

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

October 4, 1999

Doyme Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731



**CERTIFIED MAIL,**  
**RETURN RECEIPT**  
Z 208 573 153

**RE: Docket No. 458-99-1051; Texas Alcoholic Beverage Commission vs. Double R Entertainment, Inc. d/b/a Long Horn Ball Room, TABC Case No. 583446**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Stephen F. Shaw, Attorney for Respondent. For reasons discussed in the proposal, I recommend that Respondent's licenses be suspended for a period of 15 days, or that Respondent be allowed to pay a penalty in lieu of suspension in the amount of \$5,250.00

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

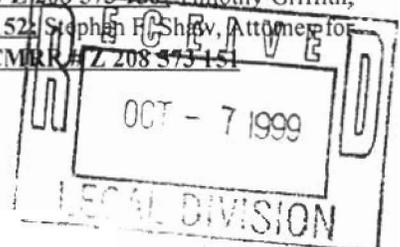
A handwritten signature in black ink, appearing to read "Tanya A. Cooper".

Tanya A. Cooper  
Administrative Law Judge

TC:ds

Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - CMRR# Z 208 573 150; Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - CMRR# Z 208 573 152; Stephen F. Shaw, Attorney for Respondent, 8828 N. Stemmons Freeway, Suite 320, Dallas, Texas 75247 - CMRR# Z 208 573 151



The Vinnedge Building  
2100 N. Main Street, Suite 10 ♦ Fort Worth, Texas 76106  
(817) 626-0003 Fax (817) 626-7448

DOCKET NO. 458-99-1051

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

DOUBLE R ENTERTAINMENT, INC  
D/B/A LONG HORN BALL ROOM  
BE-318835 & BL-318836  
DALLAS COUNTY, TEXAS  
(TABC CASE NO. 583446)

ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Double R Entertainment, Inc. d/b/a Long Horn Ball Room (Respondent), alleging that Respondent or Respondent's agent or employee, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage on the licensed premises in violation of the Texas Alcoholic Beverage Code §106.13(a)(Code). In the alternative, Staff additionally alleged that Respondent had engaged in a device, scheme, or plan which surrendered control of the employees, premises, or business of the permittee to persons other than Respondent in violation of the §109.53 of the Code. Staff requested that Respondent's licenses be canceled. The Administrative Law Judge (ALJ) agrees with Staff that Respondent or its agents, with criminal negligence, permitted a minor to possess alcoholic beverage on the licensed premises; however the ALJ recommends that Respondent's licenses be suspended, rather than canceled. The ALJ recommends that Respondent's licenses be suspended for a period of 15 days, or that Respondent be allowed to pay a penalty in lieu of suspension in the amount of \$5,250.

**JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch 5, §§6.01 and 106.13. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021.

On July 28, 1999, a hearing convened before Tanya Cooper, ALJ, of the State Office of Administrative Hearings, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas.

Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented by Stephen F. Shaw, Attorney.

Evidence was received from Staff on that date by testimony provided by witnesses and documentary evidence. Respondent did not present any evidence during the proceedings. There were no contested issues of jurisdiction.

During the hearing, Respondent contested the adequacy of Staff's Notice of Hearing. Respondent objected to a Staff witness' testimony asserting that it was irrelevant because there was no relationship between the testimony being provided and the notice issued by Staff in this proceeding. Further, Respondent moved to strike this witness' testimony because it concerned an event that occurred on March 6, 1999, rather than April 19, 1999, the date of the allegation contained in paragraph 1 of Staff's Notice of Hearing. The ALJ reserved ruling on Respondent's objection and motion. The record was closed on August 13, 1999, after the parties were allowed to submit proposed findings of fact and conclusions of law.

On June 14, 1999, a prehearing order was issued requiring the parties to file any challenge to the adequacy of notice by 5:00 p.m. on July 2, 1999; and that if no challenges were filed by that date, any subsequent challenges to the notice would be deemed waived by the ALJ. On June 23, 1999, Respondent was aware of Staff's allegations, including the date Staff had listed as the alleged violation date, April 19, 1999. Respondent did not file any objection to the notice as issued by July 2, 1999, as required by the ALJ's prehearing order.

