STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REBCO ENTERPRISES, INC.,

Petitioner,

vs. Case No. 14-2486

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

Respondent.
_____/

RECOMMENDED ORDER

On April 29, 2015, Administrative Law Judge Lisa Shearer Nelson conducted a disputed-fact hearing in Tallahassee, Florida, pursuant to section 120.57(1), Florida Statutes (2014).

APPEARANCES

For Petitioner: Maggie M. Shultz, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

For Respondent: Jason D. Borntreger, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner's request to renew a lien against alcoholic beverage license number 62-08383 on or about July 8, 2011, should be approved or denied.

PRELIMINARY STATEMENT

On August 17, 2011, Petitioner, Rebco Enterprises, Inc. (Petitioner or Rebco), filed an Amended Request for Hearing with the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DABT), challenging DABT's July 25, 2011, and August 3, 2011, denials of Rebco's request to renew a lien against a quota license. The agency referred the matter to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge on May 22, 2014.[1/] The case was originally assigned to Judge F. Scott Boyd, who promptly scheduled it for hearing July 15, 2014.

On June 24, 2014, a Joint Motion for Continuance was filed, the parties asserting that discovery was ongoing. Judge Boyd granted the motion and rescheduled the case for September 16, 2014. On July 3, 2014, the case was transferred to Judge Edward Bauer. On August 29, 2014; October 30, 2014; January 15, 2015; and March 11, 2015, additional motions for continuance were filed, all of which resulted in the granting of the motions and rescheduling of the hearing. On March 19, 2015, the case was transferred to the undersigned. On April 21, 2015, another

Joint Motion for Continuance was filed, and was denied by Order dated April 22, 2015. As a result, the case proceeded to hearing on April 29, 2015.

At hearing, Petitioner presented the testimony of Beverly Peebles, Damon Larry, and Stephanie Coxwell, and Petitioner's Exhibits 1 through 11 and 12B were admitted into evidence. Respondent did not present any witnesses but Respondent's Exhibits 4 through 7 were admitted into evidence. Prior to hearing, the parties filed a Pre-hearing Stipulation that contained several stipulated facts for which no evidence at hearing was required. Where relevant, those stipulated facts have been incorporated into the findings of fact below. The Transcript of the proceedings was filed with DOAH on May 14, 2015. At the request of the parties, 20 days were allowed for the filing of proposed recommended orders. Both parties filed their post-hearing submissions on a timely basis, and both have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the demeanor and credibility of the witnesses and other evidence presented at hearing, and upon the entire record of this proceeding, the following facts are found:

1. Respondent is the state agency charged with the licensing, regulation, and enforcement of Florida's alcoholic

beverage laws pursuant to section 20.165(2)(b) and chapters 561-568, Florida Statutes, including recordation of liens against alcoholic beverage licenses and provision of notice to lienholders pursuant to section 561.65.

2. Petitioner is the holder of a recorded lien against alcoholic beverage license number 62-08383, a 4COP spirituous alcoholic beverage license, commonly referred to as a quota license, which was issued pursuant to sections 561.20(1) and 565.02(1)(a)-(f) for use in Pinellas County.

Liens and Security Interests in Alcoholic Beverage Licenses

3. Section 561.65 governs mortgages, liens, and security interests against spirituous alcoholic beverage licenses. DABT has a lien section within its Bureau of Licensing that is responsible for the oversight of lien recordings and lien searches.

4. To perfect a lien or security interest in a spirituous alcoholic beverage license that may be enforceable against the license, the entity holding the security interest or lien must record it with DABT within 90 days of the date of creation of the lien or security interest, using forms authorized by DABT. The forms adopted by DABT require the names of the parties and the terms of the obligation being recorded. § 561.65(4), Fla. Stat.

5. Form DBPR ABT-6022, Application for Mortgagee's Interest in Spirituous Alcoholic Beverage License, is used to record a new lien, a lien assignment or assumption, or a lien renewal or extension. The form is adopted by rule. Fla. Admin. Code R. 61A-5.0012.

6. Upon receipt of a request to record a lien or the renewal of an existing lien, DABT will review the provided documentation and, if the documentation is in order on approved forms and accompanied by the security agreement and statutorily-required payment, will record the lien or lien renewal.

7. If there is a deficiency noted during review of the lien documentation submitted, DABT will issue a 14-day deficiency notice to the requesting entity to provide any missing information. If timely corrected, DABT will record the lien or lien renewal.

8. Section 561.65(4) provides that any lien or security interest filed with DABT on or after July 1, 1995, expires five years after recordation by DABT unless renewed by the lienholder within six months prior to its expiration date.

Statutory Notice Requirements to Lienholders

9. Recording a lien not only makes it enforceable, but provides assurance to the lienholder that it will receive notice of pending actions by DABT against the license that may compromise the lien's vitality. Section 561.65 also sets forth

requirements for DABT to provide notice to lienholders of both pending actions against encumbered licenses and any suspension or revocation of a license subject to a lien.

10. Specifically, section 561.65(3) provides that "such lienholder shall be notified in writing of the filing of an order to show cause as to why the license should not be suspended or revoked; and also the lienholder shall be furnished a copy of any order of suspension or revocation." (Emphasis added). In other words, two separate notices are required: one when the agency institutes proceedings against the licensee and a second if the agency action against the licensee results in a suspension or revocation of the license.

11. Respondent does not assert and no evidence was presented to demonstrate that Petitioner had knowledge of or participated in the cause for revocation of the license at issue in this proceeding, or that Petitioner would not otherwise be entitled to notice of the revocation proceeding.

12. The holder of a recorded lien is entitled to notice because the lienholder has the right to enforce the lien against the licensee within 180 days after the entry of any order of revocation or suspension of the license. Section 561.65(3) specifies that "the 180 days within which to file for enforcement of the lien by the lienholder shall commence running from the date of the mailing of the copy of the order of

revocation or suspension." Thus, the 180-day period runs from when notice is sent to the lienholder, not from the entry of the final order of suspension or revocation.

13. Once notice is provided to the lienholder, any enforcement of the lien is through foreclosure proceedings in circuit court. The process for foreclosure proceedings is outlined in section 561.65(5). Most importantly, both section 561.19(2) and section 561.65(1) provide that no revoked quota beverage license encumbered by a lien or security interest perfected in accordance with section 561.65 shall be issued until the 180-day period (from mailing of the suspension or revocation order) has elapsed or until such enforcement proceeding is final.

Re-issuance Through Double Random Drawings

14. Quota licenses may become available three ways: 1) when a dry county goes wet (i.e., a county that previously prohibited the sale of alcohol decides to allow it), three initial quota licenses are issued for the county; 2) when there are population increases in a county, an additional quota license is issued for every population increase of 7,500; and 3) when a quota license in a county has been revoked. When any of those instances occur, pursuant to the directive in section 561.19(2), quota licenses are issued through the use of a double random public drawing.

15. While a revoked quota license may be reissued in a double random quota drawing, if a revoked quota license is encumbered by a perfected and recorded lien or security interest, as discussed previously, it may not be reissued until the 180-day period has elapsed or until enforcement/foreclosure proceedings are final.

16. Damon Larry is currently the assistant bureau chief of licensing, and oversees the annual quota drawing. Each year, he runs a report of all revoked quota licenses and, if the revocation is final, determines whether the 180-day period has elapsed.

17. Before a revoked quota license is placed in the double random drawing, there is communication between staff in different sections within the Department to determine if a license is eligible for inclusion in the quota drawing. The communications involve the quota drawing section, the licensing section, the administrative case unit, the Office of the General Counsel, and the lien section. During this process, DABT staff will determine whether there is a lien attached to the license and, if so, whether there was notice to the lienholder, and whether the 180 days has elapsed or foreclosure proceedings no longer remain pending.

18. If all of these conditions have been met, the revoked license is placed in the quota drawing for reissuance under a

new license number. The revoked license number is then deleted from the Department's database.

Petitioner's Lien Against Alcoholic Beverage License No. 62-08383

19. Turning to the facts of this case, Daniel A. King, as debtor, executed and delivered a Demand Promissory Note in favor of Rebco on or about April 18, 1997, in the principal amount of $61,000, and simultaneously executed a security agreement in favor of Rebco, as the secured party, pledging license number 62-08383 (the License) as collateral for repayment of the sums due and owing under the Promissory Note.

20. Rebco submitted the promissory note and security agreement to DABT for initial recordation as a lien against the License on or about May 1, 1997, within 90 days of the date of the creation of the lien, on forms approved by the Division. The forms clearly identified the parties and the obligation.

21. DABT recorded the lien against the License effective May 8, 1997. If not timely renewed, the lien would expire on May 8, 2002.

22. Rebco submitted a request to renew its existing lien against the License for recordation on or about November 7, 2001, within six months of expiration of the lien, on forms approved by the Division. The request for renewal was

accompanied by the promissory note and security agreement, and the forms clearly identified the parties and the obligation.

23. DABT recorded the lien renewal against the License effective November 7, 2001. If not timely renewed, the lien would expire on November 7, 2006.

24. Rebco submitted a second request to renew its existing lien against the License for recordation on or about July 26, 2006, within six months of expiration of the lien, on forms approved by the Division. The request for renewal was accompanied by the promissory note and security agreement and the forms clearly identified the parties and the obligation.

25. DABT recorded the lien renewal against the License effective August 1, 2006. If not timely renewed, the lien would expire on August 1, 2011.

The License Revocation Proceedings

26. On or about November 16, 2006, at a time when the lien was recorded in the records of DABT, DABT filed administrative charges against Daniel J. King, holder of the License, in Case number 2006-049240, alleging that the licensee failed to operate the License in accordance with section 561.29(1)(f). DABT was unable to achieve personal service on Mr. King, so it published notice of the administrative action in the St. Petersburg Times on May 2, 9, 16, and 23, 2007. The published notice did not

identify Petitioner, and no evidence was presented to indicate that DABT sent a copy of the notice to Rebco.

27. Rebco clearly had a recorded lien against the License when the disciplinary action was filed against the License. DABT did not notify Petitioner of the pending action.

28. On or about June 22, 2007, after receiving no written defense in the disciplinary proceeding, DABT issued a Final Order revoking the License effective July 31, 2007. The Final Order of Revocation was not served on Rebco, the owner of the security interest in the License.

29. Petitioner had a recorded lien against the License on file with DABT both when proceedings were instituted against the License and on the date of the entry of the Final Order of Revocation.

30. Stephanie Coxwell works in the administrative case unit of DABT and has done so for at least the last 14 years. The administrative case unit is responsible for determining whether an alcoholic beverage license that is pending revocation or suspension is encumbered by a lien and for notifying any lienholder of the revocation or suspension of an encumbered license. DABT's practice was to mail any lienholder notice of the license suspension or revocation, along with a copy of the final order, soon after entry of the final order. It is this

mailing of the notice and final order that commences the 180 days referenced in section 561.65.

31. For at least the last 14 years, DABT has used a form "notice to lienholder" to notify lienholders of the revocation or suspension of an alcoholic beverage license, accompanied by a copy of the final order revoking or suspending the license. The notification form is a public record maintained by DABT. It is this notification, and not the publication of the pending action, that provides notice to the lienholder.

32. Internal correspondence from Ms. Coxwell within the licensure file for the License indicates that in December 2006, she requested a lien search with respect to the License. Ms. Coxwell was advised by return e-mail that Rebco had a recorded lien against the license. On or about March 21, 2007, Ms. Coxwell requested research for any bankruptcy proceedings affecting the License. She was again informed by intra-agency e-mail that Rebco had a recorded lien against the License. Ms. Coxwell replied by e-mail that she was aware that there was a lien, but that they would notify the lienholder of the administrative action "in the usual way." However, Ms. Coxwell's March 27 e-mail was sent three months before the final order revoking the license, not simultaneous to the Order. There is no record that notification was sent to Rebco, either

at the time of the administrative action, or after issuance of the final order.

33. Beverly Peebles works in Rebco's corporate office located at 701 Tennessee River Drive, Muscle Shoals, Alabama 35661, and has done so since 1990. She is responsible for receiving, retaining, and disbursing any mail received by Rebco. Ms. Peebles testified regarding the process used to copy, scan into the company's electronic database, and distribute any mail received by Rebco. Rebco did not receive any notice concerning the administrative action or the revocation of the License until Rebco received the letter denying the recordation of its lien renewal against the license in 2011. Rebco's address was at all times on file with the DABT since the inception of the lien against the license in 1997.

34. It is found that the DABT did not notify Rebco that there was an administrative action filed against the License, and did not notify Rebco of the Final Order of Revocation against the License. The licensure file contains all other expected documents from the first recordation of the lien in 1997 to the present. It does not include a copy of notice to Rebco of either the pending action or the Final Order of revocation. Moreover, both a letter dated August 19, 2011, to counsel for Rebco, as well as an e-mail dated March 21, 2007, from Ms. Coxwell, contain handwritten notes regarding the

failure to send proper notification. The notes, which are clearly hearsay, are part of public records maintained in the normal course of business, and corroborate Ms. Peebles' testimony that no notification was received. They also corroborate evidence of the absence of any record of notification to Rebco in DABT's records of regularly-conducted activity. The August 19, 2011, letter contains a handwritten note at the top stating, "$61K lien no lien ltr sent," and the e-mail dated March 21, 2007, referenced in paragraph 32, contains the following note: "are we the only group/people who check for current liens recorded before deleting the license? It was deleted on 5/4/2011. Lien was still recorded at that time."[2/] Respondent has presented no credible evidence to indicate that the notice was somehow sent despite the lack of any documentation to that effect contained in the DABT's records. While the handwritten notes standing alone do not establish that no notice was sent, they do indicate that a question was raised internally regarding whether adequate notice was provided.

35. Despite the failure to notify Rebco of the revocation of the License, the License was placed in the 2010 double random drawing held on March 10, 2011, at a time when a valid lien against the License was duly recorded. Only one license for Pinellas County was included in the drawing for that year, and

no licenses for Pinellas County have been issued in a double random quota drawing since then.

36. Shortly after the random drawing, the license number assigned to the License was removed from the Department's system and a new number assigned to the license issued as a result of the drawing. While there is no direct testimony on the issue, it can be inferred that the purchaser of the new license received the license with no notice that there was any outstanding lien on the right to engage in the sale of alcoholic beverages in Pinellas County under the new license.

37. While it is DABT's practice to delete a revoked license number from its database, no evidence or statutory reference was presented to support the premise that there is a legal impediment to renewing an existing lien for a revoked license when no notice of the revocation was provided.

38. Given the Department's failure to notify Rebco of the revocation of the License, the 180-day period identified in section 560.65 never began to run.

39. On or about July 6, 2011, Rebco timely submitted a third request to DABT to renew its existing lien against the License for recordation, within six months of expiration of the lien, on forms approved by the Division, which request was accompanied by the promissory note and security agreement.

40. DABT notified Rebco by letter dated July 19, 2011, that it was unable to record the lien renewal because it was not submitted for recordation within 90 days of its creation. The July 19, 2011, notice of denial was issued based upon a review of the lien renewal request submitted to DABT, because the executed ABT6022 lien-recording form submitted with Rebco's third renewal request mistakenly identified the effective date of the lien renewal as April 18, 1997, the date of the creation of the original lien.

41. On or about July 25, 2011, Rebco submitted an amended form ABT6022 correcting the effective date for renewal of the lien as August 1, 2011.

42. On August 3, 2011, DABT notified Rebco that it was unable to record the renewal of the lien against the License because "the alcoholic beverage license being pledged as collateral was revoked by the Division on July 31, 2007," following service of a Notice of Action through publication in the St. Petersburg Times on May 2, 9, 16, and 23, 2007.

43. No action taken by Rebco compromised the vitality of its recorded lien against the License. To the contrary, Rebco faithfully adhered to the recording requirements outlined by statute to record and renew its lien.

44. DABT, however, failed to take the action required by section 561.65 to provide notice to Rebco of the pending action

and subsequent revocation of the License. As a result, the 180-day period required by section 561.65 did not run before the License was placed in the quota drawing.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

46. Petitioner, as the holder of the security interest at issue in this proceeding, has standing to challenge DABT's denial of its request to renew its lien in the License.

47. This case involves the denial of Rebco's request to renew a lien against an alcoholic beverage license. As the party asserting its right to have the lien renewed, Petitioner bears the burden of proof by a preponderance of the evidence that it is entitled to have the lien renewal recorded by the Division. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1996).

48. DABT has regulatory and enforcement authority over the sale of alcoholic beverages and entities licensed for that purpose, including the perfection of liens or security interests against spirituous alcoholic beverage licenses, and the

assignment, assumption, renewal, extension, and satisfaction of said liens. § 561.65, Fla. Stat.

49. The resolution of this case is governed by the interpretation of section 561.65, which provides as follows:

> **561.65 Mortgagee's interest in license.**—
> (1) Any person holding a bona fide mortgage or lien or security interest in a spirituous alcoholic beverage license in this state shall have the right to enforcement of a lien against that license within 180 days after any order of revocation or suspension by an administrative officer or department of the government for a cause or causes of which the lienholder did not have knowledge or in which he or she did not participate. The division is required to notify any lienholder properly filing pursuant to subsection (4) of a pending revocation or suspension. No revoked quota beverage license encumbered by a lien or security interest perfected in accordance with this section shall be issued in accordance with s. 561.19(2) until the 180-day period has elapsed or until such enforcement proceeding is final. Liens or security interests in spirituous alcoholic beverage licenses existing prior to July 1, 1981, shall not be affected by the provisions of this section.
> (2) The purchaser at a foreclosure sale shall have the right to operate under such license, if otherwise lawfully qualified and authorized by the division to do so, or to have a reasonable time within which to transfer the license to some person qualified under the laws of this state to operate under such license. If the purchaser is a distributor licensed under the Beverage Law, the license becomes inoperative immediately and remains in such status until transferred, in accordance with the Beverage Law, to a person qualified to

operate under such license; however, the distributor shall transfer such license within 245 days after the date of purchase.
(3) If any such bona fide mortgagee or lienholder serves notice in writing on the division of the extension of such lien and accompanies that notice with the payment of the fee set forth in subsection (4) to the division, which money shall be used by the division to defray the costs of providing this service, then such lienholder shall be notified in writing of the filing of an order to show cause as to why the license should not be suspended and revoked; *and* also the lienholder shall be furnished a copy of any order of suspension or revocation. In this event, the 180 days within which to file for the enforcement of the lien by the lienholder shall commence running from the date of the mailing of the copy of the order of revocation or suspension.
(4) In order to perfect a lien or security interest in a spirituous alcoholic beverage license which may be enforceable against the license, the party which holds the lien or security interest, within 90 days of the date of creation of the lien or security interest, shall record the same with the division on or with forms authorized by the division, which forms shall require the names of the parties and the terms of the obligation. The division, upon the request of any person or entity, shall conduct a lien search and shall provide to the requester copies of all recorded liens and security interests in the division's records under the name searched, all for the fee set forth in this subsection. The fee for recording a lien or security interest shall be $10; the fee for recording an assignment of a recorded lien or security interest shall be $10; the fee for recording a satisfaction of a lien or security interest shall be $10; and the fee for a lien search shall be $20. The division shall promulgate forms to be used

under this subsection. All liens and security interests filed on or after July 1, 1995, shall expire 5 years after recordation unless renewed by the lienholder within 6 months prior to its expiration date. All liens and security interests filed prior to July 1, 1995, shall expire on July 1, 2000, unless renewed by the lienholder within 6 months prior to that date. Renewals of liens and security interests shall be subject to a $10 renewal fee.

(5) Any foreclosure of a perfected lien in a beverage license shall be in the circuit court in the county in which the beverage license is issued, and the division shall be joined as an indispensable party. All holders of liens senior to the lien being foreclosed shall be joined and deemed necessary parties to the foreclosure.

(6) Upon a judgment of foreclosure and after written notice to each distributor of alcoholic beverages who has filed a claim in the foreclosure, the clerk of the circuit court shall sell the license at public auction, pursuant to chapter 45, to the highest and best bidder, who shall pay the amount bid by a cashier's check within 24 hours of the time of sale. The proceeds from the sale of such license, after deducting the expenses of the sale, shall be paid, first, to the lienholder or lienholders in the order of date of filing and, second, to creditors who have paid or by law are obligated to pay federal or state excise taxes on purchases by the licensee; and the balance shall be paid as directed in the judgment of foreclosure.

(7) The institution of foreclosure procedures or the judicial transfer of a license shall not prevent the division from suspending or imposing a civil penalty against the licensee of record at the time of the alleged violation. However, should the division obtain a revocation of the license against the previous licensee of record, the revocation shall be effective

> only to impair the qualifications of the officers, directors, or stockholders of that licensee. (Emphasis added).

50. The facts giving rise to this case are largely undisputed: Rebco had a perfected security interest against the License recorded with the Division in 1997, which it renewed in accordance with the provisions of section 561.65 every five years thereafter. At a time when Rebco's lien was duly recorded with the Division, DABT began disciplinary proceedings against the License, but has no record that it notified Rebco concerning either the pending disciplinary action or the revocation of the License. Thereafter, at a time when the lien was recorded with the Division, DABT placed the License in a quota drawing, deleted the license number from its records, and issued a new license in Pinellas County to a purchaser who is not a party to this proceeding. When Rebco timely sought to renew its lien in 2011, DABT declined to renew it based on the revocation of the license. The most significant factual issue for determination is whether DABT failed to notify Rebco of the disciplinary action or the subsequent revocation of the License before placing it in the quota drawing. The greater weight of the evidence is that DABT failed to provide the statutory notices required by section 561.65. DABT's contention that its regular practice of notifying lienholders means that it in fact did so

here is rejected as contrary to the greater weight of the evidence.

51. As stated by the Supreme Court of Florida in Walling Enterprises, Inc. v. Mathias, 636 So. 2d 1294, 1297 (Fla. 1994), while a liquor license has the quality of property, it is considered a general intangible. See also United States v. McGurn, 596 So. 2d 1038, 1041 (Fla. 1992). Section 561.65 is the exclusive means by which to perfect a lien against a liquor license. McGurn; VMI Entm't, LLC v. Westwood Plaza, LLC, 152 So. 3d 617, 619 (Fla. 1st DCA 2014); Dery v. Occhiuzzo & Occhiuzzo Enters., Inc., 771 So. 2d 1276, 1278 (Fla. 4th DCA 2000). Once the lien is perfected, section 561.65(5) makes it clear that enforcement proceedings are in the circuit court in the county in which the beverage license was issued. Thus, consideration of any defenses to the enforcement proceeding are within the purview of the circuit court, should enforcement proceedings be instituted, and are not an issue to be decided in this proceeding.

52. The crux of this case is that DABT failed to notify Rebco before placing the License in the quota drawing. It appears, from the evidence presented, that the agency mistakenly relied on the publication of revocation proceedings to start the clock running for placement of the License in the quota drawing. However, section 561.65(3) expressly directs that the 180-day

period begins to run "from the date of the mailing of the copy of the order of revocation or suspension." In this case, because DABT did not notify Rebco of the revocation, that period never began to run.

53. In its Proposed Recommended Order, Respondent points out that an agency's interpretation of the statute it is charged with enforcing is entitled to great deference, citing Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002) and Bellsouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). With this deference referenced, Respondent asserts,

> In Respondent's view, at no point does Section 561.65 strictly require Respondent record any and all liens submitted thereto. Indeed, Section 561.65 commands Respondent to perform various tasks with regard to liens and lien recording, but nowhere does the statute require Respondent to record liens without discretion -- certainly not those liens which Respondent suspects or knows to be deficient. In the present case, Petitioner has attempted to record a lien on a license that has been revoked and, in Respondent's view, does not legally exist. While Respondent is likely "able" to record such a lien, Respondent rightfully questions such recording, and has reasonably refused to comply.

54. As a preliminary matter, Petitioner is not attempting to record a new lien, it is seeking to renew a duly-recorded lien already on file with DABT, as contemplated by section 561.65(4). It is also noteworthy that Respondent does not base

its refusal to renew the lien on any deficiency in the renewal request submitted by Rebco, but rather upon circumstances created by DABT through no fault of Petitioner.

55. Moreover, Respondent's reading of section 561.65 is, in the undersigned's view, clearly erroneous. Bridlewood Group Home v. Ag. for Pers. with Disabilities, 136 So. 3d 652, 656 (Fla. 2d 2013); M.H. v. Dep't of Child. and Fam. Servs., 977 So. 2d 755, 759 (Fla. 2d DCA 2008). For the reasons discussed below, recording of a properly-submitted lien is a ministerial duty and Respondent does not have discretion to refuse the request.

56. A ministerial duty is a duty "imposed expressly by law, not by contract or arising necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative." City of Tarpon Springs v. Planes, 30 So. 3d 693, 695 (Fla. 2d DCA 2012)(quoting Escambia Cnty. v. Bell, 717 So. 2d 85, 88 (Fla. 1st DCA 1988), and State ex rel. Allen v. Rose, 123 Fla. 544, 167 So. 21, 22-23 (Fla. 1936)); see also Haines v. State, 80 So. 3d 1144, 1146 (Fla. 4th DCA 2012)(certification of costs is a purely ministerial duty requiring no discretion); Vocelle v. Riddell, 119 So. 2d 809, 811 (Fla. 2d DCA 1960)(once license issued, annual renewal accompanied by required fee is a ministerial duty and a matter of right; alleged violations must be addressed through

revocation proceedings). Recording of liens is generally considered to be a ministerial duty. First American Title Ins. Co. v. Dixon, 603 So. 2d 562, 565 (Fla. 4th DCA 1992).

57. In order to determine whether an action is ministerial or discretionary, the authorizing statute's language must be examined to see what discretion may be granted to the agency, as public officers and agencies only have such authority as is "clearly conferred by statute or is necessarily implied from express statutory powers or duties." Escambia Cnty. v. Bell, 717 So. 85, 87 (Fla. 1st DCA 1988). Absent statutorily-enumerated grounds for exercising discretion, there is no discretion to exercise. Wells v. Castro, 117 So. 3d 1233, 1238 (Fla. 3d DCA 2013).

58. Section 561.65(1) provides that DABT must notify a lienholder "properly filing pursuant to subsection (4)" of a pending revocation or suspension, and prohibits the inclusion of a revoked license in the quota drawing until the 180-day period has elapsed or until enforcement proceedings are final. Paragraph four lists the only requirements for recording of a lien or security interest: that the lien be recorded within 90 days of the date of the creation of the lien; that the lien be recorded "with the division on or with forms authorized by the division;" that the forms require the names of the parties and the terms of the obligation; and that the lienholder pay a $10

fee. Likewise, the requirements for renewal of a lien with the Division are equally sparse: that the lienholder pay a $10 renewal fee and file the renewal within six months prior to the expiration of the prior recordation. Nowhere in section 561.65 does the Legislature provide any other basis for DABT to refuse to record a lien. To accept DABT's argument that it has discretion to reject a properly submitted request for renewal is to inject into section 561.65 language that the Legislature did not include.

59. The rule adopted by DABT to implement section 561.65 is rule 61A-5.0012. It provides in pertinent part:

> (2) To file a lien or security interest in a spirituous alcoholic beverage license which may be enforceable against the license, the party which holds the lien or security license, within 90 days of the date of creation of the lien or security interest, shall record the same with the division. An application must be filed on DBPR ABT-6022, APPLICATION FOR MORTGAGEE'S INTEREST IN SPIRITUOUS ALCOHOLIC BEVERAGE LICENSE, effective July 2013, adopted and incorporated herein by reference. This form may be used to file one of the following:
>
> (a) New Lien;
> (b) Lien Assignment/Assumption;
> (c) Lien Renewal/Extension;
>
> This form is available upon request from the Division of Alcoholic Beverages & Tobacco at 1940 N. Monroe Street, Tallahassee, Florida 32399-1021, the Division's district office serving your area of interest whose contact information is provided at http://www.myfloridalicense.com/dbpr/abt/fo

rms/documents/abtdistrictOfficeInformation.doc, or at http://www.flrules.org/Gateway/reference.asp?No+Ref-03330. Application must be complete and requirements furnished in accordance with the list of license application requirements.

60. Nothing in this rule or the form adopted as referenced in the rule contemplate any basis for rejection of a lien or renewal/extension of a lien, other than those required by section 561.65, i.e., failing to file the lien in a timely manner or failing to provide the names of the parties and the terms of the obligation along with the filing fee. Moreover, DABT has not asserted that there is any deficiency with respect to the information Rebco provided.

61. In Escambia County v. Bell, a dispute arose between the county and the tax collector regarding the use of the statutory uniform collection method in section 197.3632, Florida Statutes, to collect a non-ad valorem assessment for funding of fire protection services. The tax collector's concerns were that the assessment was based on services not yet provided to the property subject to the assessment, that the assessment might not be constitutionally lienable, and that the county could not collect its fiscal-year budgeted assessment through the tax notice, which collects ad valorem taxes in arrears pursuant to a calendar-year methodology. The county filed an action for declaratory judgment and sought a writ of mandamus to

require the tax collector to collect the special assessment, and the trial court granted summary judgment in favor of the tax collector. The trial court found that its decision was not based on the failure of the county to comply with any requirement in section 197.3632 or the rule adopted to implement the statute, but on the court's determination that the right to place and collect the non-ad valorem assessments on the ad valorem tax notice by the tax collector was not absolute, creating no duty or obligation on the tax collector. On appeal, the First District reversed, holding that the duty of the tax collector was wholly ministerial. In explaining its decision, the First District stated:

> [b]oth parties agree that the Tax Collector only has such authority as is clearly conferred by statute or is necessarily implied from express statutory powers or duties . . . .
>
> Section 197.3632 prescribes the procedures with which the County must comply if it elects to use the uniform method of collection of its non-ad valorem assessment on the annual tax notice. See § 197.3632, (9), Fla. Stat. The statute, however, does not invest the Tax Collector with any discretion with regard to the collecting of the special assessment on the annual tax notice once the County elects to use this statutory uniform method for collection and complies with the statute's requirements. Rather, a tax collector's duty under section 197.3632 is wholly ministerial at that point, a conclusion confirmed by Florida Administrative Code Rule 12D-18.001, which implements section 197.3632.

> The rule explains that it is the duty of the local government to determine, under law, whether an assessment levy is constitutional and may be collected as a lien. The duties of the property appraisers and tax collectors under section 197.3632, Florida Statutes, are ministerial and shall not be construed to authorize any levy.
>
> * * *
>
> We understand that the Tax Collector's objections to use of the annual tax notice for collection of the special assessment were motivated by his concerns for the property owners in Escambia County subject to the County's special assessment. Nevertheless, the Tax Collector acting in his official capacity has the ministerial duty of placing the County's assessment in this case on the annual tax notice upon the County's compliance with the uniform collection procedures contained in section 197.3632 and Florida Administrative Code Chapter 12-18. The Tax Collector has no authority to refuse that duty based upon his own determinations of the legality of the assessment or the constitutionality of any lien resulting from nonpayment of the assessment.

717 So. 2d at 87-88.

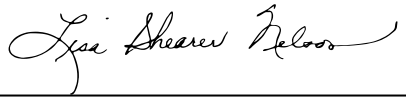
62. Like the county's action in Bell, Petitioner has complied with the statutory and rule requirements for renewing its lien against the License. Like the tax collector in Bell, DABT has concerns based on matters outside the confines of the statute and rule.[3/] Like the tax collector's concerns about the constitutionality of using the uniform process for the assessment in Bell, DABT's concerns about the vitality of the

lien, given the revocation and reissuance of the License, are issues for another entity to decide: in this case, the circuit court should decide any challenges related to enforcement proceedings. Those concerns are not a basis for refusing to extend Petitioner's lien.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a Final Order approving the renewal of Rebco's lien in the License at issue in this case.

DONE AND ENTERED this 17th day of July, 2015, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Tallahassee, Florida 32399-3060
(850) 488-9675
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www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of July, 2015.

ENDNOTES

[1/] Requests for hearing based on a dispute of material fact must be granted or denied within 15 days of receipt, and requests are to be forwarded to DOAH within that same time period.

§ 120.569(2)(a), Fla. Stat. Here, there was a delay of close to three years. No explanation was made for the lengthy delay.

[2/] Given that the handwritten note on the 2007 e-mail referenced activities in 2011, it is presumed that this note was added by someone reviewing the file at a later date.

[3/] Here, those concerns would not exist had DABT complied with section 561.65's requirements regarding notice of the revocation of the License.

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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.