

DOCKET NO. 458-99-1478
(TABCO NO. 580574)

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

BRUCE ALAN RILEY
dba RILEY'S BAR & GRILL
PERMIT NO. MB-172454, LB-172455 &
PE-172456
MIDLAND COUNTY, TEXAS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABCO), Petitioner, brought this action against BRUCE ALAN RILEY dba RILEY'S BAR & GRILL, Respondent, to suspend its permits and licenses for violations of the Texas Alcoholic Beverage Code [hereinafter Code]. The Petitioner requested a suspension of Respondent's permit for a minimum of five days. This proposal recommends that there be no suspension.

On September 3, 1999, a hearing was held in Midland, Texas before an administrative law judge with the State Office of Administrative Hearings. Jurisdiction was found and is set out below in the conclusions of law.

Discussion

A. Statutory Provisions

The following provisions are relevant in the consideration of this cause of action:

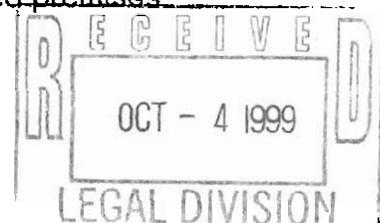
Code Section 11.61. **CANCELLATION OR SUSPENSION OF PERMIT.**

(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:

(13) the permittee was intoxicated on the licensed premises

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Code Section 1.04. **DEFINITIONS**



(11) "Permittee" means a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person.

B. Evidence and Analysis

There was no dispute on the following facts: Joseph John Kish, Jr. and Andrew Maier Walker had at one time worked for Respondent, Bruce Alan Riley, at Riley's Bar and Grill. On July 17, 1998, they both were present at Riley's Bar and Grill and were intoxicated. They got into a fight and police came. Neither one worked at the bar that night.

The true issue in this case is whether the two men were employees at Riley's Bar and Grill on July 17th. On this the evidence was conflicting. TABC Agent Lee Dick went to the bar after learning there had been a fight. The bartender on duty, Melissa Milbry Collier, told him that both men worked at the bar as barbacks. She said that Kish was supposed to work for her later that night. The door man also said they worked for Mr. Riley. Neither Ms. Collier nor the doorman appeared at the hearing to confirm their statements. Agent Dick said that he remembered the Respondent had given him conflicting information over the telephone on whether the two men worked for him. Mr. Riley was never present at the bar that night.

Ms. Collier had not worked at Riley's for very long. She had been employed there for about two weeks on two different occasions. She was not familiar with the personnel. Mr. Riley testified that Walker had once worked for him at the bar but that after an incident at a private party, he had no longer employed him in alcoholic beverage-related work. He also said that Walker had worked for him during the daytime on July 17th, but it had not been at the bar. Instead, he had moved furniture from a warehouse to another restaurant that Mr. Riley owned which was a completely separate business entity from Riley's Bar and Grill. The Respondent also testified that Kish had worked for him for a few days in early July of 1998 but that he had fired Kish a few days before the incident in question because he had caught him in a cooler drinking from a bottle of liquor. He had not had a chance to tell Collier, the night bartender, that he had fired Kish. That may have been the reason Collier had thought of having Kish be her barback. In any case, a bartender hires a barback directly and pays the barback out of her own money.

Mr. Walker testified at the hearing and his testimony was consistent with Mr. Riley's information. Kimberly Humphreys testified that she had been the daytime bartender and bookkeeper for Riley's Bar and Grill in 1998 and was familiar with the employees. She said that neither of the two men were employees of Respondent on July 17, 1998.

Respondent's testimony was credible and appeared more trustworthy than the hearsay statements on which the Petitioner relied.

C Recommendation

The preponderance of the evidence was on the Mr. Riley's side that on July 17th, 1998, Kish and Walker were not his employees at Riley's Bar and Grill. Therefore, there should be no suspension of the Respondent's permits.

FINDINGS OF FACT

1. Bruce Alan Riley dba Riley's Bar and Grill, whose address is 3421 West Wall Street, Midland, Midland County, Texas, was issued Mixed Beverage Permit No. MB-172454, Mixed Beverage Late Hours Permit No. LB-172455, and Beverage Cartage Permit No. PE-172456 by the Texas Alcoholic Beverage Commission (TABC) on June 5, 1985, which have been continuously renewed ever since.
2. On September 3, 1999, a hearing was held before Administrative Law Judge Louis Lopez in the Midland City Hall, Council Chambers, 300 North Loraine, Midland, Texas. The Petitioner was represented by attorney Gayle Gordon. The Respondent represented himself. Evidence was received and the hearing was closed on the same day.
3. Joseph John Kish, Jr. and Andrew Maier Walker had each at one time worked for Respondent, Bruce Alan Riley, at Riley's Bar and Grill.
4. On July 17, 1998, Kish and Walker got into a fight at Riley's Bar and Grill and police came. Both were intoxicated, but neither one worked at the bar that night.
5. Walker had once worked for the Respondent at the bar, but after an incident at a private party in December, 1997, he had no longer worked for Mr. Riley in alcoholic beverage-related work.
6. Walker had worked for the Respondent during the daytime on July 17th, but it had not been at the bar. Instead, he had moved furniture from a warehouse to another restaurant that Mr. Riley owned which was a completely separate business entity from Riley's Bar and Grill.
7. Joseph Kish worked at Riley's Bar and Grill for a few days in early July of 1998 but had been fired a few days before July 17th because he had been caught in a cooler drinking from a bottle of liquor.
8. Respondent had not had a chance to tell Melissa Milbry Collier, the night bartender, that he had fired Kish, and this may have been the reason Collier had thought of having Kish be her barback.
9. Collier's statements to Agent Dick were not reliable since she had not worked at Riley's for very long, and she was thus not familiar with personnel matters.

10. Mr. Riley, his former daytime bartender Kimberly Humphreys, and Andrew Walker were credible in their testimony, which favored Mr. Riley.
11. Based on the foregoing Findings of Fact, neither Joseph John Kish, Jr. nor Andrew Maier Walker were employees of Respondent, Bruce Alan Riley, at Riley's Bar and Grill on July 17, 1998.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to any or all of the following: Texas Alcoholic Beverage Code [Code] Sections 5.31--5.44, 6.01, 11.61, 61.71, and 32.01.
2. Service of proper notice of the hearing was made on Respondent pursuant to Code Section 11.63 and the Administrative Procedure Act, Texas Government Code Sections 2001.051 and 2001.052.
3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to Code Section 5.43(a) and the Tex. Govt. Code Chapter 2003.
4. Based upon the foregoing Findings of Fact, Respondent Bruce Alan Riley did not violate Code Section 11.61(b)(13).
5. Based upon the foregoing Findings of Fact and Conclusion of Law, TABC should not suspend Respondent's permits.

SIGNED this 4th day of October, 1999.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS