



of licensed premises. At about 12:40 a.m. that day he observed the Triple R Convenience Store from a distance of about 100 yards, and noticed that, although the store was usually closed at this time of the day, there were individuals standing at the front of the store and holding items in their hands. He then used binoculars to ascertain exactly what was occurring and observed that a male was consuming beer from a bottle. Three females were a few feet away from the male at the time.

Agent Villareal then proceeded to the premises and confronted the individuals. The male confirmed that he was consuming a Bud Light beer and showed the agent that he had more beer in his vehicle. Agent Villareal then spoke with the females, who stated that they were not aware that the male was consuming alcohol. One of the females, Palmira Rivera Gutierrez, is Respondent's wife and is listed as an owner on the permit. One of the other females is an employee of the store.

Agent Villareal then proceeded into the store where he spoke to Respondent, who said that he was not aware that alcohol was being consumed. According to Agent Villareal, it would have been obvious to the females that the male was drinking beer because he was standing within 5 to 6 feet of them, was not attempting to conceal his actions, and the area was well lit.

The Commission offered one document into evidence, which included a copy of the permit and a violation history of the premises. The permit is for the sale of alcohol for off premise consumption only. The violation history shows no prior violations.

Palmira Rivera Gutierrez testified that she was present at the time of the incident but did not observe the male consuming the beer. The male involved, Roel Rivera, is her brother but she was not paying attention to what he was doing.

Roel Rivera testified that he took one drink from the bottle of beer, but no one except the agent saw him.

## **B. Applicable Law**

Petitioner is authorized to suspend or cancel a permit if a permittee violates a provision of the Code TEX. ALCO. BEV. CODE §11.61(b)(2). TEX. ALCO. BEV. CODE §71.01 states, "The holder of a retail dealer's off-premise license may sell beer in lawful containers to consumers, but not for resale and not to be opened or consumed on or near the premises where sold."

#### IV. Analysis

Agent Villareal's testimony is credible and logical. He observed a violation being committed in plain view of both Ms. Gutierrez and an employee of the store. Respondent does not contest the allegation that alcohol was consumed, only that no one other than agent Villareal observed it. It is not logical that agent Villareal could have seen the consumption from 100 yards away, but that the females standing 5 feet from Roel Rivera did not see it.

#### V. Conclusion and Recommendation

The ALJ concludes that Petitioner demonstrated, by a preponderance of the evidence, that the violation occurred. The standard penalty chart found at TEX. ALCO. BEV. CODE § § 37.60(a) recommends that, for a first offense, permitting consumption of an alcoholic beverage on the premises of any off-premise license or permit by a permittee result in a 5 day suspension. The ALJ agrees with that recommendation.

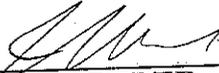
#### VI. Proposed Findings of Fact

1. Rolando Gutierrez d/b/a Triple R Convenience Store (Respondent) holds Wine and Beer Off Premise Permit No. BQ-311356 for the premises located at 100 E. Forrest Street in Falfurrias, Brooks County, Texas.
2. On January 6, 2002, Respondent permitted the consumption of alcohol on the premises.
3. As a result of the occurrence described in Finding of Fact No. 2, the Texas Alcoholic Beverage Commission (TABC or Commission) seeks to suspend Respondent's permit.
4. Respondent requested a hearing to contest the suspension.
5. On August 20, 2001, notice of the hearing was sent to Respondent. The notice contained a statement of the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
6. The hearing was held on October 24, 2002 before Administrative Law Judge John H. Beeler. The Commission appeared and was represented by staff attorney Dewey Brackin. Respondent appeared by video conference and represented himself. The record closed that same day.

## VII. Proposed Conclusions of Law

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative 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 Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact, Respondent violated TEX. ALCO. BEV. CODE § 71.01.
5. Based the above Findings of Fact and Conclusions of Law, respondent's permit should be suspended for 5 days, and Respondent should be allowed to pay a civil penalty of \$750.00 in lieu of suspension.

**SIGNED** this 17th day of December, 2002.

  
\_\_\_\_\_  
**JOHN H. BEELER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**DOCKET NO. 598278**

IN RE ROLANDO GUTIERREZ ET AL	§	BEFORE THE
D/B/A TRIPLE R CONVENIENCE STORES	§	
PERMIT NO. BQ-311356	§	
	§	TEXAS ALCOHOLIC
	§	
BROOKS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-3733)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 15th day of January, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on October 24, 2002, 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 December 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, 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 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 Wine and Beer Retailer's Off-Premise Permit No. BQ-311356 is hereby **SUSPENDED**.

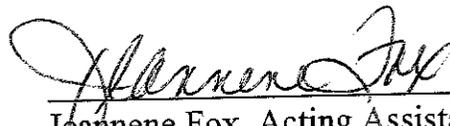
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of \$750.00 on or before the 12th day of March, 2003, all rights and privileges under the above described permit will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the 19th day of March, 2003.

This Order will become final and enforceable on February 11, 2003, 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 January, 2003.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

Rolando Gutierrez, et al  
d/b/a Triple R Convenience Store

**RESPONDENT**

RR 1, Box 6AA

Falfurrias, Texas 78355

**CERTIFIED MAIL NO. 7001 2510 0003 8686 7079**

Administrative Law Judge John Beeler  
State Office of Administrative Hearings  
Austin, Texas

**VIA FACSIMILE: (512) 475-4994**

Dewey A. Brackin

**ATTORNEY FOR PETITIONER**

Texas Alcoholic Beverage Commission  
Legal Division

McAllen District Office  
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 598278

REGISTER NUMBER:

NAME: Rolando Gutierrez

TRADENAME: Triple R Convenience Store

ADDRESS: 100 E. Forrest Street, Falfurrias, Texas 78355

DATE DUE: March 12, 2003

PERMITS OR LICENSES: BQ-311356

AMOUNT OF PENALTY: \$750.00

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 12TH DAY OF MARCH, 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.