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**DOCKET NO. 614360**

IN RE ADOLFO ALVAREZ	§	BEFORE THE
D/B/A A & A BALLROOM	§	
PERMIT NO. BG-564874	§	
	§	TEXAS ALCOHOLIC
	§	
FRIO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-8434)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 5th day of January, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on August 31, 2005, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 31, 2005. 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. Petitioner and Respondent filed exceptions to the Proposal for Decision.

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, with the exception of Conclusion of Law No. 5, of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law, with the exception of Conclusion of Law No. 5, into this Order. as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, are adopted herein, with the exception of Conclusion of Law No. 5, which is modified in accordance with the changes by the Assistant Administrator.

**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 unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **18th** day of **February, 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 **25th** day of **February, 2006**.

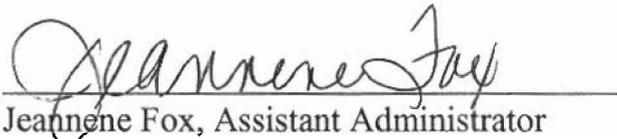
**IT IS FURTHER ORDERED** that the Respondent shall have all his employees attend a SAVE program by **February 25, 2006**.

**This Order will become final and enforceable on January 27, 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 5th day of January, 2006.

On Behalf of the Administrator,

A handwritten signature in cursive script, appearing to read "Jeannene Fox", is written over a horizontal line.

Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

LT/yt

John H. Beeler  
Administrative Law Judge  
State Office of Administrative Hearings  
Houston, Texas  
***VIA FACSIMILE: (713) 812-1001***

ADOLFO ALVAREZ  
A & A BALLROOM  
**RESPONDENT**  
320 S. Mulberry St.  
Pearsall, Texas 78061  
***CERTIFIED MAIL NO. 7005 0390.0005 7550 4099***  
***RETURN RECEIPT REQUESTED***

-  
Adolfo "Al" Alvarez  
**ATTORNEY FOR RESPONDENT**  
4409 N. McColl Rd.  
McAllen, Texas 78504  
*VIA FACSIMILE: (956) 687-7075*

Judith L. Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
San Antonio District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCED

DOCKET NUMBER: 614360

REGISTER NUMBER:

NAME: ADOLFO ALVAREZ

TRADENAME: A & A BALLROOM

ADDRESS: 320 S. Mulberry St., Pearsall, Texas 78061

DATE DUE: February 18, 2006

PERMITS OR LICENSES: BG-564874

AMOUNT OF PENALTY: \$1,050.00

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Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

If you wish to a pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 18th DAY OF FEBRUARY, 2005, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**P.O. Box 13127**

**Austin, Texas 78711**

**For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731**

**WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.**

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

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Signature of Responsible Party

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Street Address

P.O. Box No.

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City

State

Zip Code

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Area Code/Telephone No.

DOCKET NO. 458-05-8434

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

ADOLFO ALVAREZ d/b/a  
A & A BALLROOM  
PERMIT NO. BG-564874

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This is an enforcement action brought by the Texas Alcoholic Beverage Commission (TABC) against Adolfo Alvarez, d/b/a A & A Ballroom (Respondent), for selling beer to a minor. The Administrative Law Judge (ALJ) finds that TABC proved its case, and recommends a suspension of Respondent's permit for 7 days or payment of a civil penalty of \$1,050.00 in lieu of suspension.

**I. PROCEDURAL HISTORY**

On August 31, 2004, the hearing was held in the offices of The State Office of Administrative Hearings in San Antonio, Texas. Judith L. Kennison, attorney, appeared and represented TABC. Attorney Al Alvarez appeared for Respondent. The record closed on the same day.

**II. DISCUSSION**

**ISSUE:** Did Respondent's employee sell an alcoholic beverage to a minor with criminal negligence, thereby violating TEX. ALCO. BEV. CODE ANN. § 106.03?

## **Legal Standard**

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

## **TABC's Evidence**

### **Leonard Guzman**

TABC agent Leonard Guzman testified that on January 28, 2005, he was working undercover and was on Respondent's premises as part of a minor sting operation. His job was to watch an attempt by a minor to purchase a beer. The minor, Barrett Phillips, was an 18-year-old male working for TABC. Agent Guzman testified that Mr. Phillips entered the premises, asked the bartender for a beer, and paid for it in cash. The bartender got the beer and asked Mr. Phillips for an ID. The bartender looked at the ID, and gave Mr. Phillips the beer. At that time Mr. Phillips moved the beer down the bar and left the premises.

Guzman stated that he waited for another agent to enter, made a gesture that identified the bartender as the person who sold Phillips the beer, and left the premises.

### **Miguel Campos**

TABC agent Miguel Campos testified he waited outside the premises until Mr. Phillips signaled to him that a purchase had been made. Once inside the premises, agent Guzman signaled to him identifying the bartender and the person who had sold Mr. Phillips the alcohol. He then arrested the bartender.

## **Barrett Phillips**

Barrett Phillips testified that he was 18 years old at the time of the sting. He entered the premises, asked the bartender for a beer and handed the bartender his Texas driver's license. The license showed him to be 18 years old. The bartender sold him the beer and Mr. Phillips then left the premises.

## **Documents**

Several documents were admitted including a picture of Barrett Phillips taken on the day of the sting and a copy of Phillip's driver's license. On the license it states, "Under 21 Driver License" and "Under 21 until 05-19-07."

## **Respondent's Evidence**

### **Alfonso Martinez**

Alfonzo Martinez testified that he is 69 years old and was working as the bartender on the premises on the night of the sting. He usually works for Aldofo Alvarez fixing fences on a ranch and had never tended bar before the night in question. When Mr. Phillips asked for a beer, he requested ID because Mr. Phillips looked young. After viewing the ID, he refused to sell Mr. Phillips the beer. He never gave the beer to Mr. Phillips.

### **Robert Rodriguez**

Robert Rodriguez testified that he was a customer at the bar that night and saw Mr. Martinez take the beer from Mr. Phillips after viewing the ID.

## **Discussion & Recommendation**

It is clear from the evidence that Adolfo Martinez had no training or experience as a bartender. It is also clear that the beer was sold to Mr. Phillips. Respondent argues that the sale never occurred, but the testimony of Respondent's witnesses was contradictory. Alfonso Martinez testified that he never gave Mr. Phillips the beer, but Robert Rodriguez testified that he saw Martinez take the beer back from Mr. Phillips.

The testimony of TABC's witnesses was consistent and logical, and Respondent offered no reason why the agents would make up the events of the evening. The actions of Mr. Martinez created a substantial and unjustifiable risk and the risk was of such a nature and degree that the failure to perceive it constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint as contemplated by TEX. PEN. CODE ANN. §6.03 (d).

Given the fact that this is Respondent's first violation, the ALJ recommends that the proper punishment for this offense is a suspension of Respondent's alcoholic beverage permit of 7 days, or payment of a civil penalty of \$1,050.00 in lieu of the suspension.

### **III. FINDINGS OF FACT**

1. On January 28, 2005, Barrett Phillips, whose date of birth is May 19, 1986, purchased an alcoholic beverage (a beer) at A & A Ballroom.
2. Adolfo Alvarez, d/b/a A & A Ballroom (Respondent), holds Permit No. BG-564874 issued by the Texas Alcoholic Beverage Commission.
3. Barrett Phillips appears younger than 21 years old.
4. Respondent's bartender requested and inspected Mr. Phillips' driver's license, which showed him to be 18 years old, and further stated, "Under 21 Driver License" and "Under 21 until 05-19-07."
5. As referenced in the above Findings, Respondent's employee should have been aware there was a substantial and unjustifiable risk that he was selling an alcoholic beverage to a minor.

6. On August 9, 2005, Staff issued a notice of hearing informing Respondent of the hearing in this matter. Staff's notice contained the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
7. On August 31, 2005, a public hearing was held before Administrative Law Judge John H. Beeler, at the offices of the State Office of Administrative Hearings, San Antonio, Bexar County, Texas. Staff was represented by Judith L. Kennison, attorney. Respondent was represented by Al Alverson, attorney. The record was closed on that date.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. §6.01.
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. TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5).
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. §2001.051.
4. Respondent's employee sold an alcoholic beverage to a minor with criminal negligence as defined in TEX. PENAL CODE ANN. § 6.03(d), thereby violating TEX. ALCO. BEV. CODE §106.03.
5. Respondent's Permit No. BG-564874 should be suspended for 7 days, and Respondent should have the option of paying the a civil penalty in lieu of the suspension in the amount of \$1,050.00. TEX. ALCO. BEV. CODE §§ 11.61 and 11.64.

SIGNED this 31<sup>st</sup> day of October, 2005.

  
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**JOHN H. BEELER**  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS