DOCKET NO. 576267

IN RE R & K DISTRIBUTORS INC. D/B/A R & K DISTRIBUTORS INC. LICENSE NOS. BB-22953, BI222954 PERMIT NOS. X-163957, O-163958	§ § § § §	BEFORE THE TEXAS ALCOHOLIC
GREGG COUNTY, TEXAS (SOAH DOCKET NO. 458-00-0253)	§ §	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 9th day of January, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard Farrow. The hearing convened and adjourned on May 26, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 15, 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. Exceptions have been filed by Petitioner on January 2, 2001.

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 License Nos. BB-22953, BI222954 and Permit Nos. X-163957, O-163958 are herein **SUSPENDED for one (1) day.**

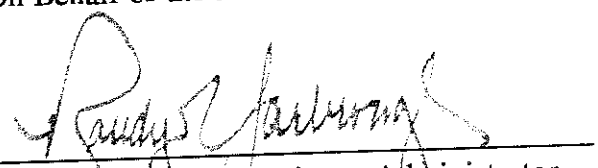
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **$500.00** on or before the **11th** day of **April, 2001**, all rights and privileges under the above described permits and licenses will be **SUSPENDED for a period of one (1) day, beginning at 12:01 A.M. on the 18th day of April, 2001.**

This Order will become final and enforceable on January 30, 2001, 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 9th day of January, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Richard Farrow
Administrative Law Judge
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Longview District Office

SOAH DOCKET NO. 458-00-0253

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
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	§	
VS.	§	OF
	§	
	§	
R & K DISTRIBUTORS INC.	§	
D/B/A R & K DISTRIBUTORS INC.	§	
LICENSE NOS. BB-222953, BI-222954	§	
PERMIT NOS. X-163957, O-163958	§	
GREGG COUNTY, TEXAS	§	
(TABC DOCKET NO. 576267)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission brought this action against the Respondent, R & K Distributors, Inc., for employing an unlicensed agent to promote brewery products. This proposal finds that the Respondent employed a person for one day to perform the services and activities of a beer agent who did not hold a beer agent's license and was not covered by the grace period and should be issued a warning for such violation.

I. Jurisdiction, Notice, and Procedural History

On May 26, 2000, hearing was held at the Tyler office of the State Office of Administrative Hearings. The Staff appeared by and through its attorney, Timothy Griffith, and its representative Alan Cameron, TABC agent. Respondent R & K appeared through its representative and president Mike Martin, and its attorney, Rex Nichols. The hearing was conducted by Richard Farrow, Administrative Law Judge for the State Office of Administrative Hearings. The hearing was conducted, evidence received, argument made, and the record was left open until June 7, 2000, for briefs from the parties regarding the issues presented.

At the start of the hearing the parties entered into stipulations which included that the TABC had jurisdiction over this matter and that the State Office of Administrative Hearings had jurisdiction of matters concerning the hearing, including the authority to issue a Proposal for Decision with findings of fact and conclusions of law. The notice provided was stipulated as good and sufficient notice and no issues were presented regarding these matters and will only be further addressed in the findings and conclusions.

II. Discussion of the Evidence

Factual stipulations were entered into by the parties which included the following:

1. The Staff withdrew the allegations contained in paragraph I. of the notice. The paragraph contained an allegation that Respondent had violated § 45.113(g)(1) of the TEX. ALCO. BEV. CODE ANN.

2. The Respondent holds licenses issued by the TABC: BB-222953, B1-222954, X-163957, O-163954, held such licenses on October 4, 1997 and continuously until present.

3. On October 4, 1997, Lynnette Moses was not a licensed beer agent.

4. Lynnette Moses applied for a agent's beer license on October 7, 1997.

5. TABC issued an agent's beer license to Lynnette Moses on October 14, 1997.

6. AMBUCS is a charitable, non-profit organization.

7. Lynnette Moses was not engaged in selling beer on October 4, 1997.

8. Lynnette Moses was wearing a swim suit with the Budweiser logo on it at the Gregg County Fairgrounds on October 4, 1997.

9. Employees of Respondent were present at the Gregg County Fairgrounds on October 4, 1997.

10. In addition to Lynette Moses, there were two other "Bud girls" present at the Gregg County Fairgrounds on October 4, 1997.

Allen Cameron, an agent with the TABC, testified that on October 4, 1997, he went to the Gregg County Fairgrounds and observed Lynnette Moses and the other two girls dressed in swim suits that had the Budweiser logo on them. The girls were giving out key chains or other such promotional items with the Budweiser logo on them, were having their pictures taken with various folks present at the event, and generally walking around and being seen and associated with the Budweiser logo. Agent Cameron talked with Lynnette Moses who told him she was employed by R & K. He also talked with Joseph Dawes, an employee of the Respondent, who told him the girls were under his control. At the time of the event, October 4, 1997, Lynnette Moses did not have and had not applied for a beer agent license.

Ms. Channey Manteufel testified that she was one of the three hired by the Respondent to be "Bud girls" for the AMBUCS event at the Gregg County Fairgrounds on October 4, 1997. She said that they were all given the same instructions. She was told to hand out promotional items, to wear the Bud bathing suit, and to generally walk around and be visible. She stated that she was employed for the event to promote Budweiser beer, but she was not instructed to sell beer and or to encourage anyone to drink or buy Budweiser beer at the festival. She only worked that one day as a Bud girl and was paid in cash.

Mr. John C. Martin, III, President of R & K, said that R&K had provided the Bud girls as a courtesy to the AMBUCS to help promote their festival and had been similarly involved with helping to promote the AMBUCS and other charitable organizations and events in the past. He was not aware that a beer agent's license was needed for the Bud girls in that situation. After the event, when he was told that the license was required, the process was immediately started to acquire or procure the licenses. He stated that there was never an intent to violate the Code or the TABC rules.

As set out in the stipulations, application was made for the agent's beer license on October 7, 1997, and the license was issued on October 14, 1997.

III. Discussion of the Evidence

TEX. ALCO. BEV. CODE ANN. § 73.03 requires that a person whose compensation is based mainly on the activities specified in § 73.01 may not engage in those activities unless he holds an agent's beer license. Section 73.01 sets out that "... the holder of an agent's beer license, acting as an employee or representative of a licensed manufacturer of beer located inside or outside the state or as an employee or representative of a licensed distributor, may: (1) promote the sale of beer through methods such as solicitation, display, advertising, and personal contact with licensed retailers of beer and their agents, servants, and employees, and with consumers of beer; and (2) sell beer and offer it for sale.

While a license is required in order to engage in the activities set out in §§ 73.01, the Commission shall not issue such a license unless it is shown to the satisfaction of the commission that the applicant is employed or has good prospects for employment as an agent or representative of a manufacturer or distributor, TEX. ALCO. BEV. CODE ANN. § 73.04. A person may engage in the activities specified for an initial grace period of five days during which he shall procure an agent's beer license from the commission, TEX. ALCO. BEV. CODE ANN. § 73.05. Also set out in the Code in § 73.06 is the prohibition of a manufacturer or distributor from using or being the beneficiary of the services of any person carrying on the activities specified in § 73.01 if he does not hold an agent's beer license and is not covered by the grace period provided by § 73.05.

The key to this whole disagreement seems to lie in the definition of the word "procure". If, as is argued by the Staff, the term means to obtain, to get, to cause to occur or be in effect, then the license was not procured within five days but was only "procured" when it was issued by the Commission. If procure means what Respondent urges, " to initiate a proceeding, to cause a thing to be done, to instigate " then the filing of the application for the license within five days, the instigation or initiation of the process, was what was required by the statute.

This whole five day grace period is further confusing by the commission's requirement that a person be employed as a representative or agent, or be able to show he has good prospects for such employment, to be qualified for issuance of the license. Further, the time it takes for the Commission to issue the license, if at all, is entirely up to the Commission and the applicant has no control over whether the license is issued within the five day grace period.

Staff urged that any fine in lieu of suspension should be substantial and requested a $10,000.00 civil penalty. It was shown by the testimony of the Respondent's president that such a

fine, or an even one substantially higher, would not seriously impact the business of the Respondent. Staff argued that to impress upon the Respondent that the rules of the commission and the statutes involved were to be followed and taken seriously, the civil penalty for a violation of those rules or statutes should be financially serious. Staff further argued that the recommendation was well below the maximum $25,000.00 per day penalty.

Respondent rebutted that the violation was not intentional, that Respondent took swift action to correct the situation when it was pointed out that the license was required even for a one day charitable event, that the required licenses were in fact applied for within five days and were issued seven days later (ten days after the event). Respondent complains that, if a violation occurred, the penalty suggested by the Staff is grossly disproportional to that violation, no matter the financial condition of the Respondent. Respondent also pointed out that it had offered the Staff a civil penalty of $500.00 in order to resolve the matter prior to hearing but that Staff had insisted on a high penalty.

Staff produced no violation history on the part of the Respondent.

IV. Analysis of the Evidence

The statute and rules seem difficult to apply in actual practice. It would seem nearly impossible to satisfy all the rules related to issuance of the beer agents license. In order to qualify for the license the applicant must show that he is employed as a beer agent, or very likely to be so employed, but he may not perform the duties of a beer agent, nor may his employer have him perform those duties for which he is employed, until the license is issued. While the grace period allows for the applicant to perform his job for five days <u>if</u> the licensed is issued within those same five days, any applicant or employer would be taking a huge risk of violating the statute and rules if they were to guess whether the Commission would issue the license within those five days, if at all.

Respondent's position that the five day grace period means that the applicant must make application within five days of the start of the activity of a beer agent is surely not contemplated by the statute and rules. If its definition were accepted, the filing of the application would be all that was ever required, even if the Commission declined to grant the license.

This proposal finds that, despite the seeming inconsistencies, the beer agent's license must have been issued by the Commission within the five day grace period in order for the agent to act as such any time during those five days. In the present case, since Lynnette Moses acted as a beer agent on behalf of the Respondent without having first procured a beer agent's license or within the five day grace period, Respondent was in violation for having used or benefitted from her unlicensed services.

The penalty requested by the Staff is not warranted by the facts. The Respondent was not aware of its violation and when made aware Respondent immediately did all it could to bring itself in compliance with the statute and rules. That Respondent had no prior violation history suggests that the violation was unintentional and seems unlikely to be repeated.

V. Findings of Fact.

1. The Respondent holds licenses issued by the TABC: BB-222953, B1-222954, X-163957, O-163954, and held such licenses on October 4, 1997 and continuously until present.

2. On October 4, 1997, Lynnette Moses was not a licensed beer agent.

3. Lynnette Moses applied for a agent's beer license on October 7, 1997.

4. TABC issued an agent's beer license to Lynette Moses on October 14, 1997.

5. AMBUCS is a charitable, non-profit organization.

6. AMBUCS was holding a fund raising event at the Gregg County Fairgrounds on October 4, 1997.

7. Respondent supplied the "Bud Girls" at the AMBUCS event of October 4, 1997.

8. Lynette Moses was not engaged in selling beer on October 4, 1997.

9. Lynette Moses was wearing a swim suit with the Budweiser logo on it at the Gregg County Fairgrounds on October 4, 1997.

10. Employees of Respondent were present at the Gregg County Fairgrounds on October 4, 1997.

11. In addition to Lynnette Moses, there were two other "Bud girls" present at the Gregg County Fairgrounds on October 4, 1997.

12. Lynnette Moses was promoting the sale and consumption of beer and was acting in the capacity as a beer agent for the Respondent on October 4, 1997.

VI. Conclusions of Law

1. Service of proper and timely notice was effected on the Respondent pursuant to TEX. GOV'T CODE ANN. § 2001.

2. Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.11.

3. 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. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.

4. Based on Findings of Fact Nos. 2-12, on October 4, 1997, Respondent employed an unlicensed agent, Lynnette Dawn Moses, to promote brewery products in violation of TEX. ALCO. BEV. CODE ANN § 73.06.

5. Based on the findings and conclusions, the issuance of a warning to Respondent for such violation is warranted.

Signed this 15th day of December, 2000.

Richard Farrow
Administrative Law Judge Presiding