

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF ALCOHOLIC BEVERAGES )  
AND TOBACCO, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 12-3867  
 )  
7 ELEVEN, INC., AND PTL )  
ASSOCIATES, INC., d/b/a )  
7 ELEVEN STORE NO. 32599A, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On February 6, 2013, an administrative hearing in this case was held by video teleconference in Fort Myers and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Andrew R. Fier, Esquire  
Department of Business and  
Professional Regulation  
Suite 42  
1940 North Monroe Street  
Tallahassee, Florida 32399

For Respondent: Timothy Joseph Perry, Esquire  
Oertel, Fernandez, Bryant  
and Atkinson, P.A.  
Post Office Box 1110  
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

Whether the Respondent committed the offense alleged in the Administrative Complaint dated August 14, 2012, and, if so, what penalties, if any, should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated August 14, 2012, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Petitioner), alleged that 7 Eleven, Inc., and PTL Associates, Inc., d/b/a 7 Eleven Store No. 32599A (Respondent), allowed an underage female to purchase an alcoholic beverage. The Respondent disputed the allegation and requested a formal administrative hearing.

On November 29, 2012, the Petitioner forwarded the dispute to the Division of Administrative Hearings (DOAH), which scheduled and conducted the formal hearing.

At the hearing, the Petitioner presented the testimony of four witnesses and had Exhibits 1 through 8 and 10 admitted into evidence. The Respondent presented the testimony of four witnesses and had Exhibits 3 through 7 admitted into evidence.

The Transcript of the hearing was filed on February 25, 2013. Both parties filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

Prior to the hearing, the parties submitted a Joint Prehearing Stipulation including a statement of admitted facts that have been adopted and are incorporated herein.

FINDINGS OF FACT

1. PTL Associates, Inc., d/b/a 7 Eleven Store No. 32599A (PTL), is a convenience store located at 4401 Colonial Boulevard, Fort Myers, Florida 33912.

2. Lucia D'Costa is the sole shareholder of PTL.

3. Since October 12, 2011, and at all times material to this case, the Respondent has been licensed by the Petitioner to sell alcoholic beverages under license number BEV 4604710, Series 2APS.

4. According to a document titled "Record of Inspection-- Official Notice," on July 19, 2012, an employee of the Respondent sold an alcoholic beverage to an underage individual after checking the individual's identification. The document advised the Respondent that a follow-up compliance check would take place within the subsequent 12 weeks.

5. The Petitioner took no disciplinary action against the Respondent based on the July 19, 2012, compliance check.

6. The Respondent has not been the subject of any prior disciplinary proceeding related to the license referenced herein.

7. On August 2, 2012, the Petitioner conducted an undercover compliance check as a follow-up to a compliance check

done on July 19, 2012, to determine whether the Respondent was selling alcoholic beverages to underage individuals. The compliance check was performed by two of the Petitioner's agents, Jennifer Nash and David Foraker, with the assistance of a 16-year-old female identified as Investigative Aide FT0205 (IA).

8. On August 2, the IA entered the store accompanied by Agent Nash, while Agent Foraker remained in the vehicle outside the store. Ms. D'Costa was present in the store, behind the counter and operating multiple store sales registers. Two employees were also present, occupied with various cleaning tasks.

9. The IA walked to the beverage cooler and withdrew a 16 ounce Coors Light, carried it to the counter area, and stood in line to pay for the beer. Ms. D'Costa took the beer from the IA, scanned the beer into the sales register, and completed the transaction. Ms. D'Costa did not ask the IA to produce any form of identification to verify the IA's age.

10. While the transaction occurred, Agent Nash observed the AI and Ms. D'Costa, initially from inside the store, and then from outside while looking through large windows on the storefront.

11. Although while in the store Agent Nash spoke to Ms. D'Costa to ask for driving directions, Agent Nash did not interfere with the sale of beer to the IA.

12. There is no evidence that Agent Nash prompted Ms. D'Costa to sell the beer to the IA, or that she interfered in the transaction in any way.

13. Some, but not all, of the Respondent's cash registers have software to prompt a register operator to verify a customer's age during the sale of an alcoholic beverage. When Ms. D'Costa sold the beer to the IA, she used a register that did not prompt the sales clerk to verify the customer's age.

14. Ms. D'Costa testified that she does not usually operate the sales registers and that the clerks are usually responsible for the counter operation. She testified that, at the time of the compliance check on August 2, 2012, the two employees present were cleaning the store in anticipation of a monthly inspection, and, therefore, Ms. D'Costa was working alone at the sales registers.

15. The inspection referenced by Ms. D'Costa is a routine monthly inspection conducted by corporate representatives at a time unknown to the licensee until the representatives arrive.

16. It is reasonable to presume, given the nature of the inspection, that store cleaning would be an ongoing obligation of a licensee. The testimony fails to suggest that a licensee is exempt from compliance with laws prohibiting underage alcohol sales when employees are busy.

17. After completing the purchase, the IA left the store and delivered the beer to Agent Foraker. The Petitioner's agents then went into the store to notify Ms. D'Costa that the transaction had taken place and to deliver to her a "Record of Inspection--Official Notice" and a "Notice to Appear."

18. Ms. D'Costa testified at the hearing that she believed the IA to be at least 30 years of age on August 2, 2012.

19. The IA participated in seven undercover compliance checks on August 2, 2012. The Respondent was the only store that did not check the IA's identification during a compliance check.

20. Ms. D'Costa also testified that the franchise agreement could be breached by a suspension of the alcoholic beverage license. The franchise agreement was not offered into evidence at the hearing.

21. The Petitioner has a written policy of not utilizing children or other relatives of the Petitioner's employees as IAs. At the time the compliance check was conducted on August 2, 2012, the Petitioner was apparently unaware that the IA was related to an employee of the Petitioner. After the Petitioner learned of the relationship, the IA was not again utilized in making compliance checks. The evidence fails to establish that the relationship between the IA and an employee of the Petitioner prompted Ms. D'Costa to sell the beer to the IA without checking whether the IA was of legal age to purchase alcohol.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2012).

23. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

24. Section 562.11(1)(a)1., Florida Statutes (2012), prohibits the sale in Florida of an alcoholic beverage to a person under 21 years of age.

25. Section 561.29, Florida Statutes (2012), provides in relevant part as follows:

(1) The [Petitioner] 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. . . .

26. The Courts have consistently held that the Petitioner's authority under the preceding statute is limited to acts personally committed by the licensee. See Pic N' Save, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco, 601 So. 2d 245 (Fla. 1st DCA 1992). The evidence clearly establishes that, on August 2, 2012, Ms. D'Costa, the licensee, sold a beer to a person who was not of legal age to purchase an alcoholic beverage.

27. The Respondent has asserted that the IA to whom Ms. D'Costa sold the beer appeared to be at least 30 years of age. An action against a licensee charged with the sale of an alcoholic beverage to an underage person can be defended on such basis pursuant to Florida Administrative Code Rule 61A-3.052, which provides in relevant part as follows:

61A-3.052 Identification to Verify Age.

(1) A licensee who has been cited in an administrative action for violations of Sections 562.11(1)(a) and 859.06, Florida Statutes, shall have a defense to any administrative action if the underage person falsely evidenced that he was of legal age to purchase the alcoholic beverage, cigarettes, or tobacco products or consume the alcoholic beverage product and the appearance of the person was such that an ordinarily prudent person would believe the person is of legal age to purchase or consume those products, and if the licensee attempted to verify the person's age by checking one of the following forms of identification with respect to the person:



- (a) A driver's license, issued by any government agency, domestic or foreign, provided it includes a photograph;
- (b) Identification cards issued by any state, provided it includes a photograph;
- (c) Passports;
- (d) An identification card issued by any branch of the United States military which shows the customer is currently serving in the United States Armed Services or is a family member of a person currently serving in the United States Armed Services. . . . (emphasis added).

28. The Petitioner performed seven compliance checks on August 2, 2012, using the same IA. The Respondent was the only sales outlet that did not ask the IA to verify her age, suggesting that the other outlets believed the IA appeared to be sufficiently youthful as to require that she establish her age. In this case, Ms. D'Costa failed to make any attempt to verify the age of the purchaser, and the defense provided by the cited rule is unavailable.

29. Florida Administrative Code Rule 61A-2.022(11) provides disciplinary guidelines relevant to this case. According to the guidelines, the penalty for a first violation of section 562.11, Florida Statutes, is a fine of \$1,000 and a license suspension of seven days. There are no aggravating or mitigating circumstances that support a variation from the penalty set forth in the guidelines.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, enter a final order suspending the license referenced herein for a period of seven days and imposing a fine of \$1,000 against the Respondent.

DONE AND ENTERED this 27th day of March, 2013, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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WILLIAM F. QUATTLEBAUM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 27th day of March, 2013.

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.