

DOCKET NO. 458-06-1204

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner

V.

EVARISTO OSORIO ABURTO  
D/B/A NANCY'S LOUNGE  
MCLENNAN COUNTY, TEXAS  
(TABC CASE NOS. 502613 & 511777),  
Respondent

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

A Proposal For Decision (PFD) was originally issued in this matter on June 2, 2006, following a hearing on the merits. Staff timely filed Exceptions to the Proposal for Decision on June 8, 2006, and the Administrative Law Judge (ALJ) issued Order No. 2, Granting a Rehearing on June 8, 2006. This PFD is being issued as a result of the new evidence admitted into evidence at the new hearing.

Staff alleges that Respondent violated the TEX. ALCO. BEV. CODE ANN. (the Code) § 106.13 and 11.61(b)(2) in that Respondent, or its agent, servant or employee, with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor on or about July 28, 2005; and that Respondent, or its agent, servant or employee sold, served, or delivered an alcoholic beverage to an intoxicated person on or about October 30, 2005. Staff and Respondent reached a settlement regarding the allegation that Respondent served an alcoholic beverage to an intoxicated person whereby Respondent agreed to a suspension of 20 days or a total civil penalty of \$3,000. Therefore, the only remaining contested allegation at issue in this matter is whether Respondent served or delivered an alcoholic beverage to a minor with criminal negligence.

The ALJ finds that the allegation is true and that this is Respondent's second violation<sup>1</sup>, and that Respondent's permit should be suspended for 90 days, or in lieu of a suspension, Respondent should be assessed a civil penalty of \$13,500.

### I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The original hearing on the merits in this matter was convened on April 6, 2006, before ALJ Bill Zukauckas at the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, Waco, Texas. Staff appeared and was represented by its attorney, Judith Kennison. Respondent appeared pro se with the help of an interpreter. Staff submitted three exhibits to be admitted into evidence: 1) the First Amended Notice of Hearing; 2) Respondent's Permit History on record with TABC; and 3) the Case Report of the alleged violation. However, the ALJ refused to admit the Case Report into evidence because Staff failed to have a witness available to testify to the accuracy of the Case Report, and subsequently be available for cross-examination.<sup>2</sup> Neither of the parties provided testimony, and the record closed on the same day.

The ALJ issued his original PFD on June 6, 2006, recommending that Respondent's permit be suspended for 60 days, or in lieu of a suspension, Respondent pay a civil penalty of \$9,000. Staff timely filed its Exceptions to the PFD on June 8, 2006, arguing that the ALJ erred in excluding the Case Report into evidence on the basis that the document was inadmissible hearsay. Staff argued that under Texas Rules of Evidence 803(8), the Case Report qualified as a hearsay exception, and should have been admitted. On June 8, 2006, the ALJ issued Order No. 2, Granting a Rehearing. The Order stated the date, time, and location of the rehearing, and provided that Respondent could have an interpreter provided for him at the hearing upon his request. Despite being given proper notice of the rehearing, Respondent failed to appear in person or by representation at the hearing. Staff appeared through its attorney, Judith Kennison, and was ready to proceed. The Case Report was

---

<sup>1</sup> See Ex. 2

<sup>2</sup> Staff requested that the document be included as an Offer of Proof, and the request was granted.

admitted into evidence along with the two exhibits previously admitted at the original hearing. In addition, Staff made a correction in the record to reflect that this is Respondent's second violation involving a minor, and consequently, Staff is therefore seeking a 90 days suspension, or in lieu of a suspension, a civil penalty of \$13,500. Because of Respondent's failure to appear, Staff moved for a default and the ALJ granted the request.

## II. FINDINGS OF FACT

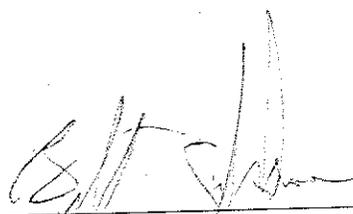
1. Evaristo Osorio Aburto dba Nancy's Lounge (Respondent) holds a Wine and Beer Retailer's Permit, BL411059, and a Retail Dealer's On-Premise Late Hours Permit, BL411060, issued by the Texas Alcoholic Beverage Commission (TABC/Staff) for the premises located at 609 S. 11<sup>th</sup> Street, Waco, McLennan County, Texas.
2. Respondent's permits, described in Finding of Fact No. 1, were originally issued on May 7, 1997.
3. After proper notice was given to all parties, a hearing on the merits was convened on April 6, 2006, at the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Bill Zukauckas.
4. A Proposal for Decision (PFD) was issued on June 6, 2006, finding that Staff failed to establish by a preponderance of the evidence that Respondent, its agent, servant or employee, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor.
5. On June 8, 2006, Staff timely filed Exceptions to the Proposal for Decision, stating that the ALJ erred in excluding the Case Report from the evidence based on inadmissible hearsay.
6. The ALJ issued Order No. 2 on June 8, 2006, acknowledging the error in the exclusion of the Case Report from the evidence, and stating the date, time, and location of the new hearing. In addition, Respondent was informed that an interpreter would be provided at the hearing upon his request.
7. The new hearing convened on August 21, 2006, at the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, Waco, Texas. Staff was represented by its attorney, Judith Kennison. Despite being given proper and timely notice, Respondent failed to appear either in person or by representative.

8. On July 28, 2005, Respondent, or its agent, servant or employee, sold, served, dispensed, or delivered, with criminal negligence, an alcoholic beverage to a minor.
9. The violation referenced in Finding of Fact No. 8 constitutes Respondent's second violation of the Texas Alcoholic Beverage Code (the Code) involving a minor.

### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC/Staff) has jurisdiction over this matter under ch. 5 and TEX. ALCO. BEV. CODE ANN. (the Code) § 61.71.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this procedure, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to ch. 2003 of the TEX. GOV'T CODE ANN.
3. 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; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE (TAC) § 155.27.
4. Based upon Finding of Fact No. 8, Respondent violated §§ 11.61(b)(2) and 106.13 of the Code.
5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's permit should be suspended for 90 days, or in lieu of a suspension, Respondent should be assessed a civil penalty of \$13,500.

SIGNED January 24, 2007.



---

**BILL ZUKAUCKAS**  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS