

DOCKET NO. 592768

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| TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner | § | BEFORE THE TEXAS |
| | § | |
| | § | |
| VS. | § | |
| | § | |
| NORTHWEST PETROLEUM LP D/B/A SONTERRA TRAVEL CENTER, Respondent | § | ALCOHOLIC |
| | § | |
| | § | |
| PERMIT NO. BQ713542 | § | |
| | § | |
| WILLIAMSON COUNTY, TEXAS (SOAH DOCKET NO. 458-11-0213) | § | BEVERAGE COMMISSION |

DOCKET NO. 593930

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|---|---|----------------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner | § | BEFORE THE TEXAS |
| | § | |
| | § | |
| VS. | § | |
| | § | |
| NORTHWEST PETROLEUM LP D/B/A SAM BASS RD SHELL, Respondent | § | ALCOHOLIC |
| | § | |
| | § | |
| PERMIT NO. BQ408007 | § | |
| | § | |
| WILLIAMSON COUNTY, TEXAS (SOAH DOCKET NO. 458-11-0213) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 19TH day of OCTOBER, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge John H. Beeler presiding. The hearing convened on October 13, 2010 and the SOAH record closed on the same date. The Administrative Law Judge (ALJ) made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on December 7, 2010. The PFD was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record

herein. On December 23, 2010, Petitioner filed Exceptions. No reply to the Exceptions was filed.

After review and due consideration of the Proposal for Decision and Petitioner's Exceptions, I am persuaded by Petitioner's arguments that the ALJ misapplied the definition of "permittee" in Tex. Alco. Bev. Code §1.04(11), and therefore will **modify accordingly the ALJ's proposed Findings of Fact and Conclusions of Law** that are contained in the Proposal for Decision.

Finding of Fact No. 2 is clarified to read:

On March 13, 2010, Respondent's employee with criminal negligence sold alcohol to a minor.

Finding of Fact No. 3 is clarified to read:

On April 1, 2010, Respondent's employee with criminal negligence sold alcohol to a minor.

Finding of Fact No. 4 is deleted pursuant to Tex. Gov't Code Ann. §2001.058(e)(1) because it does not properly apply or interpret applicable law.

Conclusion of Law No. 6 is modified to read:

Based on the Findings of Fact and Conclusions of Law, Respondent's permit at the Jarrell location should be suspended for twelve days, or in lieu of suspension, Respondent should be allowed to pay a civil penalty in the amount of \$300.00 per day, for a total of \$3,600.00. Tex. Alco. Bev. Code Ann. §§11.61, 11.64 and 11.641.

Conclusion of Law No. 7 is modified to read:

Based on the Findings of Fact and Conclusions of Law, Respondent's permit at the Round Rock location should be suspended for twelve days, or in lieu of suspension, Respondent should be allowed to pay a civil penalty in the amount of \$300.00 per day, for a total of \$3,600.00. Tex. Alco. Bev. Code Ann. §§11.61, 11.64 and 11.641.

The changes to Conclusions of Law Nos. 6 & 7 are made pursuant to Tex. Gov't Code Ann. §2001.058(e)(1) to apply the proper interpretation of Tex. Alco. Bev. Code §1.04(11). Although under Commission Rule 34.1(j) the Schedule of Sanctions in Commission Rule 34.2 does not apply to contested cases, the sanctions imposed in this Order are consistent with the level of sanctions for which an agent of the Commission could have settled the cases before they were referred to the Commission's Legal Division. As noted in Petitioner's Exceptions, Respondent's failure to have his clerks seller/server trained pursuant to Tex. Alco. Bev. Code §106.14 justifies a penalty at the higher end of the scale.

As modified herein, I adopt the Findings of Fact and Conclusions of Law proposed by the ALJ in the PFD into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED in Docket No. 592768 that Respondent pay a civil penalty in the amount of **\$3,600.00** on or before the 15TH DAY OF NOVEMBER, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under Permit No. BQ713542 by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the 23RD DAY OF NOVEMBER, 2011, and shall remain suspended for **twelve (12)** consecutive days.

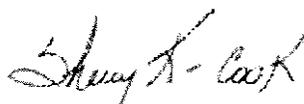
If this Order in Docket No. 592768 is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$3,600.00** on or before the **TENTH (10th)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under Permit No. BQ713542 by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **EIGHTEENTH (18th)** day following the date the judgment is signed and shall remain suspended for **twelve (12)** consecutive days.

IT IS THEREFORE ORDERED in Docket No. 593930 that Respondent pay a civil penalty in the amount of **\$3,600.00** on or before 15TH DAY OF NOVEMBER, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under Permit No. BQ408007 by the Code will be **SUSPENDED** beginning at 12:01 A.M. on 23RD DAY OF NOVEMBER, 2011, and shall remain suspended for **twelve (12)** consecutive days.

If this Order in Docket No. 593930 is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$3,600.00** on or before the **TENTH (10th)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under Permit No. BQ408007 by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **EIGHTEENTH (18th)** day following the date the judgment is signed and shall remain suspended for **twelve (12)** consecutive days.

This Order will become final and enforceable on the 14TH day of NOVEMBER, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

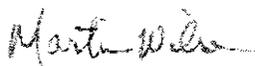
SIGNED this the 19TH day of OCTOBER, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 19TH day of OCTOBER, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

John H. Beeler
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, Texas 78701
VIA FACSIMILE: (512) 322.2061

Northwest Petroleum LP
d/b/a Sonterra Travel Center and Sam Bass Rd Shell
RESPONDENT
17171 Park Row Drive, Suite 295
Houston, Texas 77084
VIA REGULAR MAIL

John W. Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL: JOHN.SEDBERRY@TABC.STATE.TX.US

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 592768 REGISTER NUMBER:

NAME: NORTHWEST PETROLEUM LP

TRADENAME: SONTERRA TRAVEL CENTER

ADDRESS: 11710 IH35 N, SUITE D, JARRELL, TEXAS 76537

DUE DATE: 11/15/2011

PERMITS OR LICENSES: BQ713542

AMOUNT OF PENALTY: \$3,600

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.

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 593930 REGISTER NUMBER:

NAME: NORTHWEST PETROLEUM LP

TRADENAME: SAM BASS RD SHELL

ADDRESS: 806 SAM BASS ROAD, ROUND ROCK, TEXAS 78681

DUE DATE: 11/15/2011

PERMITS OR LICENSES: BQ408007

AMOUNT OF PENALTY: \$3,600

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.

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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.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing was held on October 13, 2010, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas, before John H. Beeler, Administrative Law Judge (ALJ). Staff Attorney John W. Sedberry represented Staff, and Respondent's owner, Fazil Malik, represented Respondent. The record closed at the conclusion of the hearing.

II. DISCUSSION

The Texas Alcoholic Beverage Code (Code) provides that the "...commission or administrator may cancel or suspend for not more than 90 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor..."¹

A. Agreed Facts

Respondent holds Wine and Beer Retailer's Off Premise Permits issued by the TABC for the premises at 11710 IH 35-N, Suite D, Jarrell, Texas, and 806 Sam Bass Road, Round Rock, Texas. On March 13, 2010, TABC conducted a minor sting operation at the Jarrell location, and on April 1, 2010, TABC conducted a minor sting operation at the Round Rock location. The same minor was used on both occasions and both times carried a driver's license showing him to be 18 years old. During the sting at the Round Rock location, the clerk sold him a six-pack of beer without asking to see the driver's license. At the Jarrell location, the clerk sold the minor a six-pack of beer after looking at the license. Neither clerk had a current TABC seller-server certification.

¹ Code § 106.13.

B. The Parties' Positions

Staff asked that each permit be suspended for 15 days and that Respondent be allowed to pay a \$300 civil penalty in lieu of suspension for each violation. Staff offered the permit history of each location establishing that a violation at the Round Rock location resulted in the payment a civil penalty for sale to a minor in 2000, and that the Jarrell location has no prior violations.

Respondent stated that the minor used in the sting operations appeared to be an adult and asked the ALJ to make the proper determination of the length of suspension.

C. Analysis

Rule 16 TEX. ADMIN. CODE (TAC) § 34.2 authorizes TABC's agents, compliance officers or other specifically designated personnel to settle complaints based on alleged violations. For a violation of this type, Staff may settle the case for an 8-12 day suspension for a first violation, and a 16-24 day suspension for a second violation, and in lieu of suspension, a Respondent may elect to pay a \$300 per day penalty.

As outlined in Code § 11.641, the penalty amount must be appropriate for the nature and seriousness of the violation in consideration of:

- (1) the type of license or permit held;
- (2) the type of violation;
- (3) any aggravating or ameliorating circumstances concerning the violation, including those enumerated in Section 11.64(c); and
- (4) the permittee's or licensee's previous violations.

Respondent had a previous violation at one location and none at the other, and is permitted to sell only wine and beer. While the violations are serious, there was no evidence that Respondent permitted or was aware of the sales. These facts weigh in favor of Respondent. On the other hand, neither of the clerks held a current TABC seller-server certificate.

Subsections (b) and (c) of Code § 11.64 allow the TABC or Administrator to relax any provision of the Code relating to the suspension or cancellation of the permit and assess a sanction that is just under the circumstances, or reinstate the permit during the period of suspension on payment by the permittee of a fee of not less than \$75 nor more than \$500, if the any of the following exist:

| Factors | Evidence |
|---|--|
| (1) The violation could not reasonably have been prevented by the permittee by the exercise of due diligence. | Respondent was not present when the violations occurred, but also had not required the clerks to maintain TABC seller-server certificates. |
| (2) The permittee or licensee was entrapped. | No evidence. |
| (3) An agent, servant, or employee of the permittee violated the Code without the knowledge of the permittee. | No allegation was made that Respondent of the violations. |
| (4) The permittee did not knowingly violate the Code. | No allegation was made that Respondent knew of the violations. |
| (5) The permittee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations. | No evidence. |
| (6) The violation was a technical one. | No evidence. |

Based on the facts and applicable law, the ALJ recommends a seven-day suspension or the imposition of a \$150 location per day civil penalty for a total of \$1,050 for the Jarrell location and a 12-day suspension and \$150 per day monetary suspension for a total of \$1,800 for the Round Rock location. While the Jarrell location does have one prior violation, it was 10 years between its occurrence and the one being alleged at the hearing, and a 12-day suspension is appropriate.

III. FINDINGS OF FACT

1. Northwest Petroleum LP d/b/a Sonterra Travel Center and d/b/a Sam Bass RD Shell (Respondent) holds Wine and Beer Retailer's Off Premise Permits BQ713542 and BQ408007 issued by the Texas Alcoholic Beverage Commission (TABC) for the

premises at 11710 IH 35-N, Suite D, Jarrell, Texas, and 806 Sam Bass Road, Round Rock, Texas.

2. On March 13, 2010, Respondent's employee sold alcohol to a minor.
3. On April 1, 2010, Respondent's employee sold alcohol to a minor.
4. Respondent has had no previous violations of the Texas Alcoholic Beverage Code at the Jarrell location and one previous violation at the Round Rock location, which occurred 10 years prior to the violations alleged at the hearing.
5. The clerks who sold alcohol to minors did not hold current TABC seller-server certificates.
6. Respondent was not present when the violations occurred.
7. TABC's Staff sent a notice of the hearing to Respondent on September 17, 2009. The notice included the time, date, and nature of the hearing; legal authority and jurisdiction under which the hearing would be held; applicable statutes and rules; and the matters asserted.
8. The hearing was held on October 13, 2010, at the State Office of Administrative Hearings, 300 W. 1515 Street, Austin, Texas. Staff Attorney John W. Sedberry represented TABC's Staff, and owner Fazil Malik represented Respondent.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 25.04 and 11.61(b)(13).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. ch. 2003.
3. The parties received timely and adequate notice of the hearing, as required by TEX. GOV'T CODE ANN §§ 2001.051 and 2001.052.
4. Staff bore the burden of proof in this proceeding. 1 TEX. ADMIN. CODE § 155.247.
5. The acts set out in Findings of Fact Nos. 2 and 3, constitute violations of TEX. ALCO. BEV. CODE ANN. § 106.13.

6. Based on the Findings of Fact and Conclusions of Law, Respondent's permit at the Jarrell location should be suspended for seven days, or in lieu of suspension, Respondent should pay a \$150 per day penalty for a total of \$1,050. TEX. ALCO. BEV. CODE ANN. §§ 11.61, 11.64, and 11.641.
7. Based on the Findings of Fact and Conclusions of Law, Respondent's permit at the Round Rock location should be suspended for 12 days, or in lieu of suspension, Respondent should pay a \$150 per day penalty for a total of \$1,800. TEX. ALCO. BEV. CODE ANN. §§ 11.61, 11.64, and 11.641

SIGNED December 7, 2010.



JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS