

DOCKET NO. 585279

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

§
§
§
§
§
§
§
§
§
§

BEFORE THE TEXAS

VS.

FT. WORTH P.R.'S INC.
D/B/A PR'S
PERMIT/LICENSE NO(s). MB240616, LB

ALCOHOLIC

TARRANT COUNTY, TEXAS
(SOAH DOCKET NO. 458-10-0792)

BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 13th day of July
2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Tanya Cooper, presiding. The hearing convened on February 3, 2010 and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on February 9, 2010. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

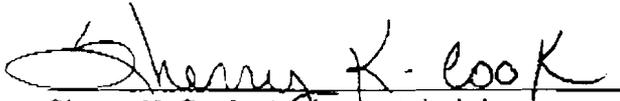
It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent shall pay a civil penalty in the amount of \$9,000.00 on or before August 10, 2010. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above license or permit by the Code will be **SUSPENDED** beginning at 12:01 A.M. on August 18, 2010 and shall remain suspended for **thirty (30) consecutive days**.

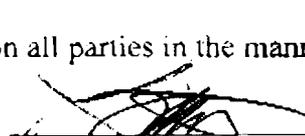
This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on August 6, 2010, unless a Motion for Rehearing is filed before that date.

SIGNED this the 13 day of July
2010 at Austin, Texas


Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the above order was served upon all parties in the manner indicated below July 13, 2010.



Joan Bates
TABC Legal Services

Tanya Cooper
Administrative Law Judge
State Office Of Administrative Hearings
6777 Camp Bowie, Blvd. Suite 400
Fort Worth, Texas 76116
VIA FACSIMILE: (817) 377-3706

John L. Gamboa
ATTORNEY FOR RESPONDENT
2501 Parkview, Suite 405
Fort Worth, Texas 76102
VIA FACSIMILE: (817) 885-8504

Ft. Worth P.R.'S Inc.
RESPONDENT
d/b/a PR'S
2411 N. Main Street
Fort Worth, Texas 76106
VIA U. S. FIRST CLASS MAIL

Shelia Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 585279

REGISTER NUMBER:

NAME: FT. WORTH P.R.'S

TRADENAME: P.R.'S

ADDRESS: 2411 NORTH MAIN STREET, FORT WORTH, TEXAS 76106

DUE DATE: August 10, 2010

PERMITS OR LICENSES: MB240616, LB240617

AMOUNT OF PENALTY: \$9,000.00

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 with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., 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.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

FT. WORTH OFFICE

6777 Camp Bowie Blvd Suite 400

Fort Worth, Texas 76116

Phone: (817) 731-1733

Fax: (817) 377-3706

DATE:

02/09/2010

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

12

REGARDING:

PROPOSAL FOR DECISION

DOCKET NUMBER:

458-10-0792

JUDGE TANYA COOPER

FAX TO:

FAX TO:

JOHN L. GAMBOA

(817) 885-8504

SHELIA A. LINDSEY (TEXAS ALCOHOLIC BEVERAGE
COMMISSION)

(713) 426-7965

LOU BRIGHT GENERAL COUNSEL (Alcoholic Beverage
Commission, Texas)

(512) 206-3498

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT DIANA DUPRE(dsc) (817) 731-1733

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address via the U.S. Postal Service. Thank you.

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 9, 2010

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

**Re: Docket No. 458-10-0792; Texas Alcoholic Beverage Commission,
v Fort Worth P.R.'s d/b/a P.R.s (TABC No. 585279)**

Dear Mr. Steen:

Enclosed please find the Proposal for Decision in the above-referenced case. It contains my recommendation and underlying rationale.

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,

A handwritten signature in black ink that reads "Tanya Cooper".

Tanya Cooper
Administrative Law Judge

TC/dd

attachments

SOAH DOCKET NO. 458-10-0792

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
FT. WORTH P.R.'S D/B/A P.R.'S, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) brought this action against Ft. Worth P.R.'s d/b/a P.R.'s (Respondent) alleging that Respondent, its agent, servant, or employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 106.13. The Administrative Law Judge (ALJ) finds Petitioner proved the allegation by a preponderance of the evidence and recommends a 30-day suspension, or a \$300 per day civil penalty for a total of \$9,000 in lieu of the suspension.

1. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the Proposed Findings of Fact and Proposed Conclusions of Law sections of this Proposal without further discussion here.

On February 3, 2010, a hearing convened before ALJ Tanya Cooper at the State Office of Administrative Hearings (SOAH), located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. Petitioner was represented at the hearing by Shelia A. Lindsey, TABC Staff Attorney. Respondent appeared in person and was represented by its attorney, John L. Gamboa. The record closed on the same date.

