

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 05-4687
)
BROTHER J. INC., d/b/a A. J.)
SPORTS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a formal hearing in this cause in Tallahassee, Florida, on May 24 and 25, 2006. The following appearances were entered:

APPEARANCES

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

For Respondent: Jay Adams, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The primary issues for determination are 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 a violation, what penalty should be imposed?

PRELIMINARY STATEMENT

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 alleging that Respondent 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.

Respondent disputed the allegations in the Administrative Action by Petition filed at the Department of Business and Professional Regulation on July 1, 2005, and requested a formal administrative hearing. The case was referred to the Division of Administrative Hearings on December 23, 2005. A formal hearing was set for March 29, 2006, in Tallahassee, Florida. It was later rescheduled to May 24, 2006, at the request of the parties.

Petitioner moved to amend its Administrative Action to add three additional counts of violation of Section 561.29(1)(a),

Florida Statutes, for serving alcoholic beverages to minors (Elizabeth McKean, David Moser, and Lee Habern). This motion was granted and the matter proceeded to hearing on seven counts. Petitioner is seeking to suspend Respondent's alcoholic beverage license for seven days and impose a \$1,000 civil penalty for each of the alleged seven violations.

At hearing, Petitioner presented testimony of 13 witnesses and ten exhibits. Petitioner presented an eleventh exhibit, Petitioner's exhibit five that was not accepted into evidence. Respondent presented the testimony of two witnesses and one exhibit.

A two-volume transcript of the final hearing was filed on June 12, 2006. After granting the parties an extension beyond the ten-day rule requirement for submission of proposed factual findings and proposed conclusions of law, Petitioner and Respondent each filed a Proposed Recommended Order. Those post-hearing submissions have been considered in the preparation of this Recommended Order.

All references to Florida Statutes are to the 2005 edition, unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the agency vested with general regulatory authority over the alcoholic beverage industry within the state,

including the administration of the laws and rules relating to the sale of alcoholic beverages.

2. Respondent is subject to the regulatory jurisdiction of Petitioner, having been issued license number 47-02607, Series 4-COP by Petitioner. That license allows Respondent to make sales for consumption on premises of liquor, wine, and beer at his establishment located in Tallahassee, Florida.

3. Events at issue in this proceeding revolve around a fraternity/sorority party held at Respondent's establishment on the evening of March 30/April 1, 2005. Members of the Phi Kappa Psi fraternity and the Delta Nu Zeta sorority decided that they would host a "construction" theme party. To facilitate the party, the social chairman of Phi Kappa Psi contacted Respondent to make arrangements.

4. Respondent's establishment has several large areas on its ground floor and a single, 1,800 square foot room on the second floor. Respondent agreed to reserve its upstairs room for the Phi Kappa Psi/Delta Nu Zeta party, to waive its cover charge for party patrons, and to make "dollar wells, dollar beers" (i.e. discounted prices on certain alcoholic beverages) available to party participants for a fee of \$300.00.

5. On the night in question, most of the participants met at the Phi Kappa Psi house before going out for the evening. They gathered around 10:00 p.m. and socialized. Some people were

getting their "construction" costumes together; others were "pre-partying" --drinking before going out to minimize the size of the bar bill when they go out later. The majority of the people at the frat house at that time were drinking.

6. At some point around 10:30 or 11:00 p.m., the party moved from the Phi Kappa Psi house to Respondent's establishment, with party members leaving in groups of three or four to drive from the fraternity house to Respondent's establishment. It was estimated that 15 or so sorority members and 15 to 30 fraternity brothers attended the party, and that somewhere between a third and a-half of those people were not of legal drinking age.

7. When they arrived at Respondent's establishment, the sorority and fraternity party makers used a side entrance set up for them by Respondent for use in getting to the party. A doorman was posted at the side entrance that checked the age of each of the patrons. He would place a "Tybex®" wristband on those persons who were over the age of 21 and would mark the hand of those under 21 with an indelible marker. Once inside, party members would go upstairs, where there was a bar with a bartender, a disk jockey, and a dance floor. The party continued on until around 2:00 a.m. on the morning of April 1, 2005, at which time the bar closed and the patrons left.

8. During the course of the evening, 244 alcoholic beverages were served at the upstairs bar at Respondent's facility. No

evidence was presented that established with any degree of accuracy how many fraternity and sorority members actually were at the party and how many were of legal drinking age. The evidence of party attendance provided at hearing varied widely and was in each instance an estimate or a guess. Numerous persons who were not members of Phi Kappa Psi or Delta Nu Zeta were in attendance. There is no accurate estimate of how many legal drinkers were at the party or how many drinks each legal patron may have had.

The Underage Drinkers

9. Shane Donnor was observed drinking at the frat house that night. He did not, however, appear to be intoxicated when he left the frat house. He had a wristband indicating that he was over 21, which allowed him to drink at Respondent's establishment, even though he was not of legal age. It is unknown how he obtained his wristband. Donnor was observed to have a glass in his hand while at Respondent's establishment, but no one could confirm that he was drinking alcohol. While at Respondent's establishment, various witnesses described him as appearing under the effects of alcohol and thought he appeared quite intoxicated. By 2:30 a.m. on April 1, Donnor had a blood alcohol level of 0.27. This corresponds to at least 10 drinks and probably more. It is an extremely high level of intoxication, which could result in a coma or even alcohol toxicity in some persons. He was quite drunk and had been so for some time.

10. Stephanie Reed was carded upon entering Respondent's establishment, as was her boyfriend and all the others in her party. She had one or two drinks, but she didn't buy them herself. One of the fraternity brothers purchased her drinks for her. Reed testified at one point that she did not receive a wristband when she entered the establishment (signifying legal drinking age); later, she testified that she did due to the intervention of some unknown man who told the doorman to give her a bracelet. Reed's testimony on this point is inconsistent and cannot be credited.

11. Christopher Lowe was carded as he entered Respondent's establishment. He received marks on the back of his hand indicating that he was underage. Although he was marked as being underage, Lowe was able to purchase two drinks from the bartender. He ordered the drinks; did nothing to conceal the underage marks on his hand; was served; and left money on the bar.

12. Tania Vasquez was carded upon entering Respondent's establishment and was marked as being underage. She did not buy any drinks while at the party, but was given an alcoholic beverage by a friend that she consumed while on the premises.

13. Elizabeth McKean, and everyone who entered with her, were carded when they arrived at the party. McKean was marked as being underage. She did not buy any drinks for herself, but was

given a shot of tequila by someone else. She drank the shot quickly to avoid detection by Respondent's staff.

14. David Moser had a roommate who manufactured fake i.d. cards. When he entered Respondent's establishment, he was carded and presented a false drivers license that made it appear that he was over the age of 21. He was marked as though he was over the legal drinking age and was able to buy and consume drinks at the bar, which he did.

15. Lee Habern had several sips of a friend's drink that was "snuck" to him.

Prevention Of Underage Drinking

16. It is well recognized that underage persons will seek to obtain alcoholic beverages at bars. This action by underage youths results in a "cat and mouse" game whereby the bar will change its tactics in trying to prevent underage drinking and the underage drinkers will change their methods of trying to obtain drinks.

17. Respondent tries to combat underage drinking by creating a culture of compliance. This starts with the initial hiring of employees by Respondent. Respondent's policy is that no underage drinking will be tolerated. This policy is stated in the Employee's Handbook. Every employee is given a copy of the handbook upon becoming employed and is required to sign an

acknowledgement that he or she received it. The policy is reiterated in informal training at every staff meeting.

18. Every new employee at Respondent's establishment is required to go through formal training with regard to liquor laws, the effect of alcohol on the human body, dealing with customers who have had too much to drink, and related topics. These courses are known as "PAR", "TIPS", and "Safe Staff" and are offered by the Florida Restaurant Association and Anheiser-Busch. Respondent has also offered training provided by agents of Petitioner. These formal training programs are offered continuously to employees, and at least one of the programs is offered three times each year. The initial formal training is accomplished within 30 days of the employee being hired. Records are maintained by Respondent as to who receives what training, and when it is provided.

19. Respondent has a policy that everyone who is served alcohol is to have his or her age checked. When the bar is not busy, this is accomplished by having the waitress check the patron's I.D. When the bar is busier, a doorman is posted at the entrance to check the patron's I.D. If the patron is over age 21, he or she is given a wristband; if under age 21, an indelible mark is placed on the back of the hand. Since Respondent has experienced persons copying their "over 21" designation, it is changed on a nightly basis.

20. Fake identification cards, if detected, are confiscated. On busier nights, Respondent might confiscate 20 to 30 of such fake identifications. On the night in question, the doorman confiscated five altered cards.

21. Respondent also has a floor manager on duty at all times that the bar is open. The floor manager will circulate throughout the establishment to make sure that all of the policies and procedures, including the prevention of underage drinking, are being carried out. On the night in question, the floor manager, Bo Crusoe, is documented to have worked and in the nominal course of events would have checked the upstairs area of the premises several times.

22. On busy nights, Respondent will hire one or more off-duty City of Tallahassee police officers to serve as security at the bar. The officers work in their police uniforms. These officers serve first and foremost as high visibility deterrents to unlawful activity. Their mere presence serves to minimize underage drinking. Respondent regularly has off-duty law enforcement on the premises.

23. Respondent also has a security consultant, Officer John Beemon, who is a Tallahassee Police officer. He evaluates the need for additional security and communicates those needs to the owners. When he becomes aware of a new wrinkle in underage persons obtaining alcohol, he works with Respondent to prevent the

practice. He assists the doormen in identifying fraudulent I.D.s. Respondent has always implemented whatever recommendations Beemon makes to them.

24. Generally, the security measures used by Respondent have proven effective. From time to time, Petitioner will try a "sting operation" at Respondent's establishment by sending a minor into Respondent's bar to see if they are able to purchase alcohol. On every such "sting operation" Petitioner's decoy was identified and stopped at the front door and was not allowed to purchase alcoholic beverages.

25. Carrie Bruce is Petitioner's special agent for the Tallahassee area. She is familiar with most Tallahassee alcoholic establishments and her testimony establishes that Respondent's establishment is not considered a "problem bar" by Petitioner and is considered to be better than other area bars in preventing underage drinking.

26. To the best of the owner's knowledge and Beemon's knowledge, no one has ever knowingly served a drink to a minor at Respondent's establishment. Further, Respondent has never previously been charged with serving alcohol to minors.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

28. Because Respondent is subject to penal sanctions in this proceeding, i.e., the imposition of an administrative penalty, Petitioner has the burden of proving by clear and convincing evidence the specific allegations in the Administrative Complaint. See, e.g., Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

29. The nature of clear and convincing evidence requires that the licensee be held to a "reasonable standard of diligence" and requires "culpable" responsibility so that any violation is due to the licensee's "own negligence, intentional wrongdoing, or lack of diligence." Pic N' Save Central Florida, Inc., v. Department of Business and Professional Regulation, 601 So. 2d 245 (Fla. 1st DCA 1992).

30. Further, clear and convincing evidence has been described as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

31. Section 561.29(1) (a), Florida Statutes, provides:

561.29 Revocation and suspension of license; power to subpoena.--

(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.

32. While this statute may appear to create strict liability for violation of the state's alcohol laws, the courts of this state have continuously and unanimously held 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, 739 (Fla. 1st DCA 1960).

33. In this regard, Petitioner has proven only count three of the Administrative Action, pertaining to Christopher Lowe. He was carded, received marks on the back of his hand indicating that he was underage. Thereafter, he purchased two drinks from the bartender. He did nothing to conceal the underage marks on his hand, was served, and left money on the bar.

34. The evidence, with the exception of Lowe, does not, however, demonstrate that Respondent willingly, knowingly, or recklessly allowed other minors to purchase and/or consume alcoholic beverages on its premises; or that Respondent fostered, condoned, or negligently overlooked these activities.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED

That Petitioner enter a final order finding Respondent to have committed one violation of selling alcoholic beverage to a minor and imposing an administrative penalty of a seven-day suspension of Respondent's license and a \$1,000 fine.

DONE AND ENTERED this 27th day of July, 2006, in Tallahassee, Leon County, Florida.



DON W. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
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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.