

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 08-3891
)
LATIN AMERICAN CAFE AND MARKET,)
INC., d/b/a LATIN AMERICAN)
CAFE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 4, 2008, in Clearwater, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearing.

APPEARANCES

For Petitioner: Joshua B. Moye, Esquire
Sarah C. Naf, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Eduardo R. Latour, Esquire
Latour and Associates, P.A.
135 East Lemon Street
Tarpon Springs, Florida 34689

STATEMENT OF THE ISSUES

The issues are: (1) whether Respondent violated Section 562.02, Florida Statutes (2007),¹ by unlawfully possessing certain alcoholic beverages on its licensed premises which were not authorized to be sold under its license; (2) whether Respondent violated Subsection 561.14(3), Florida Statutes, by purchasing or acquiring alcoholic beverages for the purpose of resale from persons not licensed as distributors; and (3) if so, what penalty or administrative fine should be imposed.

PRELIMINARY STATEMENT

On December 19, 2007, Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Division" or "Petitioner"), filed an Administrative Action against Respondent, Latin American Café and Market, Inc., d/b/a Latin American Café ("Latin American Café" or "Respondent"). Petitioner alleged that on or about November 21, 2007, Respondent: (1) allowed or permitted on its premises the possession of alcoholic beverages that it was not authorized to sell; and (2) purchased or acquired alcoholic beverages for the purpose of resale from persons not licensed as a distributor. Respondent denied the allegations and requested a formal hearing.

Petitioner referred the matter to the Division of Administrative Hearings on August 11, 2008, and requested that

an Administrative Law Judge be assigned to conduct a formal hearing. By notice dated August 26, 2008, the case was scheduled for hearing and held as noted above.

At hearing, Petitioner presented the testimony of Special Agent Casey Simon and Lieutenant David Merrill of the Division. Petitioner's Exhibits 1 through 8 were admitted into evidence. Respondent presented the testimony of one witness, Alberto Pagini, Respondent's president and owner. Respondent's Exhibits 1 and 2 were admitted into evidence.

A hearing Transcript was filed on January 8, 2009. Both parties timely filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is, and was at all times relevant hereto, the holder of alcoholic beverage License No. 62-10299, Series 2-COP, which permits the sale of beer and wine, but no other alcoholic beverages, for consumption on the premises.

2. Petitioner seeks to impose sanctions on the license of Respondent.

3. Mr. Pagini owned and operated Latin American Café, a restaurant located at 3780 Tampa Road, Oldsmar, Florida. The restaurant serves Latin American and South American foods and desserts, some of which contain alcoholic beverages in preparation of said food.

4. At all times relevant to this proceeding, the menu for Latin American Café stated that only one type of liquor was used for cooking.

5. Respondent was placed on the Division's "No Sale" list on August 21, 2007, for failure to renew its license. As a result of being on the "No Sale" list, distributors were prohibited from selling alcoholic beverages to Respondent. Nevertheless, as discussed below, a receipt dated August 23, 2007, shows that a distributor sold alcoholic beverages to Respondent.

6. Due to Respondent's being placed on the "No Sale" list, Casey Simon, a special agent with the Division, conducted an inspection of Latin American Café on November 21, 2007. During the inspection, Agent Casey discovered beer and liquor on the premises. The beer was located in a cooler behind the bar at the front of the premises, and the liquor was located in the manager's office and in the kitchen cupboards.

7. The liquor discovered on Respondent's premises on November 21, 2007, consisted of the following: (a) one, one-quart bottle of Mr. Boston Crème De Cassis; (b) one, 750-millimeter bottle of Cinzano Rosso Vermouth; (c) one, 750-millimeter bottle of Chevas Regal Whiskey; (d) one, 750-millimeter bottle of Sambuca Di Amare; (e) one, 1.75-liter bottle of Heritage Triple Sec; (f) one, 250-millimeter bottle of

Chasqui Licor De Café; (g) one, 750-millimeter bottle of Truffles Liquor; (h) one, one-liter bottle of Sambroso Licor De Café; and (i) one, .75-liter bottle of Heritage Rum.

8. Respondent contends that seven of the nine kinds of suspect liquor found on the premises were used for cooking, mostly desserts, at the business. The remaining two liquors found on the premises, Chevas Regal Whiskey and Sambuca, were for Mr. Pagani's personal use. The Chevas Regal Whiskey was a present that had been given to Mr. Pagani, and at the time of the inspection, the whiskey was in a box in his office. The Sambuca Di Amare is a "digestive" liquor made in Italy and was for Mr. Pagani's personal use.

9. Although most of the liquor was found on Respondent's premises during the inspection, Respondent's menu does not list any of the suspect liquors as an ingredient in any of the menu items.

10. The beer discovered on Respondent's premises on November 21, 2007, consisted of the following: (a) 41, 12-ounce bottles of Bud Light, with a born date of September 2007; (b) six, 12-ounce bottles of Budweiser; (c) 27, 12-ounce bottles of Miller Lite; (d) 12, 12-ounce bottles of Heineken; and (e) 19, 12-ounce bottles of Corona.

11. The Bud Light's "born date" of September 2007, is the date in which the beer was manufactured. Thus, it can be

reasonably concluded that beer with a "born date" of September 2007, cannot be purchased prior to that month.

12. During the November 21, 2007, investigation, the Division's agent requested invoices for the beer found on the premises. Respondent produced a receipt from Sam's Club dated November 16, 2007, which reflected the sale of various items to a "member," identified, presumably, by a membership number. Among the items purchased were other documents provided to Agent Simon which showed that Latin American Café was the member on the November receipt. Next to the name of each kind of beer was the number "24" which, presumably, indicated the number of bottles of beer that were purchased.

13. Mr. Pagini testified that many of the items purchased from Sam's Club on November 16, 2007, including the Bud Light and the Heineken, were for personal use.

14. At this proceeding, Respondent introduced into evidence copies of two receipts which reflect that it purchased alcoholic beverages from two authorized distributors, J.J. Taylor Distributors Florida, Inc. ("J.J. Taylor Distributors") and Great Bay Distributors, Inc. ("Great Bay Distributors"). The receipts were dated August 9, 2007, and August 23, 2007, respectively.

15. The receipt from J.J. Taylor Distributors dated August 9, 2007, reflects that Respondent purchased the following

alcoholic beverages: (a) 24, 12-ounce bottles of Becks beer; (b) 24, 12-ounce bottles of Braham beer; (c) 24, 12-ounce bottles of Heineken beer; (d) 24, 12-ounce bottles of "Lite" beer; and (e) 24, 12-ounce bottles of Presidente.

16. The receipt from Great Bay Distributors dated August 23, 2007, reflected the purchase of the following alcoholic beverages: (a) 24, 12-ounce bottles of Budweiser beer; (b) 24, 12-ounce bottles of Corona beer; (c) 24, 12-ounce bottles of Modesto Especial; and (d) 24, 12-ounce bottles of Negro Modesto.

17. Despite Respondent's providing receipts from distributors, no plausible explanation was provided to establish when and from whom the Bud Light, discovered on Respondent's premises on November 21, 2007, was purchased. The receipts from the distributor were dated about one month prior to the Bud Light's born date of September 2007.

18. The suspect Bud Light has a born date of September 2007, which is after the dates of the distributor receipts and after Respondent was placed on the "No Sale" list.

19. No evidence was offered to establish where the suspect beer, Bud Light, was purchased or acquired.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008).

21. The Division has jurisdiction over the regulation of alcoholic beverage licenses pursuant to Section 561.02, Florida Statutes.

22. Subsection 561.29(1)(a), Florida Statutes, sets forth the acts for which the Division may impose discipline and 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.

23. In this case, Respondent is charged with violating Section 562.02 and Subsection 561.14(3), Florida Statutes.

24. Section 562.02, Florida Statutes, provides that:

It is unlawful for a licensee under the Beverage Law or his or her agent to have in his or her possession, or permit anyone else to have in his or her possession, at or in the place of business of such licensee, alcoholic beverages not authorized by law to be sold by such licensee.

25. Subsection 561.14(3), Florida Statutes, provides as follows:

(3) No vendor shall purchase or acquire in any manner for the purpose of resale any alcoholic beverages from any person not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law. Purchases of alcoholic beverages by vendors from vendors shall be strictly limited to purchases between members of a pool buying group for which the initial purchase of the alcoholic beverages was ordered by a pool buying agent as a single transaction. No vendor shall be a member of more than one cooperative or pool buying group at any time. No vendor shall import, or engage in the importation of, any alcoholic beverages from places beyond the limits of the state.

26. Proceedings such as this one which seek to suspend, revoke, or impose other discipline on a professional license are penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Thus, to impose discipline, the Division must prove the charges 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).

27. Clear and convincing evidence is described in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), which was adopted by the Florida Supreme Court in Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994), 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.

28. The Division established by clear and convincing evidence that on November 21, 2007, Respondent possessed alcoholic beverages on the licensed premises which were not authorized to be sold under Respondent's license. Thus, Respondent violated Section 562.02, Florida Statutes.

29. The evidence was insufficient to prove, clearly and convincingly, that Respondent acquired alcoholic beverages for

resale from a person not licensed as a distributor under the Beverage Law. Therefore, the Division did not meet its burden of proof as to the charge that Respondent violated Subsection 561.14(3), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, enter a final order: (1) finding that Respondent, Latin American Café and Market, Inc., d/b/a Latin American Café, violated Section 562.02, Florida Statutes; (2) finding that Respondent did not violate Subsection 562.14(3), Florida Statutes; (3) imposing an administrative fine of \$1,000.00 for the violation of Section 562.02, Florida Statutes; and (4) requiring the fine to be paid within 30 days of the final order.

DONE AND ENTERED this 31st day of March, 2009, in
Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2009.

ENDNOTE

1/ All statutory references are to Florida Statutes (2007),
unless otherwise noted.

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.