

**DOCKET NO. 583368**

|  |   |                     |
|--|---|---------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION  | § | BEFORE THE TEXAS    |
|  | § |                     |
| VS.  | § |                     |
|  | § |                     |
| BERRYHILL HOT TAMALES CORPORATION<br>D/B/A BERRYHILL HOT TAMALES<br>PERMIT/LICENSE NO(s). MB424476, CB &<br>PE | § | ALCOHOLIC           |
|  | § |                     |
| HARRIS COUNTY, TEXAS<br>(SOAH DOCKET NO.458-09-3286)   | § | BEVERAGE COMMISSION |

**ORDER ADOPTING PROPOSAL FOR DECISION**

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

After proper notice was given, Administrative Law Judge Don Smith heard this case. The hearing convened on April 24, 2009 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 May 15, 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.

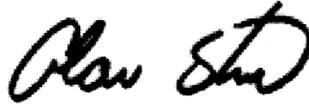
**IT IS THEREFORE ORDERED**, by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your permits are herein **SUSPENDED for ten (10) days**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$3,000.00** on or before the **11<sup>th</sup> day of August 2009**, all rights and privileges under the above described permits will be **SUSPENDED for a period of ten (10) days** beginning at 12:00 A.M. on the **19<sup>th</sup> day of August 2009**.

This Order will become final and enforceable 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 22<sup>nd</sup> day of June 2009,  
at Austin, Texas.



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Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

**ADMINISTRATIVE LAW JUDGE**

State Office of Administrative Hearings  
2020 N. Loop West, Suite 111  
Houston, Texas 77008

***VIA FACSIMILE: (713) 812-1001***

Berryhill Hot Tamales Corporation  
d/b/a Berryhill Hot Tamales

**RESPONDENT**

5603 Willers Way  
Houston, TX 77056

***VIA REGULAR MAIL***

Ramona M. Perry

**ATTORNEY FOR PETITIONER**

TABC Legal Section

Licensing Division

Enforcement-Houston District Office

RMP/aa

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 583368**

**REGISTER NUMBER:**

**NAME: BERRYHILL HOT TAMALES CORPORATION**

**TRADENAME: BERRYHILL HOT TAMALES**

**ADDRESS: 1717 POST OAK BOULEVARD, SUITE C, HOUSTON, TX 77056**

**DUE DATE: AUGUST 11, 2009**

**PERMITS OR LICENSES: MB424476, CB, PE**

**AMOUNT OF PENALTY: \$3,000.00**

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

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

**Mail this form with your payment to:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
P.O. Box 13127  
Austin, Texas 78711  
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

**You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.**

**Attach this form and please make certain to include the Docket # on your payment.**

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address P.O. Box No.

\_\_\_\_\_  
City State Zip Code

\_\_\_\_\_  
Area Code/Telephone No.

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

May 15, 2009

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

**VIA REGULAR MAIL**

**RE: Docket No. 458-09-3286; Texas Alcoholic Beverage Commission vs. Berryhill Hot Tamales Corporation d/b/a Berryhill Hot Tamales**

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,

A handwritten signature in cursive script that reads "Don Smith".

Don Smith  
Administrative Law Judge

DS/rjm  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**  
Ramona Perry, Staff Attorney Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> 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**  
Berryhill Hot Tamales Corporation d/b/a Berryhill Hot Tamales, 5603 Willers Way, Houston, TX 77056 -**VIA REGULAR MAIL**



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. Therefore, the dismissal of the underlying criminal charges concerning the alleged liquor violation is not a bar to this administrative case.

The Notice of Hearing set this matter for 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 Mike Raab. 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 January 7, 2009, Respondent or Respondent's agent, servant, or employee, with criminal negligence, sold, served, or delivered an alcoholic beverage to a minor, in violation of CODE § 106.13.

CODE § 106.13 provides that the Commission may cancel or suspend for not more than 90 days a retail license or 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.

Criminal negligence 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.

*Prima facie* evidence that the employer has directly or indirectly encouraged violation of the relevant laws includes:

- (1) The licensee/permittee fails to insure that all employees possess currently valid certificates of training issued and maintained.
- (2) The licensee/permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the licensee/permittee to prohibit such sales, service or consumption. 16 TEX. ADMIN. CODE (TAC) § 50.10 (d)(1)(2).

### III. EVIDENCE, ANALYSIS AND RECOMMENDATION

#### A. Evidence

##### Testimony of Chalen Gulley

Chalen Gulley, an enforcement agent for the TABC, stated that on January 7, 2009, she participated in a minor sting operation at Berryhill Hot Tamales, located at 717 Post Oak

Boulevard, Houston, Harris County, Texas. Agent Gulley testified she sat at the L-shaped bar (bar) close to the cash register, and a few seats from the seat where the minor ordered a beer. The minor was Ashley Mohajer, an 18-year old Caucasian female, youthful in appearance and dress. Ms. Mohajer was dressed in blue jeans, a grey zip-up hoodie, and a brown shirt. The minor was instructed to enter the location, be truthful, and attempt to purchase an alcoholic beverage. Ms. Mohajer came in, sat at the bar, asked for a Bud Light beer from the first bartender, who started looking for a beer. Agent Gulley testified that a second bartender approached, got a beer for the minor, took the minor's money, made change from the cash register, and gave the minor the change. The youth sat at the bar for about 30 seconds with the beer in front of her, then got up and left. Agent Gulley then called the open team to the bar. Agent Gulley described the first bartender as a female with blond hair, and the second bartender as a female with brunette hair.

Videos of the event were introduced into evidence. A Video shows Agent Gulley sitting in a bar chair at the inside corner on the short end of the L-shaped bar. The minor walks in, sits down in a bar chair a few seats from Agent Gulley, says something to a blond haired female, a second female with brunet hair turns and takes the minor's money, while the blond puts a beer in front of the minor, the brunet opens the cash register and hands the minor back change. The minor sits in the chair for about 30 seconds, then gets up and leaves. Camera 7 of the Videos shows the entire event from the minor sitting down around 13:50:44, being served the beer around 13:50:57, to leaving the bar at 3:51:24 (total of about 40 seconds).

The brunette was identified to Agent Gulley as bartender Ana Rivers, and the blond was identified as trainee Catherine Cooper. Ana Rivers had been seller-server trained and certified, but her certificate had expired in mid-February. Catherine Cooper was not seller-server trained or certified. Agent Gulley was told that Respondent fired Ana Rivers for selling the beer to the minor.

## **2. Testimony of Larry Whitbey**

arry Whitbey, an enforcement agent for the 'ABC, stated that on January 1, 2009, he participated in the minor sting operation as a part of the open team. Agent Whitbey testified that after the sting, he met with Ana Rivers, Catherine Cooper, and the on-duty manager. Ana Rivers told him that she was seller-server trained and certified. Catherine Cooper told him that she had only been a trainee with Respondent for 3 days. Agent Whitbey asked and looked, but did not see any posted policies and procedures by Respondent designed to prevent the sale, service, or consumption of alcoholic beverages by or to minors and intoxicated persons, and that expressed a strong commitment by the licensee/permittee to prohibit such sales.

On cross examination, Agent Whitbey discussed the instructions that the minor was given concerning being truthful about her age, if asked to tell her age, and to readily give her minor driver's license, if requested.

### **3. Testimony of Kristine Troger**

Kristine Troger is Vice-President of Respondent. Ms. Troger produced and testified about Respondent's policies and procedures (the manual) regarding sales, service, or consumption of alcoholic beverages by or to minors or intoxicated persons. Ms. Troger testified that the manual is given to each new hire and is thoroughly reviewed with the employee. Ms. Troger stated that Respondent requires every server-cashier to be seller-server trained and certified.

Ana Rivers was a server-cashier employee of Respondent on January 17, 2009. Ms. Troger testified that Respondent did not know that Ms. Rivers' certificate had expired. Ms. Troger stated that Ms. Rivers became an employee of Respondent in 2006, and was terminated due to this incident.

Catherine Cooper was a trainee. Ms. Troger testified that it is Respondent's policy that trainees are not supposed to serve alcoholic beverages, and are strictly instructed to just "observe." Ms. Troger stated that Ms. Cooper violated Respondent's policy by delivering the beer. Respondent has a strict "observation only" policy for trainees, explained Ms. Troger, because the trainees are not

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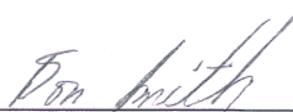
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12. On January 17, 2009, Catherine Cooper was employed as a trainee for Respondent and did not hold a current valid certificate from a commission-approved seller-server training program.
13. On January 17, 2009, Respondent did not have any policy guidelines visibly posted for employees prohibiting the sale of alcoholic beverages to minors.

### 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 and 106.13 (a).
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, Respondent indirectly encouraged its employees to violate the law. 16 TEX. ADMIN. CODE § 50.10 (d).
5. Based on the above Findings of Fact, on January 17, 2009, Respondent violated TEX. ALCO. BEV. CODE § 106.13.
6. Based on the Findings of Fact and Conclusions of Law, a 10-day suspension is warranted.
7. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, Respondent should be allowed to pay a \$3,000 civil penalty in lieu of suspension of its permits.

**SIGNED May 15, 2009.**



**DON SMITH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**