

DOCKET NO. 514011

IN RE REUBEN ALFARO	§	BEFORE THE
D. B. A. R. A.'S SPORTS BAR AND GRILL	§	
PERMIT NO. MB-536551	§	
	§	TEXAS ALCOHOLIC
	§	
HAYS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0978)	§	BEVERAGE COMMISSION

ORDER MODIFYING PROPOSAL FOR DECISION

On this day the above referenced matter came before me for consideration. I, Jeanenne Fox, Assistant Administrator for the Texas Alcoholic Beverage Commission have reviewed the file, including the Proposal for Decision, and make the following findings of fact and conclusions of law:

**I.
FINDINGS OF FACT**

1. Proper notice was given as required by law.
2. Administrative Law Judge Melissa M Ricard (ALJ) convened the hearing on April 19, 2006 and the record was closed on the same day.
3. The ALJ issued a Proposal for Decision (PFD) on June 14, 2006, in which Findings of Fact and Conclusions of Law were made.
4. No exceptions to the Findings of Fact were filed.
5. The ALJ's Findings of Fact Nos. 1 – 7 are hereby adopted without modification and wholly incorporated into this Order.

**II.
CONCLUSIONS OF LAW**

1. Texas Alcoholic Beverages Code (Code) §§5.35 and 11.43, provide the commission and administrator with authority to grant, refuse, suspend or cancel a permit as provided by the code. This authority has been delegated to the assistant administrator as authorized by Code §5.34.
2. Code §5.43 provides the commission or administrator with the authority to render a decision on based on the record or on the PFD as if the administrator had conducted the hearing. I am exercising this authority to change the conclusions of law entered by the ALJ.
3. The ALJ's Conclusions of Law Nos. 1 - 6 are adopted without modification and wholly incorporated into this Order.
4. Conclusion of Law No. 7 is modified to read as follows: "Based upon the evidence presented, this matter is RESTRAINED." This modification is due to the following facts and circumstances:
 - a. The Permittee, Ruben Alfaro, did not dispute that a violation of §106.13 of the Texas Alcoholic Beverage Code ("Code") occurred on November 26, 2005. (PFD, p. 3)
 - b. The Permittee, Ruben Alfaro substantially complied with the provisions of §106.14 of the Code.

c. Once there is a finding of a violation has occurred and a permittee avails itself of the "safe harbor" provisions of §106.14 of the Code, the policy of this agency is that the matter is Restrained.

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 it is ORDERED that the violation be, and is hereby, RESTRAINED.

This Order will become final and enforceable on January 2, 2007 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 24th day of October, 2006.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

cc:
The Honorable Melissa M. Ricard, ALJ
State Office of Administrative Hearings, Corpus Christi
VIA FACSIMILE: (361) 884-5

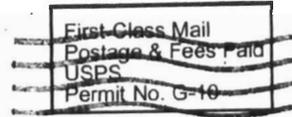
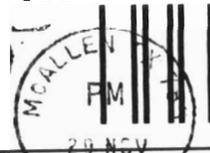
Ruben Alfaro, Jr.
d/b/a R. A. Sports Bar and Gri
RESPONDENT/ Permittee
1615 W. University Dr.
McAllen, Texas 78396
CERTIFIED MAIL NO. 7001

Judith L. Kennison
ATTORNEY FOR PETITION
TABC Legal Section

Licensing Division
Austin District Office

Docket No. 514011
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11/27/06 - JLK/yt
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8013



DOCKET NO. 458-06-1674

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	
	§	
REUBEN ALFARO	§	OF
D/B/A R.A.'S SPORTS BAR AND GRILL	§	
PERMIT NO. MB-536551	§	
HIDALGO COUNTY, TEXAS	§	
(TABC CASE NO. 514011)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Reuben Alfaro d/b/a/ R.A.'s Sports Bar and Grill (Respondent), alleging that Respondent, with criminal negligence, sold an alcoholic beverage to a minor. TABC Staff recommends that the Respondent's permit be suspended for fourteen days. The Administrative Law Judge (ALJ) finds that the TABC did not establish that Respondent is liable for the violation, therefore no suspension should be imposed.

