

SOAH DOCKET NO. 458-99-1232

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE
COMMISSION	§	
	§	
VS	§	
	§	STATE OFFICE OF
NICKERSON ENTERPRISES INC.	§	
D/B/A ORPHAN ANNIE'S LOUNGE	§	
BEXAR COUNTY, TEXAS	§	
(TABC CASE NO. 577729)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 28th day of July, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on March 15, 2000, and adjourned March 22, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 16, 2000. 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. A Motion for Rehearing was filed by the Respondent on June 2, 2000 and a Petitioner's Reply to Respondent's Motion for Rehearing (Exceptions) was filed on June 12, 2000..

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 Permit Nos. MB-193009 and LB-193010 are herein **SUSPENDED**.

IT IS THEREFORE ORDERED that unless the Respondent pays a civil penalty in the amount of \$4,500.00 on or before the 20th day of September, 2000, all rights and privileges under the above described permits will be **SUSPENDED** for a period of fifteen (15) days, beginning at 12:01 A.M. on the 27th day of September, 2000.

This Order will become final and enforceable on August 18, 2000, 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 28th day of July, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

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TABC Legal Section

Licensing Division
San Antonio District Office

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TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.S.	§	
	§	OF
NICKERSON ENTERPRISES, INC., D/B/A ORPHAN ANNIE'S LOUNGE, PERMIT NOS. MB-193009 & LB-193101 BEXAR COUNTY, TEXAS (TABC CASE NO. 577729)	§ § § § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against a licensee of the Commission for permitting a minor to possess and consume an alcoholic beverage, and for permitting the consumption of an alcoholic beverage during prohibited hours. The Staff recommended that the subject license and permit be suspended for 30 days for each violation and the licensee be allowed to pay \$300.00 per day in lieu of suspension . The licensee appeared at the hearing and was represented by counsel. This Proposal For Decision recommends that the license and permit be suspended for 10 days for the minor violation and 5 days for the prohibited hours violation, and that the licensee be allowed to pay \$300.00 per day in lieu of suspension..

I. Procedural History

On March 2, 1998, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Nickerson Enterprises, d/b/a Orphan Annie's Lounge (Respondent) that the Staff would seek disciplinary action against Respondent's permits because Respondent permitted a minor to possess and/or consume an alcoholic beverage. The Staff asserted that such act constituted grounds for suspension or cancellation of the Respondent's mixed beverage permit and its late hours mixed beverage permit. At a later date, Staff notified Respondent that Staff would also seek disciplinary action against Respondent because Respondent permitted consumption of alcoholic beverages during prohibited hours. Although the exact date of the second notice was not established, Respondent did not challenge the validity of the notice.

The hearing commenced on March 15, 2000, in the offices of the State Office of Administrative Hearings, Castle Hills Executive Center, 1015 Jackson Keller, Suite 102B, San Antonio, Bexar County, Texas. After the taking of evidence, the hearing was concluded, but the record was left open until March 22, 2000, for the filing of post hearing briefs. Staff was represented by Dewey Brackin, Assistant Attorney General of Texas. Respondent was represented by attorney Mike Haley.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (The Code) §6.01 and TEX. GOV'T CODE ANN. Chapter 2001 et seq. (1998) . The State Office of Administrative Hearings has jurisdiction over 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. GOV'T CODE ANN. Chapter 2003.

On February 14, 2000, Staff sent Respondent a Notice of Hearing concerning the allegation of permitting a minor to possess and/or consume an alcoholic beverage. Staff later sent Respondent an Amended Notice of Hearing containing both the above allegation and the allegation of permitting consumption during prohibited hours. At the hearing Staff moved to amend the Amended Notice of Hearing to correct a typographical error. Respondent initially objected to the amendment, but later withdrew the objection. The second allegation in the Amended Notice of Hearing referred to Respondent as "424 Inc. d/b/a The Daquiri Factory." It was clear, however, from the Pre-hearing Statements filed by both parties that Nickerson Enterprises, Inc. d/b/a Orphan Annie's Lounge, was the entity referred to in the Notice. Further, Respondent did not object to the evidence tending to prove that the alleged events took place at Orphan Annie's Lounge.

There were no other challenges of notice in this matter.

III. Discussion

A. The December 1997 allegation.

1. Testimony of Al Luna

Al Luna testified that on December 30, 1997, he was employed as an agent by the Commission. On that date he was on the premises of Orphan Annie's Lounge to serve a warning for a prior violation and observed, in the course of his duties, a youthful looking female later identified as Raney Renee Ahrens, sitting at the bar drinking from a small glass. When Ahrens noticed Luna watching her, she pushed the drink away. The bartender, Lori Webster (also known as Molly Smith), who was standing within three feet of Ahrens, then picked up the glass and placed it behind the bar. Luna retrieved the glass and observed that it smelled like liquor. Luna then confronted Ahrens and determined her age to be 19 years of age. Webster told Luna that she thought Ahrens was drinking a coke.

2. Testimony of Lori Webster

Lori Webster testified for Respondent and stated that she did not serve an alcoholic beverage to Ahrens, but that she would have, if requested, because a person believed to be Ahrens' father was present. The glass observed by officer Luna contained Coke, not alcohol. Webster does not want the bar to lose its permits because she has worked there for five years and would have to find other employment. Webster testified extensively concerning the times various events occurred the night the officers came in and was sure of the times because she knows what time her regular customers come and go. Interestingly, she later testified that this was the very first time she had worked the night shift.

3. Testimony of Robert Marshall

Mr. Marshall testified that he is a regular customer of Orphan Annie's and was on the licensed premises when the officers arrived. On that evening, a man named Jeff Gentle was at the bar and held out Ahrens to be his daughter. Ahrens did not consume alcohol, but requested and was served a Coke.

4. Testimony of Mike Haley

Prior to the hearing, Mr. Haley notified the Commission that he wanted to testify at the hearing in addition to acting as Respondent's attorney. The Commission did not object. Haley was at the bar on the night of the incident and Jeff Gentle introduced Ahrens, to him, as his daughter. He did not see Ahrens consume any alcohol and was not present when officer Luna confronted Ahrens.

5. Testimony of William Nickerson

Mr. Nickerson is one of the owners of Orphan Annie's, but was not present during any of the events leading up to the hearing. Nickerson, however, testified about events that supposedly occurred that no other witnesses knew about. Specifically, he testified that Ahrens' supposed father, Gentle, left through the back door of the club when officer Luna confronted Ahrens.

B. The November 1999 allegation.

1. Testimony of Troy Merek

Troy Merek, a vice detective with the San Antonio Police Department, testified that he was on the licensed premises at 2:30 P.M. on November 24, 1999. Alcohol, in Bexar County, can be sold until 2:00 A.M. and consumed on a licensed premise until 2:15 A.M. Upon arriving, Merek looked into the bar through a small window and observed an individual, later identified as Francisco Garza, behind the bar drinking what appeared to be a mixed drink while cleaning the bar. Merek continued to observe Garza to verify that what he was drinking was, in fact, an alcoholic beverage. At about 2:40 A.M. Garza poured liquid from a bourbon whiskey bottle, added soda water to the whiskey, and

then consumed the drink. Merek then entered the bar, confiscated the whiskey bottle, and verified that it contained an alcoholic beverage.

2. Testimony of Lori Webster

Webster was on duty the night of the November 24, 1999, incident and was in the office when the officers arrived. From the office she could not see the area of the bar where Garza was located. She closed the bar before 2:00 a.m. and called Garza to pick her up. He typically helps her clean the bar so she can leave and was doing so on this night. It would have been impossible for him to be drinking alcohol while cleaning because the bar uses a metering system to count drinks poured and the meter did not indicate that drinks were poured after closing time.

3. Testimony of Francisco Garza

Garza testified that he was at the bar to pick up Lori Webster, was helping her clean up, and was not consuming alcohol.

4. Testimony of William Nickerson

Nickerson testified that it was impossible for Garza to have consumed alcohol after hours because of the metering system used by the bar based on his check of the meter and the cash register.

IV. Statutory Criteria

1. TEX. ALCO. BEV. CODE ANN § 106.13

(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. TEX. ALCO. BEV. CODE ANN § 11.61

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal 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;

3. TEX. ALCO. BEV. CODE ANN § 61.71

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(18) consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by this code;

5. TEX. ALCO. BEV. CODE ANN § 105.06

(c) In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a. m. and 12 noon and on any other day between 2:15 a. m. and 7 a. m.

V. Discussion

Respondent's position concerning the first allegation is that no alcohol was consumed by Ahrens and that if there had been, it would have been legal because her father was on the premises. Respondent's position concerning the second allegation is that no alcohol was being consumed after 2:15 a.m., and that if there was, it was not by an employee, and the only employee on duty was not in a position to observe the consumption.

The evidence presented at the hearing is obviously conflicting, which requires a determination of credibility of witnesses. The primary witness for Respondent on both of the allegations was Lori Webster. Webster admitted that she has an interest in the bar remaining open because she would have to find other employment if the bar was closed. Further, her testimony is questionable because of the inconsistency concerning how she knew of the times certain events occurred, as discussed above.

With Webster's testimony discounted the preponderance of the evidence suggests that Ahrens was served alcohol. Officer Luna observed Ahrens push a glass away and Webster place it behind the bar. Webster claims there were several glasses on the bar, but does not dispute that she placed the glass in question out of sight. If she really believed it to contain no alcohol, there would have been no reason to hide it. The testimony concerning Ahrens' father being at the bar is also questionable. It would seem unlikely for a father to fail to come forward in this situation, but Gentle failed to come to Ahrens' defense at the bar and at the hearing.

The preponderance of the evidence also suggests that alcohol was being consumed after hours. The pleadings in this case allege that alcohol was consumed by a "agent, servant, or employee" of Respondent. While agent and employee were not proven, Garza would certainly meet the definition of servant. He was on the premises, as he usually was after closing time, and was cleaning the bar as he usually did. Those acts, especially when the evidence was that they occurred on a regular basis, make him a servant. Although there was testimony that it was impossible to pour alcohol without the meter counting the drink, it would have been fairly simple to pour from a bottle not yet attached to a meter.

PROPOSED FINDINGS OF FACT

1. Nickerson Enterprises, d/b/a Orphan Annie's Lounge (Respondent) is the holder of Mixed Beverage Permit No. MB- 193009 and Mixed Beverage Late Hours Permit No. MB- 193010.
2. The Texas Alcoholic Beverage Commission sent a notice of hearing to Respondent dated February 14, 2000.
3. The notice of hearing contained a statement of the time, place, and nature of the hearing, a statement of the legal authority and jurisdiction under which the hearing was to be held, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
4. The hearing was convened on March 15, 2000, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Respondent appeared and was represented by council. Attorney Dewey Brackin, represented Staff. The record was left open until March 22, 2000, to allow the parties to file briefs.
5. On December 30, 1997, Lori Webster was an employee of Respondent.
6. On December 30, 1997, Lori Webster permitted a minor, Raney Ahrens, to possess and consume alcohol on the licensed premises.
7. Lori Webster was only a few feet from Raney Ahrens while Ahrens was consuming alcohol.
8. Lori Webster took Raney Ahrens' alcoholic beverage and attempted to conceal it from officer Al Luna.
9. On November 24, 1999, Francisco Garza was a servant of Respondent.
10. On November 24, 1999, Francisco Garza consumed an alcoholic beverage on the licensed premises during prohibited hours

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § §106.13 and 11.61(b)(2) (Vernon 2000).
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. GOV'T. CODE ANN. § 2001.

3. Service of proper and timely notice of the hearing was provided to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. § 2001 and 1 TEX. ADMIN. CODE § 155.
4. Based upon Findings of Fact Nos. 5-8, Respondent's Employee, with criminal negligence, permitted a minor to possess and consume an alcoholic beverage in violation of TEX. ALCO. BEV. CODE ANN § § 106.03 and 106.13 (Vernon 2000).
5. Based upon Findings of Fact Nos. 9 and 10, Respondent's servant consumed alcohol on the licensed premises during prohibited hours in violation of TEX. ALCO. BEV. CODE ANN § § 105.06, 11.61 (b) (2), and 61.71 (a) (18) (Vernon 2000).
6. Pursuant to 16 TEX. ADMIN. CODE § 37.60 (Standard Penalty Chart), Respondent's permit and license should be suspended for 10 days, and Respondent should be allowed to pay a civil penalty in the amount of \$300.00 per day in lieu of suspension for permitting a minor to possess and consume alcohol on the licensed premises based upon the above Findings of Fact and Conclusions of Law.
7. Pursuant to 16 TEX. ADMIN. CODE § 37.60 (Standard Penalty Chart), Respondent's permit and license should be suspended for 5 days, and Respondent should be allowed to pay a civil penalty in the amount of \$300.00 per day in lieu of suspension for permitting a servant to consume alcohol on the licensed premises during prohibited hours based upon the above Findings of Fact and Conclusions of Law.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that the Respondent's Mixed Beverage Permit and Mixed Beverage Late Hours Permit should be suspended for a period of 15 days and Respondent should be allowed to pay a civil penalty in the amount of \$300.00 per day in lieu of suspension.

Signed this 16th day of May, 1999.



JOHN H. BEELER
Administrative Law Judge
State Office of Administrative Hearings