

DOCKET NO. 596947

IN RE SCOONERS CORPORATION	§	BEFORE THE
D/B/A SCOONERS	§	
PERMIT NOS. MB418828, LB418829	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1741)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 6th day of June 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones. The hearing convened and adjourned on April 12, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 3, 2002. This 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, Transcripts, 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 Assistant 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 Permit Nos. MB418828 and LB418829 are hereby **CANCELED FOR CAUSE effective immediately**.

This Order will become final and enforceable on June 27, 2002, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 6th day of June, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Scooners Corporation
d/b/a Scooners
RESPONDENT
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Licensing Division
Fort Worth District Office

DOCKET NO. 458-02-1741

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

SCOONERS CORPORATION
D/B/A SCOONERS
TARRANT COUNTY, TEXAS
(TABC CASE NO. 596947)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought to cancel Scooners Corporation's (d/b/a Scooners, hereafter Scooners) permits for allowing minors to possess alcoholic beverages on its licensed premises. The Administrative Law Judge (ALJ) recommends that Scooners' permits be canceled.

I. PROCEDURAL HISTORY & JURISDICTION

Notice and jurisdiction were not contested in this proceeding. Those matters are set out in the findings of fact and conclusions of law without further discussion.

On April 12, 2002, a hearing convened before ALJ Robert F. Jones Jr., State Office of Administrative Hearings (SOAH). The Texas Alcoholic Beverage Commission (TABC) was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared through Craig Casler, its President. Evidence was received and the record was closed on April 12, 2002.

II. DISCUSSION

A. Applicable Law

A permit may be canceled or suspended if the holder, "with criminal negligence," allows a minor to possess an alcoholic beverage on the licensed premises. TEX. ALCO. BEV. CODE ANN. §§ 106.13 (a), 106.05(a)(Vernon 2002) (the Code). A permit holder acts with criminal negligence with respect to a minor possessing an alcoholic beverage on the licensed premises when the holder "ought to be aware of a substantial and unjustifiable risk" that minors will possess an alcoholic beverage on the licensed premises. "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." TEX. PEN. CODE ANN. § 6.03(d)(Vernon 2002); see § 1.08 of the Code.

B. Evidence

On September 1, 2001, the TABC renewed Scooners' mixed beverage permit MB418828 and mixed beverage late hours permit LB418829. The permits expire on September 1, 2002. Scooners' licensed premises are located at 3051 South University Drive, Fort Worth, Tarrant County, Texas. The premises consist of three interconnected rooms, with entrances in the back room and the front room.

The alleged violations occurred on September 7, 2001. TABC Agents Tana Watkins and Tricia O'Cayce, as well as Mr. Casler, were present at the premises on that night and all three testified.

1. Agent Tana Watkins' Testimony

Agent Watkins approached and entered Scooners to investigate a complaint Scooners was selling alcohol to minors. She was accompanied by Fort Worth Police Officer Gonzalez Agent Watkins and Officer Gonzalez approached the clear glass, rear door. Agent Watkins observed two individuals standing inside by the door. One person, Matthew Moore, was later identified as Scooners' rear doorman. The other individual, who identified himself to Agent Watkins as Mason McPhail, was holding a small, clear plastic cup containing an amber liquid. The two were standing face to face, speaking. Mr. Moore and Mr. McPhail saw Agent Watkins and Officer Gonzalez nearing the door. Mr. McPhail put the cup on the arm of a wooden bench. Mr. Moore turned and ran into the interior of the premises, followed by Mr. McPhail.

Agent Watkins and Officer Gonzalez entered Scooners through the back door. Agent Watkins secured the cup Mr. McPhail had put down. She determined through sight and smell that the amber liquid was beer. According to Agent Watkins, Mr. McPhail appeared youthful, of college age, but not more than 21 years old. Mr. McPhail was dressed in a blue and red striped polo shirt and tan shorts. He had short hair, and no visible tattoos. Agent Watkins made contact with Mr. McPhail. Mr. McPhail told Agent Watkins he was a minor, his date of birth (DOB) being March 26, 1981. Mr. McPhail stated he did not have any identification with him. Agent Watkins searched him and confirmed his assertion. Mr. McPhail told Agent Watkins he had not been required to show identification to enter Scooners.¹ Agent Watkins then made contact with Mr. Moore. He told her that he was the doorman on the back door. Agent Watkins issued Mr. McPhail a citation for "minor in possession," a violation of Section 106.05 of the Code.

Agent Watkins testified that the premises were crowded, especially the middle and front rooms. She estimated 200 patrons were in the bar. She opined that Scooners was not adequately staffed to monitor the crowd. According to Agent Watkins, there were adequate bartenders to serve the patrons, but not enough to patrol the crowd and tables. She noted that when Scooners' employees

¹ Agent Watkins noted that Mr. McPhail did not have a hand-stamp, bracelet, or armband, commonly used in "18 and over" clubs to indicate a patron is a minor. Mr. Casler testified that Scooners is not licensed for an "18 or over" clientele, and does not provide patrons with markers to distinguish minors. None of the other minors that came to the agents' attention that night had markers.

knew that TABC agents were in the premises, the employees began to circulate on the floor and remove drinks from the tables.

Agent Watkins had contact with four other minors² whom she believed had been detained by Officer Gonzalez. None of the four were in possession of alcohol. According to Agent Watkins they were trying to leave when stopped by Officer Gonzalez.³ Agent Watkins noted that Mr. Casler was present and that she spoke to him. She testified Mr. Casler told her that Mr. Moore had not done his job.⁴

2. Agent Tricia O'Cayce's Testimony

Agent O'Cayce approached Scooners from the front, along with several other agents. Agent O'Cayce looked in the front door, and saw that the front room was so crowded that people were sitting or standing on a pool table to the right of the entryway. Agent O'Cayce observed a person later identified as Lauren McDonald. Ms. McDonald was standing within arms length of the front doorman. Ms. McDonald was holding a 12-ounce bottle labeled "Coors Lite." Agent O'Cayce opined that Ms. McDonald appeared youthful, of college age, but not more than 21 years old. Her features were not mature. Agent O'Cayce made contact with Ms. McDonald, and took her outside of the premises. Agent O'Cayce confirmed by smell and sight that the bottle in Ms. McDonald's possession contained beer. Ms. McDonald told Agent O'Cayce that she had obtained the beer in Scooners. Agent O'Cayce did not ask if she had purchased it. Ms. McDonald told Agent O'Cayce that she had gained admission to Scooners without producing identification. Agent O'Cayce confirmed that Ms. McDonald had a valid Virginia driver's license, in Ms. McDonald's name, showing a DOB of March 1, 1981. Agent O'Cayce opined that Scooners' doorman, whom she did not identify, should have requested Ms. McDonald's identification prior to allowing her to enter Scooners, and should have taken Ms. McDonald's beer away.

Agent O'Cayce next observed a person, later identified as Emily Kuhn, sitting at the bar near the cash register. Agent O'Cayce opined that Ms. Kuhn appeared youthful, of college age, but not more than 21 years old. She stated that Ms. Kuhn would not be mistaken for a person older than 21 years. A cup containing a pink liquid was sitting on the bar in front of Ms. Kuhn. Agent O'Cayce determined by smell and sight that the cup contained alcohol in the form of a distilled spirit. Ms. Kuhn told Agent O'Cayce she was holding the drink for a friend. Ms. Kuhn produced both a false identification and a valid Virginia driver's license. The Virginia license was in her name and showed a DOB of November 8, 1981. The false identification was a Missouri driver's license issued in another person's name. Agent O'Cayce opined that the Missouri identification, if presented, should have been rejected, because the photograph did not resemble Ms. Kuhn, the height listed on the

² They were Laura Phipps, DOB September 29, 1981; Jenny Specht, DOB August 12, 1981; Linsey Mackey, no DOB recorded; and Courtney Bryan, DOB November 21, 1981.

³ Mr. Casler testified that the four minors had attempted to enter Scooners through the back door after Agent Watkins and Officer Gonzalez had entered, and were stopped and detained by Officer Gonzalez.

⁴ Mr. Casler testified and explained that "Mr. Moore had not done his job" meant that Mr. Moore left the back door to inform other employees that the TABC was present.

license did not match Ms. Kuhn's height by six inches, and the eye color noted on the license did not match Ms. Kuhn's eye color. Agent O'Cayce testified that Nathan Bartlett was working as a bartender and cashier at the cash register where Ms. Kuhn was sitting. Agent O'Cayce was not certain that Mr. Bartlett had served Ms. Kuhn the alcohol, but did determine that Ms. Kuhn was running a tab at the register using a Visa check card in Ms. Kuhn's name.

Agent O'Cayce then made contact with Cameron Bosson, who was standing near the center of the bar holding one-half pitcher of beer. Agent O'Cayce stated that Mr. Bosson had youthful, "preppy" appearance, was of college age, but not more than 21 years old. Mr. Bosson was in sight of Mr. Bartlett and other Scooners employees. Mr. Bosson produced a purported Georgia identification with his picture, and which showed a DOB of November 6, 1979. Mr. Bosson told Agent O'Cayce his true DOB was November 6, 1981. Agent O'Cayce opined that the Georgia identification, if presented, should have been rejected, because it specifically stated it was "NOT A GOVERNMENT DOCUMENT OR RECORD." Agent O'Cayce acknowledged she was unaware if Mr. Bosson was helping Scooners' employees to clean the bar, and was merely carrying the pitcher from a table to the bar. Agent O'Cayce issued Ms. McDonald, Ms. Kuhn, and Mr. Bosson citations for "minor in possession."

Agent O'Cayce believed that there were 150 - 200 patrons in Scooners. She noted that there were five employees present: Mr. Casler, two doormen, and two bartenders.

3. Scooners' Violation History

Scooners' violation history was admitted into evidence. (TABC Ex. 4) On March 14, 2001, Scooners agreed to a suspension (or in lieu a penalty of \$1,050) for permitting a minor to possess or consume an alcoholic beverage on its premises. The infraction occurred on December 8, 2000. On September 28, 1998, a penalty action for a sale to a minor by a Scooners' employee was restrained.⁵ The sale took place on August 20, 1998. On March 2, 2000, a penalty action for a sale to a minor by a Scooners' employee was restrained. The sale took place on December 12, 1999. These transactions are set out in Table 1.

Table 2, below, represents citations issued to Scooners' patrons for possession of false identification. Table 3 represents citations issued to Scooners' minor patrons for possession of alcoholic beverages on the licensed premises. Table 4 represents citations issued to Scooners' employees for selling alcohol to minors.

⁵ As explained by Agent Watkins, an otherwise valid penalty action for sale of an alcoholic beverage to a minor is "restrained" when the licensee can take advantage of the so-called "seller-server" defense afforded under § 106.14 of the Code.

Table 1 - Penalty Cases				
Violation	Date	Disposition	Date of Disposition	Penalty
Sale to Minor (580688)	08/20/98	Restrained	09/28/98	None
Permitting Minor to Violate 106.13 (593067)	12/08/00	Suspension	03/14/01	7 days or \$1,050
Sale to Minor (588085)	12/22/99	Restrained	03/02/00	None

Table 2 - False ID				
Violation	Date	Disposition	Date of Disposition	Penalty
False - Altered ID (633502)	11/13/99	Conviction	07/28/00	None
False - Altered ID (633555)	12/09/99	Pending	Not Applicable	None
False - Altered ID (633922)	12/09/99	Pending	Not Applicable	None
False - Altered ID (633557)	12/09/99	Pending	Not Applicable	None
False - Altered ID (633526)	12/09/99	Pending	Not Applicable	None

Table 3 - Minor in Possession				
Violation	Date	Disposition	Date of Disposition	Penalty
Minor in Possession (544765)	10/24/97	Conviction	11/13/97	None
Minor in Possession (633782)	11/13/99	Conviction	02/02/00	None
Minor in Possession (633501)	11/13/99	Dismissed	07/28/00	None
Minor in Possession (633786)	11/13/99	Pending	Not Applicable	None
Minor in Possession (633527)	12/09/99	Conviction	08/11/00	None
Minor in Possession (633558)	12/09/99	Dismissed	05/11/00	None
Minor in Possession (633688)	02/04/00	Conviction	04/04/00	None
Minor in Possession (656170)	12/08/00	Dismissed	06/22/01	None

Table 3 - Minor in Possession				
Violation	Date	Disposition	Date of Disposition	Penalty
Minor in Possession (656169)	12/08/00	Pending	Not Applicable	None
Minor in Possession (656785)	12/14/00	Conviction	01/03/01	None
Minor in Possession (656849)	03/16/01	Conviction	03/22/01	None
Minor in Possession (664397)	09/07/01	Pending	Not Applicable	None
Minor in Possession (656898)	09/07/01	Pending	Not Applicable	None
Minor in Possession (657166)	09/07/01	Pending	Not Applicable	None
Minor in Possession (657167)	09/07/01	Pending	Not Applicable	None

Table 4 - Sales to Minors				
Violation	Date	Disposition	Date of Disposition	Penalty
Sale/Serve/Deliver to Minor (572759)	08/21/98	Conviction	07/12/00	None
Sale/Serve/Deliver to Minor (633535)	12/22/99	Pending	Not Applicable	None
Sale/Serve/Deliver to Minor (664398)	09/07/01	Warrant	Not Applicable	None
Sale/Serve/Deliver to Minor (664399)	09/07/01	Warrant	Not Applicable	None
Sale/Serve/Deliver to Minor (657168)	09/07/01	Warrant	Not Applicable	None

The violations in Tables 3 and 4 dated September 7, 2001, arose out of the incidents described by Agents Watkins and O'Cayce.

Agent Watkins indicated that neighboring bars such as the University Pub and Jon's Grill, both located on University Drive near Scooners, do not have histories of sales to minors, or possession of alcohol by minors. Agent Watkins stated that the TABC inspects premises such as Scooners on the basis of complaints, and on a random "spot check" basis. She denied that Scooners was subjected to discriminatory or selective enforcement.

Additionally, Agent Watkins testified that on March 24, 2002, two high school seniors were found in possession of alcohol at Scooners. The minors had purchased the alcohol from a bartender acquaintance.

4. Craig Casler's Testimony

Mr. Casler is the President of Scooners. He acknowledged that the premises were crowded on September 7, 2001, but disputed that 200 people were present. He stated that Scooners was targeted by the TABC. He explained that it is difficult to gauge a college student's age by appearance, as some appear younger than their true age and some older. He complained that minors are adept at defeating good faith attempts to screen them from clubs.

C. Analysis, Conclusion, and Recommendation

The Staff argued that the evidence demonstrated that on September 7, 2001, four minors were in possession of alcohol in Scooners. The Staff urged that each of the minors was within the plain view of Scooners' employees. The Staff noted that each of the minors appeared to be less than 21, could not be mistaken for being older than 21 years, and should have been required to provide proof of their age. The Staff further noted that there was inadequate staff on duty to circulate in the premises to assure that no minor had obtained possession of alcohol. The Staff concluded that considering the events of September 7, 2001, Scooners' violation history, and the citations issued on March 24, 2002, Scooners permits should be canceled for cause.

Scooners' arguments were summed up in Mr. Casler's testimony: the TABC was targeting Scooners to the exclusion of finding violations in other clubs, that judging the age of a college student is a difficult proposition, and that minors get into Scooners despite its employees' efforts. Mr. Casler argued that cancellation of Scooners' permits was not warranted, and that a suspension or fine, if anything, should be levied.

Were the four minors in possession of alcoholic beverages?

Mason McPhail, Lauren McDonald, and Cameron Bosson were each unquestionably in possession of alcohol in the Scooners' premises. Mr. McPhail and Ms. McDonald were holding drinking-size portions of beer in their hands. Mr. Bosson was holding a pitcher of beer, but apparently no drinking utensil such as a mug or cup. Mr. Casler suggested that Mr. Bosson was holding the pitcher to help Scooners' staff to clean the club. Although Agent O'Cayce could not deny this was the case, Mr. Casler offered no proof that Mr. Bosson was "assisting" Scooners. In particular, Mr. Casler offered no evidence that Mr. Bosson was an employee of Scooners.⁶ Ms. Kuhn asserted that she was holding the drink on the bar in front of her for a friend. Since Ms. Kuhn had a bar tab and a false identification, the ALJ discounts her statement as self-serving, and finds Ms.

⁶ If Mr. Bosson was an employee, he could possess alcohol in the course of his employment, if the employment was legal. § 106.05(1) of the Code.

Kuhn was in possession of alcohol.⁷

The ALJ finds that the four minors were in possession of alcohol in Scooners' premises, and in violation of § 106.05 of the Code.

Did Scooners' employees permit the four minors to possess alcohol in the premises?

All four minors were in Scooners. As Mr. Casler testified, Scooners was for patrons older than 21 years. None of the four should have been admitted to Scooners. Scooners' employees allowed them to enter. The minors' subsequent possession of alcohol was "permitted" by Scooners' employees in that sense. Further, Mr. McPhail stated he gained entry without being required to produce identification. If asked, he could not have produced identification. He was talking with Mr. Moore the doorman. Ms. McDonald told Agent O'Cayce she had obtained the beer she was drinking in Scooners, and without providing identification. Ms. McDonald was standing in proximity to the front doorman. Ms. Kuhn had possession of a mixed drink and was running a tab at the bar where Mr. Bartlett was working. Mr. Bosson was holding a pitcher of beer, again where Mr. Bartlett was working.

The evidence did not disclose that the four minors obtained possession of the alcohol from employees of Scooners. It is plausible that in each case the drink was purchased legally by some third person and given to the minor. However, § 106.13(a) of the Code does not require that a Scooners' employee sell or give the minor the drink. The statute, as pertinent here, forbids the licensee to "permit" the minor to possess the alcohol in the licensed premises. As Agents Watkins and O'Cayce stressed, Scooners was understaffed for the crowd present that night. Employees were not available to circulate and assure that minors did not come into possession of alcohol.

The ALJ finds that Scooners' employees permitted the four minors to possess alcohol in Scooners' premises.

Did Scooners' employees act with criminal negligence?

Scooners employs doormen to check the identification of people seeking to gain entry to the premises. Mr. Casler acknowledged that minors will attempt to enter clubs such as Scooners and drink if they are not stopped. Each of the four minors was described, without contradiction, as being persons who could not be mistaken for being older than 21. Mr. McPhail was not asked for identification. Ms. McDonald had identification which would have established her true age. Ms. McDonald was not asked for identification and was admitted. Ms. Kuhn had identification which was transparently false, as well as valid identification which established her true age. She was running a tab on a credit card with her true name. Possibly Ms. Kuhn was not asked for identification, was admitted, and ordered a drink. If Ms. Kuhn was asked to produce identification, and produced the false Missouri driver's license, the employee failed to properly examine the proffered license and compare it to Ms. Kuhn. If Ms. Kuhn produced her valid Virginia license she was admitted under a document showing her to be a minor. Mr. Bosson's identification was patently

⁷ Even if Ms. Kuhn was holding the drink for a friend, she was still in possession of the drink.

false, and should have been rejected, if in fact it was requested by a Scooners' employee.

