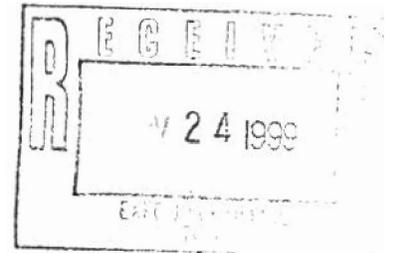


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



November 19, 1999

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

CERTIFIED MAIL NO. Z 409 580 956
RETURN RECEIPT REQUESTED

RE: Docket No. 458-99-0902; TABC vs. Salvatore Carfi d/b/a Italian Restaurant & Flying Pizza, TABC Case No. 579109

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal For Decision are being sent to Dewey Bracken, Staff Attorney representing the Texas Alcoholic Beverage Commission and Salvatore Carfi, d/b/a Italian Restaurant & Flying Pizza. For reasons discussed in the Proposal for Decision, I have recommended that no action be taken to suspend or revoke the Respondent's Wine and Beer Retailers Permit BG-203225.

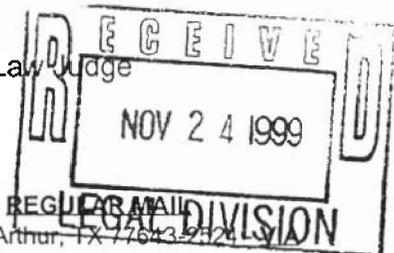
Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or replies must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

Ed Shipper
Administrative Law Judge

ES/rfm
Enclosure

CC: Dewey Bracken, TABC, 5806 Mesa Drive, Suite 160, Austin, TX 78731 - REGULAR MAIL
Bruce K. Bornefeld, McKee Tower, 4749 Twin City Hwy, Suite 426, Port Arthur, TX 77663-9524 - REGULAR MAIL
CERTIFIED MAIL NO. Z 409 580 957. RETURN RECEIPT REQUESTED
Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearings - VIA REGULAR MAIL



North Loop Office Park
2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001

DOCKET NO. 458-99-0902

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

SALVATORE CARFI
D/B/A ITALIAN RESTAURANT & FLYING
PIZZA
PERMIT NO. BG-203225

OF

TABC NO. 579109
JEFFERSON COUNTY, TEXAS

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission ("Commission") brought this enforcement action against a licensee of the Commission for selling an alcoholic beverage to a minor. Respondent appeared and was represented by counsel. The ALJ, having found insufficient evidence that beer was sold to the minor by an agent, servant or employee of the licensee, recommends that no action be taken against the licensee.

I. Procedural History

On May 25, 1999, the Staff of the Texas Alcoholic Beverage Commission ("Staff") notified Salvatore Carfi, d/b/a Italian Restaurant & Flying Pizza ("Respondent") that the staff would seek disciplinary action against the Respondent's permit because the Respondent, its agents, servants or employees sold an alcoholic beverage to a minor. The Staff asserted that such act constituted grounds for suspension or cancellation of the Respondent's Wine and Beer Retailer's Permit.

The hearing commenced on June 16, 1999, in the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. After the taking of evidence, the hearing was concluded with the record left open until June 28, 1999 for the filing of post hearing briefs from the Petitioner and Respondent. Post hearing briefs having been filed by both parties, the record was closed at 5:00 p.m. on June 28, 1999. The Staff was represented by Andrew del Cueto, Assistant Attorney General of Texas. The Respondent was represented by attorney, Bruce K. Bornefeld.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Sections 6.01 and 61.71, and TEX. GOV'T CODE ANN. Chapter 2001, et seq. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing on this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch.2003 (Vernon's 1997).

The Respondent is the holder of Wine and Beer Retailer's Permit BG-203225, and was the holder of the permit on the date of the alleged violation, May 8, 1998. The Notice of Hearing was mailed to the Respondent's attorney's office on the 25th day of May, 1999, pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. Sections 2001.051 and 2001.052.

