

OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 07-4747
)
MJT RESTAURANT GROUP, INC.,)
d/b/a THE COPPER POT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on January 23, 2008, in Ocala, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. Tarbert, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether Petitioner may discipline Respondent's alcoholic beverage license for Respondent's violating Florida Administrative Code Rule 61A-3.0141(3)(D) and Section 561.20(4)

"within" 561.29(1)(a),^{1/} Florida Statutes, on three separate occasions.

PRELIMINARY STATEMENT

This cause was referred to the Division of Administrative Hearings on or about October 16, 2007, for a disputed-fact hearing.

Respondent did not respond to the Initial Order, but the final hearing was scheduled in Respondent's city and county of operation.

The disputed-fact hearing was convened on January 23, 2008, upon a Notice of Hearing issued November 14, 2007. Respondent did not appear at the place and time appointed. The undersigned verified with the Division of Administrative Hearings in Tallahassee that Respondent had not telephoned to report any emergency delay, and after waiting for 30 minutes, Respondent still had not appeared.

Petitioner presented the oral testimonies of Angel A. Rosado, James DeLoach, Earnest Wilson, and Lawrence Perez, and had one exhibit admitted in evidence. Petitioner's Exhibits 3-5 were samples of beer, which the undersigned declined to take into evidence, as they were unduly cumbersome and repetitious in light of the testimony of the agents involved. See Section 120.569(2)(g), Florida Statutes, and Findings of Fact 6, 8, and 10. Official recognition, subject to verification by the

undersigned, was taken of the copies of Florida Administrative Code Rules 61A-3.0081, 61A-3.0101, 61A-3.0141, 61A-3.017, and 61A-3.019, and of Sections 561.20 and 561.22, Florida Statutes, provided in hard copy at the hearing.

At the close of Petitioner's case, Respondent still had not appeared, so the hearing was concluded without Respondent's appearance.

No transcript was provided.

Only Petitioner filed its Proposed Recommended Order^{2/} on February 4, 2008, and that proposal has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Pursuant to un-refuted testimony, Respondent, MJT Restaurant Group, Inc., doing business as The Copper Pot, holds Beverage License 5202697, Series 4 COP, SRX.^{3/}

2. Respondent's establishment is located in Ocala, Florida. It is divided into two separate interior rooms, with two separate exterior entrances. The two rooms are connected through the interior by a single opening between one room, which is the main restaurant area, and a second room, which is the bar/lounge.

3. A complaint was opened against Respondent with a warning letter issued by Investigative Specialist Melodi Brewton on March 15, 2007.

4. The Administrative Complaint that was ultimately filed in this case addresses only the dates of April 7, 2007, June 17, 2007, and July 20, 2007.

5. On April 7, 2007, Special Agents Angel Rosado and Lawrence Perez visited Respondent's premises in an undercover capacity at approximately 11:00 p.m. On that date, the restaurant's exterior door was closed and locked, but the lounge's exterior door was open. The agents entered through the lounge's exterior door and observed patrons consuming alcohol and listening to a band in the bar area.

6. The agents requested a menu from the bartender. The bartender told them the kitchen was closed. Each agent then ordered a beer, and a sealed alcoholic beer bottle was sold to each of them as alcoholic beer. Each agent was over 21 years of age, familiar with the smell and taste of alcohol, and testified that the liquid inside his container had been alcoholic beer. The agents testified that they had paid for, and received, the liquid as if it were alcoholic beer. A chain of custody was maintained and a sample vial of the beer served by Respondent on Tuesday, April 7, 2007, was brought to the hearing but was not admitted into evidence as unduly repetitious and cumbersome.^{4/}

7. On June 16, 2007, Special Agent Rosado and Special Agent Lawrence Perez visited The Copper Pot at approximately 11:30 p.m. The outside restaurant door was not locked, but the

lights were off inside the restaurant room where chairs were stacked on the tables. The agents observed patrons in the lounge room consuming alcohol. When the agents asked for a menu, the male bartender told them that the kitchen was closed. The bartender offered to heat up some spinach dip for them, but they declined.

8. Each agent then ordered an alcoholic beer, and a liquid was sold to each of them as alcoholic beer. Each agent was over 21 years of age, familiar with the smell and taste of alcohol, and testified that the liquid sold him was alcoholic beer. Each agent testified that he had paid for, and received, the liquid as if it were alcoholic beer. A sample of the alcoholic beer was logged into the Agency evidence room on June 17, 2007. That sample of the beer served by Respondent on June 16, 2007, was brought to the hearing but was not admitted into evidence as unduly repetitious and cumbersome.^{5/}

9. During the June 16-17, 2007, visit, Agent Perez spoke with a woman who was later determined to be one of the corporate officers of the licensee, Judith Vallejo. When Agent Perez asked her about obtaining a meal, Judith Vallejo replied that the kitchen was closed, but they could get food at the nearby Steak'N'Shake. The male bartender then told the agents that the Respondent's restaurant closes at 9:00 p.m. weekdays and

10:00 p.m. on weekends. June 16, 2007, was a Saturday.

June 17, 2007, was a Sunday.

10. At about 11:00 p.m. on July 20, 2007, Special Agents James DeLoach, Ernest Wilson, and Angela Francis entered Respondent licensee's premises through the lounge. The restaurant's outside entrance was locked and the restaurant was dark. In the lounge, they asked for a menu to order a meal. The male bartender told them that the kitchen was closed, but they could have a spinach dip. The agents ordered, and were served, one beer and two mixed drinks, which Special Agents DeLoach and Wilson testified had alcohol in them. Special Agent Francis did not testify. Both of the special agents who testified were over 21 years of age, familiar with the taste and smell of alcohol, identified that the liquids they had been served were, in fact, alcoholic beverages, and that they had bought and paid for what the bartender served them as alcoholic beverages as if they were alcoholic beverages. Each testified that the bartender had represented that what he was serving them were the alcoholic beverages they had ordered. A sample vial of only the beer served by Respondent to Special Agent Wilson on July 20, 2007, was brought to the hearing, but it was not admitted into evidence as unduly repetitious and cumbersome.^{6/}

11. Thereafter, a notice of intent to file charges was served upon one of Respondent's corporate officers.

12. There was testimony from a Special Agent that an SRX licensee is required to earn fifty per cent of its gross income from the sale of food and must sell food which is the equivalent of a full course meal during the entire time alcohol is being served, and that the Administrative Complaint herein should have cited Section 561.20(1) instead of 561.20(4), Florida Statutes.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

14. Count I of the Administrative Complaint charges Respondent with violating Florida Administrative Code Rule 61A-3.0141(3)(D) and Florida Statutes 561.20(4) "within" 561.29(1)(A), on April 7, 2007. Count II contains the same charges for June 17, 2007. Count III contains the same charges for July 20, 2007.^{7/}

15. Each count also contains the following specific language describing the violation(s) charged: ". . . did unlawfully on your licensed premises, fail to discontinue the sale of alcoholic beverages when the service of full course meals had been discontinued."

16. Although The Administrative Complaint uses capital letters, instead of lower-case letters, for the sub-sections of

both Florida Administrative Code Rule 61A-3.0141(3)(d) and Section 561.29(1)(a), Florida Statutes, these citations are understandable and gave appropriate notice of existing statutes and rules. However, those foregoing statutes and rules, together with Section 561.20(4), constitute the only charges herein.

17. The language of the statutes and rules to be applied is the language in effect on the dates in 2007, related in the Administrative Complaint.

18. Although other statutes and rules not specifically cited in the Administrative Complaint may help interpret the offenses actually charged, Respondent cannot be found guilty of violations not specifically charged in the Administrative Complaint. See Trevisani v. Dept. of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005), and cases cited therein.

19. The Florida Statutes (2007) actually charged as violations or offenses in the Administrative Complaint read as follows:

Section 561.20(4), Limitation upon number of licenses issued:

* * *

(4) The limitations herein prescribed shall not affect or repeal any existing or future local or special act relating to the limitation by population and exceptions or exemptions from such limitation by population of such licenses within any

incorporated city or town or county that may be in conflict herewith. Any license issued under a local or special act relating to the limitation by population shall be subject to all requirements and restrictions contained in the Beverage Law that are applicable to licenses issued under subsection (1).

Section 561.29(1)(a), 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 of the rules of evidence. (Emphasis supplied)

20. The Florida Administrative Code violation actually charged in the Administrative Complaint is Florida

Administrative Code Rule 61A-3.0141(3)(d), which reads as follows:

(3) Qualifying restaurants receiving special restaurant license after April 18, 1972 must, in addition to continuing to comply with the requirements set forth for initial licensure, also maintain the required percentage, as set forth in paragraph (a) or (b) below, on a bi-monthly basis. Additionally, qualifying restaurants must meet at all times the following operating requirements.

* * *

(d) Full course meals must be available at all times when the restaurant is serving alcoholic beverages except alcoholic beverage service may continue until food service is completed to the final seating of restaurant patrons for full course meals. A full course meal as required by this rule must include the following:

1. Salad or vegetable;
2. Entrée;
3. Beverage; and
4. Bread.

21. Florida Administrative Code Rule 61A-3.0141(1) is helpful in interpreting Rule 61A-3.0141(3)(d), actually cited in the Administrative Complaint against Respondent.

61A-3.0141(1) Special Restaurant Licenses.

(1) Special restaurant licenses in excess of the quota limitation set forth in subsection 561.20(1), Florida Statutes, shall be issued to otherwise qualified applicants for establishments that are bona fide restaurants engaged primarily in the service of food and non-alcoholic beverages, if they qualify as special restaurant licensees as set forth in subsection (2) of

this rule. Special restaurant licensees must continually comply with each and every requirement of both subsections (2) and (3) of this rule as a condition of holding a license. Qualifying restaurants must meet the requirements of this rule in addition to any other requirements of the beverage law. The suffix "SRX" shall be made a part of the license numbers of all such licenses issued after January 1, 1958. (Emphasis supplied)

22. The statutes charged in the Administrative Complaint only state the power, authority, and jurisdiction of Petitioner Agency to suspend or revoke licenses and do not allege a specific violation of law was committed by Petitioner against which to test the facts proven.

23. It may be inferred from the testimony as a whole (see Finding of Fact 12) ^{8/}; the context of the statutes, generally; and the specific descriptive language employed by the Agency in the Administrative Complaint, (see Conclusion of Law 15) that the Administrative Complaint intended to charge Respondent with a violation of Section 561.20(2)(a)4. Florida Statutes, which reads, in pertinent part, as follows:

* * *

4. . . . no restaurant granted a special license on or after January 1, 1958, pursuant to general or special law shall operate as a package store, nor shall intoxicating beverages be sold under such license after the hours of serving food have elapsed.

* * *

24. Herein, Petitioner seeks the penalty assigned by Florida Administrative Code Rule 61A-2.022 to violations of Section 561.20, for failure to meet minimum qualifications of a special license; that is, a \$1,000 penalty, plus license revocation without prejudice to obtain any type of license but with prejudice to obtain the same type of special license for five years. Florida Administrative Code Rule 61A-2.022 does not provide any guideline for rule violations.

25. The Agency has never moved to amend the Administrative Complaint, and Petitioner has not proven a violation of the statutory charges it actually brought. Accordingly, it may be concluded that the statutory charges actually brought against Respondent should be dismissed. On the other hand, Respondent has three times violated the rule charged in the Administrative Complaint. These proceedings do not have the technicality of a "numbers game." Even under Trevisani, the court considered the words alleging the offense and determined that the lynchpin is whether actual notice of the charges against the licensee has been provided to the licensee in the charging document.

26. Petitioner has clearly proven three violations of Florida Administrative Code Rule 61A-3.0141(3)(d), charged in the Administrative Complaint.

27. The rule alleged and proven against Respondent in the Administrative Complaint states the same offense as is contained

in Section 561.20(2)(a)4., in only slightly different language, and the actual words used in the Administrative Complaint to describe the offense charged (see Conclusion of Law 15), also clearly give notice of Respondent's activity alleged to be a violation. Although Section 561.20(2)(a)4., was not named in the Administrative Complaint, the offense described by that statute, the offense described by the actual language of the Administrative Complaint, and the offense charged by the rule named in the Administrative Complaint have been proven.

28. Florida Administrative Code Rule 61A-2.022 sets out a table of guidelines for penalties by statute number, not by rule number, but upon foregoing Conclusion of Law 27, Petitioner is entitled to the remedy it seeks, as set out Florida Administrative Code Rule 61A-2.022 for a Section 561.20(2)(a)4. violation.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that a final order be entered dismissing all statutory charges; finding Respondent guilty, under each of the three counts of the Administrative Complaint, of violating Florida Administrative Code Rule 61A-3.0141(3)(d); and for the rule violations, fining Respondent \$1,000.00, and revoking Respondent's license without prejudice to Respondent's obtaining

any type of license, but with prejudice to Respondent's obtaining the same type of special license for five years.

DONE AND ENTERED this 4th day of March, 2008, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
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 4th day of March, 2008.

ENDNOTES

- 1/ In addition to this reference of "within," the Administrative Complaint actually reads, "569.29(1)(A)."
- 2/ Attached thereto was a copy of Florida Administrative Code Chapter 61A-2.
- 3/ This would be a stronger case if the certified license file had been offered and admitted in evidence.
- 4/ This would have been a stronger case if the laboratory report on the substance served had been offered in evidence through someone capable of laying a predicate, preferably the qualified analyst. However, in light of no objection by Respondent to the foregoing procedure, the method used was sufficient.
- 5/ See n. 4.

6/ See n. 4.

7/ See n. 1.

8/ Section 561.20(1), Florida Statutes, cited by one of the witnesses as the statute the Agency intended to charge against Respondent, is not helpful in interpreting the actual charges against Respondent. It reads:

561.20 Limitation upon number of licenses issued.

(1) No license under s. 556.02(1)(a)-(f), inclusive, shall be issued so that the number of such licenses within the limits of the territory of any county exceeds one such license to each 7,500 residents within such county. Regardless of the number of quota licenses issued prior to October 1, 2000, on or after that date, a new license under s. 565.02(1)(a)-(f), inclusive, shall be issued for each population of 7,500 residents above the number of residents who resided in the county according to the April 1, 1999, Florida Estimate of Population as published by the Bureau of Economic and Business Research at the University of Florida, and thereafter, based on the last regular population estimate prepared pursuant to s. 186.901, for such county. Such population estimates shall be the basis for annual license issuance regardless of any local acts to the contrary. However, such limitation shall not prohibit the issuance of at least three licenses in any county that may approve the sale of intoxicating liquors in such county.

COPIES FURNISHED:

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Thomas Valleio, Jr.
2019-102 East Silver Springs Boulevard
Ocala, Florida 34470

Steven M. Hougland, Ph.D., Director
Department of Business and
Professional Regulations
Division of Alcoholic Beverage
and Tobacco
Northwood Centre
1949 North Monroe Street
Tallahassee, Florida 32399-0792

David J. Tarbert, Esquire
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.