DOCKET NO. 458-98- 1439

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
VS.	§	OF
	§	
ANCA INVESTMENT INC.	§	
DBA BEER BARN DRIVE THRU	§	
PERMIT NO. Q-418207	§	
LICENSE NO. BF-418208	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 579705)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against ANCA Investment, Inc., DBA Beer Barn Drive Thru (Respondent) alleging that Respondent, its agent, servant or employee, with criminal negligence sold, served or delivered an alcoholic beverage to a minor. Respondent appeared at the hearing through counsel and, after both sides rested, asserted that the evidence presented was insufficient to support Staff's allegation. This proposal for decision recommends a 7 day suspension or a $1,050.00 civil penalty.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened on September 2, 1998, at the offices of the State Office of Administrative Hearings in Dallas, Dallas County, Texas. The Staff of the Commission (Staff) was represented by it counsel, Timothy Griffith. The Respondent was represented by its counsel, David Smith.

II. THE ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS

There was one allegation in this proceeding, asserting that on May 6, 1998, the Respondent, its agent, servant, or employee with criminal negligence, sold, served or delivered an alcoholic beverage to a minor, in violation of TEX. ALCO. BEV. ANN. (Code) §106.03(a). Such a violation may be punished by cancellation or a maximum 60 day suspension of a permit (Code) §106.13(a). Pursuant to §1.08 of the Code and §6.03(b) of the Penal Code, Staff must prove by a preponderance of the evidence that under the circumstances, the actions of Respondent created a substantial and unjustifiable risk that the sale of alcohol to a minor would occur.

III. EVIDENCE

Staff's documentary evidence consisted of the Notice of Hearing, Permit, and a document indicating one previous cash law violation by Respondent. The evidence relative to the merits of this case was the live testimony provided by Mark J. Tarver, an officer in the vice division of Dallas Police Department, who was called by Staff. He testified that on May 6, 1998, an undercover minor named Jay Wallace drove to the drive-through window of Respondent's premises and purchased a six-pack of Budweiser Beer. He further stated that Wallace was 18 on that date, was wearing shorts and a t-shirt, and had a youthful appearance. He did not hear the conversation between Wallace and the clerk, but was in a vehicle behind Wallace's and did not see him present any identification. Wallace later told him that none had been requested. He testified that Wallace was carrying his own Texas Driver's License at the time and was not in possession of any fake identification. He further testified that in his opinion, under the circumstances noted above, Respondent's failure to require Wallace to provide identification resulted in a substantial and unjustifiable risk that the sale of alcohol to a minor would occur. No evidence was offered by Respondent.

IV. DISCUSSION

In this case, the testimony of Officer Tarver constituted the only evidence presented to the fact finder relative to the details of the incident upon which this proceeding is based. His testimony was straightforward and credible. Further, it was entirely uncontradicted. Under this state of the record, the Administrative Law Judge feels constrained to give it full weight, and it is accordingly accepted as the sole definitive evidence of the facts underlying this incident.

Staff pointed out in argument that in Officer Tarver's opinion, the minor had a youthful appearance, and that this conclusion was bolstered by the fact that the minor was more than two years under the age of 21. Respondent's position was that in view of the fact that the minor did not appear at the hearing so that he could be personally observed, the evidence was insufficient to impose upon Respondent a duty to require identification.

The Administrative Law Judge is of the opinion that in view of the credibility of Officer Tarver and of the uncontradicted nature of his testimony, Staff has adequately proved its case by a preponderance of the evidence.

V. SANCTIONS AND RECOMMENDATIONS

In this case, the Staff recommended that Respondent's permits and license be suspended for seven days or that, in lieu of suspension, Respondent be required to pay a civil penalty of $1,050.00. The Administrative Law Judge agrees with the Staff's recommendation.

VI. PROPOSED FINDINGS OF FACT

1. ANCA Investment, Inc., DBA Beer Barn Drive Thru holds Wine Only Package Store Permit Q-418207 and Beer Retailers Off Premise License No. BF-418208 for the premises known as Beer Barn Drive Thru, located at 1011 Corinth St., Dallas, Dallas County, Texas.

2. On August 13, 1998, the Staff sent the notice of hearing to Respondent by certified mail, return receipt requested, and all parties appeared.

3. The hearing on the merits was held on September 2, 1998 at the offices of the State Office of Administrative Hearings, Dallas, Dallas County Texas. The Staff was represented by Timothy Griffith. The Respondent was represented by its counsel, David Smith.

4. On May 6, 1998, Respondent sold Jay Wallace a six-pack of Budweiser Beer.

5. Respondent did not request any proof of age from Jay Wallace as demonstrated by the testimony of Officer Tarver.

6. Jay Wallace was 18 years of age at the time of the sale in question.

7. Jay Wallace had a youthful appearance at the time of the sale in question.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Chapter 5, §§ 6.01 and 106.13 of the Code.

2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN., Chapter 2003.

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOVT CODE ANN, §2001.051 and §2001.052.

4. Based on Finding of Fact Numbers 6 and 7, Respondent had a duty to request proof of age from Jay Wallace.

5. Based on Finding of Fact Numbers 6 and 7, Respondent had a duty to refuse to sell an alcoholic beverage to Jay Wallace.

6. The failure of Respondent to perform the duties imposed upon it pursuant to Conclusion of Law Number 4 created a substantial and unjustifiable risk that sale of alcohol to a minor would occur.

7. Based on Conclusion of Law Number 6 and Finding of Fact Number 4, Respondent sold an alcoholic beverage to a minor with criminal negligence.

8. Based on the foregoing Findings and Conclusions, a seven day suspension of Respondent's permit and license is warranted. 16 TEX. ADMIN. CODE. §37.60.

9. Pursuant to Code §11.64, Respondent should be allowed to pay a $1,050.00 civil penalty in lieu of suspension of its permits and license.

SIGNED THIS 5th day of March, 1999

for Mark S. Richards
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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