

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 08-5485
)
M AND Y VACO, INC., d/b/a M AND)
Y FOOD MART,)
)
Respondent.)
_____)

RECOMMENDED ORDER

As previously scheduled, a formal hearing was held in this case by video teleconference between Lauderdale Lakes and Tallahassee, Florida, on December 23, 2008, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael John Wheeler, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32303

For Respondent: Yves Corneille, pro se
Monette Corneille, pro se
M and Y Vaco, Inc., d/b/a M and Y Food Mart
301 West Sunrise Boulevard
Fort Lauderdale, Florida 33311

STATEMENT OF THE ISSUE

The issue is whether an administrative fine should be imposed on Respondent for unlawful possession of certain alcoholic beverages on its licensed premises, as alleged in the Administrative Action dated June 2, 2008.

PRELIMINARY STATEMENT

In an Administrative Action, taken on June 2, 2008, against Respondent, Petitioner alleged that on or about May 29, 2008, one of Respondent's officers unlawfully allowed or permitted the possession on its licensed premises of alcoholic beverages, other than the beer and wine that it is authorized to sell. On June 20, 2008, Respondent denied the allegation and requested a formal hearing.

The matter was referred by Petitioner to the Division of Administrative Hearings on November 3, 2008, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated November 25, 2008, a final hearing was scheduled and was held as scheduled on December 23, 2008, by video teleconference between Lauderdale Lakes and Tallahassee.

At the final hearing, Petitioner presented the testimony of David Kordzikowski, a special agent. Petitioner's Exhibits 1-5 were also received into evidence. Respondent presented the testimony of Yves Corneille, the husband of its officer/employee, Monette Corneille, who also testified. No transcript of the

hearing was filed. Petitioner's Proposed Recommended Order was received on January 13, 2008.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this disciplinary action, Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division), seeks to impose a penalty on the license of Respondent, M and Y Vaco, Inc., doing business as M and Y Food Mart ("M and Y").

2. Respondent, M and Y is the holder of Beverage License Number 1618148 Series 2-APS, that permits the sale of beer and wine but no other alcoholic beverages.

3. On or about May 29, 2008, Special Agent David Kordzikowski conducted a routine inspection of M and Y at 301 East Sunrise Boulevard, Ft. Lauderdale, Florida.

4. During the inspection, the special agent looked in an unlocked cabinet on the west side of the premises and found four 750 mililiter bottles of Barbancourt Rhum, one 1.44 liter bottle of Disaronno Liquor, one 1 liter bottle of Ron Llave Puerto Rican Rum, one 1 liter bottle of Bailey's Irish Cream, and one 1.75 liter bottle of Florde Cana Rum. Of the eight bottles, two were unsealed. Five of the bottles, the Barbancourt Rhum and the Disaronno Liquor, did not have the necessary proof that approximately \$7.67 in Florida excise taxes had been paid.

5. At the time the alcoholic beverages were found, the employee on duty was M and Y's Vice President Monette Corneille. Mrs. Corneille and her husband, Yves Corneille, testified that they did not know that it was illegal for them to possess alcoholic beverages other than beer and wine, and that the rums and liquors were gifts and were kept for religious purposes to protect the premises.

6. The special agent testified that the location of the cabinet, Mrs. Corneille's immediate response, and her explanation of religious beliefs about "spirits" led him to believe the violation was unintentional. In its proposed order, the Division suggests the imposition of fines of \$1,507.67, but notes that a reduced penalty may be imposed if mitigating circumstances are established.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

8. As the party seeking to impose penal sanctions on Respondent's license, Petitioner bears the burden of proving the allegations in the charging document by clear and convincing evidence. See, e.g., Pic N' Save Central Fla., Inc. v. Dep't of Bus. and Prof. Reg., Div. of Alco. Bev. and Tobacco, 601 So. 2d 245 (Fla. 1st DCA 1992).

9. The Administrative Action alleged that Respondent violated the following provisions of the beverage laws:

562.01 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.

562.02 Possession of beverage not permitted to be sold under license.--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.

10. The evidence is clear and convincing that Respondent violated the provisions of Sections 562.01 and 562.02, Florida Statutes (2008), and is subject to a penalty for the violations, as provided in Subsection 561.29(1)(a), Florida Statutes (2008).

11. Penalty guidelines are established in Florida Administrative Code Rule 61A-2.022 that provides, in relevant part:

(1) This rule sets for the penalty guidelines which shall be imposed upon alcoholic beverage licensees and permittees who are supervised by the division. District supervisors, audit supervisors, and bureau chiefs are authorized to accept settlement offers that do not deviate from the penalty guidelines. The penalties provided below are based upon a single violation which the licensee committed or knew about; or a pattern of at least three violations on different dates within a 12-week period by employees, independent contractors, agents, or patrons on the licensed premises or in the

scope of employment in which the licensee did not participate; or violations which were occurring in an open and notorious manner on the licensed premises. (Emphasis added.)


12. The guidelines provide for a \$500 fine and the payment of the excise tax of \$7.67 for a violation of Section 562.01, and a \$1,000 fine for the violation of Section 562.02.

13. Mitigating factors may be considered. The Division's special agent's and Mrs. Corneille's credible testimony justify mitigation. Based on the reduction of the suggested fine of \$1,820 to \$750 in a similar case, after a license holder's employee, without his knowledge, served unauthorized after-dinner drinks and "chasers" for beer from liquor kept in the kitchen for cooking purposes, and given the very small amount of unauthorized beverages in that case and this one, mitigation is appropriate. Dep't. of Business and Prof. Reg., Div. of Alcoholic Bev. and Tobacco v. Polpo Mario, Inc., et al., DOAH Case No. 99-3065 (R.O. 12/30/99, F.O. 2/15/2000).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division of Alcoholic Beverages and Tobacco enter a final order determining that Respondent has violated Sections 562.01 and 562.02, Florida Statutes (2008), as charged in the Administrative Action, and imposing an administrative fine in the amount of \$500 and an excise tax of \$7.67.

DONE AND ENTERED this 19th day of March, 2009, in
Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of March, 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.