

DOCKET NO. 610019

IN RE SHEIK MORGAN L.L.C. ET AL	§	BEFORE THE
D/B/A THE ESKIMO HUT	§	
PERMIT NOS. BG-467690	§	
	§	TEXAS ALCOHOLIC
	§	
RANDALL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-6098)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of November, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on August 13, 2004, 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 August 25, 2004. 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.

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.

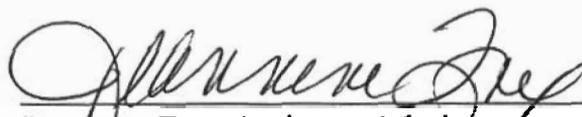
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on November 29, 2004, 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.

SIGNED on this the 8th day of November, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Jared Melton
ATTORNEY FOR RESPONDENT
P. O. Box 328
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Sheik Morgan L.L.C. et al
d/b/a The Eskimo Hut
RESPONDENT
4201 S. Western Street
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CERTIFIED MAIL NO. 7000 1530 0003 1902 7080
RETURN RECEIPT REQUESTED

Administrative Law Judge
State Office of Administrative Hearings
Lubbock, Texas
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Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Amarillo District Office
Licensing Division

DOCKET NO. 458-04-6098

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

SHEIK MORGAN L.L.C. *ET AL*
D/B/A THE ESKIMO HUT
RANDALL COUNTY, TEXAS
(TABC NO. 610019),
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC, Staff) brought this disciplinary action against Sheik Morgan L.L.C. *et al* dba The Eskimo Hut (Respondent), alleging that Respondent, its agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person on or about December 1, 2003. Petitioner recommended that Respondent's permit be suspended for twenty days or that a civil penalty of one hundred and fifty dollars per day be assessed against Respondent. The Administrative Law Judge (Judge) finds that the Petitioner did not prove the allegations by a preponderance of the evidence and recommends that no action be taken against Respondent's permit.

I. JURISDICTION, VENUE, AND NOTICE

Venue and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law. The notice of intention to institute enforcement 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 August 13, 2004, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings (SOAH), 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas.

Petitioner was represented by Dewey Brackin, staff attorney. Petitioner appeared and was represented by Jared Melton, attorney. Evidence was received from both parties through testimony provided by witnesses and documentary evidence. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to Tex. Alco. Bev. Code Ann. (the Code) § 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. TABC shall give the permittee the opportunity to pay a civil penalty rather than have the permit suspended.¹ The actions of an employee shall not be attributable to an employer if: (1) the employer requires its employees to attend a commission-approved seller training program; (2) the employee has actually attended such a training program; and (3) the employer has not directly or indirectly encouraged the employee to violate the law.² Proof by the commission that an employee of a permittee sold, delivered, or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice within a 12-month period, shall constitute *prima facie* evidence that the licensee has directly or indirectly encouraged violation of relevant laws.³

IV. EVIDENCE

A. Documentary Evidence

Staff offered three exhibits which were admitted into evidence: Respondent's permit history, a police report prepared by the Amarillo Police Department on the alleged incident, and a TABC report on the alleged incident. Respondent's permit history shows that Respondent was cited for two

¹ Tex. Alco. Bev. Code Ann. § 11.64(a)

Tex. Alco. Bev. Code Ann. § 106.14(a)

³ 16 Tex. Admin. Code § 50.10(c)

instances of sale of an alcoholic beverage to a minor, on October 30, 2003, and November 29, 2003, and one instance of sale of an alcoholic beverage to an intoxicated person on December 1, 2003. The police report states that Amarillo Police Officer Smith was dispatched to the licensed premises on December 1, 2003, in reference to a report from an employee of the Toot 'n Totum across the street from the licensed premises who refused to sell alcoholic beverages to an individual, later identified as Dennis Voight, who he believed was intoxicated and a danger to himself. The employee observed Mr. Voight get into his vehicle and drive across the street to the drive-thru at the licensed premises. Officer Smith contacted Mr. Voight, determined that he was intoxicated, arrested him, and contacted Jeffrey Hauschild, an employee at the licensed premises. Hauschild admitted to selling an alcoholic beverage Mr. Voight, but added that he did not appear to be intoxicated. The officer reported that Mr. Voight purchased a 12 pack of beer, that he was very intoxicated, appeared to be confused, incoherent at times, had very slow movements, and eyes which were very bloodshot and glassy. The TABC report restated the aforementioned facts and that Hauschild was TABC certified.

Respondent offered 38 exhibits into evidence. Exhibits 1-20 are the records kept by Respondent showing that its employees, including Hauschild, were seller-server certified by TABC. Exhibits 21-38 are the employment agreements of Respondent's employees, including Mr. Hauschild, showing that the employees were informed that employees must refuse service to anyone who appeared intoxicated.

B. Coby Marr

Mr. Marr was employed at the manager of the licensed premises on the date in question. He testified that management directly encouraged employees not to sell alcoholic beverages to minors or intoxicated persons. Management previously directed him to not sell alcoholic beverages to minors or intoxicated persons and he related this direction to the employees on a daily basis. Employees were subject to immediate termination for failure to comply with this direction. Mr. Hauschild was fired and Mr. Marr was asked to resign because of the incident which formed the basis of this action by TABC. Respondent increased efforts to educate employees regarding the

prohibition of selling alcoholic beverages to minors or intoxicated persons after this incident. Mr. Marr testified that two previous incidents involving sale of alcoholic beverages to minors occurred in October and November, 2003, and that the employees who violated Respondent's policy and the manager of the licensed premises at the time were fired or allowed to resign. He also testified that he was responsible as manager for determining that all employees were seller-server certified and that scanning devices were available for employees to check for ages of minors attempting to purchase alcoholic beverages.

C. Kevin Morgan

Mr. Morgan is the president and sole owner of the licensed premises. He testified that all employees were given copies of the written policies and procedures adopted by the licensed premises, as reflected in Respondent's exhibits 21-38. Respondent conducts internal "sting" operations on employees to determine if they are complying with these policies and procedures, and employees have been fired before based on these operations. Though not required to by TABC, Respondent also has scanners on the licensed premises to determine the age of a purchaser before any sale of an alcoholic beverage is made.

Mr. Morgan testified that Mr. Hauschild and Mr. Marr were fired for the violation which occurred on December 1, 2003, and that Ms. Holly Wilson and Mr. Adam Graves were fired or allowed to quit for the violation which occurred in November, 2003. Respondent determined that its procedures for ensuring that employees were seller-server certified were inadequate when it was discovered that Ms. Wilson, who had a seller-server card when hired, had an expired certification. A new procedure was instituted thereafter for upper management to monthly review the status of all employees' certifications. He denied that Respondent has directly or indirectly encouraged any employees to violate the law.

D. Vernon Smith

Officer Smith is employed as a police officer by the Amarillo Police Department and investigated the report of an intoxicated person attempting to purchase alcoholic beverages on December 1, 2003. He determined that Mr. Voight was intoxicated at the time and that Mr. Hauschild had sold beer to Mr. Voight. Officer Smith recalled that he told Mr. Hauschild, as a person selling at a drive-thru window, that it might have been difficult to determine that Mr. Voight was intoxicated because the weather was cold and windy.

E. Christopher Larimore

Mr. Larimore was the employee of the Toot 'n Totum which is located across the street from the licensed premises. He called the police after refusing to sell alcoholic beverages to Mr. Voight and identified Mr. Voight to police. Mr. Larimore testified that he had no doubt that Mr. Voight was intoxicated on the date in question.

V. ANALYSIS

The preponderance of the evidence does not support a finding that Respondent's permit should be suspended. The evidence clearly demonstrates that Mr. Hauschild, Respondent's employee, sold an alcoholic beverage to an intoxicated person on December 1, 2003, and that Respondent was cited for sale to a minor on October 30, 2003, and November 29, 2003. Respondent signed a Waiver Order which concluded that Respondent violated the Code provisions relating to sale of an alcoholic beverage to a minor on October 30, 2003, but that Respondent at that time did not directly or indirectly encourage sale, service, or delivery of alcoholic beverages to minors.

The only issue in this case is whether these three incidents are sufficient to now conclude that Respondent directly or indirectly encourages employees to violate the law. Regarding the incident of December 1, 2003, Mr. Hauschild was fired from his employment with Respondent due to his

failure to comply with the law. Despite the abundance of evidence that the purchaser, Mr. Voight, was intoxicated on the date in question, even the police officer admitted to Mr. Hauschild that it might be difficult for an employee at a drive-thru to determine that Mr. Voight was intoxicated due to the cold and windy weather. Mr. Larrimore, the employee of the Toot 'n Totum, had the advantage of observing Mr. Voight walking around the store before he determined that he was intoxicated. Regarding the incidents of October 30, 2003, and November 29, 2003, the employees who committed the violations and the manager at the time of both incidents were fired or allowed to resign their employment. The incident of October 30, 2003, led Respondent to change its procedures to require management to make monthly reviews of every employee's certification status.

While a *prima facie* case that Respondent directly or indirectly encouraged employees to violate the law was established through evidence of these three incidents within a 12 month period, Respondent successfully rebutted the *prima facie* case through its evidence. Respondent took action during and after these incidents to ensure that the violations were not repeated. All employees who committed violations were fired, as were the managers responsible for the conduct of the employees. Efforts to educate employees about the requirements of the law were increased thereafter. Respondent has made a good faith effort to ensure that its employees comply with the law, and the fact that the permit history shows no violations since December 1, 2003, shows that its efforts have been successful. Contrary to the arguments made by Staff, the evidence shows that Respondent is not directly or indirectly encouraging its employees to violate the law.

Having reviewed all of the evidence, the Judge finds that Respondent's employee did violate Tex. Alco. Bev. Code Ann. § 61.71(a)(6), but Respondent successfully asserted its affirmative defense, and its permit should not be suspended.

VI. PROPOSED FINDINGS OF FACT

1. Sheik Morgan L.L.C. *et al* dba The Eskimo Hut (Respondent) holds a Wine and Beer Retailer's Permit, BG467690, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 4201 S. Western Street, Amarillo, Randall County, Texas.

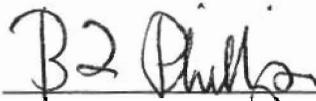
2. On August 13, 2004, a hearing was convened before Administrative Law Judge B. L. Phillips at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. TABC was represented at the hearing by Dewey A. Brackin, Staff Attorney. Respondent appeared and was represented by Jared Melton, attorney.
3. On October 30, 2003, Respondent's employee sold an alcoholic beverage to a minor. The employee was fired for the violation and Respondent instituted new procedures to ensure that all employees were seller-server certified.
4. On November 29, 2003, Respondent's employee sold an alcoholic beverage to a minor, and the employee and manager of the licensed premises were fired or allowed to resign as a result of the violation and failure to control violations by employees.
5. On December 1, 2003, Respondent's employee sold an alcoholic beverage to an intoxicated person, and the employee and manager of the licensed premises were fired as a result of the violation and failure to control violations by employees.
6. Respondent has increased efforts to educate employees regarding sale of alcoholic beverages to minors and intoxicated persons and has installed scanners to allow employees to determine the age of persons before the sale of alcoholic beverages.
7. No further violations of the law have been established since December 1, 2003, as reflected on the Respondent's permit history.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.32, 5.44, 26.03, and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Staff issued the notice of hearing in compliance with 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55, and TEX. ALCO. BEV. CODE ANN. § 11.63.
4. It is an affirmative defense to a violation of TEX. ALCO. BEV. CODE ANN § 11.61(b)(14), and the actions of an employee shall not be attributable to an employer, if: (1) the employer requires its employees to attend a commission-approved seller training program; (2) the employee has actually attended such a training program; and (3) the employer has not directly or indirectly encouraged the employee to violate the law.

5. Respondent successfully asserted its affirmative defense on this issue.
6. Based upon Proposed Findings of Fact Nos. 3-7 and Proposed Conclusions of Law Nos. 4-5, Respondent did not violate TEX. ALCO. BEV. CODE ANN § 11.61(b)(14).
7. Based upon Proposed Conclusion of Law No. 6, Respondent's permits should be not suspended.

SIGNED on the 25th day of August, 2004.



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