I. PROCEDURAL HISTORY AND JURISDICTION

On January 30, 2006, Staff sent Respondent a complaint alleging that Respondent's agent, servant, or employee, with criminal negligence, sold, served dispensed, or delivered an alcoholic beverage to a minor. This matter was referred to the State Office of Administrative Hearings (SOAH). On April 19, 2006, a hearing convened before ALJ Melissa M. Ricard. The parties appeared at 6521 N. 10th Street, Suite D, McAllen, Hidalgo County, Texas. The ALJ appeared by telephone. Staff was represented by Judith Kennison, an attorney with the TABC Legal Division. Respondent appeared personally. The record closed the same day. Because notice and jurisdiction were not contested issues, those matters are addressed only in the Findings of Fact and Conclusions of Law below.

II. DISCUSSION

A. Applicable Law

Tex. Alco. Bev. Code Ann. § 106.13(a) and (c) (the Code) state:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 90 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

(c) The commission or administrator may relax the provisions of this section concerning suspension and cancellation and assess a sanction the commission or administrator finds just under the circumstances if, at a hearing, the licensee or permittee establishes to the satisfaction of the commission or 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.

The Code further states in § 106.14(a):

For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a person who is not a member of a private club on the club premises, a minor, or an intoxicated person or the consumption of alcoholic beverages by a person who is not a member of a private club on the club premises, a minor, or an intoxicated person, the actions of an employee 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.

TABC Rules §50.10 (the Rules) provide:

(d) The following practices constitute prima facie evidence of indirect encouragement of law within the meaning of §106.14(a)(3) of the Alcoholic Beverage Code:

(1) subject to the provisions of paragraph (b) above, the licensee/permittee fails to insure that all employees possess currently valid certificates of training issued and maintained in conformity with this chapter;

(2) the licensee/permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the licensee/permittee to prohibit such sales, service or consumption;

(3) the licensee/permittee fails to insure that employees have read and understood the licensee/permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons.

B. Discussion

The Staff alleged that on or about November 26, 2005, an employee of Respondent, Tomas Hernandez, sold a beverage to a minor. As Mr. Hernandez did not attempt to identify whether the individual was of proper age, the Staff argues that the action constituted criminal negligence.

Respondent does not dispute that on that day, a minor was served an alcoholic beverage by Mr. Hernandez. Therefore, Respondent does not dispute that a violation of § 106.13 of the Code occurred. Respondent did not know of the violation at the time that it occurred.

However, Respondent argues that the employee's actions are not attributable to Respondent under §106.14(a) of the Code. Respondent requires employees to attend a commission-approved

– seller training program, and Mr. Hernandez attended such a program. Respondent further argues that he did not directly or indirectly encourage the employee to violate the law, and therefore Respondent contends that he has met all the elements of §106.14(a) of the Code.

As support, for his argument, Respondent included in the record the establishment's rules and regulations which show that it was the policy of the establishment to follow all TABC rules and regulations and, specifically, for the bartenders to I.D. customers who did not look to be at least 35 years old. Respondent demonstrated that the employee in question had signed or initialed these policies and rules. The policies and procedures were kept in a drawer in the bar area and reviewed during staff meetings. Respondent further argued that in addition to written policies and procedures, staff are closely monitored and reminded of their obligations at daily and weekly meetings. However, Respondent failed to post policies and procedures designed to prevent the sale of alcohol to minors within view of the employees. Respondent stated that he failed to do so because he did not know of the requirement to post such a policy. Further, it is the practice of the establishment to have a security guard check I.D. at the door during the evening hours. The particular incident happened at an early hour, before the security guard was on duty. The establishment has been in business 20 years without incident.

The Staff relies on Rule §50.10(d)(2) and the fact that Respondent failed to post policies and procedures designed to prevent the sale of alcohol to minors within view of the employees. The Staff argues that since the Rules indicate that such a failure is prima facie evidence that Respondent did directly or indirectly encourage sale of alcohol to a minor, and there it is liable for the violation.

C. Analysis

The only issue is whether a failure to post, within view of the employees, policies and procedures designed to prevent the sale of alcohol to minors constitutes directly or indirectly

– encourages the sale of alcohol to minors. The Staff argues that because such failure is prima facie evidence of such under the Rules, it has met its burden.

While the Staff's interpretation of the Rules is persuasive, it is not clear that a failure to follow one of the practices outlined in Rule §50.10(d), while all others have been met, warrants suspicion. Prima facie evidence forms a rebuttable presumption. Absent contradictory evidence, it becomes conclusive. In this case, Respondent showed that it had done much to prevent the sale of alcoholic beverages to minor. Respondent required all staff to be trained and certified, it had policies and procedures to prevent the sale of alcohol to minors, and it made employees aware of those policies and procedures. The policies and procedures were kept in an accessible area. The failure to post was not willful. Additionally, Respondent's employees violated the law without his knowledge. Therefore, Respondent rebutted the prima facie evidence with sufficient evidence to show that he did not directly or indirectly encourage his employee to violate the law.

Therefore the Staff failed to show that the actions of the employee in this matter are attributable to Respondent and no sanctions should be imposed.

III. FINDINGS OF FACT

1. Reuben Alfaro d/b/a/ R.A.'s Sports Bar and Grill (Respondent) holds Texas Alcoholic Beverage Commission (TABC) Mixed Beverage Permit No. MB-536551 and Mixed Beverage Late Hours Permit No. LB-536552 for a premises located at 3000 N. McColl Road, McAllen, Hidalgo County, Texas (the Establishment).
2. On November 26, 2005, an employee of Respondent, Tomas Hernandez, sold a beverage to a minor. Mr. Hernandez did not attempt to identify(I.D.) whether the individual was of proper age.
3. Respondent did not know of the violation at the time that it occurred.

4. Respondent requires employees to attend a commission- approved seller training program and Mr. Hernandez attended such a program.
5. Respondent had established policies and procedures to prevent the sale of alcohol to minors. Specifically, Respondent required bartenders to I.D. all customers who appear to be less than 35 years old; hired a security guard to check I.D. for all incoming patrons during the evening hours; required all employees to abide by TABC rules and policies; required employees to acknowledge receipt of the Establishment's rules and procedures; closely monitored employees and reminded the employees of their duties and obligations at daily and weekly meetings.
6. Respondent failed to post policies and procedures designed to prevent the sale of alcohol to minors within view of the employees.
7. TABC Staff issued a notice of hearing notifying all parties that a hearing would be held and informing the parties of the time, place, and nature of the hearing. The hearing was held on April 19, 2005, in McAllen, Hidalgo County, Texas. Administrative Law Judge Melissa M. Ricard appeared by telephone. Respondent was represented himself. Staff was represented by TABC attorney Judith Kennison.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §106.13.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. On November 26, 2005, a minor was served alcohol by Respondent's employee in violation of TEX. ALCO. BEV. CODE ANN. § 106.13.
5. The Staff did not establish by a preponderance of the evidence that the actions of Respondent's employee, by selling alcohol to a minor, should be attributed to Respondent.

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6. Based on Findings of Fact Nos. 3, 4 and 5, Respondent satisfies the statutory conditions necessary to absolve him from the action of his employees under TEX. ALCO. BEV. CODE ANN. §106.14(a).

 7. Based on Conclusion of Law No. 7, no sanctions against Respondent should be imposed.

SIGNED on the 14th day of June, 2006.



MELISSA M. RICARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS