

DOCKET NO. 585840

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
SHANNA JO DONALDSON D/B/A THE KORNER BAR, Respondent	§	ALCOHOLIC
PERMIT NO. BG675069	§	
CALDWELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-0409)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of February, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law (ALJ) Judge Sarah G. Ramos presiding. The hearing convened on March 25, 2010 and the SOAH record closed the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on May 20, 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. Petitioner filed exceptions to the Proposal for Decision on June 3, 2010. Respondent's Attorney filed exceptions on June 7, 2010. On June 22, 2010, Respondent's Attorney replied to Petitioner's exceptions to the Proposal for Decision. The Administrative Law Judge replied to both exceptions on June 29, 2010, recommending all exceptions be overruled.

After review and due consideration of the Proposal for Decision, exceptions, reply, and the ALJ's response, I determine that **Conclusion of Law Paragraph No. 7 should be changed to read:**

Based on the Findings of Fact and Conclusions of Law, Respondent's permit should be suspended for 17 days or, in lieu of suspension, Respondent should pay a \$300 per day penalty for a total of \$5,100.00.

With this change to Conclusion of Law Paragraph No. 7, I adopt the Administrative Law Judge's Findings of Fact and Conclusions of Law contained in the Proposal for Decision and incorporate 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.

I do not find that this is an appropriate case in which to exercise the discretion afforded by Alcoholic Beverage Code §11.64(b). I find that the ALJ did not properly weigh the factors set forth in Alcoholic Beverage Code §11.64(c) in coming to the conclusion that the penalty should be relaxed. A permit or license holder has a duty to the public to exercise reasonable control of the licensed premise and persons on the licensed premise. This duty is not satisfied by merely adopting policies; it requires that the license holder monitor for violations of the code and enforce adopted

policies. For public policy reasons, I do not consider the mere adoption of a written policy, which the license holder fails to enforce, as an ameliorating factor. Furthermore, there is no evidence of any actions taken by Respondent that would constitute due diligence in enforcing those policies. Finally, the Code does not require a license holder to have actual knowledge of violations unless knowledge is made an element of the violation, which it is not in this instance.

Although the Schedule of Sanctions in Rule 34.2 is not binding in a contested case [Rule 34.1(j)], it is generally indicative of how significant the Commission considers a violation. In this case, permitting an employee to become intoxicated on the licensed premise is considered a "Health, Safety and Welfare" violation under Rule 34.2, and not a "Major Regulatory" violation under Rule 34.3. The minimum penalty assigned to this violation for a first offense in Rule 34.2 is 17 days. Compare this to the minimum penalty assigned to a first offense for selling alcohol to a minor (8 days) or selling alcohol to an intoxicated person (8 days). Permitting an employee to become intoxicated on the licensed premise is a major public safety violation because it poses a serious and unreasonable risk to the health and safety of the public.

IT IS THEREFORE ORDERED, that Respondent pay a civil penalty in the amount of **\$5,100.00** on or before April 5, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permit by the Code will be **SUSPENDED** beginning at 12:01 A.M. on April 13, 2011, and shall remain suspended for **seventeen (17) consecutive days**.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$5,100.00** on or before the **tenth (10th)** day following the date the judgment is signed. 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 signed and shall remain suspended for **seventeen (17) consecutive days**.

This Order will become final and enforceable on the 24th day of March, 2011, unless a Motion for Rehearing is filed **before** that date.

SIGNED on February 28, 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 this the 28th day of February, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission
Page 2 of 4

Honorable Judge Sarah G. Ramos
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE: (512) 322-2061

Mark E. Cusack
ATTORNEY FOR RESPONDENT
242 North Guadalupe
San Marcos, Texas 78666
VIA REGULAR MAIL and
VIA FACSIMILE: (512) 392-1519

Shanna Jo Donaldson
d/b/a The Korner Bar
RESPONDENT
P.O. Box 908
Lockhart, TX 78644
VIA REGULAR MAIL

Matthew M. Clark
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Lt. Jimmy Zuehlke
Austin Enforcement District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 585840 REGISTER NUMBER:

NAME: Shanna Jo Donaldson

TRADENAME: The Korner Bar

ADDRESS: P.O. Box 908 Lockhart, TX 78644

DUE DATE: APRIL 5, 2011

PERMITS OR LICENSES: BG675069

AMOUNT OF PENALTY: \$5,100

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 20, 2010

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

VIA INTERAGENCY MAIL

RE: Docket No. 45810-04-09; Texas Alcoholic Beverage Commission v. Shanna Jo Donaldson D/B/A The Korner Bar

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Sarah G. Ramos
Administrative Law Judge

SGR:cm
Enclosure

xc Matthew Clark, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL (with Certified Evidentiary Record and 1 Hearing CD/s)
Mark Cusack, Attorney at Law, 242 North Guadalupe, San Marcos, TX 78666 -VIA REGULAR MAIL

SOAH DOCKET NO. 458-10-0409
TABC CASE NO. 585840

TEXAS ALCOHOLIC
BEVERAGE COMMISSION,
Petitioner

V.

SHANNA JO DONALDSON
D/B/A THE KORNER BAR,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's staff (TABC/Staff) brought this enforcement action against Shanna Jo Donaldson d/b/a The Korner Bar (Respondent) alleging that Respondent's agent, servant, or employee was intoxicated on the licensed premises. Respondent argues that the employee was not on duty and not on Respondent's premises when she was intoxicated. This Proposal for Decision finds that the employee was intoxicated on the premises and recommends a seven-day suspension, or in lieu of suspension, a \$150 per day monetary penalty.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing was held on March 25, 2010, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas, before Sarah G. Ramos, Administrative Law Judge (ALJ). Staff Attorney Matthew Clark represented Staff, and attorney Mark Cusak represented Respondent. The record closed at the conclusion of the hearing.

II. DISCUSSION

The Texas Alcoholic Beverage Code (Code) prohibits a person who is authorized to sell beer at retail and that person's, agent, servant, or employee from engaging in conduct that is

lewd, immoral, or offensive to public decency including, but not limited, to being intoxicated on the licensed premises.¹ If a licensee or permittee engages in such conduct, TABC may cancel the permit or license.²

A. Evidence and Argument

Respondent holds a Wine and Beer Retailer's On Premise Permit issued by the TABC for the premises at 312 Blackjack, Lockhart, Texas. Caldwell County Deputy Sheriff John Adams testified that he was on patrol in Lockhart on Monday, November 3, 2008, at approximately 1:46 a.m., when he saw a vehicle exit the parking lot of Respondent's premises. On that date, the driver of the vehicle, Joy Armstrong, was Respondent's employee. Ms. Armstrong's vehicle failed to maintain a single lane of travel; it crossed from the driving lane onto the shoulder and back onto the center lane. Deputy Adams stopped the vehicle and made contact with Ms. Armstrong.

The essential facts regarding Ms. Armstrong's field sobriety testing and intoxication level are detailed in Deputy Adams offense report.³ Based on Ms. Armstrong's performance on the field sobriety tests, Deputy Adams arrested her for driving while intoxicated.⁴ Ms. Armstrong's intoxilyzer results indicated an alcohol concentration of 0.28 and 0.27 grams of alcohol per 210 liters of breath, and Deputy Adams said the legal limit is 0.8 grams of alcohol per 210 liters of breath.

TABC agent Tricia O'Casey Rutledge testified that Ms. Armstrong would have had to drink more than five alcoholic beverages to reach the level of intoxication she had, and

¹ Code § 104.01(5).

² Code §§ 11.61(b)(13) and 61.71(a)(1).

³ Ex. 3.

⁴ On the horizontal gaze nystagmus test, in both eyes, Ms. Armstrong lacked smooth pursuit and had distinct nystagmus at maximum deviation. She also had vertical nystagmus in both eyes. On the walk-and-turn test, Ms. Armstrong began before being instructed to start, raised her arms more than six inches from her side for balance, stopped while walking, missed stepping heel to toe, and made an improper turn. On the one-leg-stand test, Ms. Armstrong put her foot down, swayed from side to side, and lifted her arms from her sides more than six inches in order to keep balance.

Ms. Armstrong could not have purchased alcohol anywhere else in Lockhart after midnight on November 3, 2008. Ms. Rutledge also said employees who are responsible for serving alcoholic beverages will have impaired judgment if they are intoxicated while on duty.

Respondent's time record for Ms. Armstrong shows that she began work on November 2, 2008, at 5:30 p.m. and ended work on November 3, 2008, at either 1:00 a.m. or 2:00 a.m. The time Ms. Armstrong was to have gone off duty was initially listed as "2:00" but the number "1" has been written over the number "2."

Staff argued that Respondent is responsible for Ms. Armstrong's behavior on the premises. Respondent's premises include the parking lot, and Deputy Adams saw her drive from there. In addition, Staff argued that an employee does not have to be working when she becomes intoxicated in order for Respondent to be responsible for a violation.

Rule 16 TEX. ADMIN. CODE (TAC) § 34.1 authorizes TABC's agents, compliance officers or other specifically designated personnel to settle complaints based on alleged violations. For a violation of this type, Staff may settle the case for a 17-25 day suspension, and in lieu of suspension, a Respondent may elect to pay a \$300 per day monetary penalty, as specified in 16 TAC § 34.2. Using this rules as a guide, Staff requested a 25-day suspension of Respondent's permit.

Respondent did not offer testimony but relied on her written policy, a copy of which was signed by Ms. Armstrong. The policy prohibits a "contractor" from drinking alcoholic beverages while working.⁵ In Respondent's view, she should not be responsible since there was no evidence that she condoned Ms. Armstrong's conduct. Further, Respondent argued that the parking lot where Deputy Adams saw her was not part of the premises.

⁵ Ex. 5.

B. Analysis

The evidence clearly demonstrates that Ms. Armstrong was intoxicated on the premises.⁶ Ms. Armstrong was on duty until at least 1:00 a.m., and Deputy Adams stopped her at 1:46 a.m. To have the intoxication level that she did, Ms. Armstrong had to have consumed more than five alcoholic beverages. Based on these facts, Code § 11.61 authorizes TABC to cancel or suspend Respondent's permit. In lieu of suspension, Code § 11.64 requires the TABC or its Administrator to give Respondent the opportunity to pay a civil penalty. As outlined in Code § 11.641, the penalty amount must be appropriate for the nature and seriousness of the violation in consideration of:

- (1) the type of license or permit held;
- (2) the type of violation;
- (3) any aggravating or ameliorating circumstances concerning the violation, including those enumerated in Section 11.64(c); and
- (4) the permittee's or licensee's previous violations.

Respondent has had no previous violations, and she is permitted to sell only wine and beer. While the violation is a serious one, there was no evidence that Respondent permitted or even was aware of Ms. Armstrong's alcohol consumption. Respondent's policy prohibits workers from consuming alcohol on the premises, and Ms. Armstrong acknowledged this policy in writing. These facts weigh in favor of Respondent. On the other hand, since Ms. Armstrong was stopped at 1:46 a.m., it is reasonable to assume that her shift ended at 1:00 a.m., and based on her high level of intoxication, it is more likely than not that she was drinking while on duty.

Subsections (b) and (c) of Code § 11.64 allow the TABC or Administrator to relax any provision of the Code relating to the suspension or cancellation of the permit and assess a sanction that is just under the circumstances, or reinstate the permit during the period of

⁶ A permittee's "premises" include the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. Code § 11.49. (b)(1).

suspension on payment by the permittee of a fee of not less than \$75 nor more than \$500, if the any of the following exist:

Factors	Evidence
(1) The violation could not reasonably have been prevented by the permittee by the exercise of due diligence.	Respondent's written policy is some evidence, but Respondent offered no evidence about the staffing or actual operation of Respondent's business to show due diligence to prevent alcohol consumption.
(2) The permittee or licensee was entrapped.	No evidence.
(3) An agent, servant, or employee of the permittee violated the Code without the knowledge of the permittee.	No evidence.
(4) The permittee did not knowingly violate the Code.	Respondent's written policy supports this factor.
(5) The permittee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations.	Although Respondent did not testify, her counsel stated that Ms. Armstrong was fired after this incident.
(6) The violation was a technical one.	No evidence.

As previously discussed, Staff presented no evidence that Respondent was aware of Ms. Armstrong's alcohol consumption. Also, Respondent has no previous violations and required employees to sign the "no alcohol consumption" policy. These facts justify a penalty lower than in the TABC's guideline. Based on the facts and applicable law, the ALJ recommends a seven-day suspension or the imposition of a \$150 per day monetary suspension for a total of \$1,050.

III. FINDINGS OF FACT

1. Shanna Jo Donaldson d/b/a The Korner Bar (Respondent) holds Wine and Beer Retailer's On Premise Permit BG675069 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises at 312 Blackjack, Lockhart, Texas.
2. On November 3, 2008, Respondent's employee, Joy Armstrong, ended her work shift at Respondent's premises at 1:00 a.m.
3. At or about 1:46 a.m. on November 3, 2008, Ms. Armstrong drove from Respondent's parking lot and, shortly thereafter, was stopped and arrested for driving while intoxicated.
4. Ms. Armstrong's intoxilyzer results on November 3, 2008, indicated an alcohol concentration of 0.28 and 0.27 grams of alcohol per 210 liters of breath, and the legal limit is 0.8 grams of alcohol per 210 liters of breath.
5. Ms. Armstrong would have had to drink more than five alcoholic beverages to reach the level of intoxication she had.
6. Ms. Armstrong could not have purchased alcohol anywhere else in Lockhart after midnight on November 3, 2008.
7. On October 1, 2008, Ms. Armstrong signed Respondent's written policy that prohibited her from drinking alcoholic beverages while working.
8. There was no evidence that Respondent knowingly allowed Ms. Armstrong's alcohol consumption on November 2 or 3, 2008.
9. Respondent has had no previous violations of the Texas Alcoholic Beverage Code.
10. Other than Respondent's written policy, there was no evidence of steps she took to prevent her employee from consuming alcohol or becoming intoxicated on the premises.
11. TABC's Staff sent a notice of the hearing to Respondent on September 25, 2009. The notice included the time, date, and nature of the hearing; legal authority and jurisdiction under which the hearing would be held; applicable statutes and rules; and the matters asserted.
12. The hearing was continued several times upon Staff's motions and was held on March 25, 2010, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas. Staff Attorney Matthew Clark represented TABC's Staff, and attorney Mark Cusak represented Respondent.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 25.04 and 11.61(b)(13).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. ch. 2003.
3. The parties received timely and adequate notice of the hearing, as required by TEX. GOV'T CODE ANN §§ 2001.051 and 2001.052.
4. Staff bore the burden of proof in this proceeding. 1 TEX. ADMIN. CODE § 155.247.
5. A permittee's "premises" include the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. TEX. ALCO. BEV. CODE ANN. § 11.49. (b)(1).
6. Respondent's employee was intoxicated in Respondent's premises.
7. Based on the Findings of Fact and Conclusions of Law, Respondent's permit should be suspended for seven days, or in lieu of suspension, Respondent should pay a \$150 per day penalty for a total of \$1,050. TEX. ALCO. BEV. CODE ANN. §§ 11.61, 11.64, and 11.641.
- 8.

SIGNED May 20, 2010.



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

