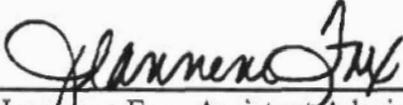


By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this 5th day of June, 2006, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC\bc

The Honorable Sarah G. Ramos
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (512) 475-4994

DENNIS MICHAEL ROOP
RESPONDENT
d/b/a BEER GARDEN
1119 S 55TH ST
TEMPLE, TX 76501
CERTIFIED MAIL NO. 7001 2510 0000 7274 1508

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Waco District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 615842

REGISTER NUMBER:

NAME: DENNIS MICHAEL ROOP

TRADENAME: BEER GARDEN

ADDRESS: 1119 S. 55th Street, Temple, Bell County, Texas

DATE DUE: August 2, 2006

PERMITS OR LICENSES: BE205813

AMOUNT OF PENALTY: \$3,150.00

Amount remitted \$ _____ Date remitted _____

If you wish to 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 2ND DAY OF AUGUST 2006, 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, 78711

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.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

LEGAL

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
PETITIONER

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BEFORE THE STATE OFFICE

V.

OF

DENNIS MICHAEL ROOP
D/B/A BEER GARDEN
BELL COUNTY, TEXAS
(TABC CASE NO. 615842),
RESPONDENT

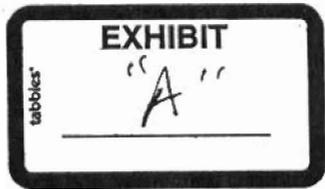
ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this disciplinary action against Dennis Michael Roop d/b/a Beer Garden (Respondent), alleging that Respondent's employee served an alcoholic beverage to a minor. Because the evidence supports the allegation, the Administrative Law Judge (ALJ) recommends a 21-day suspension of Respondent's licenses or, in lieu of suspension, payment of a \$3,150 civil penalty. The recommended sanction is less than that recommended by Staff and is based on mitigating factors described in this proposal.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Neither party challenged notice or jurisdiction, and those matters are addressed only in the Findings of Fact and Conclusions of Law. On March 8, 2006, a hearing was convened before ALJ Sarah G. Ramos, at the State Office of Administrative Hearings, 801 Austin Avenue Suite 750, Waco, Texas. Respondent represented himself, and attorney W. Michael Cady represented the Staff. The record closed the same day.



II. EVIDENCE

A. Licenses Held

Since March 18, 1986, Respondent has held a Beer Retailer's On Premise License, BE-205813, and since March 13, 1998, he has had a Retail Dealer's On-Premise Late Hours License, BL-428400, for the premises located at 1119 South 55th Street, Temple, Bell County, Texas.

B. Testimony

1. Agent Daniel Ochoa and Kaitlyn Blossman

Daniel Ochoa, a TABC Agent, and Kaitlyn Blossman, a minor who had volunteered to assist TABC, testified that they went to the Beer Garden on March 26, 2005, at 8:34 p.m. Ms. Blossman was born on June 5, 1986, and was 18 years old on the day she went to Respondent's establishment. Once she and Agent Ochoa were inside the Beer Garden, Ms. Blossman went to the bar and ordered a Bud lite beer. As Ms. Blossman recalled the setting, she said there were not more than two other people at the bar at the time.

The bartender, who was not TABC seller-served trained, asked Ms. Blossman for identification, and Ms. Blossman showed the bartender her own driver's license. A copy of the driver's license was admitted into evidence.¹ On the license it states, "Under 21 Driver License" and "Under 21 until 06-05-07."

The bartender looked at the license and gave Ms. Blossman a beer. Ms. Blossman took the beer to a table and sat with Agent Ochoa. About six minutes later, the bartender walked over to Ms. Blossman and asked to see the identification, again. Then, the bartender said to Ms. Blossman, "you're only 19; I don't want you to drink here."

¹ Ex. 2.

2. Respondent’s Testimony

Mr. Roop admitted that his employee made a mistake when she served Ms. Blossman. He acknowledged that “we did it and did it wrong.”

However, Mr. Roop also noted that he had been in business since 1986 with only three violations. He said the Staff had offered him a 14-day suspension to settle this case prior to the hearing, but that recommendation was rejected by the Austin office. Closing his business for 30 days would put his three employees out of work, Mr. Roop added.

3. Prior Violations and Sanctions Requested

Another TABC employee, Sargent Bryan Bond, testified that an appropriate sanction for this violation would be a 45-day suspension without an option to pay a monetary penalty in lieu of the suspension. According to Sgt. Bond, a lengthy suspension would be justified because of Respondent’s prior violations.

Three sanctions have been imposed upon the Respondent for prior violations, as follows:

Order Date	Finding	Sanction
11-13-01	Respondent was intoxicated on the licensed premises on 10-5-01.	seven-day suspension and agreed to pay \$1,050.00 in lieu of the suspension.
5-22-03	Respondent was intoxicated on the licensed premises on 4-6-02.	\$3,150, and if the amount was not paid by the required date, a 21-day suspension
11-23-04	Respondent’s employee sold an alcoholic beverage to a minor on 10-8-04.	a five-day suspension or, in lieu of suspension, payment of a civil penalty in the amount of \$750; also, Respondent’s employees had to attend a SAVE Program.

III. ANALYSIS

The evidence raises two issues for resolution – whether the bartender’s acts were done with criminal negligence, and if so, what is an appropriate sanction. As authorized by TEX. ALCO. BEV. CODE ANN. (Code) §§ 61.71 and 106.03 (Vernon 1995 and Supp. 2006), the Commission may cancel or suspend Respondent’s licenses if his employee, with criminal negligence, sold an alcoholic beverage to a minor.

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).

Based on the evidence, the ALJ finds that Respondent’s employee, acting with criminal negligence, sold an alcoholic beverage to a minor. The risk of selling to a minor was perceptible enough to the bartender that she asked Ms. Blossman for identification.² When the bartender looked at Ms. Blossman’s driver’s license, she should have seen that it was printed in a different format than that of an adult’s driver’s license and included the notations about Ms. Blossman’s age. Particularly in light of Respondent’s 2004 violation for a sale to a minor, the failure to recognize this obvious fact was a gross deviation from the standard of care required from an ordinary person who worked as a bartender.

The Commission has adopted a Standard Penalty Chart at 16 TEX. ADMIN. CODE (TAC) § 37.60(a) (West 2005). The chart includes suggested sanctions for the Commission’s agents,

² The ALJ disagrees with Staff that Ms. Blossman has a particularly youthful appearance; at the hearing which was about a year after the incident, Ms. Blossman appeared to be in her early 20’s. Yet, the bartender clearly realized that Ms. Blossman appeared young enough that it was necessary to ask for her identification.

compliance officers, or other designated personnel to use when settling cases prior to a hearing. According to the rule, a repeat violation by a licensee justifies a higher the penalty if it is a health, safety, and welfare violation and occurs within 36 months of the first violation. The suggested sanctions bind neither an ALJ nor the Commission's Administrator, and deviations from the chart are permitted if there are aggravating or mitigating circumstances.

In the 36 months prior to the incident with Ms. Blossman, Respondent had two other health and safety violations – a sale to a minor and Respondent's intoxication on the premises. If the chart were strictly followed, the third violation would require a 60-day suspension or cancellation of Respondent's licenses. In addition, Code § 61.71 allows the same sanction for a single violation involving a sale to a minor.

Even so, there is one significant mitigating factor to consider -- within a few minutes of the violation, the bartender attempted to rectify the situation. The bartender realized she may have made a mistake, looked at Ms. Blossman's driver's license a second time, and told Ms. Blossman that she could not drink the alcoholic beverage. There was no evidence to indicate that the bartender acted intentionally or in bad faith. Also, no one was injured as a result of the bartender's actions.³ Based on these factors, the evidence supports a lesser sanction than the one requested by Staff.

In the ALJ's opinion, a 21-day suspension is an appropriate sanction for this violation. The period of time suggested falls within the range listed in 16 TAC § 37.60(a) for a subsequent violation of serving a minor. In light of the mitigating circumstances, the ALJ believes it is appropriate. As permitted by Code § 11.64, the Applicant should be allowed to pay \$150 a day, for a total of \$3,150, in lieu of suspension.

³ Code § 37.61(c) lists these as mitigating factors when determining a sanction.

IV. FINDINGS OF FACT

1. Since March 18, 1986, Dennis Michael Roop d/b/a Beer Garden (Respondent) has a held Beer Retailer’s On Premise License, BE-205813, and since March 13, 1998, he has had a Retail Dealer’s On-Premise Late Hours License, BL-428400, for the premises which are located at 1119 South 55th Street, Temple, Bell County, Texas.
2. In the past 36 months, two sanctions have been imposed upon the Respondent for violations, as follows:

Order Date	Finding	Sanction
5-22-03	Respondent was intoxicated on the premises on 4-6-02.	\$3,150, and if the amount was not paid by the required date, a 21-day suspension
11-23-04	Respondent’s employee sold an alcoholic beverage to a minor on 10-8-04.	a license suspension for five days or, in lieu of suspension, payment of a civil penalty in the amount of \$750; also, Respondent’s employees had to attend a SAVE Program.

3. On March 26, 2005, Kaitlyn Blossman, who was born on June 5, 1986, was 18 years old.
4. At 8:34 p.m. on March 26, 2005, Ms. Blossman went to Respondent’s premises.
5. No one asked for Ms. Blossman’s identification as she entered the establishment.
6. Once Ms. Blossman was inside the Beer Garden, she went to the bar and ordered a Bud lite beer.
7. There were not more than two other people at the bar at the time.
8. Respondent’s employee who was tending the bar was not TABC seller-server trained.
9. The bartender asked Ms. Blossman for identification, and Ms. Blossman showed the bartender her own driver’s license.
10. Ms. Blossman’s license is printed in a different format than an adult driver’s license and includes these words, “Under 21 Driver License” and “Under 21 until 06-05-07.”
11. The bartender looked at Ms. Blossman’s license and then gave her the beer
12. Ms. Blossman took the beer to a table and sat down.

13. Six minutes later, the bartender walked over to Ms. Blossman and asked to see the identification, again.
14. Then, the bartender said to Ms. Blossman, "you're only 19; I don't want your to drink here."
15. Respondent's employee should have been aware there was a substantial and unjustifiable risk that she was selling an alcoholic beverage to a minor.
16. There was no evidence to indicate that the bartender acted intentionally or in bad faith.
17. No one was injured as a result of the bartender's actions.
18. On January 11, 2006, Staff issued a notice of hearing that included the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
19. On March 8, 2006, a hearing was convened before Administrative Law Judge Sarah G. Ramos, at the State Office of Administrative Hearings, 801 Austin Avenue Suite 750, Waco, Texas. Respondent represented himself, and attorney W. Michael Cady represented the Staff. The record closed the same day.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. (Code) §6.01 (Vernon 1995 and Supp. 2006).
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. 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; Code §11.63; and 1 TEX. ADMIN. CODE (TAC) §155.55.
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. Based on the Findings of Fact and Conclusions of Law, a 21-day suspension or a \$150.00 per day civil penalty in lieu of suspension is warranted, pursuant to Code §11.64 and 16 TAC §§ 37.60 and 37.61.

SIGNED May 5, 2006



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 5, 2006

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

HAND DELIVERY

RE: Docket No. 458-06-0955; DENNIS MICHAEL ROOP D/B/A BEER GARDEN

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.

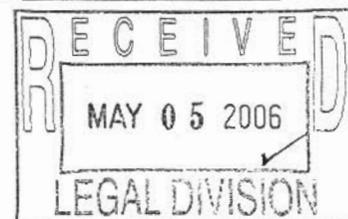
Sincerely,

A handwritten signature in black ink that reads "Sarah G. Ramos".

Sarah G. Ramos
Administrative Law Judge

SGR/trp
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
W. Michael Cady, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA HAND DELIVERY**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA HAND DELIVERY**
Dennis Michael Roop, d/b/a Beer Garden, 1119 S. 55th St, Temple, TX 76501- **VIA REGULAR MAIL**



William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>