

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 09-2164
)
T AND G OF ORLANDO, INC., d/b/a)
STAR FOOD MART,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on June 29, 2009, in Perry, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael B. Golen, Esquire
Department Business and Professional
Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399

For Respondent: Harunur Rashid Meah, pro se
T & G of Orlando, Inc., d/b/a
Star Food Mart
139 La Cour Lane
Perry, Florida 32348

STATEMENT OF THE ISSUES

Whether Respondent violated Sections 562.11(1)(a), and 561.29(1)(a) (sale of an alcoholic beverage to an underage person) and/or 561.29(1)(a) and 561.17(3) (failure to notify Petitioner licensing agency of the transfer of ten percent or more of any financial interest, change of executive officers or directors or a divestiture or resignation of such interest or position), Florida Statutes, as charged in the Administrative Complaint dated May 4, 2008, and if so, what discipline should be imposed.

PRELIMINARY STATEMENT

Petitioner charged Respondent in an Administrative Complaint as set out supra, and Respondent timely requested a disputed-fact hearing. The cause was referred to the Division of Administrative Hearings (DOAH) on or about April 23, 2009.

DOAH's file reflects all pleadings, notices, and orders intervening before the final hearing.

At the commencement of the disputed-fact hearing, Petitioner stipulated that the corporate licensee's principal, who was appearing on his own behalf and on behalf of the corporation, is Harunur Rashid Meah a/k/a Rashid Meah. Mr. Harunur Rashid Meah was permitted to act as Qualified Representative for Respondent corporation.

Also, the parties stipulated to the use of Respondent's brother, Mohammed Meah, as interpreter, for English to Bangla and Bangla to English.^{1/} Pursuant to Section 90.606, Florida Statutes, the undersigned made appropriate inquiry of Mr. Mohammed Meah and received his answers under oath. Mr. Mohammed Meah was then accepted and sworn-in as interpreter.

Petitioner presented the oral testimony of Robert L. Lastinger, Frank Anzalone, and M.C.,^{2/} and had nine exhibits admitted in evidence. Respondent Meah testified on his own behalf and presented the oral testimony of Stephanie Wood. He had one exhibit (R-1A/R-1B), a cash register tab, described as a "receipt" in the record, admitted in evidence.^{3/}

A Transcript was filed on July 16, 2009.

Only Petitioner filed a Proposed Recommended Order on July 23, 2009. That proposal has been considered in preparation of this Recommended Order. All reference to Florida Statutes are to the 2007 codification in effect at the time of the conduct, unless otherwise indicated.

FINDINGS OF FACT

1. At all times material, Respondent was licensed under the Florida Beverage Law, by Petitioner Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco.

2. Respondent is subject to Petitioner's regulatory jurisdiction, having been issued License Number 72-00497, Series 2-APS, to sell beer and wine in sealed containers for consumption off of the licensed premises only.

3. There is no evidence that Respondent business had ever been previously cited for violation of its license or that Petitioner was investigating the premises on the basis of a complaint or allegation at the time this case arose.

Charging Paragraph One ^{4/}

4. Petitioner's Special Agent and a Lieutenant, who at all times material was working as Petitioner's Special Agent, addressed "a directed enforcement issue," the belief that because energy drinks containing alcohol had newly come on the market, there would be sales of them to underage persons.

5. On April 25, 2008, the agents conducted undercover operations at what their paperwork shows to be a minimum of 13 alcoholic beverage retail stores in Perry, Florida, and one store in Steinhatchee, Florida, between 4:35 p.m. and 8:22 p.m.

6. The agents testified that their operation on that date also involved even more stores in several counties.

7. The agents' paperwork shows they arrived at Respondent's store at 5:11 p.m. on April 25, 2008, and that they followed standard Agency procedures.

8. On April 25, 2008, the Agency employed M.C. as "Investigative Aide AL0015." M.C. had worked for the Agency as an undercover operative for almost five years and previously had worked with the aforementioned two agents. On that date, M.C., a female, was 19 years old.

9. On April 25, 2008, the agents gave M.C. a \$5.00 bill with which to make "the buy." She took no other money into Respondent's store with her.

10. Petitioner's two agents testified that at 5:11 p.m., while sitting in their car parked in front of Respondent's store, they witnessed M.C. purchase a "Sparks" from Respondent Meah. Between them, the officers' testimony included details such as seeing that one other person was in the store when M.C. entered the store; seeing M.C. remove a Sparks can from the cooler; seeing that no conversation took place between M.C. and Respondent Meah; and seeing that no identification was requested by Mr. Meah. M.C. did not relate that anyone else was in the store at the time of her purchase. The agents provided no information as to how they saw so much detail through their car's windshield and the window of the store. Clearly, they could not have heard any conversation at that distance and under those conditions. There also is no evidence of backlighting from inside the store by which the agents could even see Huranur Rashid Meah and M.C. in silhouette so as to observe them talking

or not talking. For these reasons, the only competent evidence of what occurred between M.C. and Mr. Meah is the testimony of M.C. and Mr. Meah.

11. M.C. testified that at approximately 5:12 p.m. on April 25, 2008, M.C. presented a can of "Sparks" alcoholic beverage and a package of Orbits gum to Respondent Meah at the cash register; that he did not require identification/proof of age from her; that he did not ask her how old she was; and that he rang up her purchase, giving her \$1.92 in change, the can of "Sparks," and the gum.

12. Huranur Rashid Meah testified that he sold only one can of Sparks at approximately 5:27 p.m. on April 25, 2008, to his long-time customer, Stephanie Lee Wood, née Johnson.

13. At hearing, Ms. Wood presented herself as an adult, without stating her age for the record. She testified that for a significant period of time, she was in Respondent's store every day about the same time and at that time "mostly" bought a Sparks Malt Beverage from Respondent Meah.

14. Ms. Wood is Caucasian, and M.C. is a light-skinned Negro, but they have very similar builds or silhouettes, and could be mistaken for being of a similar age.

15. Upon observation of M.C. at hearing, the undersigned was unable to discern her age, and without testimony would not have guessed she was merely 21 years old on the date of hearing.

Her photograph in evidence, taken on April 25, 2008, does not look like an under-age person, or even very much as M.C. looked when she testified at age 21.

16. When M.C. returned from Respondent's store to the car containing the two agents on April 25, 2009, the agents verified that she had only \$1.92 on her; that she had with her a can of "Sparks" and a package of Orbits gum; and that \$1.92 was an appropriate remainder for the purchase of a "Sparks" 16 oz. can and a package of Orbits gum, plus tax. Then all three of Petitioner's operatives filled-out their on-scene paperwork.

17. Before leaving the scene on April 25, 2008, the agents issued to Respondent Meah an Arrest/Notice to Appear/Probable Cause Affidavit. Respondent Meah signed on the bottom of this item, acknowledging receipt thereof.

18. After repeating similar procedures multiple times throughout the remainder of the evening, Petitioner's agents checked the can of "Sparks" they had bagged at the scene into their headquarters' secure evidence lock-up, and prepared additional paperwork at headquarters.

19. Sparks Malt Beverage apparently contains seven percent alcohol. From differences in the paperwork filled out at the scene, the paperwork from the evidence lock-up, and the oral testimony at hearing, one could guess that the 16-oz. can allegedly purchased by the underage operative from Respondent

Meah contained "Sparks Plus Lemonade," "Sparks Malt Beverage," or "Sparks" as an energy drink.

20. Ultimately, the State Attorney for Taylor County, in and for the Third Judicial Circuit, issued a "nolle prosequi," for the associated criminal case, brought against Respondent Meah,^{5/} and destroyed the "Sparks" can involved. No physical evidence of the can allegedly purchased by M.C. was available to be admitted in evidence during this administrative case's disputed-fact hearing.

21. Respondent Meah submitted in evidence an automatically printed cash register tape from his store's single cash register. He claimed this item showed the transaction he had with Ms. Wood on April 25, 2008.

22. The register tape shows that only one sale for the combined amount of \$1.69 (the cost of a can of Sparks Malt Beverage), and for \$1.19, (the cost of a package of Orbits gum), was rung up together on that date. It further shows that after tax, \$1.92 was given in change to the customer. Respondent's cash register tape also shows a sales time of 5:27 p.m. on April 25, 2008. This is the only similar transaction on that date on the whole cash register receipt. Several other transactions on the tape show beer sales at \$1.69 each, but no other transactions match the exact amount(s) testified-to by Meah, Wood, and Petitioner's three operatives.

23. Based on the evidence as a whole, there is no persuasive reason to rely on the time posted on this cash register receipt as being reliable; but likewise, there is no clear evidence that the time on the receipt is not reliable. The receipt could be read to show Sparks and Orbits were sold to M.C. or that Ms. Wood purchased the Sparks and something else at that time. It could also be interpreted in a variety of other ways, but clearly, it shows only one sale matching all witnesses' testimony occurred on that date.

Charging Paragraph Two

24. On August 8, 2006, Respondent had completed and submitted to Petitioner his application for a beverage license. Section six, on page seven of that application, shows "Abdul Latif Meah" (Respondent Hurunar Rashid Meah's father) as a 50 percent owner of the corporate Respondent (licensed premises), and further shows Respondent "Harunur Rashid Meah" as a 50 percent owner. It also shows the father as corporate president and Respondent Meah as corporate vice-president.

25. At no time has anyone notified Petitioner that any change in the stock or ownership interest in the licensed facilities has taken place, or that the corporate officers have changed.

26. However, as of November 26, 2007, Respondent Harunur Rashid Meah filed with the Secretary of State, Division of

Corporations, papers for "reinstatement" of the Respondent Corporation, and these papers show Harunur Rashid Meah, as the sole owner/president, treasurer/director of Respondent corporation.

27. Respondent Meah's explanation of the foregoing is that: He "missed a payment." He never dissolved the original corporation, but he needed to get the corporation reinstated or reactivated, which he did as of November 26, 2007, listing only himself on the papers required by the Division of Corporations. Respondent Meah also testified that he had signed all the papers for obtaining the alcoholic beverage license from Petitioner without understanding or reading them, and without appreciating the oath thereon that he signed, promising to tell the truth on those papers, and further promising to comply with the Florida Beverage Law. Among other requirements, the Florida Beverage Law requires notice to Petitioner of the transfer of ten percent or more of any financial interest, change of executive officers or directors, or divestiture or resignation of such interest or position. (See Conclusions of Law.)

28. Petitioner Agency asserts that the contradiction between the August 8, 2006, disclosure of interested parties on Section Six of the Beverage Law license application and the interested parties listed on the November 26, 2007, Division of Corporations documents violates Section 561.17(3), Florida

Statutes, because Mr. Meah did not notify the Petitioner Agency as he was required to do, and that the present situation is especially serious because Petitioner had previously warned Respondent of the violation.

29. Special Agent Lastinger's testimony is credible that he discovered the November 26, 2007, incorporation papers when he was preparing to draft the criminal and administrative charges after the April 25, 2008, undercover operation. However, his testimony that finding those papers after April 25, 2008, reminded him that he had warned Respondent Meah two years before April 25, 2008 (that is, sometime between April and December 2006) that Respondent could be prosecuted for ownership problems, is not credible or persuasive testimony, since the change of ownership, if any, can only be traced to November 2007.^{6/}

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57, Florida Statutes (2009).

31. Petitioner has the duty to go forward and the burden of proof by clear and convincing evidence that Respondent violated, per Charging Paragraph One, of the Administrative Action/Complaint, Subsections 561.29(1)(a) and 562.11(1)(a), and

per Charging Paragraph Two, Sections 561.29(1)(a), and 561.17(3), Florida Statutes. See Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pic 'N' Save Central Florida, Inc. v. Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 601 So. 2d 245, 249 (Fla. 1st DCA 1992)

32. Section 561.29(1)(a), provides, in pertinent part:

561.29 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 or the rules of evidence.

Charging Paragraph One

33. Section 562.11(1) (a) Florida Statutes, provides, in pertinent part, that:

1. 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.

34. It is the responsibility of the licensee or his agents to determine the age of all patrons prior to selling alcoholic beverages to them. When engaging in such transactions, the licensee or his agents must exercise a reasonable standard of diligence to ensure that alcoholic beverages are not sold to minors. Lash, Inc. v. Department of Business and Professional Regulation, 411 So. 2d 276 (Fla. 3rd DCA 1982).

35. Herein, we do not even have to reach the issue of whether or not Respondent should have "carded" or inquired for the operative's age or was entitled to "merely eyeball" for an age of majority, because there is, at most, an equipoise of evidence that an illegal sale was/was not made to the Agency's underage operative. The undersigned is not persuaded that on April 25, 2008, Respondent made a sale of an alcoholic beverage to an underage operative, let alone that it was made "negligently, without care to diligently attempt to prevent such

sales." See Lash, Inc. v. Department of Business and Professional Regulation, supra.; Trader Jon, Inc. v. State Beverage Department, 119 So. 2d 735, (Fla. 1st DCA 1960). The "sale to an underage person" charge is not supported by clear and convincing evidence.

36. Petitioner's prayer for an administrative fine of \$1,000.00, and a seven-day suspension of Respondent's license on this basis is in line with the penalty guidelines set out in Florida Administrative Code Rule 61A-2.022(1), but may not be granted because the facts alleged in Charging Paragraph One have not been clearly and convincingly proven.

Charging Paragraph Two

37. Section 561.17, Florida Statutes, provides, in pertinent part:

(1) Any person before engaging in the business of manufacturing, bottling, distribution, selling, or in any way dealing in alcoholic beverages, shall file, with the district licensing personnel of the district of the division in which the place of business for which a license is sought is located, a sworn application in duplicate on forms provided to the district licensing personnel by the division. The applicant must be a legal or business entity, person, or persons and must include all persons, officers, shareholders, and directors of such legal or business entity that have a direct or indirect interest in the business seeking to be licensed under this part. However, the applicant does not include any person that derives revenue from the license solely through a contractual relationship

with the licensee, the substance of which contractual relationship is not related to the control of the sale of alcoholic beverages. Prior to any application being approved, the division may require the applicant to file a set of fingerprints on regular United States Department of Justice forms for herself or himself and for any person or persons interested directly or indirectly with the applicant in the business for which the license is being sought, when so required by the division. If the applicant or any person who is interested with the applicant either directly or indirectly in the business or who has a security interest in the license being sought or has a right to a percentage payment from the proceeds of the business, either by lease or otherwise, is not qualified, the application shall be denied by the division. However, any company regularly traded on a national securities exchange and not over the counter; any insurer, as defined in the Florida Insurance Code; or any bank or savings and loan association chartered by this state, another state, or the United States which has an interest, directly or indirectly, in an alcoholic beverage license shall not be required to obtain division approval of its officers, directors, or stockholders or any change of such positions or interests. A shopping center with five or more stores, one or more of which has an alcoholic beverage license and is required under a lease common to all shopping center tenants to pay no more than 10 percent of the gross proceeds of the business holding the licensee to the shopping center, shall not be considered as having an interest, directly or indirectly, in the license.

* * *

(3) A transfer of 10 percent of any financial interest, a change of executive officers or directors, or a divestiture or

resignation of such interest or position, in a business holding a vendor's license permitting the sale of any alcoholic beverages regardless of alcoholic content shall be contingent upon the express approval by the division of the persons holding or acquiring such interest or position except for persons exempted in subsection (1).

38. The facts alleged in Charging Paragraph Two, have been proven clearly and convincingly. Respondent was clearly negligent, and did not exercise a reasonable standard of diligence in keeping his records with Petitioner Agency current or in notifying Petitioner of changes in ownership or a change of officers or directors, as the law requires him to do.

39. Moreover, there is clear and convincing evidence that Harunar Rashid Meah signed his license application papers under oath without reading them, and that he thereby promised certain things were true without fully understanding what he was signing.

40. Based on Respondent Meah's testimony herein, it is impossible to know with any accuracy who had an ownership interest as of the beverage license application date or who currently has an ownership interest in the licensed facility. All that was shown herein is that the 2006 license application may have been inaccurate to start with and that the original application's disclosure of ownership interests and corporate

officers is not supported by the 2007, corporation documents currently on file with the Secretary of State.

41. The current corporate documents filed with the Secretary of State show Harunur Rashid Meah as the owner of 100 percent of the licensed premises, and since he was previously approved by Petitioner as 50 percent owner, it is unlikely he could now be disapproved. However, Respondent needs to make full and accurate disclosure to Petitioner both of ownership interests and of the identity of corporate officers.

42. Under such circumstances, the penalty proposed by the Agency and the guideline provided in the rule for a \$500.00 fine for a first offense, hardly seems sufficient. However, unlike rules of other agencies, Petitioner's Rule does not identify any aggravating or mitigating considerations which may be taken into account in assessing a penalty. Although the fine may not be increased above \$500.00, the Agency should take steps to get full disclosure of corporate involvement in this license.

RECOMMENDATION

Upon 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 that (1) Dismisses Charging Paragraph One, sale of alcoholic beverage to an underage person; (2) Finds Respondent

guilty of Charging Paragraph Two, failure to notify Petitioner of the transfer of ten percent or more of any financial interest, or change of executive officers or directors, and fines him \$500.00, therefor; and (3) Requires Respondent to notify Petitioner of the current ownership interests and names of executive officers within 30 days of the final order.

DONE AND ENTERED this 14th day of September, 2009, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 2009.

ENDNOTES

- 1/ Bangla is the official language of Bangladesh.
- 2/ M.C. was 21 years of age at the time of hearing, and her name and particulars appear of record in the Transcript. However, the undersigned has elected to substitute her initials in this Recommended Order because she was a minor on the date of the alleged incident and because she may pursue a career in law enforcement.
- 3/ See TR 124-125.

4/ Most Administrative Complaints use "Counts." The one herein only numbers paragraphs.

5/ The reason given on the nolle prosquii document was:
"Because of the expense involved in acquiring a Bengali [sic] interpreter."

6/ In making this finding, it is possible that Special Agent Lastinger meant that he had warned Respondent in 2006, concerning having let Respondent's corporate registration with the Secretary of State lapse, but there is a lack of clear evidence on this matter and there is testimony that the November 2007, corporation exhibit may not even be a complete file from the Secretary of State, Division of Corporations.

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.