

DOCKET NO. 591891

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	ALCOHOLIC
DEL PAPA DISTRIBUTING CO., INC.	§	
PERMIT NOS. BC-241174, BI-256721, X-169415 & O-169416	§	
JEFFERSON COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-1476)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 21st day of December, 2001, the above-styled and numbered cause.

This order supercedes the October 24, 2001 Order suspending Respondent's permits for five days.

After proper notice was given, this case was heard by Administrative Law Judge Stephen J. Burger. The hearing convened on April 26, 2001, and adjourned May 24, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 17, 2001. 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. On October 8, 2001, Exceptions to the Proposal for Decision were filed by Respondent. On October 24, 2001, an Order suspending Respondent's permits for five days was issued. On November 19, 2001, Respondent timely filed a Motion for Rehearing. On November 19, 2001, Petitioner requested a full transcript of the hearing for consideration pursuant to Section 5.43(b) of the Code.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Motion for Rehearing, 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 these Findings of Fact and Conclusions of Law into this Order, except as follows:

Finding of Fact No. 13, which states: "On August 30, 2000, Montijo would have stopped resetting beer, had Hallmark requested he do so" is hereby REJECTED.

DISCUSSION:

Mr. Montijo did not testify. Mr. Hallmark testified as to what he thought Mr. Montijo would do if he told him to stop the reset.

Finding of Fact No. 16 is hereby REJECTED, in that it is identical to Finding of Fact No. 9 and is therefore redundant.

Conclusions of Law No.s 6-10 are hereby REJECTED, in that without Finding of Fact No. 13, no grounds exists for which these conclusions may stand.

Revised Conclusion of law No. 6 is hereby ADOPTED as follows:

“Petitioner failed to show that Mr. Hallmark was acting as a supervisor or that anyone other than himself or Mr. Montijo has any knowledge of the reset.”

DISCUSSION:

Even though Mr. Hallmark and presumably Mr. Montijo knew what they were doing was a violation of the Alcoholic Beverage Code and the Commission’s Rule 45.109, it was not proven that either one acted in a supervisory capacity.

Their actions may be analogous to two Texas Alcoholic Beverage Commission Agents working together. Generally the senior agent is considered to be the “lead” agent on any inspection or case although unless one partner is a Sergeant or other specifically designated supervisor, both agents are actually peers

Based on the above Discussion, Revised Findings of Fact and Conclusions of Law, the Assistant Administrator is of the opinion that the Petitioner failed to meet its burden of proof and that therefore this matter should be dismissed with prejudice.

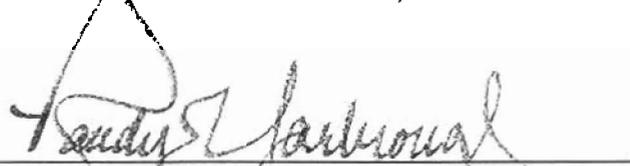
IT IS THEREFORE ORDERED that this case is DISMISSED with prejudice.

This Order will become final and enforceable on January 11, 2002, 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 21st day of December, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/dab

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