

DOCKET NO. 588507

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
BANDERA COWBOY BAR LLC	§	
D/B/A 11TH STREET COWBOY BAR,	§	ALCOHOLIC
Respondent	§	
	§	
PERMITS NO. BG638124, BL	§	
	§	
	§	
BANDERA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-2064)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of January, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), Administrative Law Judge George Lambright presiding. An evidentiary hearing convened on May 11, 2010 and June 25, 2010. The SOAH record closed on June 25, 2010. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 10, 2010. 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 Assistant 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 that 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 other motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party that are not specifically granted herein are denied.

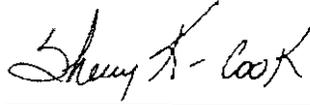
IT IS THEREFORE ORDERED that Respondent pay a civil penalty in the amount of **\$2,100.00** on or before March 15th, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permits will be **SUSPENDED** beginning at **12:01 A.M.** on March 23rd, 2011, and shall remain suspended for **seven (7)** consecutive days.

This Order becomes final and enforceable on the 9th day of February, 2011, unless a Motion for Rehearing is filed **before** that date.

If this Order is appealed and judgment is rendered by the District Court affirming the Order, Respondent shall pay the civil penalty in the amount of **\$2,100.00** on or before the **tenth (10th) day** following the date the judgment is rendered by the District Court. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18th) day** following the date the

judgment is rendered by the District Court, and shall remain suspended for seven (7) consecutive days.

SIGNED January 14, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on January 14, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

George R. Lambright
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
10300 Heritage, Suite 250
San Antonio, Texas 78216
VIA FACSIMILE: (512) 322-0476

Anton Tony Hackebell
ATTORNEY FOR RESPONDENT
315 11th Street
Bandera, TX 78003
VIA REGULAR MAIL AND
VIA FACSIMILE: (830) 796-9980

Bandera Cowboy Bar, LLC
d/b/a 11th Street Cowboy Bar
RESPONDENT
P.O. Box 3217
Bandera, TX 78003
VIA REGULAR MAIL

John W. Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Lt. Craig Smith
TABC San Antonio District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 588507 REGISTER NUMBER:

NAME: Bandera Cowboy Bar LLC

TRADENAME: 11th Street Cowboy Bar

ADDRESS: 305-07 11th Street Bandera, TX 78003

DUE DATE: March 15, 2011

PERMITS OR LICENSES: BG638124, BL

AMOUNT OF PENALTY: \$2,100.00

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.

with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015, and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding. On May 11, 2010, and June 25, 2010, an evidentiary hearing convened before ALJ George R. Lambright in San Antonio, Texas. TABC was represented by staff attorney John Sedberry. Respondent was represented by attorney Anton Hackebiel. The record closed on June 25, 2010, after Respondent's witness testified.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

State law prohibits the consumption of alcoholic beverage on licensed premises during certain hours. Specifically, TEX. ALCO. BEV. CODE ANN. § 105.06 provides:

HOURS OF CONSUMPTION. (a) In this section:

(1) "Extended hours area" means an area subject to the extended hours of sale provided in Section 105.03 or 105.05 of this code.

(2) "Standard hours area" means an area which is not an extended hours area.

(a-1) For the purposes of this section, a licensed or permitted premises is a public place.

(b) In a standard hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a. m. and 12 noon or on any other day between 12:15 a. m. and 7 a. m.

(c) In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a. m. and 12 noon and on any other day between 2:15 a. m. and 7 a. m.

Further, TEX. ALCO. BEV. CODE ANN. § 61.71 provides:

GROUND FOR CANCELLATION OR SUSPENSION: RETAIL DEALER.

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(18) consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by this code;

B. Evidence and Arguments

Petitioner offered three exhibits which were admitted into evidence by the ALJ. Exhibit No. 1 is the Notice of Hearing. Exhibit No. 2 is an affidavit by the Director of Licensing Division for TABC. Exhibit No. 3 is the TABC Incident Report written by Oliver E. Johnson, a TABC agent who is also a commissioned Texas peace officer. Agent Johnson testified for TABC. Ms. Connie Smith testified for Respondent.

1. Testimony of Oliver E. Johnson

Mr. Johnson testified that on August 16, 2009, he was employed as a TABC Agent. On that date at approximately 3:04 a.m. he went to the 11th Street Cowboy Bar in Bandera, Texas, to conduct an inspection. Upon his arrival he noticed cars parked outside and people inside the bar. Agent Johnson entered the bar and observed four people talking to each other. He identified them as Christopher Guill, Stephanie Luke, Constance Smith, and Janis Presley. Agent Johnson observed Ms. Presley take a sip out of a cup she was holding. Mr. Johnson knew it was Ms. Presley who took the sip because he met her during prior inspections at the bar and knew her to be an employee. Ms. Presley saw Agent Johnson, then turned to her side and put the cup in an unknown location. He asked Ms. Presley what was in the cup and she said it was Sprite. The agent asked if he could see the cup and Ms. Presley handed it to him. He noticed the cup was filled to the top rim. The color of the liquid in the cup was yellow and had a strong odor of alcoholic beverage. The agent asked her to go outside with him where he asked her again what was in the cup. This time Ms. Presley said the cup contained wine and Sprite. Ms. Presley's identification was obtained by the agent in order to make affirmative identification to enable the agent to issue her a citation for consuming alcoholic

beverages during prohibited hours. While there, Agent Johnson saw several open empty beer bottles on the bar. Agent Johnson believed Ms. Presley to be the manager of the 11th Street Cowboy Bar based on previous conversations with her.

During cross-examination, Agent Johnson testified that after Ms. Presley put the cup to her mouth he noticed the cup was full to the rim. Based on agent Johnson's experience and training Ms. Presley did consume some of the contents of the cup, although he stated it is possible she did not. When asked, Agent Johnson said he did not see Ms. Presley's Adam's apple move, and believed the lighting in the bar to be dim. Although he did not remember the color of the lights he did not think they were yellow. Agent Johnson did not taste the contents of the cup nor did he preserve the contents. In addition, he did not smell Ms. Presley's breath.

2. Testimony of Connie Smith

Ms. Smith testified she was an employee of the 11th Street Cowboy Bar on August 16, 2009, when Agent Johnson entered. She believes the day was Saturday and that Ms. Presley was not the manager that night. The customers were required to leave at 1:45 a.m. that night and the employees were entitled to one free "shift drink" to be finished prior to 2:00 a.m. Ms. Smith had her shift drink earlier that night. She did not notice Ms. Presley have a shift drink that night between 1:45 a.m. and 2:00 a.m. However, she did notice Ms. Presley had a cup at the time Agent Johnson entered. She did not see the contents nor did she see Mr. Presley fill the cup. It is Ms. Presley's routine to drink Sprite after she has her "shift drink" of wine. Ms. Smith heard Ms. Presley tell Agent Johnson she was drinking Sprite then Agent Johnson went outside with Ms. Presley.

C. The ALJ's Analysis

Agent Johnson testified that on August 16, 2009, he observed Ms. Presley put a styrofoam cup to her mouth and take what appeared to be a sip of its contents. Although Agent Johnson did not see Ms. Presley's Adam's apple move and the contents remained at the rim of the cup, the evidence

preponderates a finding of consumption. Ms. Presley's apology is consistent with her being observed drinking wine and Sprite from the cup. In fact, after Ms. Presley left the bar with Agent Johnson she admitted drinking wine and Sprite. Further, her motivation for attempting to hide the cup is indicative of the cup containing wine. The fact that the cup was full to the rim is consistent with the cup having been recently filled and that not much of the contents were consumed.

The law requires the evidence to preponderate a finding. It is not necessary for Petitioner to prove its case beyond a reasonable doubt. Indeed, it would be unreasonable to expect Petitioner to prove that the consuming individual's throat move or that the sip be of an amount to substantially lower the level of liquid in the cup when the observation must be made sometime after 2:15 a.m. in a bar with poor lighting.

Due to Ms. Presley's cooperation with Agent Johnson including her admission to drinking wine and Sprite, the ALJ recommends a suspension of 7 days and that Respondent be allowed to pay a civil penalty of \$300 per day in lieu of suspension.

In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. Bandera Cowboy Bar d/b/a 11th Street Cowboy Bar (Respondent) holds Mixed Beverage Permit and Mixed Beverage Late Hours Permit BG638124 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Bandera Cowboy Bar) with address P. O. Box 3217, Bandera, Texas 78003, Bandera County, Texas. This permit was in effect on August 16, 2009.
2. On August 16, 2009, TABC agent Oliver E. Johnson observed Janis Presley, an employee of Respondent, consume an alcoholic beverage on the premises at approximately 3:04 a.m., a prohibited hour.
3. Respondent has had no adjudicated violations since the present owners purchased the club
4. On January 8, 2010, TABC sent a notice of hearing to Respondent stating that a hearing

would be held on this matter on February 3, 2010, at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas. Said cause was continued to May 11, 2010, then to June 25, 2010.

5. The Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and contained 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 TABC.
6. On May 11, 2010, and June 25, 2010, the evidentiary hearing convened in San Antonio, Texas, before ALJ George R. Lambright. TABC was represented at the hearing by staff attorney John Sedberry. Respondent was represented by Anton Hackebell, Attorney at Law. The hearing concluded and the record closed on June 25, 2010.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 61.71(a)(18).
 2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015 and TEX. GOV'T CODE ANN. § 2003.021.
 3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE § 155.501.
 4. TABC has shown, by a preponderance of the evidence, that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours in violation of TEX. ALCO. BEV. CODE § 105.06.
 5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit and Mixed Beverage Late Hours Permit GB 638124 should be suspended for 7 days. In the alternative, Respondent should be given the opportunity to pay a penalty of \$300 per day in lieu of suspension.
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SIGNED: August 5, 2010.



**GEORGE R. LAMBRIGHT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**