

DOCKET NO. 624880

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
	§	
VS.	§	
	§	
BUC-EE'S, LTD. D/B/A BUC-EES #17, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT BF536309	§	
	§	
CALDWELL COUNTY, TEXAS (SOAH DOCKET NO. 458-14-4102)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd day of April, 2015, 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 (ALJ) John Beeler presiding. The hearing on the merits convened on July 28, 2014 and the SOAH record closed that same day. The Administrative Law Judge issued a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 23, 2014. The Proposal for Decision was properly served on all parties and the parties were given an opportunity to file exceptions as part of the record herein. No exceptions were filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

THEREFORE, IT IS ORDERED that **PETITIONER MAINTAIN THE RECORD** of Respondent's April 2, 2014 violation of Alcoholic Beverage Code §61.71(a)(5).

This Order will become **final and enforceable** on the 19th day of May, 2015, **unless a Motion for Rehearing is filed by the 18th day of May, 2015.**

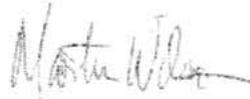
SIGNED this the 23rd day of April, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
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 23rd day of April, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

John Beeler
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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TABC Legal Division
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SOAH DOCKET NO. 458-14-4102
(TABC CASE NO. 624880)

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § § §	BEFORE THE STATE OFFICE
v.		OF
BUC-EE'S, LTD. D/B/A BUC-EE'S #17 LICENSE NO. BF536309 CALDWELL COUNTY, TEXAS, Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) alleges Buc-ee's, LTD. d/b/a Buc-ee's #17 (Buc-ee's or Respondent) violated the Alcoholic Beverage Code (Code) by selling an alcoholic beverage to a minor. The parties stipulated that the violation occurred and that Respondent has satisfied all of the requirements of the Safe Harbor affirmative defense. Respondent argues that, because it established the Safe Harbor defense, the case should be dismissed and TABC should be precluded from maintaining a record of the violation. Staff argues that the Safe Harbor defense does not require dismissal or preclude it from maintaining a record of the violation. The Administrative Law Judge (ALJ) agrees with Staff that dismissal is not warranted and that the record of the violation may be maintained.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits convened on July 28, 2014, in Austin, Texas, before ALJ John H. Beeler. Staff attorney Judith Kennison represented Staff, and attorney H. Tracy Richardson appeared for Respondent. The record closed at the conclusion of the hearing that day.

II. DISCUSSION

A. Stipulations

The agreed stipulations filed in this matter are as follows:

1. Respondent, Buc-ee's Ltd. d/ba Buc-ees, Inc., holds a Beer Retailer's Off-Premise License, number BF536309 issued by the Texas Alcoholic Beverage Commission for the premises located at 10070 IH 10 West, Luling, Caldwell County, Texas.
2. On June 18, 2014, Staff gave Respondent notice of the hearing by certified mail, return receipt requested.
3. Respondent has satisfied all provisions of the Safe Harbor affirmative defense as set forth in Section 106.14 of the Texas Alcoholic Beverage Code and has met all requirements as set forth in Chapter 50 of the Texas Alcoholic Beverage Commission Rules.
4. On that date,¹ Mr. Gloria, with criminal negligence, sold an alcoholic beverage to a minor.
5. Respondent's violation history, as maintained by the TABC, shows one previous sale to a minor violation on May 13, 2010.

B. Parties' Arguments

Respondent argues that Code § 106.14 precludes any action against a licensee that meets the requirements of the Safe Harbor defense set out in the statute. Maintaining a record of the violation, Respondent asserts, amounts to taking an action because third parties, including insurance companies and courts, would have access to the records and could take actions contrary to Respondent's interests based on knowledge of the records.

TABC argues that it is required to maintain the records and is not permitted to have two sets of records, one being private and the other being public. Further, Staff argues that one requirement of satisfying the Safe Harbor defense is that the licensee did not indirectly encourage the violation.² Pursuant to 16 Texas Administrative Code (TAC) § 34.4(c), a rebuttable presumption of indirectly encouraging the violation is established if an employee sold

¹ The stipulations are set out exactly as filed by the parties. The date set out on the notice of violation is April 2, 2014, and the ALJ will use that date in this Proposal for Decision.

² Code § 106.14(a)(3).

to a non-member of a private club, sold to a minor, or sold to an intoxicated person on three or more occasions within a 12 month period. TABC points out that this would be impossible to establish if no records could be maintained.

The ALJ finds that TABC may maintain the record of the violation in this matter. The sanctions that TABC is authorized to take against a licensee or permittee for sales to a minor are suspension of the permit or license for not more than 90 days or cancellation.³ The very next Code section sets out the Safe Harbor defense available to the licensee or permittee to avoid the sanctions. It is clear, therefore, that the Safe Harbor defense applies specifically to the suspension and cancellation penalties.

Further, as Staff points out, if TABC is not allowed to maintain a record of the violation when Safe Harbor applies, it would never be possible to establish that the licensee or permittee indirectly encourages the violation as contemplated by 16 TAC § 34.4(c). All offenses would be a first offense.

Finally, the ALJ finds no authority to issue an order dismissing this matter.

III. FINDINGS OF FACT

1. Buc-ee's, LTD. d/b/a Buc-ee's #17 (Buc-ee's or Respondent) located at 10070 IH 10 West, Luling, Caldwell County, Texas holds a Beer Retailer's Off-Premise License issued by the Texas Alcoholic Beverage Commission (Commission).
2. On April 2, 2014, Respondent's employee, agent, or servant, with criminal negligence, sold an alcoholic beverage to a minor.
3. Although the violation occurred and that Respondent has satisfied the requirements of the affirmative defense of Safe Harbor.
4. Staff of the Commission issued a notice of hearing, alleging violation of the Texas Alcoholic Beverage Code (Code).
5. The notice stated the time, place, and nature of the hearing; legal authority and jurisdiction under which the hearing was to be held; statutes and rules involved; and matters asserted.

³ Code § 106.13(a).

6. The hearing on the merits convened on July 28, 2014, Austin, Texas. Staff attorney Judith Kennison represented Staff, and attorney H. Tracy Richardson represented Respondent. The record closed at the conclusion of the hearing that day.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to Code ch. 5 and § 11.61.
2. The State Office of Administrative Hearings 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 Code § 5.43 and Tex. Gov't Code ch. 2003.
3. Respondent received notice of the hearing, pursuant to Tex. Gov't Code §§ 2001.051-.052.
4. Respondent's employee, agent, or servant sold an alcoholic beverage to a minor and thus violated Code § 61.71(a)(5).
5. Respondent has satisfied the requirements of the affirmative defense of Safe Harbor. Code § 106.14.
7. The Commission is not precluded from maintaining a record of the violation.
8. No authority exists for the Administrative Law Judge to dismiss this matter.

SIGNED September 23, 2014.



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