

**DOCKET NO. 458-02-2878**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**

§  
§  
§  
§  
§  
§  
§  
§  
§

**BEFORE THE STATE OFFICE**

**OF**

**VS.**

**POK-E-JO'S SMOKEHOUSE, INC.**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (Commission) seeks to cancel the mixed beverage, beverage cartage, and caterer's permits of Pok-E-Jo's Smokehouse, Inc. (Pok-E-Jo's) based on the restaurant's sale of beer to minors on three occasions within a 36-month period. The Administrative Law Judge (ALJ) recommends the permits be suspended for six months.

**I. JURISDICTION AND PROCEDURAL HISTORY**

Notice and jurisdiction were not contested in this proceeding; they are addressed in the Findings of Fact and Conclusions of Law.

On July 11, 2002, a hearing convened and closed before ALJ Gary Elkins. Staff appeared and was represented by Dewey Brackin. Pok-E-Jo's appeared through its owners, Doug Bohne and Danny Haberman.

**II. DISCUSSION**

**A. Evidence and Argument**

The facts underlying the allegations in this case are not in dispute. Pok-E-Jo's, a barbecue restaurant in Round Rock, holds mixed beverage, caterer's, and beverage cartage permits issued by the Commission. On December 21, 2001, the Commission was in the process of conducting a sting operation at each of several Round Rock area businesses, including Pok-E-Jo's, to determine whether the businesses were selling alcoholic beverages to minors.

To conduct the sting at Pok-E-Jo's, the agents arranged to have a 17 year old enter the restaurant and order a beer. Upon entering the establishment, the minor ordered a beer, which he paid for and received from an employee of Pok-E-Jo's. As a result, the employee was arrested and Pok-E-Jo's was cited for the offense of selling alcohol to a minor.

Although Pok-E-Jo's conceded that the facts as alleged occurred, it chose to challenge Staff's recommended punishment for the violation: cancellation of its permits under § 106.13(b) of the Texas Alcoholic Beverage Code (the Code). In support of this relief, Staff pointed out that Pok-E-Jo's had been cited three times within 36 months for selling alcoholic beverages to minors. Furthermore, Staff noted, the restaurant had taken no remedial action following either of the first two violations. Even though the company has now implemented measures to promote Code compliance, Staff argued, such measures were implemented too late and should not serve to mitigate the administrative penalty assessed. In addition, Staff noted, certain Commission enforcement personnel feel strongly that permit cancellation is the only appropriate penalty where three violations have occurred within 36 months.

The owners of Pok-E-Jo's, Doug Bohne and Danny Haberman, appealed for a penalty short of cancellation in light of the following efforts adopted to promote the business's full compliance with alcoholic beverage laws:

- All managers and "line people" are now required to attend the Commission's seller-server training school.
- All employees have read and signed a document stating they understand they will be prosecuted to the fullest extent of the law for violating alcoholic beverage laws.
- Pok-E-Jo's now has a written policy in its employee manual prohibiting employees from drinking on the premises either during or after hours.
- The restaurant has participated in the "Best Practices Program," an alcohol education and awareness program wherein Commission personnel work with businesses to develop models for how particular business types can most effectively manage their alcohol sales. The models can then be used by other permittees to promote Code compliance by their businesses.

According to Mr. Haberman, these policies and practices were adopted based on the recommendations of a Commission agent. He and Mr. Bohne also testified to their understanding, based on interactions with Commission personnel, that these efforts would make Pok-E-Jo's a candidate for an administrative penalty short of cancellation.

Both Mr. Bohne and Mr. Haberman stated that alcohol sales constituted a very small part of their business at the Round Rock store; the two owners estimated the store sells only two or three cases of beer per week.<sup>1</sup> Consequently, the cancellation of Pok-E-Jo's mixed beverage permit would have little effect on that store's business. They explained, however, that because the Code requires a mixed beverage permit as a prerequisite to holding a caterer's permit, retention of the mixed beverage permit was important to the store.

---

<sup>1</sup> The store does not offer mixed drinks.

## **B. Analysis and Conclusion**

The occurrence of the violation and the fact that it was Pok-E-Jo's third within 36 months was undisputed. The only issue remaining, therefore, is whether Pok-E-Jo's permits should be suspended for up to 12 months or whether it should be canceled as provided in § 106.13(b) of the Code:

For a second offense the commission or administrator may cancel the license or permit or suspend it for not more than six months. For a third offense within a period of 36 consecutive months the commission or administrator may cancel the permit or suspend it for not more than 12 months.

The ALJ concludes a six-month suspension is appropriate.

The difficulty in arriving at a penalty recommendation lies not in the factors to be considered but, instead, in the dearth of evidence available for weighing the penalties against each other. Staff's presentation of evidence was limited to documents reflecting the number and frequency Pok-E-Jo's violations, describing the sting operation that resulted in the sale to a minor, and portraying (via driver's license photograph) the teenager used in the sting. Otherwise, Staff relied on cross examination testimony of Mr. Bohne and Mr. Haberman together with its closing arguments. Through the testimony of the two owners and in an effort to demonstrate its good faith efforts to ensure future compliance with state alcoholic beverage laws, the evidence presented by Pok-E-Jo's focused on the remedial actions it has taken.

Because relatively few customers purchase alcohol beverages at Pok-E-Jo's, one might surmise that this customer group likewise would contain fewer minors that might try to purchase alcoholic beverages. A high incidence of sales to minors in this smaller group, then, would not reflect well on the restaurant. On the other hand, such an establishment, by virtue of its more limited exposure to the alcohol purchasing public, may not have garnered the experience necessary to effectively prevent sales to minors. Whatever the situation, Pok-E-Jo's ultimately did re-prioritize, working with Commission personnel to create an effective scheme for combating sales to minors. While such an effort under the facts of this case may not entitle the restaurant to great praise, one might reasonably conclude that it has now put itself on a path to exercising effective, law-abiding control of its alcoholic beverage sales.

Based on the candid and contrite demeanor of Pok-E-Jo's owners in readily acknowledging fault, together with the restaurant's remedial efforts, the restaurant should be assessed a penalty that impresses upon it the seriousness with which the Commission and the community view alcohol sales to minors while at the same time effectively underscoring the responsibility associated with holding a Commission permit. The ALJ concludes that a six month suspension of the permits should accomplish this objective, and it would also promote the public policy of the Code, expressed in § 1.03: protection of the welfare, health, peace, temperance, and safety of the people of the state.

In addition, it might encourage other businesses to take the same positive steps toward effectively managing alcoholic beverage sales.

### III. FINDINGS OF FACT

1. Pok-E-Jo's Smokehouse, Inc. (Pok-E-Jo's), located in Round Rock, is a barbeque restaurant that holds mixed beverage, beverage cartage, and caterer's permits issued by the Texas Alcoholic Beverage Commission (Commission).
2. On May 15, 2002, the Commission's staff (Staff) issued a notice of hearing asserting that, with criminal negligence, Pok-E-Jo's sold an alcoholic beverage to a minor. The notice also stated the time and location of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and the particular sections of the statutes and rules involved.
3. Pok-E-Jo's timely received the notice of hearing.
4. The hearing convened and closed on July 11, 2002, before Administrative Law Judge Gary Elkins.
5. On December 21, 2001, an employee of Pok-E-Jo's sold a beer to Pete Torres, a 17 year old who was born on June 20, 1984.
6. On two prior occasions within 36 months of the sale to Mr. Torres, Pok-E-Jo's was cited for selling alcoholic beverages to minors.
7. Pok-E-Jo's now requires all managers and line people to be seller-certified through the Commission's seller-server training school.
8. All employees of Pok-E-Jo's have read and signed a document reflecting their understanding that violations of the alcoholic beverage laws will result in their prosecution to the fullest extent of the law.
9. Pok-E-Jo's has a written policy in its employee manual prohibiting employees from drinking on the premises either during or after hours.
10. Pok-E-Jo's has participated in the Commission's "Best Practices Program," a Commission alcohol education and awareness program, in an effort to develop an effective approach to lawfully selling alcoholic beverages.
11. Alcohol sales constitute a very small part of the business volume at Pok-E-Jo's.
12. Beer is the only alcoholic beverage Pok-E-Jo's sells.

13. The primary reason Pok-E-Jo's holds its mixed beverage permit is to accommodate customers in its catering business.

#### IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over 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, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(5).
3. The Pok-E-Jo's received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on Findings 5 and 6 and pursuant to § 106.13(b) of the Code, the permits held by Pok-E-Jo's are subject to cancellation or suspension for not more than 12 months.
5. Based on Findings 7 - 10, the permits should be suspended for six months.

SIGNED this 6<sup>th</sup> day of September, 2002.

  
\_\_\_\_\_  
GARY W. ELKINS  
Administrative Law Judge  
State Office of Administrative Hearings

**DOCKET NO. 598176**

IN RE POK-E-JO'S SMOKEHOUSE, INC.	§	BEFORE THE
D/B/A POK-E-JO'S SMOKEHOUSE, INC.	§	
PERMIT NO. MB-161979, CB-161980	§	
& PE-247106	§	TEXAS ALCOHOLIC
	§	
WILLIAMSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-2878)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 25th day of October, 2002 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Gary Elkins. The hearing convened on July 11, 2002, and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 6, 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 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. 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 Permit Nos.MB-161979, CB-161980 & PE-247106 are hereby **SUSPENDED**.

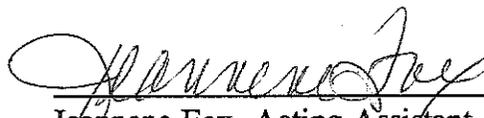
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$27,000.00** on or before the **20th day of November, 2002**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of one hundred and eighty days (180) days, beginning at 12:01 A.M. on the 27th day of November, 2002.

This Order will become final and enforceable on November 15, 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 25th day of October, 2002.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/YT

The Honorable Gary Elkins  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (512) 475-4994**

Pok-E-Jo's Smokehouse, Inc.  
d/b/a Pok- E-Jo's Smokehouse, Inc.  
1202 IH 35N  
Round Rock, Texas 78681  
**CERTIFIED MAIL NO. 7001 2510 0000 7277 7071**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Legal Division, TABC

Licensing Division  
Austin District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 598176 REGISTER NUMBER:

NAME: Pok-E-Jo's Smokehouse, Inc. TRADENAME: Pok-E-Jo's Smokehouse, Inc.

ADDRESS: 1202 IH 35N 'C', Round Rock, Williamson

DATE DUE: November 20, 2002

PERMITS OR LICENSES: MB-161979, CB-161980 & PE-247106

AMOUNT OF PENALTY: \$27,000.00

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 20TH DAY OF NOVEMBER, 2002, 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.