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TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, Petitioner, v. CARY McCORKLE and ASHLEY NEESE, d.b.a. AURA LOUNGE, Permit No. 50225

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BEFORE THE TENNESSEE
ALCOHOLIC BEVERAGE COMMISSION

IN THE MATTER OF: **TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,** ***Petitioner,*** **v.** **CARY McCORKLE and ASHLEY NEESE** **d.b.a. AURA LOUNGE** **Permit No. 50225,** ***Respondent.***	**DOCKET NO: 33.01-118313J**

INITIAL ORDER

This matter was heard as a contested case in Nashville, Tennessee on December 11, 2012 before Leonard Pogue, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Alcoholic Beverage Commission (TABC). The State was represented by Ginna Winfree, staff attorney, Tennessee Alcoholic Beverage Commission (TABC). Attorney Lisa Eischeid represented Aura Lounge.

The subject of the hearing was to consider whether the Respondent's liquor license should be suspended/revoked and/or fined for failure to follow the requirements for a limited service restaurant. Prior to the hearing, counsel for the State stipulated that the State was striking and dropping all allegations regarding the server permit issue.

After consideration of the argument of counsel and the record in this matter, it is determined that Respondent shall be fined an amount of hundred dollars ($750.00). This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Respondent, Aura Lounge ("Aura") is a partnership organized under the laws of the State of Tennessee. Respondent's principal address and licensed establishment is located at 114 South Maple Street, Murfreesboro, TN 37130.

2. Respondent is a "liquor-by-the-drink-limited service" licensee within the meaning of T.C.A. § 57-4-102(21)(A).

3. On Monday, May 21, 2012, TABC agent Juan Gomez conducted a renewal inspection at Aura Lounge in Murfreesboro with server, Randy K. Fair. During the inspection, Agent Gomez asked Mr. Fair about menus and Mr. Fair responded that there were no menus except take-out menus from nearby establishments. Agent Gomez considered this a violation of T.C.A. § 57-4-102(21)(A) since the food wasn't prepared in the subject establishment. Mr. Fair also showed Agent Gomez the inside of a glass cooler behind the bar that Mr. Fair indicated that food is kept but there was none at that time. According to Mr. Fair, Agent Gomez didn't inquire about Aura's food offerings except asking for a menu. Mr. Fair told the Agent Gomez a food delivery was expected that afternoon. Agent Gomez testified that he did not see a board listing available food but observed a microwave oven and crock pot. Mr. Fair testified that the board was up when Agent Gomez was present. During the inspection, Mr. Fair contacted owner Cary Kendall McCorkle via telephone to speak with Agent Gomez. Agent Gomez asked Mr. McCorkle about the menus and he advised that the establishment did not have menus. While Agent Gomez was present for the inspection, several customers were present.

4. As a result of the inspection, citation RI # 12-0719 was issued to Aura.

5. Cary McCorkle testified that Aura Lounge opened as a full restaurant but switched to a limited restaurant when that option was offered by the TABC. He testified that he never has been

informed by the TABC that a paper menu was necessary. Mr. McCorkle said that a dry erase board has always been present listing the food items available. Those items consist of hot dogs, nachos, and chips. The hot dogs are kept in the cooler that Agent Gomez observed. When Agent Gomez was present for his inspection, an Aura employee was at a grocery store to purchase food items to bring back to Aura that same afternoon. Mr. McCorkle was out of town on the day of Agent Gomez' inspection.

CONCLUSIONS OF LAW

1. T.C.A. § 57-3-104 *et seq.* authorizes the TABC or its authorized representative to enforce and administer the provisions of this Chapter and the rules and regulations made by it.

2. T.C.A. § 57-4-201(a)(2) provides that: "the commission shall make regulations, not inconsistent with this chapter, for clarifying, interpreting, carrying out and enforcing the terms of this chapter, for ensuring the proper and orderly conduct of business by licensees, and for regulating all advertising of alcoholic beverages by licensees."

3. T.C.A. § 57-4-102(21)(A), which states, in part:

> "Limited Service Restaurant" means a facility possessing each of the following characteristics:
>
> (A) Is a public place which has a seating capacity for at least forty (40) patrons and that is kept, used, maintained, advertised and held out to the public as a place where during regular hours of operation:
>
> (i) Alcoholic beverages, beer or wine are served to patrons;

(ii) A menu of prepared food is made available to patrons;

(iii) The gross revenue from the sale of prepared food is fifty percent (50%) or less. For purposes of determining the gross revenue from the sale of prepared food, chips popcorn, pretzels, peanuts and similar snack items shall not be included in gross revenue from the sale of prepared food sold;

(iv) The facility affirmatively established, to the satisfaction of the commission, that it has complied and will comply with the requirements of § 57-4-204;

(v) The facility provides adequate security during the regular hours of operation; and sleeping accommodations are not provided

4. T.C.A. § 57-4-202(a) provides: "the commission shall have authority to revoke or suspend any permit granted herein for the violations of the provisions of any applicable provision of this chapter, and any person aggrieved by the action of this commission in revoking or suspending a permit, or in refusing to grant a permit, may have such action reviewed as provided by the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

5. T.C.A. § 57-1-201(b)(1) provides, in part,: "In any case where the commission is given power to suspend or revoke any license or permit, it may impose a fine. Fines imposed shall not exceed:

(A) One thousand five hundred dollars ($1,500) for retailers licensed under 57-3-204;

(B) One thousand five hundred dollars ($1,500) for permittees for consumption of alcoholic beverages on the premises licensed under 57-4-201;"

….

6. At the time of Agent Gomez' inspection, Aura Lounge was open and customers were present. Pursuant to T.C.A. § 57-4-102(21)(A)(ii), Aura Lounge was required to have "a menu of prepared food … made available to patrons." Regardless of whether or not the food was listed on a paper menu or dry erase board, there was no food available to serve patrons. Respondent failed to comply with the rules and regulations of the Tennessee Alcoholic Beverage Commission.

7. Counsel for the Commission requests Aura Lounge be fined $5,175.00, based on $100 a day for a 2 month period. There was no proof presented that the violation occurred for 2 months. Further, any fined is mitigated by the fact that the establishment was without food for only a short period of time. Based on the proof presented, it is determined that a fine of $750.00 is appropriate.

It is therefore **ORDERED** that Respondent be **fined $750.00** and is assessed the costs of this matter.

This Initial Order entered this the _____ day of December, 2012.

_____
Leonard Pogue
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State

this 21 day of December, 2012 Stovall, Director

Administrative Procedures Division