

2-2101-8554-6

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE ST. PAUL CITY COUNCIL

In the Matter of the Licenses of the Cozy Cantina for the
Premises Located at 202 Concord Street, St. Paul, Minnesota,
License No. 15931

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came for hearing before Bruce D. Campbell, Administrative Law Judge from the State Office of Administrative Hearings acting as Hearing Officer for the St. Paul City Council, on February 22, 1994, in St. Paul, Minnesota.

Appearances: Philip B. Byrne, Assistant City Attorney, Office of the City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul Office of Licenses, Inspections and Environmental Protection (City); and John D. Hirte and David C. Anastasi, Murnane, Conlin, White & Brandt, Attorneys at Law, 1800 Piper Jaffray Plaza, 444 Cedar Street, St. Paul, Minnesota 55101, appeared on behalf of the Cozy Bar of St. Paul, Minnesota, Inc., d/b/a the Cozy Cantina (Licensee).

The record of the proceeding closed on March 7, 1993, with the receipt by the Administrative Law Judge of the final memorandum of counsel.

This Report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after a review of the record, which may accept, reject or modify the Findings, Conclusions, and Recommendations contained herein. Pursuant to section 310.05 (c-1) of the St. Paul Legislative Code, after receipt of this Report, the St. Paul City Council will provide an opportunity to present oral or written arguments alleging error in this Report, and to present argument related to any action recommended in this Report.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the

Licensee, Cozy Bar of St. Paul, Minnesota, Inc., d/b/a The Cozy Cantina, and its president, Herbert L. Howe, violated the law, including the St. Paul Legislative Code, when their bartender accidentally discharged a firearm in the licensed premises under the circumstances hereafter described and, if so, what action, if any, should be taken against the liquor licenses held by the Licensee.

Based upon all of the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Cozy Bar of St. Paul, Minnesota, Inc., d/b/a The Cozy Cantina, is a Minnesota corporation owned by Mr. Herbert L. Howe. The corporation operates a small retail onsale liquor establishment at 202 Concord Street, St. Paul, Minnesota. A statement of the various licenses held by the corporation for that location is contained in Ex. 4.

2. The structure in which the Cozy Cantina is housed is a one-story building occupying approximately 45 feet of frontage on Concord Street. The depth of the building is approximately 15 feet. The barroom itself is even more narrow. The bar is situated along most of the back width of the barroom with tables and side tables in front of the bar running the length of the room. A diagram of the bar, not drawn to scale, is contained in Ex. 7.

3. On the night of January 4, 1994 and into the early morning of January 5, 1994, Frank Aguillera, a regular bartender at the Cozy Cantina (Bartender), was tending bar. Mr. Aguillera had a record of felony convictions, including a conviction for second-degree arson and the offense of being a felon in possession of a pistol. For approximately ten years, Mr. Aguillera had carried a gun in a special pocket in his jacket when he felt it necessary to do so because of dangers in his St. Paul west side neighborhood or impending situations where he felt he would be threatened. Mr. Aguillera had tended bar successfully at the Cozy Cantina without incident for approximately two and one-half years prior to the night in question. The corporation and its president were not aware of Mr. Aguillera's felony record. Approximately two to three times a month, Mr. Aguillera was required to evict people from the bar who were intoxicated or disorderly. He had never been required to use a weapon for such evictions and had never been reported for using an inappropriate amount of force. Mr. Aguillera, called Poncho by bar regulars, was a popular and well-respected bartender in the Cozy Cantina.

4. Mr. Aguillera is not a physically large man. He is of rather short height and slight build.

5. Before midnight on the night of Tuesday, January 4, 1994, the evening had progressed usually with a few regular customers present. About 12:30 a.m., January 5, 1994, a large, burly man, Ronald Aguirre, entered the Cozy Cantina bar. He walked along the wall the width of the bar and spoke to a customer. That

customer then left the bar. The bartender did not recognize Mr. Aguirre as a former customer of the establishment. The bartender prepared to close the establishment sometime after 12:30 a.m. on January 5, 1994. He moved to a back cash register behind the bar to consolidate the establishment's funds in one cash register. While his back was to the customer area, the bartender was made aware that Mr. Aguirre had come behind the bar and was fixing himself a drink. At that time, Mr. Aguirre was standing behind the bar near an open cash register. The bartender ordered Mr. Aguirre to go back into the public area, out from behind the bar. Mr. Aguirre cursed the bartender but complied with his instructions. Shortly thereafter, Mr. Aguirre began verbally abusing bar patrons in the public area and poured himself a glass of beer from another patron's pitcher of beer. Again, the bartender ordered Mr. Aguirre to leave the bar.

6. When Mr. Aguirre refused to leave, the bartender turned his back on the public area again and began dialing the St. Paul Police from a telephone behind the bar. The bartender was not dialing the 911 number, but the normal non-emergency number of the St. Paul Police Department. The bartender intended to have the police remove Mr. Aguirre from the bar. While the bartender's back was turned to the public area of the bar, Mr. Aguirre again came back behind the bar. He punched the bartender in the side of the face, breaking the bartender's glasses and cutting his face. He also cursed the bartender and bar patrons.

7. After punching the bartender in the side of the face, Mr. Aguirre went back to the public area of the bar and again cursed those present. He was obviously intoxicated and out of control. The bartender saw Mr. Aguirre reach into his jacket or the waistband area of his pants. The bartender believed that Mr. Aguirre might have a deadly weapon on his person. The bartender decided to put Mr. Aguirre out of the bar to protect bar property and the patrons present.

