

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF ALCOHOLIC  
BEVERAGES AND TOBACCO,

Petitioner,

vs.

Case No. 13-1227

EDEN SUPPLY, LLC ("EDEN  
SUPPLY"),

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

An administrative hearing in this case was held by video teleconference on August 7 and 8, 2013, in Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melinda Hilton Butler, Esquire  
Department of Business and  
Professional Regulation  
Suite 40  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

For Respondent: Jed Berman, Esquire  
Infantino and Berman  
Post Office Box 30  
Winter Park, Florida 32790-0030

STATEMENT OF THE ISSUE

The issue in this case is whether the allegations set forth in the Second Amended Administrative Complaint filed by the Department of Business and Professional Regulation (Petitioner) against Eden Supply, LLC (Respondent), are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Amended Administrative Complaint dated September 12, 2012, the Petitioner alleged that the Respondent violated provisions of chapter 561, Florida Statutes (2012).<sup>1/</sup> The Respondent denied the allegations and requested an administrative hearing. The Petitioner forwarded the request to the Division of Administrative Hearings.

On June 28, 2013, the Petitioner moved, without objection, to amend the Amended Administrative Complaint, and the motion was granted on July 3, 2013. The Second Amended Administrative Complaint alleged that the Respondent committed violations of section 561.20(2)(a)5.

Prior to the hearing, the parties filed a Joint Pre-Hearing Stipulation containing a statement of agreed facts that have been incorporated herein as necessary.

At the hearing, the Petitioner presented the testimony of eight witnesses and had Exhibits 1, 2, 4 through 12, 13 (pages 2 through 4, 8, 10, 12, and 15), and 16 through 18 admitted into

evidence. The Respondent presented the testimony of two witnesses and had Exhibits 1 and 5 admitted into evidence.

A Transcript of the hearing was filed on September 4, 2013. On September 9, 2013, the Petitioner filed a Notice of Provision and Filing of Revised/Additional Transcript Pages.

The Petitioner filed a proposed recommended order on September 26, 2013. The Respondent filed a proposed recommended order on October 4, 2013. Both were reviewed in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material to this case, the Respondent held alcoholic beverage license no. BEV5810598, series 13CT, which is commonly referred to as a "caterer's license."

2. Florida Statutes set forth specific restrictions applicable to the sale or service of alcoholic beverages by the holder ("licensee") of a caterer's license. One such restriction is that service of alcohol at an event catered by the licensee is restricted to events where the licensee is also providing prepared food.

3. On Friday, November 18, 2011, the Respondent sold and served alcoholic beverages for consumption on the premises by customers attending an event at Club LAX, 7430 Universal Boulevard, in Orlando, Florida.

4. The Respondent provided no prepared food to persons attending the event at Club LAX on November 18, 2011. There were no menus, plates or utensils present at the event. There were no dining tables or food service staff present at the event.

5. On April 21, 2012, the Respondent sold and served alcoholic beverages for consumption on the premises by customers attending an event at Club Magic, 5600 West Colonial Drive, in Orlando, Florida.

6. The Respondent provided no prepared food to persons attending the event at Club Magic on April 21, 2012. There were no menus, plates or utensils present at the event. There were no dining tables or food service staff present at the event.

7. The Respondent asserted that on the dates referenced above, food was made available to customers at the end of the catered events and that many customers took the food "to go" as they left the event. The assertion was contradicted by the personal observations of witnesses who testified at the hearing, was unsupported by credible evidence, and has been rejected.

8. Florida law requires that a licensee maintain, for a period of three years, all records "required by the department by rule" to demonstrate compliance with the requirements for the caterer's license. One such requirement is that a caterer must derive "at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages."

9. The Petitioner has alleged that the Respondent failed to "maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages, and all purchases and gross retail sales of alcoholic beverages." Such records are required to determine whether the caterer is meeting the "51 percent" requirement.

10. At the request of the Petitioner, the Respondent provided various documents covering three specific time periods.

11. The materials were reviewed by an employee of the Petitioner, who testified at the hearing in detail as to his unsuccessful attempt to correlate the Respondent's documents to specific events allegedly catered by the Respondent.

12. The documents submitted by the Respondent are insufficient to permit a determination as to whether or not the Petitioner has complied with the statutory requirements to maintain a caterer's license. The Respondent presented no credible evidence that the employee's review of the submitted documents was inaccurate or otherwise flawed.

13. The Respondent asserted that the statute does not specifically state the time frame within which the "51 percent" requirement must be met. The documents submitted by the Respondent to the Petitioner lack sufficient reliability to establish that the statutory requirement was met at any point in time.

14. The applicable statute also requires that a licensee's records include "licensed vendor receipts for the purchase of alcoholic beverages and records identifying each customer and the location and date of each catered event." Alcohol purchased by a licensee for a catered event, but not used at the event, must remain with the customer for whom the event was catered or must be returned, unopened, to the vendor for credit or reimbursement.

15. At the hearing, the Petitioner presented the testimony of an alcohol vendor with whom the Respondent had an account for the purchase of alcohol in 2012.

16. The vendor reviewed records of the Respondent's purchases and testified that it was "impossible" to bill the Respondent for a single event because the Respondent did not return the unused products.

17. The records for the Respondent's purchases of alcohol from the vendor cannot be credibly correlated to specific events allegedly catered by the Respondent. The quantities of alcohol purchased cannot be reliably attributed to consumption at any specific event.

18. The vendor described the records as a "running invoice" because alcohol taken by the Respondent for use at one event and unused, was retained by the Respondent for use at subsequent events. There was no credible evidence offered to contradict the vendor's testimony.

## CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat. (2013).

20. In this case, the Petitioner is seeking to impose discipline against the Respondent's license. In order to prevail, the Petitioner must establish the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In order to be "clear and convincing," 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." See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

21. Section 561.20 limits the number of alcoholic beverage licenses that may be issued in a county based on the population of the county. The statute also creates an exemption from such limitations for specific types of businesses, including caterers.

22. The Second Amended Administrative Complaint alleges that the Respondent has violated provisions of section 561.20(2)(a), Florida Statutes (2011 and 2012), which provide, in relevant part, as follows:

No such limitation of the number of licenses as herein provided shall henceforth prohibit the issuance of a special license to:

\* \* \*

5. Any caterer, deriving at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages, licensed by the Division of Hotels and Restaurants under chapter 509. Notwithstanding any other provision of law to the contrary, a licensee under this subparagraph shall sell or serve alcoholic beverages only for consumption on the premises of a catered event at which the licensee is also providing prepared food, and shall prominently display its license at any catered event at which the caterer is selling or serving alcoholic beverages. A licensee under this subparagraph shall purchase all alcoholic beverages it sells or serves at a catered event from a vendor licensed under s. 563.02(1), s. 564.02(1), or licensed under s. 565.02(1) subject to the limitation imposed in subsection (1), as appropriate. A licensee under this subparagraph may not store any alcoholic beverages to be sold or served at a catered event. Any alcoholic beverages purchased by a licensee under this subparagraph for a catered event that are not used at that event must remain with the customer; provided that if the vendor accepts unopened alcoholic beverages, the licensee may return such alcoholic beverages to the vendor for a credit or reimbursement. Regardless of the county or counties in which the licensee operates, a licensee under this subparagraph shall pay the annual state license tax set forth in s. 565.02(1)(b). A licensee under this subparagraph must maintain for a period of 3 years all records required by the department by rule to demonstrate compliance with the requirements of this subparagraph, including licensed vendor receipts for the purchase of alcoholic beverages and records



identifying each customer and the location  
and date of each catered event. . . .

\* \* \*

The Division of Alcoholic Beverages and Tobacco is hereby authorized to adopt rules to administer the license created in this subparagraph, to include rules governing licensure, recordkeeping, and enforcement. The first \$300,000 in fees collected by the division each fiscal year pursuant to this subparagraph shall be deposited in the Department of Children and Family Services' Operations and Maintenance Trust Fund to be used only for alcohol and drug abuse education, treatment, and prevention programs. The remainder of the fees collected shall be deposited into the Hotel and Restaurant Trust Fund created pursuant to s. 509.072. (emphasis added.)

23. The evidence established that on November 18, 2011, and April 21, 2012, the Respondent sold and served alcoholic beverages for consumption at events where the Respondent provided no prepared food.

24. The evidence also established that the Respondent failed to maintain records sufficient to establish that the Respondent operated in compliance with the requirements of section 561.20(2)(a). Such requirements specifically include those related to the "51 percent" provision, to the maintenance of vendor receipts for the purchase of alcoholic beverages, and to records identifying each customer and the location and date of each catered event.

25. The Respondent noted that the Petitioner has not adopted a rule specifying which records must be maintained and suggested that the lack of a rule caused confusion regarding what records were required. The lack of a rule does not relieve a licensee from maintaining records. To the contrary, the Petitioner's failure to adopt a rule means that a licensee may maintain whatever records the licensee deems suitable, so long as those records can demonstrate compliance with the statutory requirements to maintain a caterer's license.

26. In this case, the records were insufficient to permit such a determination to be made by the Petitioner's employee responsible for reviewing the records. The Respondent offered no credible evidence at the hearing to suggest that the Petitioner's attempt to review the records was inadequate.

27. Finally, the evidence established that the Respondent failed to leave the unused alcohol with customers for whom events were catered and failed to return the product to the vendor for credit or reimbursement, but instead retained the alcohol for use at subsequent catered events.

28. Florida Administrative Code Rule 61A-2.022 sets forth "penalty guidelines" applicable to this case. The rule states that violation of section 561.20, otherwise identified as a "failure to meet minimum qualifications of special license" warrants a \$1,000 fine "and revocation without prejudice to

obtain any other license, but with prejudice to obtain the same type of special license for 5 years." The rule also provides that the fine can be increased by \$1,000 for each two-month period during which the licensee failed to meet the "51 percent" requirement.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner enter a final order imposing a fine of \$1,000 and revoking the Respondent's license no. BEV5810598, as set forth in the penalty guidelines.

DONE AND ENTERED this 30th day of October, 2013, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

---

WILLIAM F. QUATTLEBAUM  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of October, 2013.

ENDNOTE

<sup>1/</sup> All statutory references are to Florida Statutes (2012), unless otherwise noted.

COPIES FURNISHED:

Allen Douglas, Director  
Division of Alcoholic Beverages  
and Tobacco  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

J. Layne Smith, General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

Jed Berman, Esquire  
Infantino and Berman  
Post Office Box 30  
Winter Park, Florida 32790-0030

Melinda Hilton Butler, Esquire  
Department of Business and  
Professional Regulation  
Suite 40  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

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.