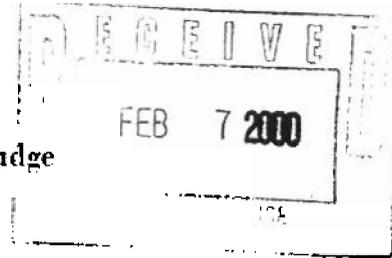


# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

February 3, 2000



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

**CERTIFIED MAIL DELIVERY NO. Z207823483**

RE: **Docket No. 458-99-2035; Texas Alcoholic Beverage Commission vs. PRC Beverage Company of Bryan, Inc., d/b/a Oxford Street Restaurant & Pub (TABC Case No. 578637)**

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 Dewey Brackin, attorney for Texas Alcoholic Beverage Commission, and to Don E. Walden, attorney for Respondent PRC Beverage Company of Bryan Inc., d/b/a Oxford Street Restaurant & Pub. For reasons discussed in the proposal, I recommend Respondent's permits be suspended for a period not to exceed 15 days or, in lieu of suspension, Respondent pay a civil penalty in the amount of \$2,250.00.

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.

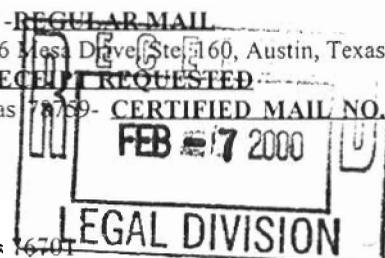
Sincerely,

A handwritten signature in cursive script, appearing to read "Suzan Moon Shinder".

Suzan Moon Shinder.  
Administrative Law Judge

Enclosure

xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - **REGULAR MAIL**  
Dewey Brackin, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 160, Austin, Texas  
78731 - **CERTIFIED MAIL DELIVERY NO. Z207823481 RETURN RECEIPT REQUESTED**  
Don E. Walden, 4408 Spicewood Springs Road, Ste. 304, Austin, Texas 78759 - **CERTIFIED MAIL NO. Z207823482 RETURN RECEIPT REQUESTED**



**DOCKET NO. 458-99-2035**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION</b>	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>PRC BEVERAGE COMPANY</b>	§	
<b>OF BRYAN INC.</b>	§	
<b>D/B/A OXFORD STREET</b>	§	
<b>RESTAURANT &amp; PUB</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>PERMIT NO. MB-196243</b>	§	
<b>BRAZOS COUNTY, TEXAS</b>	§	
<b>(TABC CASE NO. 578637)</b>	§	

**PROPOSAL FOR DECISION**

**I. Statement of the Case**

The Staff of the Texas Alcoholic Beverage Commission (Commission) brought this action seeking to suspend the permit of PRC Beverage Company of Bryan, Inc., d/b/a Oxford Street Restaurant & Pub (Respondent). The Commission seeks this relief based on its allegation that Respondent's employee, with criminal negligence, permitted a minor to possess and/ or consume an alcoholic beverage on the licensed premises. Respondent asserted, among other things, that: because the incident occurred in an area that was not a part of Respondent's actual leasehold, it was not an area for which Respondent should be held accountable; because the time elapsed between the employee and the minor was so brief, this did not rise to the level of criminal negligence; and, the penalty sought by the Commission was excessive. This proposal agrees with the Commission, but proposes a lesser suspension of the permit for fifteen days, or a \$2250.00 fine in lieu of the suspension.

**I. Procedural History, Jurisdiction, and Notice**

There are no contested issues of notice, jurisdiction, or venue, and those matters are addressed in the findings of fact and conclusions of law without further discussion in the text of this proposal.

After an agreed continuance from the original setting, Suzan M. Shinder, Administrative Law Judge (ALJ) for the State Office of Administrative Hearings (SOAH), convened a public hearing on the Commission's allegations in this matter, on November 30, 1999, in SOAH's offices at 801 Austin Avenue, Suite 750, Waco, Texas. The Commission appeared through its attorney of record, Dewey Bracken. Respondent appeared through its attorney of record, Don Walden. Denny Phillips appeared as designated representative for Respondent.