8. When the bartender saw Mr. Aguirre reaching inside his clothes as though he might have a weapon, the bartender drew a .38 caliber Smith & Wesson revolver from a holster behind the bar. He placed the gun in his right hand and held it concealed near his right leg. He came out from behind the bar and turned Mr. Aguirre around and began moving him towards the front door of the bar.

9. Mr. Aguirre grabbed the bartender and the two men struggled. Mr. Aguirre punched the bartender several times while both men were rolling on the floor. During the altercation, the gun discharged, wounding Mr. Aguirre in the leg.

10. After the gun went off, the bartender separated himself from Mr. Aguirre, who was cursing and flailing on the floor. Several patrons held Mr. Aguirre down while the police were summoned by the bartender.

11. The first police officer who came into the bar confronted Mr. Aguirre and the two men fought. Several other St. Paul police officers arrived. It finally took three police officers to subdue Mr. Aguirre, who was intoxicated, fighting and cursing.

12. During his struggle with the St. Paul police, Mr. Aguirre stated: "If I had a gun, I would get a cop."

13. There were two revolvers behind the bar, each in a separate holster. The guns were placed there by the owner of the bar, Mr. Herbert L. Howe. He told his bartenders to keep the weapons handy and use them if necessary in an emergency. Mr. Howe did not give his bartenders any instruction or specific direction as to when the firearms might be used.

14. There is no city ordinance or other law in effect in the City of St. Paul which prohibits the owner of a bar from keeping a firearm on the premises for purposes of protection of the establishment or its patrons. A combination of the St. Paul city ordinances and Minn. Stat. 609.06 and 624.714, subd. 9 (1992), would authorize Mr. Aguilera's behavior if the occurrence was in the "lawful defense of person or property against an unlawful act", and was proportionate to the danger encountered.

15. It is not uncommon, particularly in certain neighborhoods, for bars to keep loaded firearms on the premises for purposes of protection against robbery or the breakup of altercations.

16. The Cozy Cantina bar serves a legitimate social function in the neighborhood in which it is located.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have jurisdiction in this matter pursuant to Minn. Stat. 14.55 (1994) and section 310.05 (c-1) of the St. Paul Legislative Code.

2. All requirements of law have been fulfilled in the issuance of the Notice and Order for Hearing, and the matter is properly before the St. Paul City Council and the Administrative Law Judge.

3. The discharge of the firearm in the Cozy Cantina in the early morning hours of January 5, 1994, was accidental and was precipitated by the conduct of Ronald Aguirre, discussed in the Findings. The bartender and, consequently, Herbert L. Howe and/or the corporation, did not engage in illegal conduct in violation of state statute or the St. Paul Legislative Code when their bartender attempted to evict Ronald Aguirre from the Cozy Cantina in the early morning hours of January 5, 1994.

4. Under all of the circumstances described in the Findings, the bartender did not act unreasonably in attempting to protect himself, the property of the bar and patrons from a demonstratedly hostile person. The bartender, under the circumstances, had no duty to retreat. His duty was to protect the establishment and its patrons.

5. Any Finding of Fact more properly termed a Conclusion, and

any Conclusion more properly termed a Finding of Fact is hereby expressly adopted as such.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is the recommendation of the Administrative Law Judge to the St. Paul City Council that it not take adverse action against the onsale alcoholic beverage licenses of the Cozy Bar of St. Paul, Minnesota, Inc., d/b/a The Cozy Cantina, or its president, Herbert L. Howe, for the conduct of Mr. Frank Aguilera on January 5, 1994, in the Cozy Cantina, as described in the Findings.

Dated this 22nd day of March, 1994.

s/ Bruce D. Campbell

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

It is respectfully requested that the St. Paul City Council serve a copy of its final decision on the Administrative Law Judge by first class mail.

Reported: Audio-Magnetic Recording; No Transcript Prepared.

MEMORANDUM

The occurrences of January 5, 1994 are not open to serious question. It is clear that Mr. Aguirre entered the Cozy Cantina bar and acted in a decidedly hostile manner, striking the bartender, cutting him, endangering bar property and patrons, and otherwise being verbally and physically disorderly until forcibly taken into custody by three St. Paul policemen. Under such circumstances, the Administrative Law Judge believes that the Cozy Cantina bartender did not act in an unreasonable manner when he drew the .38 caliber revolver from behind the bar and took it near his person while he attempted to move Mr. Aguirre out of the bar.

One might agree with the St. Paul Licensing Division that there should not be weapons on licensed liquor premises. Such a prohibition may be reasonable and, even, constitutional. Such a prohibition has not as yet, however, been adopted by the City of St. Paul or the Minnesota Legislature. Until such action is taken, bar owners and bartenders may use weapons in the defense of themselves, their bars, and their patrons if they act reasonably under the circumstances. Given the testimony in this proceeding by the bartender, by the police and by the

contemporaneous documentation of the incident, the Administrative Law Judge must conclude that no feasible alternative course of action was open to the bartender on the evening of January 5, 1994. Mr. Aguilera acted in the interests of his own safety and the safety of bar property and patrons. Mr. Aguirre chose not to testify in this proceeding. He took the Fifth Amendment to the United States Constitution as to every question. Under such circumstances, the Administrative Law Judge must conclude that his testimony, if given, would be adverse to his interests and would have coincided with the testimony of the bartender.

It could also be argued that the owner of the bar, himself, acted negligently when he did not give instructions to his bartenders as to the specific circumstances under which they could use a firearm to evict a patron. Again, such a requirement might be appropriate. However, there is no such rule or regulation in force and there is no evidence in the record that any instruction by the owner of the bar to the bartender would have in any way affected the exercise of the bartender's reasonable judgment that evening when Mr. Aguirre was being evicted. Since the bartender acted reasonably and not illegally, no license sanction is appropriate.

B.D.C.