

DOCKET NO. 584638

IN RE SOUTH CORPUS, INC.	§	BEFORE THE
D/B/A THE PALACE	§	
PERMIT NO. MB-237184, LB-237185 &	§	
PE-237186	§	TEXAS ALCOHOLIC
	§	
NUECES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1763)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 13th day of June, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Edel P. Ruiseco. The hearing convened on December 16, 1999, and the record was closed January 15, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 10, 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 the complaint against Permit Nos. MB-237184, LB-237185 & PE-237186 is hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on July 4, 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 13th day of June, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Edel P. Ruiseco
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TEXAS ALCOHOL BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
VS.	§	OF
SOUTH CORPUS, INC., D/B/A	§	
THE PALACE MEN'S CLUB	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (TABC and Commission), brought this action against Respondent alleging South Corpus, Inc., d/b/a The Palace (Respondent), sold an alcoholic beverage to a minor in violation of Tex. Alco. Bev. Code Ann. (the Code), §§106.04, 106.05, and 106.13. Staff requested cancellation of a mixed beverage permit, mixed beverage late hours permit, and a beverage cartage permit, issued by the Commission. The Administrative Law Judge (ALJ) found that Staff failed to show that Respondent permitted a minor to possess or consume an alcoholic beverage on the licensed premises. This proposal therefore recommends that no action be taken against Respondent.

I.

PROCEDURAL HISTORY

On September 9, 1999, Staff sent a Notice of Hearing to Respondent , at its address of record, 5850 Everhart Road, Corpus Christi, Nueces County, Texas 78413. On December 16, 1999, a public hearing was held before Edel P. Ruisecco, Administrative Law Judge, at the offices of the State Office of Administrative Hearings (SOAH), 1225 N. Agnes Street, Suite 102, Corpus Christi, Texas. Staff Attorney Dewey Brackin represented the Staff. Respondent was represented by Alan L. Yaffee, Attorney. After the submission of post-hearing briefs, the record closed on January 15, 2000.

II.

JURISDICTION

The TABC has jurisdiction over this matter under Tex. Alco. Bev. Code Ann. §5.35, §6.01, and §11.61. SOAH has jurisdiction under Tex. Gov't. Code Ann. Ch. 2003 over all matters related to the hearing of this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law.

III.

DISCUSSION

A. Factual Background

Respondent was granted a Mixed Beverage permit (MB-237184), Mixed Beverage Late Hours permit (LB-237185), and a Beverage Cartage permit (PE-237186).

TABC Agent Howard Wiley, the only witness called by TABC, testified through videotape deposition, that during the day on May 12, 1999, he entered Respondent's premises. As soon as he passed the second double doors and entered the dark club, he saw Evelyn Lopez, (Lopez), who had a youthful appearance, seated at a table. Agent Wiley's testified regarding the offense that Lopez was seated at a table and, . . . "I believe she was consuming alcohol while under age, minor consuming alcoholic beverage. . . Minor in possession of an alcoholic beverage" and that Lopez held the glass, which the Agent later picked up to examine. Agent Wiley admitted that Lopez denied that it was her drink, and that other people also confirmed that it was not her drink, including two patrons (Michael Bennett and Richard Garza).

Agent Wiley stated that a gentleman came and sat beside Lopez, and the agent continued into the club checking for other violations, but shortly returned to Lopez. The agent claimed he never took his eyes off her, never saw her take a drink after he returned and watched her, and the glass he initially saw her with was the one he tested by sight and smell, and the one from which he believed Lopez consumed an alcoholic beverage. The agent verified by sight and smell that the glass contained an alcoholic beverage. However, the Agent agreed that one cannot determine if a glass contains alcoholic beverage by sight alone, and that a glass containing only a drop of liquor would smell like an alcoholic beverage.

The alleged offense took place within seconds and the entire investigation, from viewing Lopez's actions to ascertaining her age, took less than five minutes. Lopez denied having drunk any alcoholic beverage, and denied that the glass Agent Wiley picked up was her drink. Agent Wiley placed Lopez under arrest and took her to the Nueces County jail. Agent Wiley admitted that Lopez was only 11 days short of her 21st birthday; that he did not smell any odor of an alcoholic beverage on Lopez, or on her breath; that he did not take the glass and its contents as evidence; and that he did not know or have the contents of the glass analyzed to show that it contained more than one-half of one percent of alcohol per volume.

Respondent called Lopez to testify. She explained that she told the Agent that the drink was not hers and that she did not drink from the glass. Respondent called, besides Lopez, three other witnesses to testify about what took place, including about the glass from which Lopez was accused of drinking. These witnesses, two patrons

(Michael Bennett and Richard Garza) and one of the two dancers at the club (Brenda Jade Cortez - the other, Amanda Kusenberger, did not testify due to illness), all testified that the four of them were seated at a table together before Agent Wiley entered the premises. The patrons stated that immediately after the two dancers went to the restroom, Lopez walked up, leaned on the table (near a glass belonging to one of the dancers) and asked if they wanted company. The patrons told her no, explaining that their companions had just gone to the restroom and were expected back shortly. She apologized, excused herself, and started to walk away when she was approached by Agent Wiley who asked for identification. Neither party disputes that Lopez was a minor at the time of this action.

Cortez testified that she and Kusenberger were drinking from glasses similar to the one picked up by Agent Wiley; that they both finished their drinks, leaving only ice; that they went to the restroom together; and when they returned Lopez had already been arrested. Respondent's witnesses testified that the glass Agent Wiley picked up contained the remnants of an alcoholic beverage of one of the two dancers sitting with the patrons; that the drink was not Lopez's drink; that Lopez did not drink from the glass; and the glass contained melted ice and not an alcoholic beverage.

B. Staff's Position

Staff contends that Respondent has violated Tex. Alco. Bev. Code Ann. §§106.04¹, 106.05², and 106.13³, in that Respondent exhibited criminal negligence in allowing Lopez, a minor, to possess or consume an alcoholic beverage on the licensed premises.

Staff further contended that the ALJ can infer that the glass contained an alcoholic beverage, according to the case law.⁴

C. Respondent's Position

¹ Sec. 106.04. Consumption of Alcohol by a Minor. (a) A minor commits an offense if he consumes an alcoholic beverage. . .

² Sec 106.05. Possession of Alcohol by a Minor. (a) Except as provided in Subsection (b) of this section, a minor commits an offense if he possesses an alcoholic beverage. (b) A minor may possess an alcoholic beverage: (1) while in the course and scope of the minor's employment if the minor is an employee of a licensee or Respondent and the employment is not prohibited by this code. . .

³ Sec. 106.13. Sanctions Against Retailer. (a) . . . the commission or administrator may cancel or suspend . . . a retail license or permit . . . if it is found . . . that the licensee or Respondent with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

⁴ An Amended Proposal for Decision issued by Jerry Van Hamme, ALJ in SOAH Docket No. 458-98-0569, styled Texas Alcoholic Beverage Commission vs. Jay S. Yun, d/b/a Doc's Food Store #3, Permit No. BQ-317833, Dallas County, Texas.

At the hearing and in the pre-hearing brief, Respondent contended that Staff failed to prove: 1) that Lopez consumed or possessed an alcoholic beverage; or 2) that the alcoholic beverage belonged to Lopez. Respondent contended as a matter of law that Staff failed to prove that the contents of the glass alleged to be possessed and/or consumed by Lopez contained an alcoholic beverage as defined by the Code⁵. Ruling was reserved until the evidence had been presented. Respondent also contended that it did not act with criminal negligence⁶ in this matter.

D. Analysis and Recommendation

1. Alcoholic Beverage

Staff failed to prove the glass contained an alcoholic beverage as defined by the Code. The evidence showed that the drink alleged to have been in Lopez's hand, contained melted ice, but not the requisite percent of alcohol by volume to meet the definition of an alcoholic beverage, as defined by the Code. The evidence showed that the glass contained a liquid (melted ice), a trace of an alcoholic beverage, and the odor of an alcoholic beverage. Agent Wiley admitted that he had not tested the liquid to determine the percent of alcohol by volume, only smelled the odor of an alcoholic beverage; saw that it was in a glass typically used for serving alcoholic beverages; and did not notice the odor of an alcoholic beverage on either Lopez's breath or person.

The evidence showed that the drink was not Lopez's, but was the remnants of a drink of one of the four persons seated at the table. The evidence further showed that Lopez did not drink from the glass, and that the glass contained only melted ice.

The case law cited by Staff in support of its contention that the ALJ could infer that the drink was an alcoholic beverage referred to situations in which the alcoholic beverage was in a packaged container, *i.e.*, beer cans, whiskey bottles, etc., and not in an open glass mixed with other liquids. Therefore, the ALJ did not find it persuasive.

2. Consumption or Possession by a Minor

The evidence failed to establish that Lopez, a minor, consumed or possessed an alcoholic beverage. Lopez merely placed her hand near the glass when she leaned over to speak to Bennett and Garza. Agent Wiley noticed the glass in front of her and

⁵ §1.04. Definitions. In this code: (1) "Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

⁶ §6.03(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding the conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

assumed it belonged to her. Additionally, after noticing the alleged violation, Agent Wiley moved around tables, looked for other violations, and then returned to Lopez and tested a glass near her. This is insufficient to establish that Lopez consumed or possessed the contents of the glass which the Agent believed was the one from which Lopez drank.

The testimony regarding the fact that the club was dark, and the Agent's admission that his eyes were not fully adjusted after entering a dark club from the sunlit street, indicates that the agent may not have clearly observed the offense. The conflicting testimony as to whether Lopez was seated or standing, alone or with others, drinking or not drinking, or whether the drink was in fact an alcoholic beverage, all are resolved in favor of Respondent, since the agent contradicted himself by declaring that while he looked for other violations, he never took his eyes off Lopez. The testimony by the patrons describing the facts and events was credible and more logical, especially considering the duration of the alleged offense and the darkened interior of the club. Also, Lopez's appearance at the hearing did not confirm a "youthful appearance". There was insufficient evidence to support that Lopez had consumed an alcoholic beverage.

IV.

RECOMMENDATION

This proposal recommends that no action be taken against Respondent's permit and license.

V.

PROPOSED FINDINGS OF FACT

1. All parties received notice of the hearing, appeared, and no party objected to the notice.
2. Respondent South Corpus, Inc., d/b/a The Palace, located at 5850 Everhart Road, Corpus Christi, Nueces County, Texas 78413, holds a mixed beverage permit, mixed beverage late hours permit, and a beverage cartage permit issued by the Texas Alcoholic Beverage Commission (TABC).
3. On May 12, 1999, Agent Wiley (Agent) of the TABC enforcement division, entered Respondent's premises and observed a person, subsequently identified as Evelyn Lopez (Lopez), who appeared to be a minor, in front of a glass containing what appeared to be an alcoholic beverage.
4. The Agent noted this alleged violation, and walked around the leased premises, returning to Lopez when no other violations were found.
5. The Agent found that Lopez was under 21 years of age.

6. Upon examining the contents of the glass that was next to Lopez, the Agent believed that the glass contained an alcoholic beverage, based on its odor and appearance.
7. Lopez did not consume any alcoholic beverage from the glass, but only had her hand near the glass.
8. Lopez did not possess an alcoholic beverage, but only had her hand near the glass.
9. The contents of the glass alleged to be an alcoholic beverage by the Agent, contained melted ice and did not have the percent of alcohol per volume required to be meet the definition of an "alcoholic beverage", contained in §1.04, Tex. Alco. Bev. Code Ann. (the Code).

VI.

PROPOSED CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing of 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. Ch. 2003.
2. Based on Findings of Fact Nos. 1 and 2, TABC has jurisdiction over this matter. Tex. Alco. Bev. Code Ann. §§ 5.31 and 5.35.
3. Based on Findings of Fact Nos. 8 and 9, the glass did not contain an alcoholic beverage as defined by §1.01(1) of the Code.
4. Based on Findings of Fact Nos. 3 through 8, Respondent did not permit a minor to possess or consume an alcoholic beverage on the licensed premises.
5. An "alcoholic beverage" is defined in §1.04(1) of the Code as a beverage containing more than one-half of one percent of alcohol by volume.
6. Based on Findings of Fact Nos. 3 through 9, and Conclusions of Law Nos. 3, 4 and 5, no penalty is warranted.

SIGNED this 10th day of April, 2000.



Edel P. Ruiseco, ALJ, Corpus Christi
State Office of Administrative Hearings