

DOCKET NO. 507963

IN RE LONGHORN RESTAURANT CORP. § BEFORE THE
D/B/A LONGHORN CATTLE COMPANY §
PERMIT NO. BG-198109 § §
 § TEXAS ALCOHOLIC
 §
CAMERON COUNTY, TEXAS §
(SOAH DOCKET NO. 458-05-1673) § BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of August, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on May 9, 2006, and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 10, 2006. 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. **As of this date no exceptions have been filed.**

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 Wine and Beer Retailer's Permit is 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 27th day of **September, 2006**, all rights and privileges under the above described permit will be **SUSPENDED** for a period of **seven (7) days**, beginning at **12:01 A.M.** on the 4th day of **October, 2006**.

This Order will become final and enforceable on September 18, 2006, 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 28th day of August, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK/yt

Melissa M. Ricard
Administrative Law Judge
State Office of Administrative Hearings
Corpus Christi, Texas
VIA FACSIMILE: (361) 884-5427

Hap Fairhart, President
Longhorn Restaurant Corp.
Longhorn Cattle Company
RESPONDENT
3055 Expy. 83 W
San Benito, Texas 78586
CERTIFIED MAIL NO. 7001 2510 0000 7275 9039
RETURN RECEIPT REQUESTED

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
McAllen District Office

City

State

Zip Code

Area Code/Telephone No.

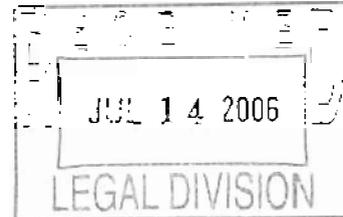
State Office of Administrative Hearings

KT



Shelia Bailey Taylor
Chief Administrative Law Judge

July 10, 2006



Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

**RE: Docket No. 458-06-1673; TABC vs. LONGHORN RESTAURANT CORP. d/b/a
LONGHORN CATTLE COMPANY**

Dear Mr. Steen:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Melissa M. Ricard".

MELISSA M. RICARD
Administrative Law Judge

MMR/MAR
Enclosure

xc: **Natalie Howard** Docket Clerk, State Office of Administrative Hearings-**REGULAR MAIL**
Judith L. Kennison, Staff Attorney Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Hap Fairhart, - 3055 Expressway 83 West, San Benito, Tx 78586 - **VIA REGULAR MAIL**

DOCKET NO. 458-06-1673

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	
LONGHORN RESTAURANT CORP.	§	OF
D/B/A LONGHORN CATTLE COMPANY	§	
PERMIT NO. BG-198109	§	
CAMERON COUNTY, TEXAS	§	
(TABC CASE NO. 507963)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Longhorn Restaurant Corp. d/b/a/ Longhorn Cattle Company (Respondent), alleging that Respondent, with criminal negligence, delivered an alcoholic beverage to a minor. The Administrative Law Judge (ALJ) finds that the Staff established that Respondent is liable for the violation, therefore the suspension should be imposed.

I. PROCEDURAL HISTORY AND JURISDICTION

Staff sent Respondent a complaint alleging that Respondent's agent, servant, or employee, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor. This matter was referred to the State Office of Administrative Hearings (SOAH). On May 9, 2006, a hearing convened before ALJ Melissa M. Ricard at the Rio Grande Law Center on 501 E. Tyler Street, Harlingen, Cameron County, Texas. Staff was represented by Judith Kennison, an attorney with the TABC Legal Division. Respondent appeared through its president, Hap Fairhart. The record closed the same day. Because notice and jurisdiction were not contested issues, those matters are addressed only in the Findings of Fact and Conclusions of Law below.

II. DISCUSSION

Respondent holds Wine and Beer Retailer's permit, BG-198109 for the premises located at 3055 Expressway 83 West, San Benito, Cameron County, Texas (the establishment).

A. Applicable Law

Tex. Alco. Bev. Code Ann. § 106.13(a) (the Code) states:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 90 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

“Criminal negligence” is defined in TEX. PEN. CODE ANN. §6.03 (d) 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.

B. Evidence

The Staff alleged that on or about September 24, 2005, an employee of Respondent, Feliciano Rueben Renteria, delivered a beverage to a minor in a sting operation conducted by the Staff. As Mr. Renteria reviewed the minor's identification, which clearly showed he was not of the proper age, the Staff argues that the delivery constituted criminal negligence. The Staff provided a hidden-

camera video of the incident and pictures of the minor as evidence.

1. Neva Saenz

On September 24, 2005, TABC Agent Neva Saenz conducted a sting operation at the licensed premises. With her were two minors, one of whom was Zachary Rhinehart. At the time, Mr. Rhinehart was 17, had a youthful appearance with no facial hair, and was wearing jeans a T-shirt. Ms. Saenz and the minors arrived at the establishment and seated themselves at a table. Ms. Saenz left her purse on the table (with the hidden camera inside), and stood approximately 10 feet away (one empty table length), using a cell phone.

Mr. Renteria approached the young men at the table and took drink orders for two waters and a beer. Mr. Renteria returned with the waters and the beer and asked Mr. Rhinehart for identification (an I.D.) The young man gave Mr. Renteria his driver's license which clearly showed that his date of birth is Feb. 11, 1988, and that on that day he was 17 years old. Mr. Renteria took the license and left the beer and the waters on the table. Mr. Rhinehart picked up the beer but did not drink from it. Mr. Renteria was gone for a time with the license, and upon his return he handed the license back to the Mr. Rhinehart saying "just had to check, my manager's here...that's why I... ." Mr. Renteria then left the table.

Agent Saenz returned to the table shortly thereafter and instructed the young men to pay the tab so that they could leave, and then she left the table again. The young men stood up, caught the eye of Mr. Renteria, and sat back down again. When Mr. Renteria came back to the table, they told him they had to leave. Mr. Renteria asked Mr. Rhinehart if he had drank any of the beer. When he found out Mr. Rhinehart had not drank the beer, he told them there was no charge. Agent Saenz returned to the table, smelled the beer, picked up her purse, and left with the young men.

2. Brent Puente

TABC Agent Brent Puente was called to the scene. Relying on a description given to him by Agent Saenz, Agent Puente approached Mr. Renteria and interviewed him. Mr. Renteria indicated that he did not have TABC certification to sell alcohol. Agent Puente also indicated that a later search of the TABC data base verified that Mr. Renteria had never attended a certification course.

Agent Puente served an administrative citation for the establishment to the manager on duty. An arrest warrant for Mr. Renteria was later served.

3. Respondent's evidence

Respondent has been in business for more than twenty years without incident and offers a class in-house every two years for its employees to obtain TABC certification to be able to sell alcohol. Mr. Hap Fairhart, president of the Respondent, produced pictures of the establishment which show that a notice instructing employees regarding sale of alcohol was posted, and that a bulletin board with a birth date marked for serving alcohol is also used, changed daily, and posted. Mr. Fairhart included portions of the establishment's policies and the pictures of the establishment in the record.

Mr. Fairhart stated that Mr. Renteria was working outside his authority on that day and was terminated. Mr. Renteria was a bus boy who was only supposed to serve beans to patrons as they sat down. Respondent argues that the minor was with an adult and that it was not clear whether the alcohol was ordered for the minor or for the adult. Respondent also argues that Mr. Renteria was not authorized to serve alcohol, that the Staff abused its authority in conducting the sting operation, and that Staff failed to follow its own procedures in conducting the investigation by not taking the beer that was served as evidence. Respondent argues that Agent Saenz was not where she testified

she was, and that she was farther away and could not hear what was said at the table.

C. Analysis

The evidence shows that on September 24, 2005, a 17-year-old minor ordered a beer from an employee of Respondent. The employee delivered the alcoholic beverage to the minor. The employee asked for an I.D., and obtained one which clearly showed that the minor was not yet 21 years old. Both the minor's appearance and his driver's license were sufficient to establish that there was a substantial risk that a minor involved, if the employee had used any amount of diligence.

Respondent showed that it has proper policies in place so that its servers can become TABC certified and that it has postings to note special handling of alcoholic beverages. In this case, however, the employee was not authorized or certified to serve alcohol. Respondent did not show how it came to be that a bus boy, who was an untrained employee, on that day was taking orders for and delivering alcoholic beverages or how Respondent avoids such employees working outside their authority or their training. No evidence was offered to show that this situation could not happen again. Therefore, Respondent should be held liable for the incident.

TABC Staff recommends that the Respondent's permit be suspended for 15 days. The standard penalty chart contained in the TABC Administrative Rules Chapter 37 §60 recommends a 7 to 15 day suspension for first time violations in this type of matter. Given that this is the first violation for the Respondent in 20 years, the lower penalty is appropriate and Respondent should have the opportunity to pay a fine in lieu of the suspension.

III. FINDINGS OF FACT

1. Longhorn Restaurant Corp. d/b/a/ Longhorn Cattle Company (Respondent) holds Wine and Beer Retailer's permit, BG-198109 for the premises located at 3055 Expressway 83 West, San Benito, Cameron County, Texas (the Establishment).

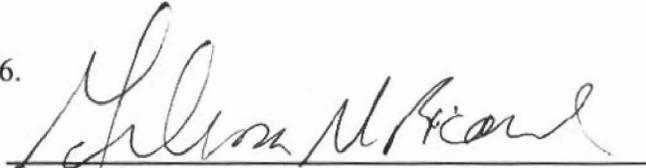
2. On September 24, 2005, Zachary Rheinhart, who appeared younger than 21 years old and whose date of birth is February 11, 1988, ordered an alcoholic beverage at the establishment from Feliciano Renteria, an employee of Respondent. Mr. Rheinhart was working with the TABC in an undercover sting operation.
3. Respondent's employee delivered the beverage to Mr. Rheinhart.
4. After the alcoholic beverage was delivered to Mr. Rhienhart, the employee asked for an I.D.
5. The employee took Mr. Rhienhart's driver's license for a short period of time, leaving the alcoholic beverage on the table with Mr. Rhienhart. The license clearly showed that Mr. Rhienhart was not yet 21 years old. The employee returned the driver's license a short time later.
6. Respondent's employee should have been aware there was a substantial and unjustifiable risk that he was delivering an alcoholic beverage to a minor.
7. TABC Staff issued a notice of hearing notifying all parties that a hearing would be held and informing the parties of the time, place, and nature of the hearing. The hearing was held on May 9, 2006, in Harlingen, Cameron County, Texas. Administrative Law Judge Melissa M. Ricard appeared by telephone. Respondent was represented by Hap Fairhart. Staff was represented by TABC attorney Judith Kennison.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §106.13.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based on the above Findings of Fact, on September 24, 2005, Respondent, its agent, servant, or employee, with criminal negligence sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE § 106.13.

5. Based on Conclusion of Law 4, a seven day suspension is warranted. 16 TEX. ADMIN. CODE § 37.60. Pursuant to TEX. ALCO. BEV. CODE ANN. §11.64, the Respondent should be allowed to pay a \$1,050 or \$150 per day civil penalty in lieu of suspension of its permit.

SIGNED on the 10th day of July, 2006.



MELISSA M. RICARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS