

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF ALCOHOLIC BEVERAGES)	
AND TOBACCO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-4600
)	
RAY'S MARKET, INC., d/b/a RAY'S)	
MARKET,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on March 25, 2008, by video teleconference between Fort Lauderdale and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Michael J. Wheeler, Esquire
Department of Business and
Professional Regulation
Northwood Centre, Suite 40
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Ibrahim Ghantous, Esquire
420 South Dixie Highway, Suite 2C
Coral Gables, Florida 33146

STATEMENT OF THE ISSUES

The issues are whether Respondent committed the offenses alleged in the Administrative Action filed by Petitioner against Respondent on August 7, 2007, and, if so, the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

By Administrative Action dated August 7, 2007, Petitioner charged that on July 18, 2007, Respondent or Respondent's ". . . agent(s), officer(s), servant(s), or employee(s), to wit: Ibrahim Abul-Kahir did unlawfully on your licensed premises sell, give, serve, or permit to be served . . . " an alcoholic beverage to Investigative Aide FL0068. Petitioner alleged that Respondent had violated Sections 562.11(1)(a) and 561.29(1)(a), Florida Statutes (2007)¹

Respondent timely disputed the factual predicate of the Administrative Action, the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Investigative Aide FL0068 (the IA), Agent Sasha Patrice Boykin, Agent David Gayle, and Special Agent John Cobban. Respondent cross-examined each of Petitioner's witnesses, but offered no additional witness. Respondent offered eight sequentially-numbered exhibits, each of which was admitted into

evidence without objection. Respondent's Exhibit 3 is a bottle of Seagram's wine cooler, which will be discussed in the Findings of Fact section of this Recommended Order. Petitioner offered no additional exhibits.

The Transcript of the proceeding, consisting of one volume, was filed April 22, 2008. By Order entered May 6, 2006, Petitioner's motion for an extension of time to file proposed recommended orders was granted, and the parties were given the deadline of May 20, 2008, to file their proposed recommended orders. Petitioner filed its Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. At the times relevant to this proceeding Respondent, Ray's Market, Inc., d/b/a Ray's Market was the holder of License No. 16-1362, Series 2 APS. The license authorizes Respondent to sell packaged beer and wine at the licensed premises, which is a convenience store located at 1707 NW 6th Street, Ft. Lauderdale, Florida 33313 (the licensed premises). At the times relevant to this proceeding Ibrahim Abdul-Kahir (the owner) was the owner of the licensee and the manager of the licensed premises.

2. On July 18, 2007, Petitioner's undercover investigative team performed a compliance check of the licensed premises while

checking other licensed locations to determine whether the various stores were selling alcoholic beverages to under-aged patrons. Petitioner's investigative team included the IA, Agent Boykin, Agent Gayle, and Special Agent Cobban.

3. The IA acted as Petitioner's underage operative on July 18, 2007. The IA is a female, born November 22, 1989. As of July 18, 2007, the IA was 17 years of age. At all times relevant to this proceeding, the IA operated under the direct supervision of one or more of Petitioner's agents.

4. The IA was instructed by Petitioner's agents to attempt to purchase alcoholic beverages from Respondent. She was instructed to enter the licensed premises, retrieve an alcoholic beverage from the cooler, and attempt to purchase the alcoholic beverage. The IA was instructed to answer truthfully if anyone in the store asked her age. Petitioner's agent gave the IA funds to make the purchase.

5. On July 18, 2007, both Mr. Gayle and Ms. Boykin entered the licensed premises before the IA entered. This procedure provided security for the IA while she was inside the licensed premises and provided corroboration for the events that ensued. Both Mr. Gayle and Ms. Boykin had unobstructed views of the IA's activities within the licensed premises and were able to hear the conversations described below.

6. At the times relevant to this proceeding, the licensed

premises had two cash registers open. Norma Williams, an employee of the licensee, was stationed at one cash register and the owner was stationed at the other. The two cash registers were located within sufficient proximity so that the owner could communicate with Ms. Williams and could observe the events occurring at her register.

7. After Agents Gayle and Boykin were inside the premises the IA entered the licensed premises, walked straight to the cooler, and took out a bottle of Seagram wine cooler. Seagram wine cooler is an alcoholic beverage. The IA then walked to the cash register at which Ms. Williams was stationed and handed the wine cooler to Ms. Williams. At that juncture, the owner asked Ms. Williams whether she had checked the IA's identification to verify the IA's age. Ms. Williams responded to the effect that she knew the IA because the IA hangs out with her (Ms. Williams') nieces and cousins all the time. Ms. Williams then stated that she knew that the IA was over 18 years of age. The owner responded: "Okay. We'll let them² bail you out." When the owner made that statement, he knew that the IA was about to purchase an alcoholic beverage and he knew that his employee had not verified her age by checking the IA's identification.

8. The IA paid Ms. Williams for the wine cooler and left the licensed premises. Immediately after she left the premises,

the IA dropped the wine cooler, breaking the bottle and spilling the contents on the sidewalk in front of the licensed premises.

9. Upon instructions from Petitioner's agent, the IA immediately re-entered the licensed premises and told the owner what had happened. The IA asked the owner if she could replace the broken wine cooler. The owner permitted the IA to do so. The IA went to the cooler, retrieved a replacement wine cooler, and left the licensed premises. Respondent's Exhibit 3 is the replacement wine cooler. The broken wine cooler was discarded.

10. At no time on July 18, 2007, did Ms. Williams, the owner, or anyone else acting on behalf of the licensee ask the IA her age or for identification to verify her age.

11. After the IA obtained the replacement wine cooler and left the licensed premises, Special Agent Cobban entered the licensed premises, identified himself as a special agent, and asked to speak to the owner of the licensed premises. Mr. Abul-Kahir identified himself as the owner of the licensed premises and showed Special Agent Cobban on his store's security system a re-play of the purchase of the wine by the IA. Mr. Abul-Kahir told Special Agent Cobban that he told Ms. Williams to check the IA's identification. Mr. Abul-Kahir was present at the formal hearing, but he did not testify. The clear and convincing evidence presented by Petitioner established that Mr. Abul-Kahir did not tell Ms. Williams to check the IA's identification.

CONCLUSIONS OF LAW

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

13. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So.2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So.2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

Clear 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 evidence 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 the firm belief of (sic) conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

14. Section 562.11(1)(a), Florida Statutes provides as follows in relevant 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 . . .

15. Section 561.29(1)(a), Florida Statutes (2007),
provides:

(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 . . .

16. In construing Subsection 561.29(1), Florida Statutes,
Florida's appellate courts have consistently held a licensee
liable only for his or her personal misconduct. In Pic N' Save,
supra, at 250, the court stated:

Although the statutory language in section
561.29(1) has since 1957 spoken in terms of
the Division's power to revoke or suspend a
beverage license for violation of the
beverage law committed by a licensee or "its
agents, officers, servants, or employees,"
the courts of this state have consistently
construed and applied this disciplinary
authority only on the basis of personal
misconduct by the licensee. Thus, while an
employee may violate the beverage law in
making illegal sales of alcoholic beverages
to minors, the licensee's culpable
responsibility therefore is measured in
terms of its own intentional wrongdoing or
its negligence and lack of diligence in
training and supervising its employees
regarding illegal sales. This limitation on

the licensee's liability is consistent with the notion, also long recognized by the courts of this state, that one's license to engage in a occupation is not to be taken away except for misconduct personal to the license.

17. Petitioner established by clear and convincing evidence that the owner of the licensed premises observed the transaction between Ms. Williams and the IA and that he failed to require his employee to verify the age of the IA. That failure of the owner established the violation alleged by Petitioner.

18. The recommendation as to the penalty that follows was taken from the Petitioner's Proposed Recommended Order, is consistent with the penalty guidelines found at Florida Administrative Code Rule 61A-2.022(11), and is the penalty imposed by Petitioner in recent final orders for identical violations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order finding Respondent guilty of one violation of Subsection 562.11(1)(a) Florida Statutes as alleged in the Administrative Action. It is further recommended that the final order impose

an administrative fine against Respondent in the amount of \$1,000.00 and suspend Respondent's license for seven consecutive days.

DONE AND ENTERED this 16th day of June, 2008, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of June, 2008.

ENDNOTES

1./ Unless otherwise indicated, all references are to the 2007 Florida Statutes.

2./ The undersigned construes this to be a reference to Ms. William's nieces and cousins.

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.