II. APPLICABLE LAW

TABC may cancel or suspend a retail dealer's permit for not more than 90 days if the permittee's agent or employee, "with criminal negligence," sells or serves an alcoholic beverage to a minor.¹ The Code adopts the definition of criminal negligence found in the Texas Penal Code:

A person acts with criminal negligence, or is criminally negligent with respect to circumstances surrounding his conduct, or the result of his conduct when he ought to be aware of a substantial or unjustifiable risk and the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as perceived by the actor.²

For a second violation, TABC may cancel the permit or suspend it for not more than six months. For a third violation within a period of 36 months, TABC may cancel the permit or suspend it for not more than 12 months.³ Instead of a suspension, TABC may allow a permittee to pay a civil penalty.⁴ The amount of civil penalty imposed may not be less than \$150 per day nor more than \$25,000 for each day the permit was to be suspended.⁵

The actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor will not be attributable to the employer if: (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law.⁶ However, the following practices constitute prima facie evidence of indirect encouragement of law within the meaning of §106.14(a)(3) of the Alcoholic Beverage Code:

¹ TEX. ALCO. BEV. CODE ANN. (Code) § 106.13(a).

² Code § 1.08 and TEX. PEN. CODE ANN. § 6.03(d).

³ Code § 106.13(b).

⁴ 16 TEX. ADMIN. CODE (TAC) § 37.61.

⁵ Code § 11.64(a).

⁶ Code § 106.14.

that 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.⁷

III. EVIDENCE & ALJ'S ANALYSIS OF EVIDENCE

A. Background Information

Respondent holds a Mixed Beverage Permit, MB-240616, which includes a Mixed Beverage Late Hours Permit, for the premises known as P.R.'s, located at 2411 N. Main St., Fort Worth, Texas 76106. The permits were issued by TABC on October 19, 1993, and have been continuously renewed. Respondent's administrative violation history was admitted into evidence which includes, in part, the following:

Violation date	Violation description	Disposition
09-26-09	Sale/Serve/Deliver AB To Minor	Written Warning
09-18-09	Breach/Failure To Report	Written Warning
01-13-07	Sale/Serve/Deliver AB To Minor	Suspension or Civil Penalty
01-13-07	Intoxicated Permittee/Licensee On Premises	Suspension or Civil Penalty
05-30-04	Sale/Serve/Deliver AB To Minor	Civil Penalty Only
06-21-03	Permitting Removal Of AB From License Premise	Written Warning
04-21-03	Breach/Failure To Report	Civil Penalty Only
12-09-02	Breach/Failure To Report	Written Warning
03-15-02	Sale/Serve/Deliver AB To Minor	Suspension
07-21-01	Sale to minor	Civil Penalty
11-03-01	Permit Consump. During Prohibited Hours By Lic/Perm	Civil Penalty Only
04/10/99	Breach, Failure To Report	Written Warning

⁷ 16 TAC § 50.11(d) (2).

B. Petitioner's Evidence

Petitioner presented the testimony of TABC Agent Matthew Kelso, TABC Agent William Feick, and one of the minors involved in the "sting," William Shotwell. In addition, it presented documentary evidence including Respondent's permit and history, photographs taken of the minors the night of the "sting" operation, and copies of both minors' driver's licenses.

Agent Kelso testified that on April 12, 2009, TABC agents conducted a "sting" operation at Respondent's licensed premises. During this operation, one of Respondent's bartenders sold two beers to two underage minors. The minors presented two provisional Texas drivers' licenses to the bartender showing their correct dates of birth, June 27, 1990 and October 11, 1991, and their hands had been marked with P.R.'s designation for minors (i.e. an "X" on both hands made with a permanent marker) by P.R.'s employees working at the premises' door where the minors' identification had also been checked.

Agent Kelso said he was inside the licensed premises and testified he observed the alcoholic beverage sales transaction between the minors, Alexandra Cook and William Shotwell, and Respondent's bartender. According to Agent Kelso, Mr. Shotwell ordered two Bud Light beers, produced both his driver's license and Ms. Cook's driver's license showing they were both minors, and paid for the beers with a \$20 bill. Upon receiving the beers and change from the \$20, Mr. Shotwell and Ms. Cook set the beer bottles on a nearby table and exited the premises. Agent Kelso confirmed the bottles' contents as beer and called for other TABC agents to enter the premises to complete the "sting" investigation and issue any appropriate citations. Agent Kelso remained inside the premises to ensure the proper bartender was contacted by the enforcement team. After seeing the correct bartender was being contacted, Agent Kelso left the premises to check TABC records for any seller/server certificates on file for Respondent's employees. Agent Kelso testified he could not find any documentation for Respondent's employees having completed this training in TABC's data base of information.

Mr. Shotwell testified that he and Ms. Cook produced their driver's licenses at the door prior to entering the licensed premises. Both of their hands were marked with a black "X" to signify they were minors. According to Ms. Shotwell, he and Ms. Cook approached one of the bars. The bar was busy, so they waited for the bartender to approach them. Mr. Shotwell said he asked the bartender for two beers. After placing the drink order, Mr. Shotwell pushed both driver's licenses across the bar toward the bartender using his hands so that the back of his hands bearing the black "Xs" were visible to the bartender. He stated that the bartender picked up the driver's licenses, looked at them, and then brought over the beers. Mr. Shotwell paid for the beers. Mr. Shotwell stated that he and Ms. Cook then left the beer bottles on a nearby table as they had been previously instructed by the TABC agents overseeing the "sting."

TABC Agent William Feick stated that he and another TABC Agent, Jason Chapman, contacted Respondent's employees about the sale to minor violations. Agent Feick spoke with Respondent's manager while Agent Chapman spoke with Respondent's bartender. According to Agent Feick, he and Respondent's manager walked around the licensed premises discussing the situation, and while doing so, Agent Feick did not see any posted policies by Respondent concerning prohibiting alcoholic beverage sales to minors.

C. Respondent's Evidence

Respondent's manager, Keith Gilmore, testified on Respondent's behalf. He has been employed by Respondent for three years, oversees all Respondent's operations at the licensed premises, and was present when this incident occurred. Mr. Gilmore said that he holds meetings with Respondent's staff before and after each period of operation. During these meetings, he stresses compliance with all TABC regulations, and is particularly diligent in adopting procedures to avoid any sales to minors or intoxicated persons. According to Mr. Gilmore, all of Respondent's personnel associated with serving alcoholic beverages have received seller/server training, including

himself,⁸ and he has further posted a list of Respondent's policies concerning compliance with TABC regulations.⁹

Mr. Gilmore said there were two bartenders on duty the night of this incident. According to Mr. Gilmore, he noticed Mr. Shotwell and Ms. Cook with the beer bottles and thought something was not right due to their behavior. He acknowledged that he thought the pair looked young, but said he had seen some 30-year-olds that looked younger than 21. Mr. Gilmore said he questioned one of the bartenders about the pair and was assured everything was alright. Mr. Gilmore stated despite all precautions having been taken by Respondent, one person, the bartender, resulted in this violation occurring. Because he was unable to determine which bartender had sold the beer to Mr. Shotwell, he terminated both bartenders that night.

Mr. Gilmore denied telling Agent Feick that there were no policies concerning alcoholic beverage sales posted. According to Mr. Gilmore, smaller versions of Respondent's Exhibit 3 were posted on poles behind the premises' bars. He further denied telling Agent Feick that the bartenders were not seller/server certified. Mr. Gilmore said the seller/server training for Respondent's staff had been secured through a provider listed to the TABC's web site. When asked about why he had not raised a safe-harbor defense to this violation prior to the hearing, Mr. Gilmore said he was not aware of the defense.

Ricky Dale McCarley is Respondent's principal shareholder. Mr. McCarley said that he visits this licensed premises on regular basis. He testified he was involved with a few decisions concerning this licensed premises, but that the majority of operational decisions were left to Mr. Gilmore because he was a good manager.

D. Analysis

Based on the evidence, Respondent's employee, a bartender, with criminal negligence, sold

⁸ Respondent's Exhibit 3.

alcoholic beverage, *i.e.*, two bottles of Bud Light beer, to minors, William Shotwell and Alexandra Cook, on April 12, 2009. While purchasing the beers, Mr. Shotwell produced his driver's license and Ms. Cook's driver's license, as well as displayed his hands that had "X" marks placed on them by Respondent's staff upon entering the licensed premises signifying he was underage. Mr. Shotwell observed the bartender visibly examine the driver's licenses before she took his money and delivered the beer bottles to him. The bartender's conduct rises to the level of criminal negligence in that Mr. Shotwell's driver's license indicated his date of June 27, 1990, and Ms. Cook's driver's license indicated her date of birth of October 11, 1991. The bartender's failure to perceive the minors' ages and the risk posed by selling beer to the minors is a gross deviation from what a reasonable person would perceive under the same circumstances. The bartender further disregarded Respondent's own safeguards (placing "X" marks on underage patrons' hands) in selling beer to these minors.

The sale of an alcoholic beverage to a minor is a health, safety, and welfare violation. Respondent's permits were issued by TABC on October 19, 1993. From the first day, Respondent had the responsibility to ensure that alcohol is not sold to minors and to ensure that its employees were not merely aware of, but also followed the laws prohibiting the sale of alcohol to minors. Respondent's manager appears to have made some efforts in preventing this type of Code violation, but these efforts were insufficient because these violations still occurred. Further, despite Mr. Gilmore's claims to the contrary, evidence of seller/server training was not produced for Respondent's bartenders on duty at the time of this incident.

TABC Staff requested that Respondent's permits be suspended for a period of 30 days, or in lieu of suspension, that Respondent pay a penalty assessed at \$300 per day of the recommended suspension, which is \$9,000. After having reviewed Respondent's licensing history, which contains several health, safety, and welfare violations, the ALJ finds the requested suspension or penalty payment is appropriate.

⁹ Respondent's Exhibit 1.

IV. PROPOSED FINDINGS OF FACT

1. Ft. Worth P.R.'s Inc. d/b/a P.R.'s (Respondent) holds Mixed Beverage Permit, MB-240616, which includes a Mixed Beverage Late Hours Permit, issued by TABC. Respondent's premises are located at 2411 N. Main St., Fort Worth, Texas 76106.
2. The permits were issued by TABC on October 19, 1993, and have been continuously renewed.
3. On October 30, 2009, Petitioner issued its notice of hearing to Respondent.
4. The notice contained a statement of the time, place, and 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 matters asserted.
5. On February 3, 2010, a hearing convened before ALJ Tanya Cooper at SOAH offices, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. Petitioner was represented by Shelia A. Lindsey, TABC Staff Attorney. Respondent appeared and was represented by attorney John L. Gamboa. The record closed on the same date.
6. On April 12, 2009, Respondent's employee, a bartender, sold alcoholic beverage, two bottles of Bud Light beer, to minors, William Shotwell and Alexandra Cook, during an undercover operation involving Respondent's licensed premises.
7. On that date, the minors were under 21 years of age and had a youthful appearance.
8. Mr. Shotwell produced his and Ms. Cook's driver's licenses, which reflected their correct dates of birth, and the bartender looked at the licenses.
9. Mr. Shotwell's hands were also clearly marked the an "X" made with a permanent marker used by Respondent's door employees that confirmed his age was under 21 years, which was also visible to Respondent's bartender at the time of the sale and delivery of the alcoholic beverage to Mr. Shotwell and Ms. Cook.
10. This bartender's conduct grossly deviated from the standard of care an ordinary seller of alcoholic beverages would exercise under the same or similar circumstances.
11. No evidence was produce to confirm that either of Respondent's bartenders that were on duty on April 12, 2009, had attended a TABC-sanctioned seller/server training course.
12. Respondent's licensing history includes several health, safety, and welfare violations, including other violations of the Code involving the sale of alcohol to a minor.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 106.13.
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with 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 Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the Findings of Fact, on April 12, 2009, Respondent's employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of Code § 106.13.
5. Respondent's permit and licenses should be suspended for 30 days or Respondent should be allowed to pay \$9,000 (*i.e.* 30 days x \$300/day) in lieu of any permit suspension.

SIGNED February 9, 2010.



TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

FT. WORTH OFFICE
6777 Camp Bowie Blvd Suite 400
Fort Worth, Texas 76116
Phone: (817) 731-1733
Fax: (817) 377-3706

SERVICE LIST

AGENCY: Alcoholic Beverage Commission, Texas (TABC)
STYLE/CASE: FT.WORTH P.R.'S dba P.R.'s
SOAH DOCKET NUMBER: 458-10-0792
REFERRING AGENCY CASE: 585279

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ TANYA COOPER

REPRESENTATIVE / ADDRESS

PARTIES

JOHN L. GAMBOA
ATTORNEY AT LAW
ACUFF & GAMBOA, LLP
2501 PARKVIEW DRIVE, SUITE 405
FORT WORTH, TX 76102
(817) 885-8500 (PH)
(817) 885-8504 (FAX)

RESPONDENT

SHELIA A. LINDSEY
STAFF ATTORNEY
TEXAS ALCOHOLIC BEVERAGE COMMISSION
427 W. 20TH STREET, Suite 600
HOUSTON, TX 77008
(713) 426-7900 (PH)
(713) 426-7965 (FAX)

PETITIONER

cc: Docket Clerk, State Office of Administrative Hearings
LOU BRIGHT GENERAL COUNSEL, TABC. Fax No. 512-206-3498