evidence is sufficient to meet the Division's burden of proving that the Dierestils violated Sections 210.18(1) and 210.15(1)(h), Florida Statutes.

21. Based on the violations of Sections 210.18(1) and 210.15(1)(h), Florida Statutes, the Division is authorized by Section 561.29(1) and (3) to revoke or suspend the Dierestils' Series 2-APS license for the Food Mart or to impose an administrative fine "not to exceed \$1,000.00 for violations arising out of a single transaction." The Division has promulgated penalty guidelines "which shall be imposed upon alcoholic beverage licensees and permittees who are supervised by the division." The table included in Florida Administrative Code Rule 61A-2.022 provides that the penalty for a first-occurrence violation of Sections 210.06(3) and 210.18, Florida Statutes, is an administrative fine in the amount of \$500.00, plus payment of the excise tax owing on the cigarettes. The penalty specified for a first-occurrence violation of Section 210.15(1)(b), Florida Statutes, for "[p]urchasing cigarettes for purpose of resale from other than a licensed wholesale dealer" is an administrative fine in the amount of \$1,000.00.²

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. Dismissing Count 1 of the Administrative Action against Cebatien and Marc Dierestil;

2. Finding that Cebatien and Marc Dierestil violated Sections 210.18(1) and 210.15(1)(h), Florida Statutes;

3. Finding that, because of these statutory violations, the Division is authorized to impose administrative penalties on Cebatien and Marc Dierestil pursuant to Section 561.29(1) and (3), Florida Statutes;

4. Imposing an administrative fine in the amount of \$500.00 and ordering payment of the excise tax owing on the unstamped packages of cigarettes for the violation of Section 210.18(1), Florida Statutes; and

5. Imposing an administrative fine in the amount of \$1,000.00 for the violation of Section 210.15(1)(h), Florida Statutes.

DONE AND ENTERED this 27th day of January, 2005, in
Tallahassee, Leon County, Florida.

S

PATRICIA HART MALONO
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 27th day of January, 2005.

ENDNOTES

^{1/} All citations to the Florida Statutes herein are to the 2004 edition unless otherwise indicated.

^{2/} The correct statutory citation for this violation is Section 210.15(1)(h); Section 210.15(1)(b) deals with the renewal of distributing-agent permits.

COPIES FURNISHED:

Captain Patrick Roberts
Department of Business and
Professional Regulation
5080 Coconut Creek Parkway, Suite C
Margate, Florida 33063-3942

Benjamin G. Snipes, Esquire
Department of Business and
Professional Regulation
Office of the General Counsel
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Cebastien Dierestil
Marc Dierestil
2519 North Andrews Avenue
Wilton Manors, Florida 33311

Leon Biegalski, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Jack Tuter, Director
Division of Alcoholic Beverages
and Tobacco
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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.