III. Evidence

From the Staff:

Documentary evidence:

- a. TABC EXHIBIT 1: Texas Alcoholic Beverage Commission Notice of Hearing directed to Salvatore Carfi doing business as Italian Restaurant & Flying Pizza.
- b. TABC EXHIBIT 2: Affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Permit BG-203225 issued to Salvatore Carfi d/b/a Italian Restaurant & Flying Pizza.
- c. TABC EXHIBIT 3: Xeroxed photo and driver's license of Chad Stegall.
- d. TABC EXHIBIT 4: Video tape of restaurant scene.

All four of these exhibits were admitted into evidence; only Exhibit 3 was objected to.

Testimony:

1. Agent Artie D. Freeman:

Agent Artie D. Freeman testified that TABC recruited Chad Stegall for its minor sting operation on the night in question. Agent Freeman testified that Stegall was instructed to walk into the restaurant and order a beer. Agent Freeman also testified that Stegall was told to take only his driver's license and money to pay for the beer into the restaurant. In addition, Freeman testified that he instructed Stegall not to lie if asked about his age. Agent Freeman also testified that Stegall was accompanied into the restaurant by Agent Stewart Arnold. Freeman also testified that he did not witness the sale of the beer to Stegall, but learned of it after the fact from conversations with agent Arnold, as well as from viewing the video. Freeman testified that after Stegall and Agent Arnold left the restaurant, he entered the restaurant and spoke to Mrs. Carfi and to Morris Bardwell. Freeman testified that when he spoke to Mrs. Carfi and Mr. Bardwell, that he did not ask them if they worked for the restaurant. Agent Freeman also testified that when he spoke to Morris Bardwell, that Bardwell confirmed that he had given the beer to the minor. Freeman also testified that Bardwell told him that he did not work for Mr. Carfi's restaurant; and that he was merely trying to help the Carfi's out, when he went to get the beer and give it to Mr. Stegall. Freeman testified that Bardwell told him he had done work for Carfi as a carpenter.

2. Chad Stegall:

Chad Stegall testified that he had been recruited to participate in the minor sting operation, and that he did, in fact, do so on the date in question. Stegall further testified that he had been instructed not to lie about his age and to carry only his driver's license and cash for the purchase of the beer into the restaurant. Stegall testified that he had been instructed to produce his driver's license if requested to do so by the restaurant. Stegall testified that he entered the restaurant with Agent Arnold; he said Agent Arnold went in first, and that they sat at separate tables. Stegall testified that his table faced Agent Arnold's table, so Arnold could film and record the activity at the restaurant. Stegall testified that neither Mr. Carfi nor Mrs. Carfi had attempted to wait upon him at the restaurant before Mr. Bardwell did so. Stegall testified that Bardwell had given him the menu and had taken his beer order. Stegall also testified that Bardwell had checked his identification. Stegall also testified that he had seen Bardwell in the restaurant with other people, and he had assumed Bardwell was at the restaurant for social purposes. Stegall testified that he has heard Bardwell tell Agent Arnold that he did not work for the restaurant when Agent Arnold asked him to take his order.

From Respondent:

No documentary evidence was offered.

Testimony:

1. Morris Bardwell

Morris Bardwell testified that he is 32 years old and has known Mr. and Mrs. Carfi for approximately 15 years. He testified he has done carpentry work for the Carfis as well as plumbing work, on an "as-needed" basis. He stated he is not an employee of the restaurant. He testified that he did serve beer to the minor, Chad Stegall at Italian Restaurant & Flying Pizza on the night in question, but that he only did so because he could see that the restaurant was busy and that he thought the Carfis needed some assistance. Mr. Bardwell testified that he had gone to the restaurant on the night in question to have dinner with his family. Mr. Bardwell testified that neither Mr. nor Mrs. Carfi asked him to serve beer to the minor; nor were they aware that he had served beer to a minor.

2. Rose Carfi

Rose Carfi testified that she is Salvatore Carfi's wife and that she works at the restaurant with her husband, the restaurant owner. She testified she takes orders from customers and takes their money at the checkout counter. She also serves orders to the customers of the restaurant. Ms. Carfi testified that she is the only person who works at the restaurant with her husband. Ms. Carfi testified that she did not know that Mr. Bardwell had asked Chad Stegall if he wanted a beer. Nor did she know that Bardwell had gone to get a beer for Chad Stegall. Ms. Carfi testified that she assumed her husband had asked Chad Stegall for his identification to be certain he was of sufficient age to order a beer.

3. Sal Carfi

Sal Carfi testified that he was the sole owner of the restaurant, Carfi's Italian Restaurant & Flying Pizza. Carfi testified that his wife was the only person who worked at the restaurant with him. He testified that Morris Bardwell is a trusted friend but is not an employee of the restaurant. Carfi testified he did not know that Bardwell had served beer to the minor. Carfi testified he and his restaurant have never served alcoholic beverages to minors. He testified that the restaurant sells only one case of beer every three months. Carfi also testified that he had subpoenaed Mr. Bardwell to appear at the hearing to teach Bardwell a lesson; that Bardwell could not jeopardize Carfi's livelihood .

IV. Statutory Criteria

1. Section 106.13 of the Code states, in pertinent part:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit...if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor in violation of this code...

2. Section 11.61 of the Code states, in pertinent part:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewed permit if it is found, after notice and hearing, that any of the following is true: ... (2) the permittee violated a provision of this code or a rule of the commission;...

V. Analysis

There are two questions which must be answered here.

(1) Was Chad Stegall a minor on the 8th day of May, 1998?

It is the undisputed testimony of Chad Stegall that he was eighteen years old on May 8, 1998.

(2) Did the permittee, or licensee, or its agents, servants or employees, with criminal negligence, sell, serve, dispense, or deliver an alcoholic beverage to the minor, Chad Stegall, on the 8th of May, 1998?

The evidence is undisputed that Morris Bardwell served a beer to the minor, Chad Stegall, on May 8, 1998, at the licensee's restaurant. However, the evidence also is undisputed that Bardwell was not an agent, servant or employee of the licensee's restaurant. Rather, Bardwell, a friend of Salvatore and Rose Carfi, who intended to help the Carfis, instead committed a wrong in their establishment. The evidence indicates that neither Mr. nor Mrs. Carfi was aware that Bardwell had served beer to the minor. Moreover, the evidence from the video indicates that Agent Stewart

Arnold asked Morris Bardwell if he worked for the restaurant, and Bardwell responded that he did not work for the restaurant. In addition, Morris Bardwell told Agent Artie D. Freeman he was not employed by the restaurant.

PROPOSED FINDINGS OF FACT

1. Salvatore Carfi, doing business as Italian Restaurant and Flying Pizza is the holder of the Wine and Beer Retailer's Permit BG-203225.
2. Salvatore Carfi, doing business as Italian Restaurant and Flying Pizza received proper and timely notice of hearing, by means of certified mail, return receipt requested, delivered to Respondent's Attorney of Record, on May 25, 1999.
3. On the 8th of May, 1998, Chad Stegall was a minor, eighteen years of age.
4. On the 8th of May, 1998, Chad Stegall was served a beer at Italian Restaurant and Flying Pizza by Morris Bardwell.
5. Morris Bardwell was a friend of Salvatore and Rose Carfi on May 8, 1998, but was not an agent, servant or employee of Italian Restaurant & Flying Pizza.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 106.13 and 11.61(b)(2) of the TEX. ALCO. BEV. CODE ANN.
2. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN., Chapter 2003 (Vernon's 1999).
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, TEX. GOVT. CODE ANN., Chapter 2001 and 1 TEX ADMIN. CODE, Chapter 155.
4. Based upon the Proposed Findings of Fact and Proposed Conclusions of Law there was insufficient credible evidence that an agent, servant or employee of Salvatore Carfi, doing business as Italian Restaurant and Flying Pizza sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of Sections 106.03 and 106.13 of the TEX. ALCO. BEV. CODE ANN.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that no action be taken to suspend or cancel the Respondent's Wine and Beer Retailer's Permit BG-203225.

Signed this _____ day of November, 1999

ED SHIPPER
ADMINISTRATIVE LAW JUDGE