

SOAH DOCKET NO. 458-06-1957

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

BRUCE ALAN RILEY
D/B/A RILEY'S BAR & GRILL,
MIDLAND COUNTY, TEXAS
(TABC CASE NO. 499668)
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) brought this disciplinary action against Bruce Alan Riley d/b/a Riley's Bar & Grill, (Respondent), alleging that, on or about May 18, 2005, Respondent, his agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person, in violation of Texas Alcoholic Beverage Code (the Code) §§ 11.61(b)(14) and/or 61.71(a)(6). Based on the evidence, the Administrative Law Judge (Judge) finds the Petitioner proved the allegations by a preponderance of the evidence and recommends that Respondent's permits should be suspended for twenty days or a civil penalty paid.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute disciplinary action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. HEARING AND EVIDENCE

On December 5, 2006, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner

was represented by Diane Brown, attorney. Respondent appeared and represented himself. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code §§ 11.61(b)(14) and 61.71(a)(6), TABC may suspend a permit if it is found that the permittee sold, served, or delivered an alcoholic beverage to an intoxicated person.

IV. EVIDENCE

A. Documentary Evidence

Petitioner offered into evidence two exhibits, the Notice of Hearing issued in the case and the Respondent's permit history. All offered exhibits were admitted into evidence.

B. Jonathan Simcik, TABC Agent

Agent Simcik testified that, on May 18, 2005, he went to Riley's Bar & Grill (Riley's) accompanied by Agent Rene Carrasco to conduct an undercover sting operation. Agent Simcik entered the licensed premises and was able to observe the bar area where bartender Tabitha Prather was working that night. He observed a man, later identified as Robert Vanhuss, as Ms. Prather served him a beer while he was intoxicated. Simcik observed that Vanhuss had poor balance and motor skills, swayed, used the bar to help maintain his balance, his speech was slurred, he had the odor of an alcoholic beverage, and he fumbled with his money while talking to Ms. Prather. Agent Simcik testified that the area where he observed Mr. Vanhuss was well lit and the bartender could have observed his intoxicated state. A review of the seller-server records for Ms. Prather determined that her certification had expired on the date of the incident in question. Agent Simcik has been a peace officer for eleven years, the last four years with the Commission, and is experienced identifying intoxicated persons.

C. Rene Carrasco, TABC Agent

Agent Carrasco was with Agent Simcik on May 18, 2005, at the licensed premises conducting a sale to intoxicated persons sting operation. He was called by Agent Simcik, who stated that he observed a sale to an intoxicated person and pointed out Mr. Vanhuss as that person. Agent Carrasco observed that Mr. Vanhuss looked at him with a blank stare, refused to get up after Carrasco identified himself as a Commission agent, and had to be physically escorted outside, had alcohol on his breath, a flushed face, red bloodshot eyes, slurred speech, appeared lethargic, and became combative and belligerent. Mr. Vanhuss also kept stating that he knew Mr. Riley, later identified as the bar owner, and told Agent Carrasco to contact him as he was arrested for public intoxication. Agent Carrasco located Ms. Prather and arrested her for the offense of sale to an intoxicated person.

D. Doug Doss

Mr. Doss is the manager of the Riley's and was working on the night of the incident at issue. He testified that he spoke with Mr. Vanhuss for quite a while when Vanhuss first entered Riley's and then again later that evening and observed that he was served three beers in approximately one and a half hours. Mr. Doss testified that he did not observe Mr. Vanhuss exhibit any signs of intoxication or any other signs that would lead him to cut him off from purchasing further alcoholic beverages. He also recalled that Ms. Prather, the bartender, refused to sell alcoholic beverages to some other patrons of the bar shortly before the incident with Mr. Vanhuss occurred. Mr. Doss stated that the bar policy on serving intoxicated persons was very strict, there were many meetings regarding observation of the law, and there was no coercion or pressure by the owner to serve alcoholic beverages to patrons.

E. Kimberly Carnes

Ms. Carnes was employed by Riley's on May 18, 2005, but she was not present on the licensed premises when the TABC agents arrived and made an arrest and charge of an administrative violation. She is, however, familiar with Mr. Vanhuss and testified that he usually has bloodshot eyes, walks very slowly, and walks with his feet out in an unsteady manner.

V. ANALYSIS

Pursuant to the Code §§ 11.61(b)(14) and 61.71(a)(6), TABC may suspend a permit if it is found that the permittee sold, served, or delivered an alcoholic beverage to an intoxicated person.

The evidence is undisputed that Ms. Prather was the agent, servant, or employee of Respondent and that her seller-server certification had expired on the date in question. The only issue was whether or not Ms. Prather actually served an alcoholic beverage to Mr. Vanhuss when he was intoxicated that night.

The evidence from Agents Simcik and Carrasco directly contradicts that of Mr. Doss, the bar manager that night, as to whether Mr. Vanhuss displayed signs of intoxication. Agent Simcik's testimony is that he observed that Vanhuss had poor balance and motor skills, swayed, used the bar to help maintain his balance, that his speech was slurred, that he had the odor of an alcoholic beverage and that he fumbled with his money while talking to Ms. Prather. Agent Carrasco observed that Mr. Vanhuss looked at him with a blank stare, that he refused to get up after Carrasco identified himself as a Commission agent, that he had to be physically escorted outside, had alcohol on his breath, a flushed face, red bloodshot eyes, slurred speech, that he appeared lethargic, and became combative and belligerent. Mr. Doss testified that he did not observe Mr. Vanhuss exhibit any signs of intoxication or any other signs that would lead him to cut him off from purchasing further alcoholic beverages.

No evidence was adduced to show that Agent Simcik or Agent Carrasco would perjure themselves in order to pursue one minor administrative violation on the part of the licensed premises. Both agents were trained in the detection and evaluation of intoxicated persons as Texas peace officers. On the other hand, Mr. Doss would certainly have a stronger motivation to deny under oath that Mr. Vanhuss was intoxicated that night, since his job with Respondent could be affected if the licensed premises were forced to close for a period of time. Ms. Carnes also has a similar motivation because her job at the licensed premises could be affected. The weight of the credible evidence is that Ms. Prather served an alcoholic beverage to Mr. Vanhuss while he was intoxicated, in violation of the Code. The evidence was sufficient to prove that Respondent violated the Code and his permits should be suspended or a civil fine paid.

VI. PROPOSED FINDINGS OF FACT

1. Bruce Alan Riley d/b/a Riley's Bar & Grill, Midland County, Texas, holds Permit No. MB-172454, issued by the TABC for the premises located at 3421 West Wall, Midland, Midland County, Texas.
 2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated April 25, 2006.
 3. The hearing on the merits convened December 5, 2006, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney Diane Brown. The Respondent appeared and represented himself. The record closed on the same day.
 4. On or about May 18, 2005, Respondent employed Tabitha Prather at the licensed premises as a bartender.
 5. On that same date, Ms. Prather was not seller-server certified.
 6. Agent Simcik entered the licensed premises on that date and was in a position to observe Ms. Prather serve an alcoholic beverage to Mr. Robert Vanhuss.
 7. Agent Simcik observed Mr. Vanhuss for twenty minutes to determine and observed that he displayed signs of intoxication.
 8. Agent Simcik conferred with Agent Carrasco, who also observed that Mr. Vanhuss displayed signs of intoxication, and explained to him that he observed Ms. Prather serve an alcoholic beverage to Mr. Vanhuss.
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9. Agent Carrasco entered the licensed premises, determined that both Ms. Prather was an employee and arrested Ms. Prather for serving an alcoholic beverage to an intoxicated person.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-9, the Commission proved that Respondent violated the Code when his agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person on the licensed premises on May 18, 2005.
5. Based on the foregoing, suspension of Respondent's permits for a period of twenty days or payment of a civil penalty of one hundred and fifty dollars per day of the proposed suspension is warranted.

SIGNED: January th 10, 2007

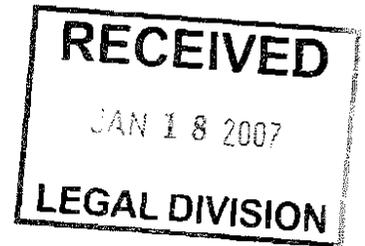


B. L. Phillips
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



January 10, 2007

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-06-1957, Bruce Alan Riley; d/b/a Riley's Bar & Grill

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "B.L. Phillips".

B.L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Tim Griffith, Texas Alcoholic Beverage Commission, 8700 Stemmons Frwy., Ste. 460, Dallas, TX 76427
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Bruce Alan Riley, 3421 W. Wall, Midland, TX. 79701 -VIA REGULAR MAIL