

DOCKET NO(S). 615262, 504859, 505050 & 564362

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
EAGLE GULCH SALOON LLC	§	ALCOHOLIC
D/B/A EAGLE GULCH SALOON	§	
PERMIT/LICENSE NO(s). MB553491, LB	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-07-2198)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ami L. Larson. The hearing convened on the 22nd day of June 2007 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 14th day of January 2008. The 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 have been filed and the Administrative Law Judge did not recommend any changes.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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 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, and your permits are hereby **SUSPENDED forty (40) days** for the violations described in **Docket Nos. 615262, 505050 and 564362**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$6000.00** on or before the **8th day of April 2008**, all rights and privileges under the above described permits will be **SUSPENDED for a period of forty (40) days, beginning at 12:01 A.M. on the 15th day of April 2008**.

IT IS FURTHER ORDERED that the violations described in **Docket No. 504859** are hereby **DISMISSED**.

This Order will become final and enforceable on March 25, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this February 29, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

The Honorable Ami L. Larson
Administrative Law Judge
State Office of Administrative Hearings
San Antonio, Texas
VIA FAX (210) 308-6854

David L. Cunningham
ATTORNEY FOR RESPONDENT
7750 Broadway
San Antonio, TX 78209
FAX (210) 822-0916

EAGLE GULCH SALOON LLC
RESPONDENT
d/b/a EAGLE GULCH SALOON
8007 WEBBLES
SAN ANTONIO, TX 78218-1618

JUDITH L. KENNISON
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBERS: 615262, 505050 & 564362

REGISTER NUMBER:

NAME: Eagle Gulch Saloon, LLC etal

TRADENAME: Eagle Gulch Saloon

ADDRESS: 8007 Webbles, San Antonio, Texas 78218-1618

DATE DUE: April 8, 2008

PERMITS OR LICENSES: MB553491, LB

AMOUNT OF PENALTY: \$6,000.00

Amount remitted \$ _____ Date remitted _____
You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form along with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

Overnight Delivery Address: 5806 Mesa Drive, Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

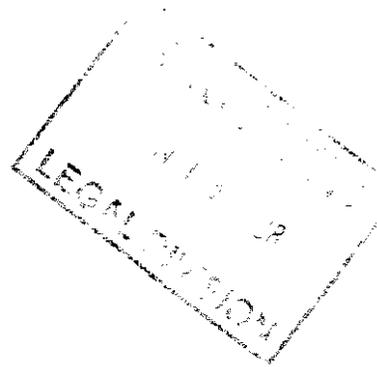
Area Code/Telephone No.

LEGAL

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

January 14, 2008



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

HAND DELIVERY

RE: Docket No. 458-07-2198; Texas Alcoholic Beverage Commission v. Eagle Gulch Saloon, LLC et al d/b/a Eagle Gulch Saloon (TABC Case Nos. 615262, 504849, 505050) - 5 64362

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(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Ami L. Larson
Administrative Law Judge

ALL/ed
Enclosure

xc Christopher Gee, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA HAND DELIVERY**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA HAND DELIVERY**
David Cunningham, Attorney at Law, Hayden & Cunningham, P.L.L.C., 7750 Broadway, San Antonio, TX 78209 - **VIA REGULAR MAIL**

SOAH DOCKET NO. 458-07-2198

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

V.

EAGLE GULCH SALOON, LLC ET AL
d/b/a EAGLE GULCH SALOON
(TABC CASE NOS. 615262, 504849,
505050),
Respondent

§
§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff/TABC) requested that the mixed beverage and mixed beverage late hours permits of Eagle Gulch Saloon (Eagle Gulch or Respondent), located at 214 Losoya in San Antonio, Texas, be canceled based on several violations of the Texas Alcoholic Beverage Code (Code) alleged to have occurred between February 17, 2005, and May 17, 2007. Respondent denied the allegations but argued in the alternative that even if violations occurred, it was exempt under the safe harbor affirmative defense, which provides that the actions of an employee regarding the sale, service, dispensing, or delivery of alcohol shall not be attributable to the employer under certain conditions.¹ The Administrative Law Judge (ALJ) finds that Staff has met its burden of proof to establish only three of the four alleged violations. The ALJ further finds that Respondent does not qualify from immunity pursuant to the safe harbor defense. Accordingly, as explained in detail below, the ALJ recommends that Respondent's permits be suspended for a total of 60 days with an option to pay \$150.00 per day in lieu of the suspension.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

¹ TEX. ALCO. BEV. CODE ANN. § 106.14.

The hearing in this matter convened at the State Office of Administrative Hearings in San Antonio, Texas, on June 22, 2007, before Administrative Law Judge (ALJ) Ami L. Larson. TABC Staff was represented by attorney Christopher G. Gee. Respondent appeared by attorney David Cunningham. Following the hearing, the parties submitted written objections to exhibits offered during the hearing and written closing arguments. The record closed on December 3, 2007.

II. ALLEGATIONS AND LEGAL STANDARDS

In its Amended Notice of Hearing, Staff made the following allegations:

- 1) On or about February 17, 2005, Respondent or its agent, servant or employee, was intoxicated on the licensed premises in violation of the Code.²
- 2) On or about July 15, 2005, Respondent or its agent, servant, or employee, was intoxicated on the licensed premises in violation of the Code.³
- 3) On or about August 19, 2005, Respondent, or its agent, servant, or employee, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage in violation of the Code.⁴
- 4) On or about May 17, 2007, Respondent, or its agent, servant, or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of the Code.⁵

A person acts with criminal negligence under the Code if:

with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care

² Code sec. 11.61(b)(13).

³ Id.

⁴ Code sec. 106.13.

⁵ Code secs. 106.13 and 106.03.

that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.⁶

Pursuant to what is known as the "safe harbor defense," acts of an employee relating to sales, service, dispensing or delivery of alcoholic beverages to a minor or an intoxicated person shall not be attributable to an employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.⁷

Pursuant to TABC rules, *prima facie* evidence that the employer has directly or indirectly encouraged violation of the relevant laws includes the following acts or omissions:

- (1) Proof by the commission that an employee or agent of a licensee/permittee sold, delivered or served alcoholic beverages to a minor . . . more than twice within a 12-month period;
- (2) the licensee/permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the licensee/permittee to prohibit such sales, service or consumption;

⁶ This definition is the Penal Code definition of criminal negligence on which the Code § 1.08 relies.

⁷ TEX. ALCO. BEV. CODE ANN. § 106.14(a).

(3) the licensee/permittee fails to insure that employees have read and understood the licensee/permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons.⁸

The burden of proof is on Respondent to demonstrate that it has not directly or indirectly encouraged the employee to violate the law.⁹

III. SUMMARY OF EVIDENCE PRESENTED AND ANALYSIS

Staff presented the testimony of seven witnesses and offered nine exhibits. Respondent called two witnesses and offered five exhibits. Following is a summary of the evidence presented concerning each of the violations alleged by Staff in its amended notice of hearing and the ALJ's analysis. A separate discussion of the Safe Harbor affirmative defense asserted by Respondent is discussed separately in section E below:

A. February 17, 2005 - Allegation that Respondent or its agent, servant or employee, was intoxicated on the licensed premises.

1. Evidence:

On February 17, 2005, TABC enforcement agent Michael Cantrell responded to Eagle Gulch regarding a report that a bartender who was working there was intoxicated. Agent Cantrell made contact with Nina Sakalares, who admitted that she was working as the bartender in charge at Eagle Gulch that night.

⁸ 16 TAC § 50.10(d).

⁹ *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829 (Tex.App.-Fort Worth 1995) writ denied; *Parker v. 20801, Inc.*, 194 S.W.3d556 (Tex.App.-Houston (14 Dist.) 2006) pet. for review granted (Tex. March 9, 2007); *Pena v. Neal, Inc. d/b/a Fina One Stop*, 901 S.W.2d663 (Tex. App.-San Antonio 1995) writ denied; *Perseus, Inc. d/b/a Hippodrome v. Canody*, 995S.W.2d202 (Tex. App.-San Antonio 1999) no writ hist.

Agent Cantrell observed that Ms. Sakalares was unsteady on her feet, swayed, and on three different occasions fell against him and had to grab his arm in order to steady herself. Additionally, Agent Cantrell observed that Ms. Sakalares's speech was heavily slurred to the point that it was difficult to understand what she was saying and that she had a noticeable odor of alcoholic beverages on her breath. After administering the Horizontal Gaze Nystagmus standardized field sobriety test and a portable breath test¹⁰ on Ms. Sakalares, Agent Cantrell informed her that she was intoxicated to which she responded, "Yea, I'm fucked up." Ms. Sakalares further acknowledged that she had consumed two shots that night. Agent Cantrell then determined that Ms. Sakalares was a danger to herself and others because of her intoxication and, once bartender David Saenz arrived to assume operation of the bar, she was released her to a responsible party to escort her home. Agent Cantrell then left an administrative notice of the TABC violation with Mr. Saenz.

According to Michael Patton, sole owner of Eagle Gulch, it took him some time following the incident to determine what had occurred because of discrepancies in Ms. Sakalares's reports to him and to police. Ultimately, however, he concluded that she was drunk while on duty and consequently, he terminated her employment.

2. Analysis

The undisputed evidence establishes that on February 17, 2005, Ms. Sakalares was the agent, servant, or employee of Respondent and, while she was working as a bartender at the licensed premises, she was intoxicated. Accordingly a violation of the Code section 11.61(b)(13) was established as alleged.

¹⁰ The ALJ only considers the fact that the portable breath indicated the presence of alcohol, but does not rely on its results as proof of intoxication.

B. July 15, 2005 - Allegation that Respondent or its agent, servant, or employee, was intoxicated on the licensed premises.

1. Evidence

On July 15, 2005, San Antonio Police Officers were dispatched to Eagle Gulch regarding a report of a disturbance there. Upon arrival, the officers made contact with Victor Juarez and observed that he was unsteady on his feet, had a strong odor of intoxicants coming from his breath, his eyes were bloodshot, and his speech was slurred. TABC Agent Paul Biasioli arrived on the scene and administered a portable breath test to Mr. Juarez, which revealed the presence of alcohol in his system. Mr. Juarez told the officers that he was an Eagle Gulch manager, but Agent Biasioli testified that he did not know whether Mr. Juarez in fact worked for or was paid by Eagle Gulch. Mr. Juarez was arrested that night for being an intoxicated employee on a licensed premises and also for two outstanding arrest warrants.

Mr. Patton, owner of Eagle Gulch, testified that Victor Juarez was not an employee of Respondent. He explained that Mr. Juarez was the boyfriend of Nina Sakalares, who was hired to work as a bartender for Respondent, but that Mr. Juarez himself was not an employee and was not paid by Respondent.

2. Analysis

Although the Code does not specifically define "employee," the Texas Court of Criminal Appeals has defined the term as:

simply a person who works for another in return for financial or other compensation. The test to determine whether one person is another's employee is whether or not he is subject to the control of the other person.¹¹

¹¹ *Ackley v. State*, 592 S.W. 2d 606, 608 (Tex. Crim. App. 1980).

In this case, the only evidence to suggest that Mr. Juarez was employed by Respondent was his own claim to the police, while he was allegedly intoxicated, that he was employed as a manager at Eagle Gulch. The officer who took his statement acknowledged that he did not know whether Mr. Juarez was in fact employed by Respondent. And the sole owner of Eagle Gulch testified that Mr. Juarez was not employed by Respondent, but rather was merely the boyfriend of a bartender who worked at Eagle Gulch. No evidence was offered to show that Mr. Juarez had been hired by Respondent or that Respondent had any control over Mr. Juarez's actions. Additionally, there is no evidence in the record to show that Mr. Juarez was ever compensated by Respondent, either in currency or otherwise, for his services.

Therefore, although the evidence suggests that Mr. Juarez may indeed have been intoxicated on the licensed premises, the ALJ finds that Staff has failed to meet its burden to sufficiently prove, as alleged, that on July 15, 2005, he was an agent, servant, or employee of Respondent. Accordingly, the ALJ finds that this alleged violation of the Code section 11.61(b)(13) was not proved by a preponderance of the evidence.

C. August 19, 2005 - Allegation that Respondent, or its agent, servant, or employee, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage.

1. Evidence

On August 19, 2005, TABC Enforcement Agent Alfredo Alvarez, along with TABC Agents Nina Gonzales and Gregory Francois, conducted an investigation of Eagle Gulch. At approximately 9:50 p.m., Agent Alvarez entered the bar and observed a very young-looking male subject, who was later identified as 18-year-old Alexander Levitan, seated at the bar holding a 12-ounce bottle of Bud Light beer. Agent Alvarez observed that somebody next to Mr. Levitan at the bar whispered something to him and Mr. Levitan then pushed the beer away from him. According to Agent Alvarez, Mr. Levitan was clean-shaven and appeared to be significantly younger than 21. Mr. Levitan's military identification revealed that he was 18 years old at that time.

Agent Alvarez also observed that bartenders Joshua Matthew Clayton and David Saenz were walking back and forth behind the bar serving other customers and were within approximately two feet from Mr. Levitan. Mr. Levitan pointed out the bartender who served him and Agent Alvarez identified that person as Mr. Clayton. When notified that he had been identified as having served Mr. Levitan, who was a minor, Mr. Clayton stated that he did not recall doing so. He then stated that he assumed his co-worker had already confirmed that Mr. Levitan was over 21.

2. Analysis

The undisputed evidence shows that Mr. Levitan, on August 19, 2005, was 18 years of age and appeared to be significantly younger than 21. The evidence also establishes that Mr. Levitan was present at Eagle Gulch on that date and, while there, was in possession of a beer as he sat at the bar within two feet of two bartenders who were working that night.

Whether Mr. Levitan actually drank the beer or was just holding it is irrelevant - the fact that he was observed with it in his presence and that he, at one point, took the bottle and pushed it away, sufficiently demonstrates that, at the very least, he was in possession of an alcoholic beverage. And the fact that he appeared to be well under 21 years old and was sitting at the bar within two feet of the bartenders while he was in possession of the beer is sufficient to establish that the bartenders, with criminal negligence, permitted a minor to possess an alcoholic beverage in violation of the Code section 106.13 as alleged.

D. May 17, 2007 - Allegation that Respondent, or its agent, servant, or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor.

1. Evidence

On May 17, 2007, TABC enforcement agents Tulita Harris, Nina Gonzales, Greg Francois, and William Allen went to Eagle Gulch as part of a minor sting operation. During such an operation,

TABC agents send an undercover minor into a TABC-licensed or permitted establishment to attempt to purchase alcohol. The undercover minor, before entering the target establishment, is equipped with a valid driver's license or identification card issued by the Texas Department of Public Safety (DPS) as well as DPS-issued money to use for the purchase.

Kimberly Brewer was the undercover minor used in this particular operation. Ms. Brewer was 18 years old at the time and appeared to be youthful and well under 21.¹² She carried her own DPS-issued driver's license with her, which indicated that she was under 21.¹³

Agent Harris observed Ms. Brewer enter Eagle Gulch and approach the side of the bar where the bartender gave her a beer after checking her identification. Agent Harris then contacted other TABC agents in the area and notified them that the sale had been made.

Agent William Allen identified Julian Lozano as the employee who served Ms. Brewer. Eagle Gulch owner, Mr. Patton, testified that he terminated Mr. Lozano's employment because of this incident.

2. Analysis

The undisputed evidence shows that on May 17, 2007, Mr. Lozano, while employed as a bartender for Respondent, served an alcoholic beverage to Ms. Brewer, a youthful-looking minor, on the licensed premises. Accordingly, the ALJ finds that a violation of the Code section 106.13 was established as alleged.¹⁴

¹² TABC Exhibits 7.

¹³ TABC Exhibit 8.

¹⁴ The parties disagreed as to whether the safe harbor defense can be applied to violations of Code section 11.61(b)(13). Because the ALJ finds that Respondent failed to sufficiently show that he meets the criteria necessary to avail himself of the safe harbor defense in the first place, the ALJ does not address this issue.

E. Safe Harbor Defense

For each alleged violation, Respondent relied on the affirmative “safe harbor” defense,¹⁵ to assert that he could not be held responsible or sanctioned for violations committed by his employees. The safe harbor defense provides in relevant part that the employee’s actions relating to the sales, service, dispensing, or delivery of alcoholic beverages to a minor are not attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.

According to TABC rules, the following practices by a licensee/permittee constitute *prima facie* evidence that prong the employer has indirectly encouraged the employee to violate the applicable law:

- (1) failure to insure that all employees possess currently valid certificates from a commission-approved seller-server training program;
- (2) failure to adopt and post within view of its employees, policies and procedures that are designed to prevent and express a strong commitment by permittee to prohibit sales, service or consumption of alcoholic beverages to minors and intoxicated persons; or

¹⁵ Code § 106.14(a).

- (3) failure to insure that employees have read and understood the licensee/permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages to minors or intoxicated persons

1. **Evidence**

Michael Patton and the bar manager of Eagle Gulch, Brian Lewis, both testified that Respondent requires its employees to be seller-server trained and to hold current certification thereof. Documentary and testimonial evidence was presented to show that bartenders Nina Sakalares, Joshua Clayton, and Julian Lozano each had current seller-server certifications on the dates of the alleged incidents concerning them.

Mr. Patton acknowledged, however, that David Saenz's seller-server certification was not current on August 19, 2005, while he was working as a bartender at Eagle Gulch. Mr. Patton explained that Mr. Saenz had been referred through a bartending school that refers its graduates to various bars for employment. Mr. Patton further indicated that in the past, only seller-server-certified bartenders have been referred to him from this particular school. Additionally, he testified that Mr. Saenz had been certified when he graduated from bartending school but, unbeknownst to Mr. Patton, his certification had lapsed before he was hired at Eagle Gulch. Mr. Patton stated that he did not know when Mr. Saenz was originally seller-server certified. He later testified that he did not know if Mr. Saenz was ever, in fact, seller-server certified prior to the August 2005 incident date. Mr. Patton stated that he had assumed Mr. Saenz was certified based on the reputation of the bartending school that referred him to Respondent for employment. Mr. Lewis, the bar manager, also testified that he did not know when Mr. Saenz was first certified. Mr. Patton indicated that he terminated Mr. Saenz's employment in August 2005, when he determined that Mr. Saenz was not certified.

With respect Respondent's policies, Mr. Patton testified that he prepared written policies on December 13, 2004, after consulting Lieutenant Gehra and reviewing the TABC website. He then

posted them on the inside door of the liquor cabinet at Eagle Gulch. He stated that every employee has to view the policies approximately every 20 minutes while working since there is no way to retrieve a bottle of liquor without accessing the inside of the liquor cabinet. He explained that he did not want to post the bar policies in a place where the public could see them because most of his customers did not have cars and he did not want them to see that the bar would pay for a cab in advance.

During their August 19, 2005 investigation, TABC agents confirmed that Eagle Gulch did have written policies posted inside the liquor storage cabinet indicating that employees are prohibited from serving minors or intoxicated persons. Agent Alvarez testified that one or both of the bartenders must have pointed out the posted policies to him. He further stated that he would not consider the location of the policies to be within the view of bar employees.

On May 17, 2007, during his investigation, Agent Allen asked the bartender on duty, Mr. Lozano, if there were any bar policies posted for employees to see and Mr. Lozano said no. Agent Allen checked the bar and employee-only areas of Eagle Gulch for posted policies but did not see any.¹⁶

2. Analysis

Pursuant to the applicable Code provision and corresponding rules, Respondent's violations cannot be excused based on the safe harbor defense based on the evidence presented. Although Mr. Patton's testimony indicates that he requires all Eagle Gulch employees to be current in their seller-server training, the record merely establishes that three out of four employees involved in the alleged incidents held valid certifications. No evidence was offered to show Respondent's total roster of employees, much less whether they all held current seller-server certifications. In fact, the undisputed evidence clearly demonstrates that one of Respondent's employees, David Saenz, was not seller-server certified while he was employed by and working as a bartender at Eagle Gulch.

¹⁶ Respondent's Exhibit 3

And although Mr. Patton offered an explanation as to why he assumed that Mr. Saenz had the required certification, the record is clear that Mr. Patton failed to check to insure that Mr. Saenz was, in fact, seller-server certified as is required to qualify for immunity under the safe harbor defense.

Additionally, according to TABC rules, if a licensee/permittee fails to insure that employees have read and understood its policies and procedures regarding sales, service, or consumption of alcoholic beverages by or to minors or intoxicated persons, that failure is also considered to be *prima facie* evidence that the employer indirectly encouraged the employee to violate the law.

In this case, the first provision of Respondent's written policies and procedures,¹⁷ states in relevant part:

Employees engaged in the sale of alcohol on the premises of Eagle Gulch Saloon are required to read the following procedures, follow the procedures and acknowledge in writing that they have read and intend to follow these procedures.

However, notwithstanding that provision and the testimony of bar manager, Brian Lewis, that all employees were required to be familiar with Respondent's written policies and procedures and that Respondent goes over those procedures and the location where they are posted¹⁸ with each new employee, no evidence was presented to show that any employees actually read the policies or understood them. For example, no signed documents from any employees indicating that they read and understood Respondent's policies and procedures were offered into evidence even though Respondent's policy ostensibly requires each employee to sign and submit such a statement. It is not enough for Respondent to merely develop and post policies - it must also make sure that those policies are read and understood by its employees. The record does not demonstrate that Respondent did so here.

¹⁷ Respondent's Exhibit 3.

¹⁸ The ALJ does not make a finding as to whether Respondent's policies were posted within view of its employees since, Respondent's evidence remains insufficient to show that he qualifies for immunity under the safe harbor affirmative defense, regardless.

As a result, the ALJ finds that the established violations by Respondent's employees as described in sections III A, C, and D above may be attributed to Respondent.

IV. SANCTIONS

The Commission has adopted a Standard Penalty Chart which sets forth suggested sanctions for the Commission's agents, compliance officers, or other designated personnel to use when settling cases prior to a hearing.¹⁹ The suggested sanctions bind neither an ALJ nor the Commission and deviations from the chart are permitted if there are aggravating or mitigating circumstances. For the first violation of permitting a minor to possess or consume an alcoholic beverage contrary to Code section 106.13, the penalty chart recommends a seven-to-fifteen day suspension. For a second violation of the same provision, the suggested penalty is a ten-to-ninety day suspension. And the suggested sanction for a first violation involving an employee being intoxicated on a licensed premise contrary to the Code section 11.61(b)(13), is a ten-to-fifteen day suspension.

Although the Standard Penalty Chart is not binding, it does provide some guidance in considering a penalty. And based on the range of suggested sanctions for the corresponding violations, the ALJ does not agree with Staff's recommendation for permit cancellation. The ALJ does, however, find that the number of violations committed by Respondent over a relatively short period of time, particularly in light of the fact that Respondent has only been a permit holder since January 1, 2005, is indeed cause for concern. Additionally, although Mr. Patton apparently terminated the employment of Ms. Sakalares and Mr. Saenz once he determined that they had committed violations, the evidence presented does not inspire any confidence that Respondent is adequately overseeing the operation of the licensed premises as required by law and in a manner that would prevent violations from occurring. Accordingly, the ALJ recommends suspensions on the high end of the suggested penalty range for each established violation as specified further in the recommendation section below.

¹⁹ 16 Tex. Admin. Code (TAC) § 37.60(a).

For the types of violations at issue in this case, the Commission may, but is not required to, allow the permittee the opportunity to pay a civil penalty in lieu of suspension.²⁰ The civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended.²¹

The amount of the civil penalty must be appropriate to the nature and seriousness of the violation in consideration of the following factors:²²

- the type of permit held
- the type of violation
- any aggravating or ameliorating circumstances
- any previous violations

In this case, there is no evidence that Respondent had actual knowledge of its employee's actions at the time they committed violations of the Code and TABC rules. And the evidence shows that Respondent terminated the employment of three of the four violators upon becoming aware that violations had occurred.²³ Although the violations themselves did not result in any injury, property damage or other safety issues, each certainly had the potential to affect the health, safety, and welfare of others. And although Respondent has no prior history of violations, the first violation established in this case occurred less than three weeks after Respondent was permitted. It does appear, however, Respondent was able to go for almost two years without any violations.

²⁰ In addition to the violation of Code § 106.13, which the ALJ found was established by a preponderance of the evidence, Staff also alleged a violation of Code § 106.03 with respect to the May 17, 2007 incident. According to the Code and TABC rules, a licensee or permittee may not be offered the option of paying a civil fine in lieu of a suspension for a violation of Code § 106.03. Code § 11.64 and 16 TAC § 37.61(a)(10). The ALJ, however, finds that the evidence was insufficient to establish a violation of Code § 106.03 since no evidence of an actual sale was presented.

²¹ Code § 11.64.

²² Code § 11.641.

²³ There is no evidence that Respondent terminated Josh Clayton's employment even though he was identified as having served alcohol to a minor.

The ALJ is primarily disturbed by the apparent lack of oversight by Respondent combined with the absence of any evidence to suggest that Respondent has taken steps to prevent similar violations from occurring in the future. Therefore, based on the totality of the circumstances and for the reasons stated above, the ALJ finds that a civil penalty of no less than \$200.00 a day in lieu of suspension is appropriate.

V. RECOMMENDATION

Accordingly, the ALJ recommends that Respondent be sanctioned as follows:

- For having an employee intoxicated on the licensed premises on February 17, 2005, contrary to Code section 11.61, Respondent's permit should be suspended for a period of 10 days with the option to pay \$150.00 per day in lieu of the suspension pursuant to applicable law.
- For the August 19, 2005 instance of Respondent's employee, with criminal negligence, permitting a minor to possess an alcoholic beverage in violation of Code section 106.13, Respondent's permit should be suspended for a period of 10 days with the option to pay \$150.00 per day in lieu of the suspension pursuant to applicable law.
- For the May 17, 2007, instance of Respondent's employee, with criminal negligence, serving an alcoholic beverage to a minor, Respondent's permit should be suspended for a period of 20 days with the option to pay \$150.00 per day in lieu of the suspension pursuant to applicable law.

VI. FINDINGS OF FACT

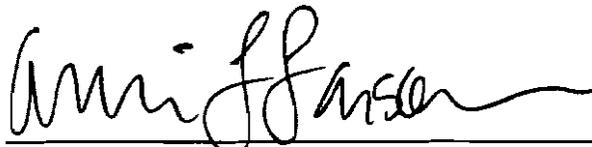
1. Eagle Gulch Saloon (Respondent) is the holder of Mixed Beverage and Mixed Beverage Late Hours permits issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 214 Losoya, San Antonio, Bexar County, Texas.
2. Michael Patton is the sole owner of Respondent.
3. On June 5, 2007, TABC Staff (Staff) sent a Notice of Hearing to Respondent.

4. The Notice of Hearing contained a statement of the time, date, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the TABC.
5. On June 22, 2007, a public hearing was held at the State Office of Administrative Hearings in San Antonio, Bexar County, Texas, before Administrative Law Judge Ami L. Larson (ALJ). Staff appeared through attorney Christopher Gee. Respondent appeared through attorney David Cunningham. The presentation of evidence concluded that day but the administrative record remained open until December 3, 2007, to allow the parties to submit written objections, responses, and closing arguments as ordered by the ALJ.
6. Respondent first became permitted by TABC on January 1, 2005.
7. On February 17, 2005, Nina Sakalares was employed by Respondent as a bartender and was intoxicated while working on the permitted premises.
8. On July 15, 2005, Victor Juarez was not employed by Respondent.
9. On August 19, 2005, Alexander Levitan was 18 years of age and appeared significantly younger than 21.
10. On August 19, 2005, Alexander Levitan was in possession of a beer while seated at Respondent's bar within two feet of Joshua Clayton and David Saenz, both of whom were employed by Respondent as bartenders and were working that night.
11. On May 17, 2007, Julian Lozano, while employed as a bartender for Respondent, served an alcoholic beverage to Kimberly Brewer, an 18-year-old who appeared younger than 21.
12. Respondent did not insure that all its employees possessed current valid certificates from a commission-approved seller-server training program.
13. On August 19, 2005, David Saenz was employed as a bartender for Respondent and did not hold a current valid certificate from a commission-approved seller-server training program.
14. Respondent had no record of Mr. Saenz ever having been seller-server certified prior to being employed by Respondent.
15. Respondent failed to insure that its employees read and understood its policies and procedures regarding sales, service, or consumption of alcoholic beverages to minors or intoxicated persons.
16. Respondent has not taken any significant steps to prevent violations from occurring in the future.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, and §§ 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. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE (TAC) § 155.55.
4. Respondent indirectly encouraged its employees to violate the law. 16 TAC § 50.10(d).
5. Based on the above Findings of Fact, on February 17, 2005, Respondent violated TEX. ALCO. BEV. CODE § 11.61(b)(13) and a 10-day suspension is warranted for this violation pursuant to 16 TAC § 37.60.
6. Based on the above Findings of Fact, on August 19, 2005, Respondent violated TEX. ALCO. BEV. CODE § 106.13 and a 10-day suspension is warranted for this violation pursuant to 16 TAC § 37.60.
7. Based on the above Findings of Fact, on May 17, 2007, Respondent violated TEX. ALCO. BEV. CODE § 106.13 and a 20-day suspension is warranted for this violation pursuant to 16 TAC § 37.60.
8. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, the Respondent should be allowed to pay a civil penalty in the amount of \$150.00 per day in lieu of suspension of its permits.

SIGNED January 14, 2008.



AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS