

DOCKET NO. 582893

IN RE JANIE LEA TUCKER	§	BEFORE THE
D/B/A CABARET 7	§	
PERMIT NOS. MB219380, LB219381,	§	
& PE219382	§	TEXAS ALCOHOLIC
	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-2913)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of August, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan M. Shinder. The hearing convened on May 30, 2000 and adjourned May 30, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 20, 2000. 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, Transcripts, and Exhibits, 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.

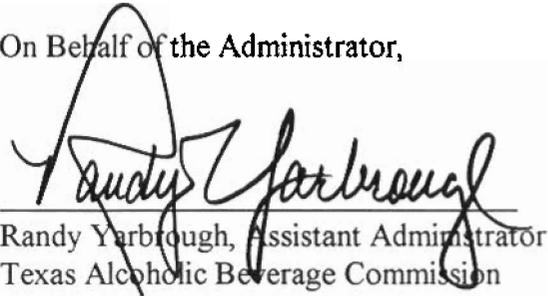
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB219380, LB219381 and PE219382 are herein **SUSPENDED for a period of ten (10) days, beginning at 12:01 A.M. on the 18th day of October, 2000**, unless Respondent pays a civil penalty in the amount of \$1,500.00 on or before the 11th day of October, 2000.

This Order will become final and enforceable on September 1, 2000, 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 11th day of August, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Suzan M. Shinder
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (254) 750-9380

Holly Wise, Docket Clerk
State Office of Administrative Hearings
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Licensing Division
Waco District Office

DOCKET NO. 458-99-2913

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
	§	
JANIE LEA TUCKER D/B/A CABARET 7 PERMIT NOS. MB-219380, LB-218381, & PE-219382 BELL COUNTY, TEXAS (TABC CASE NO. 582893)	§ § § § § § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Commission) initiated this action seeking a fifteen-day suspension of the permits, or a \$150.00 per day civil penalty in lieu of suspension, of Janie Lea Tucker d/b/a Cabaret 7 (Respondent). This is based on the allegations that on or about February 20, 1999, a servant, agent or employee of Respondent, was intoxicated on the licensed premises, in violation of Section 104.01(5) of the Texas Alcoholic Beverage Code (Code), warranting suspension or cancellation of the permit under Sections 25.04 and 11.61(b)(13) of the Code. Respondent contended that Janie Lea Tucker was not intoxicated on the premises and asked that any suspension be for not more than two days. This Proposal For Decision recommends a suspension of ten days, or a \$150.00 per day civil penalty in lieu of suspension.

I. Jurisdiction, Notice, and Procedural History

The hearing on the merits convened on May 30, 2000, before Administrative Law Judge Suzan Shinder, in the offices of the State Office of Administrative Hearings (SOAH) in Waco, McLennan County, Texas. Petitioner appeared through its attorney, Christopher Burnett. Respondent appeared through its attorney, F. Edward Brown. Janie Lea Tucker was also present in person, but did not otherwise participate in the hearing. The Commission's motion to amend the alleged date of June 2, 1995, to February 20, 1999, was granted. The hearing was concluded and the record was closed the same day.

The Commission and SOAH have jurisdiction of this matter as reflected in the Conclusions of Law. The notice of the hearing met the notice requirements imposed by statute and rule as set forth in the Findings of Fact and Conclusions of Law.

II. The Evidence

It was not disputed that Respondent is the holder of a mixed beverage permit, a mixed beverage late hours permit, and a beverage cartage permit, issued by the Commission for the premises known as Cabaret 7, located at 213 North Mary Jo Drive, Harker Heights, Bell County, Texas 76542, and has been the holder of these permits at all relevant times.

Sergeant Kenneth Cleghorn's Testimony:

Sergeant Kenneth Cleghorn has been an officer for the Harker Heights Police Department approximately 5 ½ years. Ms. Tucker has operated the Cabaret 7 club for the tenure of Sergeant Cleghorn's employ with the police department in Harker Heights, if not longer. He has been to the club on calls prior to this event, and has met Ms. Tucker and spoken with her several different times prior to this event, but has never had a problem with her prior to the events of February 20, 1999. Ms. Tucker is Korean and has an accent, but makes herself understood.

The sergeant conducted an investigation at the Cabaret 7 on February 20, 1999, because he had probable cause to believe that an offense was being committed by Ms. Tucker. Specifically, it was his opinion that she was in violation of what he described as the "T.A.B.C. agent-intoxication statute," since she was the licensee, and might be intoxicated on the licensed premises. Section 101.04 of the Texas Alcoholic Beverage Code states that, "by accepting a license or permit, the holder consents that the Commission, an authorized representative of the Commission, or a peace officer may enter the licensed premises at any time to conduct an investigation or inspect the premises for the purpose of performing any duty imposed by this code."

At approximately 1:30 a.m., on February 20, 1999, Sergeant Cleghorn and Corporal John Peck were dispatched to the Cabaret 7 (the club) based on a report that a person was refusing to leave the club. When the officers arrived at the club, Sergeant Cleghorn met with Mr. O'Rorke, an employee of the club, who was standing in the foyer immediately inside the front glass doors, with another male, Mr. Ron Brown. Mr. O'Rorke told Sergeant Cleghorn that Mr. Brown had been in an argument with the manager of the club, Janie Lea Tucker, that Mr. Brown had been told to leave, but that Mr. Brown wanted to continue the argument. Sergeant Cleghorn entered the club to elicit Mr. Brown's and Ms. Tucker's version of the events.

From where Sergeant Cleghorn stood, in the front of the club, he could see seven to ten persons around the bar area. When Sergeant Cleghorn first saw Ms. Tucker, he observed her for the approximate thirty seconds that it took her to walk the length of the bar. She was walking from the direction of the dance floor at the back of the bar, toward the front of the bar, in the area between the booths and the bar. She was staggering and appeared to be unsteady on her feet. She stumbled and held onto the bar for support, and Sergeant Cleghorn was suspicious that she was intoxicated. Because of this, Sergeant Cleghorn asked Mr. Brown to step out onto the club's front porch with him to have their conversation. Sergeant Cleghorn informed Mr. Brown that if someone from the club advised him to leave the club, he had to leave the club. Mr. Brown apologized to the officer, stated that he had been in an argument, and he now understood that he had to leave. Mr. Brown was put in a cab and he left the premises.

Sergeant Cleghorn asked Corporal Peck to bring Ms. Tucker outside to get her version of the events. However, when Sergeant Cleghorn looked into the bar, he observed the corporal and Ms. Tucker standing in the foyer, arguing with each other. The corporal was holding Ms. Tucker's arm, and she was resisting his attempt to escort her outside, so Sergeant Cleghorn stepped into the foyer. He asked Ms. Tucker to step outside with him, but she was argumentative, refusing to step outside and talk to the sergeant. When he tried to take her arm to escort her outside, she began swinging her other arm directly in front of the sergeant's face, to the extent that the sergeant thought he would be burned with the cigarette she was holding in that hand. Because of this, he took her hand in his hands and threw the cigarette out the door. Ms. Tucker continued to argue with the sergeant, and refused to go outside. At this time, the sergeant observed that Ms. Tucker's breath smelled of an alcoholic beverage, and her eyes were bloodshot and glassy. She had been so slow to understand that the officers wanted her to go outside, that the sergeant was left with the impression that Ms. Tucker was confused about what was going on. At that time the corporal and the sergeant escorted Ms. Tucker outside in an attempt to avoid a scene inside the club. Because Ms. Tucker continued to be uncooperative and combative, the officers did not request that she attempt sobriety tests in that location. Ms. Tucker refused to comply with the officer's request that she sit down in their vehicle, and had to be physically placed in the vehicle by the officers. Mr. O'Rorke told Sergeant Cleghorn that Mr. O'Rorke had tried to persuade Ms. Tucker to go home earlier that evening, telling the sergeant that he had done this, "because she was drunk." Sergeant Cleghorn arrested Ms. Tucker and took her into the Harker Heights Police Department, into the booking area. At that time, he unsuccessfully attempted to get her to perform sobriety tests. She refused to follow the directions for the horizontal gaze nystagmus sobriety eye-test, preventing the administration of this test. She continued to argue with the sergeant, and because of this, he did not request that she perform any other sobriety tests.

Based on his observations of her, and his experience, it was his opinion that on February 20, 1999, Ms. Tucker was intoxicated at the time he observed her, in the licensed premises.

Respondent's Exhibit No. 2:

This is a certified copy of the Assistant County Attorney's motion to dismiss, and court order, in Cause No. 2C99-04410, in the County Court At Law Of Bell County, Texas, styled "The State Of Texas vs. Janie Lee Tucker." This one-page document contains a motion to dismiss the action because it had been refiled as 2C99-10647, and the court's order that the criminal action be dismissed.

Respondent's Exhibit No. 3:

This is a certified copy of the judgement and sentence in Cause No. 2C99-10647, out of the County Court At Law Number Two/ Three Of Bell County, Texas, styled "The State Of Texas vs. Janie Tucker." This one-page document acknowledges Ms. Tucker's plea of nolo contendere, and adjudges her guilty of the offense of "Disorderly Conduct," a class "C" misdemeanor, committed on February 20, 1999, fining Ms. Tucker \$400.00 and costs of court.

William Charles O'Rorke's Testimony:

William Charles O'Rorke is currently unemployed, but on February 20, 1999, he was working as the manager of the Cabaret 7 club. He had been employed there for 3 ½ years. On February 20, 1999, he called the police department because of a disturbance in the club caused by Ronald Brown. Mr. O'Rorke observed Ms. Tucker to consume one alcoholic drink late that evening, an "apple-corn," which is a German schnapps that is 12% alcohol.

Mr. O'Rorke has an employment history that includes being a deputy sheriff for 1 ½ years in Kansas, and has thirty years experience working in clubs. He has a great deal of experience identifying an intoxicated person. In most cases, he can identify an intoxicated person. On February 20, 1999, at approximately 1:30 a.m., he did not think that Ms. Tucker was intoxicated.

According to Mr. O'Rorke, in the foyer area, there is a counter. This makes the walkway in the foyer very narrow, and two persons could not stand side by side in the width of the foyer, on the walkway side of the counter. The bar can be partially seen from the foyer area. The back area of the bar can be partially seen from the foyer, but the pool tables in the back cannot be seen from the foyer area. Between the bar-stool area and the booths on the other side of the bar, the walkway area is approximately three feet wide. Two to three persons can stand side by side in this walkway area. If persons were standing in this walkway area, it would partially block their view of the dance floor area. *(See Respondent's Exhibit No. 4)*

Mr. O'Rorke stated that on February 20, 1999, no one in Cabaret 7's management refused the Harker Heights Police Department access to the premises to inspect the premises.

Respondent's Exhibit No. 4:

This is a hand drawing of the layout of Cabaret 7, drawn by William Charles O'Rorke at the hearing.

Lewis Hernandez's Testimony:

On February 20, 1999, Lewis Hernandez was in the Cabaret 7, having arrived at the club between 7:00 and 7:30 p.m. Cabaret 7 is a "pool-bar" club, and there are sixteen to eighteen pool teams at the club. On February 20, 1999, a pool team was in the club. Mr. Hernandez and Ms. Tucker are both on Cabaret 7 pool teams. He observed Ms. Tucker in the club that night, around 7:30 p.m., and she did not appear to be intoxicated. Between 7:30 p.m. and the time he observed the police officers escort her out of the club, he observed Ms. Tucker to consume "a couple" of drinks. He was unsure if Ms. Tucker was playing on a pool team that evening. In his opinion, Ms. Tucker was not intoxicated that evening. She appeared to be steady on her feet, and she was not hostile.

