

**DOCKET NO. 589912**

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

VS.

SHYTOWN LIMITED PARTNERSHIP I  
D/B/A CORNER TAP  
PERMIT NO. MB-456256, LB-456257  
& FB-456258  
DALLAS COUNTY, TEXAS  
(SOAH Docket No. 458-01-1296)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**ORDER**

**CAME ON FOR CONSIDERATION** this 24th day of May, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on March 7, 2001, 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 May 8, 2001. 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, Transcripts, 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, except for Conclusions of Law Nos. 3 and 4.

The Assistant Administrator is of the opinion that the Administrative Law Judge did not properly apply or interpret applicable law and rules in regard to Conclusions of Law Nos. 3 and 4. As found by the Administrative Law Judge, the employee in this case is an owner, who has a direct interest in the permit. It is the position of the Commission that the "safe harbor" provisions of §106.14 of the Code protect only a permittee's employees and not an individual permittee/owner who is held to a higher standard as a permit holder. Therefore, this violation should not be 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 Permit Nos. MB-456256, LB-456257

and FB-456258 are hereby **SUSPENDED**.

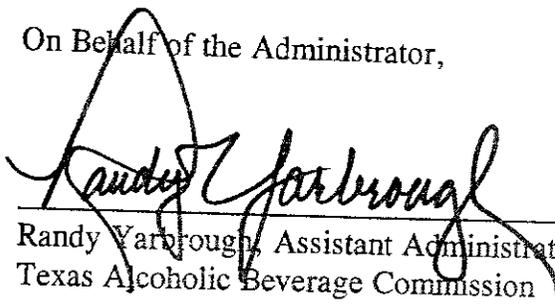
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **18th day of July, 2001**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of seven (7) days, beginning at **12:01 A.M. on the 25th day of July, 2001**.

**This Order will become final and enforceable on June 14, 2001**, 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 May, 2001.

On Behalf of the Administrator,

  
Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

David Schum  
Shytown Limited Partnership I  
d/b/a Corner Tap  
**RESPONDENT**  
P. O. Box 12345  
Dallas, Texas 75225-0345  
**CERTIFIED MAIL NO. 7000 1530 0003 1927 3142**

Administrative Law Judge  
State Office of Administrative Hearings  
Dallas, Texas  
**VIA FACSIMILE: (214) 956-8611**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Legal Division, Texas Alcoholic Beverage Commission

Dallas District Office  
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 589912

REGISTER NUMBER:

NAME: Shytown Limited Partnership

TRADENAME: Corner Tap

ADDRESS: 2101 Greenville Avenue, Dallas, Dallas County, Texas

DATE DUE: July 18, 2001

PERMITS OR LICENSES: MB-456256, LB-456257 & FB-456258

AMOUNT OF PENALTY: \$1,050.00

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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 18TH DAY OF JULY, 2001, 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**

**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.



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333  
http://www.tabc.state.tx.us Fax: (512) 206-3498

May 16, 2001

Mr. Randy Yarbrough  
Assistant Administrator  
Texas Alcoholic Beverage Commission  
P. O. Box 13127  
Austin, Texas 78711-3127

Re: Docket No. 589912  
TABC v. Shytown Limited Partnership I  
d/b/a Corner Tap

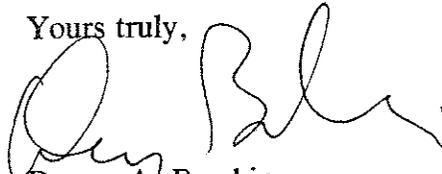
Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause. No exceptions to the Proposal have been filed.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,



Dewey A. Brackin  
Legal Division

DAB/yt

*I find the conclusion of Law to be illogical. The person making the sale is the "Permittee" by definition! Overturn SOAH & suspend permit 7 days / \$1,050<sup>00</sup>*

*Randy Yarbrough*  
5/17/2001

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
Petitioner	§	
	§	
V.	§	
	§	
SHYTOWN LIMITED PARTNERSHIP I	§	OF
D/B/A CORNER TAP	§	
PERMIT NOS. MB-456256, LB-456257	§	
& FB-456258	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 589912)	§	
Respondent	§	ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against Shytown Limited Partnership I, d/b/a Corner Tap (Respondent), alleging that on or about March 17, 2000, Respondent, its agent, servant, or employee sold with criminal negligence an alcoholic beverage to a minor. The Administrative Law Judge finds that Respondent's employee sold with criminal negligence an alcoholic beverage to a minor, but recommends that Respondent not be subject to discipline because the act of the employee should not be attributable to Respondent pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14(a) (Vernon 1995 and Supp. 2000).

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On March 7, 2001, a hearing was held before Jerry Van Hamme, Administrative Law Judge (ALJ), State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney, Dewey Brackin. Respondent appeared pro se. The record was closed on that date.

**II. LEGAL STANDARDS AND APPLICABLE LAW**

Pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13(a) (Vernon 1995 and Supp. 2000), the Texas Alcoholic Beverage Commission (Commission) may cancel or suspend a permittee's permits for not more than 60 days if the permittee sells with criminal negligence an alcoholic beverage to a minor.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 1.04(11) (Vernon 1995 and Supp. 2000), a "permittee" is defined as the person who is the holder of the permit, or an agent, servant or employee of that person.

However, pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14(a) (Vernon 1995 and Supp. 2000), the actions of an employee who sells an alcoholic beverage to a minor are not 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.

### III. EVIDENCE

#### 1. Staff's Evidence

Detective DeWees with the Dallas Police Department, Vice Section, testified that he accompanied a minor, Ms. Tricia Runnels, into Respondent's establishment on March 17, 2000. Ms. Runnels, who was born on June 10, 1981, looked younger than 21 years of age and was wearing clothing consistent with that worn by young people. Det. DeWees testified that he observed Ms. Runnels go up to the bar and purchase a Coors Light beer from the bartender, Leslie Cooke.

Petitioner stipulated on the record that Respondent requires its employees to attend a Commission-approved seller training program, that Mr. Cooke had actually attended such a training program, and that there is no evidence Respondent directly or indirectly encouraged Mr. Cooke to violate the law by selling an alcoholic beverage to a minor.

#### 2. Respondent's Evidence

Leslie Cooke testified that he was the bartender at Respondent's establishment on the date in question. Mr. Cooke was certified on that date as having completed a Commission-approved seller training program.

Mr. Cooke testified that the establishment was particularly busy on that date because it was St. Patrick's Day, and that two bartenders and two door checkers did not show up for work, making it particularly difficult to watch for minors. He also testified that he was a 40% co-owner in Respondent's establishment, and that the majority shareholder, David Schum, owns the remaining 60% and can terminate Mr. Cooke's employment.

### IV. ANALYSIS

There are two issues to be decided: (1) whether an alcoholic beverage was sold with criminal negligence to a minor; and, if so, (2) whether that act is attributable to Respondent.

**1. Sale to a Minor**

**a. Alcoholic Beverage**

The evidence shows that Respondent sold Coors Light beer to Ms. Tricia Runnels. The ALJ infers from the evidence that Coors Light beer is an alcoholic beverage as defined in TEX. ALCO. BEV. CODE ANN. § 1.04(1). See Dixon v. State, 262 S.W.2d 488 (Tex. Cr. App. 1953).

**b. Minor**

Petitioner presented evidence showing that Ms. Runnels was a minor at the time of the sale. Respondent presented no evidence rebutting Petitioner's evidence that Ms. Runnels was under 21 years of age at the time she purchased the beer.

**c. Criminal Negligence**

Criminal negligence is defined in § 6.03 of the Penal Code as a "gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."<sup>1</sup>

The "actor's standpoint," in the instant case, is Respondent's. Respondent knows, or certainly should know, that minors attempt to purchase alcoholic beverages from licensed premises. Respondent also knows, or should know, that as a permit holder in a highly regulated industry Respondent has an affirmative obligation to not sell alcoholic beverages to minors. It is incumbent upon the holders of such permits to take the necessary steps, and to make the necessary observations, to ensure that alcoholic beverages are not sold to minors. That is all the more important when a large number of patrons, as was present on St. Patrick's Day, is coupled with a shortage of working personnel. Such a situation increases the risk that minors will attempt to purchase alcoholic beverages.

In the instant case, Respondent's bartender observed a youthful-looking 18-year-old, wearing

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<sup>1</sup>Tex. Pen. Code Ann. § 6.03(d) (Vernon 2000) states as follows:

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 standpoint.

In addition, pursuant to Tex. Pen. Code Ann. § 6.02(d) (Vernon 2000), "criminal negligence" constitutes the lowest degree of culpable mental state of those listed in this section (i.e. intentional, knowing, reckless, and criminal negligence.)

clothing consistent with that worn by young people, attempt to purchase a beer. By making the sale to the minor, without conducting an adequate review of the minor's identification or taking note of her obvious signs of youth, Respondent's bartender exhibited criminal negligence.

## 2. Employee's Action Attributable to the Employer

Pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14(a) (Vernon 1995 and Supp. 2000), the Commission has provided a "safe harbor" for employers who require their employees to attend Commission-approved seller training programs. See Penav. Neal, 901 S.W.2d 663, 667 (Tex.App.--San Antonio 1995, writ denied). The apparent intent of this statute is to protect employers who have taken steps to ensure that their employees are adequately trained regarding sales to minors.

In the instant case, however, the employee bartender who sold the alcoholic beverage to the minor is also a minority partner in Respondent's general partnership. Petitioner argues, therefore, that the safe harbor provision should not apply to Respondent.

Petitioner contends that the bartender who sold the alcoholic beverage to the minor was an owner, not a mere employee. The purpose of the statute is to protect the employer from the acts of its employees. It is not intended to protect the owner from its own acts.

Respondent, however, argues that since the bartender was only a 40% owner of the partnership, and was subject to termination by the 60% owner for unlawful acts -- such as for selling alcoholic beverages to minors -- the bartender should be considered an employee of Respondent for purposes of this statute. Accordingly, Respondent argues, it should be sheltered from the consequences of the employee's actions.

Although Petitioner's position is certainly understandable, Respondent's position appears to be more in keeping with the legislative intent regarding the safe harbor statute.

It is possible to envision a scenario in which a permittee or licensee may allow any or all of its employees to obtain an ownership interest in the company. Unlike the instant case where there are only two co-owners, the company might, for example, allow its employees to buy stock in the company, or give shares of the company to employees as bonuses. In such a case, any number of employees could also be considered as co-owners.

This would be particularly true of a publicly traded company. Employees could buy stock in the company and, by virtue of being shareholders, also be considered co-owners. In fact, a large company with multiple locations could have hundreds of employees holding minimal ownership interests in the company. In such a case an employee holding less than 1% interest in the company who sells an alcoholic beverage to a minor, could, using Petitioner's reasoning, negate the safe harbor provision for the permittee or licensee, despite the permittee or licensee having met all three requirements under the safe harbor statute.

Such a result does not appear to be in accordance with the legislative intent. A permittee or licensee who takes the necessary steps to meet the three prongs of the safe harbor statute should be able to enjoy the protection it affords. The fact that the employee also has an ownership interest in the permittee or licensee should not make the actions of the employee *per se* attributable to the

employer.

## V. RECOMMENDATION

The ALJ recommends that Respondent's permits not be suspended. The sale of an alcoholic beverage to a minor by Respondent's employee in the instant case should not be attributable to Respondent.

### FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, Shytown Limited Partnership d/b/a Corner Tap, 2101 Greenville Avenue, Dallas, Dallas County, Texas, holds Mixed Beverage Permit, MB-456256, Mixed Beverage late Hours Permit, LB 456257, and Food and Beverage Certificate, FB-456258, issued by the Commission on September 20, 1999.
3. On March 17, 2000, Leslie Cooke owned a 40 % share in Respondent's establishment. The majority shareholder, David Schum, owned the remaining 60% and had the authority to terminate Mr. Cooke's employment.
4. On that date, Leslie Cooke was an employee in Respondent's establishment and was working as a bartender.
5. Mr. Cooke had been required by his employer to attend a Commission-approved seller training program and had actually attended such a training program.
6. Mr. Cooke was certified as having attended a Commission-approved seller training program.
7. On that date, Detective DeWees, Dallas Police Department, Vice Section, accompanied Ms. Tricia Runnels, a minor whose date of birth is June 10, 1981, into Respondent's establishment.
8. Ms. Runnels purchased a Coors Light beer from Mr. Cooke.
9. Ms. Runnels looked younger than 21 years of age.
10. Ms. Runnels driver's license had printed on it in capital letters, "UNDER 21 DRIVER LICENSE."
11. Mr. Cooke's employer did not directly or indirectly encourage him to violate the law by selling the Coors Light beer to the minor.
12. Petitioner instituted disciplinary action against Respondent alleging Respondent sold alcoholic beverages to a minor with criminal negligence in violation of TEX. ALCO. BEV. CODE ANN. § 106.03 (Vernon 1995 and Supp. 2000), and was therefore subject to discipline

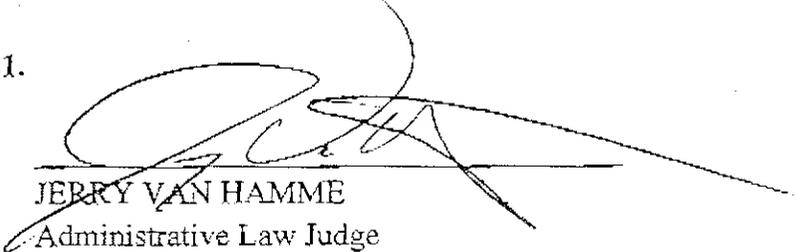
pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13(a) (Vernon 1995 and Supp. 2000).

13. A hearing was held on March 7, 2001, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by its attorney, Dewey Brackin. Respondent appeared pro se.

### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, §§ 6.01 and 11.61. The State Office of Administrative Hearings has jurisdiction over all matters related 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 (Vernon 2000).
2. Based on Findings of Fact Nos. 4 and 7-10, Respondent's employee sold with criminal negligence an alcoholic beverage to a minor. TEX. ALCO. BEV. CODE ANN. § 106.13(a) (Vernon 1995 and Supp. 2000).
3. Based on Findings of Fact Nos. 5, 6, and 11, and Conclusion of Law No. 2, the actions of Respondent's employee are not attributable to Respondent. TEX. ALCO. BEV. CODE ANN. § 106.14(a) (Vernon 1995 and Supp. 2000).
4. Based on the foregoing Findings and Conclusions, Respondent should not be subject to discipline by the Commission.

SIGNED this 8th day of May, 2001.



JERRY VAN HAMME

Administrative Law Judge

State Office of Administrative Hearings