

SOAH DOCKET NO. 458-08-1803

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE  
COMMISSION §  
§  
VS. §  
§ OF  
DANIEL LOZANO III §  
D/B/A D & D MINI MART §  
PERMIT/LICENSE NO(s). BQ616682 §  
TAYLOR COUNTY, TEXAS §  
(TABC CASE NO. 571482) § ADMINISTRATIVE HEARINGS

**ORDER**

**CAME FOR CONSIDERATION** on this day in the above-styled and numbered cause. After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on the 23<sup>rd</sup> day of April, 2008 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on the 19<sup>th</sup> day of May, 2008. The Proposal for Decision was properly served on all parties. The parties 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 Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the record and the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge. The Administrator hereby incorporates those Findings of Fact and Conclusions of Law, which are contained in the Proposal for Decision, into this Order. The **CANCELLATION** of Respondent's permit is warranted, based upon Findings of Fact Nos. 4-10.

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 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 your permit is hereby **CANCELLED**.

This Order will become final and enforceable on the 10 day of July, 2008. A Motion for Rehearing in this matter must be filed **before** that date.

**SIGNED** this the 16<sup>th</sup> day of June, 2008, at Austin, Texas.

  
\_\_\_\_\_  
Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

The Honorable B. L. Phillips, Administrative Law Judge  
State Office of Administrative Hearings  
Austin, TX 78711  
**VIA FAX: (512) 475-4994**

Daniel Lozano III  
**RESPONDENT**  
D/B/A D & D Mini Mart  
784 Grape  
Abilene, TX 79601  
**CERTIFIED MAIL NO. 7006 0100 0002 2009 3334**

Susan Stith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Enforcement District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

May 19, 2008

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

VIA REGULAR MAIL

**RE: Docket No. 458-08-1803; Re: Daniel Lozano, III d/b/a D & D Mini Mart**

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](http://www.soah.state.tx.us).



Sincerely,

*B.L. Phillips*  
B.L. Phillips  
Administrative Law Judge

BLP/vu

Enclosure

xc Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 – VIA REGULAR MAIL  
Daniel Lozano, III; 784 Grape, Abilene, TX 79601 – VIA REGULAR MAIL



## II. HEARING AND EVIDENCE

On April 23, 2008, a hearing was convened before ALJ B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Susan M. Stith, attorney. Respondent appeared and represented himself. The record closed the same day.

## III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 106.13(a), TABC may cancel or suspend a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises. A person acts with criminal negligence under Code § 1.08 if the person acts with a mental state that would constitute criminal negligence under chapter 6 of the Penal Code, which states:

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.

Section 106.14 states that, for the purposes of the provisions relating to sales, service, dispensing, or delivery of alcoholic beverages to a minor or intoxicated person, the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if : (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employeec to violate such law. However, under TABC Rule 50.10 (c), proof by the Commission that an employeec or agent of the

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 in a 12-month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

#### IV. DISCUSSION AND ANALYSIS

##### A. Background

It is undisputed that, on November 17, 2007, Respondent's employee Terrell Deshon Turner, sold an alcoholic beverage to a minor and did not check his identification prior to the transaction. Agent Arriaga of the Texas Alcoholic Beverage Commission observed the transaction which took place on the licensed premises and contacted both the minor and Mr. Turner regarding the offense.

##### B. Petitioner's Evidence and Contentions

Petitioner offered into evidence three exhibits, including the Notice of Hearing issued in the case, the Respondent's permit history, and reports of the agent involved in the operation. All offered exhibits were admitted into evidence.

Agent Arriaga testified that, on November 17, 2007, he went to a location near the licensed premises to observe after receiving a complaint from the Abilene police department that sale to minor violations were occurring at the location. He observed a young man, later identified in the TABC Offense Report as Justin Glenn Davis, enter the licensed premises and purchase beer from the employee, who never checked Mr. Davis' identification. Agent Arriaga made contact with Mr. Davis after the purchase was consummated and asked him for identification, and he stated that the only identification he had was a social security card. After Abilene police checked on Mr. Davis, Arriaga learned that his date of birth was August 23, 1987. Agent Arriaga then contacted the employee of the licensed premises who stated that he had identified Mr. Davis in a previous

transaction and at that time he had identification showing him to be over twenty-one years of age. However, Mr. Davis denied that he had made any previous purchases of an alcoholic beverage at the licensed premises.

Agent Arriaga testified that the employee's seller-server certification had expired on August 15, 2007. He stated that Respondent had three previous sales to minor violations at the licensed premises, on December 8, September 23, and June 2, 2006. The administrative violation history for Respondent's license confirmed Agent Arriaga's testimony regarding the three previous violations for sale to minor. Finally, Agent Arriaga recommended cancellation of Respondent's permit because it appears that he does not comply with the law regarding sales to minors.

### **C. Respondent's Evidence and Contentions**

Respondent offered into evidence a computer printout showing that the employee who allegedly sold the alcoholic beverage to the minor was seller trained at the time of the offense. He testified that he has provided his employees with an identification scanner that should prevent the sale to minor violations, has terminated employees for sale to minor violations, and believes that he has done everything that he can do to prevent the problem. However, according to Respondent, he entrusts his employees with responsibility for the operation of the store in his absence. He acknowledged that the store is in a "bad" part of town and if his employees do not sell to minors, the minors will just go to another package store and purchase the alcoholic beverages.

### **D. Analysis**

Regarding the issue of whether permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises, the only issue is whether the administrative action should be restrained because the employee who committed the act was seller-server certified. Respondent admitted that the employee, Mr. Turner, was the agent, servant, or

employee of Respondent on the date in question and did not dispute that she sold a beer to Mr. Davis, the minor identified by Agent Arriaga as the purchaser. Mr. Turner's actions on that day rise to the level of criminal negligence in that he did not even ask him for identification before selling him an alcoholic beverage. Mr. Davis was free to continue to purchase alcoholic beverages because of Mr. Turner's actions, which evidenced a clear failure to perceive the risk of allowing a minor to commit an illegal act.

Pursuant to Code § 106.14, the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if : (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law. The evidence shows that Mr. Turner was seller training certified on the date in question, conforming to the first two elements of this affirmative defense. However, under TABC rule 50.10 (c), proof by the Commission that an employee or agent of the 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 in a 12-month period, constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

The testimony and documentary evidence demonstrates that the licensed premises had two incidents of sale of an alcoholic beverage to a minor in a twelve-month period, which constitutes prima facie evidence that Respondent has directly or indirectly encouraged violation of this law. In addition, there were three incidents of sale of an alcoholic beverage to a minor in a six-month period alone in 2006. These violations, including the present case, is either indicative of Respondent's inability to properly supervise the licensed premises or his direct or indirect encouragement to his employees to violate the law and sell to minors. The affirmative defense is not applicable in the present case.

## V. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence was sufficient to prove that that, on or about November 17, 2007, Respondent, his agent, servant or employee, with criminal negligence sold, served, dispensed or delivered an alcoholic beverage to a minor and recommends that Respondent's permit should be cancelled.

The evidence shows that Respondent had administrative violations for a sale of an alcoholic beverage to a minor on December 8, September 23, and June 2, 2006, making this the fourth such violation at this licensed premises. The proof of two violations of this nature within a twelve-month period (December, 2006 and November 2007) constitutes prima facie evidence that Respondent has directly or indirectly encouraged violation of the relevant laws and is indicative of Respondent's inability to properly supervise the licensed premises.

## VI. PROPOSED FINDINGS OF FACT

1. Daniel Lozano, III dba D & D Mini Mart, Lubbock County, Texas, holds Permit No. BQ-616682, issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 784 Grape, Abilene, Taylor County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated February 15, 2008.
3. The hearing on the merits convened April 23, 2008, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney Susan Stith. The Respondent appeared and represented himself. The record closed on the same day.
4. On or about November 17, 2007, Respondent employed Terrell Turner at the licensed premises.
5. Mr. Justin Davis entered the licensed premises and purchased beer from Mr. Turner.
6. Mr. Turner did not check Mr. Davis' identification before selling and delivering beer to him.
7. Mr. Davis was later identified by Abilene police as a minor with a date of birth of August 23, 1987.

8. Mr. Turner failed to act as an ordinary person would have by permitting a minor to illegally purchase, possess, and/or consume alcoholic beverages, which constitutes a risk to the minor and the public.
9. Respondent has had two violations within a twelve month period of the Code prohibition against sale of an alcoholic beverage to a minor.
10. Respondent did not exercise sufficient control over the operation of the licensed premises and the employees thereof to prevent the violations.

#### VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-10, Respondent violated the Code by having an agent, servant, or employee who, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor on November 17, 2007.
5. Based on the foregoing, cancellation of Respondent's permit is warranted.

SIGNED: MAY 19<sup>th</sup>, 2008



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B. L. PHILLIPS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**SOAH DOCKET NO. 458-08-1803**

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DANIEL LOZANO III	§	OF
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PERMIT/LICENSE NO(s). BQ616682	§	
	§	
TAYLOR COUNTY, TEXAS	§	
(TABC CASE NO. 571482)	§	ADMINISTRATIVE HEARINGS

**PETITIONER'S REPLY TO RESPONDENT'S MOTION FOR REHEARING**

TO THE HONORABLE ADMINISTRATOR FOR THE TEXAS ALCOHOLIC  
BEVEAGE COMMISSION:

Comes Now, the Texas Alcoholic Beverage Commission (TABC), Petitioner, by and through its attorney, and files this Reply to Respondent' Motion for Rehearing. In support thereof Petitioner would show the following:

**I.**

The above-styled cause of action was heard before ALJ B.L. Phillips, at the State Office of Administrative Hearings for Lubbock, Texas on April 23, 2008. After hearing testimony from TABC Agent Elias Arriaga and Respondent Daniel Lozano, the ALJ recommended that the cancellation of Respondent's permit was warranted in this matter.

A proposal for decision recommending cancellation was filed on May 19, 2008. Neither party filed exceptions to the proposal for decision. On June 16, 2008, the Order regarding the Cancellation of Respondent's permit was signed, showing the cancellation would be final and enforceable unless a Motion for Rehearing was filed before July 10, 2008. Respondent filed his Motion for Rehearing on July 9, 2008.

## II.

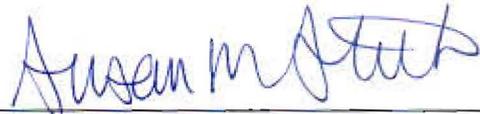
Respondent argues in his Motion for Rehearing that he has implemented policy changes, procedures and training of employees to prevent any infractions of TABC code. He further states that cancellation of his permit will cause undue hardship to his family and employees. These arguments are insufficient to grant a Motion for Rehearing of this matter.

Respondent has already provided testimony and evidence regarding the policies, procedures and training of his employees to the ALJ. *See Proposal for Decision, pg 4.* The ALJ determined that the testimony and documentary evidence in this case demonstrate that the Respondent is either unable to properly supervise the licensed premises or he is directly or indirectly encouraging his employees to violate the law. *See Proposal for Decision, pg 5, ¶ 3.* Any further testimony or evidence regarding the policies and procedures of Respondent after the Order for cancellation is immaterial and should not be considered.

Furthermore, Respondent's argument that the Order will create undue hardship to his family and employees is not persuasive. While the cancellation of Respondent's permit in this matter may indeed create a hardship to Respondent and his employees, this hardship is a direct result of the violations of TABC code by Respondent and his employees. Moreover, the hardship suffered by Respondent is outweighed by the public safety concerns implicated by allowing Respondent, or any permittee who has multiple infractions for selling alcoholic beverages to minors, to continue operating.

**WHEREFORE PREMISES CONSIDERED**, the Texas Alcoholic Beverage Commission, respectfully requests Respondent's Motion for Rehearing be denied.

By:

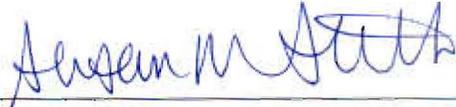


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Telephone: (512) 206-3493  
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**CERTIFICATE OF SERVICE**

I, Susan M. Stith, certify that I have served true copies of this Petitioner's Reply to Respondent's Motion for Rehearing on all parties, on July 22, 2008, in the manner indicated below.



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Susan M. Stith  
**ATTORNEY FOR THE PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Services Division

Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FAX (806) 792-0149**

Mr. Daniel L. Barnes  
**ATTORNEY FOR RESPONDENT**  
104 Pine Street, Suite 106  
Abilene, Texas 79601  
**VIA FAX (325) 677-6129**

Mr. Alan Steen  
**Administrator**  
**Texas Alcoholic Beverage Commission**