

DOCKET NO. 500453

**IN RE OUTFITTER'S
d/b/a Outfitter's
PERMIT NO. N563328**

§
§
§
§
§
§
§

BEFORE THE TEXAS

ALCOHOLIC

**HUTCHINSON COUNTY, TEXAS
(SOAH DOCKET NO. 458-06-1956)**

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of January, 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on July 11, 2006 and closed on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 25, 2006. 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. Exceptions and Response have been filed and ruled on by the ALJ.

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.

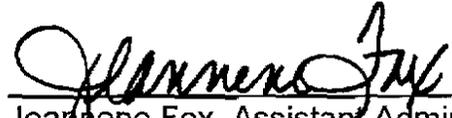
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits shall be suspended for a period of 15 days commencing at 12:01 on March 28, 2007, unless a civil penalty in the sum of \$2,250.00 is paid by the Respondent to the Commission on or before 12:01 a.m. on March 21, 2007.**

This Order will become final and enforceable on February 19, 2007, 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.

SIGNED on this 5th day of January, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeanene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

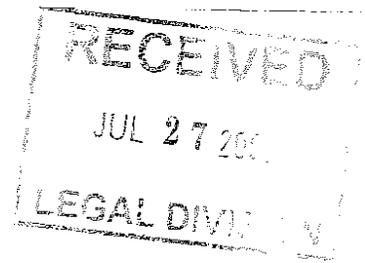
OUTFITTER'S
d/b/a Outfitter's
RESPONDENT
RR 2 Box 6-9
Fritch, Texas 79036-9606

Frank Lay
RESPONDENT'S ATTORNEY
VIA FACSIMILE 806-273-2347
Ph.: 806-273-2347

Jerry McClain
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4050
Ph.: 214-678-4044
TABC Legal Section

Licensing Division

Amarillo District Office



SOAH DOCKET NO. 458-06-1956

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

§
§
§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

V.

OUTFITTER'S
D/B/A OUTFITTER'S,
HUTCHINSON COUNTY, TEXAS
(TABC CASE NO. 500453)
Respondent

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) brought this disciplinary action against Outfitter's d/b/a Outfitter's, (Respondent), alleging that, on or about July 9, 2005, Respondent, his agent, servant, or employee permitted the consumption of alcoholic beverages during prohibited hours, in violation of Texas Alcoholic Beverage Code (the Code) §§ 105.06, 11.61(b)(2), 61.71(a)(1), and/or 32.17(a)(8). Based on the evidence, the Administrative Law Judge (Judge) finds the Petitioner proved the allegations by a preponderance of the evidence and recommends that Respondent's permits should be suspended for fifteen days or a civil penalty paid.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute disciplinary action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. HEARING AND EVIDENCE

On July 11, 2006, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was

represented by Timothy E. Griffith, attorney. Respondent was represented Frank Lay, attorney, who appeared by telephone. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 61.71(a) (18), the TABC may suspend a permit if it is found that the permittee or his agent, servant, or employee consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours. Pursuant to the Code § 105.06(b), in a standard hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a.m. and 12 noon or on any other day between 12:15 a.m. and 7 a.m. Section 105.06(2) defines "Standard hours area" as an area which is not an extended hours area.

IV. EVIDENCE

A. Documentary Evidence

Petitioner offered into evidence two exhibits, the Notice of Hearing issued in the case and the Respondent's permit history. Respondent offered into evidence a series of photos showing different views of the licensed premises. All offered exhibits were admitted into evidence.

B. Randy McCarthy, TABC Agent

Agent McCarthy testified that, on July 9, 2005, at approximately 12:30 p.m., he went to Outfitter's accompanied by Agent James Martin after receiving complaints from the Fritch police department that customers were at the licensed premises all night drinking alcoholic beverages. Agent McCarthy approached the licensed premises and was able to observe the bar area through a glass door. He observed a woman later identified as June Blevins at the bar drinking from a bottle of Bud Lite beer while an employee of the licensed premises, Jessica Rawlins, was behind the bar

talking to Ms. Blevins. Agent McCarthy testified that he had no trouble seeing into the licensed premises from the outside through the glass door. McCarthy and Agent Martin watched the employee and Ms. Blevins for about five minutes to see if the employee would stop Ms. Blevins from drinking and observed that she did not. At approximately 12:40 a.m., Agents McCarthy and Martin conferred with each other and determined that it this was the time that the drinking occurred, and they entered the license premises through the unlocked front glass door. Agent McCarthy told the employee that it was illegal to drink alcoholic beverages after 12:15 a.m. and was told by Ms. Rawlins that it was okay to drink at that time. He then contacted Ms. Blevins, who stated that she was an employee on the licensed premises, and arrested her for a class B misdemeanor. Agent McCarthy examined the bottle from which Ms. Blevins was drinking and determined that it as cold to the touch and had condensation on the outside.

C. Gary Barnes

Mr. Barnes is the manager of the Outfitter's Club and the owner of the restaurant and building where both are located. He is also a game warden and licensed Texas peace officer and testified that he is aware of the law regarding when persons must stop consuming alcoholic beverages on a licensed premises and told his employees that they must stop drinking by 12:30 a.m. by the "bar clock". On the date in question, both Ms. Blevins and Ms. Rawlins were employed by Outfitter's and had remained on the licensed premises after it shut down that night for other purposes. He denied that he would have told his employees to do anything in violation of the law. He testified that he has taken action since the incident in question to ensure that prevent any other charges of administrative violations by shutting the bar down earlier. He denied ever giving permission for employees to drink on the licensed premises after hours.

D. Jessica Rawlins

Ms. Rawlins was employed by Outfitter's on July 9, 2005, and was present on the licensed premises when the TABC agents arrived and made an arrest and charge of an administrative

violation. She and Ms. Blevins were on the licensed premises that night cooking for an event to take place the next day and she admitted that Ms. Blevins was drinking a beer. According to Ms. Rawlins, Ms. Blevins had a drink at approximately 12:30 to 12:35 a.m. by the bar's clock, which was always 15-20 minutes fast, then she and Ms. Rawlins went back to the kitchen and then returned to the bar area. Ms. Rawlins testified that Ms. Blevins did not take another drink once they returned to the bar, that it was 12:35 a.m. by the bar clock, and that the TABC agents entered the bar approximately two to three minutes later.

E. June Blevins

Ms. Blevins was employed by Outfitter's as a cook on July 9, 2005, when she stayed past the normal hours of operation of the restaurant the night to cook. At approximately 12:30 a.m., she and Ms. Rawlins went to the back of Outfitter's for approximately five minutes to tend to the cooking and then returned to the bar area, after which she did not have any further drinks from her bottle of beer. She testified that the bar clock read 12:38 a.m. when the TABC agents entered into the licensed premises. Ms. Blevins admitted that she was arrested for a class B misdemeanor and that it was pled down to a class C with deferred adjudication in settlement of the charges against her.

V. ANALYSIS

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71 (a)(18), the Commission may suspend or cancel a permit if it is found that the permittee consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by the Code. Section 105.06(a)(2) defines "Standard hours area" as an area which is not an extended hours area. Pursuant to § 105.06(b), a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a.m. and 12 noon or on any other day between 12:15 a.m. and 7 a.m. Section 1.04(11) defines "permittee" as a person who is the holder of a permit or an agent, servant, or employee of that person.

The evidence is sufficient to prove that Ms. Blevins was the agent, servant, or employee of Respondent on the date in question. The witnesses at the hearing identified her as the cook in the licensed premises, and she testified that she served in that capacity. No evidence was offered to show that Ms. Blevins was seller/server trained. The only issue was whether or not Ms. Blevins actually drank an alcoholic beverage during prohibited hours that night. The questions propounded by Respondent's attorney appeared to have been designed to elicit evidence that Agent McCarthy could not have seen Ms. Blevins drinking when he was looking through the glass entrance door of the licensed premises because of where she was sitting and signs that were located on the door. However, the real issue must be whether he observed her doing so during *prohibited hours* since there is no fact dispute that she was drinking a beer that night at approximately the time that Agent McCarthy testified that he observed her do so.

The evidence from Agent McCarthy directly contradicts that of Ms. Blevins and Ms. Rawlins as to when he observed Ms. Blevins drinking the alcoholic beverage. McCarthy's testimony is that he conferred with Agent Martin and that both agreed that it was 12:40 a.m. when the drinking occurred. Ms. Blevins testified that it was 12:38 a.m. on the bar clock when the agents entered the licensed premises, and Ms. Rawlins testified that the bar clock was always 15 to 20 minutes fast. According to Ms. Rawlins, Ms. Blevins had a drink at approximately 12:30 to 12:35 a.m. by the bar's clock, then she and Ms. Rawlins went back to the kitchen before returning to the bar area. Ms. Rawlins testified that Ms. Blevins did not take another drink once they returned to the bar, that it was 12:35 a.m. by the bar clock, and that the TABC agents entered the bar approximately two to three minutes later.

No evidence was adduced to show that Agent McCarthy would perjure himself in order to pursue one minor administrative violation on the part of the licensed premises. On the other hand, Ms. Blevins would certainly have a strong motivation to deny under oath that she was drinking alcoholic beverages during prohibited hours that night, since her job with Respondent would be on the line. Ms. Rawlins also has the same motivation to support Ms. Blevins' story since she was

would be an employee who permitted a person to consume an alcoholic beverage during prohibited hours if the charges were upheld. Both women also admitted that Ms. Blevins was drinking but only could say that she could not have been drinking during prohibited hours because the bar clock, which both said was not accurate, said otherwise. No evidence exists that the time observed by the TABC agents was in any way inaccurate. The weight of the credible evidence is that Ms. Blevins consumed an alcoholic beverage on the licensed premises during prohibited hours. The evidence was sufficient to prove that Respondent violated the Code and his permits should be suspended or a civil fine paid.

VI. PROPOSED FINDINGS OF FACT

1. Outfitter's d/b/a Outfitter's, Hutchinson County, Texas, holds Permit Nos. N-563328, FB-563330 and PE-563329, issued by the TABC for the premises located at 9609 Fritch Fortress Road, Fritch, Hutchinson County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated April 19, 2006.
3. The hearing on the merits convened July 11, 2006, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney Timothy E. Griffith. The Respondent was represented by Frank Lay, attorney, who appeared by telephone. The record closed on the same day.
4. On or about July 9, 2005, Respondent employed June Blevins and Jessica Rawlins at the licensed premises and they both stayed after regular business hours to do some cooking for an event the next day.
5. On that same date, Ms. Blevins was drinking a beer on the licensed premises at approximately 12:40 a.m.
6. Agent McCarthy approached the licensed premises on that date at approximately 12:30 a.m. and was in a position to observe Ms. Blevins drinking the beer.

7. Agent McCarthy observed Ms. Blevins and Ms. Rawlins for approximately five minutes to determine if Ms. Rawlins, who was behind the bar working, would stop Ms. Blevins from drinking, which she did not.
8. Agent McCarthy conferred with Agent Martin who accompanied him and determined that it was 12:40 a.m. by their watches when the drinking occurred.
9. Agent McCarthy and Agent Martin entered the licensed premises, determined that both Ms. Blevins and Ms. Rawlins were employees and arrested Ms. Blevins for drinking during prohibited hours.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the 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 ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-9, the Commission proved that Respondent violated the Code when his agent, servant, or employee consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours on July 9, 2005.
5. Based on the foregoing, suspension of Respondent's permits for a period of fifteen days or payment of a civil penalty of one hundred and fifty dollars per day of the proposed suspension is warranted.

SIGNED: July 25th, 2006



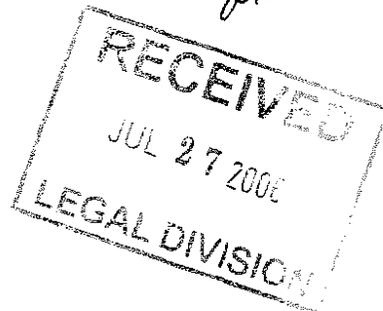
B. L. Phillips
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 25, 2006



Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-06-1956, Outfitter's d/b/a Outfitter's

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59©, a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "B. L. Phillips".

B. L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Tim Griffith, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Frank Lay, Respondent's Attorney, 2110 Hemlock, Borger, TX. 79007-VIA REGULAR MAIL