

Final Order No. BPR-2006-06532 Date: **9-7-06**

FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By:

Brandon M. Nichol

**Department of Business and Professional Regulation
Division of Alcoholic Beverages and Tobacco
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1020**

2006 SEP - 8 AM 11:17
FILED
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO
ADMINISTRATIVE HEARINGS

Department of Business and Professional Regulation
Division of Alcoholic Beverages and Tobacco
PETITIONER

vs.

Brother J. Inc.
d/b/a **A. J. Sports**

RESPONDENT

CASE NO. 2005-019764
DOAH CASE NO. 05-4687
LICENSE NO. 47-02607
SERIES: 4COP

FINAL ORDER

This matter comes before me for final Agency Order.

The issue before me is whether Brother J. Inc., d/b/a A. J.'s Sports (Respondent) violated Section 561.29(1)(a), Florida Statutes; and secondarily, if Respondent committed such violation, what penalty should be imposed?

PRELIMINARY STATEMENT

1. On June 15, 2005, the State of Florida, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Petitioner") served an administrative action on Respondent which alleged that Respondent had violated Section 561.29(1) (a), Florida Statutes, by serving alcoholic beverages at its licensed establishment to four persons (Shane Donnor, Stephanie Reed, Christopher Lowe and Tania Vasquez) under the legal drinking age.

2. Respondent filed a timely request for hearing, citing disputed issues of fact.

3. A formal hearing was conducted by Administrative Law Judge on Don W. Davis on May 24 and 25, 2006.

4. A Recommended Order was issued by the Administrative Law Judge on July 27, 2006.

5. Exceptions to the Recommended Order were received from Respondent on August 11, 2006. On August 21, 2006, Petitioner filed Petitioner's Response to Respondent's Exceptions.

FINDINGS OF FACT

6. A thorough review of the entire record of this matter reveals that the findings of fact contained in the recommended order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law.

7. The Division hereby adopts and incorporates by reference the Findings of Fact as set forth in the Recommended Order.

CONCLUSIONS OF LAW

8. A thorough review of the entire record in this matter indicates that the Conclusions of Law contained in the Recommended Order are reasonable and correct interpretations of the law based on the Findings of Fact. All exceptions are thus rejected.

9. The Division hereby adopts and incorporates by reference the Conclusions of Law as set forth in the Recommended Order.

10. This Final Order is entered after a review of the complete record.

ORDER

Having fully considered the complete record of this case, the Recommended Order of the presiding officer and the exceptions filed, I hereby adopt the Recommended Order of the Administrative Law Judge and reject all exceptions.

It is ORDERED that Respondent pay a civil penalty in the amount of \$1,000.00 and serve a seven-day license suspension. Payment of the civil penalty must be received on or before September

29, 2006, and must be submitted to the District Enforcement Office located at 1940 North Monroe Street, Tallahassee, Florida 32299-1025. The seven-day suspension will be served on September 25, 26, 27, 28, 29, 30, and October 1, 2006. During the suspension period the Division will post signs on the exterior and interior of the licensed premises indicating that Respondent's beverage license is suspended for the seven-day period. Respondent shall not deface, cover, remove, relocate, alter or damage any suspension signs posted by the Division, nor permit others to do the same. Failure to fully comply with the terms of this Final Order will result in the initiation of proceedings to revoke the license as provided in Section 561.29(1) (k), Florida Statutes.

DONE and ORDERED at Tallahassee, Florida, this 31 day of August, 2006.



St M. Houglan

STEVEN M. HOUGLAND, Ph. D., Director
Division of Alcoholic Beverages and Tobacco

This *Order* of the Director of the Division of Alcoholic Beverages and Tobacco will become final unless judicial review is initiated within 30 days of the date of rendition. The rendition date is the date the *Order* is filed by the Agency Indexing Clerk. Judicial review may be commenced by filing an original *Notice of Appeal* with the Clerk of the Division of Alcoholic Beverages and Tobacco and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal, pursuant to Section 120.68, Florida Statutes and Rule 9.110, F.R.A.P. A transcript of the informal hearing may be obtained upon written request received no later than 60 days from the rendition date of this *Order*.

Mail Certification: This Final Order was sent by Certified Mail

7005 1820 0002 9910 4134 to:

Jay Adams, Esquire

Broad and Cassel

215 South Monroe Street, Suite 400

Tallahassee, Florida 32301

By:

Stephani Cooper

Mail Date:

9/7/06

Additional copies mailed to:

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Administrative Law Judge
Division of Administrative Hearings
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Petitioner,

vs.

BROTHER J, INC., d/b/a A.J. SPORTS,

Respondent.