The evidence demonstrated that Scooners is well aware of the risk that minors will gain access to alcohol at its premises. The evidence proves that two minors were not requested to produce identification. The ALJ infers the other two were not requested to produce identification either. If the minors had been requested to produce identification, the evidence demonstrates that none of them could produce valid proof they were older than 21, or could only produce easily refuted false identification. The ALJ concludes that Scooners' employees disregarded their duty to keep minors out of the premises.

When Scooners' employees failed to require patrons to produce identification, they created a "substantial and unjustifiable risk" that minors would obtain possession of alcoholic beverages in Scooners. The employees grossly deviated from the care an ordinary person would exercise if that person intended to keep minors from possessing alcohol in Scooners.

The ALJ finds that Scooners' employees acted with criminal negligence.

What is the appropriate penalty?

Section 106.13 dictates cancellation or not more than a 60-day suspension for a first offense, cancellation or not more than a three-month suspension for a second offense, and cancellation or not more than a 12-month suspension for a third offense occurring within 36 consecutive months of the first offense. § 106.13 of the Code. Under the TABC's "standard penalty chart" a violation of § 106.13 calls for a suspension of seven to 15 days for a first offense, a suspension of 10 to 90 days for a second offense, and a minimum suspension of 60 days or cancellation for a third offense. *See* 16 TAC TEX. ADMIN. CODE (TAC) § 37.60. The standard penalty chart is not binding. The facts developed in the record are the determining factors "as to the sufficiency of the penalty assessed." *Id.* § 37.60(g).

Scooners has one prior penalty under § 106.13, in Number 593067, for a violation occurring on December 8, 2000. The penalty was assessed on March 14, 2001. The two prior, "restrained" cases cannot be considered in determining the range of penalty. Those cases are not attributable to Scooners. § 106.14(a) of the Code. The events of September 7, 2001, are a "second offense" for the purposes of penalty range. Accordingly, Scooners is subject to either cancellation or a suspension of 10 to 90 days. § 106.13(b) of the Code; 16 TAC § 37.60 (standard penalty chart).

Section 106.13 of the Code provides that the requirement of cancellation or suspension can be relaxed if Scooners proved "(1) that the violation could not reasonably have been prevented by [Scooners] by the exercise of due diligence; (2) that [Scooners] was entrapped; or (3) that an agent, servant, or employee of [Scooners] violated [the Code] without the knowledge of [Scooners]." § 106.13(c) of the Code. Mr. Casler offered no evidence concerning Scooners' employees exercise of due diligence. The employees acted with criminal negligence, and not due diligence. Scooners was

not entrapped.⁸ Mr. Casler offered no evidence that the employees acted in violation of the Code without his knowledge. Mr. Casler was present, and was the employee in charge of the premises. The ALJ concludes that the requirement of cancellation or suspension cannot be relaxed.

Whether a suspension should be imposed or a cancellation should be ordered is a matter of the Commission's discretion.⁹ Scooners holds mixed beverage permits. Permitting a minor to possess alcoholic beverages in a licensed premises is a "health, safety, and welfare" violation. 16 TAC § 37.60 (standard penalty chart). The events of September 7, 2001, show that Scooners is negligent in failing to exclude minors from its premises. Scooners has one prior violation of § 106.13(a), which took place in December 2000. No persons were hurt or died as a result of the current violations, although the danger of injury from drunken driving or fighting was present. The "nature and character" of Scooners' operation are reflected in Tables 2, 3, and 4. Aside from the four citations issued to the minors on September 7, 2001, minors have been cited for possessing alcohol in Scooners 13 times since October 1997. Six citations have lead to convictions. One Scooners' bartender has been convicted of a sale, service, or delivery of an alcoholic beverage to a minor. There are four such pending citations to Scooners' employees. Four citations to minors for presenting false identification were issued in 1999, but none since then. Agent Watkins testified that in March 2002 two minors were cited for possession of alcohol. The ALJ concludes that Scooners' operation is not reasonably calculated to avoid violations.

The ALJ recommends the TABC cancel Scooners' permits.

IV. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued mixed beverage permit MB418828 and mixed beverage late hours permit LB418829 to Scooners Corporation (d/b/a Scooners, hereafter Scooners)
2. Scooners' licensed premises are located at 3051 South University Drive, Fort Worth, Tarrant County, Texas.
3. On September 7, 2001, TABC Agents Tana Watkins and Tricia O'Cayce, and other law enforcement officers, entered and inspected Scooners.
4. Agent Watkins observed Mason McPhail, whose date of birth (DOB) is March 26, 1981, holding a cup of beer.
5. Mr. McPhail did not have any identification.

⁸ "It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense." TEX. PEN. CODE ANN. § 8.06(a). No evidence even suggests such an inducement.

⁹ Section 106.13 states that the TABC "may cancel or suspend" a permit. § 106.13(a) & (b) of the Code.

6. Mr. McPhail had not been required to show identification to enter Scooners.
7. Mr. McPhail was talking to Matthew Moore, a doorman on duty at Scooners, when Agent Watkins first observed him.
8. Mr. McPhail appeared youthful, of college age, but not more than 21 years old.
9. Agent Watkins issued Mr. Moore a citation for "minor in possession," a violation of Section 106.05 of the Texas Alcoholic Beverage Code (the Code).
10. Agent O'Cayce observed Lauren McDonald, DOB March 1, 1981, near the front door.
11. Ms. McDonald was holding a 12-ounce bottle of beer.
12. Ms. McDonald had a valid Virginia driver's license, in her name, showing her true DOB.
13. Ms. McDonald had gained admission to Scooners without producing identification.
14. Ms. McDonald was standing near the doorman's table, and was within arms length of the doorman, when Agent Watkins first observed her.
15. Ms. McDonald appeared youthful, of college age, but not more than 21 years old. Her features were not mature.
16. Agent O'Cayce observed Emily Kuhn, DOB November 8, 1981, sitting at the bar near the cash register.
17. A cup containing an alcoholic drink was sitting on the bar in front Ms. Kuhn.
18. Ms. Kuhn had a valid Virginia driver's license, in her name, showing her true DOB.
19. Ms. Kuhn was in possession of a Missouri driver's license issued in another person's name.
20. The photograph in the Missouri license did not resemble Ms. Kuhn, the height listed on the license did not match Ms. Kuhn's height by six inches, and the eye color noted on the license did not match Ms. Kuhn's eye color.
21. Ms. Kuhn told Agent O'Cayce she was holding the drink for a friend.
22. Nathan Bartlett was working as a bartender and cashier at the cash register where Ms. Kuhn was sitting.
23. Ms. Kuhn was running a tab at the register using a Visa check card in Ms. Kuhn's name.

24. Ms. Kuhn appeared youthful, of college age, but would not be mistaken for a person older than 21 years.
25. Ms. Kuhn had not been required to show identification to enter Scooners.
26. Agent O'Cayce observed Cameron Bosson, DOB November 6, 1981, standing near the center of the bar holding one-half pitcher of beer.
27. Mr. Bosson was in possession of a purported Georgia identification with his picture, and which showed a DOB of November 6, 1979.
28. The Georgia identification stated it was "NOT A GOVERNMENT DOCUMENT OR RECORD."
29. Mr. Bosson was in sight of Mr. Bartlett and other Scooners employees.
30. Mr. Bosson had a youthful, "preppy" appearance, of college age, but not more than 21 years old.
31. Mr. Bosson had not been required to show identification to enter Scooners.
32. Agent O'Cayce issued Ms. McDonald, Ms. Kuhn, and Mr. Bosson citations for "minor in possession."
33. Scooners was crowded on September 7, 2001.
34. Scooners had 150 to 200 patrons.
35. Scooners had five employees present.
36. Scooners was not adequately staffed to monitor the crowd.
37. Employees were not available to circulate and assure that minors did not come into possession of alcohol.
38. Scooners management is aware of the risk that minors will gain access to alcohol at its premises.
39. Scooners' employees disregarded their duty to keep minors out of the premises.
40. The violations of September 7, 2001, could have been prevented by Scooners through the exercise of due diligence.
41. Scooners was not entrapped.

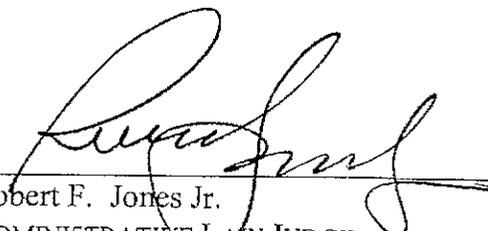
42. Scooners' employees violated the Code with the knowledge of Craig Casler, its President.
43. On March 14, 2001, Scooners agreed to a suspension (or in lieu a penalty of \$1,050) for permitting a minor to possess or consume an alcoholic beverage on its premises. The infraction occurred on December 8, 2000.
44. Prior to September 7, 2001, minors have been cited for possessing alcohol in Scooners 13 times in four years. Six citations have lead to convictions.
45. In September 1998, a Scooners' employee was convicted for a sale, service, or delivery of alcohol to a minor. There are four such pending citations to Scooners' employees.
46. On March 24, 2002, two high school seniors were found in possession of alcohol at Scooners. The minors had purchased the alcohol from a bartender acquaintance.
47. On February 5, 2002, the Staff of the TABC served its Notice of Hearing (the NOH) on Respondent by certified mail.
48. The NOH alleged Respondent had violated the Code in several specified instances. It informed the Respondent the hearing would be held on April 12, 2002, at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. The NOH referenced the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
49. On April 12, 2002, a hearing convened before Administrative Law Judge Robert F. Jones Jr., State Office of Administrative Hearings (SOAH). Staff was represented by Timothy E. Griffith, an attorney with the TABC Legal Division. Respondent appeared through Mr. Casler. The record was closed on April 12, 2002.

V. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter under § 106.13 of the Code.
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §2003.021 (Vernon 2002).
3. Respondent received notice of the proceedings and hearing, pursuant to TEX. GOV'T CODE § 2001.051, and 1 TEX. ADMIN. CODE §§ 155.25(d)(3) and 155.27.
4. Based on Findings of Fact Nos. 4 - 8, on September 7, 2001, Mason McPhail, a minor, was in possession of alcohol in Scooners' premises.
5. Based on Findings of Fact Nos. 10 - 15, on September 7, 2001, Lauren McDonald, a minor,

- was in possession of alcohol in Scooners' premises.
6. Based on Findings of Fact Nos. 16 - 25, on September 7, 2001, Emily Kuhn, a minor, was in possession of alcohol in Scooners' premises.
 7. Based on Findings of Fact Nos. 26 - 31, on September 7, 2001, Cameron Bosson, a minor, was in possession of alcohol in Scooners' premises.
 8. Based upon Conclusions Nos. 4 - 7, Mason McPhail, Lauren McDonald, Emily Kuhn, and Cameron Bosson violated § 106.05(a) the Code.
 9. Based upon Findings of Fact Nos. 5 - 8 and 11 - 31, Scooners employees permitted Mason McPhail, Lauren McDonald, Emily Kuhn, and Cameron Bosson to violate § 106.05(a) the Code.
 10. Based upon Findings of Fact Nos. 5, 13, 25, 31, and 33 - 39, Scooners employees acted with criminal negligence in permitting Mason McPhail, Lauren McDonald, Emily Kuhn, and Cameron Bosson to violate § 106.05(a) the Code.
 11. Based upon Conclusions Nos. 8 - 10, Scooners violated § 106.13(a) of the Code.
 12. Based upon Findings of Fact Nos. 40 - 42, the requirement that Scooners' permits be canceled or suspended should not be relaxed. § 106.13(c) of the Code.
 13. Based upon Findings of Fact Nos. 43 - 46, the character and nature of Scooners operation is not reasonably calculated to avoid violations.
 14. Based on the foregoing findings and conclusions, Respondent's permits should be canceled.

SIGNED May 3, 2002.


Robert F. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS