

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 24, 2007

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

**RE: Docket No. 458-07-2946; Texas Alcoholic Beverage Commission vs Aldis Michelle Petite
d/b/a Viola's Cafe, (TABC Case Nos. 546072 and 564505)**

Dear Mr. Steen

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Danielle Schick, attorney for Texas Alcoholic Beverage Commission, and to Timothy Griffith, attorney for the Respondent. The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Aldis Michelle Petite d/b/a Viola's Cafe (Respondent). Petitioner sought suspension of Respondent's permit and license alleging Respondent with criminal negligence permitted a minor to possess or consume an alcoholic beverage, that Respondent was intoxicated on the licensed premise. For the reasons discussed in this proposal for decision, the Administrative Law Judge (ALJ) recommends that Respondent's existing permit and license not be suspended in the matter of permitting a minor on the licensed premises, the existing permit and license be suspended for 10 days or a civil penalty of \$1500 be paid in lieu of suspension.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

 Phyllis Cranz
 Administrative Law Judge

PC/dd

DOCKET NO. 458-07-2946

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
ALDIS MICHELLE PETITE d/b/a/ VIOLA'S CAFE (TABC Nos. 546072 and 564505)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Aldis Michelle Petite d/b/a Viola's Cafe (Respondent). Petitioner sought suspension of Respondent's permit and license alleging Respondent with criminal negligence permitted a minor to possess or consume an alcoholic beverage, and that Respondent was intoxicated on the licensed premise. For the reasons discussed in this proposal for decision, the Administrative law Judge (ALJ) recommends that Respondent's existing permit and license not be suspended in the matter of permitting a minor to possess or consume an alcoholic beverage and that in the matter of the Respondent being intoxicated on the licensed premises, the existing permit and license be suspended for 10 days or a civil of penalty of \$1500 be paid in lieu of suspension.

I. PROCEDURAL HISTORY

The hearing was held on August 14, 2007, at the Fort Worth field office of the State Office of Administrative Hearings (SOAH), 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas, before Phyllis Crazz, an Administrative Law Judge (ALJ). Petitioner appeared and was represented by Danielle Boazeman-Schick, TABC Staff Attorney. Respondent appeared and was represented by her attorney, Timothy E. Griffith. There were no challenges to the notice of hearing, jurisdiction, or venue. The hearing concluded on August 14, 2007, and the record closed on August 7, 2007.

II. DISCUSSION

A. Applicable Law

TABC is authorized under TEX. ALCO. BEV. CODE ANN. §§ 106 3, 104.01 (5), 61 (b) (13), 25.04, and 61.71 (a) to cancel or suspend a Respondent's permit and license

B. Evidence

No business records or violation history of the Respondent's permit and after hours license were offered by TABC. As no objection was heard from the Respondent, the permit numbered BG 557308 named in the notice of violation will be considered the relevant permit/license.

1. Minor in possession of an alcoholic beverage on the licensed premises.

TABC Agent D. Boseker testified that on or about September 9, 2006, he and TABC Agent C Applewhite visited the license premises. Agent Boseker observed a woman of youthful appearance with an alcoholic beverage. Upon questioning her, he did not ascertain her age as she did not have an identification such as a driver's license, student id, or other official document that disclosed her age. The young woman left the premises without any alcoholic beverages. Agent Boseker did not ticket the woman for a violation.

Agent Charles Applewhite was with Agent Boseker on September 9, 2006 but did not have any testimony that would determine the age of the young woman.

Respondent did not present any evidence.

2. Permittce/Licensee intoxicated on the premises during business hours.

On May 6, 2007, Police Officer Sgt. K. Rowell, Fort Worth Police Department, Fort Worth, Tarrant County, Texas, was dispatched to investigate the licensed premises in response to several "911 call hangups". She testified that upon arriving she observed a large crowd of people going in and out the building onto the surrounding licensed premises area. When she entered the building, no one was near the telephone on the wall. When questioned, none of the staff or patrons knew anything about calling 911. Sgt. Rowell was told that the telephone did not work. Sgt. Rowell interviewed Ms. Petite, Respondent. She observed that the Respondent had the strong odor of an alcoholic beverage on her breath, was swaying as she stood, and appeared disoriented. Sgt. Rowell called TABC and requested an agent to come and investigate due to repeated emergency calls from the premises and her observations of the Respondent.

TABC Agent D. Boseker arrived in response to Sgt. Rowell's request at approximately 2:45 a.m.. He observed a large crowd at the licensed premise where a pool tournament was in progress. After hearing Sgt. Rowell's observations, Agent Boseker asked Ms. Kirk who was behind the bar to speak with him outside where it was easier to talk. Ms. Kirk was followed by two people, one of whom was Ms. Petite, the Respondent. When asked about the 911 calls, no one could explain them. Agent Boseker personally observed the Respondent who identified herself as the owner. Respondent had the strong odor of an alcoholic beverage on her breath, was unsteady standing and needed support, had difficulty answering questions, appeared confused, and did not know what time of day it was.

Continuing his testimony, Agent Boseker stated that he is certified to and conducted a horizontal gaze nystagmus examination of Respondent. Respondent lacked smooth pursuit in both eyes, demonstrated distinct nystagmus at the maximum deviation of both eyes, and demonstrated an onset of nystagmus prior to 45° from the center line. Respondent stated that she had consumed two beers in the last hour. Respondent was requested to provide a sample of her breath for a Portable Breath Tester and refused. Agent Boseker formed the opinion that the Respondent was intoxicated

and arrested her for public intoxication.

Respondent called six witnesses who knew her and were present part or all May 6, 2007, the day of the pool tournament at the licensed premises. Each of the witnesses stated that their belief was that Respondent was not intoxicated that day.

Sharon Johnson stated that she observed Respondent for approximately nine hours on May 6, 2007. She observed the Respondent serving a crowd of more than one hundred people, picking up cups, keeping score of the tournament, and appearing quiet and sober.

Paul Lillard was at the premises from noon until closing time. He stated that Respondent was cleaning tables, making change, serving customers, alert, coherent and sober, and keeping up with the two tables of competitors at the tournament.

B.J. Simmons was at the premises from approximately 2:15 p.m. until Respondent was arrested. He observed that she appeared tired but sober and was behind the bar and working fast while taking care of the tournament.

Cary Jones was at the premises all day and did not observe the Respondent with slurred speech, lack of balance, or staggering.

James Love was at the premises from noon until Respondent was arrested. He stated that she was sober with no signs of intoxication while running the pool tournament.

Crystal Kirk was at the premises for 12 hours and saw Respondent waiting tables. She stated that the Respondent was sober in her estimation, being alert and coherent.

After the six witnesses had testified, Respondent testified. She stated that she was working all day on the tournament which drew a large crowd. She stated that she did not believe she was

intoxicated, but tired. She said that she had consumed two beers over two hours and had eaten barbeque, beans, and potato salad for dinner at 1:30 p.m. In response to cross examination, Respondent stated that she is not seller-server trained. She was unclear about any training that she had since acquiring her permit/license.

Respondent did offer evidence of posting TABC rules concerning the operation of the licensed premises which included notice of no consumption of alcoholic beverages by persons under 21 years of age, and no illegal drug usage on the premises.

C. Analysis and Conclusion

As to the first allegation that Respondent or her agent, servant, or employee with criminal negligence permitted a minor to possess or consume an alcoholic beverage on the licensed premise. There are insufficient specific, articulated facts presented to support a finding that such a violation occurred. There is not credible evidence that the woman with the youthful appearance was under 21 years of age in possession of an alcoholic beverage.

The evidence presented on the second issue of the permittee/licensee being intoxicated on the premises is sufficient to determine that the Respondent was intoxicated on the night in discussion. Respondent is the owner/operator of the premises and was present when the Fort Worth Police Department responded to multiple 911 calls where someone from the premises was calling and hanging up. Fort Worth Police Department called TABC for assistance. Respondent could not explain to the police officer and the TABC agent who was phoning 911 and hanging up. She appeared intoxicated. Upon completing a standardized field sobriety test and refusing to provide a sample of her breath for a portable breath tester, Respondent was arrested for public intoxication. Although multiple persons testified as to Respondent's hard work and long hours on May 6, 2007, none of those persons were trained in recognizing intoxication nor did they testify as to whether Respondent had been consuming alcoholic beverages and how few or many. Each person did testify to Respondent performing tasks that she had performed many times before but did not testify to the

time of their observations or as to observations that were inconsistent with public intoxication. Trained observers, Respondent exhibited the signs on intoxication including being unsteady on her feet, confused and unable to answer questions about her premises, the odor of an alcoholic beverage on her breath, and exhibiting clues during the horizontal gaze nystagmus examination. Respondent was intoxicated on her premises.

No history of the premises was offered by the TABC. It is presumed that Respondent has no prior violation history.

III. FINDINGS OF FACT

Aldis Michelle Petite d/b/a Viola's Cafe (Respondent) is the holder of a Wine and Beer Retailer's permit BG 557308 and a Retail Dealer's On-Premises Late Hours License which are currently valid.

Respondent's permit and license were issued for the premises located at 312 East Hattie Street, Fort Worth, Tarrant County, Texas 76104.

- 3 On July 19, 2007, the Texas Alcoholic Beverage Commission (Petitioner) issued its Notice of Hearing to Respondent concerning two violations at its address of record, 312 East Hattie Street, Fort Worth, Tarrant County, Texas 76104, via certified mail, return receipt requested (#7006 0100 0002 2009 4591).
- 4 On August 14, 2007, a hearing convened before ALJ Phyllis Cranz at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented by Danielle Boazeman-Schick, TABC Staff Attorney. Respondent appeared in person and was represented by counsel, Timothy Griffith.
- 5 On September 9, 2007, TABC Agent D. Boseker spoke with a woman who appeared younger than 21 years of age who was in possession of an alcoholic beverage on the premises.
- 6 Agent Boseker did not ascertain the true age of the woman nor her identity and did not issue a ticket for a minor in possession.
- 7 On May 6, 2007, repeated 911 calls were made from the premises then hung up prompting the Fort Worth Police Department to respond.

8. Police Officer Sgt. K. Rowell, Fort Worth Police Department, was dispatched to the premises where a pool tournament was in progress, and called the local TABC office to send an agent.
9. Sgt. K. Rowell questioned the staff and several customers who could not explain the calls and stated that the phone was not working.
10. Sgt. K. Rowell observed the Respondent who could not explain the phone calls and had the strong odor of an alcoholic beverage on her breath, was swaying as she stood, and appeared disoriented.
11. TABC Agent D. Boseker arrived and heard Sgt. Rowell's observations and personally observed the Respondent.
12. Agent D. Boseker personally observed that the Respondent had the strong odor of an alcoholic beverage on her breath, was unsteady standing and needed support, had difficulty answering questions, appeared confused, and did not know what time of day it was.
3. Agent D. Boseker is certified to and conducted a horizontal gaze nystagmus examination of Respondent. Respondent lacked smooth pursuit in both eyes, demonstrated distinct nystagmus at the maximum deviation of both eyes, and demonstrated an onset of nystagmus prior to 45° from the center line.
14. Respondent stated that she had consumed two beers in the last hour.
15. Respondent was requested to provide a sample of her breath for a portable breath tester and refused.
16. Agent Boseker formed the opinion that the Respondent was intoxicated and arrested her for public intoxication.
7. Respondent was intoxicated on the licensed premises.

V CONCLUSIONS OF LAW

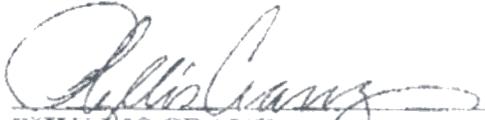
TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Chapters 5, 6, and 61.

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 proposed findings of fact and conclusions of law, under TEX. GOV'T CODE ANN., ch. 2001.

- 3 Respondent received proper notice of hearing. TEX. GOV. CODE ANN. § 2001.052
4. Based upon Findings of Fact Numbers 5 and 6, there is insufficient evidence to support a violation of TEX. ALCO. BEV. CODE ANN. § 106.13.

Based upon Findings of Fact Numbers 7-17, Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 104.01 (5) and 11.61 (b)(13).
6. Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's Beer Retailer's On-Premises License and a Retail Dealer's On-Premises Late Hours License should be suspended for 10 days or a penalty of \$1500.00 should be assessed in lieu of suspension.

SIGNED ON September 24, 2007


PHYLIS CRANZ
ADMINISTRATIVE LAW JUDGE