Case No. 05-4687

Petitioner's Response to Respondent's Exceptions

COMES NOW, the Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (hereinafter "Division"), by and through the undersigned Counsel, and files this Response to Respondent's Exceptions to the Recommended Order in the above entitled matter and states as follows:

Standard of Review

1. Section 120.57(1)(1), Florida Statutes, states in relevant part:

When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or

modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

2. An agency, at its discretion, may disagree with and reject or modify an Administrative Law Judge's Conclusions of Law to reflect the agency's understanding and interpretation of the law. Florida Public Employees Council 79, AFSCME v. Daniels, 616 So. 2d 813 (Fla. 1st DCA 1994); University Community Hosp. v. Department of Health and Rehabilitative Services, 610 So. 2d 1342 (Fla. 1st DCA 1992); Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992); Harloff v. City of Sarasota, 575 So. 2d 1324 (Fla. 2nd DCA 1991), review denied, 583 So. 2d 1035 (Fla. 1991).

Respondent's Exception

3. The Respondent's exceptions concern only the Administrative Law Judge's ("ALJ") determination that Respondent is guilty of one count of serving alcoholic beverages to a person under the age of 21.

4. In support of this assertion, Respondent suggests that the ALJ erroneously reached this determination and a conclusion should be entered that Respondent is not guilty.

Response

5. The Respondent has failed to adequately establish how a finding that the Respondent did not commit one violation of

selling alcoholic beverage to a minor is a more reasonable determination than the ALJ's determination.

6. Section 120.57(1)(1), Florida Statutes, clearly provides that a modification or rejection of a conclusion of law may not serve as a modification or rejection of a finding of fact. This is because the standard for modifying or rejecting findings of fact is a more onerous standard than that required for modifying or rejecting conclusions of law. See § 120.57(1)(1), Fla. Stat. (2005) ("The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.").

7. The ALJ determined that, based upon the facts found at hearing, Respondent committed one violation of selling alcoholic beverages to a person under the age of 21. Rejecting the ALJ's conclusion of law would require an impermissible re-weighing of the evidence. See Southpointe Pharmacy v. Dep't of Health and Rehab. Servs., 596 So.2d 106, 109 (Fla. 1st DCA 1992) ("Where the hearing officer's findings of fact and reasonable inferences drawn therefrom are based upon competent and substantial evidence, it is a gross abuse of discretion for the agency to

disregard those findings."); See also, Strickland v. Fla. A & M Univ., 799 So.2d 276, 278 (Fla. 1st DCA 2001) (finding an abuse of discretion to disregard findings of fact based upon competent substantial evidence."). There is no evidence presented by Respondent that the ALJ's findings of fact are not supported by competent substantial evidence.

a. Furthermore, the Respondent has failed to note one case where an employee of a licensee consistently served drinks to conspicuously marked patron who was under the age of 21. Instead, the Respondent has offered cases where the persons under the age of 21 obtained service of alcoholic beverages through fraudulent practice. See e.g., Trader Jon, Inc. v. State Beverage Dep't, 119 So.2d 735 (Fla. 1st DCA 1960) (containing facts of minors gaining entry through unguarded emergency door and asserting they were over the age of 21). The ALJ determined that Christopher Lowe was carded, received marks on the back of his hand, and proceeded to purchase two alcoholic beverages from the Respondent's employee without concealing his underage status.

Conclusion

9.. The ALJ's findings of fact and conclusion of law are supported by competent substantial evidence. The conclusion of law suggested by the Respondent is less reasonable than that found by the ALJ. The Division of Alcoholic Beverages and

Tobacco may not engage in reweighing the evidence presented at the hearing to reject the ALJ's conclusion of law that Respondent is guilty of serving alcoholic beverages to a person under the age of 21. The ALJ's determination is reasonable based upon the evidence presented at trial, findings of fact, and the relevant case and statutory law applied to those facts found.

WHEREFORE

Petitioner prays that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco:

Enter a Final Order consistent with the ALJ's Recommended Order.

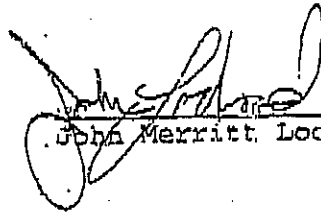
Respectfully submitted this 21st day of August, 2006



John Merritt Lockwood
Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202
(850) 922-2406

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been provided by hand delivery to Jay Adams, Esq., 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301, this 21st day of August, 2006.



John Merritt Lockwood

STATE OF FLORIDA
DIVISION OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION

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GENERAL COUNSEL'S OFFICE

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)

Petitioner,)

vs.)

BROTHERS J., INC., d/b/a A. J. SPORTS,)

Respondent.)

CASE NO 05-4687

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent Brothers J, Inc., d/b/a A. J. Sport, by its undersigned attorney, files hereby its exceptions to the Recommended Order entered in the above styled proceeding and would show:

1. Respondent takes exception to the Conclusion of Law contained in Paragraph 33 of the Recommended Order. This Conclusion of Law erroneously applies the correct legal standard to the facts as found in the Recommended Order.

2. The Recommended Order correctly states in Paragraph 32 that "... a license may only be sanctioned if the licensee failed to exercise reasonable diligence in preventing underage drinking. See, e.g. Woodbury v. State Beverage Department, 219 So.2d 47, 48 (Fla. 1st DCA 1969); Trader Jon, inc. v. State Beverage Department, 119 So.2d 735 (Fla. 1st DCA 1960)".

3. Paragraph 32 of the Recommended Order correctly states the law regarding a licensee's responsibility with regard to prevention of underage drinking at the

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licensed premise. In the first case cited in Paragraph 32, Woodbury v. State Beverage Department, the First District Court of Appeal stated “. . . [A] liquor licensee is not an insurer against violations of law committed on his premises by or through his employees. The licensee is responsible to determine who is underage, but since the inquisition into a charge of violation is equitable in nature and not criminal, he is held only to a reasonable standard of diligence” (emphasis added). The decision in Trader Jon, Inc. v. State Beverage Department states the fact that sales were made to minors, standing alone, is not sufficient to subject the seller to penalties. “It must be made to appear that the sale was made knowingly and willfully, or that it was made negligently, with out care to diligently prevent such sales”. (citing Davis v. Noland, 70 So.2d 512, 539 (Fla. 1954). Other cases in a similar vein include Lash v. Department of Business Regulation, 411 So.2d 276, 278 (Fla. 3rd DCA 1982) (“[I]f the evidence supports the conclusion that the licensee failed to exercise ordinary care in the maintenance of the licensed premises or the supervision of his employees, he can be found negligent and his license [sanctioned]”). Surf Attractions, Inc. v. Department of Business Regulation, 480 So.2d 1354, 1355 (Fla. 1st DCA 1986) (“[T]he agency must show a lack of due diligence on the part of the beverage licensee before sanctions may be imposed”) (Id. At 1357 – “In summary, we find that the agency erred in adopting the hearing officer’s conclusion of law that the licensee could be held strictly liable for a violation of the beverage laws”); Pic N’ Save v. Department of Business Regulation, 601 So.2d 245 (Fla. 1st DCA 1992) (“Additionally, we point out that:

[I]n those instances where courts have sanctioned revocation by the DBR because of simple negligence on a licensee’s part for failing to exercise due care in the supervision of agents or employees who engage in unlawful

activity on the licensee's premises, the courts have found repeated *and flagrant* violations by the employees *which allow an inference that said violations had been fostered, condoned, or negligently overlooked by the licensee*" (id at 253; emphasis in original; citing *Charlotte County Lodge v. Department of Business Regulation*, 194 So.2d 321, 329 (Fla. 2nd DCA 1967)).

4. In the instant case, the Recommended Order found that Respondent tries to create a "culture of compliance". Respondent's policy is that "no underage drinking will be tolerated". This policy is "reiterated in informal training at every staff meeting". All employees are required to go through formal training within 30 days of being hired. Respondent has a policy that everyone who is served alcoholic beverages must have his age checked. Due to the skill that underage persons have in deceiving liquor sellers, A.J.'s changes its "over 21" designation every night. It has a floor manager on duty, among whose duties is the prevention of underage drinking, at all times. A.J.'s has hired an experienced Tallahassee police officer to consult on security matters including prevention of underage drinking. (See, Paragraphs 17 – 23 of the Recommended Order).

5. Respondent's underage drinking prevention measures have been successful. When Petitioner has tried "sting" operations at Respondent's bar, the decoy has been prevented from drinking every time. (Finding of Fact 24). Petitioner's special agent considers Respondent to be "better than other bars in preventing underage drinking". (Finding of Fact 25). To the best of the licensee's knowledge, no one has ever knowingly served an alcoholic drink to a minor at A.J.'s. (Finding of Fact 26). Respondent has never previously been charged with serving alcohol to minors. (Finding of Fact 26). Clearly, all of these findings of fact show that Respondent exercised reasonable diligence in preventing underage drinking. (Woodbury, supra).

6. There is absolutely no evidence (and there is no finding) that the licensee was aware of, or should have been aware of, the liquor sales to Christopher Lowe. There is absolutely no evidence (and there is no finding of fact) that the licensee failed to exercise ordinary care in the supervision of its employees. The bartender, perhaps, should have been more diligent, but this failure cannot in any be attributed to any negligence or want of care on the licensee's part. See, Surf Attractions (supra) and Pic N' Save (supra).

7. In the absence of a showing that Respondent was in some manner responsible for allowing Christopher Lowe to drink, was negligent in allowing him to drink, or was even aware that he was allowed to drink; and with a strong showing that Respondent actively implements one of the more successful efforts to prevent underage drinking, it was error to find that the fact that Christopher Lowe was able to obtain alcoholic beverages at Respondent's establishment constituted a sanctionable violation of Section 561.29(1)(a), *Florida Statutes*.

WHEREFORE Respondent prays that the Department of Business and Professional Regulation, Division of Alcoholic Beverages:


Grant this exception;

Enter a Final Order finding that Respondent did not violate Section 561.29(1)(a),

Florida Statutes; and

Withdraw its Administrative Action and Amended Administrative Sanction.

Respectfully submitted,



Jay Adams
Florida Bar Number 341819

BROAD AND CASSEL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct and true copy of the foregoing has been furnished by hand delivery to those persons listed below this 11th day of August, 2006.



Jay Adams

Service list:

Sorin Ardelean, Esquire
John Lockwood, Qualified Representative
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-2202