Mr. Hernandez has known Ms. Tucker for more than three years, and knows her to be talkative, repetitive, and animated. She can get on a person's nerves because she does not like to leave a subject alone.

Robert Kenneth Tucker's Testimony:

Robert Kenneth Tucker is Janie Lea Tucker's husband of almost eleven years. Ms. Tucker has been the sole owner of the Cabaret 7 club for more than ten years. According to Mr. Tucker, there have been no violations of the "liquor laws" by the club, except for having a piece of cork in a bottle. Ms. Tucker wears platform shoes with big heels most of the time. Mr. Tucker described Ms. Tucker as a Korean lady with a "hyper" demeanor. She normally talks loudly; she often sounds like she is yelling, and could mistakenly be taken as hostile and combative if a person had not known her for a long time. Mr. Tucker was out of town on February 20, 1999, and is unsure if Ms. Tucker was playing on a pool team that evening. He testified that Ms. Tucker starts to drink as soon as she gets up in the morning.

III. Discussion

On February 20, 1999, Janie Lea Tucker was the owner and manager of the Cabaret 7 club. Pursuant to Section 104.01(5) of the Code, the Commission must prove that Respondent, Respondent's agent, servant, or employee, was intoxicated on the licensed premises. The acts and omissions of Janie Lea Tucker are the acts and omissions of the permittee, Janie Lea Tucker d/b/a Cabaret 7, as contemplated by Section 1.04(11) of the Code, which includes any agent, servant, or employee of the holder of the permit as the "permittee."

Pursuant to Section 25.04(b) of the Code, the provisions of the Code that are applicable to the cancellation and suspension of a retail dealer's on-premise license also apply to the cancellation and suspension of a wine and beer retailer's permit. Pursuant to Section 11.61(b)(13) of the Code, the Commission may suspend for not more than sixty days or cancel an original or renewal permit if it is found that the permittee was intoxicated on the licensed premises. Pursuant to Section 11.64 of the Code, when the Commission is authorized to suspend a permit or license, the amount of the civil penalty in lieu of suspension may not be less than \$150.00 per day for each day the permit or license was to have been suspended.

On February 20, 1999, Sergeant Cleghorn and Corporal Peck were called to the Cabaret 7 club based on a complaint that a customer would not leave the club. When the officers arrived at the club, the sergeant observed that Janie Lea Tucker, the owner, manager, and permittee of the licensed premises appeared to be intoxicated. Because Sergeant Cleghorn suspected the permittee and manager of the club to be intoxicated on the licensed premises, he conducted an investigation of this suspected violation of the Texas Alcoholic Beverage Code. The sergeant was aware of Ms. Tucker's participation in the argument with Mr. Brown that resulted in the police being called. A Cabaret 7 employee, Mr. O'Rorke, told the officer that Mr. O'Rorke had told Ms. Tucker to go home earlier in the evening, "because she was drunk." During his investigation, the sergeant made several observations of Ms. Tucker. He observed her to exhibit impairment of her physical capacities, in that, she was unsteady on her feet, she staggered as she walked, and she stumbled and held onto the bar for support as she walked. Her breath smelled of an alcoholic beverage. Her eyes were bloodshot and glassy. She exhibited impairment of her mental capacity in that she was slow to understand that the officers were instructing her to go outside. She exhibited impairment of her mental capacity by

swinging her arm directly in front of the sergeant's face with a lit cigarette in her hand, so close to the sergeant's face that he thought he would be burned, demonstrating impairment of normal social inhibitions. She exhibited impairment of her mental capacity by her excessive agitation under the circumstances, even after Mr. Brown had left the club, continually arguing with the officers and physically resisting their simple direction to go outside the club, demonstrating impairment of normal social inhibitions. She exhibited impairment of her mental capacity by refusing to comply with the officer's instruction to sit down in his vehicle, having to be physically placed in the vehicle by the officers, further demonstrating impairment of normal social inhibitions. She refused to follow the sergeant's directions for the administration of the horizontal gaze nystagmus sobriety eye-test, preventing the administration of this sobriety test, consistent with an effort to conceal the results of this test from the sergeant. Based on these observations, and on the sergeant's experience as a law enforcement officer, it was the sergeant's opinion that Ms. Tucker was intoxicated on the licensed premises on February 20, 1999.

It was uncontested that Ms. Tucker was consuming alcoholic beverages in the club that evening. Mr. O'Rorke was aware of her consumption of one alcoholic drink. Mr. Hernandez testified that he was aware of her consumption of two drinks. Ms. Tucker's husband testified that Ms. Tucker starts to drink as soon as she gets up in the morning. However, Ms. Tucker did not testify, and none of these men had such continual contact with Ms. Tucker on that evening that any of them could credibly say how much alcohol she had cumulatively consumed that evening.

A preponderance of the evidence demonstrates that, on February 20, 1999, Respondent was then and there intoxicated on the licensed premises, in violation of Section 104.01(5) of the Code, warranting suspension or cancellation of the permit under Sections 25.04 and 11.61(b)(13) of the Code. The violation was the result of the intentional conduct of Ms. Tucker, but the only other violation in evidence was a non-specific violation involving having a piece of cork in a bottle. Additionally, the permittee, by its employee Mr. O'Rorke, demonstrated responsibility for the safety of persons in the club, by intervening in a potentially explosive situation, first by attempting to persuade Ms. Tucker that she should go home when she became intoxicated, and later by calling the police to the club that evening. The balance of these factors would support a somewhat lesser suspension than the fifteen-day suspension requested the Commission. Therefore, the undersigned Administrative Law Judge recommends a suspension of ten days, or a \$150.00 per day civil penalty in lieu of suspension.

IV. Findings of Fact

1. On December 6, 1999, the Texas Alcoholic Beverage Commission (Commission) notified Janie Lea Tucker d/b/a Cabaret 7 (Respondent), of the hearing on the merits initially set for February 11, 2000 in the Notice of Hearing served on Respondent by Certified Mail, No.473 038 723, as evidenced by the notice's Certificate of Service. The Commission's Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted. The hearing on the merits was continued twice, based on the agreement of both parties. The undersigned Administrative

Law Judge notified both parties of the final hearing on the merits in the Pre-trial Order No. 2, by facsimile and by U.S. mail, on May 10, 2000, as evidenced by the cover letter for this order.

2. At the May 30, 2000, hearing on the merits, the Commission appeared by its attorney Christopher Burnett, and the Respondent appeared by its attorney F. Ed Brown. Both parties stipulated that there were no contested issues of notice or jurisdiction in this proceeding.

3. The hearing was convened on May 30, 2000 at the Hearings Facility of the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, Waco, Texas. All parties appeared, evidence and argument were heard, and the record was closed the same day.

4. Respondent is the holder of a mixed beverage permit, a mixed beverage late hours permit, and a beverage cartage permit, issued by the Commission for the premises known as Cabaret 7, located at 213 North Mary Jo Drive, Harker Heights, Bell County, Texas 76542, and has been the holder of said permits at all relevant times.

5. Janie Lea Tucker is the owner and manager of the Cabaret 7 club.

6. On February 20, 1999, Janie Lea Tucker was consuming alcoholic beverages on the licensed premises of the Cabaret 7 club, and became engaged in an argument with Ron Brown, a club patron, who refused to leave the premises.

7. Mr. William Charles O'Rorke, an employee of the Cabaret 7 club, working at the club on February 20, 1999, has extensive experience in recognizing intoxicated persons.

8. Mr. O'Rorke called the police, resulting in Sergeant Kenneth Cleghorn and Corporal John Peck being dispatched to the Cabaret 7 club on February 20, 1999, based on Mr. O'Rorke's report of a person refusing to leave the Cabaret 7 club.

9. During that evening, Mr. O'Rorke unsuccessfully attempted to persuade Ms. Tucker to go home because, at that time, he felt she was intoxicated. Later that evening, Mr. O'Rorke communicated this information to Sergeant Cleghorn.

10. On February 20, 1999, Sergeant Cleghorn observed Janie Lea Tucker to exhibit multiple signs of intoxication, as follows:

- a) She was unsteady on her feet;
- b) She staggered as she walked;
- c) She stumbled and held onto the bar for support as she walked;
- d) Her breath smelled of an alcoholic beverage;
- e) Her eyes were bloodshot and glassy;
- f) She was slow to understand that the officers were instructing her to go outside;
- g) She swung her arm directly in front of the sergeant's face with a lit cigarette in her hand, so close to the sergeant's face that he thought he would be burned;

- h) She was excessively agitated, under the circumstances, even after Mr. Ron Brown had left the club, continually arguing with the officers and physically resisting their simple direction to go outside the club,
- I) She refused to comply with the officer's instruction to sit down in his vehicle, having to be physically placed in the vehicle by the officers; and
- j) She refused to follow the sergeant's directions for the administration of the horizontal gaze nystagmus sobriety eye-test, preventing the administration of this sobriety test, consistent with an effort to conceal the results of this test from the sergeant.

11. Mr. William Charles O'Rorke, an employee of the Cabaret 7, diffused a potentially dangerous situation by timely calling the police to the Cabaret 7 club before the incident could escalate to something more serious.

12. Respondent's only other known violation of the Code is a non-specific violation involving having a piece of cork in a bottle

V. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5, of the TEX. ALCO. BEV. CODE (Vernon 1995)(Code).
2. The State Office of Administrative Hearings has jurisdiction over the 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. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(6)(Vernon 2000).
3. As referenced in Findings of Fact Nos. 1-3, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. Based on Findings of Fact Nos. 4 and 5, the acts and omissions of Janie Lea Tucker, the owner and manager of the Cabaret 7 club, are the acts and omissions of the permittee, as contemplated by Section 1.04(11) of the Code (Vernon 1995) which would include any agent, servant, or employee of the holder of the permit as the "permittee."
5. Based on Finding of Fact No. 7, the mitigating acts of William Charles O'Rorke, an employee of Cabaret 7, working in the club on February 20, 1999, during all relevant events, are also the acts of the permittee, as contemplated by Section 1.04(11) of the Code (Vernon 1995) which would include any agent, servant, or employee of the holder of the permit as the "permittee."
6. Based on Findings of Fact Nos. 4, 5, 6, 7, 9, and 10, on February 20, 1999, as a result of her intentional conduct, Janie Lea Tucker was intoxicated on the licensed premises, in violation of Section 104.01(5) of the Code (Vernon 1995).

7. Pursuant to Section 11.61(b)(2) of the Code (Vernon 1995), the Commission may suspend for not more than 60 days or cancel a permit if it is found, that the permittee violated a provision of the Code or a rule of the Commission.

8. Pursuant to Section 11.64 of the Code (Vernon 1995 & Supp. 2000), when the Commission is authorized to suspend a permit or license, the amount of the civil penalty in lieu of suspension, may not be less than \$150.00 per day for each day the permit or license was to have been suspended.

9. Based on Findings of Fact Nos. 4-12, and Conclusions of Law Nos. 4-8, a 10-day suspension of Respondent's permits is warranted. In the alternative, Respondent should pay a civil fine of \$150.00 per day for 10 days, for a total of \$1500.00.

Signed this 20th day of July, 2000.



Suzan Moon Shinder
Administrative Law Judge