At the conclusion of the hearing, the record was left open until December 7, 1999 for the receipt of copies of cases relevant to issues in this matter. These copies were timely received from both parties and the record closed at 5:00 p.m. on December 7, 1999.

## II. Discussion

### A. Legal Standards

The Commission may cancel or suspend for not more than 60 days a retail license or permit if it is found, on notice and hearing, that the licensee or permittee did then and there on the licensed premises with criminal negligence permit a minor to possess and/ or consume an alcoholic beverage in violation of TEX. ALCO. BEV. CODE ANN. §§106.04, 106.05, and 106.13 (Vernon 1995 & Supp. 2000) (Code). Criminal negligence is described in TEX. PENAL CODE ANN. §6.03(d) (Vernon 1994) (Penal Code) as follows:

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.

"Permittee" in these sections includes the person holding the permit, as well as an agent, servant, or employee of that person. See Code §1.04(11)(Vernon 1995). Although there is an exception to the actions of an employee being attributed to the employer, such exception would require, among other things, that the employer require its employees to attend a commission-approved seller training program. See Code §106.14(a)(1)(Vernon 1995 & Supp. 2000).

The definition of "premises" would include the grounds and any adjacent premises if they are directly or indirectly under the control of the same person. See Code §11.49(a)(Vernon 1995).

The Commission or administrator may relax the sanctions against a retailer in some circumstances, if it is found that the violation could not reasonably have been prevented by the permittee by the exercise of due diligence, or that the employee of the permittee violated the Code without the knowledge of the permittee. See Code §106.13(c)(Vernon 1995 & Supp. 2000).

When the Commission is authorized to suspend a permit under the Code, with some exceptions, the Commission must give the permittee the opportunity to pay a civil penalty in lieu of suspension. The Commission's rules in regard to any penalty must take into consideration the type of violation, aggravating or ameliorating circumstances concerning the violation, and past violations of the Code by the permittee. In assessing the imposition of a suspension, the economic impact on the permittee must be considered. See Code §11.64(a)(Vernon 1995 & Supp. 2000).

### B. Evidence

Agent Randy Field, Agent Laban Toscano, and Travis Crawford testified for the Commission. Tamara Pfiester, Matt Thurstin, and Anthony Hammett testified for the Respondent. Anthony Hammett's testimony was taken by telephone at the request of the Respondent, with the agreement of both parties. Fourteen exhibits, including several photographs, were admitted into evidence without objection.

## 1. Documentary Evidence

Respondent holds a Mixed-Beverage Permit, MB-196243, issued to the PRC Beverage Company of Bryan Inc., d/b/a Oxford Street Restaurant & Pub, 1710 Briarcrest Drive, Bryan, Brazos County, Texas, by the Texas Alcoholic Beverage Commission, on the 13th day of November 1987, that has been continuously renewed. Except for the current allegations, Respondent's violation history shows only miscellaneous violations in 1993, that were not adjudicated, but only resulted in a warning.

A map of the location that includes Respondent's building, a southwest parking lot, a northeast parking lot, and the surrounding roadways, has the leasehold area highlighted, to exclude the northeast parking lot, where the incident occurred. This map, and pictures of the relevant area, show that the northeast parking lot is bounded on four sides by: 1. the Oxford Street Restaurant & Pub (identified as the "Steak & Ale" when the map was drawn); 2. a wooded area (that testimony later revealed included a creek); 3. a five-lane roadway (Briarcrest Drive); and, 4. a two-lane roadway ("Entrance Drive") off of Briarcrest Drive, controlled by a stop sign, and separated from the northeast parking lot by a grassy median and a driveway from this roadway into the northeast parking lot. The pictures reveal that on the opposite side of the "Entrance Drive" there is another parking lot and a multi-story building, later identified as the "Galleria." The southwest parking lot, on the opposite side of Respondent's building, is bounded on one side by Briarcrest Drive, and on another side by Kent Street. The incident occurred in the northeast parking lot, in a parking space that is approximately eleven or twelve parking spaces from Respondent's northeast wall.

Respondent's lease for the licensed premises does not include the northeast parking lot, and indicates that the lessor will provide fifteen parking places for the Lessee's employees adjacent to and/ or across Kent Street, as convenient as possible to Lessee's premises.

Webster's Seventh New Collegiate Dictionary definition of "control," admitted as Respondent's Number 4, states, in part, that "control" means to: ". . . exercise restraining or directing influence over . . . to have power over . . ."

## 2. Agents Field and Toscano

Agent Randy Field has been an agent with the Commission for almost 11 years and has been a licensed peace officer for two years. Agent Laban Toscano, currently a Sergeant with the Commission, has been an agent with the Commission for almost 22 years, and a licensed peace officer for almost 26 years. He has been in the Commission's Bryan office, located in the parking area across from the location of this incident, for approximately five years.

The agents are familiar with the parking lot northeast and adjacent to Respondent's building, and have observed that the majority of Respondent's customers and employees park in this parking lot. They have observed that Respondent's employees do not commonly park across Kent Street. No other business or building is directly adjacent to the parking lot northeast and adjacent to Respondent's building. Over the years of observing Respondent's business, and the adjacent northeast parking lot, based on this use, and the boundaries of this parking lot (including the Respondent's building, a wooded creek, a five-lane roadway, and a grassy median by a road controlled by a stop-sign), they

believed that the northeast parking lot was a part of Respondent's leased, and licensed, premises. They now understand that it is not a part of the leasehold.

At approximately 11:05 p.m., on February 27, 1998, the agents were driving away from their (above described) Bryan office, toward Briarcrest Drive, when they observed two males standing by a car in the above described northeast parking lot. The agents had some familiarity with Respondent's business, and would not normally have expected that parking lot to have any customer vehicles in it at that time. One of the males, later identified as Anthony Hammett, did not appear to be less than twenty-one years of age. However, they observed that the other male, later identified as Travis Crawford, had a youthful face, appearing to be less than twenty-one years of age; wearing a baggy shirt, and wearing baggy pants with a low crotch and baggy legs. This was dress commonly worn by high-school students, minors, at that time. They observed that Mr. Crawford was holding a 16-ounce beer-can in one hand, and was standing by an automobile, in a fairly well lighted area, in conversation with Mr. Hammett. The two males were standing two to four feet from one another. When the agents' vehicle got closer to the two males, the two males looked toward the agents' vehicle, and the agents observed Mr. Crawford to behave in a suspicious manner; setting the beer-can down beside the car and throwing something under the front of the car. Also appearing suspicious, when Mr. Crawford took these actions, Mr. Hammett simultaneously started walking away from Mr. Crawford, toward Respondent's building. From the time the Agents first observed the males, until the time the two males observed the agents, was approximately 10 to 15 seconds. The agents called Mr. Hammett to return, and he complied. From the time Mr. Hammett observed the agent's vehicle and started walking away, until the time the agent called to Mr. Hammett to return, was an additional 10 to 15 seconds. Agent Field retrieved the 16-ounce beer-can and found that it contained beer, as evidenced by the container itself (identifying itself as "beer"), the content's cold temperature, and the content's beer-smell and appearance. Agent Toscano retrieved the baggy, and found that it contained a green-leafy substance that he believed to be marijuana. Mr. Hammett told the agents that he was currently employed by Respondent. He told them that he had worked with Mr. Crawford, for Respondent, in the past, and was acquainted with Mr. Crawford. Mr. Crawford admitted to the agents that he was less than twenty-one years of age.

Agent Toscano testified that Anthony Hammett had been to "seller-server certification school" at some time.

Both agents would advise employees who encounter a minor in possession of alcohol in the above situation: to tell the minor to dispose of the alcohol; to tell the minor to leave; and/ or, to inform law enforcement of the situation.

### 3. Anthony Hammett

Customers and employees, including Mr. Hammett, park in both the southwest and the northeast parking lots, that are both adjacent to the restaurant, in a proportion "about fifty-fifty." Matt Thurstin, the general manager told him that he preferred employees not park in the northeast parking lot, adjacent to the restaurant, so that customers could have these parking places.

Some time between 11:00 and 11:30 p.m., on February 27, 1998, Anthony Hammett was taking a break after the restaurant had closed to customers. He was waiting for his turn to have a manager (Tamara Pfister) manually do his "check out," since the restaurant's computer was down. He was sitting on the tailgate of his pickup, parked next to the restaurant's northeast wall (in an area designated as part of Respondent's leasehold), when he observed an acquaintance, Respondent's ex-employee Travis Crawford, drive into the northeast parking lot, adjacent to the restaurant. He had worked with Mr. Crawford for approximately six months, at the Oxford Street Restaurant & Pub, but had not seen him in awhile. He approached Mr. Crawford, who was still in his car, but was in the process of exiting his car. As Mr. Crawford was exiting his car: he shook Mr. Hammett's hand; he saw the agent's car enter the parking lot; and, he threw something under the car. Mr. Hammett testified that this process took 10 to 20 seconds, after they exchanged greetings, before he observed the agent's vehicle coming quickly into the parking lot. He testified that he was not aware that the occupants of the vehicle were law enforcement. The speed at which the agent's vehicle entered the parking lot frightened him, and as a result, he began to walk away. At one point Mr. Hammett testified he did not realize Mr. Crawford had anything in his hand until the agents came into the parking lot. However, he also testified that he never saw Mr. Crawford with a beer in his hand; it was dark; and, he was unaware of the beer until the agent found the can of beer sitting next to the car, on the ground. He admitted to the agents that he was Respondent's employee and that he believed Mr. Crawford to be about 17 years of age. He told the agents that he was not aware that it was illegal to allow a minor to possess alcohol on the premises; that a restaurant could "lose" its license for this.

#### 4. Travis Crawford

Travis Crawford's date of birth is February 25, 1980. On February 27, 1998, on the date of the above described incident, Mr. Crawford was 18 years of age. At approximately 11:00 p.m. on that date, Mr. Crawford drove a blue Geo into the parking lot, adjacent to the northeast wall of the Oxford Street Restaurant & Pub, and parked about eleven parking places from Respondent's building. He testified that he was parked there for about 10 to 15 seconds before he saw Anthony Hammett, and recognized him as an employee of the restaurant, and as an acquaintance. Mr. Crawford had also worked for Respondent until the prior December, as a "salad boy" and "bus boy." Mr. Crawford stepped out of his vehicle, put a can of beer on top of the Geo, and yelled Mr. Hammett's name. He then proceeded to gather some things out of the Geo. When Mr. Hammett walked up, they shook hands. About 10 to 15 seconds after he shook Mr. Hammett's hand, the agent's vehicle came quickly into the parking lot. After the agent's car rolled up, Mr. Crawford started to walk back to the Geo. He testified that at this time, the beer was still on top of the Geo. He denied throwing anything under the Geo.

Mr. Crawford testified that at the time of the above described incident, he did not have any facial hair.

#### 5. Tamara Pfister

Tamara Pfister was employed as one of Respondent's managers, and was working on February 27, 1998. She did not observe the incident, but was advised of the incident at that time by one of the Commission's agents. Anthony Hammett was an employee, working on that evening. The

restaurant closed to the public at 10:30 p.m. that evening, and the incident occurred shortly after that, probably about 11:00 p.m. She was having to manually do the evening's "check outs," calculating how much the waiters sold, and how much they owed the restaurant, because their computer was down.

## 6. Matt Thurstin

Matt Thurstin has been Respondent's employee since 1987, and is the general manager, superior to Tamara Pfister. He was not working on February 27, 1998. He acknowledges that the restaurant's customers use the northeast parking lot, adjacent to the restaurant, for parking. He testified that there were a few parking places designated for "USDA" in the back of the building. He testified that the majority of customers park on the Kent Street side of the restaurant, in the southwest parking lot, and asserts that he cannot control what occurs outside of that area. However, he admits that the southwest parking lot is inadequate for parking for employees and customers when the restaurant is busy.

## C. Analysis

The ALJ finds that the Commission has sustained its burden of proof in this matter. The area in which all relevant events occurred, does fall under the Code definition of "premises." The northeast parking lot, adjacent to Respondent's northeast wall, where the incident occurred, by all physical appearances, is under the control of Respondent. The physical boundaries of this parking lot give it the appearance that it is a part of the parking designated for Respondent, and for Respondent alone. The public and Respondent's employees treat this parking lot as if it belonged to Respondent. Although there was some testimony that there were a few parking places designated for "USDA" in the back of the building, there was very little evidence that the northeast parking lot was actually utilized by anyone else but Respondent's customers and employees. Management treats this parking lot as their own, and not just as an "overflow" parking lot; exercising control over this area in an indirect, but affirmative, manner by encouraging Respondent's employees not to park there, so that there would be more available, convenient parking for Respondent's customers in the northeast parking lot. Respondent routinely relies on this area for customer and employee parking during periods of time when the restaurant is busy. When a permittee exercises this kind of regular use and control, routinely drawing this kind of benefit from a parking area, they also incur some responsibility for this area.

Although there is some evidence that Mr. Hammett had been to "seller-server certification school," he told the agents that he was not aware that it was illegal to allow a minor to possess alcohol on the premises; that a restaurant could "lose" its license for this. There is no evidence that Respondent requires its employees to attend a commission-approved seller training program, and no exception is found to absolve Respondent from the actions of its employee.

At the time of the incident, Anthony Hammett was working as Respondent's employee. He was acquainted with Travis Crawford, knew that Mr. Crawford was less than 21 years of age, and in fact, believed him to be approximately 17 years of age when all of the relevant events occurred. At the time of the incident, Mr. Crawford had no facial hair, had a youthful appearing face, and was dressed

in a style common to high-school students; having the appearance of a person less than 21 years of age.

The testimony of the agents is consistent. However, Mr. Hammett's testimony conflicts with that of Mr. Crawford. The testimony of the only two witnesses to the period of time prior to the first observation by the agents is difficult to reconcile. They do not agree, whether or not Mr. Crawford was in or out of the car as the agents drove up. Mr. Crawford describes a scenario in which, after he saw the agent's vehicle, he had to "walk back to" the Geo. However, Mr. Hammett stated that Mr. Crawford was just exiting the Geo, greeting him, shaking his hand, and throwing something under the car, all at substantially the same time as the observation of the agents entering the parking lot. Mr. Hammett offered no explanation for how a 16-ounce beer-can got from the top of Mr. Crawford's car, to the ground, without Mr. Hammett seeing it. Mr. Hammett's testimony is ambiguous at best. At one point he seemed to say that he saw the beer in Mr. Crawford's hand, but did not realize it was a beer at the time. At another point he clearly denies ever seeing the beer until the agents discovered it on the ground. On the other hand, Mr. Crawford admitted that he did have a beer, that was on top of his car. Mr. Hammett stated that he observed Mr. Crawford throw something under the car. Mr. Crawford denied that he threw anything under his car.

The agents did not see Mr. Hammett as he walked up to Mr. Crawford's vehicle. During the walk toward Mr. Crawford's vehicle, in a lighted parking lot, Mr. Hammett had to have already made some observation of a 16-ounce beer-can that Mr. Crawford testified was on top of his car; a walk that Mr. Crawford testified took 20 to 30 seconds after he yelled Mr. Hammett's name. The agents did not see Mr. Hammett and Mr. Crawford shake hands. They did not observe Mr. Hammett and Mr. Crawford while they were engaged in conversation, while Mr. Crawford's beer was still on top of Mr. Crawford's vehicle. They did not see Mr. Crawford retrieve the beer from the top of his vehicle. All of these things had to occur prior to the time the agents began their observation of Mr. Hammett and Mr. Crawford, taking an undetermined, but unavoidable, additional amount of time. Based on the most credible evidence, when the agents first observed these two gentlemen, they were engaged in conversation, both standing outside of Mr. Crawford's vehicle, and Mr. Crawford had the 16-ounce beer-can in his hand. When they saw the agents, Mr. Crawford placed the beer on the ground, and threw a baggy under the car; the entire period of observation by the agents taking between 10 and 15 seconds.

Based on the most credible evidence, all of the above activity that was not observed by the agents, occurred prior to, and in addition to, the 10 to 15 second activity that was observed by the agents. Mr. Hammett's walk toward Mr. Crawford's car, took 20 to 30 seconds. Additionally, Mr. Crawford and Mr. Hammett testified that from the time they shook hands, until the time they saw the agent's vehicle enter the parking lot, was 10 to 20 seconds. Notwithstanding, it still remains unclear how much time elapsed before the agents began their observation of Mr. Hammett and Mr. Crawford, in that; all of the additional activity, unobserved by the agents, is unlikely to have occurred within the brief time frame related by Mr. Hammett and Mr. Crawford.

Because Mr. Hammett effectively denies seeing the beer until after he was called back by the agents, he cannot be said to have told Mr. Crawford to dispose of the beer or to leave the area because of

the beer. He cannot be said to have been on his way to inform management or law enforcement of the situation.

Based on the above: Mr. Hammett, whose actions are imputed to Respondent, did knowingly permit a minor to possess an alcoholic beverage, when Mr. Hammett was affirmatively aware that they were in a parking lot that was in Respondent's indirect control; and when he was affirmatively aware that Mr. Crawford was less than 21 years of age. This constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances of which Mr. Hammett was aware, causing his actions to be criminally negligent.

In assessing the imposition of a suspension, the economic impact on the permittee must be considered. However, there is no evidence of economic impact on Respondent in this case.

Although it appears that the alcohol in question did not come from Respondent, Mr. Hammett's affirmative knowledge of the circumstances, and lack of action, borders on the egregious. This is not a situation in which Mr. Hammett could have had some question in his mind regarding the age of the Mr. Crawford. Notwithstanding Mr. Hammett's actions, a somewhat more lenient penalty still appears to be warranted in this case. Respondent's violation history speaks for the exercise of due diligence, being a twelve-year history described by Agent Field as "very clean." This type of history could not be maintained for this period of time had there not been consistent reinforcement by Respondent, of Respondent's employees, to abide by the Commission's seller-server restrictions. Additionally, there is no evidence that Respondent's management had, or should have had, personal knowledge of what was occurring between Mr. Hammett and Mr. Crawford that evening, and could not have reasonably prevented this specific event.

### **III. Findings of Fact**

1. Original Notice of the hearing was issued on September 24, 1999, and sent to Respondent, PRC Beverage Company of Bryan, Inc., d/b/a Oxford Street Restaurant & Pub, by and through its attorney of record, by certified mail, return receipt requested.
2. During the November 2, 1999 pre-trial conference, both parties acknowledged their agreement that the hearing on the merits, originally set for November 18, 1999, be rescheduled for November 30, 1999, at 1:00 p.m., and this was so ordered.
3. The hearing on the merits convened on November 30, 1999, in the offices of the State Office of Administrative Hearings, at 801 Austin Avenue, Suite 750, Waco, Texas, 76701. Both parties appeared by their attorneys. Respondent also appeared by a designated representative.
4. As a pre-trial matter, both parties stipulated to the jurisdiction of SOAH and the Commission, to adequate notice, and to proper venue.
5. Respondent holds a Mixed-Beverage Permit, MB-196243, issued to the PRC Beverage Company of Bryan Inc., d/b/a Oxford Street Restaurant & Pub, 1710 Briarcrest Drive, Bryan,

Brazos County, Texas, by the Texas Alcoholic Beverage Commission, on the 13th day of November 1987, that has been continuously renewed.

6. Except for the current allegations, Respondent's violation history shows only miscellaneous violations in 1993, that were not adjudicated, but only resulted in a warning.

7. The physical perimeters of the parking lot where this incident occurred, northeast and adjacent to Respondent's northeast wall, are such that the physical appearance to the public and to Respondent's employees, is that this parking lot is a part of Respondent's premises, in that: one side of the parking lot is bounded by a wall of Respondent's building; one side is bounded by a five-lane roadway; one side is bounded by a wooded creek; and, one side is bounded by a two-lane roadway, controlled by a stop sign, and separated from the northeast parking lot by a grassy median and a driveway from this roadway into the northeast parking lot.

8. No other businesses routinely utilize the parking lot, northeast and adjacent to Respondent's northeast wall, treating this parking lot as Respondent's premises.

9. Over a substantial period of time, some of Respondent's employees and many, if not most, of Respondent's customers have parked in the parking lot, northeast and adjacent to Respondent's northeast wall, treating this parking lot as Respondent's premises.

