

DOCKET NO. 578117

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
GEORGE THEADO WATSON	§	
D/B/A OLD BARN ICE HOUSE & BAR-B-QUE	§	ALCOHOLIC
LICENSE NO. BF536805	§	
ROBERTSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-3848)	§	BEVERAGE COMMISSION

ORDER

**CAME ON FOR CONSIDERATION** this 28th day of October, 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard R. Wilfong. The hearing convened on the 5<sup>th</sup> day of August, 2009 and adjourned on September 17, 2009 after Staff and Respondent submitted briefs on the “safe harbor” statute. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 2<sup>nd</sup> day of October, 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 and Exhibits, 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.

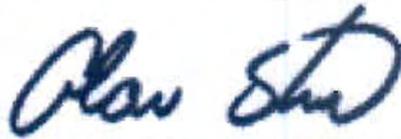
**IT IS THEREFORE ORDERED**, by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your license is hereby **SUSPENDED**.

**IT IS THEREFORE ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$4,500.00** on or before the **15th** day of **December, 2009**, all rights and privileges granted by the Commission under the above described license will be **SUSPENDED** for **thirty (30) days**, beginning the **23rd** day of **December, 2009**.

This Order will become final and enforceable on the 23rd day of November, 2009, unless a Motion for Rehearing is filed **before** that date.

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

**SIGNED** this the 28th day of October, 2009, at Austin, Texas.



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Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

EEH/cb

Honorable Judge Richard R. Wilfong  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
Waco/Austin  
**VIA FACSIMILIE: (254) 750-9300**  
**VIA FACSIMILIE: (512) 475-4994**

George Theado Watson  
**RESPONDENT**  
d/b/a Old Barn Ice House & Bar-B-Que  
3415 FM 1644 W.  
Franklin, TX 77856  
**VIA REGULAR MAIL**

Emily E. Helm  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Waco District Office

SOAH DOCKET NO. 458-09-3848

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner

v.

GEORGE THEADO WATSON  
D/B/A OLD BARN ICE HOUSE &  
BAR-B-QUE  
PERMIT NO. BF536805  
(TABC CASE NO. 578117),  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (TABC or Petitioner) requested that the permit of George Theado Watson d/b/a Old Barn Ice House & Bar-B-Que (Respondent) be suspended for 30 days or that Respondent be assessed an administrative penalty of \$4,500, in lieu of suspension of the permit, because Respondent violated the Texas Alcoholic Beverage Code and TABC rules on June 30, 2008, by selling an alcoholic beverage to a minor. The facts are undisputed and the sole issue to be decided is whether the "safe harbor" defense under § 106.14(a) TEX. ALCO. BEV. CODE ANN. (Code) is applicable under the facts of this case so as to absolve Respondent from liability. The Administrative Law Judge (ALJ) recommends that Respondent's permit be suspended for 30 days and that Respondent be given the opportunity to pay an administrative penalty of \$4,500, in lieu of suspension of the permit because Respondent does not meet the "safe harbor" requirements of § 106.14(a) of the Code.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits convened August 5, 2009, at the State Office of Administrative Hearings (SOAH), Raleigh Building, 801 Austin Ave., Waco, Texas, before ALJ Richard

R. Wilfong. TABC was represented by its staff attorney Emily Helm. Respondent appeared on his own behalf. At the conclusion of Petitioner's evidence, Respondent stipulated to the facts and raised the affirmative defense that the "safe harbor" provisions of § 106.14 of the Code, and 16 TEX. ADMIN. CODE (TAC) § 50.10, are applicable under the facts to absolve Respondent of liability. The record closed on September 17, 2009, after Staff and Respondent submitted briefs on the "safe harbor" statute.

## II. BACKGROUND AND SUMMARY OF UNDISPUTED FACTS

Respondent is the holder of a Beer Retailer's Off Premise License issued by TABC for the premises known as Old Barn Ice House & Bar-B-Que, located at 2938 FM 1644 West, Franklin, Robertson County, Texas.

On June 30, 2008, a 17-year-old minor, who was working with TABC and the City of Bryan Police Department in a "sting" operation, was sold an alcoholic beverage at Old Barn Ice House & Bar-B-Que by its employee Amanda M. Topfer, who had been employed approximately 10 days. She did not request the minor to provide proof of age. She was scheduled to attend the next scheduled TABC seller-server training program which would have been completed within 30 days of her employment, but she was not seller-server trained at the time of the violation on June 30, 2008.

## III. THE ALLEGATIONS AND APPLICABLE LAW

### A. Allegations

Staff alleges that Respondent, its agent, servant or employee, with criminal negligence, sold or delivered an alcoholic beverage to a minor, in violation of § 106.13(a) of the Code.

### B. Respondent's Affirmative Defense

Respondent raised § 106.14(a) of the Code, or the "safe harbor" statute, as an affirmative defense, claiming that Respondent is protected from TABC's action because Respondent complied with this statute.

In pertinent part, §106.14(a) of the Code states that the sale, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person shall not be attributable to the employer if:

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

A licensee who claims exemption from administrative action under § 106.14(a) of the Code bears the burden of proof. TABC's recovery against a licensee is barred if that licensee alleges and proves *all three* components of the statute.

Further clarification of the requirements of the "safe harbor" statute are found at the Commission rules in 16 TAC ch. 50. As relates to Code § 106.14(a), 16 TAC § 50.10(a) states that, "the Commission shall require each licensee/permittee who claims exemption from administrative action under [Code] § 106.14, to produce evidence ... that the licensee/permittee met the three criteria outlined in § 106.14(a)."<sup>2</sup>

#### IV. SUMMARY AND ANALYSIS OF LEGAL ARGUMENTS

##### A. Respondent's Arguments

Respondent acknowledges that Code § 106.14 requires a licensee/permittee to prove all three elements, including the second element that, "the employee has actually attended such a training

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<sup>1</sup> The phrase "seller-server" is commonly used to signify that a person has successfully graduated from a TABC-approved seller training program under TEX. ALCO. BEV. CODE ANN. § 106.14. Commission rules at 16 TEX. ADMIN CODE (TAC) ch. 50 establish the requirements for approval of seller-server training programs, and the requirements and procedures for certification under these programs. Graduates of these programs receive a certificate to signify successful completion of the program, and this certificate is valid for two years. These seller-server training programs are calculated to modify the behavior of seller-servers of alcoholic beverages, primarily to prevent the sale of alcoholic beverages to minors and intoxicated persons. TABC maintains a list of currently certified sellers. See 16 TAC §§ 50.1 and 50.8(a)(b)(d).

<sup>2</sup> See 16 TAC § 50.10(a) and (b).

program,” but contends that 16 TAC § 50.10(b) allows an employer 30 days from the date of hire to satisfy the second element under § 50.10(b):

(b) The licensee/permittee shall not be deemed to require its employees to attend a commission approved seller-server training program unless employees are *required to attend such program within 30 days of their initial employment ...* (emphasis added)

Respondent construes this language to mean that the converse is true – that a licensee/permittee *shall be deemed* to require its employees to attend a training program if each employee is required to attend such training within 30 days, thereby giving the employer a 30-day window to satisfy the second element of Code § 106.14(a). Thus, Respondent claims he has met the requirement of Code § 106.14(a)(2) since he requires all employees to attend a commission approved seller/server training program within 30 days of their initial employment.

Respondent argues, in the alternative, that if the “safe harbor” provision is not available to him as he interprets the statute and rule, then he should nonetheless be afforded liability protection to avoid undue burden on him as a small business owner. Respondent contends that he only needs one employee and that employee should be allowed to work while waiting for the next scheduled training program, and the employer should have “safe harbor” protection during the interim. To require otherwise places an unfair burden on small business owners. Respondent further contends that his interpretation is consistent with the legislative intent.

#### **B. Petitioner’s Arguments**

Petitioner argues that TAC § 50.10(b) makes clear that for the “safe harbor” protection of Code § 106.14(a) to apply, all three elements of the statute must be met at the time of the violation. Petitioner further asserts that Code § 106.14(a) needs no interpretation as argued by Respondent, because it clearly and unequivocally requires that the employee who sold the alcoholic beverage “has

actually attended such a training program.” Petitioner cites several cases that hold that the statute requires the employee in question to have actually attended the seller-server training program.<sup>3</sup>

### C. ALJ’s Analysis

The ALJ agrees with Petitioner, 16 TAC § 50.10 does not, as Respondent contends, interpret Code § 106.14(a) in such a way as to create a grace period of up to 30 days providing an employer “safe harbor” protection for violations committed by a new employee before the employee attends seller-server training. Rather, the statute and rule at issue are in harmony in that they unequivocally require a licensee/permittee to prove that all three elements of Code § 106.14(a) have been met to be eligible for “safe harbor” avoidance of administrative enforcement action. Additionally, the statute provides no exception for small business owners.

## V. CONCLUSION

Respondent failed to sustain his burden to prove the second prong of the “safe harbor” statute, because the stipulated evidence shows that Ms. Topfer was not a TABC-certified seller on June 30, 2008.

Because Respondent failed to meet the requirements of CODE § 106.14(a), the sale of an alcoholic beverage to a minor by Respondent’s employee Ms. Topfer, on June 30, 2008, without requesting proof of age, should be attributed to Respondent. The ALJ concludes that Respondent’s license should be suspended for 30 days, and Respondent should be given the opportunity to pay an administrative penalty of \$4,500, in lieu of suspension of his license.

## VI. FINDINGS OF FACT

1. George Theado Watson d/b/a Old Barn Ice House & Bar-B-Que (Respondent) is the holder of a Beer Retailer’s Off Premise License issued by the Texas Alcoholic Beverage

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<sup>3</sup> *Pena v. Neal, Inc., d/b/a Fina One Stop*, 901 S.W.2d 663, 667 (Tex.App.—San Antonio 1995, writ denied); *Perseus, Inc. d/b/a Hippodrome v. Debbie Canody, et al*, 995 S.W.2d 202 (Tex.App.—San Antonio 1999, rehearing denied); *20801, Inc. v. John L. Parker*, 249 S.W.3d 392 (S.Ct. 2008).

- Commission (TABC) for the premises located at 2938 FM 1644 West, Franklin, Robertson County, Texas.
2. On June 30, 2008, Respondent's employee, Amanda M. Topfer, sold an alcoholic beverage to a 17-year-old minor without requesting proof of age.
  3. On June 30, 2008, Ms. Topfer had been employed by Respondent for approximately 10 days. She was scheduled to attend the TABC seller-server training within 30 days of her initial employment.
  4. Ms. Topfer had not received TABC seller-server training on or before June 30, 2008.
  5. On May 5, 2009, TABC sent its Notice of Hearing to Respondent. The Notice of Hearing contained: a statement of the date, location and 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 Commission.
  6. The hearing on the merits was convened on August 5, 2009, at the State Office of Administrative Hearings, 801 Austin Ave., Suite 750, Waco, Texas, before Administrative Law Judge Richard R. Wilfong. The Commission appeared by staff attorney Emily Helm. Respondent appeared on his own behalf, Evidence and argument were heard, and the record closed September 17, 2009, after the parties briefed the "safe harbor" statute issue.

## VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. subchapter B of chapter 5.
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 § 155.401.
4. On June 30, 2008, Respondent's employee with criminal negligence sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 106.13(a), and the actions of Respondent's employee are attributable to Respondent pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13.

5. Respondent did not meet the requirements for "safe harbor" avoidance of liability for the violation by his employee pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14(a).
6. Suspension of Respondent's license is warranted.
7. Based on these Findings of Fact and Conclusions of Law it is recommended that Respondent's license be suspended for 30 days, and that Respondent be given the opportunity to pay an administrative penalty of \$4,500, in lieu of suspension of the license.

SIGNED October 2, 2009.



RICHARD R. WILFONG  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS