

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF RICHFIELD**

In the Matter of the Suspension
Of the On-Sale 3.2 percent Malt
Liquor License of Vina, Inc., dba
Vina Restaurant

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30.m. on Thursday, June 24, 1999, at the City Council Chamber, Richfield City Hall, 6700 Portland Avenue South, Richfield, Minnesota.

Joe Y. Yang, of the firm of Kennedy & Graven, Chartered, Suite 470, 200 South Sixth Street, Minneapolis, Minnesota 55402, represented the City of Richfield (the City) at the hearing. The Licensee, Vina Restaurant, was represented by its manager, Thuy Nguyen. The record closed on June 24, 1999, when the hearing ended.

This Report is a recommendation, not a final decision. The City Council of the City of Richfield will make the final decision after reviewing the hearing record. The City Council may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minnesota Law,^[1] the City Council may not make its final decision until after the parties have had access to this Report for at least ten days. During that time, the City Council must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument. Parties should contact the office of Steve Devich, Acting City Manager, City of Richfield, 6700 Portland Avenue South, Richfield, Minnesota 55423, to find out how to file objections or present argument.

STATEMENT OF THE ISSUES

Whether the Vina Restaurant sold intoxicating liquor to a minor in violation of the laws of the State of Minnesota^[2] and the Richfield City Code,^[3] and if so, whether Vina's liquor license should be suspended and a civil penalty assessed.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In cooperation with the Boy Scouts of America, the City sponsors the Richfield Police Explorer Program for young people, ages 14 to 21. The purpose of the program is to provide young people who may be interested in a career in law enforcement with opportunities to learn about the duties and responsibilities of police work.^[4]

2. The City also has a continuing alcohol compliance program that involves conducting annual undercover compliance checks on all businesses to which it has issued liquor licenses.^[5] That program frequently employs underage explorers from the Police Explorer Program in an undercover capacity to help determine whether or not businesses holding City liquor licenses might be willing to sell alcoholic beverages to underage customers without requiring proper identification. When explorers participate in undercover compliance checks, they are accompanied by sworn police officers over the age of 21.^[6]

3. Vina, Inc., (Vina) is a Minnesota corporation that has owned and operated the Vina Restaurant at 6401 Nicollet Avenue South, Richfield, Minnesota, for the last thirteen years. Vina, Inc., holds an on-sale liquor license from the City of Richfield to serve 3.2 percent malt liquor at that restaurant.

4. In the past, Vina has operated other restaurants in the Twin Cities metropolitan area and has held on-sale liquor licenses from other cities to serve alcoholic beverages at those locations. Vina has never before been cited for selling intoxicating liquor to persons under 21 years old at any of its restaurant locations.^[7]

5. From Monday through Saturday, the Vina Restaurant is scheduled to be open for business to serve lunch from 11:00 a.m. to 2:00 p.m., and from Monday through Thursday, it is scheduled to be open to serve dinner from 5:00 p. to 8:00 p.m.^[8]

6. The Vina Restaurant has standing policies for training its employees. When new waiters and waitresses are first hired, they are on a probationary training status. While in training, they are instructed not to take customer orders except when accompanied by the restaurant manager or one of the restaurant's experienced waiters and waitresses. When customers order alcoholic beverages, trainees are instructed to ask customers for identification to verify their ages if there is any possibility that they may be under the age of 21.^[9]

7. On the afternoon of Tuesday, April 13, 1999, at approximately 4:50 p.m., the Vina Restaurant had already opened its doors to customers, even though it normally did not begin serving them for dinner until 5:00 p.m. Ms. Nguyen, the restaurant's manager was then on duty with a new trainee, Mr. Danh. Sometime shortly before 4:40 p.m., a male and a female acquaintance of Mr. Danh had entered the restaurant, had been seated, and were being served dinner.^[10]

8. Also, on the afternoon of April 13, 1999, Richfield Police Officer Robert Schletty and Renee Jewell, an explorer in the Richfield Police Explorer program, were conducting compliance checks as part of the City's alcohol compliance program. Ms. Jewell was 18 years old at the time. Both were in plain clothes.^[11]

9. At about 4:50 p.m. on April 13, 1999, Officer Schletty and Ms. Jewell entered the Vin Restaurant and asked to be seated for service. They were met at the door by Ms. Nguyen and Mr. Danh.^[12] Ms. Nguyen explained to them that the restaurant would not begin serving dinner until 5:00 p.m., but she invited them in to be seated until dinner was ready to be served. Ms. Nguyen then went into the restaurant's kitchen to attend to duties there.^[13]

10. While Ms. Nguyen was in the kitchen, Mr. Danh went over to the table where Officer Schletty and Ms. Jewell were seated and asked them whether they wished to order anything.^[14] In so doing, Mr. Danh violated Ms. Nguyen's instructions that he not solicit customer orders without her or an experienced member of the wait staff being present.^[15] In response to Mr. Danh's solicitation, Ms. Jewell ordered a bottle of Heineken's beer. Mr. Danh did not then or at any other time ask her for identification to verify that she was over the age of 21.^[16]

11. Mr. Danh served Ms. Jewell a bottle of Heineken's beer. Ms. Jewell then gave an excuse for having to leave the restaurant prematurely. She paid for the bottle of beer with cash and then left the premises.^[17] No one employed by the Vina Restaurant asked Ms. Jewell for identification to verify her age before she left the restaurant.^[18]

12. After Ms. Jewell left the Vina Restaurant, Sergeant Lotzer of the Richfield Police Department entered the restaurant and joined Officer Schletty. Together they informed Ms. Nguyen that Officer Schletty and Ms. Jewell had been conducting an alcohol compliance check, that Ms. Jewell was under the age of 21, and that Mr. Danh had allowed her to purchase an alcoholic beverage without checking her identification to verify that she was over 21 years old.^[19]

13. On April 13, 1999, the Director of the City's Public Safety Department notified the Vina Restaurant by letter that, as required by state law, the City had been conducting alcohol compliance checks of the businesses holding liquor licenses issued by the City. The Director indicated that City had evidence that the Vina Restaurant, along with sixteen other businesses, had made a sale of an alcoholic beverage to an underage youth. The letter went on to advise the Vina Restaurant to have a

representative present at an April 26, 1999, meeting of the City Council at which it would be considering what enforcement actions to take against the restaurant.^[20]

14. On April 23, 1999, the City provided the Vina Restaurant with another letter concerning the April 26th City Council Meeting. That second letter indicated, among other things, that the Public Safety Department was recommending that the City Council impose a penalty of a two-day suspension of the restaurant's liquor license and a \$500 penalty. It went on to advise the restaurant that it could choose to admit that a violation occurred and agree to the City Council's penalty or deny that a violation occurred and request a contested case hearing.^[21]

15. Vina requested that the City Council provide it with a contested case hearing, and that request resulted in this proceeding.

16. Betsy Christensen, the City's Health Administrator and the individual responsible for business licensing matters within the City, recommends that the City Council impose a penalty of a two-day suspension of the restaurant's liquor license and a \$500 penalty. That is the penalty that she customarily recommends for licensees that serve an alcoholic beverage to a minor but that have no prior history of violations.^[22]

17. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

18. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law^[23] gives the Administrative Law Judge and the Richfield City Council authority to conduct this proceeding, to consider whether the Vina Restaurant has violated state laws and City ordinances pertaining to the sale and purchase of alcoholic beverages, and to make findings, conclusions, and orders on that subject.

2. The City gave the Vina Restaurant proper and timely notice of the hearing in this matter, and the City has complied with all of the law's substantive and procedural requirements.

3. Minnesota's laws pertaining to the sale of intoxicating liquors provide in part that "[i]t is unlawful for any person . . . to sell, barter, furnish, or give alcoholic beverages to a person under 21 years of age . . ."^[24]

4. Minnesota law also provides that:

[e]very licensee is responsible for the conduct in the licensed establishment and any sale of alcoholic beverage by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee for the purposes of all provisions of this chapter except sections 340A.701, 340A.702, and 340A.703.

5. Restaurant waiters customarily have the authority to sell and serve customers alcoholic beverages. Even though Mr. Danh was a waiter trainee in a probationary status whom Ms. Nguyen had not authorized to sell or serve alcoholic beverages except under direct supervision, customers could not reasonably be expected to know that he did not have that authority. The Vin Restaurant is therefore legally responsible for what Mr. Danh did on April 13, 1999.

6. The City has the burden of proving that the Vin Restaurant violated the laws pertaining to the sale of intoxicating liquors, and it has met that burden in this contested case proceeding.

7. The Vin Restaurant violated state law and a city ordinance by selling a of bottle Heineken's beer to Ms. Jewell on April 13, 1999.

8. Upon a finding that the holder of a liquor license has violated the law prohibiting sale of alcoholic beverages to persons under the age of 21, Minnesota law authorizes the City Council to:

revoke the license or permit, suspend the license or permit for up to 60 days, impose a civil penalty of up to \$2,000 for each violation, or impose any combination of these sanctions.^[25]

9. It has been the City's practice to impose a penalty of a two-day suspension of the liquor license and a \$500 penalty for serving an alcoholic beverage to an underage person where there the licensee has no prior history of violations.

10. The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Richfield City Council take appropriate disciplinary action against the Vin Restaurant's liquor license.

Dated this 28th day of June 1999.

BRUCE H. JOHNSON
Administrative Law Judge

NOTICE

Under Minnesota law,^[26] the City Council must serve its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

There is little dispute between the parties about what happened at the Vina Restaurant on the afternoon of April 13, 1999. Vina does not really dispute that a bottle of beer was sold to an underage person. But it believes that there are extenuating circumstances here that make it unfair to penalize the restaurant for the violation. Vina argues that the waiter who sold the bottle of beer to Ms. Jewell did not have the authority to do so for two reasons.

First, Vina points out that when Officer Schletty and Ms. Jewell arrived about ten minutes before the restaurant began serving dinner, and that the manager only invited them in to be seated until dinner was being served. In other words, Vina argues that it was inappropriate for either of them to have ordered anything before 5:00 p.m. when the restaurant customarily was open for business. But the evidence established that neither Officer Schletty nor Ms. Jewell insisted on ordering anything before 5:00 p.m. It was the waiter who appeared to be on duty who asked them whether they wanted to order anything. Under Minnesota law, an employee is generally considered to have authority from the business owner to do the things that are customarily done by similar employees in that particular kind of business.^[27] In the restaurant business, waiters customarily have the authority to solicit orders for food and beverages on behalf of the restaurant owner. So even though the manager may have indicated that the restaurant would not be open to serve dinner until 5:00 p.m., Officer Schletty and Ms. Jewell had a right to rely on Mr. Danh's apparent authority to solicit a drink order before then. Mr. Danh's apparent authority to take the order is bolstered by the fact that there was already a couple in the restaurant who were being served dinner. Officer Schletty and Ms. Jewell had no way of knowing that the other couple were friends of the waiter and were being given special service by being served early.

Vina also argues that since Mr. Danh was in a training status, he did not have the authority to take a drink order without the manager or an experienced member of the wait staff being present. But Officer Schletty and Ms. Jewell also had no way of knowing that limitation on Mr. Danh's authority. The Minnesota Supreme Court has ruled that the fact that an employer has placed secret limitations on an employee's authority will not absolve the employer of liability if others, such as the City, are unaware of those limitations.^[28]

Making an employer legally responsible for the actions of an employee who disregards his employer's instructions may seem harsh here. But the Administrative Law Judge notes from a reading of the law that both the Minnesota legislature and the City of Richfield's City Council consider underage drinking of alcoholic beverages to be a very serious social problem. And both legislative bodies require the police to take strong measures to prevent underage drinking. It is for that reason that the Administrative Law Judge is recommending that the City Council impose the penalty on the Vina Restaurant that is customarily imposed on licensees for an offense of this kind.

B. H. J.

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- ^[1] Minnesota Statutes, section 14.61 (1998). (Unless otherwise specified, all references to Minnesota Statutes are to the 1998 edition.)
- ^[2] Minnesota Statutes, section 340A.503, subdivision 2.
- ^[3] Richfield City Code, section 1210.15.
- ^[4] Testimony of Officer Robert Schletty.
- ^[5] Testimony of Officer Schletty; Exhibit 1.
- ^[6] Testimony of Officer Schletty and Renee Jewell.
- ^[7] Testimony of Thuy Nguyen.
- ^[8] Exhibits A and B.
- ^[9] Testimony of Thuy Nguyen.
- ^[10] Testimony of Officer Schletty, Renee Jewell, and Thuy Nguyen.
- ^[11] Testimony of Officer Schletty and Renee Jewell.
- ^[12] Testimony of Officer Schletty, Renee Jewell, and Thuy Nguyen.
- ^[13] Testimony of Thuy Nguyen.
- ^[14] Testimony of Officer Schletty and Renee Jewell.
- ^[15] Testimony of Thuy Nguyen.
- ^[16] Testimony of Officer Schletty and Renee Jewell.
- ^[17] Testimony of Renee Jewell.
- ^[18] Testimony of Renee Jewell.
- ^[19] Testimony of Officer Schletty.
- ^[20] Exhibit 1.
- ^[21] Exhibit 2.
- ^[22] Testimony of Betsy Christensen.
- ^[23] Minnesota Statutes, section 14.50, and section 340A.503.
- ^[24] Minnesota Statutes, section 340A.503, subdivision 2 (1).
- ^[25] Minnesota Statutes, section 34A.415.
- ^[26] Minnesota Statutes, section 14.62, subdivision 1.
- ^[27] See, for example, Minnesota Valley Memorial Hospital, Inc. v. Kranz, 169 N.W.2d 400, 401 (Minn. 1969)
- ^[28] Lindstrom v. Minnesota Liquid Fertilizer Co., 119 N.W.2d 855 (Minn. 1963)