

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 08-5045
)
MAYRA N. VAZQUEZ, d/b/a MI)
GENTE MARKET,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On December 4, 2008, a formal administrative hearing in this case was held in Sarasota, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: (No appearance)

STATEMENT OF THE ISSUES

The issues in this case are whether the allegations of the Administrative Action are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Action dated July 3, 2008, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Petitioner), alleged that Mayra N. Vazquez, d/b/a Mi Gente Market (Respondent), possessed and sold cigarettes and alcohol that did not comply with various licensing and tax requirements. The Respondent disputed the allegations and requested a formal administrative hearing. By letter dated October 10, 2008, the Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled and conducted the hearing.

The Respondent made no appearance at the hearing. The Petitioner presented the testimony of one witness and had one exhibit admitted into evidence. At the conclusion of the Petitioner's case presentation, the Petitioner moved to deem admitted all matters addressed in the Petitioner's First Request for Admissions dated October 22, 2008. The request had advised the Respondent that a failure to respond within 30 days of the request could result in the matters being deemed admitted. The Respondent failed to respond. The Administrative Law Judge

granted the motion. The Findings of Fact set forth herein are based upon the admissions and testimony presented during the hearing.

No transcript of the hearing was filed. The Petitioner filed a Proposed Recommended Order on December 10, 2008.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was the operator of Mi Gente Market and held Florida license number BEV6803562, Series-2APS. The license permitted the Respondent to sell packaged beer, wine, and tobacco products.

2. An investigator employed by the Petitioner entered Mi Gente Market on April 18, 2008, while conducting an investigation into the sale and distribution of alcoholic beverages by Azteca Imports, LLC.

3. Azteca Imports, LLC, is not licensed to sell or distribute alcoholic beverage products in Florida.

4. The investigator observed two one-liter bottles of "Tres Coronas Mexican Sherry Wine" available for sale at Mi Gente Market.

5. Upon inquiry, Cornelio Reyes-Vazquez, a relative and employee of Mayra N. Vazquez, stated that the Tres Coronas wine had been purchased from Azteca Imports, LLC.

6. The investigator also observed approximately 115 packages of "Belmont" cigarettes available for sale at Mi Gente Market.

7. The Belmont cigarette packages did not have State of Florida excise tax stamps.

8. Cornelio Reyes-Vazquez admitted to the investigator that the cigarettes had been purchased from an unregistered distributor.

9. The Florida excise tax for cigarettes is 33.9 cents per pack. The total unpaid excise tax for the Belmont cigarettes at Mi Gente Market is \$38.98.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

11. The Petitioner has the burden of establishing the allegations of the Administrative Complaints by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

12. Subsection 561.29(1)(a), Florida Statutes (2007), provides as follows:

(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. (Emphasis supplied)

13. Section 562.01, Florida Statutes (2007), provides as follows:

Possession of untaxed beverages.--It is unlawful for any person to own, possess, purchase, sell, serve, distribute, or store any alcoholic beverages unless said person has fully complied with the pertinent provisions of the beverage law relating to the payment of excise taxes.

14. Subsection 561.14(3), Florida Statutes (2007), provides as follows:

561.14 License and registration classification.--Licenses and registrations referred to in the Beverage Law shall be classified as follows:

* * *

(3) Vendors licensed to sell alcoholic beverages at retail only. 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. (Emphasis supplied)

15. An excise tax is charged on each pack of cigarettes sold in Florida, and a stamp is placed on each package to document payment of the tax. Subsection 210.18(1), Florida Statutes (2007), provides that it is illegal for any person to sell or offer for sale unstamped packages of cigarettes.

16. Subsection 210.65(2), Florida Statutes (2007), provides that it is illegal for a retailer to purchase tobacco products from an unlicensed vendor.

17. The uncontroverted evidence establishes that the Respondent offered for sale alcoholic beverages obtained from an unlicensed dealer. The evidence also establishes that the

Respondent obtained, from an unlicensed vendor, tobacco products which lacked tax stamps.

18. Florida Administrative Code Rule 61A-2.022 sets forth the penalties applicable to this case. The Respondent has no previous disciplinary history. The rule provides a penalty of \$1,000.00 for a violation of Section 562.01, Florida Statutes; \$1,000.00 for a violation of Subsection 564.14(3), Florida Statutes; \$1,000.00 for a violation of Subsection 210.65(2), Florida Statutes; and a penalty of \$500.00 and payment of the unpaid excise tax. There is no evidence indicating that any variance from the rule is warranted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, enter a final order finding Mayra N. Vazquez, d/b/a Mi Gente Market, in violation of the statutes referenced herein and imposing an administrative fine of \$3,500.00 plus applicable excise tax of \$38.98 for a total fine of \$3,538.98.

DONE AND ENTERED this 5th day of January, 2009, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2009.

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.