STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 10-9216
NATIONAL DELI CORP, d/b/a EPICURE GOURMET MARKET AND CAFE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on April 27, 2011, and June 1, 2011, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Thomas J. Morton, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399-2202

For Respondent: Louis J. Terminello, Esquire
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2700 Southwest 37th Avenue
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STATEMENT OF THE ISSUE

Whether "[o]n or about January 16, 2009, Respondent [the holder of an SR license] failed to maintain a restaurant . . . contrary to and in violation of [s]ection 561.20(2), Florida Statutes (1953), within [s]ection 561.20(5), Florida Statutes (2008), within [s]ection 561.29(1)(a), Florida Statutes (2008),"[2] as alleged in the Fourth Amended Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This case involves disputed allegations made in the Fourth Amended Administrative Complaint (Complaint) filed by Petitioner against Respondent on December 21, 2010, the body of which reads as follows:

> 1. Petitioner is the state agency charged with licensing, regulating, and enforcing the Florida alcoholic beverage and tobacco statutes pursuant to Sections 559.061, 561.07, 561.15, 561.19, 561.29, 561.501, 210.15, 210.16, 210.45, 210.50, 560.003, and 569.006, Florida Statutes.
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> 2. Respondent is, and has been at all times material hereto, the holder of alcoholic beverage license number 23-02630, Series 4COP/SR.
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> 3. Respondent's last known mailing address is National Deli Corporation d/b/a Epicure Gourmet Market & Café, 12711 Ventura Blvd, Suite 400, Studio City, California 91604.
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> 4. The location of the licensed premises is 17190 Collins Avenue, Sunny Isles Beach, Florida 33160.

> 5. On or about January 16, 2009, Respondent failed to maintain a restaurant, this act being contrary to and in violation of Section 561.20(2), Florida Statutes (1953), within Section 561.20(5), Florida Statutes (2008), within Section 561.29(1)(a), Florida Statutes (2008).
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> 6. Based on the foregoing, Respondent has violated Section 561.29(1)(a), Florida Statutes, by failing to maintain a restaurant as required by Section 561.20(2), Florida Statutes (1953), within Section 561.20(5), Florida Statutes (2008).
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> WHEREFORE, Petitioner respectfully requests entry of an Order imposing one or more of the following penalties against Respondent's license: revocation, suspension, imposition of an administrative fine, annulment of the license, reimbursement of investigative costs, imposition of late penalties, any combination thereof, or any other relief that is deemed appropriate.

Respondent disputes the core allegation made in the Complaint that, "[o]n or about January 16, 2009, [it] failed to maintain a restaurant."

As noted above, the final hearing in the instant case was held on April 27, 2011, and June 1, 2011. Ten witnesses testified at the hearing: Richard Akin, Special Agent Bradley Frank, Elena Forbes, James West, Jason Starkman, Michael Tarkoff, Maria Laverde, Monica Anderson, Captain Carmen Puentes-Croye, and Special Agent Thomas Williams. In addition to the testimony of these ten witnesses, the following exhibits were offered and received into evidence at hearing: Petitioner's

Exhibits 2 through 4, 6, 8 through 10, 12, 13, and 19, and Respondent's Exhibits 1 through 19.

At the conclusion of the hearing on June 1, 2011, the undersigned announced on the record that the parties would have 45 days from the date of the filing with DOAH of the transcript of the June 1, 2011, hearing session to file their proposed recommended orders. (The Transcript of the April 27, 2011, session (consisting of two volumes) had been filed on May 31, 2011.)

The Transcript of the June 1, 2011, hearing session (consisting of two volumes) was filed with DOAH on June 29, 2011.

During a telephone conference call held on July 13, 2011, the parties jointly requested that the proposed recommended order filing deadline be extended to September 14, 2011, to give them additional time to explore the possibility of a post-hearing settlement. The request was granted by Order issued that same day. By Order issued September 8, 2011, the undersigned, at the request of Respondent, further extended the proposed recommended order filing deadline, this time to September 26, 2011.

Respondent and Petitioner timely filed their Proposed Recommended Orders on September 26, 2011.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been at all material times, the holder of alcoholic beverage license number 23-02630, Series 4COP/SR (Subject License), which is a "Special Restaurant" or "SR" license issued by Petitioner.

2. The location of the licensed premises is 17190 Collins Avenue, Sunny Isles Beach, Florida, where Respondent operates Epicure Gourmet Market and Café (Epicure) in a structure having 34,000 square feet of interior space, 10,000 to 12,000 square feet of which is open to the consuming public.

3. The Rascal House, an eating establishment specializing in comfort food, formerly occupied this location.

4. The Rascal House opened in 1954 and was operated under the Subject License from December 30 of that year until March 30, 2008, when it was shuttered.

5. For the final twelve years of its existence, the Rascal House was owned and operated by Jerry's Famous Deli, Inc., Respondent's parent corporation.

6. Respondent acquired the Rascal House property and the Subject License from Jerry's Famous Deli in 2008. After spending $7.5 million on renovations to the property,[3] Respondent reopened the venue as Epicure on October 7, 2008, and has done

business under that name at the former Rascal House location since.

7. Petitioner approved the transfer of the Subject License to Respondent on October 27, 2008, following an inspection of the premises of Epicure by one of Petitioner's Special Agents, Bradley Frank, who found that all statutory requirements for "SR" licensure were met.

8. In the summer of 2008, prior to the opening of Epicure, Respondent, through its Chief Financial Officer, Christina Sperling, submitted a Request for Initial Inspection and Food Permit Application with the Florida Department of Agriculture and Consumer Services, Division of Food Safety (DACS), in which it described Epicure as a "[f]ood market with indoor/outdoor seating area; but not a service restaurant." At the time of the filing of the Food Permit Application, Respondent had no intention of using waiters or waitresses to serve Epicure's patrons, although it did intend for these patrons to be able to purchase food and beverage items for consumption on the premises. Before Epicure opened, Respondent was granted a DACS Annual Food Permit, "Supermarket"-type, for the establishment, a permit it continues to hold today.

9. On February 11, 2009, and again on July 28, 2009, Respondent applied to the Department of Business and Professional Regulation, Division of Hotels and Restaurants

(H&R) for a "public food service establishment"[4] license for Epicure. Both applications were denied by H&R because Epicure was licensed (properly so, in the opinion of H&R) by DACS.

10. The DACS permit is not the only license Respondent has for Epicure. It also has a retail license, a food market license, and a restaurant-outside dining license, all issued by the City of Sunny Isles Beach. Respondent has held these City of Sunny Isles Beach-issued licenses since 2008.

11. On January 16, 2009, the date of the violation alleged in the Fourth Amended Administrative Complaint, Epicure had the necessary equipment and supplies (including those in its 4,000 to 5,000 square foot kitchen where food was prepared) to provide, and it did provide, patrons full course meals (including ready to eat appetizer items, ready to eat salad items, ready to eat entree items, ready to eat vegetable items, ready to eat dessert items, ready to eat fruit items, hot and cold beverages (non-alcoholic and alcoholic), and bread) for on-premises consumption at indoor and outdoor tables[5] (Eating Tables) having a total seating capacity in excess of 200 and occupying more than 4,000 square feet of space.[6] There were no waiters or waitresses, at that time, to take orders from, and to serve food and beverages to, patrons sitting at the Eating Tables.[7] The patrons themselves brought to their Eating Tables the food and beverages they consumed there--food and beverages

they obtained from manned counters (in the hot food, raw meat/fresh seafood,[8] deli, bakery, and bar areas); from the fresh produce area; and from the cases, shelves, and tables where packaged food and drink items were displayed for sale. Epicure employees were stationed in the areas where the Eating Tables were located to assist patrons who wanted tableware, a glass of ice water, a packaged item (such as soup) to be opened or warmed, or their table to be cleaned.

12. Not all of the items sold at Epicure on January 16, 2009, were consumed on the premises. True to its name, Epicure had not only a bona fide "café" operation, it also operated as a "market" where patrons shopped for "gourmet" food and other items for off-premises consumption and use. Among the food and beverage items for sale were raw meat and fresh seafood; dairy products; ready to eat deli meats and cheeses, including those packaged by the manufacturer; packaged grains; packaged stocks, including vegetable, beef, seafood, and chicken stock; condiments, including jams, jellies, and caviar; sauces; spices; eggs; chips, popcorn, and nuts; packaged crackers and cookies; ingredients (other than meat and seafood) for salads, dips, and dressings; cooked and other prepared foods ready to eat; baked bread and other bakery items; candy; fruit and other fresh produce; bottles of wine, liquor, and beer, as well as non-alcoholic beverages, including water; and packaged tea. Among

the non-food items for sale were flowers; glassware; candles; napkins, paper and plastic plates and cups, and eating and serving utensils; paper towels; toilet paper; toilet bowel cleaner; wine and liquor opening devices and equipment; publications relating to alcoholic beverage products; cookbooks; and personal care and over-the-counter health care items. Shopping carts were available for patrons to use in the establishment to transport items selected for purchase. These items were paid for at the same cash registers (at the front of the establishment) where food and beverages consumed on the premises were paid for.

13. There was considerable overlap between Epicure's "café" and "market" operations in terms of space used and items sold.

14. Both the "café" and the "market" were fundamental and substantial components of Epicure's business, and they worked together synergistically.

15. The record evidence does not clearly and convincingly reveal that Epicure's "café" operation was merely incidental or subordinate to its "market" operation, or that its "café" was in any way operated as a subterfuge.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to chapter 120, Florida Statutes.

17. Florida's Beverage Law is contained in chapters 561, 562, 563, 564, 565, 567, and 568, Florida Statutes. § 561.01(6).

18. Petitioner is statutorily charged with the responsibility of administering and enforcing the Beverage Law. § 561.02.

19. The Beverage Law includes provisions empowering Petitioner to issue "quota" licenses and various types of "special" licenses to vendors selling alcoholic beverages at retail in this state. §§ 561.14(3) and 565.02(1).

20. "Quota" licenses, as their name suggests, are limited in number. The number of "quota" licenses available in each county is based upon that county's population. § 561.20(1).

21. "Special" licenses, on the other hand, are not subject to any quota or numerical limitation. § 561.20(2)(a).

22. Among the "special" licenses the Beverage Law authorizes Petitioner to issue are "special" restaurant licenses, as provided for in section 561.20(2)(a)4., which currently provides as follows:

> No such limitation of the number of licenses as herein provided shall henceforth prohibit the issuance of a special license to:
>
> Any restaurant having 2,500 square feet of service area and equipped to serve[9] 150 persons full course meals at tables at one time, and deriving at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages; however, no restaurant granted a special license on or after January 1, 1958, pursuant to general or special law shall operate as a package store, nor shall intoxicating beverages be sold under such license after the hours of serving food have elapsed.

Florida Administrative Code 61A-1.006(2) provides that, as used in section 561.20(2)(a)4.:

> [T]he term 'restaurant' shall include all interior rooms or areas which are directly connected by interior openings or doorways from the place where food is delivered, stored, prepared, served, or sold. It shall not include common areas used by patrons to enter buildings or malls with more than two places of business,[10] or hotels, motels, motor courts, and condominium accommodations which are licensed as a vendor. Common areas shall not be considered rooms or areas of the licensed place of business if they are not leased to any tenant occupying the building and are not used as part of any occupant's business.

23. "It has always been the legislative intent that a special restaurant license under [s]ection 561.20(2) was available only when there was a bona fide substantial restaurant operation primarily engaged in the service of [not alcoholic beverages, but rather] food and nonalcoholic beverages. [In

other words,] [i]t was never to be a subterfuge for the operation of a bar or cocktail lounge with only incidental sales of food." Dep't of Bus. Reg., Div. of Beverage v. Huddle, Inc., 342 So. 2d 140, 142 (Fla. 1st DCA 1977).

24. There are two types of "special" restaurant licenses authorizing the retail sale of alcoholic beverages by restaurants: SRX licenses and SR licenses. SRX licenses are "special" restaurant licenses that were originally issued in or after 1958. See Fla. Admin. Code R. 61A-3.0141(1)("The suffix 'SRX' shall be made a part of the license numbers of all such [special restaurant] licenses issued after January 1, 1958."). SR licenses are "special" restaurant licenses that were originally issued prior to 1958.

25. The license at issue in the instant case is an SR license held by Respondent. It was originally issued (to someone other than Respondent) in 1954.

26. SR licenses (such as Respondent's) are not governed by the current version of section 561.20(2), given subsection (5) of the statute, which provides as follows:

> Provisions of subsections (2) and (4) as amended by chapter 57-773, Laws of Florida, shall take effect January 1, 1958, and shall apply only to those places of business licensed to operate after January 1, 1958, and shall in no manner repeal or nullify any license issued under provisions of law which are now operating or will operate prior to the effective date January 1, 1958; and all

> such places of business shall be exempt from the provisions of this law so long as they are in continuous operation.

Both parties are in agreement that the version of section 561.20(2) applicable to the instant case is the pre-1958 version of the statute which was amended by chapter 57-773, Laws of Florida, and read, in pertinent part, as follows:

> No such limitation of the number of licenses as herein provided shall be applicable . . . to any restaurant containing all necessary equipment and supplies for, and serving full course meals regularly and having accommodations for service of two hundred or more patrons at tables and occupying more than four thousand square feet of space; provided however, that any licenses heretofore or hereafter issued to any such . . . restaurants under the provisions of any law shall not be moved to a new location, such licenses being valid only on the premises of such . . . restaurant, and provided further, that licenses issued to . . . restaurants under the general law and held by such . . . restaurants on May 24, 1947, shall be counted in the quota limitations contained in subsection (1) herein.

To have been licensed as a "special" restaurant under this version of the statute, an establishment must have been: (1) a "restaurant" of "any" type (2) "containing all necessary equipment and supplies for, and serving full course meals regularly and having accommodations for service of two hundred or more patrons at tables" and (3) "occupying more than four thousand square feet of space." There was no requirement that

the establishment derive any specific minimum percentage of its gross revenue from the sale of food and nonalcoholic beverages.

27. As the holder of an SR license, Respondent is limited in what it can sell on the licensed premises by section 565.045(2)(a), which provides (as it did on January 16, 2009) as follows:

> There shall not be sold at such places of business anything other than the beverages permitted, home bar and party supplies and equipment (including but not limited to glassware and party-type foods), cigarettes, and what is customarily sold in a restaurant.[11]

28. Petitioner has adopted rules--Florida Administrative Code Rules 61A-1.006(1), 61A-3.054, and 61A-3.055 (all of which were in effect on January 16, 2009)--interpreting this statutory language.

29. Florida Administrative Code Rule 61A-1.006(1) provides as follows:

> As used in Section 565.045, Florida Statutes, the term "place of business" shall include all interior rooms, or areas which are directly connected by interior openings or doorways from the space where alcoholic beverages are sold, delivered, consumed, or stored. It shall not include common areas used by patrons to enter buildings or malls with more than two places of business. Common areas shall not be considered rooms or areas of the licensed place of business if they are not leased to any tenant occupying the building and are not used as part of any occupant's business.

30. Florida Administrative Code Rule 61A-3.054 provides, in pertinent part, as follows:

> (1) Party-type supplies shall only include the following:
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> (a) All dairy products;
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> (b) Ready to eat deli meats and cheeses, including those packaged by a manufacturer;
>
> (c) Condiments;
>
> (d) Sauces;
>
> (e) Spices;
>
> (f) Eggs;
>
> (g) Chips, popcorn, and nuts;
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> (h) Crackers;
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> (i) Ingredients for salads, dips, and dressings;
>
> (j) Cooked foods ready to eat;
>
> (k) Bread;
>
> (l) Candy; and
>
> (m) Fruit;
>
> (n) Napkins, paper and plastic plates and cups, and eating and serving utensils;
>
> (o) Wine and liquor opening, storage, and serving utensils and equipment;
>
> (p) Publications relating to alcoholic beverage products and recipes;
>
> (q) Items containing the logo, trade name, or trademark relating to alcoholic beverages;

(r) Gift wrapping accessories and greeting cards; and

(s) Ice.

(2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can clearly show the item is to be used as a party-type supply. This petition shall be submitted to the director of the division at Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399-1020, and must be approved prior to selling or offering the item for sale.

31. Florida Administrative Code Rule 61A-3.055 provides as follows:

(1) As used in Section 565.045, Florida Statutes, items customarily sold in a restaurant shall only include the following:

(a) Ready to eat appetizer items; or

(b) Ready to eat salad items; or

(c) Ready to eat entree items; or

(d) Ready to eat vegetable items; or

(e) Ready to eat dessert items; or

(f) Ready to eat fruit items; or

(g) Hot or cold beverages.

(2) A licensee may petition the division for permission to sell products other than those listed, provided the licensee can show the item is customarily sold in a restaurant. This petition shall be submitted to the director of the division at Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399-1020, and must be

> approved prior to selling or offering the item for sale.
>
> (3) For the purpose of consumption on premises regulations set forth in Section 565.045, Florida Statutes, items customarily sold in a restaurant shall include services or sales authorized in the "Florida Public Lottery Act," Section 24.122(4), Florida Statutes.

32. It is abundantly clear from a reading of section 565.045, together with rules 61A-3.054 and 61A-3.055 in their entirety, that the items listed in rule 61A-3.055(1)(a)-(g) are not the only items that an SR license holder may sell on the licensed premises. Other items, including those described in rule 61A-3.054(1)(a)-(s), may be sold on the premises without the licensee running afoul of the law and exposing its license to disciplinary action.

33. Section 561.29(1)(a) authorizes Petitioner to suspend or revoke a "quota" or "special" license, and to also impose a civil penalty not to exceed $1,000.00 per single transaction against the licensee, for a "[v]iolation by the licensee . . . of any of the laws of this state . . . or license requirements of special licenses issued under s. 561.20 . . . ."

34. Petitioner may take such action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to sections 120.569 and 120.57. See § 120.60(5).

35. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. See Hollis v. Dep't of Bus. & Prof'l Reg., 982 So. 2d 1237, 1239 (Fla. 5th DCA 2008); and §§ 120.569(1) and 120.57(1).

36. At the hearing, Petitioner bears the burden of proving that the licensee committed the violation(s) alleged in the charging instrument. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence is required. See Dep't of Banking & Fin,, Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Pic N' Save, Inc. v. Dep't of Bus. Reg., 601 So. 2d 245, 249 (Fla. 1st DCA 1992)("It is now settled in Florida that a business license, whether held by an individual or a corporate entity, is subject to suspension or revocation only upon proof by clear and convincing evidence of the alleged violations."); and § 120.57(1)(j) ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

37. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . .

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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

38. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations made in the charging instrument. Due process prohibits Petitioner from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Dep't of

Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000)("Marcelin first contends that the administrative law judge found that he had committed three violations which were not alleged in the administrative complaint. This point is well taken. . . . We strike these violations because they are outside the administrative complaint."); Dep't of Rev. v. Vanjaria Enters., 675 So. 2d 252, 254 (Fla. 5th DCA 1996)("[T]the issue must be treated as though it had been raised in the pleadings because the parties tried the issue by consent."); and Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed to have been violated.").

39. If there is any reasonable doubt concerning the proper interpretation of the statute or rule alleged in the charging instrument to have been violated, that doubt must be resolved in favor of the licensee. See Djokic v. Dep't of Bus. & Prof'l Reg., Div. of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); Elmariah v. Dep't of Prof'l Reg., Bd. of Med., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Dep't of Prof'l & Occupational Regs., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

40. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult Petitioner's "penalty guidelines," which impose restrictions and limitations on the exercise of Petitioner's disciplinary authority. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); see also State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); and Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules.").

41. Petitioner's "penalty guidelines" are found in Florida Administrative Code Rule 61A-2.022, which has at all times material to the instant case provided, in pertinent part, as follows:

> (1) This rule sets forth the penalty guidelines which shall be imposed upon alcoholic beverage licensees . . . who are supervised by the division. . . . The penalties provided below are based upon a single violation which the licensee committed or knew about; . . . .

> (2) Businesses . . . issued alcoholic beverage licenses . . . by the division are subject to discipline (warnings, corrective action, civil penalties, suspensions, revocations, reimbursement of cost, and forfeiture). . . .
>
> (9) No . . . order may exceed $1,000 for violations arising out of a single transaction.
>
> * * *
>
> (11) The penalty guidelines set forth in the table that follows are intended to provide field offices and licensees . . . with penalties that will be routinely imposed by the division for violations. The description of the violation in the table is intended to provide a brief description and not a complete statement of the statute. . . .
>
> STATUTE: 561.20
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> VIOLATION: Failure to meet minimum qualifications of special license
>
> FIRST OCCURRENCE: $1000 and revocation without prejudice to obtain any other type of license, but with prejudice to obtain the same type of special license for 5 years . . . .

42. The charging instrument in the instant case (to wit: the Fourth Amended Administrative Complaint) simply alleges that, "[o]n or about January 16, 2009, Respondent failed to maintain a restaurant, . . . in violation of [s]ection 561.20(2), Florida Statutes (1953), within [s]ection 561.20(5), Florida Statutes (2008), within [s]ection 561.29(1)(a), Florida

Statutes (2008)." "[M]aintain[ing] a restaurant," as that term ("restaurant") is used in the pre-1958 version of section 561.20(2), is one of the requirements of an SR license.[12] Accordingly, if Respondent "failed to maintain a restaurant" on January 16, 2009, as Petitioner has alleged, Respondent's SR license is subject to disciplinary action pursuant section 561.29(1)(a) (which disciplinary action must be in accordance with the "penalty guidelines" set forth in rule 61A-2.022).

43. To determine whether Petitioner met its burden of proving this allegation by clear and convincing evidence, it is necessary, as a threshold matter, to ascertain what constitutes a "restaurant," within the meaning of section 561.20(2), Florida Statutes (1953).

44. There is no statutory or rule provision defining the term "restaurant," as used in section 561.20(2), Florida Statutes (1953).[13] "Where [as here] a statute does not specifically define [a] word[] of common usage, such word[] must be given [its] plain and ordinary meaning." Se. Fisheries Ass'n v. Dep't of Nat. Res., 453 So. 2d 1351, 1353 (Fla. 1984); see also Greenfield v. Daniels, 51 So. 3d 421, 426 (Fla. 2010)("It is 'appropriate to refer to dictionary definitions when construing statutes' in order to ascertain the plain and ordinary meaning of the words used [but not defined] there."); and Salvation, Ltd., 452 So. 2d at 67 ("The above statute does

not define the term[] 'restaurant' . . . . [It] should, therefore, be given [its] plain and ordinary meaning."). A "restaurant" is commonly understood to be a "public eating place"; "[a]n establishment where refreshments or meals may be procured by the public . . . to be eaten on the premises." Shell Harbor Grp., Inc. v. Dep't of Bus. Reg., Div. of Alcoholic Beverages and Tobacco, 487 So. 2d 1141, 1142 (Fla. 1st DCA 1986); Salvation, Ltd., 452 So. 2d at 67; and Miami Beach v. Royal Castle Sys., Inc., 126 So. 2d 595, 597 (Fla. 3d DCA 1961); see also Colony Nat'l Ins. Co. v. Hing Wah Chinese Rest., 546 F. Supp. 2d 202, 208-209 (E.D. Pa. 2008)("In the absence of a clear definition rooted in law, '[w]ords of common usage in an insurance policy are construed according to their natural, plain, and ordinary sense,' for which the court may consult the dictionary definition of a word. Webster's New Collegiate Dictionary (1988) defines 'restaurant' as 'a public eating place.' Similarly, current online dictionaries typically define the term as '[a] place where meals are served to the public,' or 'a business establishment where meals or refreshments may be purchased.' Again, these definitions imply that the food is provided on the premises . . . .")(citations omitted).

45. Without question, Epicure met this definition on January 16, 2009. The record evidence overwhelmingly establishes that, on that date, Epicure was a bona fide eating

establishment where the public could, and did, purchase food and refreshments for on-premises consumption, including each and every item listed in rule 61A-3.055(1) as being "customarily sold in a restaurant," thus making Epicure a "restaurant," within the meaning of section 561.20(2), Florida Statutes (1953).

46. It is true that there was other commercial activity, aside from the sale of food and refreshments for on-premises consumption, taking place at Epicure on January 16, 2009, but that other activity (involving the sale of food and non-food items for off-premises consumption) did not destroy Epicure's status as a "restaurant." A bona fide "public eating place," as was Epicure on January 16, 2009, does not cease to be a "restaurant" simply because it also sells items not intended for on-premises consumption. Depending on what it sells, it may be in violation of the Beverage Law, specifically section 545.045(2)(a)[14] (a statutory provision Respondent is not currently charged with and therefore cannot (at least in this proceeding) be found guilty of violating), but it still retains its essential character as a "restaurant."

47. Because Petitioner did not prove by clear and convincing evidence that, "[o]n or about January 16, 2009, Respondent failed to maintain a restaurant, . . . in violation of [s]ection 561.20(2), Florida Statutes (1953), within

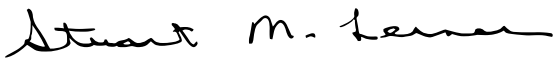
[s]ection 561.20(5), Florida Statutes (2008), within [s]ection 561.29(1)(a), Florida Statutes (2008)," as alleged in the Fourth Amended Administrative Complaint, the Fourth Administrative Complaint must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, issue a final order dismissing the Fourth Amended Administrative Complaint in its entirety.

DONE AND ENTERED this 24th day of October, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2011.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2011).

[2] The 2008 versions of sections 561.20(5) and 561.29(1)(a) are identical to the current versions of these statutory provisions.

[3] Respondent did not incur any of these renovation costs in reliance on any representation made by Petitioner concerning the Subject License.

[4] A "public food service establishment" is defined in section 509.013(5)(a), Florida Statutes, as "any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption." Specifically excluded from this definition, pursuant to subsection (5)(b)5. of the statute, is "[a]ny place of business issued a permit . . . by the Department of Agriculture and Consumer Services under s. 500.12." Since prior to October 7, 2008, Respondent has held such a "permit . . . by the Department of Agriculture and Consumer Services under s. 500.12" for Epicure.

[5] The outdoor tables were under a permanent awning.

[6] Some, but not all, of the many different food items available for on-premises consumption were prepared in Epicure's own kitchen.

[7] Although Epicure did not have waiters and waitresses on January 16, 2009, it now does (and has since February 2011).

[8] Patrons ordering raw meat or seafood at the counter were routinely asked by the server whether or not they wanted their order cooked and prepared.

[9] The term "'[t]o 'serve' means 'to help persons to food.' . . . The serving of food by a restaurant simply does not require that the food be prepared and cooked on the premises. If the legislature had intended to impose such a requirement, it could easily have done so." Dep't of Bus. Reg., Div. of Alcoholic Beverages and Tobacco v. Salvation, Ltd., 452 So. 2d 65, 67 (Fla. 1st DCA 1984).

[10] Unlike a "mall" of the type excluded from the term "restaurant" by Florida Administrative Code 61A-1.006(2), Epicure is a single place of business (albeit one with a "market" operation in addition to a "café" operation).

[11] This limitation on what may be sold on the licensed premises, which applies to not only SR, but also SRX, licenses, serves as a disincentive to licensure. Some establishments qualified to seek, or to maintain, a "special" restaurant license may decline to do so because they want to sell items that are prohibited by section 565.045(2)(a) from being sold on the premises of an SR or SRX licensed restaurant.

[12] No allegation has been made that there was a failure to meet, on January 16, 2009, any other requirement of the statute.

[13] Rule 61A-1.006(2) (which is set forth above) does not contain such a definition. See, e.g., Shephard v. Dep't of Comty. Corr., 646 P.2d 1322, 1325 (Or. 1982)("This borrowed definition is not a definition at all; rather than stating what the term or terms attempted to be defined mean, ORS 95.010 is couched in terms of inclusion, i.e., those things which are included. Nothing tells us that the list is exhaustive.").

[14] Many, but not all, of the items sold at Epicure for off-premises consumption on January 16, 2009, were items excluded by the Legislature from section 545.045(2)(a)'s prohibitory reach. (That the Legislature provided for such an exclusion in section 545.045(2)(a) is irrefutable proof that, in the eyes of the Legislature, a "restaurant" does not lose its status as such, and thereby becomes ineligible for "special" licensure, by selling these items.)

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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.