

DOCKET NO. 573641

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| IN RE PANOLA COUNTY POST NO. 5620 § | BEFORE THE |
| D/B/A PANOLA COUNTY POST NO. 5620 § | |
| VETERANS OF FOREIGN WARS OF THE § | |
| UNITED STATES § | |
| PERMIT NOS. NE-119953 & PE-067736 § | TEXAS ALCOHOLIC |
| § | |
| § | |
| PANOLA COUNTY, TEXAS § | |
| (SOAH DOCKET NO. 458-98-1932) § | BEVERAGE COMMISSION |

O R D E R

CAME ON FOR CONSIDERATION this 22nd day of June, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard Farrow. The hearing convened on August 31, 1999 and the record was closed September 24, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 18, 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. 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.

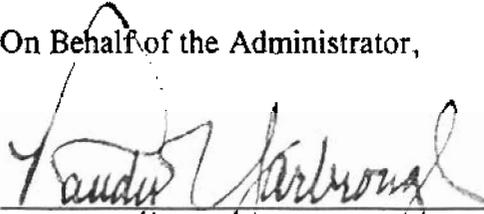
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that unless the Respondent pays a civil penalty in the amount of **\$4,500.00** on or before the **23rd day of September, 2000**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **thirty (30) days, beginning at 12:01 A.M. on the 30th day of September, 2000.**

This Order will become final and enforceable on July 13, 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 22nd day of June, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Richard Farrow
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SOAH DOCKET NO. 458-98-1932

| | | |
|-----------------------------------|---|-------------------------|
| TEXAS ALCOHOLIC BEVERAGE | § | BEFORE THE STATE OFFICE |
| COMMISSION | § | |
| | § | |
| VS. | § | |
| | § | |
| PANOLA COUNTY POST NO. 5620 | § | OF |
| VETERANS OF FOREIGN WARS OF | § | |
| THE UNITED STATES | § | |
| PERMIT NOS. NE-119953 & PE-067736 | § | |
| PANOLA COUNTY, TEXAS | § | |
| (TABC CASE NO. 573641) | § | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against the Permittee requesting cancellation of the Respondent's license alleging that the Respondent sold or delivered alcoholic beverages to an intoxicated person and that an agent, servant or an employee of the Respondent was intoxicated while on or at the licensed premises. This proposal for decision finds that both allegations are true and recommends the license be suspended for 30 days.

I. Procedure, Jurisdiction, and Notice.

There were no disputes regarding notice of hearing or jurisdiction and, therefore, these issues will be dealt with in the findings and conclusions only.

A hearing was held on August 31, 1999, at the Tyler office of the State Office of Administrative Hearings before Richard Farrow, Administrative Law Judge. The Texas Alcoholic Beverage Commission was represented by its Staff Attorney, Dewey Brackin. Respondent appeared by and through its attorney Larry Fields. The facts were presented in the form of affidavits and by stipulation of the parties. Argument was made on that date and the record was left open by agreement of the parties until September 24, 1999, in order to allow another witness the opportunity to testify by telephone. Such witness was unavailable for the hearing but, by agreement of the parties, the testimony could be taken by telephone if such testimony was tendered by September 24, 1999. The witness did not tender any testimony within the time period and the record was closed September 24, 1999.

II. Discussion and Analysis of the Evidence.

On September 27, 1996, Mr. George Albert White was First Vice-Commander of the Panola County Post 5620 Veterans of Foreign Wars (Post 5620). He was also the bar manager. It also appears from the evidence that Mr. White had a drinking problem. From the report of Mr. Tommy Rodgers, TABC agent, and the affidavit of Wanda Tew Ehrmann, both admitted by stipulation, it

was common knowledge that Mr. White had a drinking problem, would drink at the licensed premises, would often be intoxicated at the licensed premises, and that the waitresses and employees would water his drinks at the premises when it became clear that he was intoxicated. The local Sheriff's office and Police Department were aware that Mr. White had a drinking problem. Mr. White was known to keep a bottle under the seat of his automobile to drink from time to time.

Mr. White died in an automobile accident on the night of September 27, 1996, with a blood alcohol content of .22 grams of alcohol per 100 milliliters of blood. The legal definition for driving while intoxicated, at the time of the incident, included a blood alcohol concentration (BAC) of a level of .10 or greater. He had been at Post 5620 drinking prior to the accident and the Staff has brought this action against the licensee for serving alcoholic beverages to an intoxicated person and for an officer of the licensee being on the licensed premises while intoxicated.

There seems to be no dispute that Mr. White was at all times relevant an officer of the licensee. While no evidence was presented showing the business structure of the permittee, whether it was a corporation, partnership, limited partnership, or other structured entity, Mr. White held the title of First Vice-Commander and it was stipulated that he was an officer.

Whether he was intoxicated while on the premises and whether he was served an alcoholic beverage at the premises while intoxicated were the issues that were disputed.

On September 27, 1996, Wanda Ehrmann arrived for work as a bartender at about 2:30 p.m. and George White was already there. During the afternoon Mr. White had four drinks, three served to him by Ms. Ehrmann, and one he fixed himself. At approximately 6:00 p.m. she cut him off in order to keep him from becoming intoxicated. She stated in her affidavit that she had trouble with him in the past when he had been drinking too much. She gave him coffee which he did not drink, and he left the club then, at around 6:00 p.m.

George White returned to the premises between 9:00 and 9:30 p.m. that night with a clean shave and a change of clothes. He did not appear intoxicated, but was acting strange. According to Ms. Ehrmann and Ms. Tammy Masey Wilmoth, a witness who was not an employee, but who was a regular patron and sometimes helped out at the bar when Ms. Ehrmann was busy, Mr. White was not a friendly man and was tight with his money. They both thought he was acting strange that night because he was paying the cover charge for people, buying rounds of drinks for the house, and was apparently paying people money he owed them. Mr. White had one drink of V.O. and water served by Ms. Ehrmann and left the club at about 10:00 p.m. The fatal accident occurred at approximately 10:40 p.m.

A "Know Your Limits" chart was introduced as part of the stipulated evidence that indicates the body eliminates alcohol at an average rate of .01 grams each 40 to 60 minutes. Nothing presented at the hearing suggests how fast the body absorbs alcohol or what other factors, if any, effect absorption or elimination rates. The chart suggests that for a 160-pound person to achieve a .22 blood alcohol level he would have had to consume 10 ounces of 80-100 proof liquor. It does not indicate over what period of time the liquor is consumed. It does indicate that for every ounce

consumed, for a 160-pound person the BAC would rise to .02. The figures vary for different body weights as reflected on the chart.

Staff argues that with a BAC of .22 less than an hour from the time he left the club, it is clear Mr. White had a BAC above .10 while at the premises and that by definition Mr. White was intoxicated while at the club where he was served an alcoholic beverage. The Respondent argues that Mr. White could have been drinking after he left the premises. That he carried a bottle in his automobile could indicate that he consumed more alcohol after he left the premises, and it has not been shown that, while at the premises, he was intoxicated. To further the argument, Ms. Ehrmann, the bartender that night, was very familiar with Mr. White's drinking habits and his demeanor when he was intoxicated. She stated that while he was acting strange when he came back into the club around 9:00 or 9:30, he did not appear intoxicated. She served him only one drink before he left the club at about 10:00 p.m.

Case law has set out that extrapolation evidence is not required for the introduction of a later BAC test or its results. Neither is it required in order for those results to have probative weight, even when the burden of proof is beyond a reasonable doubt, as in a criminal case. The burden here is by a preponderance of the evidence and a BAC of .22 at the time of death, approximately 10:41 p.m., would preponderate that at, between 9:30 and 10:00 p.m., his BAC was at or above .10.

In finding that Mr. White was intoxicated while at the premises and that Ms. Ehrmann served alcoholic beverages to an intoxicated person is not to say that Ms. Ehrmann acted unreasonably under the circumstances. Based on her knowledge and familiarity with Mr. White's drinking, his behavior and appearance when intoxicated, her actions in the past of cutting him off when he had been drinking too much and of watering down his drinks, her problems with his drinking in the past, the fact that he was an officer of the Post 5620 and in a position as her boss, and the fact that he did not appear intoxicated at the time she served him, she can not be required to shoulder too much responsibility.

As Mr. White had been abusing alcohol for some time, it is likely that he did not show the effects of intoxication as quickly or to the degree that other people would. It may be that he had to be more than a little drunk in order to show it and Ms. Ehrmann could not be expected to know if he was drunk until he at least showed some indication of being drunk. That Mr. White did not appear intoxicated at the time she served him was not disputed and should certainly be a factor in determining appropriate sanctions.

Staff has asked that the permit be canceled due to the death of Mr. White. It is certainly tragic that Mr. White died in the accident that night. According to the argument of the Staff, Mr. White was very intoxicated before he came into the Post 5620 premises that night. He stayed only a short time and had only one drink before he left for the last time. That alcohol was a factor in the accident that took Mr. White's life is likely. It is just as likely that an accident could have occurred without the one drink that Post 5620 served him. In seeking to cancel the permits, Staff seems to blame the licensee for the accident.

While there is blame enough to go around, the blame for Mr. White's behavior should fall primarily on Mr. White. The serving of one drink to Mr. White when he did not appear intoxicated to those who knew how he appeared when intoxicated did not cause him to become intoxicated nor did it cause the accident.

Mr. White was an officer of the licensee and should not have been on the premises while intoxicated. Mr. White should have been aware he was intoxicated when he went to the premises on the night of September 27, 1996, and therefore, should not have been there. While Mr. White cannot be further sanctioned for that violation, the licensee should have been aware that this behavior was not uncommon and Mr. White's actions and violation can be imputed to the licensee.

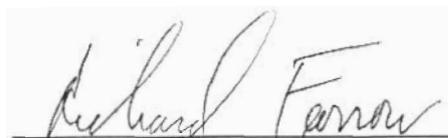
III. Findings of Fact

1. At all times relevant and in particular on September 27, 1996, Respondent, Panola County Post No. 5620 Veterans of Foreign Wars of the United States, was the holder of Permit NE-119953 and PE-067736 issued to Respondent by the Texas Alcoholic Beverage Commission.
2. Mr. George Albert White was an officer of the Respondent Licensee on September 27, 1996.
3. Mr. White died as a result of a automobile accident that occurred at approximately 10:40 p.m. on September 27, 1996.
4. At the time of his death, Mr. White had a blood alcohol concentration of .22 as determined by blood test .
5. A blood alcohol concentration of .10 or greater was, at the time by definition, the level at which a person was considered to be intoxicated while driving.
6. Mr. White had been on the licensed premises between 9:30 and 10:00 p.m. on September 27, 1996.
7. Mr. White was in the licensed premises while intoxicated on September 27, 1996.
8. Mr. White was served one alcoholic beverage while at the licensed premises between 9:30 and 10:00 p.m. on September 27, 1996. The beverage was served by an employee of the Respondent when Mr. White was intoxicated.
9. Mr. White did not appear intoxicated to the employee who served him the alcoholic beverage.
10. The employee was well aware of Mr. White's drinking behavior, and his demeanor when intoxicated, and had seen Mr. White intoxicated on many occasions.
11. Mr. White was often intoxicated and was known to have a drinking problem.

IV. Conclusions of Law

1. Service of proper and timely notice was made on Respondent as required in TEX. GOV'T. CODE ANN. § 2001.
2. The State Office of Administrative Hearings has jurisdiction over this matter, including the authority to make Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. § 2003.
3. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61, 6.01.
4. Based on Finding Nos. 2-7, the Permittee, or an officer, agent, servant, or employee of the permittee, Mr. George White, was on the licensed premises while intoxicated, in violation of § 11.61(b)(13) of the Texas Alcoholic Beverage Code.
5. Based on Findings Nos. 7-10 above, an agent, servant, or employee of the licensee did sell, serve or deliver an alcoholic beverage to an intoxicated person, Mr. George White, in violation of § 11.61(b)(14) of the Texas Alcoholic Beverage Code.
6. Based on the Findings of Fact and Conclusions of Law, a suspension of 30 days, or a civil penalty in lieu of suspension, in the amount of \$4,500.00 is warranted.

Signed this 18th day of May 2000.



Richard Farrow
Administrative Law Judge Presiding