

DOCKET NO. 604501

IN RE ALVA EARL CORNELISON § BEFORE THE
D/B/A EARL'S II §
PERMIT NOS. BG-476892 & BL-476893 §
§ TEXAS ALCOHOLIC
§
ECTOR COUNTY, TEXAS §
(SOAH DOCKET NO. 458-04-0352) § BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 17th day of May, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on January 26, 2004, 2004, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 17, 2004. 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 and Exhibits, 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 Wine and Beer Retailer's Permit No. BG-476892 and Retail Dealer's On-Premise Late Hours License No. BL-476893 are hereby **SUSPENDED**.

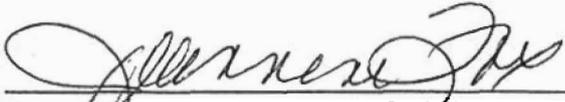
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,500.00 on or before the 30th day of June, 2004, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of ten (10) days, beginning at 12:01 A.M. on the 7th day of July, 2004.

This Order will become final and enforceable on June 9, 2004, 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 19th day of May, 2004.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

B. L. Phillips
Administrative Law Judge
State Office of Administrative Hearings
Lubbock, Texas
VIA FACSIMILE: (806) 792-0149

Alva Earl Cornelison
d/b/a Earl's II
RESPONDENT
4721 Andrews Hwy.
Odessa, Texas 79762
CERTIFIED MAIL NO. 7001 2510 0007 0098 423
RETURN RECEIPT REQUESTED

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Odessa District Office

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

604501

Sent To: Alva Earl Cornelison
Street, Apt. No.,
or PO Box No.
City, State, ZIP+4
Odessa 5-17-04

7001 2510 0007 0098 4239
PS Form 3800, January 2001 See Reverse for Instructions

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 604501

REGISTER NUMBER:

NAME: ALVA EARL CORNELISON

TRADENAME: EARL'S II

ADDRESS: 4721 Andrews Hwy., Odessa, Ector County, Texas 79762

DATE DUE: June 30, 2004

PERMITS OR LICENSES: BG-476892 & BL-476893

AMOUNT OF PENALTY: \$1,500.00

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 30TH DAY OF JUNE, 2004, 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.

II. DISCUSSION

A. Testimony.

Nicole N. She testified that she was sixteen years old on date of the alleged incident. That night, she entered Earl's II and purchased a beer from a bartender named Peterson, who never asked for any identification, nor did she show him any. She remained in there for approximately two hours and was in a position where the bartender could observe her drinking beer. When she was leaving, she was stopped in the parking lot by an Ector County Deputy who gave her a breathalyzer test. Nicole N. admitted that she was "real drunk" that night when she left the bar. At the hearing, Nicole N. appeared to be quite young to the Judge. She appeared to be a minor.

B. Analysis.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13 (a), the Commission may suspend or cancel a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. Section 1.04(11) defines a "permittee" as a person who is the holder of the permit or an agent, servant, or employee of that person. Pursuant to TEX. PENAL CODE ANN. § 6.03 (a), a person acts with criminal negligence, or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he 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.

The evidence is sufficient to prove that the bartender Peterson was the agent, servant, or employee of Respondent on the date in question. The witness Nicole N. testified that he was the bartender who sold her beer that night and no further evidence was offered to contest this fact. As the employee of Respondent, the bartender's actions are attributable then to Respondent. On the date of the hearing, the witness appeared to the Judge to be quite young and most certainly a minor; therefore, it is reasonable to assume that she appeared the same to the bartender on the date in question. Notwithstanding her apparent status as a minor, the bartender failed to ask for any form of identification from Nicole N. before selling her beer. Nicole N. testified that she was "real drunk" when she left Earl's II after two hours that night, which leads the Judge to conclude that there were

ample opportunities for the bartender to ascertain her age and respond appropriately. He did neither but instead apparently continued to serve this minor alcoholic beverages.

The bartender's actions on that night rise to the level of criminal negligence in that he ought to have been aware that Nicole N. was a minor and insisted on identification before making the determination to sell her an alcoholic beverage. The evidence was sufficient to prove that Respondent violated the Code and his permits should be suspended or a civil fine paid.

III. PROPOSED FINDINGS OF FACT

1. Alva Earl Cornelison d/b/a Earl's II, Ector County, Texas, holds Permit Nos. BG-476892 and BL-476893, issued by the TABC.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated October 1, 2003.
3. The hearing on the merits convened January 26, 2004, at the Justice of the Peace Court, Midland, Texas. The TABC was represented by attorney Dewey Brackin. The Respondent appeared and represented himself. The record closed on the same day.
4. Respondent employed a bartender by the name of Peterson at the licensed premises on or about March 7, 2003.
5. On that same date, Nicole N. was sixteen years old.
6. Nicole N. had a very youthful appearance which made it appear that she was a minor.
7. On that date, Nicole N. entered the licensed premises and purchased a beer from Peterson.
8. Nicole N. remained on the licensed premises for approximately two hours and was intoxicated when she left.
9. On that same date, Peterson was in a position to observe Nicole N. drinking beer.
10. Peterson failed to asked for any identification from Nicole N. that night or to ascertain if she was a minor.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 61.71, and 61.73.

2. SOAH has jurisdiction to conduct the 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 TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-10, the Commission proved that Respondent violated the Code by having an agent, servant, or employee who, with criminal negligence, permitted a minor to possess and consume an alcoholic beverage on March 7, 2003.
5. Based on the foregoing, suspension of Respondent's permits for a period of ten days or payment of a civil penalty of one hundred and fifty dollars per day of the proposed suspension is warranted.

SIGNED this 17th day of February, 2004.



B. L. Phillips
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS