

SOAH DOCKET NO. 458-02-2700

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

NEW VICTORIA L.L.C., ET AL
D/B/A BENNIGAN'S
PERMIT NOS. MB451585,
LB473602, PE451586 & FB-451587
VICTORIA COUNTY, TEXAS
(TABC CASE NO. 597679)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against New Victoria L.L.C. et al, (the Respondent), a permittee of the Commission, alleging that the permittee, its agent, servant, or employee violated the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN. §1.01 *et seq* (Code) or the Texas Alcoholic Beverage Commission Rules, 16 TAC § 31.1 *et seq* (Rules) by:

- 1) Selling with criminal negligence an alcoholic beverage to a minor in violation of § 106.03(a) of the Code;
- 2) Permitting a minor to possess or consume an alcoholic beverage on the premises in violation of § 106.13(a) of the Code;
- 3) Selling or delivering an alcoholic beverage to an intoxicated person in violation of § 11.61 (b) (14) of the Code;
- 4) Selling, serving or providing an alcoholic beverage to a person obviously intoxicated so that the person presented a clear danger to himself and others, and the intoxication was the proximate cause of damages suffered in violation of § 2.02 of the Code.

RECOMMENDATION

The Staff recommended that the Respondent's permit or license be suspended for 60 days for each of the first three alleged violations 1) selling with criminal negligence an alcoholic beverage to a minor, 2) permitting, with criminal negligence, a minor to possess or consume an alcoholic beverage on the premises, and 3) selling or delivering an alcoholic beverage to an intoxicated person.

The Staff recommended that payment of \$25,000 be allowed in lieu of suspension for each month of suspension. The Staff asserted that the only action permitted against the permits or licenses upon a finding that Respondent had violated § 2.02 of the Code is the cancellation of the permits and licenses.

The ALJ finds sufficient evidence that the Respondent sold with criminal negligence an alcoholic beverage to a minor, permitted a minor to possess or consume an alcoholic beverage on the premises and sold or delivered an alcoholic beverage to an intoxicated person. However the ALJ recommends that the permits or licenses be suspended for 20 days for each of the three violations for a total suspension of 60 days and that for each day of suspension payment of \$150 in lieu of suspension be allowed.

The ALJ found insufficient evidence that Respondent violated § 2.02 of the Code by selling, serving or providing an alcoholic beverage to a person obviously intoxicated so that the person presented a clear danger to himself and others, and the intoxication was the proximate cause of damages suffered. The ALJ recommends that no action be taken against Respondent's license or permit as a result of the allegation of a violation of § 2.02 of the Code.

I. Procedural History

By Notice of Hearing dated April 24, 2002, the Staff, notified the Respondent that the Staff would seek disciplinary action against the Respondent's permits or licenses because the Respondent its agent, servant, or employee had violated the Code in the four instances set out above.

On August 7, 2002, the hearing commenced, pursuant to the Notice of Hearing, in the offices of the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Dewey Brackin and Lindy To of the TABC Legal Section. The Respondent was represented by its attorney Spencer Markle. The hearing was concluded on August 8, 2002 and the record was left open through August 22, 2002, for the filing of briefs and case law.

II. Jurisdiction and Notice

Pursuant to TEX. GOV'T CODE ANN. Chapter 2001 *et seq.* and TEX. ALCO. BEV. CODE ANN. (The Code) § 6.01 the Commission has jurisdiction over this matter. Pursuant to TEX. GOV'T CODE ANN. CHAPTER 2003. SOAH matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law.

The Respondent is the holder of Mixed Beverage Permit, MB-451585, Mixed Beverage Late Hours Permit, LB-473602, Beverage Cartage Permit PE-451586, and Food and Beverage Certificate

FB-451587 and was the holder of such permits on the date of the alleged violation. Notice of this hearing was mailed to Respondent on April 24, 2002.

III. Evidence

Staff offered 16 exhibits, 14 of which were admitted, including four videotaped depositions. Respondent offered 26 exhibits including excerpts from videotaped depositions, all of which were admitted.

A synopsis of witnesses' testimony follows:

1. Nicolas Michael Cochran

This witness appeared by written and videotape deposition. Mr. Cochran testified that on March 21, 2001 he was employed by Respondent as a bartender at the Bennigan's restaurant in Victoria, Texas. On that date he was seller/server certified by the TABC. In that certification course he was taught to recognize signs that an intoxicated person might display. Examples of these signs included slurred speech, rowdiness, being loud or "cussing". The witness stated that these signs might also include stumbling, and impaired judgment or coordination.

Mr. Cochran stated that on the night of March 21, 2001, he saw Chad Slavik and Nolan Proff together in the bar. He recognized Mr. Slavik but did not learn his name until later. The witness did not recall seeing Christian Krueger in Bennigan's that evening but has learned that Mr. Krueger was the third person he saw seated at the table with Mr. Slavik and Mr. Proff. He further stated that he was not sure but he believed that he first served alcohol to Mr. Slavik and Mr. Proff at around 8:00 p.m. The witness testified that he did not ask Mr. Slavik for identification for proof of age before serving him an alcoholic beverage. Mr. Cochran recalled that Mr. Slavik was drinking Bud Light draft beer. The witness testified that at 11:45 p.m. he served them the last drinks of the evening. The witness estimated that he served 8 to 10 glasses of beer to Mr. Slavik. In his opinion Mr. Slavik was drinking steadily through out the evening. He did not charge for the last drink, which was a full shot glass containing the mixture of spilled liquor which had collected under the mat in the pouring tray at the bar.

The witness denied observing Chad Slavik exhibit any signs of intoxication. He saw Mr. Slavik walk to the restroom and did not notice any stagger or loss of balance. Mr. Slavik and Mr. Proff were laughing but did not seem to him to be loud. He stated that he has observed intoxicated persons at the bar and has "cut people off" if he thought they were intoxicated. He would have stopped serving Mr. Slavik if he thought he was intoxicated.

2. Tyler Melissa Meador

This witness appeared by written and videotape deposition. Ms. Meador testified that on March 21, 2001, she was employed by Respondent as a server at the Bennigan's restaurant in Victoria, Texas. On that date she was not seller/server certified by the TABC. She has since become seller/server certified. She also served alcohol at her previous employment at TGI Friday's. She learned to recognize intoxicated customers during her past employment as well as the training during seller/server certification. Ms. Meador stated that some signs of intoxication included slurred speech, stumbling, staggering, obnoxious behavior and redness in the face.

Ms. Meador testified that she knew Chad Slavik through a mutual acquaintance. She had occasion to see Mr. Slavik drink alcohol at baseball games and at restaurants where she had been employed as well as at parties she had attended. The witness stated that she had seen Mr. Slavik when he appeared intoxicated. This was at a friend's house. Mr. Slavik was staggering, slurring his words and screaming out what the witness termed as "nonsense". Ms. Meador saw Mr. Slavik and his friends enter Bennigan's at around 9:00 p.m. on the night in question. While she had occasion to serve Mr. Slavik only one beer at around 11:30 p.m. she had observed Mr. Slavik and his friends as she passed by their table during the night. She had a short conversation with Mr. Slavik. The witness testified that she saw no signs that indicated that Mr. Slavik was intoxicated on the evening in question. Ms Meador testified that she did not ask Mr. Slavik for proof of age before serving him beer.

3. Frederic Nolan Proff

Frederic Nolan Proff testified that on the evening of March 21, 2001 he had accompanied Chad Slavik to the Bennigan's restaurant in Victoria, Texas. He had played softball with Mr. Slavik that evening. He did not see Mr. Slavik drink any alcohol at the game. After the game he met Mr Slavik and Christian Krueger in the parking lot of the Bennigan's and they entered the restaurant together at 9:30 or 9:45 p.m. The witness stated that Mr. Slavik did not appear in anyway impaired or intoxicated at that time.

Mr. Proff and Mr. Slavik drank together from approximately 9:45 p.m. until closing at midnight. He believes that they each had 12 12oz mugs of beer, 2 pint mugs of beer and a shot of liquor. The witness stated that he and Mr. Slavik were served beer by both the bartender and the server Tyler Meador. No employee of Bennigan's requested them to show identification for proof of age. The witness related that he did not feel that Mr. Slavik was exhibiting any signs of intoxication. He and Mr. Slavik were having a "good time" "screaming and hollering" and singing. He stated that Mr. Slavik did not appear intoxicated until after midnight when they were leaving Bennigan's. As they were leaving Tyler Meador asked if him if Mr. Slavik was driving. Mr Proff did not respond to that question. In the parking Mr. Proff felt intoxicated and believed that since Mr. Slavik was of smaller build he must be feeling intoxicated as well. He stated that he knew Chad Slavik very well and had seen him nearly every day for the last 2 years of his life. The witness testified that he had observed Mr. Slavik on more than 10 occasions when he believed him to be

intoxicated Mr. Proff argued with Mr. Slavik about letting him drive Mr Slavik home. Mr. Slavik refused that offer.