Staff's allegations within the Notice of Hearing are sufficiently accurate statements in light of all the evidence produced at the hearing. No evidence was produced showing that Respondent was surprised by Staff's evidence as it was presented during the hearing or that it was incapable of making adequate preparation for the hearing due to the variance between the event as alleged and the proof being presented by Staff. Further, Respondent did not make any timely written application for a more definite and detailed statement regarding the matters asserted as provided for in TEX. GOV'T CODE ANN. §2001.052(b)(Vernon 1999). As a result, any objection raised regarding adequacy of notice during the hearing on July 28, 1999, is untimely and not supported by any showing of harm to Respondent. The ALJ finds that Staff's Notice of Hearing was adequate. Respondent's objection to this proceeding is, therefore, denied.

Respondent's motion to strike testimony is denied. The request to strike testimony was in relation to evidence concerning events occurring on March 3, 1999, again due to variance from the date as alleged in Staff's Notice, (i.e., April 19, 1999, contained in paragraph 1 of Staff's Exhibit 1). Respondent's Motion is denied because of the rationale stated in the foregoing paragraph. The ALJ finds that the testimony in question is relevant to the allegations contained in Staff's Notice.

#### LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized to cancel or suspend a permit or license for not more than 60 days, pursuant to §§11.65, 61.71(a)(5), or 106.13 of the Code, if a licensee or permittee violates the Code.

In this case, two alternative violations are alleged by Staff. The first allegation concerns a violation of Code provisions §§106.04, 106.05, and 106.13 (Vernon 1999). These sections make it a violation to, with criminal negligence, allow a minor to possess or consume an alcoholic beverage on the licensed premises. Criminal negligence is defined in TEX. PENAL CODE ANN. §6.03(d) as:

conduct, or results of conduct, when an actor ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's viewpoint.

Secondly, Staff asserts in the alternative that if Respondent's agent or employee did not allow a minor to possess or consume alcoholic beverage on the licensed premises, then Respondent has engaged in a device, scheme, or plan that surrendered control of the employees, premises, or business of the permittee to persons other than Respondent, contrary to §109.53 of the Code. This allegation is also referred to as a subterfuge in the operation of a licensed premises. The term "subterfuge" is not defined within the provisions of the Code; however, its common meaning is defined as a deception in order to . . . escape, or evade; or a deceptive device or stratagem. (See Webster's Collegiate Dictionary, Tenth Edition).

Section 109.53 of the Code states:

It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such a permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission or the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices herein after declared to constitute unlawful trade practices. . . . Every permittee shall have and maintain exclusive occupancy and control of the entire license premises in every phase of the storage, distribution, possession, and transportation, and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. (Emphasis added).

The standard of proof required to establish a violation is that required in a civil case: the preponderance of the evidence. The trier of fact must ask, if, weighing all the evidence, the party with the burden of proof has shown by 51% of the evidence that the alleged violation occurred. Staff bears the burden of proof to show the alleged violations occurred.

When suspension of a permit or a license is authorized, the permittee must be given an opportunity to pay a civil penalty in lieu of suspending the permit. The amount may not be less than \$150 nor more than \$25,000 for each day the permit was to have been suspended. If the penalty is not paid before the sixth day after the permittee is notified of the amount, the permittee loses the opportunity to pay it, and the permit's suspension shall be imposed. In determining the amount of the penalty, Texas Alcoholic Beverage Commission is directed to consider the economic impact a suspension would have on the permittee. [See Code §11.64.]

In addition, the Commission or its administrator, may relax provisions of §106.13 concerning suspension and cancellation and assess a sanction the Commission or its administrator finds just under the circumstances, if, at a hearing, the licensee or permittee established to the satisfaction of the Commission or its administrator:

- (1) that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
- (2) that the permittee or licensee was entrapped; or
- (3) that an agent, servant, or employee of the permittee or licensee violated this Code without the knowledge of the permittee or licensee. TEX. ALCO. BEV. CODE ANN. §106.13(c)(Vernon 1999).

### EVIDENCE AND PARTIES' CONTENTIONS

1. Minor in possession and/or consuming alcoholic beverage on the premises violation.

Respondent holds a Beer Retailer's On-Premises License and a Retail Dealer's On-Premises Late Hours License (BE-318835 and BL-318836), issued to Respondent doing business as The Long Horn Ball Room, 216 Corinth, Dallas, Dallas County, Texas. Staff alleged that Respondent or its agent, servant, or employee, with criminal negligence, permitted a minor to possess and/or consume an alcoholic beverages on the licensed premises.

On March 6, 1999, Agent Joe Cavazos, Texas Alcoholic Beverage Commission, was assigned to investigate a complaint received that minors were consuming alcoholic beverage at the Long Horn Ball Room, the licensed premises. As Agent Cavazos entered the premises, he observed an individual, later identified as Cory Roberson, give two youthful females seated inside the premises a hand signal described by Agent Cavazos as the "high" sign. The two females were later identified as Karen Bailey and Shahan Gentry.

Ms. Bailey and Ms. Gentry were each younger than twenty-one years of age on March 6, 1999. Agent Cavazos believed Mr. Roberson's actions were a signal to Ms. Bailey and Ms. Gentry that a law enforcement officer was on the premises because he observed each of them take plastic cups that were on their table into their hands and then place them under their respective chairs. Agent Cavazos' attention was immediately directed toward Ms. Bailey and Ms. Gentry because their youthfulness was apparent to him due to their clothing, appearance, and actions when observing Roberson's signal.

The area where Ms. Bailey and Ms. Gentry were seated was openly visible within the premises. The plastic cups taken from the table and placed under chairs by Ms. Bailey and Ms. Gentry were of the same variety as alcoholic beverage was being served in by Respondent's employees at the premises' bar. Upon a closer examination of the cups in the possession of Ms. Bailey and Ms. Gentry, the liquid contents had the appearance and odor of an alcoholic beverage

identifiable by Agent Cavazos. No adult was present with Ms. Bailey or Ms. Gentry as they were in possession of the alcoholic beverage.

## 2. Subterfuge violation.

On March 6, 1999, Sgt. J. Busby, Texas Alcoholic Beverage Commission, was also at the licensed premises as Agent Cavazos was investigating the complaint of minors consuming alcohol. He contacted Respondent's agent, R. Ramirez, regarding the minors that were observed possessing alcoholic beverage on the premises.

Mr. Ramirez was present on the premises at the time of this incident. He informed Sgt. Busby that the ongoing event was being sponsored by a production company. Mr. Ramirez, along with other bartenders and employees of Respondent, were working serving alcoholic beverages to persons at the premises attending the event. The event sponsor did not possess any type of permit or license for lawfully serving alcoholic beverages.

During this conversation with Respondent's agent, Mr. Ramirez, Sgt. Busby was advised that the event sponsor was responsible for determining who was being admitted onto the premises by its personnel manning the premises' door and monitoring the crowd for violations such as minors in possession of alcoholic beverage. Mr. Roberson, the individual observed signaling Ms. Bailey and Ms. Gentry of Agent Cavazos' presence on the premises, was an employee of the event sponsor. Respondent contends that if minors were in possession of alcoholic beverage on the premises, it was not due to any negligence by Respondent, or its agents or employees on March 6, 1999, but was instead the responsibility of the event sponsor.

## 3. Respondent's licensing history and other relevant factors for consideration.

Respondent's licensing history, as maintained by the Texas Alcoholic Beverage Commission, reveals that two prior violations of the Code have occurred before the March 6, 1999, incident. No evidence was presented to establish what penalties were assessed regarding these violations, but neither of these violations appear to be of the same nature as the violations addressed in this proceeding.

No evidence was presented for consideration in these proceeding regarding the economic impact a suspension of Respondent's license, rather than cancellation as sought by Staff, might have on his business as provided for in §11.64 of the Code or of other mitigating factors that might impact establishing a recommended penalty as set forth pursuant to §106.13(c) of the Code. No evidence was received regarding any corrective actions that may have been undertaken by Respondent to prevent this type of violation involving minors possessing or consuming alcoholic beverages on the licensed premises in the future.

## ANALYSIS

Clearly, two minors were in possession of alcoholic beverages on the licensed premises on

March 6, 1999, in violation of the Code. The only questions remaining for determination are:

1. Who was responsible for allowing this situation to occur: Respondent, or its agents or employees; or some other person or entity? and,
2. Was the party responsible for the activity on the premises that day criminally negligent in allowing minors to possess alcoholic beverages on the licensed premises?

From the evidence presented, the ALJ believes this responsibility must be placed upon Respondent, and its agents or employees. Respondent, as a corporate entity, must by necessity rely on agents or employees to perform all of its activities. Mr. Ramirez, is a primary agent of Respondent. He was at the licensed premises while the event was taking place and minors were in possession of alcoholic beverages. He and other bartenders, employees or agents of Respondent, were in control of the premises' business which is the sale of alcoholic beverages belonging to Respondent. The event sponsor was not authorized by the Commission as a seller of alcoholic beverages pursuant to any daily temporary mixed beverage permit or caterer's permit (See TEX. ALCO. BEV. CODE ANN. chs. 30 and 31) or subject to the Code's provisions regarding control of activities on a licensed premises.

TEX. ALCO. BEV. CODE ANN. §109.53 requires every permittee to have and maintain exclusive control of the entire premises in every phase of the sale of alcoholic beverages on its licensed premises. Any plan, scheme, or device that attempts to do otherwise, is unlawful. Respondent's attempt to abdicated its responsibility for controlling the premises and preventing Code violations to the event sponsor in the instance was unlawful; and as a result, ineffective.

Respondent permitted the event's sponsor to determine who would be allowed into the premises where Respondent was selling its merchandise, alcoholic beverages. By this conduct, Respondent created an agency relationship with the event sponsor. Employees of the event sponsor at that point were vested with Respondent's authority and responsibility to prevent violations, such as underage persons unlawfully consuming or possessing alcoholic beverages on the premises. These persons, and specifically Mr. Robertson, became Respondent's agents for that purpose.

In determining if Respondent, its agent or employees acted with criminal negligence resulting in minors possessing alcoholic beverages, the ALJ determines that Respondent and its agents did. The possession of alcoholic beverages was in such an open setting within the licensed premises, that any reasonably prudent permittee would have observed this ongoing unlawful activity. The minors were obviously youthful in appearance. The alcoholic beverages possessed by the minors were held in containers the same as others being served by Respondent's agents and employees from the bar. Staff further established that beyond being criminally negligent in allowing the ongoing illegal activity, that at least one of its agents, Mr. Robertson, had actual knowledge of the illegal activity. This was demonstrated by Mr. Robertson signaling to minors that law enforcement personnel were present at the licensed premises and the minors' actions attempting to hide the alcoholic beverage when seeing Mr. Robertson's signal.

Staff met its burden of proof establishing that Respondent, its agents or employees allowed

minors to be in possession of alcoholic beverage on the license premises, and did so, with criminal negligence. Respondent was responsible for the activities on the premises and in exclusive control of the premises because it was the only entity authorized to engage in the sale of alcoholic beverages properly regulated by the Commission.

### RECOMMENDATION

The ALJ recommends that Respondent's licenses be suspended, rather than canceled. Respondent's licensing history, as maintained by TABC Staff does not indicate that Respondent has engaged in repeated violations of the Code by allowing minors to possess or consume alcoholic beverages on the licensed premises. In fact, Respondent's licensing history contains no previous suspensions for any Code violations. As a result, the ALJ deems that cancellation of Respondent's licenses for its first violation of this type is excessive.

Alternatively, there are several factors presented in this instance making this violation one of particular concern. Respondent's initial response when confronted with the violations occurring on its premises was to attempt shifting its responsibility for maintaining control over its business and premises from itself to another entity. This is a position that Respondent has continued to maintain throughout this proceeding. Respondent has not demonstrated any willingness to work toward preventing these type of violations in the future which suggests that a potential for further violations exists if corrective action is not implemented. Nor did Respondent establish that there were any mitigating factors that resulted in the events of March 6, 1999, being merely an isolated instance. Upon consideration of these factors, the ALJ recommends that Respondent's licenses be suspended for a period of 15 days, or in lieu of suspension that Respondent be allowed to pay a civil penalty in the amount of \$5,250, pursuant to §11.64 of the Code.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be and are denied.

### FINDINGS OF FACT

1. Double R Corral Entertainment, Inc., d/b/a Long Horn Ball Room (Respondent) holds a Beer Retailer's On-Premise License, BE-318835, and Retail Dealer's On-Premise Late Hours License, BL-318836, for the premises located at 216 Corinth, Dallas, Dallas County, Texas.
2. On June 23, 1999, Respondent was provided with notice of hearing. No objection to this notice was raised prior to the hearing in this matter and was sufficient to inform Respondent of the matters asserted by Staff. A hearing was convened before the State Office of Administrative Hearings on July 28, 1999. Both parties appeared and Staff presented evidence. No challenges to jurisdiction were made by either party.
3. On March 6, 1999, two minors, Karen Bailey and Shahan Gentry possessed alcoholic beverages on the licensed premises, in violation of the Texas Alcoholic Beverage Code

(Code).

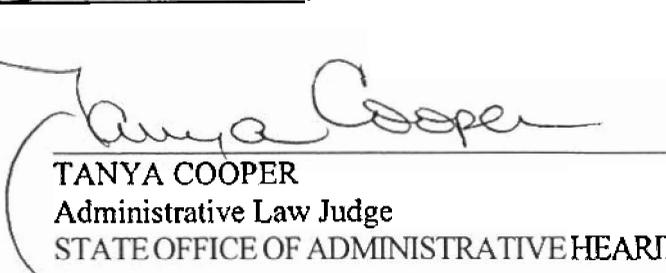
4. Ms. Bailey and Ms. Gentry were seated at a table inside the licensed premises openly visible with plastic beverage containers on their table and no adults in close proximity to them.
5. Ms. Bailey and Ms. Gentry were obviously youthful due to their appearance, dress, and actions of hiding the beverage containers when given a signal by an individual identified as Cory Roberson.
6. After making the observations contained in Finding of Fact 5, TABC agent J. Cavazos approached Ms. Bailey and Ms. Gentry and verified each was under twenty-one years of age at the time, and confirmed that the plastic containers held alcoholic beverages by sight and smell of the liquid.
7. Cory Roberson was not employed by Respondent, but instead was an employee of another entity sponsoring an event on the licensed premises.
8. When Respondent's agent, R. Ramirez, was contacted by TABC Sgt. J. Busby about the violation set forth in Findings of Fact 3 - 6, Mr. Ramirez attempted to disclaim responsibility for the violation stating that the ongoing event's sponsor was responsible for allowing persons on the premises through its personnel working at the premises' door and was also responsible for monitoring the crowd present at the premises for Code violations, such as minors possessing alcoholic beverages.
9. The event's sponsor did not possess any license or permit issued by the Texas Alcoholic Beverage Commission in order to sell, serve, or dispense alcoholic beverages on the premises on that date.
10. Respondent's agent and employees were responsible for selling and serving alcoholic beverages to the event's participants while on the licensed premises.
11. Respondent, as the only authorized seller of alcoholic beverages on the premises on March 6, 1999, was required by provisions of the Code to be in sole or exclusive control of the licensed premises.
12. By allowing the event sponsor to determine who would be admitted into the premises and authority to supervise the patrons on the premises for potential violations of the Code, Respondent created an agency relationship with the event sponsor and employees of the event sponsor became agents of Respondent, specifically including Mr. Roberson.

#### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch 5, §6.01 and §106.13 (Vernon 1999).

2. The State Office of Administrative Hearings had jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch 2003 (Vernon 1999).
3. Respondent received adequate notice of the hearing.
4. Based on Findings of Fact Nos. 3 - 12, violations of the Code occurred, in that minors were permitted, with criminal negligence, to violate TEX. ALCO. BEV. CODE ANN. §106.05 while on the licensed premises. TEX. ALCO. BEV. CODE ANN. §§106.05 and 106.13. (Vernon 1999).
5. Based on Findings of Fact Nos. 3 - 12 and Conclusion of Law No. 4, Respondent, its agents or employees were responsible for allowing the violation to occur. TEX. ALCO. BEV. CODE ANN. §§106.05, 106.13, and 109.53 (Vernon 1999).
6. Based on Findings of Fact Nos. 3 - 12 and Conclusion of Law Nos. 4 and 5, Respondent's Retail Dealer's On-Premises License and Retail Dealer's On-Premise Late Hours License should be suspended for 15 days, or a civil penalty of \$5,250 paid by Respondent in lieu of any suspension.

SIGNED this 4<sup>th</sup> day of October, 1999.

  
TANYA COOPER  
Administrative Law Judge  
STATE OFFICE OF ADMINISTRATIVE HEARINGS