

DOCKET NO. 577155

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
BUC-EE'S LTD.	§	
D/B/A BUC-EE'S #13	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BQ469786	§	
	§	
BRAZORIA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-2040)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this day, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on April 24, 2009 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 19, 2009. The 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.

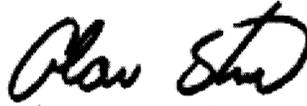
The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and 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 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 **NO ACTION BE TAKEN AGAINST RESPONDENT'S PERMIT.**

This Order will become final and enforceable on July 16, 2009 unless a Motion for Rehearing is filed before that date.

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

SIGNED this the 22nd day of June 2009,
at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

Judge Don Smith
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 N. Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

Clyde Burleson
ATTORNEY FOR RESPONDENT
6776 Southwest Freeway, Suite 620
Houston, Texas 77074
VIA FACSIMILE: (713) 521-7365

Buc-EE's Ltd.
d/b/a Buc-Ee's #13
RESPONDENT
327 FM 2004
Lake Jackson, Texas 77566
VIA REGULAR MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Sgt. Larry Linscombe, Enforcement Division

RMP/aa

State Office of Administrative Hearings

RECEIVED

MAY 21 2009

LEGAL DIVISION



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED

MAY 26 2009

May 19, 2009

**TABC HOUSTON
LEGAL**

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

VIA REGULAR MAIL

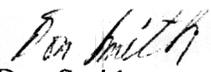
**RE: Docket No. 458-09-2040; Texas Alcoholic Beverage Commission vs.
BUC-EE's Ltd. d/b/a BUC-EE's #13**

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,


Don Smith
Administrative Law Judge

DS/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Ramona M. Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Clyde Burluson, Attorney for Respondent, 6776 S.W. Freeway, Suite 620, Houston, Texas 77074 -VIA REGULAR MAIL

I. PROCEDURAL HISTORY AND JURISDICTION

TEX. ALCO. BEV. CODE ANN. (CODE) § 11.641 (c) states

A civil penalty, including cancellation of a permit, may not be imposed on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication.

In cases prior to SOAH Docket No. 458-07-0178, the underlying criminal charges being dismissed may have been interpreted as barring the Commission from imposing a civil penalty in the administrative case. In Docket No. 458-07-0178, the Commission issued an Order that determined the interpretation of CODE § 11.641 (c) is a legal issue that the Commission has the authority to determine, and concluded § 11.641 (c) is not a bar to proving acts in an administrative action against the permit holder, stating that an interpretation of Sec. 11.641 (c) that would bar the administrative action against the permit holder would be contrary to the comprehensive statutory scheme set out for the regulation of alcoholic beverages in the Texas Alcoholic Beverage Code. The ALJ cannot distinguish the issues in this case from those in 458-07-0178, therefore, the dismissal of the underlying criminal charges concerning the alleged liquor violation is not a bar to this administrative case, and Respondent's Motion for Summary Disposition and/or Plea to the Jurisdiction is denied.

The Notice of Hearing set this matter for February 6, 2009. On January 20, 2009, an Order granting Respondent's Motion for Continuance reset the hearing to March 20, 2009. On February 4, 2009, an Amended Order granting Respondent's Motion for Continuance reset the hearing to April 24, 2009. The hearing on the merits convened April 24, 2009, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Don Smith. TABC Staff was represented by attorney Ramona Perry. Respondent appeared through attorney Clyde Burlison. Evidence was presented, and the record was closed on April 24, 2009.

The Commission and SOAH have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute enforcement action and of the hearing met the notice

requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law

II. LEGAL STANDARD

The Notice of Hearing issued by Staff alleges that on or about April 6, 2008, Respondent or Respondent's agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of CODE §§ 61.71 (a)(1), 61.71 (a)(6), and 25.04 (b). Staff was allowed to make a trial amendment changing to pertinent statutory reference from CODE §§ 25.04 (b) (on-premise license) to 26.04 (off-premise permit), because Respondent's permit is not a retail dealer's on-premise license, but a wine and beer retailer's off-premise permit

CODE § 61.71 (a)(6) provides that the Commission may cancel or suspend for not more than 60 days a retail license or permit if it is found, after notice and hearing, that the licensee or permittee sold, served, dispensed, or delivered an alcoholic beverage to an intoxicated person.

CODE § 101.63 (a) states that a person commits an offense if the person, with criminal negligence, sells an alcoholic beverage to an habitual drunkard or an intoxicated or insane person.

Criminal negligence, as used in CODE § 101.63 (a), is defined in § 6.03 (d) TEXAS 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.

he determination to be made from the evidence is whether, under all the circumstances present, an ordinary person under all the same circumstances would have observed the customer to be intoxicated before or when making the sale of the alcoholic beverage. CODE § 101.63 (a).

III EVIDENCE, ANALYSIS AND RECOMMENDATION

A. Evidence

Testimony of Detective Vandergriff

On April 6, 2008, Detective Vandergriff was an undercover narcotics officer for the Angleton Police Department. At approximately 7:41 p.m., Detective Vandergriff was in the parking lot of Buc-ee's, located at 2299 East Mulberry Street in Angleton, Brazoria County, Texas, when he observed a Hispanic male (later identified as Andres Luna Martinez) exit the store and start walking to a purple two-door vehicle. The male was having trouble walking and was stumbling over his own feet. Detective Vandergriff immediately called Sgt. Derrick White at the Angleton Police Department, reporting that the male appeared to be intoxicated and about to drive a motor vehicle. The detective then observed the male get some money from another male passenger inside the vehicle, and the male then went back inside the store. Detective Vandergriff observed the male walk around by the front, walk over to the beer cooler, and remove a six-pack of beer from the cooler. The male then walked to the counter, placed the six-pack of beer onto the counter, and handed money to the clerk. It appeared that the clerk sold the beer to the male. The male came out of the store carrying a six-pack of 16 ounce cans of beer. He was swaying side to side and had bloodshot eyes. The male got behind the driver's wheel of a purple Camero, started backing up, and almost collided with an Angleton Police marked patrol unit with the emergency lights on. The male was arrested for driving while intoxicated.

Detective Vandergriff met with the store clerk who sold the beer to the male. The clerk identified as Jessica Trevino. She stated to the deputy that she did sell a six-pack of 16 ounce

Budweiser beer cans to the male, but she said she was unaware that the male was intoxicated. Ms. Trevino was placed under arrest for "Sale of Alcoholic Beverage to Intoxicated/Insane Person.

Detective Vandergriff described the store as about 2,100 square feet in size and busy with customers at the time of the incident. Only two clerks were on duty in the store. The detective described the intoxicated person, Mr. Martinez, as a Hispanic male who only spoke Spanish. Detective Vandergriff stated that he did not believe that the clerk knew Spanish.

2. Testimony of Agent Bowers

B.D. Bowers, an enforcement agent for the TABC, stated that before he issued Respondent the administrative notice "Sale to Intoxicated Person," he reviewed the officer's offense report, met with the patrol officer who arrested the Hispanic male, met with the manager of the store, and reviewed the store's video recordings of the incident. Agent Bowers testified that Respondent's employees are all seller-server trained and certified, Respondent has posted policies against sales of alcoholic beverages to intoxicated persons, and Respondent meets all the requirements for a safe harbor defense under CODE § 106.14. Agent Bowers explained that the safe harbor defense exempts the employer from administrative action under the CODE, so any finding against the employee would be "restrained" against the Respondent.

Agent Bowers testified about the store's video recordings. There are three views (from three cameras). An overhead view from the cashiers to the bathrooms show a male walking in the store, weaving away from the counter towards the bathroom, going into the bathroom, coming out of the bathroom walking toward the counter, almost bumping into a stand, and walking out of the store. Agent Bowers observed that customers blocked the view between the cashiers and the man. Later, the same view shows the male walking up to the counter, reaching around a customer, and hitting the counter with a six-pack of beer (loudly). The audio has a female voice saying "say excuse me," and later saying "want a bag, want a bag." The male responded by saying, "por favor. A second camera's view was on the beer cooler and shows the male opening the door, grabbing the beer, and

having to hold onto the door to stand up. It was Agent Bowers' opinion, that, after watching all the videos, the clerks were not watching the male, but were watching other customers. He gave an example of one camera showing a young male walking into the glass door and the clerks laughing. The loud noise of setting the beer down on the counter should have indicated to the clerk that the man may be intoxicated, testified Agent Bowers.

Agent Bowers also talked with Sgt. Derrick White, the officer who arrested Mr. Martinez for driving while intoxicated. Sgt. White told Agent Bowers that Andres Luna Martinez was well known by the clerks at the store. Sgt. White said the clerks have complained to Sgt. White and the Angleton Police Department in the past about Mr. Martinez yelling at the clerks, being rude, and being aggressive towards the female clerks.

3. Testimony of Jessica Trevino

Jessica Trevino is the store clerk who sold Mr. Martinez the beer. She testified that Mr. Martinez is a rude customer who does not speak any English. He stares at the female clerks in a suggestive manner; and no one likes to deal with him. Ms. Trevino stated that, on April 6, 2008, at 7:41 p.m., it was dark outside, and the store was steady-to-busy with customers. Ms. Trevino defined "steady" to be more than five persons in the store, and "busy" to be more than 25 persons in the store. Ms. Trevino testified that she first noticed Mr. Martinez when he slammed a six pack down on the counter, and she said, "say excuse me." She explained that Mr. Martinez was trying to cut in front of a customer, like he has done in the past. Ms. Trevino described Mr. Martinez's past actions of pushing a customer aside while throwing the beer onto the counter and said that she thought she was observing his typical behavior on the day of the incident. Ms. Trevino testified that she has refused to sell to intoxicated persons before, but did not think Mr. Martinez was intoxicated, just rude. Both clerks had customers in front of them. Ms. Trevino thought Mr. Martinez chose her because she only had one customer in front of her, while the other clerk had two customers. Ms. Trevino testified that she would not have sold Mr. Martinez the beer if she thought he was

intoxicated. She also asserted that she did not see Mr. Martinez in the store until he was before her checking out

B. ALJ's Analysis and Recommendation

There is insufficient evidence to prove that Ms. Trevino knew or should have known that Mr. Trevino was intoxicated. Respondent's employee, Jessica Trevino, did not realize that she was selling an alcoholic beverage to an intoxicated person. She testified that she has refused to sell alcoholic beverages to intoxicated persons in the past. Ms. Trevino is seller-server trained and certified to recognize, and not sell alcoholic beverages to, intoxicated persons. She told Detective Vandergriff she was unaware of Mr. Martinez's intoxication.

Agent Bowers testified that it did not appear from the videos that Ms. Trevino saw Mr. Martinez until he was in front of her with the beer. Yet, Agent Bowers was of the opinion that Ms. Trevino should have realized that Mr. Martinez was intoxicated because the beer was thrown down onto the counter. Evidence was submitted that Mr. Martinez's actions in front of Ms. Trevino were similar to his past actions. Mr. Martinez's character of being rude to the clerks and cutting in front of customers in the past are similar to his actions in front of Ms. Trevino on the date of the incident

Mr. Martinez was not in front of Ms. Trevino for enough time for her to realize that he was intoxicated. An ordinary person would need more than just a few seconds to analyze Mr. Martinez's actions to realize that he may be intoxicated, especially when the same actions have occurred in the past when the actor was not intoxicated. In addition, an ordinary person would need to observe further signs of intoxication by Mr. Martinez to confirm a suspicion of intoxication before the ordinary person would act on that suspicion. Ms. Trevino's actions were not a "gross deviation from the standard of care that an ordinary person would exercise. Under all the circumstances presented, this ALJ does not believe that an ordinary person in the same circumstances would have had

sufficient reason to recognize that the customer was intoxicated when purchasing the alcoholic beverages.

IV. FINDINGS OF FACT

1. Buc-ee's Ltd. d/b/a Buc-ee's #13 (Respondent) is the holder of a Wine and Beer Retailer's Off Premise Permit, BQ-469786, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 2299 E. Mulberry, Angleton, Brazoria County, Texas.
2. On January 20, 2009, the TABC's Staff sent a Notice of Hearing to Respondent.
3. The Notice of Hearing contained a statement of the time, date, 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 TABC.
4. On January 20, 2009, an Order granting Respondent's Motion for Continuance reset the hearing to March 20, 2009.
5. On February 4, 2009, an Amended Order granting Respondent's Motion for Continuance reset the hearing to April 24, 2009.
4. On April 24, 2009, a public hearing was held before Administrative Law Judge Don Smith. The Staff appeared through staff attorney Ramona Perry. Respondent appeared through attorney Clyde Burlison. Evidence was presented, and the record closed on April 24, 2009.
5. On April 6, 2008, Respondent's employee, Jessica Trevino, sold alcoholic beverages to Andres Luna Martinez.
6. On April 6, 2008, Jessica Trevino held a current valid certificate from a Commission-approved seller-server training program.
7. On April 6, 2008, Jessica Trevino did not see Mr. Martinez until he was in front of her with the beer.
8. On April 6, 2008, Mr. Martinez's actions in front of Ms. Trevino were consistent with his prior rude behavior she had observed when he was not intoxicated.
9. On April 6, 2008, Ms. Trevino did not observe sufficient signs of intoxication by Mr. Martinez to form an opinion that Mr. Martinez was intoxicated.

- 10. On April 6, 2008, an ordinary person, under the same circumstances as Jessica Trevino, would not have realized that Andres Luna Martinez was intoxicated.

V. CONCLUSIONS OF LAW

- 1 TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, and §§ 6.01, 61.71, and 26.03.
- 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 § 155.55.
- 4 Based on the above Findings of Fact, on April 6, 2008, insufficient evidence was submitted that Respondent's employee violated TEX. ALCO. BEV. CODE § 61.71 (a)(6).
- 5 Based on the Findings of Fact and Conclusions of Law, the ALJ recommends that no action be taken with regards to Respondent's permit.

SIGNED May 19, 2009.



DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS