

**DOCKET NO. 458-03-2640**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>DENNIS MICHAEL ROOP D/B/A NEW DESPERADO LICENSE NO. BE-279876 BELL COUNTY, TEXAS (TABC CASE NO. 602685)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	
	§	

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC or the Commission) requested that the license of Dennis Michael Roop d/b/a New Desperado (the Respondent) be suspended, alleging that on or about November 16, 2002, the Respondent, its agent, servant or employee, sold or delivered an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. (Code) §61.71(a)(6). Both parties stipulated that the Respondent's employee sold an alcoholic beverage to an intoxicated person, in violation of this section of the Code; however, the Respondent raised Code §106.14(a) as an affirmative defense, claiming that this Code section protected the Respondent from the Commission's action. The Respondent asserts that he had complied with this statute, known as the "safe harbor" statute. This Proposal for Decision disagrees with the Respondent and recommends that the Respondent's license be suspended for a period of twenty-one days, or that a civil penalty in lieu of suspension be imposed, in the amount of \$150.00 per day of suspension.

**I. Statement of the Case**

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits was convened on June 16, 2003, at 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Suzan Shinder. The Commission appeared by staff attorney Dewey Brackin and by its party representative, TABC agent, Victor Kuykendoll. The Respondent appeared by attorney F. Ed Brown and by its party representative, Dennis Michael Roop (the Licensee). Both parties stipulated that the violation occurred as alleged; that, on November 16, 2002, the Respondent's employee, Crystal Glass, sold or delivered an alcoholic beverage to an intoxicated person on the licensed premises. In addition, both parties stipulated that

Ms. Glass was "seller-server certified"<sup>1</sup> at the time of the sale. Based on the fact that Ms. Glass was seller-server certified, the Respondent asserted the affirmative defense under Code §106.14(a),<sup>2</sup> and this sole remaining issue was tried with the consent of the Commission, without prior notice to the Commission. Evidence and argument were heard, and the record closed the same day.

## II. The Statutes

In pertinent part, Code §61.71(a)(6) provides for the suspension or cancellation of a license if it is found that the licensee sold, served, or delivered an alcoholic beverage to an intoxicated person. According to the Standard Penalty Chart,<sup>3</sup> the Commission may offer a settlement to a person charged with violating Code §61.71(a)(6) of: a ten to fifteen-day suspension for a first violation; a fifteen to thirty-day suspension for a second violation; and a thirty-day suspension to cancellation of a license or permit for a third violation.<sup>4</sup> In this context, a civil penalty may be imposed in lieu of suspension, and this penalty may not be less than \$150.00 or more than \$25,000.00 for each day the license was to have been suspended.<sup>5</sup> When the Commission considers a suspension, the Commission may consider aggravating and ameliorating circumstances, which may include whether the violation was caused by the intentional or reckless conduct of the licensee.<sup>6</sup>

In pertinent part, Code §106.14(a) states that the sale, service, dispensing, or delivery of alcoholic beverages to an intoxicated person shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a Commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.

A licensee who claims exemption from administrative action under Code §106.14(a) must produce evidence that the licensee met all three criteria outlined in Code §106.14(a), and a licensee shall not be deemed to require its employees to attend a Commission approved seller-server training

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<sup>1</sup>This phrase is commonly used to signify that a person has successfully graduated from a Commission - approved seller training program, under Code §106.14.

<sup>2</sup>The Respondent bears the burden of proof in this statutory affirmative defense. This defense, also known as the "safe harbor" defense, would bar the Commission's recovery against a respondent, if that respondent alleged and proved all three components of the statute.

<sup>3</sup>See 16 TEX. ADMIN. CODE (Rules) §37.60(a).

<sup>4</sup>The Standard Penalty Chart is persuasive, but not binding in this case. See Rules §37.60(g).

<sup>5</sup>See Rules §37.60(b) and TEX. ALCO. BEV. CODE ANN. (Code) §11.64.

<sup>6</sup>See Rules §37.61(c).

program unless employees are required to attend such program within thirty days of their initial employment.<sup>7</sup>

16 TEX. ADMIN. CODE (Rules) Chapter 50 establishes the requirements for approval of seller-server training programs as authorized by Code §106.14, and the requirements and procedures for certification under these programs. Graduates of these programs receive a certificate to signify successful completion of the program, and this certificate is valid for two years.<sup>8</sup> These seller-server training programs are calculated to modify the behavior of seller-servers of alcoholic beverages, primarily to prevent the sale of alcoholic beverages to minors and intoxicated persons.<sup>9</sup> The Commission maintains a list of currently certified seller trainees.<sup>10</sup>

The following practices constitute prima facie evidence of indirect encouragement to sell or serve alcoholic beverages to intoxicated persons:

1. the Licensee fails to insure that all employees are currently seller-server certified;
2. the Licensee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages to intoxicated persons, and that express a strong commitment by the licensee to prohibit such sales, service, or consumption;
3. the licensee fails to insure that employees have read and understood the licensee's policies and procedures regarding sales, service or consumption of alcoholic beverages to intoxicated persons.<sup>11</sup>

### III. Evidence

A Beer Retailer's On Premises License, BE-279876, was issued to Dennis Michael Roop, doing business as New Desperado, 1602 South 1<sup>st</sup> Street, Temple, Bell County, Texas, by the Commission on October 5, 1992, and has been continuously renewed.<sup>12</sup>

The Commission called two witnesses: Agent Victor Kuykendoll; and Dennis Michael Roop. The Respondent did not call any witnesses.

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<sup>7</sup>See Rules §50.10(a) and (b).

<sup>8</sup>See Rules §50.8(a) and (b).

<sup>9</sup>See Rules §50.1.

<sup>10</sup>See Rules §50.8(d).

<sup>11</sup>See Rules §50.10(d).

<sup>12</sup>Commission's Exhibit No. 1.

## **A. Testimony of TABC Agent Victor Kuykendoll**

On December 11, 2002, TABC Agent Victor Kuykendoll returned to the Respondent's licensed premises (the bar) and spoke to the bar employees to ascertain whether or not they were seller-server certified on November 16, 2002, the day of the event. Bar employee Herschell Compton told the agent that he had been working at the bar for seven or eight years; his certification had expired on January 24, 2002; he was not certified on November 16, 2002; and as of that date, he had not been certified for several months.<sup>13</sup>

The agent noted that the Respondent did not have a posted policy that intoxicated persons were not to be served. When the agent interviewed the bar employees, they told him that they were not aware of any such policy.

## **B. Testimony of Dennis Michael Roop, the Licensee**

Dennis Michael Roop, the Licensee, owns and/ or manages five clubs in Bell County, including the bar. He recalled with varying degrees of certainty three employees that Agent Kuykendoll addressed during his testimony. Mr. Roop seemed certain that Belinda Benavides was one of his employees in November and/ or December of 2002. Herschell Compton worked for him several times over the last few years. He was unsure when or how long Mr. Compton worked for him, but he thought that Mr. Compton worked for him for a few weeks at the bar. Mr. Roop was uncertain if a Ms. Whetstone ever worked for him, but if she is the "Rose" that works for him now, then she worked for him in November of 2002. Crystal Glass worked for him for more than three weeks, so he assumed that she was certified. Mr. Roop did not have copies of any employee's certification, nor did he have any personal knowledge that any of these employees were seller-server certified at the time of the incident or at any time.

Mr. Roop stated that he requires all of his employees to become seller-server certified. He either gives them three weeks or four weeks to become certified, or be terminated; however, he was not certain about this time frame. His employees are supposed to post their certification at the bar, but he does not verify this; he just assumes that it is done. Sometimes he tries to "check on it." He has a policy that his employees are to stop serving customers who are intoxicated, but this policy is not posted. He has a binder with the policy in it, and his employees are supposed to "sign off" on these policies before they are hired. He did not bring the binder with him to the hearing, and he did not bring any of his employees to testify to his policies and procedures; or to their certification or lack of certification; or as to whether or not they had been encouraged or discouraged from selling alcoholic beverages to intoxicated persons, in any manner. He denied directly or indirectly encouraging his employees to sell alcoholic beverages to intoxicated persons, and he specifically does not penalize his employees for refusing to sell to intoxicated persons. He has personally barred persons from the bar when they were intoxicated.

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<sup>13</sup>Two other uncertified employees were interviewed, but because of the brief length of their employment, these two employees may have fallen under a thirty-day grace period for certification at the time the agent interviewed them. It is uncertain whether or not these uncertified persons continued to be employed at the bar after the agent interviewed them, and their certification status after the grace period elapsed is also unknown.

#### IV. Discussion

The Respondent failed to prove that the bar employees were required to attend a Commission-approved seller training program; and the Respondent failed to prove that the Licensee, Dennis Michael Roop, had not directly or indirectly encouraged the bar employees to sell alcoholic beverages to intoxicated persons. As a result, the sale of alcohol to an intoxicated person by the Respondent's employee, Crystal Glass, at the bar on November 16, 2002, should be attributed to the Respondent.

##### **A. The Respondent's employees were not required to attend a Commission-approved seller training program.**

Mr. Roop stated that he had a policy that his employees had to be certified or they would be terminated. However, he was remarkably oblivious to the identities of his employees, and surprisingly uninformed about their certification status and their compliance or non-compliance with the alleged policies for bar employees. As a result, at minimum, long-time bar-employee Herschell Compton, whose certification had expired, had not been certified for several months at the time of the incident. Mr. Roop had no personal knowledge that any of the bar employees were seller-server certified,<sup>14</sup> and provided no proof of any employee's certification at any time, beyond the parties' stipulation that employee Crystal Glass was certified at the time of the incident.

The Respondent argued that because Crystal Glass, the employee who served alcohol to the intoxicated person, was certified at the time of the incident, this was sufficient to meet the requirements of Code §106.14(a). Respondent's position was that the Code did not require anyone but the employee who actually served the intoxicated person to be certified. However, Code §106.14(a)(1) states that the sale alcoholic beverages to an intoxicated person shall not be attributable to the employer if the employer requires its employees (plural) to attend a Commission-approved seller training program.

Section 106.14(a) of the Code has three components. This plainly demonstrates that there must be more than a requirement that employees become certified. After a licensee establishes a policy that employees are to become seller-server certified, the licensee cannot then ignore all actions of the employees, and be safe in an assumption that no matter what the employees do (or fail to do), recovery against the licensee will be barred. This cannot be the intention of the legislature. Notwithstanding the Licensee's alleged policy that uncertified employees were to be terminated, at the time of the incident, Mr. Compton had been working at the bar for months while he was not seller-server certified, and he had not been terminated. A "policy" that is without real consequences is not much more than a suggestion. Notwithstanding Mr. Roop's alleged policy, his actions clearly demonstrated to the bar's employees that there was a lack of interest in the employee's certification status and in the employee's compliance (or lack of compliance) with the Licensee's "policies." Mr. Roop's testimony to the contrary was not credible. Based on all of the foregoing, the Respondent's employees were not required to attend a Commission-approved seller training program.

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<sup>14</sup>Notwithstanding the stipulation of both parties that Crystal Glass was seller-server certified, this was the testimony of Mr. Roop.

**B. The Respondent directly or indirectly encouraged its employees to sell alcoholic beverages to intoxicated persons, in violation of Code §61.71(a)(6).**

Mr. Roop allegedly had a policy that intoxicated persons were not to be served alcoholic beverages. This policy was not posted; but, according to Mr. Roop, it was in a binder that the employees were supposed to read and acknowledge. However, there was no evidence that the bar's employees had read this policy. To the contrary, the bar employees interviewed by Agent Kuykendoll were not aware of such policy, and bar-employee Crystal Glass' action, in serving an alcoholic beverage to an intoxicated person, was a manifestation of that ignorance. While Mr. Roop testified that he does not penalize the bar-employees for refusing to sell alcohol to intoxicated persons, there was no evidence that an employee who sold alcohol to an intoxicated customer suffered any repercussions.

The failure to post policies and procedures designed to prevent the sale or service of alcoholic beverages to intoxicated persons, Ms. Glass' sale of alcohol to an intoxicated person, the lack of consequences for a violation of a policy against serving intoxicated persons, and the bar-employees' ignorance of a policy prohibiting the sale of alcoholic beverages to intoxicated persons, is characteristic of the Licensee's direct or indirect encouragement of the bar employees to make sales of alcoholic beverages to intoxicated customers.

**C. A suspension of twenty-one days is supported by the evidence.**

The intentional conduct of the Licensee, encouraging the bar employees to sell alcohol to intoxicated persons, is an aggravating circumstance, relevant to the length of a suspension. Based on the Licensee's conduct, a suspension of twenty-one days is supported by the evidence.

**Findings of Fact**

1. A Beer Retailer's On Premise License, BE-279876, was issued to Dennis Michael Roop, doing business as New Desperado, 1602 South 1<sup>st</sup> Street, Temple, Bell County, Texas, by the Commission on October 5, 1992, and has been continuously renewed.
2. The Respondent's employee, Herschell Compton, who was employed by the Respondent for seven or eight years at the time of the incident, was not seller-server certified on November 16, 2002; and had not been certified for several months; yet, the Respondent took no action against Mr. Compton for his failure to become seller-server certified for this lengthy period.
3. In that the Respondent failed to make reasonable attempts to assure that its employees were seller-server certified, or even to ascertain whether or not they were so certified, the Respondent did not have a mandatory policy that its employees were to become seller-server certified in a Commission approved seller training program.
4. The Respondent did not have a posted policy prohibiting the sale of alcoholic beverages to intoxicated persons. Respondent's employees were unaware of Respondent's policy that they were not to serve alcoholic beverages to intoxicated persons, and the Respondent's employees suffered no repercussions for serving an intoxicated customer.

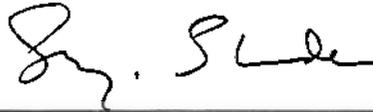
5. In that the Respondent failed to make reasonable attempts to assure that its employees did not sell or serve alcoholic beverages to intoxicated persons, the Respondent did not have a mandatory policy that its employees were not to sell alcohol to intoxicated persons.
6. By its failure to make a reasonable effort to effectively prohibit its employees from serving alcoholic beverages to intoxicated persons, the Respondent intentionally, directly or indirectly, encouraged its employees to serve alcohol to intoxicated persons.
7. On November 16, 2002, Crystal Glass, the Respondent's employee, was working on the licensed premises while she served an alcoholic beverage to an intoxicated person.
8. On April 7, 2003, the Commission sent its Notice of Hearing to the Respondent's last known mailing address. This Notice of Hearing informed the Respondent that the hearing on the merits was set for June 16, 2003, at 10:00 a.m., and it contained: a statement of the location and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the Commission.
9. The hearing on the merits was convened on June 16, 2003, at 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Suzan Shinder. The Commission appeared by staff attorney Dewey Brackin, and by its party representative, TABC Agent Victor Kuykendoll. The Respondent appeared by attorney F. Ed Brown and by its party representative, Dennis Michael Roop (the Licensee). Evidence and argument were heard, and the record closed the same day.

### **Conclusions of Law**

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over 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. GOV'T CODE ANN. ch. 2003.
3. Based on Findings of Fact Nos. 8 and 9, proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; Code §11.63; and 1 TEX. ADMIN. CODE §155.55.
4. Based on Findings of Fact Nos. 2-7, the Respondent is not protected by Code §106.14(a), and the sale or service of an alcoholic beverage to an intoxicated person is attributable to the Respondent, because the Respondent's employees were not required to attend a Commission-approved seller training program, and the Licensee directly or indirectly encouraged the employees to sell or serve alcoholic beverages to intoxicated persons.

5. Based on Finding of Fact No. 7, and Conclusion of Law No. 4, the Respondent sold or served an alcoholic beverage to an intoxicated person, in violation of Code §61.71(a)(6).
6. Based on Findings of Fact Nos. 4-7, a twenty-one day suspension or a \$150.00 per day civil penalty in lieu of suspension is warranted, pursuant to 16 TEX. ADMIN. CODE (Rules) §37.60(a), (b), and (g); Rules §37.61(c); and Code §11.64.

Signed this 29<sup>th</sup> day of July, 2003.



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SUZAN MOON SHINDER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 602685**

IN RE DENNIS MICHAEL ROOP	§	BEFORE THE
D/B/A NEW DESPERADO	§	
PERMIT NO. BE-279876	§	
	§	TEXAS ALCOHOLIC
	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-2640)	§	BEVERAGE COMMISSION

**O R D E R**

**CAME ON FOR CONSIDERATION** this 24th day of September, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on June 16, 2003, and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 29, 2003. 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, 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 Beer Retailer's On-Premise License No. BE-279876 is hereby **SUSPENDED**.

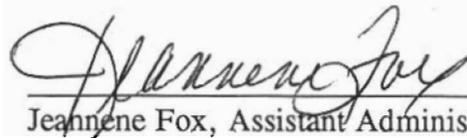
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$3,150.00** on or before the **10th day of December, 2003**, all rights and privileges under the above described license will be **SUSPENDED** for a period of **twenty-one (21) days, beginning at 12:01 A.M. on the 17th day of December, 2003**.

**This Order will become final and enforceable on October 16, 2003**, 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> September, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

Dennis Michael Roop

d/b/a New Desperado

**RESPONDENT**

1602 S. 1<sup>st</sup> Street

Temple, Texas 76504

***CERTIFIED MAIL NO. 7001 2510 0003 8687 2110***

***RETURN RECEIPT REQUESTED***

F. Edward Brown

**ATTORNEY FOR RESPONDENT**

P. O. Box 1782

Belton, Texas 76513

***VIA FACSIMILE: (254) 899-8293***

The Honorable Suzan Moon Shinder

Administrative Law Judge

State Office of Administrative Hearings

***VIA FACSIMILE (254) 750-9380***

Dewey A. Brackin

**ATTORNEY FOR PETITIONER**

Texas Alcoholic Beverage Commission

Legal Division

Waco District Office

Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 602685

REGISTER NUMBER:

NAME: Dennis Michael Roop

TRADENAME: New Desperado

ADDRESS: 1602 S. 1<sup>st</sup> Street, Temple, Bell County, Texas 76504

DATE DUE: December 10, 2003

PERMITS OR LICENSES: BE-279876

AMOUNT OF PENALTY: \$3,150.00

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Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 10TH DAY OF DECEMBER, 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

**For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731**

**WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.**

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No.