

**DOCKET NO. 579109**

IN RE SALVATORE CARFI	§	BEFORE THE
D/B/A ITALIAN RESTAURANT AND	§	
FLYING PIZZA	§	
PERMIT NO. BG-203225	§	
	§	TEXAS ALCOHOLIC
	§	
JEFFERSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-0902)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 24th day of January 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ed Shipper. The hearing convened on June 16, 1999 and adjourned June 16, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law in November, 1999. 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 were filed by both Respondent and Petitioner.

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 regarding Permit No. BG-203225, be hereby **DISMISSED** with prejudice.

**This Order will become final and enforceable on February 14, 2000**, 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 25<sup>th</sup> day of January, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Ed Shipper  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (713) 812-1001**

Shanee Woodbridge, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
**VIA FACSIMILE (512) 475-4994**

Bruce K. Bornefeld  
**ATTORNEY FOR RESPONDENT**  
P.O. Box 2524  
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Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Houston District Office



INTER-OFFICE COMMUNICATION  
TEXAS ALCOHOLIC BEVERAGE COMMISSION

January 6, 2000

**TO:** Gayle Gordon, Director of Legal

**FROM:** Randy Yarbrough, Assistant Administrator

**SUBJECT:** Docket No. 458-99-0902  
TABC Case No. 579109  
Salvadore Carfi d/b/a Flying Pizza  
Wine and Beer Retailer's Permit (BG-203225)  
Jefferson County, Texas

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I have read the attached Proposal for Decision in the above styled case and find the recommendations of the Hearings Examiner should be adopted.

Please prepare an **ORDER** adopting the Proposal for Decision, adopting all Findings of Fact and Conclusions of Law and show that the case should be **DISMISSED**.

Please make a copy of this decision and submit it along with the order to the respective parties.

A handwritten signature in cursive script, reading "Randy Yarbrough", written over a horizontal line.

RY

DOCKET NO. 458-99-0902

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	
	§	
SALVATORE CARFI	§	OF
D/B/A ITALIAN RESTAURANT & FLYING	§	
PIZZA	§	
PERMIT NO. BG-203225	§	
	§	
TABC NO. 579109	§	
JEFFERSON COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission ("Commission") brought this enforcement action against a licensee of the Commission for selling an alcoholic beverage to a minor. Respondent appeared and was represented by counsel. The ALJ, having found insufficient evidence that beer was sold to the minor by an agent, servant or employee of the licensee, recommends that no action be taken against the licensee.

**I. Procedural History**

On May 25, 1999, the Staff of the Texas Alcoholic Beverage Commission ("Staff") notified Salvatore Carfi, d/b/a Italian Restaurant & Flying Pizza ("Respondent") that the staff would seek disciplinary action against the Respondent's permit because the Respondent, its agents, servants or employees sold an alcoholic beverage to a minor. The Staff asserted that such act constituted grounds for suspension or cancellation of the Respondent's Wine and Beer Retailer's Permit.

The hearing commenced on June 16, 1999, in the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. After the taking of evidence, the hearing was concluded with the record left open until June 28, 1999 for the filing of post hearing briefs from the Petitioner and Respondent. Post hearing briefs having been filed by both parties, the record was closed at 5:00 p.m. on June 28, 1999. The Staff was represented by Andrew del Cueto, Assistant Attorney General of Texas. The Respondent was represented by attorney, Bruce K. Bornefeld.

**II. Jurisdiction and Notice**

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Sections 6.01 and 61.71, and TEX. GOV'T CODE ANN. Chapter 2001, et seq. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing on this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch.2003 (Vernon's 1997).

The Respondent is the holder of Wine and Beer Retailer's Permit BG-203225, and was the holder of the permit on the date of the alleged violation, May 8, 1998. The Notice of Hearing was mailed to the Respondent's attorney's office on the 25th day of May, 1999, pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. Sections 2001.051 and 2001.052.

### III. Evidence

From the Staff:

Documentary evidence:

- a. TABC EXHIBIT 1: Texas Alcoholic Beverage Commission Notice of Hearing directed to Salvatore Carfi doing business as Italian Restaurant & Flying Pizza.
- b. TABC EXHIBIT 2: Affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Permit BG-203225 issued to Salvatore Carfi d/b/a Italian Restaurant & Flying Pizza.
- c. TABC EXHIBIT 3: Xeroxed photo and driver's license of Chad Stegall.
- d. TABC EXHIBIT 4: Video tape of restaurant scene.

All four of these exhibits were admitted into evidence; only Exhibit 3 was objected to.

Testimony:

1. Agent Artie D. Freeman:

Agent Artie D. Freeman testified that TABC recruited Chad Stegall for its minor sting operation on the night in question. Agent Freeman testified that Stegall was instructed to walk into the restaurant and order a beer. Agent Freeman also testified that Stegall was told to take only his driver's license and money to pay for the beer into the restaurant. In addition, Freeman testified that he instructed Stegall not to lie if asked about his age. Agent Freeman also testified that Stegall was accompanied into the restaurant by Agent Stewart Arnold. Freeman also testified that he did not witness the sale of the beer to Stegall, but learned of it after the fact from conversations with agent Arnold, as well as from viewing the video. Freeman testified that after Stegall and Agent Arnold left the restaurant, he entered the restaurant and spoke to Mrs. Carfi and to Morris Bardwell. Freeman testified that when he spoke to Mrs. Carfi and Mr. Bardwell, that he did not ask them if they worked for the restaurant. Agent Freeman also testified that when he spoke to Morris Bardwell, that Bardwell confirmed that he had given the beer to the minor. Freeman also testified that Bardwell told him that he did not work for Mr. Carfi's restaurant; and that he was merely trying to help the Carfi's out, when he went to get the beer and give it to Mr. Stegall. Freeman testified that Bardwell told him he had done work for Carfi as a carpenter.

2. Chad Stegall:

Chad Stegall testified that he had been recruited to participate in the minor sting operation, and that he did, in fact, do so on the date in question. Stegall further testified that he had been instructed not to lie about his age and to carry only his driver's license and cash for the purchase of the beer into the restaurant. Stegall testified that he had been instructed to produce his driver's license if requested to do so by the restaurant. Stegall testified that he entered the restaurant with Agent Arnold; he said Agent Arnold went in first, and that they sat at separate tables. Stegall testified that his table faced Agent Arnold's table, so Arnold could film and record the activity at the restaurant. Stegall testified that neither Mr. Carfi nor Mrs. Carfi had attempted to wait upon him at the restaurant before Mr. Bardwell did so. Stegall testified that Bardwell had given him the menu and had taken his beer order. Stegall also testified that Bardwell had checked his identification. Stegall also testified that he had seen Bardwell in the restaurant with other people, and he had assumed Bardwell was at the restaurant for social purposes. Stegall testified that he has heard Bardwell tell Agent Arnold that he did not work for the restaurant when Agent Arnold asked him to take his order.

From Respondent:

No documentary evidence was offered.

Testimony:

1. Morris Bardwell

Morris Bardwell testified that he is 32 years old and has known Mr. and Mrs. Carfi for approximately 15 years. He testified he has done carpentry work for the Carfis as well as plumbing work, on an "as-needed" basis. He stated he is not an employee of the restaurant. He testified that he did serve beer to the minor, Chad Stegall at Italian Restaurant & Flying Pizza on the night in question, but that he only did so because he could see that the restaurant was busy and that he thought the Carfis needed some assistance. Mr. Bardwell testified that he had gone to the restaurant on the night in question to have dinner with his family. Mr. Bardwell testified that neither Mr. nor Mrs. Carfi asked him to serve beer to the minor; nor were they aware that he had served beer to a minor.

2. Rose Carfi

Rose Carfi testified that she is Salvatore Carfi's wife and that she works at the restaurant with her husband, the restaurant owner. She testified she takes orders from customers and takes their money at the checkout counter. She also serves orders to the customers of the restaurant. Ms. Carfi testified that she is the only person who works at the restaurant with her husband. Ms. Carfi testified that she did not know that Mr. Bardwell had asked Chad Stegall if he wanted a beer. Nor did she know that Bardwell had gone to get a beer for Chad Stegall. Ms. Carfi testified that she assumed her husband had asked Chad Stegall for his identification to be certain he was of sufficient age to order a beer.

3. Sal Carfi

Sal Carfi testified that he was the sole owner of the restaurant, Carfi's Italian Restaurant & Flying Pizza. Carfi testified that his wife was the only person who worked at the restaurant with him. He testified that Morris Bardwell is a trusted friend but is not an employee of the restaurant. Carfi testified he did not know that Bardwell had served beer to the minor. Carfi testified he and his restaurant have never served alcoholic beverages to minors. He testified that the restaurant sells only one case of beer every three months. Carfi also testified that he had subpoenaed Mr. Bardwell to appear at the hearing to teach Bardwell a lesson; that Bardwell could not jeopardize Carfi's livelihood.

#### IV. Statutory Criteria

1. Section 106.13 of the Code states, in pertinent part:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit...if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor in violation of this code...

2. Section 11.61 of the Code states, in pertinent part:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewed permit if it is found, after notice and hearing, that any of the following is true:  
...(2) the permittee violated a provision of this code or a rule of the commission;...

#### V. Analysis

There are two questions which must be answered here.

(1) Was Chad Stegall a minor on the 8th day of May, 1998?

It is the undisputed testimony of Chad Stegall that he was eighteen years old on May 8, 1998.

(2) Did the permittee, or licensee, or its agents, servants or employees, with criminal negligence, sell, serve, dispense, or deliver an alcoholic beverage to the minor, Chad Stegall, on the 8th of May, 1998?

The evidence is undisputed that Morris Bardwell served a beer to the minor, Chad Stegall, on May 8, 1998, at the licensee's restaurant. However, the evidence also is undisputed that Bardwell was not an agent, servant or employee of the licensee's restaurant. Rather, Bardwell, a friend of Salvatore and Rose Carfi, who intended to help the Carfis, instead committed a wrong in their establishment. The evidence indicates that neither Mr. nor Mrs. Carfi was aware that Bardwell had served beer to the minor. Moreover, the evidence from the video indicates that Agent Stewart

Arnold asked Morris Bardwell if he worked for the restaurant, and Bardwell responded that he did not work for the restaurant. In addition, Morris Bardwell told Agent Artie D. Freeman he was not employed by the restaurant.

### **PROPOSED FINDINGS OF FACT**

1. Salvatore Carfi, doing business as Italian Restaurant and Flying Pizza is the holder of the Wine and Beer Retailer's Permit BG-203225.
2. Salvatore Carfi, doing business as Italian Restaurant and Flying Pizza received proper and timely notice of hearing, by means of certified mail, return receipt requested, delivered to Respondent's Attorney of Record, on May 25, 1999.
3. On the 8th of May, 1998, Chad Stegall was a minor, eighteen years of age.
4. On the 8th of May, 1998, Chad Stegall was served a beer at Italian Restaurant and Flying Pizza by Morris Bardwell.
5. Morris Bardwell was a friend of Salvatore and Rose Carfi on May 8, 1998, but was not an agent, servant or employee of Italian Restaurant & Flying Pizza.

### **PROPOSED CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 106.13 and 11.61(b)(2) of the TEX. ALCO. BEV. CODE ANN.
2. The State Office of Administrative Hearings has jurisdiction in 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. GOVT. CODE ANN., Chapter 2003 (Vernon's 1999).
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, TEX. GOVT. CODE ANN., Chapter 2001 and 1 TEX ADMIN. CODE, Chapter 155.
4. Based upon the Proposed Findings of Fact and Proposed Conclusions of Law there was insufficient credible evidence that an agent, servant or employee of Salvatore Carfi, doing business as Italian Restaurant and Flying Pizza sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of Sections 106.03 and 106.13 of the TEX. ALCO. BEV. CODE ANN.

**RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that no action be taken to suspend or cancel the Respondent's Wine and Beer Retailer's Permit BG-203225.

Signed this \_\_\_\_ day of Novembert, 1999

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ED SHIPPER  
ADMINISTRATIVE LAW JUDGE

DS:rfm/d:99-0902