

DOCKET NO. 591999

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

JUAN IGNACIO MATEOS
D/B/A GRIDIRON SPORTS BAR
PERMIT NOS. MB429789, LB429790
EL PASO COUNTY, TEXAS
(SOAH Docket 458-01-1514)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 22nd day of February, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Lopez. The hearing convened on October 30, 2001, and the record was closed on December 13, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 4, 2002. 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. Exceptions were filed by Petitioner on January 31, 2002.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, Exhibits and Exceptions to 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.

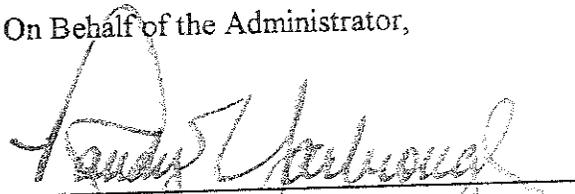
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on March 15, 2002, 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 22nd day of February, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Louis Lopez, ALJ
State Office of Administrative Hearings
VIA FACSIMILE: (915) 834-5657

Sergio Gonzalez
ATTORNEY FOR RESPONDENT
8517 Lockheed
El Paso, Texas 79925
REGULAR MAIL

El Paso District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE
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BEFORE THE STATE OFFICE

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PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Staff) brought this action against Juan Mateos, doing business as the Gridiron Sports Bar (Respondent). The Staff alleged that Respondent had committed a violation of the Texas Alcoholic Beverage Code (Code) and requested cancellation of Respondent's permits. This proposal finds that Respondent had a valid affirmative defense under the Code and recommends that Respondent's permits not be canceled.

The hearing on the merits was held on October 30, 2001, at the State Office of Administrative Hearings, 401 East Franklin Avenue, Suite 580, El Paso, Texas. The Staff appeared through attorney Dewey Brackin. Respondent appeared in person and was represented by attorney Sergio Gonzalez. Administrative Law Judge Louis Lopez presided. The record was closed on December 13, 2001.

Since there were no contested issues related to jurisdiction or notice, those matters are set out below in the Findings of Fact and Conclusions of Law.

I. LEGAL PROVISIONS

The following provisions are relevant to this case:

CODE §106.13 (Vernon 1995 and Supp. 2001). **SANCTIONS AGAINST RETAILER.**
(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 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.

CODE §1.04 (Vernon 1995 and Supp. 2001). **DEFINITIONS.**

.....
(11) "Permittee" means a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person.

TEXAS PENAL CODE §6.03 (Supp. 2001). **DEFINITIONS OF CULPABLE MENTAL STATES.**

.....

(d) 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 a 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.

CODE §106.14 (Vernon 1995 and Supp. 2001). **ACTIONS OF EMPLOYEE.** (a) For purposes of this chapter and any other provision of this code to the sales, service, dispensing, or delivery of alcoholic beverages to a minor or intoxicated person or the consumption of alcoholic beverages by a minor or an intoxicated person, the actions of an employee shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate the law.

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II. EVIDENCE

The Staff had seven exhibits admitted into evidence: (1) a set of documents related to Respondent's permits and past history of violations, (2) a videotape of the deposition of Ellen Kimberly Presley, (3) a transcript of that deposition, and (4) other documents intended to show that Ms. Presley was ultimately adjudicated for committing the criminally negligent homicide of Eric Gomez. The Staff did not call any witnesses. Respondent had three exhibits: the first two were Supplement Reports of the El Paso Police Department, and the third was a portion of a transcript in Ms. Presley's adjudication in juvenile court. Respondent was the only person to testify at the hearing. The Staff asked that the record be held open to provide a copy of a decision in a similar case. Respondent asked that the record be held open to provide a copy of the terms of probation of Eric Gomez. Neither document was ever provided. The record was closed on December 13, 2001.

Deposition of Ellen Kimberly Presley

Kimberly Presley stated in her deposition that on Wednesday, August 30, 2000, about 11:30 p.m., she drove with her friend, Eric Gomez, to the Gridiron Sports Bar. She uses her second name of Kimberly. Ms. Presley was driving her father's car which he had lent her so that she could drive to work. Ms. Presley had been reluctant to go, but Mr. Gomez had insisted that they go because he had "made a lot of money" that night as a waiter at Cattle Baron's, a restaurant. He told her, "I'm going to pay for all your drinks." Mr. Gomez had told Ms. Presley that he was not allowed to drive under his conditions of probation for a criminal charge. Ms. Presley was also an employee at Cattle Baron's. She was 16 years old, and Mr. Gomez was 24.

Cynthia Kennedy was working that night as a bartender and asked Ms. Presley to see her identification. She looked at the Texas Department of Public Safety identification card which Ms. Presley showed her and allowed her to sit down at the bar. Ms. Kennedy asked all the other people with Ms. Presley to show their identification. Mr. Gomez ordered a pitcher of Amber Bock beer. Ms. Kennedy brought the pitcher, along with two glasses, to Mr. Gomez and Ms. Presley. Ms. Presley testified that she and Ms. Kennedy had been friends for about six months. They had met when they worked at a ranch tending horses. That morning, Ms. Presley had visited Ms. Kennedy at her house where she had played with Ms. Kennedy's little boy Jacob and had fallen asleep by her bed. Ms. Presley knew Ms. Kennedy was 26 years old and divorced. She claimed that Ms. Kennedy knew that she was 16 years old, but no questions were asked to determine how certain she was of that.

Mr. Gomez later ordered a second pitcher of Amber Bock beer. Two fellow employees from Cattle Baron's, Kevin, 37, and Gary, 24, sat next to the couple at the bar. They had come to the Gridiron separately from Ms. Presley and Mr. Gomez. Ms. Presley remembered that the four of them drank a variety of alcohol shots and mixed drinks. This was done along with the drinking of the Amber Bock beer. Ms. Presley estimated that she drank ten alcoholic drinks.

Ms. Presley testified that Respondent Juan Mateos was not present when she and Mr. Gomez entered the Gridiron but arrived sometime later and sat on the other side of a bar that was shaped something like a horseshoe. The bartenders work inside the horseshoe. She never saw him serve anyone. After the Gridiron closed, Ms. Presley and Mr. Gomez drove to Denny's Restaurant to eat. On the way, Ms. Presley drove off the road, and Mr. Gomez was killed.

On the videotape of the deposition, Ms. Presley looked as if she were in an age range between 18 and 22. A photocopy of the identification card she presented to Ms. Kennedy was an exhibit attached to the deposition transcript. It showed a woman between 18 and 24 who had the round face of an overweight person and otherwise bore some resemblance to Ms. Presley. She had long hair that looked much like that of Ms. Presley. The name on the card was Eivira Bustamante. Ms. Presley did not appear overweight in the videotape. She contended that Ms. Kennedy knew that the identification card was not hers, but she was not questioned on what foundation she had for that allegation.

The copy of the deposition of Ms. Presley, Petitioner's Exhibit No. 3, showed that Chip Cobb, attorney for the automobile insurance company of Ms. Presley, was present at the deposition.

Testimony of Respondent

Respondent testified that he had been seated at the bar the night of August 30, 2001. He arrived late in the evening and asked Cynthia Kennedy if she had checked everyone's identification to make sure they were legally in the Gridiron. She told him she had. He said he had a policy that did not allow minors to remain inside the Gridiron even if they were in a group of adults. He said he remembered seeing a couple sitting across the bar who were sitting close and hugging each other who later turned out were Ms. Presley and Mr. Gomez. They were acquainted with some other people at the bar. Respondent said he had not thought anyone looked under 21. He was positive that he had not served any drinks to anyone that night and had not even stepped behind the bar. He said that he did

not work as a bartender serving customers. He did occasionally get involved in things like answering the telephone, providing change he might have in his pocket, and cleaning as done by a person known as a "bar back." He was asked in cross-examination whether he had ever served alcoholic beverages to customers, and he answered, "Yes." No further questions were asked on his serving customers. Respondent testified that he required all his employees to attend a server training program and that, consequently, his two bartenders, Cynthia Kennedy and Tanya Deter, had attended such a program. The Staff stipulated to that fact.

III. DISCUSSION

There is no question that Cynthia Kennedy served alcoholic beverages to the minor, Kimberly Presley. The first issue is whether bartender Ms. Kennedy did so with criminal negligence. At the hearing, the Staff further alleged that Mr. Mateos had himself been involved in serving alcoholic beverages with criminal negligence to Ms. Presley because he failed to investigate whether she was under 21.

Criminal Negligence of Cynthia Kennedy

While Ms. Kennedy did not actually sell any alcoholic beverages to Ms. Presley, she provided a glass for her to drink beer in and served her mixed drinks. She allowed her to drink those alcoholic beverages. The Staff claimed that Ms. Kennedy was criminally negligent because she actually knew that Ms. Presley was less than 21 years of age. Ms. Presley asserted in her deposition that Ms. Kennedy knew she was 16. When asked how Ms. Kennedy knew her age, she simply said, "From hanging around me." There was no further testimony giving specific support to the contention, such as a conversation about her age that the two may have had.

There were several indications that Ms. Presley could have been 21 or older. From her facial appearance, Ms. Presley looked as if she could pass for being 21. She socialized with friends who were definitely over 21, she drove a car that appeared to be her own, she had a job, and she was not attending school. Certainly, those indications would have made it seem less likely that she was 16. There is a possibility that Ms. Kennedy could have been misled by appearances that Ms. Presley was 21 or older.

In addition, doubts can be raised about Ms. Presley's credibility. She had not demonstrated great judgment, maturity, or character in the past. Her first job was at the age of 14 at a gentlemen's club. She had dropped out of school by the time she was 16 and had lived away from her parents' home for a period of time. She used a false identification card to get into bars and drink alcoholic beverages. She did not show moderation when she drank. Her testimony could have been tainted by concerns about lawsuits against her father and his insurance company. The attorney for the insurance company traveled from El Paso to Giddings, Texas which is about 50 miles east of Austin, to be present at her deposition.

In spite of these doubts, there are countervailing considerations that make it more probable than not that Cynthia Kennedy knew that Ms. Presley was 16, or at the very least, that Ms. Kennedy should have suspected that she was under 21. First, Ms. Presley seemed credible in her demeanor and in her answers at the deposition. She answered quickly and did not seem to have been rehearsed. She gave no evasive or questionable answers. She did not try to shift blame away from her own actions but openly testified how

excessively she and her friends drank that night. She did not try to cast a bad light on Respondent but instead helped absolve him from direct responsibility in serving alcohol to her.

While Ms. Presley was not asked to give specific facts supporting her contention that Ms. Kennedy knew she was 16, her claim is made believable by the surrounding circumstances. There was no reason to doubt that the two had met working at a ranch and had been friends for six months. Ms. Presley knew details about Ms. Kennedy such as her age and that she was divorced. It seemed acceptable for her to go to Ms. Kennedy's house on the morning of August 30 and fall asleep there. Given all this, it is hard to believe that there would not have been some conversation between the two indicating that Ms. Presley was 16. Given the nature and length of their relationship, it seems likely that Ms. Kennedy would have found out Ms. Presley's age. For the same reasons, it is also credible that Ms. Kennedy found out that Ms. Presley was using an older woman's identification.

Even if Ms. Kennedy never found out that Ms. Presley was 16 years old, it is hard to believe that she did not suspect that Ms. Presley was younger than 21. Regular conversation between two friends would have surely raised a red flag on this issue for Ms. Kennedy. While Ms. Presley could pass for 21 from her appearance, she could also be easily estimated to be less than 21. If Ms. Kennedy did not know Ms. Presley's age when she looked at Ms. Presley's identification card on August 30, she should have availed herself of the opportunity to finally find out for sure. She surely would have had enough doubts about her age to examine the card closely. If she had done this, she would have seen that the name on the card was Elvira Bustamante and not Kimberly Presley. She would have also noticed that the date of birth on the card was 09-04-75, which made her a few days from being 24. She should have looked more closely if Ms. Presley was trying to pass herself off for being almost 24. For the card to have shown her to be 21 or 22 would have been one thing, but an age of 24 for Ms. Presley called for some questioning.

Code §106.13 requires criminal negligence in the serving of an alcoholic beverage to a minor. A knowing violation subsumes the culpable mental state of criminal negligence. Ms. Kennedy was criminally negligent because she knew Ms. Presley was younger than 21. Even if she did not know that Ms. Presley was less than 21, there were sufficient signs to put her on notice to take a close look at an identification card that showed her to be just short of 24 and that showed her to be heavy in weight. Her failure to detect that the identification card Ms. Presley presented was not hers was a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.

Criminal Negligence of Respondent

The Code holds a permittee liable for the actions of its employees, and so the violation of Ms. Kennedy can be attributed to Respondent as if it had been committed by him. The Staff went further and asserted that Respondent was criminally negligent in his own capacity because he should have recognized that Ms. Presley was under 21 and walked over to her to ask for identification.

As mentioned before, Ms. Presley could have been mistaken for being 21 or over from the appearance in the videotape of the deposition. The fact that she worked at a gentleman's club at age 14 provides additional evidence that she could look older than her

age. She stated in her deposition that she was allowed to enter a bar named Pitchers. At the Gridiron, the friends she was sitting with were all well past 21.

Neither Ms. Presley nor her friends did anything that called special attention to themselves or that would have suggested that they should be approached. There was no evidence of disruptive incidents started by the group that night. All the evidence shows that they simply sat quietly and drank.

Ultimately, Respondent had every right to rely on his seller-program-certified bartender when she told him she had checked everyone's identification. Ms. Kennedy had worked for Respondent for six months, and she had given him no reason, up to that point, not to trust her. Nor was there any other reason for Respondent to approach Ms. Presley to check her age. Respondent was not criminally negligent in connection with Ms. Presley being served alcoholic beverages.

Affirmative Defense of Respondent

Respondent had a policy on August 30, 2001, of requiring all his employees to attend a seller training program. He employed two bartenders, including Cynthia Kennedy, and they had both actually attended a commission-approved seller training program. The Staff stipulated to this. There was no intimation that Respondent had in any way encouraged Ms. Kennedy to violate the law. Given this, it would appear that Respondent properly complied with the requirements of Code §106.14 and thus absolved himself of any liability for the violation committed by Ms. Kennedy. The Staff, however, came up with an interpretation of §106.14(a) that includes the owner of the bar himself or herself as an employee if he has ever served an alcoholic beverage to a patron. Respondent had not attended a seller-training program and so, under such an interpretation, §106.14 is not available to him as a defense. This is claimed even though the errant employee was someone other than the permittee. The Staff's attorney, Dewey Brackin, conceded that there were no appellate court opinions dealing with this interpretation. He did not provide any other decision which supported his position.

The reasonable interpretation of "employee" in §106.14 is that it is a person involved in the selling or serving of drinks such as a bartender or even a person checking patrons' ages at the entrance door. A person coming in to clean in the morning would not be expected to attend a seller training program. Perhaps if Respondent regularly served customers in his bar, he could be counted as such an employee, but there was not even evidence of that. In his testimony, Respondent stated confidently that he did not serve drinks to customers in his bar. He said that he occasionally helped by doing things like providing change or cleaning up. He admitted in cross-examination that he had served someone in the past, but no further questions were asked to determine the extent to which he had served drinks.

Respondent's not serving customers is consistent with Ms. Presley's testimony. In questioning her, Mr. Brackin tried to determine if Respondent had served drinks on August 30, but she clearly maintained that she had only been served by Ms. Kennedy and the other bartender, Tanya Deter. Respondent merely sat at the other side of the bar where customers sat. Ultimately, the impression was that while Respondent may have served drinks in the past, he did so very rarely. Naturally, it would be understandable for the owner of a bar to step in occasionally to serve drinks in the event, for instance, that a bartender was absent, but this would not be significant enough to classify the owner as a

bartender. Respondent did not perform the work of a bartender to any significant extent. Nor should Respondent fall into the category of employee based simply on his answering the phone or cleaning glasses.

However, even if the owner of a bar were to serve drinks regularly in his or her own bar, that should not mean that he or she should be classified as an employee. In the common use of the two words, an employer and an employee are two different persons. An employer cannot be his own employee. Respondent, as the sole owner of the Gridiron, was clearly an employer and serving customers did not also make him an employee. If Respondent were merely a manager without being an owner, it could certainly be argued that he was an employee, but he was the sole owner. Surely, Respondent is not expected to be listed on his own payroll nor is he subject to laws protecting employees, such as the Federal wage and hour laws.

A plain reading of Code §106.14 requires that there be a distinction between employer and employee. An employer sends his or her employees to a seller training program for his protection against their errors, intentional or otherwise. It would be odd for an employer to send himself to a seller training program for his protection. Furthermore, an owner is expected to know and observe all the laws and regulations involved in owning a bar. An owner has a great degree of responsibility simply by virtue of being a licensee or permittee. The Code in general holds an owner accountable for making sure the laws are obeyed, and under certain provisions of the law, a permittee is even held strictly liable for the acts of employees. A permittee, presumed to have full knowledge of the law by virtue of being an owner, probably would not learn much from attending a seller training program. If the Texas Legislature had wanted to count an employer who actively participates in the running of the business as an employee, it would have included a provision to make that clear.

It would also be odd to expect a permittee to attend a seller training program in order to interpose the affirmative defense provided by §106.14 because the permittee would surely not be able to invoke the defense in the event that the permittee were to personally serve a minor or intoxicated person. The Staff would no doubt protest loudly if a permittee tried to invoke §106.14 in such a situation and rightly so. §106.14 was surely not enacted with such a result in mind. Instead, it was meant to soften the harshness of the strict liability a permittee has to face for the errant acts of employees in disregard of the law. To allow a permittee to avoid prosecution for his own illegal acts by using the same provision would be absurd.

Any requirement that a permittee take a seller training program to qualify for protection under §106.14 could not serve the purpose contemplated by the provision. Respondent was not an employee and was not required to take the seller training program. He is thus protected from the criminal negligence of Ms. Kennedy by properly complying with Code §106.14.

Based on a preponderance of the evidence, Respondent's employee alone committed a violation of the Code, but it was not attributable to Respondent. It is proposed that Respondent's permits be neither canceled nor suspended.

FINDINGS OF FACT

1. Juan I. Mateos, d.b.a. Gridiron Sports Bar (Respondent), is the holder of Mixed Beverage Permit No. MB-429789 and Mixed Beverage Late Hours Permit No. LB-

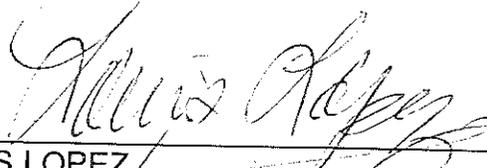
429790, issued by the Texas Alcoholic Beverage Commission (TABC) on April 8, 1998. The permits have been continuously renewed.

3. On November 21, 2000, the staff of TABC (the Staff) sent a notice to Respondent asserting that Respondent had committed a violation of the Texas Alcoholic Beverage Code (Code) and that TABC was seeking to cancel or suspend Respondent's permits on that basis.
4. On January 16, 2001, the Staff sent a Notice of Hearing to Respondent. The hearing notice specified the time, place, and nature of the hearing; the legal authority for the hearing; and the matter to be determined. The State Office of Administrative Hearings notified Respondent of the hearing in an Order Setting Prehearing Conference on February 1, 2001.
5. On Wednesday, August 30, 2000, Kimberly Presley, born on March 23, 1984, was 16 years old.
6. Cynthia Kennedy had worked with Kimberly Presley, had known her for six months, and had known her well enough to invite her to her house.
7. Ms. Kennedy knew Ms. Presley was less than 21 years of age and knew that she used an identification card that belonged to an older woman.
7. On Wednesday, August 30, 2000, Kimberly Presley showed an identification card to Cynthia Kennedy, a bartender at the Gridiron Sports Bar, and the card showed it belonged to Elvira Bustamante, born on 09-04-75.
8. Ms. Kennedy looked at the card and allowed Ms. Presley to enter and sit down.
9. Ms. Kennedy served a glass to Ms. Presley and allowed her to drink beer and other alcoholic beverages knowing that she was less than 21 years old.
10. In serving Ms. Presley, Ms. Kennedy should have been aware that she was taking a substantial and unjustifiable risk that she was serving alcoholic beverages to a minor and that the risk was a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.
11. Under all the circumstances as viewed from Respondent's standpoint, he was justifiably not aware of a substantial risk that Ms. Presley was a minor.
12. Respondent was the sole owner of the Gridiron Sports Bar and not an employee.
13. Respondent required all his employees to attend a commission-approved seller training program and did not encourage his employees to violate the law regarding the serving of minors or intoxicated persons.
14. Respondent's only two employees attended a commission-approved seller training program.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. [CODE] §§5.31--5.44 (Vernon 2001).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to CODE §5.43(a) and TEX. GOV'T. CODE ANN. §§2003.021 and 2003.042 (Vernon 2001).
3. Service of proper notice of the hearing was made on Respondent pursuant to CODE §11.63 and the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052 (Vernon 2001).
4. On August 30, 2000, Respondent's employee, Cynthia Kennedy, with criminal negligence served a minor, violating CODE §106.13.
5. On August 30, 2000, Respondent himself did not act with criminal negligence in serving a minor.
5. Under the criteria in CODE §106.14, the violation of Cynthia Kennedy is not attributable to Respondent.
6. Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that Respondent's permits not be canceled or suspended.

SIGNED this 4th day of January, 2002.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS