

DOCKET NO. 597393

IN RE YASSER M. ALHAMAYDEH
D/B/A STANLEY'S ICE STATION #7
PERMIT NO. BQ-434734

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BEFORE THE

TEXAS ALCOHOLIC

BEXAR COUNTY, TEXAS
(SOAH DOCKET NO. 458-01-2839)

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd day of August, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Leah Davis Bates and was thereafter assigned to ALJ Nancy Bage Sorenson. The hearing convened on May 29, 2002, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 20, 2002. 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. No exceptions to the proposal were 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 allegations are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on September 13, 2002, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 23rd day of August, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Administrative Law Judge
State Office of Administrative Hearings
10300 Heritage Blvd, Suite 250
San Antonio, Texas 78216
VIA FACSIMILE: (210) 308-6854

Yasser Mohammad Alhamaydeh
RESPONDENT
d/b/a Stanley's Ice Station #7
2217 San Pedro
San Antonio, Texas 78212-2323
REGULAR MAIL

Dewey A. Brackin
TABC, Legal Division

Licensing Division
San Antonio District Office

DOCKET NO. 458-02-2839

TEXAS ALCOHOLIC
BEVERAGE COMMISSION

V.

YASSER M. ALHAMAYDEH
d/b/a STANLEY'S ICE STATION #7
BEXAR COUNTY, TEXAS

PERMIT NO. BQ-434734
(TABC CASE NO. 597393)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Yasser M. Alhamaydeh, d/b/a Stanley's Ice Station #7 (Respondent) alleging that a breach of the peace occurred on the licensed premises, under the Permittee's control, and resulted from the Permittee's, its agent's, servant's, or employee's, improper supervision of persons on the premises. The Respondent denied the allegation. Finding the evidence insufficient to prove that the person who committed the assault was either an agent, servant, or employee of Mr. Alhamaydeh, this decision recommends no action be taken against Respondent.

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 before Administrative Law Judge (ALJ) Leah Davis Bates on May 29, 2002, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas and was thereafter assigned to ALJ Nancy Bage Sorenson. Staff was represented by its counsel, Dewey Brackin. Respondent represented himself.

II. ALLEGATIONS AND EVIDENCE

There was one allegation in this proceeding, asserting that on September 21, 2001, a breach of the peace occurred on the licensed premises, which was not beyond the Permittee's, its agent's, servant's, or employee's control, and resulted from the Permittee's, its agent's, servant's, or employee's, improper supervision of persons on the premises. Therefore, the Staff alleges this breach of the peace violated TEX. ALCO. BEV. CODE ANN. § 69.13 and 16 TEX. ADMIN. CODE (TAC) § 35.31(b).

A. Staff's Evidence

Agent Joseph Reilly of the Texas Alcoholic Beverage Commission (TABC) testified that on

September 21, 2001, three men were outside Respondent's store drinking alcoholic beverages. Because Respondent's store has an Off-Premise license, consumption of alcoholic beverages is permitted only off the store's premises. Agent Reilly and Detective Charles McLenan (his partner) issued citations to the three men and confiscated their beverages. Because the store clerk could not have seen these three men from his position in the store, the agent went inside to inform and warn the clerk. The agent advised the clerk that action should be taken to ask the men to leave the outside area or if this was unsuccessful, to call the police to remove them from the premises. Agent Riley testified that a man who appeared to be arranging the shelves in the cooler in the back of the small store then asked, "Is that Scottie?" This alleged "stocker" then went outside the store and proceeded to kick one of the men who had been reported drinking in the area outside the store.

Detective McLenan of the San Antonio Police Department was the second witness called by TABC. Detective McLenan testified that after seeing the three men consuming beverages outside Stanley's Ice Station on the sidewalk, he and Agent Reilly issued citations to the men. After Agent Reilly went inside the store, a large man came hurrying out of the store and began kicking the man named Scott. Detective McLenan testified he stopped the assault after two kicks and Mr. Livingstone blurted out, "I work here; I'm the stocker." The Detective then recounted that he asked "Scott" if he wanted to press charges, but he did not elect to do so.

Mr. Brackin argued on behalf of the Staff that whether Mr. Livingstone was on Respondent's payroll or not, he was performing a service for Respondent that benefitted Respondent and therefore, Respondent is responsible for Mr. Livingstone's actions under the strict liability statute.

B. Respondent's Evidence

Respondent argued that the man who committed the assault was not his employee. He stated he did not know who the man was. Respondent said he questioned his cashier about who the man was and the cashier stated that the man was a customer.

Respondent cross-examined the Staff's two witnesses. Respondent asked both of the witnesses whether his store clerk could have been able to see the three men drinking outside the store from where he was positioned. Both answered in the negative. Agent Reilly stated that he went inside the store to warn the clerk, rather than issue a citation, because the clerk could not have seen the three men from his position in the store.

III. APPLICABLE STATUTORY PROVISIONS

TABC may either suspend a permit for not more than 60 days or cancel a permit if it is found that the permittee violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

The Code states at Section 61.71(a)(17):

(a) The commission or administrator may suspend for not more than 60 days

or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(17) conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people.

The Code states at Section 69.13:

The commission or administrator may suspend or cancel the license of a retail beer dealer after giving the licensee notice and the opportunity to show compliance with all requirements of law for retention of the license if it finds that a breach of the peace has occurred on the licensed premises or on premises under the licensee's control and that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.

16 TAC § 35.31(b) states that:

A licensee or permittee violates the provisions of the Alcoholic Beverage Code ... if any of the offenses listed in paragraph (c) of this rule are committed:

- (1) by the licensee or permittee in the course of conducting his/her alcoholic beverage business; or
- (2) by any person on the licensee or permittee's licensed premises; and
- (3) the licensee or permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense.

16 TAC § 35.31(c)(16):

[A]ny law, regulation or ordinance of the federal government or of the county or municipality in which the licensed premises is located, violation of which is detrimental to the general welfare, health, peace and safety of the people.

IV. ANALYSIS AND RECOMMENDATIONS

The Staff has the burden of proof in this case. The Staff failed to show that the licensee or permittee in the course of conducting his alcoholic beverage business knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense. The Staff failed to show that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control. The Staff submitted no employment records or other conclusive evidence that the person who committed the assault, Mr.

Livingstone, was a servant, agent, or employee of Mr. Alhamaydeh. Evidence that Mr. Livingstone stated that he was Respondent's employee is not enough to prove by a preponderance of the evidence that he was employed by Mr. Alhamaydeh. The ALJ disagrees with the Staff that because Mr. Livingstone was apparently arranging beer on the shelves, he was benefitting Mr. Alhamaydeh's business, such that Mr. Alhamaydeh should be held responsible for his actions. There was not a preponderance of the evidence showing that this breach of the peace was not beyond the control of Mr. Alhamaydeh and resulted from his improper supervision of persons permitted to be on the premises, such that he could have foreseen or taken reasonable steps to prevent the offense. Instead, the evidence is that Respondent's clerk could not see the men drinking outside.

V. FINDINGS OF FACT

1. Yasser Mohammad Alhamaydeh (Respondent) is the holder of Wine and Beer Retailer's Off Premises Permit BQ-434734 for the premises known as Stanley's Ice Station #7, located at 2217 San Pedro, San Antonio, Bexar County, Texas, 78212-3231.
2. On May 3, 2002, the Staff sent the notice of hearing to Respondent by certified mail and all parties appeared.
3. The hearing on the merits was held on May 29, 2002 at the offices of the State Office of Administrative Hearings, San Antonio, Bexar County, Texas. Staff was represented by Dewey Brackin. Respondent represented himself.
4. On September 21, 2001, a breach of the peace occurred on the licensed premises of Stanley's Ice Station #7, an establishment owned by Respondent..
5. Agent Joseph Reilly and Detective Charles McClenan observed the breach of the peace.
6. The breach of the peace consisted of an assault by Ralph Livingstone on a man referred to as "Scottie."
7. Ralph Livingstone was in the back of the store when Agent Reilly came into the store to warn the store clerk of three men illegally consuming alcoholic beverages outside the store.
8. Mr. Livingstone then ran outside and kicked "Scottie."
9. Detective McClenan intervened and stopped the assault.
10. Mr. Livingstone told Detective McClenan he worked at the store.
11. Mr. Livingstone was not an employee of Respondent.
12. Respondent was not responsible for Mr. Livingstone's kicking Scott.
13. The store clerk could not see the men drinking outside the store.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Chapter 5, §§ 6.01, 11.61, and 61.71 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. GOV'T CODE ANN., Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. § 2001.051 and § 2001.052.
4. Staff bore the burden of proof in the proceeding.
5. Respondent did not violate TEX. ALCO. BEV. CODE ANN. §61.71(a)(17), concerning conducting a business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people.
6. Pursuant to Findings of Fact Nos. 11 and 12, Respondent did not violate TEX. ALCO. BEV. CODE ANN. §69.13, concerning a breach of the peace that occurs on the licensed premises that was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.
7. Pursuant to Finding of Fact No. 13, Respondent did not violate TEX. ADMIN. CODE § 35.31(b)(3) and (c)(16), concerning the commission of a breach of the peace that the licensee or permittee knew or, in the exercise of reasonable care, should have known of or the likelihood of its occurrence and failed to take reasonable steps to prevent the breach of the peace.
8. Based on the above Findings of Fact and Conclusions of Law, no disciplinary action should be taken against the Respondent's permits.

SIGNED THIS 24th day of July, 2002


Nancy Bage Sorenson
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS