

**STATE OF VERMONT
LIQUOR CONTROL BOARD**

JAN 30 2011

IN RE:

**Farrell Distributing Corporation
Doing business at:**

1. **5 Holmes Road
South Burlington, Vermont, under Wholesale Dealer License 2142-006-WHDR-01;
and**
2. **Route 7 South Main Street
Rutland, Vermont, under Wholesale Dealer License 2142-002-WHDR-01**

DECISION

The Liquor Control Board ("LCB") held proceedings in Montpelier, Vermont, on March 23, 2011, to consider the suspension or revocation of Wholesale Dealer License No. 2142-006-WHDR-01 and No. 2142-002-WHDR-01 granted to Farrell Distributing Corporation ("FDC"), doing business at the captioned locations.

Each Wholesale Dealer License enables FDC to sell malt and vinous beverages to first and second class liquor license holders (retailers).

FDC was present by and through David Farrell, its president and duly authorized agent. FDC was not represented by an attorney.

The Department of Liquor Control ("DLC") was present, and represented by Assistant Attorney General Jacob A. Humbert.

A Notice of Hearing, dated February 18, 2011, with Investigative Reports attached, was sent to FDC at each of its two captioned locations, in which it was alleged: that during 2010, FDC provided things of value to retail licensees in violation of Wholesale Dealer Regulation No. 15 ("WDR 15").

WDR 15 was duly adopted by the LCB.

FINDINGS OF FACT

1. The Licensee, FDC, doing business at 5 Holmes Road, South Burlington, Vermont, and at Route 7 South Main Street, Rutland, Vermont, by and through Wholesale Dealer License No. 2142-006-WHDR-01 and No. 2142-002-WHDR-01, respectively, is permitted to sell malt and vinous alcohol containing beverages to first and second class retailers.

2. WDR 15 states:

No manufacturer, certificate of approval holder, or wholesale dealer shall directly or indirectly or through any affiliate induce any licensee to purchase any alcoholic beverage by giving or offering to such purchaser anything of value except brand-identified items which are primarily valuable to the retailer for advertising purposes only. Such advertising items require prior Liquor Control Board approval.

3. Prior to the receipt of any testimony, the DLC, through Humbert, its attorney, and FDC, by and through Farrell, its president, stipulated jointly, or separately, as indicated, to the following:

(a) That FDC properly received and is in receipt of the Notice of Hearing dated February 18, 2011 and the attached Investigative Reports; and

(b) That FDC is familiar with WDR 15; and

(c) That State's Exhibit No. 1 for identification is a CD that contains a complete copy of every document that was on file with and in the possession of FDC that the DLC Investigators obtained, then examined, and deemed material to their investigation; and

(d) That State's Exhibit No. 2 for identification is a factually correct summary of all FDC records, at issue (commentary excluded). The records of which State's 2 is a summary are all contained in State's 1; and

(e) That Licensee's Exhibit No. 1 for identification is a rearranged and annotated version of State's 2 (commentary excluded) that FDC has created, it asserts, to assist

the LCB in understanding State's 2, by placing its content into categories, and to assist the LCB to more easily understand the forthcoming testimony of David Farrell; and

(f) DLC stipulates to the admission of Licensee's 1 as to any facts stated thereon, but not to any commentary inconsistent with the commentary the DLC has placed on State's 2; and

(g) FDC stipulates to the admission of State's 2 with respect to all statements of fact, but not to any commentary inconsistent with any commentary on Licensee's 1; and

(h) DLC and FDC both stipulate to the admission of State's 1.

4. State's 1 and 2 and Licensee's 1 are admitted as stipulated. The Board will incorporate any "commentary" on the admitted exhibits, or not, consistent with what it finds to be fact based upon the admitted exhibits, and the credible testimony received.

5. Pursuant to a statewide investigation of wholesale alcohol dealers, in October of 2010, DLC Investigators were at the FDC facility in South Burlington, Vermont. Their visit was unannounced. The investigation was precipitated by the DLC receiving anonymous reports that wholesale dealers were giving gifts and things of value to certain retail alcohol licensees, in possible violation of WDR 15.

6. The DLC Investigators requested and then obtained FDC records of its sales representatives' expenditures for or on behalf of retailers to determine if any gifts or things of value were being given or offered by the sales representatives to FDC licensees. Records were obtained for the period January 1, 2010 through October of 2010. An FDC employee provided the requested records in a timely manner.

7. The documentation obtained from FDC was brought to the DLC offices in Montpelier, Vermont, where they were examined and reviewed individually. Those records

revealing transactions questionable in nature were noted, photocopied for documentation purposes, and then the originals were returned to FDC. (Representations made by Humbert, unopposed by Farrell).

8. At this point, the DLC rested, subject to its request that it be permitted to reopen in the event that at the end of the Licensee's case it found it necessary to do so. The Board noted the DLC request.

9. Because of the nontraditional manner in which this case was presented to the Board, the Board took judicial notice of the FDC file in this cause by virtue of which it inserted the foregoing Paragraphs 5, 6 and 7 for clarity.

10. David Farrell ("Farrell"), president of FDC, a Vermont corporation with offices in South Burlington and Rutland, Vermont, was duly sworn and testified without an attorney, and in large part unprompted by questions materially, as follows.

(a) Page 1 of Licensee's 1, in summary form, relates that between and including 4/9/10 and 8/11/10, FDC expended a total of \$235.00 to contribute to "charity events" held at two of its retailers. All of the proceeds were distributed to the two charities noted.

(b) Page 2 of Licensee's 1, in summary form, relates that between 2/12/10 and 9/9/10 FDC expended a total of \$245.00 to sponsor "consumer raffles" for which approval was obtained from the DLC beforehand.

(c) On Pages 3 and 4 of Licensee's 1, again in summary form, is related that FDC during the period from 2/3/10 through 9/4/10, expended \$3,956.00 for a variety of promotions involving dinner, lunch meetings and the like for non-alcohol retailer "soda" accounts. They are mentioned because they were part of the records obtained by the DLC

Investigators. Soda accounts, and all non-alcohol accounts, are not matters with which the DLC has any authority or concern.

(d) On Page 5 of Licensee's 1, in summary form, is related that FDC from the period 1/16/10 through 8/2/10 expended a total of \$1,422.00 to participate in eight separate wine dinners at different restaurants for four different retailers. At each such dinner, the invited public paid the same price as did FDC and the price paid for the wine provided by FDC was the same price at which FDC bought the wine. There was here no giving of a thing of value to a retailer.

(e) Page 6 of Licensee's 1 details a list of 12 events for the period 2/5/10 through 8/30/10 for which FDC expended the sum of \$8,550.00 to sponsor promotions at Nectar's, a retailer, which were conducted by a third party marketing company. DLC approval was received in advance for each event.

(f) Pages 7 through 9 of Licensee's 1 set forth the e-mail paper trail between FDC and the DLC seeking the approvals for the events set forth in the previous paragraph.

(g) Pages 10 through 18, inclusive, of Licensee's 1 reveal that the sum of \$16,979.00 was expended by FDC during calendar year 2010 through its numerous sales representatives for a variety of purchases, including but not limited to, retail entertainment and hospitality purposes at licensed establishments. Also included without limitation are the following: dinners, hotel expenses, lunches, "tournaments", beer tickets, rounds of golf, beer as beverages, golf tournaments, "working" dinners and lunches, food purchases, wine as beverage purchases, two account dinners, lunch and/or dinner with business customers, concert tickets, race-track tickets, baseball game tickets, and associated expenses typically made by a host.

11. The expenditures by FDC presented in detailed summary form on Pages 10 through 18, inclusive, of Licensee's 1, were not presented to the DLC for preapproval, and consequently were not known to the DLC.

12. FDC did not seek approval for the expenditures identified on Pages 10 through 18 of Licensee's 1, inclusive, because FDC did not believe that it was needed. Expenditures of the type set forth on Pages 10 through 18 have been made, asserted Farrell, on behalf of FDC and all other known wholesale dealers in the alcohol beverage industry for decades. This is true not only in Vermont but if not in all states nationwide then in the majority of states.

13. Such expenditures have become a long standing practice in the beer, wine and liquor industries and are made for and on behalf of each wholesaler's licensed retailers.

14. At each such event, whether at business meetings at lunch or dinner, entertainment at a golf course or at tournaments and ball games, without exception, employees of FDC were always present and FDC was always well represented at such events by its employees.

15. The Board asked the question of Farrell as follows: "Who and by whom is it determined which retail licensees receive gifts or things of value for which the expenditures shown on Pages 10 through 18 of Licensee's 1 were made?"

Farrell responded to the question and said that those determinations are made by FDC salesmen, who are all over the state, on the basis of demographics and are not micromanaged by either he or other FDC managerial employees. FDC relied upon the good judgment of each FDC salesman vis-a-vis the proceeds expended.

16. FDC from time to time had the opportunity to buy suites of hotel rooms and a block of tickets at ball games which are then distributed by the salesmen to FDC retailers.

17. In many instances retailers ask for business meetings off the premises and often these meetings result in lunches and/or dinners at which the alcohol is purchased by FDC as well as the food.

18. Farrell did not believe that the expenditures shown on Pages 10 through 18 of Licensee's 1 induced any retailer to purchase alcohol or to purchase more alcohol, in violation of WDR 15. (Underlining to call attention to the word).

19. Farrell strongly asserted that the expenditures made by FDC illustrated on Pages 10 through 18 of Licensee's 1 are now and have been made by alcohol wholesalers for decades. FDC was established by his grandfather and then passed on to his father and now is in his hands, the grandson of the founder. Those gifts, gratuities, promotions and purchases made on behalf of retailers by FDC have been a business practice expense for so long and so openly conducted, that Farrell thought it was unnecessary to present these expenses to the DLC for approval, even though they are in the strict interpretation of WDR 15, the giving of a thing of value. The expenses in question, he believed, should be treated as a separate category of permitted business expenses, and therefore not a violation of WDR 15.

20. FDC has a modern computerized bookkeeping system which is capable of producing for the DLC, within reason, whatever statistic the DLC requires FDC to report. It would not present a problem for FDC to insure that any retail account which is both a non-alcohol as well as an alcohol account be reported separately so that there could be no intermingling of any record of alcohol transactions with non-alcohol transactions.

21. Farrell emphatically asserted his wish to be recognized as a wholesaler wholly cooperative with the DLC, and in that regard requested that the LCB and the DLC look at the issues presented by the FDC expenditures for retailers and adjudicate the issues before the LCB

with an understanding of the long history of the practice, and the need for clarifying and clear supplementary regulation by the LCB. (Taken from the testimony of Farrell).

22. The DLC requested it be permitted to remove the Nector's expenditures, shown on Page 6 of Licensee's Exhibit 1, from the list of allegations of wrongdoing by FDC. The LCB granted the request.

23. Farrell stated that DLC Exhibit marked State's 3, a memo from William Goggins, Director of DLC Enforcement, dated May 24, 2005, and addressed to "All Wholesale Dealers, Certificate of Approval Holders, Manufacturers, Holders of Solicitor's Permits, Spirits Brokers" concerning "Tasting/Promotions/Things of Value" must have been received by FDC. State's 3 was admitted without objection. In it, Goggins made the following statements which have been paraphrased:

(a) He (Goggins) is still receiving information that retailers are receiving incentives by industry members ranging from price breaks, free product, direct/indirect monetary payments, payments for advertising and so on and so forth; and

(b) Both State and Federal Regulations view these and other incentives as inducements and are therefore considered illegal practices (underlining for clarity). He encouraged a review of certain advertising regulations as well as General Regulation No. 22 and Wholesale Dealer/Certificate of Approval/Manufacturers Regulation No. 15; and

(c) It is imperative he said that Vermont maintain its status as a level playing field. The Regulations on the books are there for a reason and they will be enforced; and

(d) Effective immediately, prior Board approval is necessary for all promotions, incentives and point of sale advertising. Requests for such shall include the nature of the promotion, the dates and times, the number of items supplied and the cost of each item.

Any contract or agreement entered into by an industry member and a retailer or retailer association will be forwarded by you (the wholesaler) to the Board for review. Violations will be thoroughly investigated and administrative action before the Board may occur. (Taken from State's 3).

24. At this point, FDC rested and the DLC stated that it had no wish to reopen its case and rested as well. The hearing then concluded. Neither the DLC nor FDC requested an opportunity to submit findings.

CONCLUSIONS

1. The Licensee, FDC, conducts its wholesale dealer business at 5 Holmes Road, South Burlington, Vermont, and at Route 7 South Main Street, Rutland, Vermont. FDC at each location does business with a wholesale dealer license which are in sequence No. 2142-006-WHDR-01 and 2142-002-WHDR-01. Each license enables FDC to sell malt and vinous beverages to first and second class licensees within its geographic territory.

2. WDR 15, which is set forth in full in the Findings, has divided the Board with respect to its interpretation.

3. One interpretation of WDR 15 requires that before the giving or offering a licensee anything of value can become a violation it must have induced that licensed retailer to purchase an alcoholic beverage. (Underlining added here and below for emphasis and clarity).

4. Another interpretation of WDR 15 is that by the mere giving or offering to a retail licensee anything of value, you have induced that licensee purchaser without more.

5. It is clear and undisputed that there is an exception in the prohibition against giving or offering a purchaser anything of value when a brand identified item is given, which

item is primarily valuable to the retailer and is for advertising purposes only. Such advertising items require prior Liquor Control Board approval, however. (WDR 15).

6. The fact that the DLC at the end of FDC's case did not wish to reopen indicates to the Board that State's 2 is materially consistent with Licensee's 1 and therefore need not be individually treated. In addition, there was no need for the Board to consider State's 1 because there was no controversy between the DLC and FDC as to any transaction reported on Licensee's 1, that required referral to State's 1 for resolution.

7. The Board is impressed by its examination of Licensee's 1 and by the testimony given by Farrell. Both were helpful to the Board in better understanding FDC's records and documents in question, and the reason for the expenditures.

8. The charity events to which FDC contributed \$235.00 as detailed on Page 1 of Licensee's 1, do not constitute a violation of WDR 15.

9. So also, on Page 2 of Licensee's 1, the purchase of raffle tickets by FDC for the two identified licensees for which DLC gave approval, do not constitute a violation of WDR 15.

10. Pages 3 and 4 of Licensee's 1, which were part of the documents obtained by DLC Investigators, although they pertained entirely to a soda account over which the DLC and the LCB have no jurisdiction, are not applicable, and are therefore dismissed from any further consideration.

11. Page 5 of Licensee's 1 showing FDC expenditures of \$1,422.00 are not a violation of WDR 15 because the dinners were held by the retailers and the attending public paid one-half of the cost of the wine and FDC paid the other half, while the total price for the wine was at cost to FDC. The Board wishes to look at these events realistically and in doing so finds

no violation of WDR 15. There was no actionable giving of anything of value to the retailer by FDC.

12. Page 6 of Licensee's 1 is merely a list of promotions held at Nectar's, a Burlington retailer, for which FDC received DLC approval.

13. Pages 7 through 9 of Licensee's 1 are merely e-mail requests by FDC to the DLC seeking approval for the Nectar's promotions.

14. Pages 10 through 18 of Licensee's 1 contain a variety of expenditures by FDC for gifts and promotions that are each violations of WDR 15 because they constitute the giving of a thing of value to a retailer and are not covered by an exception. Many of the expenditures constitute the picking up of the tab for lunches and dinners as well as associated beverages, but others for example involve rounds of golf, tickets to concerts, tickets for horse races, tickets for baseball games with associated expenditures as stated for food and drink, hotel fees, and the like. The violation of WDR 15 by FDC as stated was proven by an unquestionable preponderance of the evidence.

15. As to the expenditures detailed on Pages 10 through 18 on Licensee's 1, two Board members voted in favor of finding a violation of WDR 15 and one voted against. The prevailing conclusion of the Board is that a prohibited inducement has occurred when "anything of value" is given or offered to a licensed retailer, unless the Board has beforehand approved the "giving or offering" of the "anything of value" as brand identified advertising. (WDR 15).

16. The Board further painfully concludes that the Memo from DLC Enforcement Director William Goggins to "All Wholesale Dealers, Certificate of Approval Holders, Manufacturers, Holders of Solicitor's Permits, Spirits Brokers." dated May 24, 2005, in evidence as State's 3, gave good and sufficient notice to FDC and other Vermont wholesalers that:

- (1) retailers are receiving incentives from industry members, and
- (2) that the incentives in part included “price breaks, free product, monetary payments, payments for advertising . . .” and so on, and
- (3) Vermont and Federal Regulations view the foregoing incentives as inducements (emphasis) and are consequently an illegal practice; and
- (4) the wholesalers and other addresses should review, in part, WDR 15, and
- (5) effective immediately – all promotions and incentives shall have “prior Board approval”. (A summary of State’s 3).

17. This causes the Board to conclude that FDC blatantly ignored and avoided the constructive warning given to it some four (4) years before. Farrell did not in any sense of the word recognize State’s 3, but concluded that if it was sent to the wholesalers, it must have been received by FDC. Regulations of the Board need to be given serious attention. Failure to do so places the liquor license in jeopardy.

18. The Board also concludes, from the testimony of Farrell and from an examination of Licensee’s 1, that FDC retailers do not share materially equally in the receipt of “anything of value” from FDC.

DECISION

It is the determination of the Liquor Control Board that: Farrell Distributing Corporation, doing business at 5 Holmes Road, South Burlington, Vermont, and at Route 7 South Main Street, Rutland, Vermont, under Wholesale Dealer License 2142-006-WHDR-01 and 2142-002-WHDR-01, violated Wholesale Dealer Regulation No. 15 as set forth in this Decision, is fined the sum of Five Thousand Dollars (\$5,000.00) to be paid to the DLC by the end of the 10th business day following the day this Decision is served upon Farrell Distributing Corporation.

Dated at Burlington, Vermont, on this 23rd day of January,

2012.

LIQUOR CONTROL BOARD

By: Stephanie O'Brien
Stephanie M. O'Brien, Chair