

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE ALCHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:	)	
	)	
DENNIS FREEMAN	)	
dba West Rib Café & Pub	)	
	)	
Respondent.	)	OAH No. 10-0557-ABC
_____	)	Agency No. 10-19

**DECISION**

**I. Introduction**

At its September 30, 2010, meeting the Alcoholic Beverage Control Board voted to impose a \$500 fine on license No. 3667, in the name of West Rib Café & Pub, Dennis Freeman, for violation of the pricing and marketing statute, AS 04.16.015. Mr. Freeman requested a hearing, and the assigned administrative law judge conducted a hearing on April 6, 2011. Mr. Freeman testified, as did Investigator John Bilyeu.

Testimony and evidence at the hearing established that Mr. Freeman promoted and advertised a “Happy Hour” during the time period from 4-6:00 p.m., during which time patrons purchased beer in 10 oz. glasses at a price of \$1.50 per glass (\$0.15 per ounce), as compared with a standard 16 oz. glass at a price of \$3.00 per glass (\$0.1875 per ounce). Mr. Freeman testified that the 10 oz. beer was offered and sold throughout the day, not only during the advertised Happy Hour. Investigator Bilyeu testified that a waitress at the establishment told him that beer was sold at a special price during the Happy Hour.

The preponderance of the evidence is that the 10 oz. beer was offered and sold throughout the day, and accordingly there was no violation of AS 04.16.015(a). However, because the 10 oz. beer was advertised and promoted only during a set period of the day, Mr. Freeman is liable for violation of AS 04.16.015(b). The imposition of a \$500 fine is therefore affirmed.

**II. Facts**

Dennis Freeman is the licensee for the West Rib Café & Pub in Talkeetna. The West Rib includes an outdoor patio during the summer. For several years, Mr. Freeman has advertised a Happy Hour by means of a banner set up on the fence enclosing the patio. The banner consists

of three lines. The first line, in large red letters, announces: “HAPPY HOUR!”. The next line, in black print about half the size of the first line, states: “1/2 PRICE APPETIZERS 4-6 PM”. The third line, in red print about midway in size between the first two lines, states: “\$1.50 DRAFT BEER.” The banner had been created by the Odom Company at Mr. Freeman’s request.<sup>1</sup> Mr. Freeman had explained to Odom Company that the reduced pricing during Happy Hour would apply only to the appetizers, and that beer would be served at the same price all day long.<sup>2</sup>

In early June, 2009, Alcoholic Beverage Control Board staff received an anonymous complaint about the banner.<sup>3</sup> On June 8, Board enforcement supervisor Bob Beasley directed Investigator John Bilyeu to investigate the complaint.<sup>4</sup> At about 2:30 p.m. that afternoon, Investigator Bilyeu drove to the West Rib, where he observed the banner.<sup>5</sup> Investigator Bilyeu entered the establishment and was seated in the inside dining area.<sup>6</sup> He ordered a hamburger and a draft beer.<sup>7</sup> He was served a 16 oz. beer, priced at \$3.00.<sup>8</sup> After consuming his lunch, Investigator Bilyeu left.<sup>9</sup>

Investigator Bilyeu returned to the West Rib at around 4:30 that same day. He went into the small bar area and took a seat at the bar.<sup>10</sup> The bartender asked if he wanted a Happy Hour beer; Mr. Bilyeu answered, “Yes,” and was served a beer in a 10 oz. glass, priced at \$1.50.<sup>11</sup> He asked the bartender about how the Happy Hour worked, and the bartender told him that the smaller glasses priced at \$1.50 were a better deal than the 16 oz. beers, which sold for \$3.00.<sup>12</sup>

Investigator Bilyeu left the bar area and spoke with Mr. Freeman. Mr. Freeman told him that the 10 oz. beer for \$1.50 was available all week.<sup>13</sup> The West Rib’s sales records reflect that beer is regularly sold for \$1.50 outside of the 4-6 pm. time period.<sup>14</sup>

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<sup>1</sup> R. 41.  
<sup>2</sup> R. 41.  
<sup>3</sup> R. 39.  
<sup>4</sup> R. 39.  
<sup>5</sup> R. 39.  
<sup>6</sup> R. 39.  
<sup>7</sup> R. 39.  
<sup>8</sup> R. 39.  
<sup>9</sup> R. 39.  
<sup>10</sup> R. 39.  
<sup>11</sup> R. 39. Recording at 0:08-0:11.  
<sup>12</sup> R. 39. Recording at 0:34-0:38.  
<sup>13</sup> R. 39.  
<sup>14</sup> Ex. D; Supp. Ex.

### III. Discussion

#### A. The Alleged Violation

The accusation in this case alleges that in June, 2009, Mr. Freeman, or his agent or employee, “advertised, promoted, offer[ed] to sell, sold, or delivered...an alcoholic beverage(s) at a price(s) during a period of time during the business day less than the entire period of time the premises was open for business.” The accusation asserts this constitutes a violation of AS 04.16.015(a)(3), AS 04.16.015(b), and 13 AAC 104.440.

AS 04.16.015 provides:

(a) On premises where alcoholic beverages are sold by the drink, a licensee or a licensee’s agent or employee may not...(3) sell, offer to sell, or deliver alcoholic beverages to a person or group of persons at a price less than the price regularly charged for the beverages during the same calendar week, except at private functions not open to the public. ...

(b) A licensee or a licensee’s agent or employee may not advertise or promote in any way, either on or off the premises, a practice prohibited under (a) of this section.

13 AAC 104.440 provides:

For the purpose of AS 04.16.015, a licensee or licensee’s agent or employee may not set a period of time during a day that an alcoholic beverage drink or brand of alcoholic beverage is sold or delivered that is less than the hours that the licensed premises is open to the general public.

AS 04.16.015(a)(3) expressly prohibits the practice of selling an alcoholic beverage by the drink at any time for a price less than the price regularly charged during the same calendar week. In effect, the statute mandates that the price for alcoholic beverages must remain the same throughout each calendar week.

13 AAC 104.440 states that that for purposes of AS 04.16.015, no alcoholic beverage drink or brand may be sold for a set period of time during the day, regardless of pricing. The regulation is construed to prohibit the practice of offering or selling a drink only during a set period of the day. So construed, the regulation is consistent with AS 04.16.015(a)(3), which prohibits only sales at differential prices: selling a drink only during a set period of the day may reasonably be seen as equivalent to selling it at a price different than that at which the drink is regularly sold, because the drink is not regularly sold at any price during the entire remainder of that same week.

Thus, reading the regulation together with the statutory provisions, under AS 04.16.015(a)(3) a licensee may not offer or sell (i) an alcoholic beverage by the drink during a set period of time at a price less than the price at which that drink is sold during the remainder of the calendar week, or (ii) an alcoholic beverage by the drink only during a set period of the day, regardless of pricing; and under AS 04.15.016(b), a license may not advertise or promote sales that would be in violation of AS 04.15.016(a)(3) under either of those two scenarios.

Under neither of those scenarios, it must be pointed out, would it be illegal for a licensee to sell a 10 oz. beer for \$1.50, while selling a 16 oz. beer for \$3.00, even though the per ounce price of a 10 oz. beer for \$1.50 is less than the per ounce price of a 16 oz. beer for \$3.00. This is because licensees do not sell beer by the ounce: they sell it by the drink (a glass of beer is a drink). It is not impermissible under AS 04.16.015(a)(3) to sell alcoholic beverages by the drink at prices that are differential by the ounce. Rather, it is impermissible to sell alcoholic beverages by the drink at prices that are differential by the drink. In this case, in order to show a violation of applicable law, the director needed to show either that (a) the 10 oz. beer (or some other drink) was advertised, promoted, offered or sold for different prices during some period of time in a calendar week, or that (b) the 10 oz. beer was advertised, promoted, offered or sold only during a set period of the day, regardless of pricing.

The director, made no attempt to show, and presented no evidence, that the 10 oz. drink of beer was ever sold at a price other than \$1.50 per drink, and in fact that is not what the accusation alleges. The only theory of liability that is stated in the accusation and that was argued or for which any evidence was presented is that the 10 oz. drink of beer was advertised, promoted, offered or sold during only between the hours of four and six p.m. That is the factual issue to be determined.

**B. The 10 Oz. Beer Was Not Offered Or Sold Only During A Set Period Of Time**

The primary evidence supporting the allegation that the 10 oz. beer was offered or sold only between four and six p.m. consisted of some ambiguous comments made by the bartender to Mr. Bilyeu. A recording of their conversation, largely indecipherable due to background noise, was admitted into evidence. What the bartender said is difficult to know; what he meant is even less clear. In the recording, the bartender can be heard explaining that the Happy Hour beer is a 10 oz. glass of beer that is a better deal (in terms of price per ounce) than the regular 16 oz. glass of beer, and some of his comments might be understood to mean that the 10 oz. beer was

only sold during that time. However, there is much more persuasive evidence to the contrary, in the form of the establishment's sales receipts. Those receipts show that the 10 oz. beer was sold at all times of day. The business's bookkeeper testified that those records were accurate. While the director argued that the records could have been doctored, there was no testimony or evidence offered to support such speculation. The clear preponderance of the evidence is that the 10 oz. beer was not offered (that is to say, available for sale) or sold only during a set period of the day.

C. The 10 Oz. Beer Was Advertised And Promoted Only In A Set Period Of Time

That a 10 oz. glass of beer for \$1.50 was sold throughout the day does not mean that no violation of law occurred. As previously observed, it is a violation of AS 04.16.015(b) to advertise or promote a drink for sale only during a set period of the day. In this case, there is clear and undisputed evidence that a glass of beer for \$1.50 was advertised and promoted for sale only during the Happy Hour, by means of a large on-site banner proclaiming that during Happy Hour, from four to six p.m., beer was sold for \$1.50 and appetizers were sold at half price. Such a banner is an advertisement for the sale of a \$1.50 drink of beer only during the hours of four to six p.m., and a promotion for such sales only during that time period by means of the associated offer of half-priced appetizers. As such, the posting the banner was a violation of AS 04.16.015(b), even if the drink advertised and promoted for sale only during the Happy Hour was in fact offered and sold throughout the day.

**IV. Conclusion**

By posting a banner advertising and promoting an alcoholic drink for sale only during a set period of the day, Mr. Freeman violated AS 04.16.015(b), regardless of whether that drink was offered and sold at all times of the day, and regardless of its price. Mr. Freeman did not contest the sanction. Accordingly, the imposition of a \$500 fine is **AFFIRMED**.

DATED: July 25, 2011.

Signed  
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Andrew M. Hemenway  
Administrative Law Judge

## Adoption

The undersigned, on behalf of the Alcoholic Beverage Control Board, adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 7<sup>th</sup> day of December, 2011.

By: Signed  
Signature  
Robert Klein  
Name  
Board Chair  
Title

[This document has been modified to conform to the technical standards for publication.]