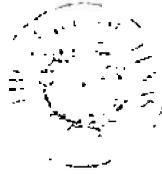
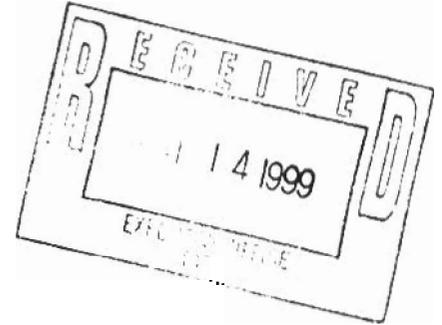


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



October 11, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

CERTIFIED MAIL,
RETURN RECEIPT
Z 283 051 818

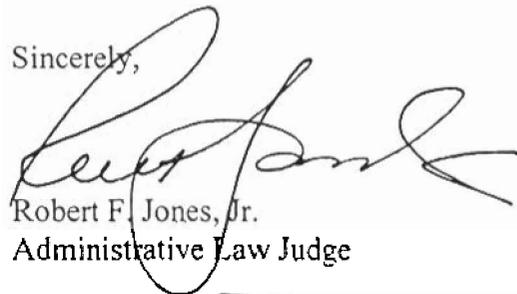
**RE: Docket No. 458-99-1270; Texas Alcoholic Beverage Commission vs. Applebee's Club No. 12;
TABC Case No. 583598**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Stephen F. Shaw, Attorney for Respondent. For reasons discussed in the proposal, I recommend that Respondent's licenses be suspended for a period of 10 days. Respondent should have the opportunity to pay a civil penalty of One Hundred Fifty Dollars per day of suspension or a total of \$1,500.00, rather than have the permit or license suspended.

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. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

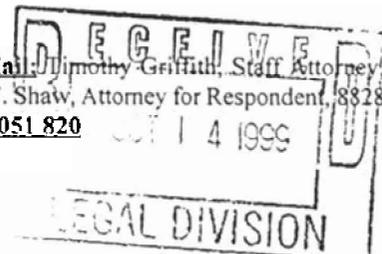


Robert F. Jones, Jr.
Administrative Law Judge

RJ:ds

Enclosure

xc: **Shanee Woodbridge, State Office of Administrative Hearing - Regular Mail** Timothy Griffith, Staff Attorney
Texas Alcoholic Beverage Commission - **CMRR# Z 283 051 819**; Stephen F. Shaw, Attorney for Respondent, 8828
N. Stemmons Freeway, Suite 320, Dallas, Texas 75247 - **CMRR # Z 283 051 820**



DOCKET NO. 458-99-1270

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
	§	
VS.	§	OF
	§	
APPLEBEE'S CLUB #12	§	
PERMITS NO. N-259634, NL-259635,	§	
& PE-259636	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 583598)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Applebee's Club #12 alleging that Respondent, through its employees: (1) served or delivered an alcoholic beverage to a minor, and (2) sold liquor to a non-member so as to constitute an "open saloon," all violations of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permit and license be canceled or suspended. This proposal finds that the allegations against Respondent are true. The Administrative Law Judge (ALJ) recommends suspension of Respondent's permits.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under §§ 11.61(b)(2), 106.13, and 32.17, ALCO. BEV. CODE. The State Office of Administrative Hearings (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, under §2003.021, GOV'T CODE. There were no contested issues of notice or jurisdiction in this proceeding.

On July 12, 1999, the Staff issued its Notice of Hearing, admitted into evidence as Petitioner's Exhibit Number 1. The notice was directed to Applebee's Club #12 by and through its attorney of record. On August 3, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent was represented at the hearing by Stephen F. Shaw, Attorney at Law. The record was closed on August 20, 1999.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under § 11.61(b)(2) of the Code to cancel a permit if it is found that the permittee has violated a provision of the Code during the existence of the permit. Under § 1.04(11), "permittee" means "an agent, servant, or employee" of

the permittee. A private club registration permit may be canceled or suspended for not more than 60 days if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. ALCO. BEV. CODE § 106.13(a).

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 and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that 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 viewed from the actor's standpoint. ALCO. BEV. CODE § 1.08; PENAL CODE § 6.03(d).

A private club permit may be canceled or suspended for a period of time not exceeding 60 days on finding that the permittee club has sold, offered for sale, purchased, or held title to any alcoholic beverage so as to constitute an "open saloon." [T]he term open saloon "means any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink or in broken or unsealed containers, or a place where any alcoholic beverage is sold or offered for sale for on-premises consumption." ALCO. BEV. CODE § 32.17(a)(1) & (2). Under ALCO. BEV. CODE § 106.14(a), the actions of an employee, relating to the sales, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person or the consumption of alcoholic beverages by a minor or an intoxicated person, shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a Commission-approved seller training program;
- (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.

EVIDENCE AND PARTIES' CONTENTIONS

The Staff's Exhibit 2 proved that Respondent was issued Private Club Registration Permit, N-259634, Private Club Late Hours Permit, NL-259635 and Beverage Cartage Permit, PE-259636. The permits were issued on November 2, 1995, and have been continuously renewed. The permits were issued to an unincorporated association of persons doing business as Applebee's Club #12 (Applebee's). Applebee's licensed premises is located at 810 South Cockrell Hill Road, Duncanville, Dallas County, Texas. Staff alleged that (1) on January 15, 1999, an employee of Respondent, Chesney Renai Brewer a.k.a. Chesney Sellers (hereafter referred to as Chesney Sellers or Sellers), served or delivered an alcoholic beverage to a minor,

Cassandra Jessica Delgado, and (2) on January 15, 1999, Respondent, through its employee, Chesney Sellers, sold an alcoholic beverage to a non-member, Cassandra Jessica Delgado, so as to constitute an "open saloon." Applebee's asserts the seller/server defense.

1. Stipulation of parties

At the hearing, Mr. Griffith, on behalf of Petitioner, and Mr. Shaw on behalf of Respondent, stipulated to the following facts:

(a) Chesney Sellers, Respondent's employee, was seller/server certified under certificate #464028907, from July 11, 1996 to July 10, 1998.

(b) Chesney Sellers, Respondent's employee, was not seller/server certified under any certificate, on January 15, 1999.

2. Testimony of Alisa Matthew

Alisa Matthew, an agent of the TABC, testified that she was at the licensed premises on January 15, 1999. Matthew was one of several agents conducting a "minor sting." Matthew accompanied and observed Cassandra Jessica Delgado enter the licensed premises. A copy of Delgado's Texas Department of Public Safety "Under 21 Identification Card" was admitted as Petitioner's Exhibit #3. The card bears Delgado's picture, states in capital letters "UNDER 21", and lists Delgado's date of birth as March 20, 1982. On January 15, 1999, Delgado was sixteen years old.

Matthew observed Delgado approach the bar where Delgado encountered Sellers, who was working as a bartender. Delgado on that day had a youthful appearance, and was dressed in a fashion similar to persons of her age. Delgado purchased a 12 ounce bottle of Miller Lite beer from Sellers for \$ 2.25 in cash. As a part of the transaction, Sellers requested identification from Delgado. Delgado tendered her Texas Department of Public Safety "Under 21 Identification Card". Sellers took the card, looked at the card, and returned the card to Delgado. Sellers did not inquire of Delgado if she was a member of Applebee's, nor did Sellers request to inspect Delgado's Applebee's membership card. Sellers did not ask if Delgado wished to become a member of Applebee's. Sellers did not run the card through the club's UNICARD system.¹ Matthew testified that Delgado was not a member of the club and, had never been to the licensed premises before January 15, 1999. Delgado was not a guest of any club member, or a family member of a club member at the time the alcoholic beverages were provided to her by Sellers, and was not asked to join the private club.

1

UNICARD was explained by Matthew to be a computer based identification system which can "read" a driver's license or membership card to determine if the holder of the license or card is a member of the club.

Matthew identified the liquid Delgado had purchased as beer, an alcoholic beverage. Matthew identified the beverage as beer by its smell and the labeling of the bottle in which it was served.

3. Applebee's violation history

Applebee's past history, admitted as a part of Petitioner's Exhibit #2, shows warnings for patrons not being on membership lists in June 1998, and an open saloon violation in December, 1995.

ANALYSIS

1. Sale to a Minor

Four questions are presented. Was Delgado a minor on January 15, 1999? If the first issue is answered "yes," was an alcoholic beverage sold or delivered to Delgado? If the answer to the second question is "yes," did Sellers deliver or sell the alcoholic beverage to Delgado with criminal negligence? If the answer to the third question is "yes," is Respondent protected under the seller server doctrine? Delgado's age was proved by Matthew's testimony, and Petitioner's Exhibit #3. Delgado was sixteen years of age on January 15, 1999, and was a minor under the law.² Delgado purchased a 12 ounce bottle of Miller Lite beer from Sellers for \$ 2.25 in cash. The beer was an alcoholic beverage. Delgado had presented Sellers with an identification card with Delgado's name and picture, clearly marked "Under 21 Identification Card," which contained a birth date which clearly established that Delgado was a minor. Sellers examined the card. In light of these facts, Sellers' sale and delivery of the beer to Delgado was criminally negligent. Sellers ought to have been aware of a substantial and unjustifiable risk that a sale of an alcoholic beverage to a minor would occur. The risk was of such a nature and degree that Sellers' failure to perceive it constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from Sellers' standpoint.

Was Sellers's negligence excused? Under § 106.14, ALCO. BEV. CODE, the defense has been established if (1) the employer requires its employees to attend a Commission-approved seller training program; (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. The stipulation of the parties establishes that Sellers had actually attended a Commission-approved seller training program, and had been certified, for the period July 11, 1996 to July 10, 1998, by the Commission. The defense afforded by § 106.14 is an affirmative defense, and the burden rests with Applebee's to prove each element of the defense. See *Pena v. Neal, Inc.*, 901 S.W.2d 663(Tex.Ct.App.--San Antonio 1995, writ denied); *Gonzalez v. South Dallas*

2

"Minor" means a person under 21 years of age. ALCO. BEV. CODE § 106.01.

Club, 951 S. W.2nd 72(Tex.Ct.Ap.--Dallas 1997, no writ). Assuming that the parties' stipulation could also be construed as proof that Sellers was required by Applebee's to attend a Commission-approved program, no proof was offered by Applebee's with respect to whether Applebee's has not encouraged its employees to violate the law. The defense has not been established. See *Pena* and *Gonzalez*.

2. Sale or Delivery to constitute an open saloon

A private club registration permit may be canceled or suspended for a period of time not exceeding 60 days, if it is proved that the permittee club has sold, offered for sale, purchased, or held title to any alcoholic beverage so as to constitute an open saloon. "[T]he term "open saloon" means any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink or in broken or unsealed containers, or a place where any alcoholic beverage is sold or offered for sale for on-premises consumption." ALCO. BEV. CODE § 32.17(a)(1) & (2). TABC's evidence shows that Delgado was sold an alcoholic beverage, beer, for consumption on the licensed premises on January 15, 1999. This sale of alcoholic beverages was made by Sellers, an employee of Respondent. At the time this sale was made, Sellers did not inquire of Delgado if she was a member of Applebee's, nor did Sellers request to inspect Delgado's membership card. Sellers did not ask if Delgado wished to become a member of Applebee's. Delgado was not a member of Applebee's, a guest of any club member, or a family member of a club member at the time the alcoholic beverages were provided to her by Sellers. The sale of beer by Sellers to Delgado constituted Applebee's an open saloon.

RECOMMENDATION

Under the Code, Applebee's sale to Delgado violated both § 106.03(a), and § 106.13(a), and its permits are subject to cancellation or suspension for not more than 60 days for the sale to a minor. Applebee's permits are also subject to a further cancellation or suspension for not more than 60 days for running an open saloon.

To punish running an open saloon, the Commission may suspend Respondent's permit, and the Commission under § 11.64(a) shall give the Respondent the opportunity to pay a civil penalty rather than have the permit suspended. The Commission sets the amount of the penalty and in doing so is to consider the economic impact a suspension would have on the permittee or licensee. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended.

With respect to the sale to a minor, since Respondent has been found to have violated § 106.03, under an exception found in 11.64(a), the Commission has to determine whether Respondent may have the opportunity to pay a civil penalty rather than have the permit or license suspended. Under TABC regulation, found at 16 TEX. ADMIN. CODE § 37.61(b), in determining whether to deny a licensee or permittee the

right to pay a civil penalty in lieu of a suspension, the Commission considers:

- (1) the type of permit or license held by the violating licensee or permittee and whether the sale of alcoholic beverages constitutes the primary or partial source of the licensee or permittee's business;
- (2) the type of violation or violations charged;
- (3) the licensee's or permittee's record of past violations; and
- (4) any aggravating or ameliorating circumstances.

Under § 37.61(c) aggravating or ameliorating circumstances may include but are not limited to:

- (1) whether the violation was caused by intentional or reckless conduct by the licensee or permittee;
- (2) the number, kind and frequency of violations of the Alcoholic Beverage Code and rules of the Commission committed by the licensee or permittee;
- (3) whether the violation caused the serious bodily injury or death of another; and/or
- (4) whether the character and nature of the licensee's or permittee's operation are reasonably calculated to avoid violations of the Alcoholic Beverage Code and rules of the Commission.

As to the open saloon charge, the ALJ recommends that Private Club Registration Permit, N-259634, Private Club Late Hours Permit, NL-259635 and Beverage Cartage Permit, PE-259636 held by an unincorporated association of persons doing business as Applebee's Club #12 (Applebee's), located at 810 South Cockrell Hill Road, Duncanville, Dallas County, Texas, be suspended, for a period of ten (10) days or Applebee's pay a fine of One Hundred Fifty Dollars per day of suspension or a total of \$1500.00.

Regarding the sale to a minor charge, the ALJ recommends that Private Club Registration Permit, N-259634, Private Club Late Hours Permit, NL-259635 and Beverage Cartage Permit, PE-259636 held by an unincorporated association of persons doing business as Applebee's Club #12 (Applebee's), located at 810 South Cockrell Hill Road, Duncanville, Dallas County, Texas, be suspended, for a period of ten (10) days. The ALJ further recommends that Respondent have the opportunity to pay a civil penalty of One Hundred Fifty Dollars per day of suspension or a total of

\$1500.00, rather than have the permit or license suspended.

The bases for both of these recommendations are as follows:

(a) Respondent holds is private club whose sole purpose is the providing of alcoholic beverages to its members;

(b) Respondent's employee was negligent in not determining that, or inquiring if, the minor was a member of Applebee's;

(c) Respondent's record and reputation shows recent problems associated with sales or service of non members, and one past similar problem;

(d) Respondent should be charged with the following aggravating or ameliorating circumstances:

(i) the violation was caused by near gross negligence of the employees of the Respondent;

(ii) the violation did not cause serious bodily injury or death of another; and

(iii) the character and nature of the Respondent's operation is reasonably calculated to avoid future violations of the Alcoholic Beverage Code and rules of the Commission, as personnel have available technology to quickly determine membership of potential patrons.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be denied.

FINDINGS OF FACT

1. An unincorporated association of persons doing business as Applebee's Club #12 (Applebee's), was issued Private Club Registration Permit, N-259634, Private Club Late Hours Permit, NL-259635 and Beverage Cartage Permit, PE-259636 on November 2, 1995.
2. Applebee's licensed premises are located at 810 South Cockrell Hill Road, Duncanville, Dallas County, Texas.
3. On January 15, 1999, Applebee's, through its employee Chesney Renai Brewer a.k.a. Chesney Sellers (hereafter referred to as Chesney Sellers),

served or delivered an alcoholic beverage to a minor, Cassandra Jessica Delgado.

4. The sale and delivery of the alcoholic beverage by Sellers to Delgado was made with criminal negligence, because:

- (a) Delgado had a youthful appearance, and was dressed in a fashion similar to persons of her age.

- (b) Sellers requested identification from Delgado. Delgado tendered her Texas Department of Public Safety "Under 21 Identification Card". Sellers took the card, looked at the card, and returned the card to Delgado.

- (c) The card bore Delgado's picture, stated in capital letters "UNDER 21", and listed Delgado's date of birth as March 20, 1982.

5. On January 15, 1999, Respondent, through its employee, Sellers sold an alcoholic beverage to a non-member, Cassandra Jessica Delgado, so as to constitute Applebee's an "open saloon," because:

- (a) Sellers did not inquire of Delgado if she was a member of Applebee's, nor did Sellers request to inspect Delgado's Applebee's membership card.

- (b) Sellers did not ask if Delgado wished to become a member of Applebee's.

- (c) Sellers did not run Delgado's identification card through the club's UNICARD system.

- (d) Delgado was not a member of the club and, had never been to the licensed premises before January 15, 1999.

- (e) Delgado was not a guest of any club member, or a family member of a club member at the time the alcoholic beverages were provided to her by Sellers.

6. The sale and delivery of the alcoholic beverage to Delgado were characterized by the following:

- (a) Respondent holds is private club whose sole purpose is the providing of alcoholic beverages to its members;

- (b) Respondent's employee was negligent in not determining that, or

inquiring if, the minor was a member of Applebee's;

(c) Respondent's record and reputation shows recent problems associated with sales or service of non members, and one past similar problem;

(d) Respondent should be charged with the following aggravating or ameliorating circumstances:

(i) the violation was caused by near gross negligence of the employees of the Respondent;

(ii) the violation did not cause serious bodily injury or death of another; and

(iii) the character and nature of the Respondent's operation is reasonably calculated to avoid future violations of the Alcoholic Beverage Code and rules of the Commission, as personnel have available technology to quickly determine membership of potential patrons.

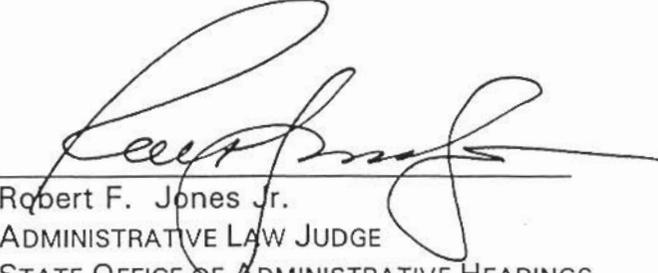
7. On July 12, 1999, the Staff issued its Notice of Hearing. The notice was directed to Applebee's Club #12 by and through its attorney of record. The Notice was received on July 14, 1999.
8. On August 3, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent was represented at the hearing by Stephen F. Shaw, Attorney at Law. The record was closed on August 20, 1999.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under §§ 106.13(a) and 32.17(a), ALCO. BEV. CODE.
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 §2003.021, GOV'T CODE.
3. Respondent received adequate notice of the proceedings and hearing, pursuant to § 2001.052, GOV'T CODE., and 1 TEX. ADMIN. CODE §§ 155.25(d)(3) and 155.27.

4. Based on Findings of Fact Nos. 1, 2, 3, and 4, Applebee's violated § 106.13(a), ALCO. BEV. CODE.
5. Based on Finding of Fact No. 6 and Conclusion of Law No. 4, Applebee's Private Club Registration Permit, N-259634, Private Club Late Hours Permit, NL-259635, and Beverage Cartage Permit, PE-259636, should be suspended, for a period of ten (10) days or Applebee's pay a fine of One Hundred Fifty Dollars per day of suspension or a total of \$1500.00.
6. Based on Findings of Fact Nos. 1, 2, and 5, Applebee's violated § 32.17(a), ALCO. BEV. CODE.
7. Based on Finding of Fact No. 6 and Conclusion of Law No. 6, Applebee's Private Club Registration Permit, N-259634, Private Club Late Hours Permit, NL-259635, and Beverage Cartage Permit, PE-259636, should be suspended, for a period of ten (10) days. Applebee's should have the opportunity to pay a civil penalty of One Hundred Fifty Dollars per day of suspension or a total of \$1500.00, rather than have the permit or license suspended.

SIGNED this 11th day of October, 1999.


Robert F. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS