STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 08-0250
HOLIDAY LIQUORS 2002, INC., d/b/a HOLIDAY LIQUORS,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on February 22, 2008, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Michael J. Wheeler, Esquire
Department of Business and Professional Regulation
Northwood Centre, Suite 6
1940 North Monroe Street
Tallahassee, Florida 32399-1020

For Respondent: Charles Wender, Esquire
190 West Palmetto Park Road
Boca Raton, Florida 33432

STATEMENT OF THE ISSUES

The primary issue in this disciplinary proceeding is whether Respondent, which operates a liquor store and sells alcoholic beverages on the premises under a license issued by Petitioner, sold beer to a person under the age of 21, in violation of the statutes governing holders of beverage licenses. If Petitioner proves the alleged violation, then it will be necessary to consider whether penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On April 26, 2007, Petitioner Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, issued an Administrative Action [Complaint] against Respondent Holiday Liquors 2002, Inc., d/b/a Holiday Liquors, charging the liquor licensee with one count of selling an alcoholic beverage to a person less than 21 years of age. Respondent timely requested a formal hearing to contest the allegations, and, on January 15, 2008, the matter was filed with the Division of Administrative Hearings ("DOAH").

On January 20, 2008, the Administrative Law Judge ("ALJ") originally assigned to this case (not the undersigned) consolidated the matter with DOAH Case No. 08-0249, which involved the same parties and counsel.

The final hearing of the consolidated cases took place on February 22, 2008, as scheduled, with both parties present. At the outset of the hearing, Respondent, through counsel, made a "full admission" of guilt as to the charge at issue in DOAH Case No. 08-0249. Consequently, the undersigned later severed the uncontested case and relinquished jurisdiction over it, there being no disputed issues of material fact for an ALJ to resolve in a formal administrative proceeding.

Petitioner offered two exhibits, numbered 1 and 2, and each was received in evidence. In addition, Petitioner called as a witness Special Agent Eric Scarbrough. Respondent presented no evidence.

The final hearing was recorded, but neither party ordered a transcript of the proceeding. The parties were instructed to submit their respective Proposed Recommended Orders on or before March 7, 2008, which they did.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2007 Florida Statutes.

FINDINGS OF FACT

1. At all relevant times, Respondent Holiday Liquors 2002, Inc., d/b/a Holiday Liquors ("Holiday"), has held a license to sell alcoholic beverages at retail. Consequently, Holiday is subject to the regulatory and disciplinary jurisdiction of

Petitioner Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the "Division").

2. On March 23, 2007, five agents of the Division placed under surveillance the liquor store that Holiday operates, covertly watching for sales to underage buyers. At around 10:45 p.m., Special Agent Eric Scarbrough observed a woman enter the store and purchase a six-pack of beer. To Agent Eric Scarbrough the woman appeared to be young——too young, perhaps, to purchase alcohol legally.

3. Agent Scarbrough and his partner followed the woman's car as she drove away from the store's premises. Soon, they pulled her over, making a "traffic stop." The agents could see the six-pack in the car, in plain view. According to Agent Scarbrough, whose testimony in this regard the undersigned credits as true, the woman identified herself to him as Edith Rosario and produced her driver license, which showed November 6, 1986, as her date of birth. Agent Scarbrough confiscated the beer and issued the woman a Notice to Appear. Later that night, he also gave a Notice to Appear to the licensee's agent, Jakia Bergum, charging her with one count of selling alcohol to a person under the age of 21.[1]

4. Notwithstanding the foregoing, the undersigned is unable to find that the alleged underage buyer ("Ms. Rosario") was, in fact, under the age of 21 on March 23, 2007. This is

because the Division did not offer any *nonhearsay* evidence in support of the woman's age. (Ms. Rosario did not testify at hearing.)

5. The evidence being insufficient as to a material element of the Division's case (i.e. the age of the alleged underage buyer), it must be concluded, as a matter of ultimate fact, that Holiday is not guilty of selling alcoholic beverages to a person less than 21 years of age, as charged in the Administrative Action [Complaint].

CONCLUSIONS OF LAW

6. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

7. Section 561.29, Florida Statutes, sets forth the acts for which the Division may impose discipline. This statute 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.

8. Holiday stands accused of violating Section 562.11(1)(a)1., Florida Statutes, which provides as follows:

> 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 or to permit a person under 21 years of age to consume such beverages on the licensed premises. A person who violates this subparagraph commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

9. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charge against the licensee by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla.

1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

10. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> 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 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.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler

Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

11. The fatal flaw in the Division's case is that the only evidence presented at hearing concerning the age of the woman to whom Holiday allegedly made the unlawful sale is hearsay, to wit: (1) the woman's statements to Agent Scarbrough regarding her age, which "out of court" declarations he repeated in his testimony; and (2) the woman's driver license, the "out of court" documentary source that supplied Agent Scarbrough the woman's date of birth, which information he later passed along in his testimony.

12. Hearsay is generally admissible in administrative proceedings, but unless a predicate is laid for the admission of the hearsay under a recognized exception to the hearsay rule, such "evidence" (which would be rejected as unreliable in a court of law) can be used only to supplement or explain other nonhearsay evidence (or hearsay received pursuant to an exception). See § 120.57(1)(c), Fla. Stat. Thus, while the rules of evidence are relaxed in this forum, an "out of court" declaration offered for the truth of the matters asserted therein is yet insufficient, in itself, to support a finding of fact.

13. There is no evidence in the instant record bearing on the buyer's age except the hearsay described above.

Consequently, there is no nonhearsay evidence that the hearsay could fairly be said to supplement or explain.[2] Faced with that, the Division argues that Ms. Rosario's "out of court" revelation of her age (to Agent Scarbrough) constituted a "statement against interest" coming within the hearsay exception for such declarations.

14. As defined in the Evidence Code, a "statement against interest" is one which,

> at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true.

§ 90.804(2)(c), Fla. Stat.

15. Ms. Rosario's "out of court" declarations might qualify as "statements against interest." The hearsay exception for such declarations, however, applies only when "the declarant is unavailable as a witness." § 90.804(2), Fla. Stat. "Unavailability" in this context is a term of art, meaning not simply that the declarant wasn't present at the hearing, but that the declarant:

> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
> (b) Persists in refusing to testify concerning the subject matter of the

> declarant's statement despite an order of the court to do so;
> (c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
> (d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
> (e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.
>
> However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

§ 90.804(1), Fla. Stat.

16. The Division did not attempt to lay a foundation for establishing that Ms. Rosario was "unavailable as a witness," and the result, predictably, is that none of the foregoing conditions was shown to exist. Indeed, the Division did not even identify Ms. Rosario as a possible witness on its pre-hearing witness list, which tells the undersigned that the Division considered her, not "unavailable," but *unnecessary* as a witness. In any event, the bottom line is: Ms. Rosario's "out of court" statements cannot be received under Section 90.804(2)(c), for lack of proof of "unavailability."

17. At hearing, the undersigned received in evidence, as Petitioner's Exhibit 2, a copy of the Notice to Appear that had been issued to Ms. Bergum, which was described as a one-page document.[3] (Actually, the undersigned thought at the time, not having a copy of the document to examine, that the Division was offering the Notice to Appear that Agent Scarbrough had issued to Ms. Rosario.) When introducing the exhibit, the Division asserted that the Notice to Appear——which charges Ms. Bergum with selling beer "to a 20 year old female"——could be admitted as a "business record" and hence provide the basis for a finding that Ms. Rosario was underage at the time of the alleged unlawful purchase. The undersigned expressed skepticism that the buyer's age could be thus proved under the business records exception to the hearsay rule but told the Division he would revisit the question in connection with the preparation of a Recommended Order. Although the Division did not discuss the issue in its Proposed Recommended Order and might thereby be deemed to have abandoned the argument, the undersigned will address the matter, as he said he would.

18. To be admissible as a business record pursuant to section 90.803(6), the record must be shown to have been:

> 1. made at or near the time of the event recorded,
>
> 2. by or from information transmitted by a person with knowledge, and

> 3. kept in the course of a regularly conducted business activity and
>
> 4. that it was the regular practice of that business to make such a record.

Quinn v. State, 662 So. 2d 947, 953 (Fla. 5th DCA 1995)(footnote omitted).

19. Assuming that the Notice to Appear qualified as a business record within the subject exception, the only declarations therein that might be admissible under Section 90.803(6), Florida Statutes, would be those written by a person who, while *conducting the regular affairs of the business*, inscribed either (a) facts of which he or she had *personal knowledge*, or (b) facts that had been "transmitted" *in the ordinary course of the business* by another person having personal knowledge thereof. In this instance, the "business" is the Division, and Agent Scarbrough is the one who made the record on behalf of the business. It is conceivable that statements in the Notice to Appear which reflect Agent Scarbrough's personal knowledge could be admitted under the business records exception.

20. The problem for the Division is that Agent Scarbrough did not have personal knowledge regarding Ms. Rosario's age. His knowledge of that fact——which of course is *the* fact that the Notice to Appear was offered to prove——is based solely on the hearsay that the Division wants the undersigned to consider as

substantive evidence. *That* hearsay (Ms. Rosario's declarations and the facts written on her driver license) is hearsay within hearsay (the Notice of Appear, remember, is itself hearsay). To be admissible, the embedded hearsay must conform to an exception to the hearsay rule. See § 90.805, Fla. Stat.

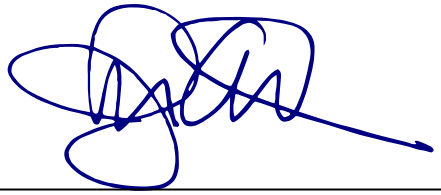
21. The business records exception does not apply either to Ms. Rosario's declarations or the facts written on her driver license because the source(s) of the relevant information (i.e. Ms. Rosario's age or date of birth) were not employees or agents of the Division and were not acting within the regular course of Division's business; that is, the relevant sources with personal knowledge of the material fact (Ms. Rosario's age) were not under a "business duty" to report the information accurately to the Division. See Quinn v. State, 662 So. 2d 947, 953-54 (Fla. 5th DCA 1995); Harris v. Game and Fresh Water Fish Com'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986); see also Franzen v. State, 746 So. 2d 473, 474 (Fla. 2d DCA 1998)(Casanueva, J., explaining, in a concurring opinion, that the predicate for admitting a business record includes the requirement "that the source of the information be an employee or agent of the business possessing the requisite knowledge of the data or information."). The "statement against interest" exception does not apply either, for reasons already discussed. No other possible exception was invoked.

22. It is concluded that the relevant hearsay is not admissible under an exception to the hearsay rule and therefore cannot be used as the exclusive basis for a finding of fact.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order finding Holiday not guilty of the instant charge.

DONE AND ENTERED this 13th day of March, 2008, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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.stae.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of March, 2008.

ENDNOTES

[1]/ In its Proposed Recommended Order, the Division urged the undersigned to find that, when confronted by Agent Scarbrough following the arrest of Ms. Rosario, Ms. Bergum admitted having "made a mistake" ——the implication being that she mistakenly had sold beer to an underage customer. Agent Scarbrough testified, however, that Ms. Bergum (who did not testify at hearing) had told him she disagreed with the accusation that she had sold

beer to a person under the age of 21, and that she had been asking purchasers for identification all night. Indeed, Ms. Bergum had refused earlier that same evening to make a sale to an underage, undercover agent of the Division who was attempting, as part of a sting, to catch Holiday violating the law. Because, it is found, the evidence does not clearly and convincingly prove that the licensee admitted facts sufficient to establish guilt, the undersigned expressly rejects the Division's proposed finding to the contrary.

[2]/ Although (to its credit) the Division did not press the argument, the undersigned considered the possibility that the hearsay might be used to "supplement" or "explain" Agent Scarbrough's nonhearsay testimony that the buyer appeared, subjectively to him, to be underage. Such use of the hearsay, however, effectively would supplant (to the point of making superfluous) the other evidence, becoming the primary——and the only convincing——evidential basis for a finding that the woman was under age 21. Given that § 120.57(1)(c) is obviously intended to accord otherwise inadmissible hearsay merely a supporting role, the undersigned concludes that an "out of court" declarant (Ms. Rosario) cannot be the star witness, and that likewise an "out of court" exhibit (the driver license) cannot be the "smoking gun."

[3]/ The Division delivered its two exhibits to the undersigned several weeks after the hearing. Upon taking possession of the exhibits, the undersigned discovered, attached to the Notice to Appear (Petitioner's Exhibit 2), a separate record, not part of the Notice, which purports to be a one-page printout from the State of Florida Department of Highway Safety and Motor Vehicles Driver and Vehicle Information Database (DAVID). This record contains specific personal information about Ms. Rosario, including her address, date of birth, height, and Social Security number, together with a photograph of the woman. There was no testimony regarding this document, and it was neither offered nor received in evidence. Because the DAVID printout is not part of the evidence of record, the undersigned cannot base any findings of fact on it, and has not done so. See § 120.57(1)(j), Fla. Stat.

COPIES FURNISHED:

Michael J. Wheeler, Esquire
Department of Business and
Professional Regulation
Northwood Centre, Suite 6
1940 North Monroe Street
Tallahassee, Florida 32399-1020

Charles Wender, Esquire
190 West Palmetto Park Road
Boca Raton, Florida 33432

Steven M. Hougland, Ph.D., Director
Division of Alcoholic Beverages and Tobacco
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Ned Lucynski, General Counsel
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.