10. Respondent exercises indirect, but affirmative, control over the parking lot, northeast and adjacent to Respondent's northeast wall, telling employees not to park in this parking lot, so that customers could have these parking places; treating the parking lot as a part of Respondent's premises.

11. At the time of the incident, Mr. Hammett was aware that he and Mr. Crawford were in a parking lot that was in Respondent's indirect control.

12. Although Mr. Hammett had been to "seller-server certification school" at some time, it cannot be found that Respondent required its employees to attend a commission-approved seller training program.

13. On February 27, 1998, at the time of the incident, Mr. Hammett was working as Respondent's employee, and his actions are imputed to be Respondent's actions.

14. At the time of the incident, Mr. Crawford's face and dress were that of persons less than 21 years of age; having no hair on his youthful face, and wearing a baggy shirt and baggy pants with a low crotch, typical of high-school students.

15. At the time of the incident, Mr. Hammett correctly believed that Mr. Crawford was less than 21 years of age, and believed him to be 17 years of age.

16. Mr. Crawford's birthday is February 25, 1980, and he was actually 18 years of age at the time of the incident.

17. At the time of the incident, Mr. Hammett did observe Mr. Crawford to be in possession of a 16-ounce beer can, containing beer; on top of Mr. Crawford's vehicle, and in Mr. Crawford's hand.

18. Mr. Hammett's awareness of Mr. Crawford's possession of this beer was in excess of the 15 seconds observed by the agents, and was sufficient time for Mr. Hammett: to tell Mr. Crawford to dispose of the beer; to tell Mr. Crawford to leave the premises; or, for Mr. Hammett to initiate action to inform Respondent's management and/ or the authorities about the situation.

19. Mr. Hammett did not, at any time: tell Mr. Crawford to dispose of the beer; tell Mr. Crawford to leave the premises; or, initiate action to inform Respondent's management and/ or the authorities about the situation.

20. Mr. Hammett's knowledge that Mr. Crawford was a minor, in possession of beer (an alcoholic beverage), on premises that he knew to be indirectly under Respondent's control, and Mr. Hammett's inaction under these circumstances, constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from Mr. Hammett's standpoint.

21. Respondent's "clean," twelve year violation history speaks for Respondent's due diligence in consistent reinforcement of Respondent's employees, to abide by the Commission's seller-server restrictions.

22. Respondent's management did not have personal knowledge of the above described incident between Mr. Hammett and Mr. Crawford, and could not reasonably have prevented the incident.

#### **IV. Conclusions of Law**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5 and §§6.01(Vernon 1995), 11.61, and 106.13 (Code)(Vernon 1995 & Supp. 2000).

2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in the matter and to issue this Proposal for Decision pursuant to TEX. GOV'T CODE ANN. ch. 203 (Vernon 2000).

3. Notice of hearing was provided as required under the Administrative Procedures Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).

4. Based on the foregoing, on February 27, 1998, Respondent, by the actions of Respondent's employee, with criminal negligence, knowingly permitted Travis Crawford, a minor, to possess beer, an alcoholic beverage, in the northeast parking lot, adjacent to Respondent's northeast wall, that being an area indirectly under Respondent's control, and as such, a part of Respondent's licensed premises. See Code §§106.05 , and 106.13 (Vernon 1995 & Supp. 2000). See Penal Code §6.03(d)(Vernon 1994).

5. Respondent has shown due diligence as evidenced by his clean, 12-year, violation history. See Code §106.13(c)(Vernon 1995 & Supp. 2000).

6. Respondent's management did not have personal knowledge of the above described incident between Mr. Hammett and Mr. Crawford, and despite Respondent's due diligence, could not reasonably have prevented the incident. See Code §106.13(c)(Vernon 1995 & Supp. 2000).

7. Based on the foregoing, Code §11.64(a)(Vernon 1995 & Supp. 2000), and 16 TEX. ADMIN CODE §37.60 (1999), a 15 day suspension of Respondent's permits, or a civil penalty of \$150 per day of suspension, for a total of \$2250.00, is warranted.

Signed this 3<sup>rd</sup> day of February, 2000.



**Suzan Moon Shinder**  
**Administrative Law Judge**  
**State Office of Administrative Hearings**