

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 18-3101

CELTIC MANAGEMENT CONCEPTS, LLC,  
d/b/a CONNOLLY'S PUB,

Respondent.

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RECOMMENDED ORDER

On August 10, 2018, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing in this case by video teleconference in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Alicia Bhambhani, Esquire  
Daniel Johnathon McGinn, Esquire  
Department of Business and  
Professional Regulations  
2601 Blair Stone Road  
Tallahassee, Florida 32399

For Respondent: Leonard Nolan  
Celtic Management Concepts, LLC,  
d/b/a Connolly's Pub  
323 North Ronald Regan Boulevard  
Longwood, Florida 32750

STATEMENT OF THE ISSUE

Whether Celtic Management Concepts, LLC, d/b/a Connolly's Pub (CMC), violated section 561.29(1)(a), Florida Statutes (2017),<sup>1/</sup> when it failed to remit proper taxes to the Division of Revenue (DOR); and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

Petitioner, the Department of Business and Professional Regulation (DBPR), Division of Alcoholic Beverages and Tobacco (Division), issued an Administrative Complaint (Complaint) dated November 9, 2017, charging CMC with one count:

On or about 05/23/2017 you, the aforementioned licensee, holding a license issued by the Division of Alcoholic Beverages and Tobacco [ ]to wit: CELTIC MANAGEMENT CONCEPTS LLC, D/B/A CONNOLLYS PUB, did unlawfully on your premises or elsewhere while in the scope of employment, fail to comply with the reporting requirements and submission of sales taxes collected and to timely remit taxes collected to the Florida Department of Revenue, this act being contrary to and in violation of sections 212.14 and 212.15, Florida Statutes, within section 561.29(1)(a), Florida Statutes.

The Complaint was silent as to whether this proceeding involved CMC's first offense, how much CMC owed DOR, or how long CMC failed to comply with the reporting requirements and/or pay the proper amount of taxes.

As for the penalty the Division was seeking, the Complaint was vague.<sup>2/</sup> It stated:

Petitioner intends to revoke; suspend; annul; impose civil penalties, investigative costs, and late penalties; or any combination of these authorized penalties.

In response to the Complaint, on December 19, 2017, CMC filed a "Request for Hearing" form indicating it disputed an issue of fact in the Complaint, and it believed CMC was owed a tax credit from DOR for past overpayments.

The Division referred the matter to DOAH on June 15, 2018, along with page 2 of Respondent's "Request for Hearing" form and pages 7 and 8 of the Complaint. The undersigned noticed a final hearing for August 10, 2018, and a pre-hearing telephone conference for August 1, 2018. Petitioner failed to attend the pre-hearing conference.

At the final hearing, the Division presented the testimony of Angelica Rivera, a DBPR Administrative Assistant II in the Orlando field office; and Steven Amole, a DOR Administrator III in the Orlando field office. CMC presented the testimony of Leonard Nolan, its owner; and Pam Bowan, a tax preparer and personal friend of Mr. Nolan. The undersigned took official recognition of Petitioner's Exhibits 2 and 3, and Petitioner's Exhibit 4 was entered into evidence. CMC offered as evidence a Stipulation Agreement between CMC and DOR and was allowed to supplement the record with this document after the hearing. That Stipulation Agreement has been admitted into evidence as Respondent Exhibit 1.

CMC also submitted additional documents after the hearing. None of Respondent's other documents have been admitted into evidence or considered by the undersigned.

The Transcript of the final hearing was filed on August 31, 2018. Both parties timely filed proposed recommended orders, and both have been considered in preparation of this Order.

#### Motions to Relinquish Jurisdiction

On August 2, 2018, the Division filed a Motion to Relinquish Jurisdiction. The undersigned denied this motion at the commencement of the final hearing on August 10, 2018, finding it had been filed too close to the final hearing date. Pursuant to Florida Administrative Code Rule 28-106.204, Respondent had seven days to respond to the motion, but because it was served only by U.S. Mail, it had an extra five days to respond. See Fla. Admin. Code R.28-106.103. This placed CMC's response due beyond the August 10, 2018, hearing date.

At the final hearing, the Division renewed its Motion to Relinquish Jurisdiction arguing that a DOR tax warrant against CMC left no disputed fact regarding the charge in the Complaint. Although the tax warrant established CMC owed outstanding taxes to DOR, CMC claimed any failure to pay taxes was inadvertent and it had entered into a payment plan with DOR. Therefore, CMC argued, it should either not be penalized or it should receive a less severe penalty due to mitigating circumstances. This

created disputed issues of material fact related to CMC's intent and the appropriate penalty. The undersigned denied the oral request to relinquish jurisdiction at the hearing because of the vagueness of the administrative complaint relating to the penalty; the lack of any stipulations between the parties; and to allow CMC to present evidence as to its intent and the corrective measures it had taken.

After the final hearing, on September 6, 2018, the Division filed a Second Motion to Relinquish Jurisdiction arguing again the existence of the tax warrant eliminated any issues of disputed fact. CMC failed to file a response to the Motion in the time allotted by rule 28-106.204(1).

As an initial matter, the Division had the burden to prove CMC intended to defraud the state in order to establish a violation of section 212.15, Florida Statutes, as alleged in the Complaint. The existence of the tax warrant did not establish this element or resolve the dispute created by CMC's evidence that it did not know it was delinquent in its tax obligations.

Next, even if the tax warrant established Respondent violated section 212.14 (which does not require a showing of intent), there was still a disputed issue of fact regarding the penalty. Ordinarily, matters that are offered in mitigation of uncontested administrative charges can be presented directly to the agency at an informal hearing. See, e.g., McGraw v. Dep't.

of State, 491 So. 2d 1193, 1195 (Fla. 1st DCA 1986) ("To the extent that appellant's petition for hearing sought to present mitigation, an informal hearing under Section 120.57(2) would have provided a forum more than adequate for such purpose."). If, however, as here, the charge is contested and there is a disputed issue of material fact relevant to the penalty, then the factual disputes should be determined by DOAH in a formal hearing. See Altee v. Duval Cnty. Sch. Bd., 990 So. 2d 1124, 1129-30 (Fla. 1st DCA 2008) ("We conclude that the School Board's motion raised a disputed factual issue as to the appropriate penalty or remedy. . . . At the very least, due process requires the ALJ to hold a hearing to afford the parties an opportunity to present evidence on these disputed material facts."); cf., Dep't of Bus. and Prof'l Reg., Div. of Alcoholic Beverages and Tobacco v. Pineapple Grille, Case No. 08-3110, 2008 Fla. Div. Adm. Hear. LEXIS 846, at \*10 (Fla. DOAH Sept. 30, 2008; Fla. DBPR November 17, 2008) (noting the Division has discretion to impose a lesser penalty pursuant to section 561.29(3), based on the facts); Dep't of Bus. Reg., Div. of Alcoholic Beverages and Tobacco v. Sloane's Bar-B-Q, Inc., Case No. 83-2657, 1983 Fla. Div. Adm. Hear. LEXIS 6253, at \*5 (Fla. DOAH Oct. 28, 1983) ("There are mitigating circumstances present in the case at bar. The violations were clearly not intentional and were attributable to circumstances beyond Respondents' control.

Moreover, Respondents have entered into an arrangement with the Department of Revenue for full repayment of the taxes due.”). As such, the Division’s Second Motion to Relinquish Jurisdiction is denied, and the undersigned enters this Recommended Order.

FINDINGS OF FACT

1. CMC is the holder of a series 2-COP beverage license, number BEV6910406 (License), issued by the Division in 2011.

2. CMC was required by chapter 212, Florida Statutes, to remit to DOR the taxes associated with alcoholic beverages sold pursuant to its License. It failed to do so.

3. On May 23, 2017, DOR issued a tax warrant against CMC in the amount of \$15,279.45 for the amount of taxes owed by CMC, along with interest, penalties, and fees pursuant to chapter 212. CMC acknowledges the tax warrant and that it owes DOR outstanding taxes.

4. The undersigned rejects the testimony by Leonard Nolan, CMC’s president and stockholder, that CMC was unaware it was delinquent in paying state taxes because all of the DOR and Division paperwork was handled by its accounting firm. Mr. Nolan knew or should have known as of May 23, 2017 (the date of the tax warrant) that it had an outstanding tax obligation. Moreover, the claim that Mr. Nolan did not receive any correspondence from the Division is also not credible. He responded to the Complaint and the same address was used for other correspondence. CMC’s

conduct of ignoring the notices of past due taxes and failing to address the delinquency in a more timely manner was intentional.

5. CMC established, however, it has recently taken steps to become fully compliant. It entered into a Stipulation Agreement, Form DR-68, with DOR on August 6, 2018. The Stipulation Agreement provides that CMC will make three payments beginning August 27, 2018, and ending October 25, 2018. In total, CMC will pay \$35,721.35; this is more than the amount of the 2017 tax warrant.

6. This is CMC's first violation of chapter 212.

#### CONCLUSIONS OF LAW

7. The Division is authorized to impose penalties against CMC's License when the licensee is determined to have violated any of the laws of the State of Florida. See § 561.29(1)(a), Fla. Stat.

8. In disciplinary proceedings involving beverage licenses, the Division bears the burden to prove a violation has occurred by clear and convincing evidence. See Silver Show, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco, 763 So. 2d 348, 349 (Fla. 4th DCA 1998) (explaining the differences between the burdens of proof in agency licensing and disciplinary proceedings).

9. The "clear and convincing standard" is defined as an intermediate burden of proof requiring that:



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.

S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872

(Fla. 2014) (citations omitted).

10. Section 212.14(2) provides:

Wherever returns are required to be made to the department hereunder the full amount of the taxes required to be paid as shown by said return shall be paid and accompany said return, and the failure to remit said full amount of taxes at the time of making said return shall cause said taxes to become delinquent.

11. Section 212.15(2) provides:

Any person who, with intent to unlawfully deprive or defraud the state of its moneys or the use or benefit thereof, fails to remit taxes collected under this chapter is guilty of theft of state funds.

12. By intentionally failing to pay taxes it owed to DOR, CMC violated sections 212.14 and 212.15, and, therefore, is subject to administrative action against its License pursuant to section 561.29.

13. Florida Administrative Code Rule 61A-2.022 provides the penalty guideline for the first violation of chapter 212 by an alcoholic beverage license holder is "Corrective action and

satisfaction of debt to DOR, or approved payment plan." Here, CMC has entered into such an approved payment plan with DOR.

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:

1. Finding Respondent, Celtic Management Concepts, LLC d/b/a Connolly's Pub, is subject to penalties pursuant to section 561.29 (1) (a), for violations of sections 212.14 and 212.15, related to delinquent taxes owed to the State Department of Revenue; and

2. Requiring Respondent to comply with the terms of the Stipulation Agreement it entered into with the Department of Revenue dated August 6, 2018.

DONE AND ENTERED this 25th day of September, 2018, in Tallahassee, Leon County, Florida.



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HETAL DESAI  
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 25th day of September, 2018.

ENDNOTES

<sup>1/</sup> All references to the Florida Statutes and Florida Administrative Code are to the 2017 versions in effect at the time of the violation as described in the Administrative Complaint.

<sup>2/</sup> Until the hearing, it was unclear which of these penalties (or combinations thereof) the Division was seeking. It was not until the undersigned asked the Department about the penalty it was pursuing at the close of opening arguments, that Respondent learned "[t]he Department's guideline penalty for this particular offense requires that the Respondent provide the Department with evidence of having either satisfied the tax warrant or entered into a payment plan with the Florida Department of Revenue."

COPIES FURNISHED:

Alicia Bhambhani, Esquire  
Department of Business and  
Professional Regulation  
2601 Blair Stone Road  
Tallahassee, Florida 32399  
(eServed)

Leonard Nolan  
Celtic Management Concepts, LLC,  
d/b/a Connolly's Pub  
323 North Ronald Regan Boulevard  
Longwood, Florida 32750

Daniel Johnathon McGinn, Esquire  
Department of Business and  
Professional Regulation  
Suite C452  
2601 Blair Stone Road  
Tallahassee, Florida 32399  
(eServed)

Jason Maine, General Counsel  
Department of Business and  
Professional Regulation  
Capital Commerce Center  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2202  
(eServed)

Thomas Philpot, Director  
Division of Alcoholic Beverages and Tobacco  
Department of Business and  
Professional Regulation  
Capital Commerce Center  
2601 Blair Stone Road  
Tallahassee, Florida 32399-2202  
(eServed)

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.