

DOCKET NO. 618731

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
JET LOUNGE INC. D/B/A JET LOUNGE, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT MB669541, LB	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-0402)	§	BEVERAGE COMMISSION

ORDER DENYING MOTION FOR REHEARING

CAME ON FOR CONSIDERATION this 21st day of October, 2014, 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 Lindy Hendricks presiding. The hearing convened on November 22, 2013 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 17, 2014. 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. No exceptions were filed.

After review and due consideration of the Proposal for Decision, I issued an Order on September 12, 2014 adopting the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision and incorporating those Findings of Fact and Conclusions of Law into that Order, as if such were fully set out and separately stated therein. The Order required suspension of Respondent's permit for 24 days, but Respondent was given the option of paying a civil penalty in the amount of \$7,200.00.

A timely Motion for Rehearing was filed by Respondent on October 6, 2014. Petitioner replied on October 10, 2014.

Having considered Respondent's Motion for Rehearing and Petitioner's response thereto, the Motion for Rehearing is **DENIED**.

IT IS THEREFORE ORDERED that the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at 12:01 a.m. on November 11, 2014** and shall remain suspended **for TWENTY-FOUR (24) CONSECUTIVE DAYS, UNLESS** a civil penalty in the amount of \$7,200.00 is **paid ON OR BEFORE November 5, 2014**.

If this Order is appealed and judgment is issued affirming the Order, the privileges granted by the Commission and the activities authorized under the above permit 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 twenty-four (24) consecutive days, unless a civil penalty in the amount of \$7,200.00 is paid on or before the **tenth (10th)** day following the date the judgment is signed.

SIGNED this the 21st day of October, 2014, 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 21st day of October, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

Jet Lounge Inc.
d/b/a Jet Lounge
RESPONDENT
1515 Pease St. Unit C
Houston , TX 77002
VIA FIRST CLASS MAIL, CMRRR # 70050390000575497100

Clyde W. Burleson
ATTORNEY FOR RESPONDENT
1533 W. Alabama, Suite 100
Houston, Texas 77006
VIA FIRST CLASS MAIL, CMRRR# 70050390000575497117
AND
VIA FACSIMILE: (713) 526-3787

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: sandra.patton@tabc.texas.gov

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 618731

REGISTER NUMBER:

NAME: Jet Lounge Inc.

TRADENAME: Jet Lounge

ADDRESS: 1515 Pease St., Unit C, Houston, Texas

DUE DATE: November 5, 2014

PERMITS OR LICENSES: MB669541, LB

AMOUNT OF PENALTY: \$7,200.00

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.

DOCKET NO. 618731

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
	§	
VS.	§	
	§	
	§	
JET LOUNGE INC. D/B/A JET LOUNGE, Respondent	§	ALCOHOLIC
	§	
	§	
	§	
PERMIT MB669541, LB	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-0402)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of September, 2014, 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 Lindy Hendricks presiding. The hearing convened on November 22, 2013 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 17, 2014. 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. 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.

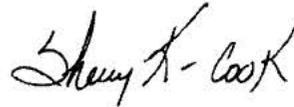
All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at 12:01 a.m. on October 22, 2014** and shall remain suspended **for TWENTY-FOUR (24) CONSECUTIVE DAYS, UNLESS** a civil penalty in the amount of **\$7,200.00 is paid ON OR BEFORE October 15, 2014.**

If this Order is appealed and judgment is issued affirming the Order, the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **suspended** beginning at 12:01 a.m. on the **tenth (10th)** day following the date the judgment is signed and shall remain suspended for twenty-four (24) consecutive days, unless a civil penalty in the amount of \$7,200.00 is paid on or before the **seventh (7th)** day following the date the judgment is signed.

This Order will become final and enforceable on the 7th day of October, 2014, unless a Motion for Rehearing is filed by the 6th day of October, 2014.

SIGNED this the 12th day of September, 2014, 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 12th day of September, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

Jet Lounge Inc.
d/b/a Jet Lounge
RESPONDENT
1515 Pease St. Unit C
Houston, TX 77002
VIA FIRST CLASS MAIL, CMRRR # 70120470000133008538

Clyde W. Burleson
ATTORNEY FOR RESPONDENT
1533 W. Alabama, Suite 100
Houston, Texas 77006
VIA FIRST CLASS MAIL, CMRRR# 70120470000133008545
AND
VIA FACSIMILE: (713) 526-3787

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: sandra.patton@tabc.texas.gov

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 618731

REGISTER NUMBER:

NAME: Jet Lounge Inc.

TRADENAME: Jet Lounge

ADDRESS: 1515 Pease St., Unit C, Houston, TX 77002

DUE DATE: October 15, 2014

PERMITS OR LICENSES: MB669541, LB

AMOUNT OF PENALTY: \$7,200.00

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.

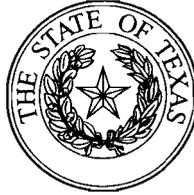
Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 17, 2014

RECEIVED

JAN 22 2014

ADMINISTRATIVE
HEARINGS

VIA REGULAR MAIL

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

RE: SOAH Docket No. 458-14-0402; Texas Alcoholic Beverage Commission vs. Jet Lounge Inc. d/b/a Jet Lounge

Dear Ms. Cook:

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

Sincerely,

A handwritten signature in black ink that reads "Lindy Hendricks".

Lindy Hendricks
Administrative Law Judge

LH/mr
Enclosure

xc Sandra K. Patton, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008 - **VIA REGULAR MAIL**
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
Clyde Burluson, Attorney at Law, 1533 W. Alabama, Suite 100, Houston, Texas 77006 - **VIA REGULAR MAIL**

SOAH DOCKET NO. 458-14-0402

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	
JET LOUNGE INC. D/B/A JET LOUNGE PERMIT NOS. MB669541, LB Respondent	§	OF
	§	
	§	
HARRIS COUNTY, TEXAS (TABC CASE NO. 618731)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Jet Lounge Inc. d/b/a Jet Lounge (Respondent/ Jet Lounge) alleging that Respondent, its agent, servant, or employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of Texas Alcoholic Beverage Code (Code) § 106.13. The Administrative Law Judge (ALJ) finds Petitioner proved the allegation by a preponderance of the evidence and recommends that Respondent’s license be suspended for 24 days, or in lieu of a suspension, that Respondent be allowed to pay a civil penalty of \$300 per day, for a total of \$7,200.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing in this matter convened on November 22, 2013, before State Office of Administrative Hearings (SOAH) ALJ Lindy Hendricks. Sandra K. Patton, staff attorney, represented Staff at the hearing. Clyde W. Burlison, attorney, represented Respondent. The hearing concluded and the record closed the same day.

There are no contested issues of notice or jurisdiction in this case. Therefore, notice and jurisdiction are addressed only in the findings of fact and conclusions of law.

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.³ Under Code § 11.61(g), the length of a suspension must be appropriate for the nature and seriousness of the violation. In determining the length of a suspension, TABC is required to consider: (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 or licensee's previous violations. Except for certain types of violations not involved here, TABC is required to allow the permittee or licensee the opportunity to pay a civil penalty in lieu of suspension.⁴ The amount of the civil penalty imposed must be appropriate for the nature and seriousness of the violation. The same factors that determine the appropriate length of a suspension are employed to determine the proper amount of a penalty.⁵

¹ Code § 106.13(a).

² Code § 1.08 and Tex. Penal Code § 6.03(d).

³ Code § 106.13(b).

⁴ Code § 11.64(a).

⁵ Code § 11.641.

III. EVIDENCE & ALJ'S ANALYSIS OF EVIDENCE

A. Background Information

Respondent holds a Mixed Beverage Permit, MB669541, which includes a Mixed Beverage Late Hours Permit, for the premises known as Jet Lounge, located at 1515 Pease Street Unit C, Houston, Texas 77002. The permits were issued by TABC on August 24, 2007, and have been continuously renewed. Respondent's administrative violation history was admitted into evidence and shows a sale to minor violation occurred on September 27, 2012, for which Respondent accepted a suspension or civil penalty.

B. Evidence

Petitioner presented the testimony of Houston Police Department (HPD) Officer Bryant Hall and TABC Agent Peter Gonzales.

Officer Hall testified that he and two undercover officers conducted an investigation at Jet Lounge on October 24, 2012, in response to a complaint regarding the sale of alcoholic beverages to minors. At the entrance, a doorman provided the officers with orange armbands without checking their identifications. Officer Hall testified he is 43 years old. He agreed that someone may make a fair and accurate assessment that he was over the age of 21 and not card him based on his appearance. He testified that the armbands were used to separate adult from minor patrons. Once inside, the officers situated themselves along the bar where two bartenders were working.

Officer Hall observed a female patron approach the bar. He noted that her face and overall appearance were very youthful. The patron was able to make two separate purchases of alcohol from a bartender. The first purchase was for Peach Schnapps, an alcoholic beverage containing 15% alcohol by volume, and the second was a shot of Bailey's Irish Cream liqueur. Officer Hall observed the bartender did not check identification in either transaction. The patron consumed the shot of Bailey's in front of the bartender. Officer Hall did not recall if the patron had an orange armband.

After observing the transaction, Officer Hall notified the open team who later identified the patron as 18-year-old Itzel Ibarra and the bartender as Patrice Gonzalez.

Respondent offered a photograph of Ms. Ibarra, showing her to have a tattoo, nose ring, and 4 four lip rings on November 21, 2012. Officer Hall testified he did not recall whether Ms. Ibarra had the nose or lip rings on October 24, 2012, but he said she appeared very youthful on that day and did not look like her photograph during his investigation.

Agent Gonzales testified he was familiar with Jet Lounge, having conducted multiple inspections of the business. He was also familiar with Ms. Gonzalez whom he saw working as a bartender during his inspection in September. Agent Gonzales reviewed the HPD police report of this investigation. He “adopted” this case and issued an administrative violation after determining that a person identified as a minor with a youthful appearance was sold an alcoholic beverage. He testified that Jet Lounge has been open for six years with only one prior violation. There have been six inspections in which no violations were observed.⁶

C. Analysis

Based on the evidence, Respondent’s employee, a bartender, with criminal negligence, sold an alcoholic beverage, *i.e.*, a Peach Schnapps and Bailey’s liqueur, to a minor, Itzel Ibarra, on October 24, 2012.

In this case, no evidence or argument was made to show the minor possessed an armband or that the bartender relied on an armband in determining the patron’s age. Additionally, the bartender is ultimately the seller of alcohol and bears the responsibility for ensuring the patron is of age.

The only issue presented by the parties was whether the minor had a “youthful appearance” such that the failure to ask for identification at the time of the sale of alcohol constituted criminal negligence.

⁶ One inspection was conducted before the October violation date.

Respondent argued that the photograph of Ms. Ibarra shows that she did not appear youthful with her tattoo and body piercings. After review of the evidence, the ALJ does not agree with this argument. Along with the piercings, Ms. Ibarra has red highlights and a large butterfly barrette in her hair. As a whole, the ALJ finds the minor's face and appearance to be youthful and not easily mistaken for someone over 21 years of age. Additionally, the photograph is dated a month after the incident, whereas Officer Hall provided credible testimony regarding the minor's youthful appearance the night of the incident.

Despite her youthful appearance, Ms. Ibarra was not asked for and did not produce a driver's license when she purchased the alcoholic beverages. The bartender's conduct rises to the level of criminal negligence in that Ms. Gonzalez failed to check for identification before selling alcohol to a person with a youthful appearance. The bartender's failure to perceive the risk posed by selling alcohol to the minor is a gross deviation from what a reasonable person would perceive under the same circumstances.

The sale of an alcoholic beverage to a minor is a health, safety, and welfare violation. Respondent was issued an administrative notice for sale of alcohol to a minor less than a month before this incident. Additionally, Agent Gonzales spoke to Ms. Gonzalez during his September inspection. Despite being on notice that a minor was able to purchase alcohol from Jet Lounge, Ms. Gonzalez sold alcohol to another minor less than a month later.

Staff requested that Respondent's permits be suspended for a period of 24 days, or in lieu of suspension, that Respondent be ordered to pay a penalty of \$300 per day for each day of the suspension period, for a total of \$7,200. After having reviewed Respondent's licensing history, which contains the prior sale to minor violation less than a month earlier, the ALJ finds the requested suspension or penalty payment is appropriate. Therefore, the ALJ recommends that Respondent's permits be suspended for 24 days, or in lieu of a suspension, Respondent be allowed to pay a civil penalty of \$300 per day, for a total of \$7,200.

IV. PROPOSED FINDINGS OF FACT

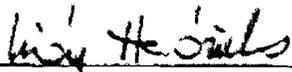
1. Jet Lounge Inc. d/b/a Jet Lounge (Respondent) holds a Mixed Beverage Permit, MB669541, with accompanying Mixed Beverage Late Hours Permit, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 1515 Pease Street Unit C, Houston, Harris County, Texas.
2. The permit was originally issued on August 24, 2007, and has been continuously renewed.
3. On October 24, 2012, Respondent's employee sold alcoholic beverages, Peach Schnapps and Bailey's liqueur, to a minor, Itzel Ibarra.
4. On that date, the minor was under 21 years of age and had a youthful appearance.
5. The bartender did not check for identification at the time of the sale and delivery of the alcoholic beverage to Ms. Ibarra.
6. The bartender's conduct grossly deviated from the standard of care an ordinary seller of alcoholic beverages would exercise under the same or similar circumstances.
7. Respondent's licensing history includes a health, safety, and welfare violation, namely another sale of alcohol to minor, less than a month earlier.
8. On October 3, 2013, Staff issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice contained the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
9. The hearing convened on November 22, 2013, before State Office of Administrative Hearings (SOAH) ALJ Lindy Hendricks. Sandra K. Patton, staff attorney, represented TABC at the hearing. Clyde Burlison, attorney, represented Respondent. The hearing concluded and the record closed the same day.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Texas Alcoholic Beverage Code (Code) ch. 5 and § 11.61.
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 Texas Government Code ch. 2003.

2. Respondent received notice of the proceedings and hearing, pursuant to Texas Government Code §§ 2001.051 and 2001.052 and 1 Texas Administrative Code ch. 155.
3. Respondent's employee acted with criminal negligence when she served an alcoholic beverage to a minor. Code § 1.08 and Texas Penal Code § 6.03(d).
4. Respondent violated Code §§ 11.61(b)(2) and 106.13.
5. Based on the findings of fact and conclusions of law, Respondent's permit should be suspended for a period of 24 days, or in lieu of suspension, Respondent should be ordered to pay a civil penalty of \$300 per day, for a total of \$7,200. Code § 11.61.

SIGNED January 17, 2014



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS