

DOCKET NO. 458-03-1850

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

A & R ENTERTAINMENT, INC.
D/B/A ALICE FAYE'S
PERMIT NOS. MB-502781 & LB-502780
ARANSAS COUNTY, TEXAS
(TABC CASE NO. 600709)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks to suspend or cancel permits held by A & R Entertainment, Inc., (Respondent) doing business as Alice Faye's, for allegedly selling an alcoholic beverage to an intoxicated person. The Administrative Law Judge (ALJ) concludes that Petitioner failed to prove by a preponderance of the evidence that Respondent sold or delivered an alcoholic beverage to an intoxicated person. Consequently, this Proposal for Decision (PFD) recommends that no adverse action be taken against Respondent.

I. Jurisdiction and Notice

Notice and jurisdiction were not contested issues and are addressed in the findings of fact and conclusions of law without further discussion here.

II. Procedural History

The hearing convened and the record closed on May 2, 2003. Respondent appeared through its president, Alice Faye Fields and was represented by Patricia Asack, attorney. Petitioner was represented by its attorney, Dewey Brackin. ALJ Melissa M. Ricard presided over the hearing and issues this PFD.

III. Discussion

A. Background

Respondent operates Alice Faye's, a restaurant-bar establishment, in Fulton, Aransas County, Texas, pursuant to Texas Alcoholic Beverage Commission permit numbers MB-502781 and LB-502780.

On July 5, 2003, Respondent sold an alcoholic beverage to Chris Cable. Petitioner conducted an investigation and determined that on July 5, 2003, Respondent's agent, servant, or employee sold

an alcoholic beverage to Mr. Cable, who was intoxicated at the time, in violation of TEX. ALCO. BEV. CODE §11.61(b)(14).

B. Legal Standards

1. Authorization for suspension

Petitioner is authorized to suspend or cancel a permit if a permittee sells or delivers an alcoholic beverage to an intoxicated person. TEX. ALCO. BEV. CODE (the Code) §11.61(b)(14). "Permittee" includes the permit holder as well as the holder's agent, servant, or employee. TEX. ALCO. BEV. CODE §1.04(11).

2. "Intoxication" defined

"Intoxication," for purposes of this proceeding, is defined at 16 TEX. ADMIN. CODE (TAC) §50.2(2)(A) as not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body.

3. Burden of Proof

Petitioner has the burden of proof to establish by a preponderance of the evidence that Respondent and/or its agent, servant, or employee sold alcoholic beverages to a person who was intoxicated.

C. Evidence

Petitioner called one witness in support of its case, TABC Agent Brian Tullis. In addition, it offered documentary evidence, which included Respondent's permit and license history.

Respondent called one witness, Alice Faye Fields, its president. Respondent offered a videotape of the premises on the night of July 5, 2003, into evidence.

1. Agent Brian Tullis

Agent Brian Tullis testified that he was on the premises on July 5, 2003 because the TABC had received anonymous complaints that the establishment was selling alcohol to intoxicated persons.

Agent Tullis testified that he was at the establishment, in plain clothes. He was seated at a table about 10 feet away from the bar. There were approximately 35 -50 people in the establishment at the time. Due to the size of the establishment, it was fairly full. Although a band playing outside on the back porch, Agent Tullis had no trouble talking with and listening to his partner and others who were at his table.

Agent Tullis observed Mr. Cable sitting at the bar talking loudly. Mr. Cable sat on a bar stool and swayed from side to side. Agent Tullis noted that when Mr. Cable stood up, he had unsteady balance and difficulty walking. Agent Tullis could hear Mr. Cable talking loudly as he moved about the establishment, but could not make out what Mr. Cable was saying.

Agent Tullis observed that Mr. Cable approached an on-going shuffle board game. It was Agent Tullis impression from the facial expressions of those individuals that the intrusion was not welcome. However, Agent Tullis did not hear the individuals complain or respond to Mr. Cable, and it appeared they all knew each other. Agent Tullis observed Mr. Cable sway from front to back as he was standing waiting by the shuffleboard. Agent Tullis testified that Mr. Cable returned to the bar and ordered a drink. During the entire observation, Agent Tullis could still hear Mr. Cable speaking in a loud voice.

Agent Tullis watched the bartender, Victoria Mercer, serve Mr. Cable a mixed drink at the bar and Mr. Cable drink from it. From the shape of the bottle and the color of the liquid Ms. Mercer used to make the drink, Agent Tullis determined that the drink contained alcohol. Agent Tullis observed Mr. Cable stagger back to the shuffleboard and engage in a game with others. Mr. Cable was being loud and obnoxious all the while. As Agent Tullis watched Mr. Cable playing shuffleboard, he noted that Mr. Cable had trouble maintaining his balance.

Agent Tullis had never seen or met Mr. Cable prior to this incident. After watching Mr. Cable for approximately 40 minutes, Agent Tullis contacted Sargent Art Munsel from the Texas Department of Public Safety and inform him that Mr. Cable was publicly intoxicated. Agent Tullis also advised Sargent Munsel that the Respondent was selling alcohol to an intoxicated person. Mr. Cable was arrested for public intoxication, but refused to provide a breath specimen to verify the concentration of alcohol in his system. Ms. Mercer was arrested for selling of alcohol to an intoxicated person.¹

2. Alice Faye Fields

Alice Faye Fields is the president and shareholder of A & R Entertainment, Inc. Ms. Fields testified she was not present in the establishment on July 5, 2002. She also stated that she knows Mr. Cable and considers him a regular customer. She testified that Mr. Cable usually runs a tab.

She testified that in October 2000 she began videotaping activities in her restaurant. The videotape records four different areas of the restaurant-bar all at the same time without audio. Although the timer on the videotape shows real time, the tape shows movement as being faster than normal, as if the tape is in "fast forward" mode. The relevant portion of the tape admitted into evidence begins at 22:57 p.m. which Ms. Fields testified was 11:57 p.m on July 5, 2002. The tape shows Mr. Cable moving about the bar, without having to hold on to anything to balance himself. Mr. Cable did not stumble, stagger or sway noticeably. The tape shows Agent Tullis at a table next to the shuffleboard. It shows Mr. Cable leaving the bar area twice to go to the patio area, and twice

¹ The parties stipulated that Ms. Mercer was acquitted of the charge at a jury trial.

to the location of the phones and the restrooms. It shows Mr. Cable at the bar being served and drinking a beverage at 23:38. It shows Mr. Cable approaching the shuffleboard, and then later returning to the shuffleboard and engaging in a game for a period of time. It ends with Sargent Munsel and Agent Tullis entering the bar, approaching Mr. Cable and thereafter, all of them exiting the bar at 23:57. Mr. Cable held the door for Sargent Munsel and Agent Tullis to exit.

IV. Analysis

The Petitioner relies solely on the testimony of Agent Tullis. Respondent relies solely on the videotape. Because the tape shows movement in a faster than normal fashion, it can not wholly corroborate or disprove Agent Tullis' observations. The tape is useful to show that Mr. Cable was, in fact, served a beverage from Ms. Mercer at the bar. The tape also shows the relative location of the persons involved in the incident to each other. The tape does not show a slight sway, nor does it show Mr. Cable falling down, mis-stepping or hanging on to anything to maintain his balance.

Agent Tullis believed that Mr. Cable disturbed the patrons who were playing shuffleboard when he approached them. He stated he had that impression from facial expressions, and not from complaints or anything they may have said. The tape shows that Mr. Cable first went over to the shuffleboard table and approached individuals playing a game. Agent Tullis was right next to the shuffleboard table. If Mr. Cable was talking in a loud voice, then Agent Tullis should have been able to hear what Mr. Cable was saying. Later, Mr. Cable went back to the shuffleboard, waxed the surface and engaged in a game for a period of time. Respondent argues that the first approach by Mr. Cable was mostly to determine when the on-going shuffleboard was ending so that Mr. Cable could start his own game. The Agent's impression was only that, and with out more evidence, his impression regarding the intrusion does little to establish whether Mr. Cable was intoxicated at the time.

Although Agent Tullis indicated Mr. Cable was speaking in a loud voice, the Agent could not hear specifically what Mr. Cable was saying. Additionally, the swaying and unsteady balance that the Agent reported are not evidenced on the video tape. Thus, while there is no reason to doubt Agent Tullis' testimony, there was no corroboration either. The Petitioner must establish that it was more likely than not that the Respondent sold alcohol to Mr. Cable at a time when Mr. Cable had lost normal use of his mental and physical faculties. The ALJ finds that the Petitioner did not meet its burden of proof. The Agent's testimony regarding Mr. Cable's loud voice, swaying and unsteady balance in light of the videotape is not enough to carry this burden.

Because Petitioner failed to sustain its burden of proof, the ALJ recommends that no adverse action be taken against Respondent.

V. Findings of Fact

5. A & R Entertainment, Inc. (Respondent) operates an establishment known as Alice Faye's in Fulton, Aransas County, Texas, pursuant to Texas Alcoholic Beverage Commission (Petitioner) permit numbers MB-502781 and LB-502780.

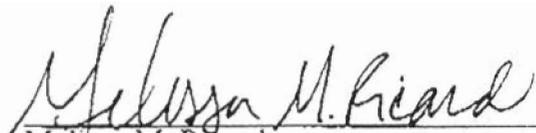
6. On July 5, 2003, Christopher Cable purchased and was served alcoholic beverages from Respondent.
7. Petitioner conducted an investigation and determined that Respondent sold or served alcoholic beverages to Mr. Cable when Mr. Cable was intoxicated.
8. Based on Finding of Fact 3, Petitioner determined that Respondent violated TEX. ALCO. BEV. CODE §11.61(b)(14). Respondent brought an appeal of this determination resulting in this administrative hearing.
9. On January 29, 2003, notice of the hearing was sent to Respondent. The notice contained a statement of the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
10. The hearing was held on May 2, 2003, in Corpus Christi, Texas.
11. Mr. Cable was present at the establishment on July 5, 2002 and was served an alcoholic beverage.
12. Mr. Cable moved about the establishment, coming and going, without having to hang on to anything for balance; he did not stumble, stagger or sway noticeably. Mr. Cable engaged in a game of shuffleboard, which included waxing down the playing surface and engaged in the game without losing his balance.
13. The Petitioner argued that Mr. Cable was talking in a loud voice, but not loud enough that words could be made out and this argument was not be corroborated.
14. Other than Mr. Cable's balance and loud voice, no other evidence to demonstrate that Mr. Cable was intoxicated was introduced at the hearing.
15. The Petitioner failed to establish that Mr. Cable had lost the normal use of his mental or physical capacities at the time Respondent sold and served Mr. Cable alcoholic beverages.

VI. Conclusions of Law

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE §§2001.051 and 2001.052.

4. Based upon Findings of Fact No. 12, 13 and 14, Petitioner failed to prove by a preponderance of the evidence that Respondent sold or delivered an alcoholic beverage to a person who was intoxicated.
5. Based Conclusion of Law No. 4, Petitioner's proposed suspension of Respondent's permits should be denied.

SIGNED this 26th day of June, 2003.



Melissa M. Ricard
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 600709

IN RE A & R ENTERTAINMENT, INC.	§	BEFORE THE
D/B/A ALICE FAYE'S	§	
PERMIT NO. MB-502779, LB-502780	§	
& PE-502781	§	TEXAS ALCOHOLIC
	§	
ARANSAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-1850)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of July, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on May 2, 2003, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 26, 2003. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

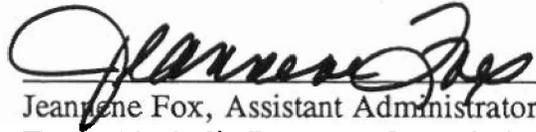
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations made concerning Docket No. 600709 are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on August 6, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 16th day July, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Melissa M. Ricard
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (361) 884-5427

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Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Corpus Christi District Office
Licensing Division