

DOCKET NO. 458-03-2632

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**ALL AMERICAN CITY REALTY CO.
D/B/A BARREL HOUSE #20
PERMIT NO. P-506363, PS-506364
EL PASO COUNTY, TEXAS
(TABC CASE NO. 601534)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (hereinafter TABC) brought this action against All American City Realty Co. d/b/a Barrel House #20 (hereinafter Respondent), alleging that Respondent with criminal negligence sold an alcoholic beverage to a minor in violation of the Texas Alcoholic Beverage Code §106.13(a). TABC recommended that Respondent's license be suspended for a period of 10 to 30 days, or, in lieu of a suspension, Respondent pay an administrative penalty of \$150.00 per day of suspension. The undersigned Administrative Law Judge recommends the license be suspended for 7 days, or alternatively, that Respondent pay an administrative penalty of \$150.00 per day for a total civil penalty of \$1,050.00.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

The hearing was convened on June 6, 2003 at 9:30 a.m. at the Office of Administrative Hearings, 401 East Franklin Avenue, Suite 580, El Paso, Texas. Staff attorney Dewey A. Brackin appeared on behalf of TABC. Respondent was represented by its President, Mr. Richard Telles-Goins. The hearing concluded that same day. The record closed upon receipt of Petitioner's Brief on June 13, 2003.

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law sections without further discussion.

II. DISCUSSION

A. Background.

Respondent currently operates under authority of a Package Store Permit, Package Store Tasting Permit and a Beer Retailer's Off-Premise License issued to All American City Realty Company on December 18, 2001 by TABC. The President and General Manager of All American City Realty Company is Richard Telles-Goins. The company has five stores throughout El Paso and twelve employees.

B. Stipulations and Evidence.

At the hearing, the parties stipulated to the following TABC allegations:

- a) Respondent has no prior incidents at the Barrel House #20 location;
- b) Respondent has had no violations since 1990 at any other of its locations;
- c) On September 6, 2002, Respondent's employee, Maria S. Moreno, sold an alcoholic beverage to a minor, Earl Pike, 15 years old, and by doing so she acted with criminal negligence meaning that she grossly deviated from the standard of care of a reasonable and prudent person in a similar circumstance.

TABC offered 4 exhibits: a certified copy of the permits at issue (Exhibit #1); the complete offense report with pictures (Exhibit #2); the incident video taken from outside the store (Exhibit #3); and the six pack of beer at issue (Exhibit #4). All four exhibits were entered into the record. Respondent offered a compilation of correspondence, discovery, reports, employee handbook, pictures, and personal data information in a binder (Respondent's Exhibit #1). Respondent also offered the in-store video of the event at issue (Respondent's Exhibit #2). Both exhibits became part of the record.

TABC also made available for testimony the following witnesses: Mr. Oscar Williams with TABC and Earl Pike, the minor involved in the purchase at issue. Also, Respondent had numerous witnesses present to testify. But, due to the stipulations made, none of their testimony was received on the offense. Mr. Telles-Gion did testify under oath on the issue of penalty. Respondent also called TABC's witness, Oscar Williams, to testify.

C. Argument.

Having stipulated to the actual offense,¹ the only issue before the Court is the issue of penalty.

¹Texas Alcoholic Beverage Code, Sec. 106.13 SANCTIONS AGAINST RETAILERS. (a) "The Commission or administrator may cancel or suspend for not more than 90 days a retail license or permit ... if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold an alcoholic beverage to a minor."

TABC elected to take the option of payment of penalty in lieu of license suspension in this case.²

1) Respondent's Affirmative Defense.

Respondent asserted the affirmative defense under section 106.14³ of the Code stating that the employee had previously attended the required seller training program. The testimony indicated that the employee attended the required training five years prior to the incident at issue.

2) Respondent's Relaxation Defense.

Respondent also argued for a relaxation of the provisions pursuant to section 106.13(c)(1)⁴ concerning suspension alleging that "it was a human mistake." Respondent spoke to the character of the employee and admitted that the employee had "goofed" but that she had confused the year of 1987 for 1981. He stated that the employee's "mind was elsewhere and that anybody that had any sense whatsoever would not have sold." He testified that the employee handbook requires all employees to attend the seller training program and pointed out the sign prohibiting entrance to minors to his establishment which is posted on the door. Mr. Telles-Gion further ardently argued that Respondent "attempts to do it right" and that Respondent has not been cited since 1990 for any TABC violations.

D. Analysis.

The statutory affirmative defense provided by section 106.14 will bar recovery against an employer when all three components are alleged and proven.⁵ The first and second components of the section are not met. With regard to the first component, mere written directives in the employee handbook are not sufficient to satisfy this section. The employer must take some affirmative actions, that is, do more than simply require attendance to the training programs. In this case, there was absolutely no follow up after the initial employment to ascertain whether the employee had attended the seller training program. With regard to the second component, it is undisputed that the employee at issue had been employed by Respondent beyond thirty (30) days at the time of the incident. The

²Texas Alcoholic Beverage Code. Sec. 11.64. ALTERNATIVES TO SUSPENSION, CANCELLATION. "...the commission or administrator shall determine whether the permittee or licensee may have the opportunity to pay a civil penalty rather than have the permit or license suspended."

³Texas Alcoholic Beverage Code. Sec. 106.14 ACTIONS OF EMPLOYEES. "...the actions of an employee shall not be attributable to an employer if: (1) the employer requires its employees to attend a commission-approved seller training program; See also Rule 50.9(b) which requires the attendance to be within 30 days of initial employment. (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.

⁴Texas Alcoholic Beverage Code. Sec. 106.13(c)(1) SANCTIONS AGAINST RETAILERS. "That the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence."

⁵*Pena v. Neal, Inc.*, 901 S.W.2d 663 (Tex.App.-San Antonio 1995).

record is also clear that the employee at issue did not attend the training within the initial thirty (30) days of employment and was not currently certified on the date of the incident. She attended the course in the past, but her certification had lapsed. Each certificate is valid for two years.⁶ Therefore, the affirmative defense alleged by Respondent is not applicable.

Although Respondent does not have a history of selling alcoholic beverages to minors, it is of concern to this ALJ that under such obvious circumstances, the employee proceeded with the sale. It is worrisome that even after receiving identification from the youthful looking minor, the sale was completed. If the employee's "mind is elsewhere," as Respondent has stated, the logical inquiry is whether the employee's conduct was habitual. Although Respondent's violation history is favorable, the offense of selling alcoholic beverages to a minor is adverse. The lack of careful attention or assiduous effort, which constitute due diligence, to make sure that the employee became certified counteract the argument for relaxation of the penalty. There was no evidence presented to establish Respondent's affirmative actions beyond a written attendance requirement in the employee manual.

III. CONCLUSION

On September 6, 2002, Respondent's employee, Maria S. Moreno, sold an alcoholic beverage to a minor, Earl Pike, 15 years old, and by doing so she acted with criminal negligence. It is the undersigned ALJ's expectation that the employee's conduct on September 6, 2002 is not in conformity with a habit and it is also expected that Respondent will undertake affirmative steps to prevent its recurrence.

THEREFORE, having considered the evidence and arguments presented, the undersigned ALJ recommends that a license suspension of seven (7) days be imposed on Respondent. The ALJ further recommends and agrees with TABC that Respondent be given the opportunity to pay a civil penalty in the amount of \$1,050.00 in lieu of suspension before the sixth day after the TABC notifies Respondent of its order.

IV. FINDINGS OF FACT

1. All American City Realty d/b/a Barrel House #20 (Respondent), located in El Paso, Texas, holds permits no. P-506363, PS-506364 and BF-506365 issued by the Texas Alcoholic Beverage Commission.
2. On April 2, 2003, TABC issued a notice of hearing asserting that Respondent,

⁶TABC Rule §50.8(b) Trainee Certification

with criminal negligence, sold an alcoholic beverage to a minor. The notice also stated the time and location of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and the particular sections of the statutes and rules involved.

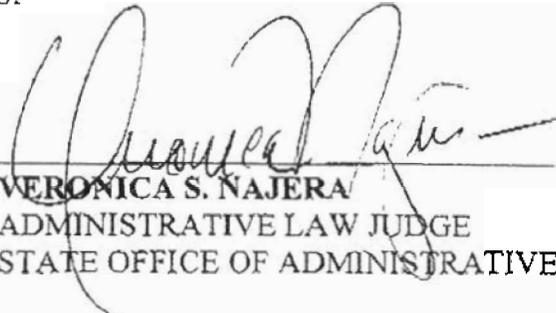
3. Respondent timely received the notice of hearing.
4. On September 6, 2002, at approximately 8:29 p.m., a Minor Sting Operation was conducted by the Texas Alcoholic Beverage Commission and the El Paso Police Department-Vice Unit at the Barrel House #20 package store located at 420 Redd Road, Suite B, City of El Paso, County of El Paso, State of Texas.
5. On September 6, 2002, on the licensed premises, the undercover minor Earl Pike (15 years old, DOB 6-17-87) purchased a 6-pack of 12 ounce Budweiser beer cans. Respondent's employee, Maria S. Moreno, asked Pike for his ID, which he provided to her. Ms. Moreno looked at the ID, returned it to the minor and proceeded to finalize the sale.
6. The employee who sold the alcohol to the minor had been employed by Respondent over 30 days and was not currently TABC certified.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§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. GOVT. CODE ANN. §§ 2003.021(b) and 2003.042(5).
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOVT. CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact and pursuant to § 106.13 of the Code, Respondent's permits are subject to suspension or, in lieu, an administrative penalty.

5. Based on the above findings of fact and conclusions of law, Respondent's permits should be suspended for seven (7) days, and Respondent should be allowed to pay a fine of \$150.00 per day in lieu of suspension.

SIGNED this 24th day of July, 2003.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS
El Paso State Office Building
401 E. Franklin Ave. Suite 580
El Paso, TX. 79901
Phone (915) 834-5650
Facsimile (915) 834-5657

DATE: July 25, 2003

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 8

SOAH DOCKET NO.: 458-03-2632

TABC vs. All American cityRealty Co. d/b/a Barrel House #20

REGARDING: Proposal for Decision

FROM: JUDGE VERONICA S. NAJERA

FAX TO:	FAX NO.:
DEWEY BRACKIN	(512) 206-3498
RICHARD TELLES- GOINS	VIA REGULAR MAIL

MESSAGE: Attached is the **Proposal For Decision** for the above mentioned docket no.

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT CELIA RODRIGUEZ AT (915) 834-5650.

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 above address via the U.S. Postal Service. Thank you.

DOCKET NO. 601534

IN RE ALL AMERICAN CITY REALTY CO§	BEFORE THE
D/B/A BARREL HOUSE #20 §	
PERMIT NO. P-506363 & BF-506365 §	
	TEXAS ALCOHOLIC
EL PASO COUNTY, TEXAS §	
(SOAH DOCKET NO. 458-03-2632) §	BEVERAGE COMMISSION

AMENDED ORDER

This order amends the September 25, 2003 order to reflect the correct Package Store Permit number.

CAME ON FOR CONSIDERATION this 6th day of October, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on June 6, 2003, and adjourned June 13, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 24, 2003. This 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 were filed by the Respondent on August 8, 2003. Petitioner did not file a response. The Administrative Law Judge did not amend her Proposal for Decision based on Respondent's Exceptions.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, 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 Assistant 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, that Package Store Permit No. P-506363 and Beer Retail Dealer's Off-Premise License No. BF-506365 are hereby **SUSPENDED**.

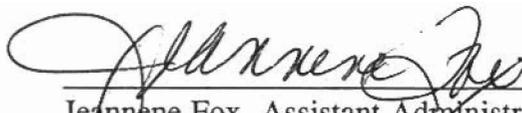
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **10th** day of **December, 2003**, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of seven (7) days, beginning at **12:01 A.M.** on the **17th** day of **December, 2003**.

This Order will become final and enforceable on October 16, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 10th day of October, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE 458-03-2632

Richard Telles-Goins
OFFICER OF RESPONDENT
All American City Realty Co.
d/b/a Barrel House #20
P. O. Box 960099
El Paso, Texas 79996
CERTIFIED MAIL NO. 7001 2510 0003 8687 2011
RETURN RECEIPT REQUESTED

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

El Paso District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 601534

REGISTER NUMBER:

NAME: All American City Realty, Co. TRADENAME: Barrel House #20

ADDRESS: P. O. Box 960099, El Paso, Texas 79996

DATE DUE: December 10, 2003

PERMITS OR LICENSES: P-506363 & BF-506365

AMOUNT OF PENALTY: \$\$1050.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 10TH DAY OF DECEMBER, 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.
MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:

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

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

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.