4. Christian Krueger

Mr. Krueger testified that he had played golf with Chad Slavik on March 21, 2001 starting at 1:00 p.m. and ending around 4:30p.m.. He did not see Mr. Slavik drink any alcohol At 6:30 p.m. he met Mr. Slavik at a friend's house prior to going to play softball. He that saw Mr. Slavik had a beer at that time. He saw Mr. Slavik at the softball field around 7:30p.m.. The game began at 8:00 p.m. and was over at little before 9:00 p.m.. He did not see Mr. Slavik drinking any alcohol at the ballfield. After the game he went home, changed clothes and walked into Bennigan's at 9:45 with Mr. Slavik and Mr. Proff.

The witness sat at the bar with Mr. Proff and Mr. Slavik and all three ordered beer. Mr. Krueger was asked for proof of age and after providing it was served. Mr. Slavik was not asked for identification. All three men then moved from the bar to a table. During the time he was with Mr. Slavik he did not see any signs that Mr. Slavik might be intoxicated. He observed Mr. Slavik have a conversation with a waitress and make a cell phone call to his girl friend. He also saw Mr. Slavik get up from the table and walk to the restroom. He testified that he did not observe any slurred speech, stumbling, staggering or loud behavior indicating that Mr. Slavik might be intoxicated. He stayed at Bennigan's until about 11:15 p.m. when he left, after paying his tab for three or four drinks.

Mr. Krueger believed that he had seen Mr. Slavik intoxicated on 5 occasions and on one of these occasions he had taken Mr. Slavik's car keys so that he could not drive while intoxicated. He stated that the main indicator that Mr. Slavik was becoming intoxicated was that he would become loud. The witness denied that Mr. Slavik had become loud while they were together at Bennigan's.

5. Love Dave Paul, M.D.

Love Dave Paul testified that he is a medical doctor who has been practicing in the Victoria, Texas area since 1980. In addition to practicing medicine he had entered the restaurant business. His company is now a franchisee with four Bennigan's restaurants including the Bennigan's Restaurant in Victoria, Texas. He was saddened to learn of the death of Mr. Slavik. His company's insurance carrier exercised its independent judgment in negotiating and paying the Slavik family a settlement in response to a negligence law suit. The witness had advised his insurance carrier that he believed that the suit was defensible.

Dr. Paul estimated that Bennigan's Restaurant in Victoria averages 75% of its income each month from the sale of food and 25% from the sale of beverages. Of the total beverage sales, 7-8% are non-alcoholic beverage sales. The witness then identified as Respondent Exhibit 6 the menu used at the restaurant in Victoria. The witness then explained why he felt it was necessary for his restaurant to sell alcoholic beverages and that without a liquor license his business would be harmed.

The witness, after being qualified as a medical expert, testified that he was licensed to practice medicine in Texas and had read thousands of laboratory reports in the course of that practice. The witness then testified that he was competent to interpret the laboratory report marked Respondent Exhibit 5. In the opinion of the witness the white blood cell count, red blood count, hemoglobin, hematocrit and platelet counts in that report were all higher than normal. In the witnesses opinion this was the result of the body's reaction to the severe burns received by Chad Slavik. The loss of fluid results in a thickening of the blood. The witness testified that he was not a specialist in hematology or toxicology.

The Respondent Exhibit 7 was identified by the witness as aerial photographs (2) of the area where Mr. Slavik received his injuries.

During cross examination the witness testified that it was his company's policy to request age identification from a customer if the customer appeared younger than 30 years of age. The witness agreed that the Bennigan's mission statement (Respondent Exhibit 2) includes loud talking as a possible sign of intoxication. Testimony from the witness concerning income from the business was not objected to but is not relevant to any genuine issue at this hearing.

6. Raymond Douglas Giles

Raymond Douglas Giles testified that he was the area manager for the four Bennigan's Restaurant franchises owned by Respondent. Prior to working for Respondent the witness worked as an employee of Bennigan's corporately owned restaurants and became a General Manager for those restaurants. The witness stated that he was familiar with corporate policies and procedures of Bennigan's and that Respondent agreed that he could run Respondent's restaurant according to those policies and procedures. As part of these policies the employees would be required to obtain TABC Seller/Server Certification about every three months.

Mr. Giles confirmed that both Mr. Cochran and Ms. Meador were employees of the Respondent on the night of March 21, 2001. Mr. Cochran had been hired as a server and was later promoted to bartender. Ms. Meador had prior experience serving alcoholic beverages. On March 21, 2001 Mr. Cochran was seller/server certified while Ms Meador was not. The witness stated that it was company policy to train servers to recognize signs of intoxication among which would be loud talking and to request state issued identification or a passport if the customer appears to be under 30 years old. Mr Giles testified that he was not seller/server certified on March 21, 2001.

On March 21, 2001 the bar, in the restaurant, had what the witness described as a "Happy Hour" from 9-11 p.m. during which domestic draft beer was sold in 10 ounce cups holding 8 ounces of beer, with each cup of beer costing \$1.00. The witness stated that he has seen the check issued in payment to Bennigan's by Mr. Proff on the night in question. That check is in the amount of \$26.78. After the end of happy hour the price of a 16oz draft beer would be \$2.25 each. The witness stated that he had been unable to find a cash register receipt in that amount. The witness gave a hypothetical scenario whereby he conjectured that each of two people at the table would have been served 7 beers.

The witness agreed that this hypothetical would not include any free beer or alcoholic beverage served to the table and assumed a \$3.00 tip. He did not recall if Mr. Cochran had admitted during deposition that he gave any alcoholic drinks to Mr. Slavik. The witness stated he was not present on the night in question and was not familiar with Mr. Slavik.

In rebuttal Mr. Giles testified that receipts were time stamped when the tabs were opened and not when closed.

7. Daniel Webster Williams

Daniel Webster Williams testified that he is a 77 year old retired military man. In the early morning hours of March 22, 2001 he was driving south on Highway 87 and turned on to Sugar Creek Road. As he approached the over pass he saw a small fire. He discovered that the fire was under what he believed was a Jeep Cherokee. He approached the vehicle and discovered that a young man, who he later determined was Chad Slavik, was stuck in the vehicle. He attempted to pull the young man from the vehicle but was unsuccessful. He told Mr. Slavik that he was going for help Mr. Slavik said "Don't let me burn." Mr. William stated that when Mr. Slavik spoke with him his speech was clear.

8. Rodney Meyer

Mr. Rodney Meyer testified that he is employed as an enforcement agent with the Commission. For the past two and a half years he has been stationed at the Victoria district office. He is familiar with the Bennigan's in Victoria. As a part of his duties he investigated the events of March 21, 2001. He had no first hand information concerning the events at Bennigan's. He made contact with Mr. Giles some two to three weeks after this incident concerning records of the sale of alcoholic beverages. The witness stated that Mr. Giles cooperated with him in his investigation. The receipts for the night in question were in his opinion not complete. There was no receipt that matched the check written by Mr. Proff. It appeared to him that two receipts might have been missing. The last receipt was timed as 11:30 p.m. with no later receipts. Mr. Giles gave no explanation as to the missing receipts. If the receipts are timed when tabs are opened then he agreed that he should have been looking for a tab opened between 9:45 p.m. and 10:00 p.m.

Mr. Meyer investigated this incident for 9 months before issuing the administrative notice. During that investigation he did not interview Mr. Cochran or Ms. Meador. The only evidence of intoxication was the blood alcohol concentration shown in the laboratory reports. In his experience the standard field sobriety tasks are used by peace officers to detect intoxication. As a practical matter sellers/servers must rely on their own observations and interaction with customers to detect intoxication.

9. Paul Goldstein, Ph.D.

Paul Goldstein, Ph.D., testified that for 17 years he has held the position of full professor of genetics and toxicology in the Department of Biology at the University of Texas at El Paso. It was stipulated that Dr. Goldstein is qualified as an expert in toxicology. The witness testified that based upon his review of the medical records, medical and scientific literature of accepted authority and commonly used by persons in the field of toxicology, he had arrived at certain opinions concerning the blood alcohol concentration or concentrations on the late night March 21, 2001, and the early morning of March 22, 2001.

The blood alcohol concentration (BAC) reported in the laboratory report from Deter Hospital was 0.246 g/dl and lead the witness to extrapolate that Mr. Slavik had consumed 11 to 12 drinks during a two hour period at Bennigan's. He further gave his expert opinion that "anyone who has a .246 gram per 100 mil of BAC would show—would demonstrate so many symptoms that even a layperson who is not trained to look for a person who is drunk could easily look at this person and say this person is drunk".

The witness said that he was not aware of the sworn testimony of eye witnesses and therefore that testimony formed no part of his opinion. The witness agreed that the serum BAC is 18% to 20% higher than a whole blood BAC but that it made no actual difference in his conclusions.

Dr. Goldstein stated that Mr. Slavik's BAC could not have been higher at 1:00 a.m. that at midnight. He then added "but as soon as he was in an accident everything stops right there. There's no more metabolism at that point". . . "Once you have an accident, there's not a person in the world that's going to be able to extrapolate this stuff".

10. Gary Wimbish Ph.D.

Gary Wimbish testified that he holds a Ph.D. in toxicology which he received in 1973 from Indiana University Medical Center and he is board certified by the American Board of Forensic Toxicology. The witness stated that based upon his knowledge and experience and all of the information he had been provided, including laboratory reports, police reports and deposition he formed scientific opinions concerning the BAC of Mr. Slavik on the night in question.

Dr. Wimbish explained how and why blood serum BAC and whole blood BAC will show different BAC and what adjustment must be made. He also offered the opinion that some experienced drinkers can mask the signs of intoxication even at BAC levels higher than .20. In his opinion it was shown to a scientific certainty that Chad Slavik had developed such a metabolic tolerance to the effects of alcohol. The witness testified that in his opinion the highest BAC of Chad Slavik while at Bennigan's was .15 percent and in his opinion Mr. Slavik did not present a clear danger to himself and others when he left Bennigan's.

IV. Statutory Criteria

1. Section 6.01 (b) of the Code states:
A license or permit issued under this code is a purely personal privilege and is subject to revocation or suspension if the holder is found to have violated a provision of this code or a rule of the commission.
2. Section 106.03 (a) of the Code states in relevant part:
A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.
3. Section 106.13 (a) of the Code states in relevant part:
The commission or administrator may cancel or suspend for not more than 60 days a retail license or permit....if it is found, on notice and hearing, that the licensee or permittee with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the premises.
4. Section 11.61 (b) of the Code states in relevant part:
The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . .(14) permittee sold or delivered an alcoholic beverage to an intoxicated person.
5. Section 2.02(b) of the Code states in relevant part:
Providing, selling, or serving an alcoholic beverage may be made . . .the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that: (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

V. Analysis

It was undisputed that on March 21, 2001 Chad Slavik was 20 years old, a minor, having been born on May 5, 1980. The evidence clearly showed that the Respondent's employees sold or served alcoholic beverages to Mr. Slavik. The list of these beverages presented at the hearing was staggering in its volume. The minor was served 12 10 ounce cups of beer, two pints of beer and a shot class of mixed liquors all in a two hour period. Both the bartender and server admitted that they did not ask the minor for proof of age. The failure to even ask for proof of age from a customer so obviously in his late teens or early twenties constituted criminal negligence by both the bartender and the server. That the Respondent's employees permitted the minor to possess or consume an alcoholic beverage on the premises was never denied or a matter of dispute. Respondent's position that the

minor did not appear to be intoxicated when he was served is not substantiated by the evidence. Mr. Proff testified that he and the minor, Mr. Slavik, were having a "good time" "screaming and hollering" and singing even when they had to make up the lyrics. The bartender served the minor a pint of beer and a shot glass of an unknown mixture immediately before the minor left at closing time. Mr. Proff testified that the server, Ms. Meador, asked him if the minor was driving. Some signs of intoxication must have led her to ask that question. The same signs should have been noticed by the bartender. Failing to stop serving the intoxicated minor was a violation of the code. It should be noted that Respondent's expert stated that the minor's BAC when he left Bennigan's was .15, or nearly twice the legal threshold for intoxication.

It does not appear from the testimony and depositions that Mr. Slavik was evidencing signs that he was so obviously intoxicated that he presented a clear danger to himself and others. The testimony from Mr. Slavik's friends was that they had seen him intoxicated a number of times. The testimony of Dr. Wimbish was that his review of the reports indicated that Mr. Slavik had developed a tolerance which would allow him to mask some of the sign of intoxication. There was no evidence that any of the usual and expected signs of intoxication were evidenced by Mr. Slavik. There was no slurred speech, no staggering or loss of balance, no abusive language or bumping into furniture. There is no need therefor to discuss issues of proximate cause of damages sustained.

PROPOSED FINDINGS OF FACT

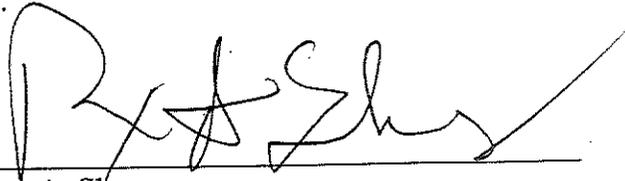
1. The Respondent, New Victoria L.L.C. et al , d/b/a Bennigan's is the holder of Mixed Beverage Permit, MB-451585, Mixed Beverage Late Hours Permit, LB-473602, Beverage Cartage Permit PE-451586 and Food and Beverage Certificate FB-451587
2. On March 21, 2001 Chad Slavik was a, 20 year old minor, having been born on May 5, 1980.
3. Nicholas Michael Cochran was an employee of Respondent, working on Respondent's premises, on March 21, 2001.
4. Tyler Melissa Meador was an employee of Respondent, working on Respondent's premises, on March 21, 2001.
5. On March 21, 2001, both Mr. Cochran and Ms. Meador served alcoholic beverages to Mr. Slavik on Respondent's premises.
6. On March 21, 2001 Mr. Cochran failed to request Mr. Slavik to provide proof of his age before serving him an alcoholic beverage and such failure constituted criminal negligence.
7. On March 21, 2001 Ms. Meador failed to request Mr. Slavik to provide proof of his age before serving him an alcoholic beverage and such failure constituted criminal negligence.

8. On March 21, 2001 both Mr. Cochran and Ms. Meador permitted Mr. Slavik to possess and consume alcoholic beverages on Respondent's premises and such conducted constituted criminal negligence.
9. Mr. Cochran delivered an alcoholic beverage to Mr. Slavik on March 21, 2001 when Mr. Slavik was an intoxicated person.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to the TEX. ALCO. BEV. CODE ANN. (The Code) § 1.01 *et seq.*
2. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision, proposed findings of fact and conclusions of law pursuant to TEX. GOV'T. CODE ANN. Chapter 2003.
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN, Chapter 2001 and 1 TEX. ADMIN. CODE, Chapter 155.
4. On March 21, 2001, Respondent, its agents servants or employees, with criminal negligence sold an alcoholic beverage to a minor in violation of Section 106.03 of the Code.
5. On March 21, 2001, Respondent, its agents servants or employees, with criminal negligence permitted a minor to possess and consume an alcoholic beverage on the premises in violation of Section 106.13(a) of the Code.
6. On March 21, 2001, Respondent, its agent servant or employee delivered an alcoholic beverage to an intoxicated person in violation of Section 11.61(b)(14) of the Code.
7. Based on the above findings of fact and conclusions of law, Respondent did not violate § 2.02 of the Code.
8. Based on the above findings of fact and conclusions of law, Respondent's permits or licenses should be suspended for 20 days for each of the three violations for a total suspension of 60 days and that for each day of suspension payment of \$150 in lieu of suspension be allowed.

SIGNED this 17th day of October 2002.

A handwritten signature in black ink, appearing to read "Rex A. Shaver", written over a horizontal line.

Rex A. Shaver
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 597679

IN RE NEW VICTORIA L.L.C., ET AL	§	BEFORE THE
D/B/A BENNIGAN'S	§	
PERMIT NOS. MB-451585, LB-473602,	§	
PE-451586 & FB-451587	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-2700)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 21st day of November, 2002 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on August 7, 2002, and adjourned August 8, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 17, 2002. 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 Acting Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, 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 Acting 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-451585, LB-473602, PE-451586 & CB-451587 are hereby **SUSPENDED**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$9,000.00** on or before the **21st of February, 2003**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **sixty (60) days**, beginning at **12:01 A.M. on the 26th day of February, 2003**.

This Order will become final and enforceable on **December 12, 2002**, 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 21st day of November, 2002.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Spencer G. Markle
ATTORNEY FOR RESPONDENT
777 Post Oak Blvd., Ste.350
Houston, Texas 77056
VIA FACSIMILE: (713) 355-8368

New Victoria L.L.C. et al
d/b/a Bennigan's
RESPONDENT
3706 N. Navarro
Victoria, Texas 77901
CERTIFIED MAIL NO. 7001 2510 0003 8686 7376

Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

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

Houston District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 597679

REGISTER NUMBER:

NAME: New Victoria L.L.C.,
et al

TRADENAME: Bennigan's

ADDRESS: 6220 N. Navarro Street, Victoria, Texas

DATE DUE: January 16, 2003

PERMITS OR LICENSES: MB-451585, LB-473602, PE-451586 & FB-451587

AMOUNT OF PENALTY: \$9,000.00

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 16TH DAY OF JANUARY, 2003, 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.