

DOCKET NO. 609888

IN RE AJRS, LLC	§	BEFORE THE
D/B/A ROCKY LARUE'S	§	
PERMIT NO. MB-450261	§	
	§	TEXAS ALCOHOLIC
	§	
HAYS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-9003)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of May, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Katherine L. Smith. The hearing convened on January 26, 2006, and the record was closed February 3, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 4, 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.

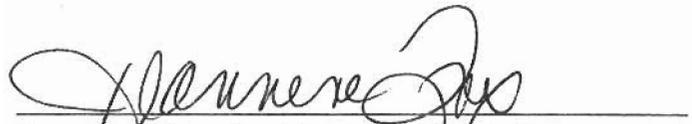
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on May 29, 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 8th day of May, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK/yt`

Katherine L. Smith
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

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Licensing Division

SOAH DOCKET NO. 458-05-9003

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	
	§	
AJRS, LLC d/b/a ROCKY LaRUE'S	§	OF
PERMIT NOS. MB-450261	§	
and PE-450-262	§	
HAYS COUNTY, TEXAS	§	
(TABC CASE NO. 609888), Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) brought an action to cancel or suspend the Mixed Beverage Permit and Beverage Cartage Permit issued to AJRS, L.L.C., d/b/a Rocky LaRue's (Respondent) for violations of the Texas Alcoholic Beverage Code and Commission rules for serving an alcoholic beverage to an intoxicated person who was later involved in a fatal automobile accident. The Administrative Law Judge (ALJ) recommends that Respondent's permits not be canceled, because Respondent meets the "safe harbor" requirements of TEX. ALCO. BEV. CODE ANN. (Code) § 106.14(a).

I. JURISDICTION, PROCEDURAL HISTORY AND BACKGROUND

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

On October 14, 2005, Respondent filed a Motion for Summary Disposition in this case which was partially granted in Respondent's favor in Order No. 6 issued January 2, 2006. The remaining issues were set for a hearing on the merits, which convened on January 26, 2006, at the State Office of Administrative Hearings (SOAH), 300 West 15th Street, Fourth Floor, Austin, Texas, before ALJ Katherine L. Smith. Staff was represented by its attorney, Judith Kennison. Respondent was represented by Attorney Don E. Walden. Evidence and argument were heard, and the ALJ closed the record February 3, 2006, after Staff and Respondent submitted citations to case law and other authorities relevant to the remaining issues.

Respondent is the holder of a Mixed Beverage Permit and Beverage Cartage Permit issued by the Commission for the premises known as Rocky LaRue's, located at 138 N. LBJ Drive, San Marcos, Hays County, Texas. On September 30, 2003, Jason Hester, an employee, sold alcoholic beverages to Jonathan Kincaid, who was later involved in a fatal automobile accident.

II. ALLEGATIONS AND APPLICABLE LAW

A. Allegation

Staff alleges that Respondent, its agent, servant or employee, sold or delivered an alcoholic beverage to an intoxicated person, in violation of § 11.61(b)(14) of the Code, when Jason Hester served Jonathan Kincaid.

B. Respondent's Affirmative Defense

Respondent raised § 106.14(a) of the Code, or the "safe harbor" statute, as an affirmative defense, claiming that Respondent is protected from the Commission's action because Respondent complied with this statute.

C. Applicable Law

In pertinent part, § 106.14(a) of the Code states that the sale, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person shall not be attributable to the employer if:

- the employer [permittee] requires its employees to attend a Commission-approved seller training program;
- the employee has actually attended such a training program; and
- the employer has not directly or indirectly encouraged the employee to violate such law.

A permittee who claims exemption from an administrative action under § 106.14(a) of the Code bears the burden of proof. Section 50.10(a) of the Commission's rules requires that "each licensee/permittee who claims exemption to produce evidence by affidavit indicating that the licensee/permittee met the three criteria outlined in § 106.14." Section 50.10(b) states further that a licensee/permittee "shall not be deemed to require its employees to attend a Commission-approved seller-server training program unless employees are required to attend such program within 30 days of their initial employment, and each employee's certification has not expired, been suspended, or revoked."

Concerning whether an employer has indirectly encouraged the employee to violate the law, as stated in § 106.14(a)(3) of the Code, § 50.10(d) states that the following practices constitute *prima facie* evidence of indirect encouragement to sell or serve alcoholic beverages to minors or intoxicated persons:

- the permittee fails to insure that all employees possess currently valid seller-server certificates of training;
- the permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the permittee to prohibit such sales, service, or consumption;
- the permittee fails to insure that employees have read and understood the permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons.

D. Issues Resolved

In Order No. 6 Granting Partial Motion for Summary Disposition, the ALJ determined that the following facts are not in dispute:

- Jason Hester is the employee who the Commission alleges served an alcoholic beverage to an intoxicated person on September 30, 2003.
- Respondent requires its employees to attend a Commission-approved seller training program.

Jason Hester attended commission approved seller/server training prior to and had valid certifications on September 30, 2003.

Respondent posted, within view of its employees, policies and procedures designed to prevent the sale, service, or consumption of alcoholic beverages by or to minors and intoxicated persons.

E. Disputed Facts and Issues Remaining

The following facts and issues are in question:

- Whether Respondent must take additional affirmative steps to ensure that its employees read and understand its alcoholic beverage service policies.

Whether all employees have read and understood the licensee/permittee's policies and procedures regarding sales, service, or consumption of alcoholic beverages by or to minors or intoxicated persons.

Whether Respondent has met the requirements of § 50.10(d) and thus complied with Code § 106.14(a)(3).

III. EVIDENCE AND ANALYSIS

A. Respondent's Position and Arguments

Jason Roland, co-owner of Rocky LaRue's with Allen Shy, testified about the layout of the bar and the day-to-day procedures that he and Mr. Shy have implemented. He stated that the bar is a very narrow and long room that allows the bartenders to see everyone in the room. Resp. Ex. 1. The bar owners employ no wait persons. Anyone who wants a drink must get up from the tables across from the bar or the booths adjacent to and behind the bar to buy a drink. This arrangement enables the bartenders to observe the customers as they approach the bar and return to their chairs or booths. Rocky LaRue's policies and procedures are posted directly above the cash register. Resp. Ex. 2. There is no way for the bartender to ring up a drink for a customer without his or her seeing the policies and procedures. On duty at any given time are at least one doorman who checks I.D.s

and is on the lookout for intoxicated persons; the bartender who also checks for I.D.s and sells the drinks; and a "roamer" or floor manager who collects used glasses, cleans tables, and generally keeps an eye open for possible problems or overdrinking. No one underage is allowed into the bar. Rocky LaRue's employs about fourteen people. On a busy weekend, there are about ten employees working. On the night in question, a Tuesday, two people were working. When the staff becomes aware that someone has become intoxicated, they will either call a cab for the person, or else take the person home themselves.

In addition to the daily procedures, Mr. Roland testified, the owners have "clean days" that occur every 30 to 60 days. On those days all the employees give the bar a thorough cleaning. During the course of the day, the owners discuss with the employees their procedures for checking for underage or intoxicated persons, the latest information issued by the Commission, new information about fake I.D.s, and any other matters that may have come to their attention.

Rocky LaRue's has received seven commendation letters from the Commission for following the requirements of the law and the Commission's rules when the Commission performed sting operations, such as hiring an underage person to try to enter the bar and order a drink. When they received those letters of commendation, the owners posted them and gave a \$100 bonus to every employee who was on duty that night. The owners did this, Mr. Roland said, as a way of rewarding the employees for being diligent and following procedures and to encourage them to continue doing so in the future.

Only once in the last seven years has Respondent had to fire an employee for not following procedures. That incident occurred in August 2003, when a doorman allowed an underage person into the bar. The person had been hired by the Commission to try to gain entrance. When the Commission informed Rocky LaRue's of the event, the doorman was fired. According to Mr. Roland, the owners then had a "fire and brimstone" meeting with their employees to remind them of how important it is to follow procedures.

Randy Yarbrough, an expert witness, prepared a report and also testified on behalf of Respondent. Mr. Yarbrough has 30 years of experience with the Commission and was assistant administrator until his retirement in 2002. Mr. Yarbrough prepared his report, Resp. Ex. 3, based on an on-site visit to Rocky LaRue's, interviews of Mr. Shy and Mr. Roland, and a review of Respondent's policies and procedures. He found that Respondent uses training that has been certified and monitored by the Commission. He asked the co-owners about how they operate their business, and inquired specifically into the nature of their "clean days." He reviewed photos taken of the inside of the bar. Mr. Yarbrough concluded that Rocky LaRue's has met all of the requirements to insure that its employees do not violate the law and that the owners do not directly or indirectly encourage its employees to sell alcohol to minors or intoxicated persons. Furthermore, he pointed out, the Commission did not file a criminal charge or provide a "source investigation" concluding that Mr. Hester should have known that the person he was serving was intoxicated.

During questioning by Ms. Kennison, Mr. Yarbrough was given an offense report to review regarding the events of September 30, 2003, resulting in Mr. Kincaid's fatal accident. Mr. Yarbrough stated that nothing he saw in the report would convince him to change his testimony. Although credit card receipts in the report showed the number of drinks that Mr. Kincaid had purchased, Mr. Yarbrough stated that it is not possible to determine whether Mr. Kincaid consumed those was drinks or was buying them for others. Either way, Mr. Yarbrough maintained, nothing in the report was evidence showing that Respondent directly or indirectly encouraged Mr. Hester or any other employee to sell alcohol to minors or intoxicated persons.

Respondent maintains that even though a tragic death occurred, that in and of itself does not warrant a more in-depth look at the bar owner's actions. Nothing in the statute or rules requires closer scrutiny when a death is involved.

B. Staff's Position and Arguments

Staff's position is that Respondent either directly or indirectly encouraged the bartender to serve an alcoholic beverage to an intoxicated person and that Respondent's permits should be canceled as a result.

Rod Venner testified on behalf of Staff regarding his understanding of indirect encouragement and what an appropriate penalty should be in this case. Mr. Venner has been the Deputy Chief Assistant of Enforcement for the last year and a half and has been with the Commission for about eighteen years. Mr. Venner stated that serving an intoxicated person is one of the more serious public safety violations because of the far-reaching effect of intoxicated persons being involved in crimes and accidents. He testified that a commitment to enforce the rules of the Commission is shown by owners' posting the rules, communicating regularly with employees about the rules, and consistently enforcing the rules. He stated that direct encouragement by bar owners to violate the rules consists of overt actions such as a "wink, wink, nod, nod" by which an employee is told that it is permissible to serve intoxicated persons and those under 21.

Indirect encouragement, he testified, is discerned more from the totality of how the employees are allowed to act by the owners. Evidence of indirect encouragement by the owners to violate the law would be, for example, the high alcohol content in Jonathan Kincaid's blood and his fatal accident. He also noted that just one adjudicative violation is sufficient in the judgment of the Commission to cancel a permit, so the fact that Respondent had received a violation one month prior to the alleged violation – in August 2003 – is further condemnation of Respondent and an indication that the owners are encouraging its employees to violate the law. Other strong evidence of indirect encouragement is Mr. Kincaid's purchase of several drinks in a short period of time and the bar owners failure to reprimand or fire the bartender. According to Mr. Venner, all those factors showed a strong lack of commitment by the owners to enforce the law. Mr. Venner admitted under cross-examination that the Commission does not consider the "safe harbor" defense when a fatality occurs.

Mr. Venner claimed that the Commission usually looks to its standard penalty chart at 16 TEX. ADMIN. CODE § 37.60 to determine what kind of penalty to impose based on aggravating or ameliorating factors. Mr. Venner explained that aggravating factors include whether the violation was caused by reckless behavior; the number, kind and frequency of violations; whether the violation caused serious bodily injury or death of another; and whether the character and nature of the permittee's operation are reasonably calculated to avoid violations.

C. Analysis and Conclusion

There is no evidence that Respondent directly or indirectly encouraged Mr. Hester to serve intoxicated persons or minors. Commission Rule 50.10(c) states that:

Proof by the commission that an employee or agent of a licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice within a 12-month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

In this case there is only the one clear violation of August 1, 2003, and the alleged violation here within a 12-month period. TABC Ex. 2. Therefore, the violation of August 1, 2003, has limited effect. Moreover, a high level of alcohol content in Jonathan Kincaid's blood is no evidence that the owners directly or indirectly encouraged Jason Hester to serve an intoxicated person. Moreover, that there was a fatal accident is not determinative. That law enforcement brought no actions against Jason Hester also suggests there was no fault on his part.

Respondent's policy is that all employees are to be TABC-certified sellers and that intoxicated persons and minors are not to be served alcoholic beverages. All employees, as well as Jason Hester, had attended Commission-approved seller/server training classes and had current seller/server certificates. Respondent's policies and procedures are posted directly above the cash register so that the employees can see them as they make sales. Respondent reviews the policies and procedures with the employees during the "clean days" held every 30 to 60 days. Seven

commendations in the last seven years versus one more recent violation persuades the ALJ that from the totality of the actions of the owners, Respondent encourages lawful operation of its bar. The Commission presented no controverting evidence.

Respondent met its burden of proof to show that it met the requirements of the "safe harbor" statute. Because Respondent meets the requirements of TEX. ALCO. BEV. CODE ANN. § 106.14, the sale of alcoholic beverages to an alleged intoxicated person by Respondent's employee Mr. Hester at Rocky LaRue's on September 30, 2003, should not be attributed to Respondent. The ALJ concludes that Respondent's permits should not be canceled.

Because the ALJ has found in favor of Respondent, there is no need to analyze the aggravating and mitigating factors in Commission rule 37 referred to during the hearing.

IV. FINDINGS OF FACT

1. AJRS, L.L.C. d/b/a Rocky LaRue's (Respondent) is the holder of a Mixed Beverage Permit and Beverage Cartage Permit issued by the Commission for the premises known as Rocky LaRue's, located at 138 N. LBJ Drive, San Marcos, Hays County, Texas.
2. On August 29, 2005, the Staff of the Texas Alcoholic Beverage Commission (Commission) sent a notice of hearing to Respondent. The notice contained: a statement of the location and the 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 allegations and the relief sought by the Commission.
3. On January 2, 2006, Order No. 6 Granting Partial Motion for Summary Disposition was issued, reserving the remaining issues for the hearing on the merits.
4. The hearing on the merits convened on January 26, 2006, at the State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas, before Administrative Law Judge Katherine L. Smith. The Commission appeared by staff attorney, Judith Kennison. Attorney Don E. Walden, represented Respondent. The record closed February 3, 2006.

5. On September 30, 2003, Respondent's bartender Jason Hester served alcoholic beverages to Jonathan Kincaid.
6. Mr. Kincaid was later involved in a fatal accident.
7. Respondent requires all of its employees to obtain Commission-approved seller-server certificates prior to working their first shift, and to renew those certificates prior to expiration.
8. Mr. Hester held a currently valid seller-server training certificate on September 30, 2003.
9. All of Respondent's employees held valid seller-server training certificates on September 30, 2003.
10. On and prior to September 30, 2003, Respondent had its policies and procedures regarding the sale of alcoholic beverages to minors or intoxicated persons posted directly above the cash register.
11. All of Respondent's employees were aware of Respondent's policies and procedures. Respondent's rules were discussed during "clean days" that were held every 30 to 60 days.
12. Rocky LaRue's had received seven letters of commendation from the Commission in seven years.
13. Respondent's employees have read and understand Respondent's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons.
14. Respondent made a reasonable effort to prevent its employees from serving intoxicated persons or minors, so did not directly or indirectly encourage the sale of alcohol to intoxicated persons or minors.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. §11.63; and 1 TEX. ADMIN. CODE (TAC) §155.55.
4. Respondent met the requirements of 16 TAC § 50.10(d).
5. The actions of Respondent's employee are not attributable to Respondent pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14 because Respondent met the requirements of the "safe harbor" statute by not directly or indirectly encouraging the employee to sell, provide, or serve alcoholic beverages to an underage or intoxicated person.
6. Based on Conclusions of Law Nos. 4 and 5, cancellation of Respondent's permits is not warranted.

SIGNED April 4, 2006.



KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS