

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FUBAR,)
)
 Petitioner,)
)
 vs.)
) Case No. 12-3649
 CITY OF GAINESVILLE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on January 28, 2013, via video teleconference with sites in Gainesville and Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary S. Edinger, Esquire
Gary S. Edinger and Associates, P.A.
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For Respondent: Lee C. Libby, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent's issuance of an Underage Prohibition Order is appropriate or should be rescinded.

PRELIMINARY STATEMENT

Pursuant to Section 4-53, Gainesville Code of Ordinances, Respondent, City of Gainesville, issued an Underage Prohibition Order dated October 15, 2012, to Petitioner, Fubar, which was served on October 25, 2012. Petitioner objected to the entry of this Order and requested this administrative proceeding.

By letter dated October 31, 2012, Respondent timely filed a request for hearing. The case was forwarded to the Division of Administrative Hearings on or about November 13, 2012.

Petitioner filed a Motion to Dismiss which was denied. A Notice of Hearing was issued on December 3, 2012, scheduling the hearing for January 28, 2013. The hearing took place as scheduled. At the hearing, Petitioner presented the testimony of Matthew Merdian and Charles Williams. Petitioner's Exhibits numbered 1 and 2 were admitted into evidence. Respondent presented the testimony of Officers Marquitta Brown, Lonnie Scott, Justin Torres, and Jeffrey Guyan of the Gainesville Police Department, and Special Agent Ernest Wilson of the Florida Division of Alcoholic Beverages and Tobacco. Respondent's Exhibits numbered 1 through 31 were admitted into evidence. Official recognition was taken of the Final Declaratory Judgment issued in Grog House, Inc. v. City of Gainesville, Case No. 01-2009-CA-1691 (Fla. 8th Jud. Cir.), and

Grog House, Inc. v. City of Gainesville, 37 So. 3d 969 (Fla. 1st DCA 2010).

A two-volume Transcript was filed on February 13, 2013. Respondent timely filed Proposed Findings of Fact and Petitioner timely filed a Proposed Recommended Order, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, the City of Gainesville (the City), is a municipal corporation organized under the laws of the State of Florida.

2. Petitioner, Fubar, is an alcoholic beverage establishment as defined in section 4-51, Gainesville Code of Ordinances, located in Gainesville. The occupancy load for Fubar is greater than 201 persons.

3. Section 4-51, Gainesville Code of Ordinances (the Ordinance), defines "underage drinking incident" and "underage prohibition order" as follows:

Underage drinking incident means any physical arrest or notice to appear (NTA) issued for possession or consumption of an alcoholic beverage by a person under the age of 21 which results in an adjudication of guilt, finding of guilt with adjudication withheld, waiver of right to contest the violation, plea of no contest including, but not limited to, payment of fine or civil penalty, or entering into an agreement for deferred prosecution.

Underage prohibition order means an order issued by the city manager or designee which prohibits an alcoholic beverage establishment as herein defined, from admitting patrons under the age of 21 into such establishments during specified times.

4. Pursuant to section 4-53 of the Ordinance, an underage prohibition order will be issued to an alcoholic beverage establishment if 10 or more underage drinking incidents occur at that establishment during any quarter when the establishment has an aggregate occupancy load of greater than 201.

5. On October 15, 2012, a Prohibition Order was issued pursuant to the Ordinance and served upon Petitioner on October 25, 2012, based upon 13 underage drinking incidents that occurred in one calendar quarter.

6. Subsequent to the issuance of the Prohibition Order, an additional three underage drinking incidents occurred. The City gave notice to Fubar of these subsequent incidents on January 7, 2012, and they were considered as part of this case.

7. Fubar is located in the "downtown district" of Gainesville, which is a square roughly located between Northwest 3rd Avenue, Southwest 3rd Avenue, Southeast 3rd Street, and Northeast 3rd Street.

8. The duties of the Gainesville Police Department (GPD) officers assigned to patrol this downtown area include going into establishments that sell alcoholic beverages to check for

underage drinking, a common problem in Gainesville, a college town.

9. Four GPD officers who made arrests at Fubar testified at hearing. While on patrol for underage drinking, the officers enter Fubar, and similar establishments in the downtown area, wearing uniforms. Typically, it is the underage offender's actions that alert the officers to a possible incidence of underage drinking. That is, upon seeing a uniformed officer, an underage drinker may attempt to hide an alcoholic drink, quickly put a glass or cup down, quickly drink the contents of a cup and attempt to throw it away, or quickly hand the drink to someone of legal drinking age.

10. The officers have access to law enforcement databases not generally available to the public known as "DAVID" and "FCIC/NCIC," which allow them to obtain photos and other identifying information regarding the suspected underage offenders.

11. All four officers who made arrests at Fubar for underage drinking also made arrests for that offense at similar establishments in downtown Gainesville.

12. Of the 16 total underage drinking incidents which occurred at Fubar during the relevant time period, the evidence at hearing proved that the City made 15 arrests for underage drinking at Fubar and secured 15 deferred prosecutions.

13. The parties stipulated that four of these arrests were of persons who possessed fake or fraudulent identification cards, or identification cards belonging to other persons.^{1/}

14. The remaining arrests made were of underage persons wearing "under-21" wristbands who were found to be in possession of alcohol, and persons who were wearing legal age wristbands, but who were actually underage. However, there is insufficient competent evidence to establish how these individuals obtained the alcoholic beverages or the legal age wristbands.^{2/}

15. On one night, Officer Scott arrested an underage person in Fubar who, upon seeing Officer Scott, placed a drink down on a pool table. Officer Scott observed what appeared to be an off-duty Fubar "bouncer" standing near the underage offender and playing pool. This offender was in possession of someone else's ID showing legal drinking age.

16. At the time of the hearing, there were no administrative actions filed against Fubar's alcoholic beverage license by the Division of Alcoholic Beverages and Tobacco.

17. None of the law enforcement officers testified that they observed underage persons obtaining alcohol from any employee of Fubar.

Efforts of the Petitioner

18. Matthew Merdian is the owner of Fubar. Mr. Merdian has been either a manager or owner of bars for the past 16

years. Mr. Merdian is knowledgeable about the laws regarding underage drinking and of the best practices in the industry regarding this issue.

19. Persons who are under 21 are allowed to enter Fubar and similar establishments in Gainesville. Fubar differentiates between underage and legal age patrons by the use of wristbands which have the Fubar logo on them. The patron presents his or her identification at the front door. The Fubar logo is repeated around the entire band for legal age patrons, but the band designating underage patrons states "under 21" in bold letters and has a small logo. Wristband colors are alternated nightly, therefore colors are not repeated on consecutive nights and the sequence is not repeated the following week. The wristbands are designed to show efforts of tampering in an attempt to prevent underage patrons from obtaining wristbands given to legal age patrons. The only persons who have access to the wristbands are Mr. Merdian and his general manager, Charles Williams.

20. Petitioner actively participates in a responsible hospitality vendor program furnished by Regulatory Compliance Services at a cost of \$1,200 per year. Mr. Merdian, Mr. Williams, and staff attend those training programs.

21. Petitioner has adopted a written manual for door and security personnel that includes several specific directives for

the prevention of underage drinking and the responsibilities of individual employees to further these policies. The manual instructs the following:

- Receive and account for over-21 wristbands
- Every patron is to present a valid ID
- Valid ID is: US driver's license, passport card, military ID, state-issued ID
- IDs may NOT be expired
- UNACCEPTABLE IDs: Birth Certificate, Social Security Card, out of US driver's license, school ID
- IDS are checked with face, height, and weight
- If a person is questionable ask a detail such as "What's your middle name?"
- Asking for a middle name usually throws a person off who is lying
- Anyone presenting a "fake ID" will be turned away
- All other questions concerning validity will be brought to the attention of the manager
- Upon reentry of patrons, check the wristband to make sure it hasn't been altered or switched with a different patron.

22. Employees are subject to suspension or termination for violating the above policies regarding underage patrons. At times, Mr. Merdian has paid a cash "reward" for successfully preventing admission of someone using a fraudulent ID. Fubar trains its employees as to these policies and reviews them each

quarter when they go through the responsible vendor program. All employees participate in this program.

23. Fubar trains and instructs its doormen to require a picture ID for all patrons and further instructs them regarding measures to ensure that the ID is valid and belongs to the person who presented it.

24. Fubar uses a fluorescent UV light to identify holograms which are present on valid Florida driver's licenses and which are not present on fake IDs. Wristbands are checked to ensure that they are not frayed or tampered with, which are indications that they have been taken off and used again.

25. Mr. Merdian makes an effort to employ older doormen, preferably with military backgrounds, who follow instructions and are less likely to be friends with patrons.

26. Fubar's security employees circulate within the establishment looking for "under-21" wristbands and the kind of body language previously described by police witnesses which raises suspicions of underage patrons trying to evade detection. Fubar employs both door staff and security personnel, both of which have responsibilities concerning the prevention of underage drinking at their establishment.

27. Additionally, bartenders are instructed to ask for ID if they have a suspicion that an underage patron is banded with a legal age wristband. In addition to possible termination,

bartenders are also instructed about potential personal criminal liability for serving underage patrons.

28. There was no evidence that an employee of Fubar was observed selling or giving an underage drinker any alcoholic beverage.

29. Mr. Merdian has visited every club of a similar nature in downtown Gainesville, and he has not observed any practices in those clubs that he finds superior to the ones employed by Fubar.

30. In the past, the general manager, Mr. Williams, worked as a security employee at the club under previous ownership. His duties included checking IDs and looking for underage drinkers. He carries on these responsibilities as part of being general manager. He personally works with new security personnel for a few nights until they feel comfortable with their responsibilities. Mr. Williams keeps track of the wristbands, stores them in a locked location, and personally gives them to the doorman each night. Mr. Williams is on the premises every night that Fubar is open.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57, 120.65(7), Fla. Stat. (2012).^{3/} The City, as the party asserting the affirmative, has the

ultimate burden of proof by a preponderance of the evidence. See Fla. Dep't. of Transp. v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat. (2012).

32. Pursuant to section 4-53 of the Ordinance, an underage prohibition order will be issued to an alcoholic beverage establishment if 10 or more underage drinking incidents occurred at that establishment during any quarter when the establishment has an aggregate occupancy load of greater than 201.

33. Section 4-53 of the Ordinance sets out the process for the establishment subject to an underage prohibition order to request an administrative hearing, and, prior to judicial modification, reads in pertinent part:

(c)(4) . . . The lack of actual knowledge of, acquiescence to, participation in, or responsibility for any underage drinking incident for this hearing on the part of the owner or agent shall not be a defense by such owner or agent.

34. The above-quoted language was challenged in circuit court in the case of Grog House v. City of Gainesville, Case No. 01-2009-CA-1691 (Fla. 8th Jud. Cir.) aff'd Grog House, Inc. v. City of Gainesville, 37 So. 3d 969 (Fla. 1st DCA 2010). The circuit court found that the challenged sentence conflicts with section 562.11(1)(c), Florida Statutes, and Florida Administrative Code Rule 61A-3.052. The circuit court noted:

Both the statute and rule allow an 'innocent owner defense' which is premised on an

underage patron falsely evidencing that they are of legal age, that a reasonable person would believe their appearance is of a person of legal age and that the establishment had procedures in place to reasonably check the identification of patrons.

The circuit court struck the last sentence, finding it was preempted by state law, and that it "conflicts with the purpose of the Ordinance (preventing underage patrons in establishments that do not reasonably try to prevent underage drinking) by preventing the establishment from presenting evidence as to its reasonable efforts to prevent underage consumption."

35. The Final Judgment of the circuit court expressly struck the challenged language prohibiting the consideration of the innocent owner defense: ". . . the last sentence of Section 4-53(c)(4) which is hereby stricken." The First District Court of Appeal in its per curiam opinion did not reverse or modify the circuit court's order, and the circuit court's order with respect to the last sentence of section 4-53(c)(4) remains intact.

36. The undersigned is persuaded that the last sentence of section 4-53(c)(4) prohibiting the innocent owner defense in this and other similar proceedings was struck by the circuit court for all purposes. The City has proven that it arrested 15 patrons for underage possession of alcohol and that it secured 15 adjudications. That is sufficient to establish a prima facie

case under section 4-53 of the Ordinance. It is next appropriate to examine whether Petitioner has proven its innocent owner defense.

37. Courts have applied a reasonable diligence standard in alcoholic beverage licensure cases involving the sale of alcohol to underage persons. See Pic N' Save Cent. Fla., Inc. v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 601 So. 2d 245 (Fla. 1st DCA 1992). The undersigned is well aware that the instant case does not involve licensure. However, in light of the language prohibiting the innocent owner defense contained in the Ordinance being stricken by the Grog court, and the restrictions imposed by the Ordinance on the licensee, the reasonable diligence standard discussed in Pic N' Save is, if not controlling, instructive.

38. The preponderance of the evidence established that Petitioner instructs and trains its doormen and security employees to check IDs upon entry to the premises. It has a written manual detailing ways to identify underage patrons and/or fake or fraudulent IDs. Wristbands are used when a patron enters the premises identifying legal age and underage patrons. A system is in place to lessen the possibility that wristbands could be taken off and used by another patron, or reused on another night. Petitioner employs the use of a fluorescent UV light to identify holograms which are not present

on fake Florida IDs. The owner and employees of Petitioner regularly participate in a responsible hospitality program. The one instance in which Officer Scott observed what appeared to be an off-duty Fubar employee standing near an underage offender is not persuasive in establishing lack of reasonable diligence on behalf of Fubar.

39. The undersigned concludes that in employing the measures set forth herein, Petitioner was reasonably diligent with respect to instances in which an underage patron obtained alcohol from another person of lawful age; that Petitioner was reasonably diligent with respect to instances of an underage patron obtaining a wristband from a patron of legal age; and that Petitioner was reasonably diligent with respect to the instances involving the use of false driver's licenses.

RECOMMENDATION

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

Recommended that the Underage Prohibition Order issued to Fubar be vacated.

DONE AND ENTERED this 14th day of March, 2013, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of March, 2013.

ENDNOTES

^{1/} Officer Scott testified that he confiscated false licenses and tendered them to his sergeant for safekeeping. The confiscated IDs are apparently kept in a bag of some sort at GPD. The licenses are not in evidence. Petitioner argues that the licenses were sought in discovery but only one was produced. However, the docket does not reflect a motion to compel. While Officer Scott offered testimony that the photographs on some of the driver's licenses did not resemble the individuals who presented the license as identification, the undersigned finds this testimony to be unpersuasive, lacking sufficient detail, and prejudicial to Petitioner, who did not have the opportunity to cross-examine Officer Scott as to each individual license.

^{2/} The record reflects references to hearsay statements made by the underage individuals as to how they obtained an alcoholic beverage or how their wristbands were obtained, e.g., that someone handed them a drink or that they obtained a wristband from persons who were of lawful age. However, these statements are not sufficient in themselves to support a finding of fact as contemplated by section 120.57(1)(c), Florida Statutes.

^{3/} Constitutional issues were also raised but will not be addressed, as the undersigned lacks jurisdiction to determine

those issues. Dep't of Rev. v. Young Am. Builders, Inc., 330 So. 2d 864, 865 (Fla. 1st DCA 1976); Rice v. Dep't of HRS, 386 So. 2d 844, 847 (Fla. 1st DCA 1980).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.