

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

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July 1, 2011

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

VIA REGULAR MAIL

**RE: Docket No. 458-11-1624; Texas Alcoholic Beverage Commission vs.
Crabbydaddy Holdings LLC d/b/a Crabbydaddy**

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.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Horan", written over a horizontal line.

Timothy Horan
Administrative Law Judge

TH/mr
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL
Shelia Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- VIA REGULAR MAIL (with Certified Evidentiary Record and 1 hearing CD)
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL
Nick Chagouris, Owner, Crabbydaddy Holdings LLC d/b/a Crabbydaddy, 25186 IH 45 N, Suite 4G, Spring, Texas 77386 -VIA REGULAR MAIL

2020 North Loop West Suite 111 Houston, Texas 77018
713.957.0010 (Telephone) 713.812.1001 (Fax)
www.soah.state.tx.us

SOAH DOCKET NO. 458-11-1624

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	
	§	
CRABBYDADDY HOLDINGS LLC	§	OF
D/B/A CRABBYDADDY	§	
PERMIT NO. MB 659762, FB & LB	§	
(TABC CASE NO. 596707),	§	
Respondent	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (TABC or Petitioner) requested that the permit of Crabbydaddy Holdings LLC d/b/a Crabbydaddy (Respondent) be suspended for 18 days or that Respondent be assessed an administrative penalty of \$5,400, in lieu of suspension of the permit, because Respondent violated the Texas Alcoholic Beverage Code (the Code) § 106.13 and TABC rules on August 6, 2010, 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 shield Respondent from liability. The Administrative Law Judge (ALJ) recommends that Respondent’s permit be suspended for 18 days and that Respondent be given the opportunity to pay an administrative penalty of \$5,400, 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 May 13, 2011, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite # 111, Houston, Texas, before ALJ Timothy Horan. TABC was represented by its staff attorney Shelia A. Lindsey. The principal owner, Nick Chagouris, appeared for Respondent. Respondent stipulated to the violation in the notice of hearing. The record closed the same day.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 106.13(a), TABC may cancel or suspend a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises.

Section 106.14 of the Code states that, for the purposes of the provisions relating to sales, service, dispensing, or delivery of alcoholic beverages to a minor or intoxicated person, the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if: (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law.

Further clarification of the requirements of the “safe harbor” statute is found within Commission rules in 16 TEX. ADMIN. CODE (TAC) § 50.10. As relates to Code § 106.14(a), 16 TAC § 50.10(b) states in part that, “employees are required to attend such program within 30 days of their initial employment and *each employee’s certification has not expired, been suspended or revoked.*” (emphasis added)

III. DISCUSSION

Respondent is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Food and Beverage Certificate, issued by TABC for the premises known as Crabbydaddy, located at 25186 IH 45 N, Suite 4G, Spring, Montgomery County, Texas.

The parties stipulated that on or about August 6, 2010, Respondent, Crabbydaddy Holdings LLC, or Respondent's agent, servant, or employee, with criminal negligence sold served, dispensed, or delivered an alcoholic beverage to a minor. The following is a synopsis of the stipulation:

On August 6, 2010, Michael Reardon, bartender for Respondent, sold an alcoholic beverage to Logan Moore, a minor. Logan Moore was 17 years old when he purchased the alcoholic beverage from Respondent's establishment. The minor displayed a provisional license to the bartender which clearly depicted that the minor was under 21 years of age. TABC Agent J. Walzel was working in an undercover capacity and observed the bartender sell an alcoholic beverage to the minor. Agent Walzel later confirmed that the minor had purchased beer from Respondent's establishment. The parties further stipulated that the bartender, Michael Reardon, was TABC seller-certified at the time of the sale to the minor.

Staff presented evidence reflecting that Respondent had a total of six employees working with expired TABC seller-certificates at the time of the violation of August 6, 2010. Staff also submitted a violation sheet which noted that Respondent had one prior violation for sale of an alcoholic beverage to a minor on March 15, 2010.

Staff argues that for the "safe harbor" provisions to apply, each employee of Respondent must have current TABC seller-server certificates.

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 has complied with this statute. Respondent stated that all employees are required to attend the TABC seller-server training before they can work at Crabbydaddy's. Further, Mr. Chagouris stated Crabbydaddy's had attempted to do periodic checks with TABC to confirm the status of each employee's seller-server certificates. He argues that the bartender who sold the alcohol to the minor was TABC seller-certified on the day of the violation and that just because other employees had expired seller server certificates this did not preclude him from asserting the "safe harbor" defense under § 106.14(a) of the Code.

IV. ANALYSIS

The only issue is whether Respondent meets the requirements § 106.14(a) of the Code.

The ALJ agrees with the Petitioner that Respondent has not met the provisions § 106.14(a) of the Code. 16 TAC § 50.10(b) states in part that, “employees are required to attend such program within 30 days of their initial employment and *each employee’s certification has not expired, been suspended or revoked.*” (emphasis added)

Staff proved that Respondent failed to insure that all employees possessed currently valid TABC seller-server certificates. It is clear from the evidence that Respondent had six employees working with expired TABC seller-server certificates on the date alcohol was served to the minor. Respondent had at least two employees working on August 6, 2010, whose seller-server certificates had expired at least six months or more prior to the violation date.

The statute and rule work together in that they require a licensee/permittee to prove that all three elements of § 106.14(a) of the Code have been met to be eligible for the “safe harbor” avoidance of administrative enforcement action. All employees of Respondent must have current TABC seller-server certificates for these provisions to apply. It is the responsibility of the licensee/permittee to insure that all employees possess currently valid certificates. This was not done by Respondent. Therefore, the “safe harbor” defense is not applicable in this case.

V. RECOMMENDATION

The ALJ finds that the evidence was sufficient to prove that on or about August 6, 2010, Respondent, or Respondent’s agent, servant, or employee, with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. Staff requested an 18 day suspension, and, that in lieu of suspension, Respondent be permitted to pay \$5,400 administrative penalty. Because Respondent had one prior sale to a minor violation, the ALJ agrees with Staff’s recommendation.

The ALJ concludes that Respondent's license should be suspended for 18 days, and Respondent should be given the opportunity to pay an administrative penalty of \$5,400, in lieu of suspension of his license.

VI. FINDINGS OF FACT

1. Crabbydaddy Holdings LLC d/b/a Crabbydaddy (Respondent) is the holder of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Food and Beverage Certificate issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 25186 IH-45 N, Suite 4G, Spring, Montgomery County, Texas.
2. On August 6, 2010, Respondent's employee, Michael Reardon, sold an alcoholic beverage to a 17-year-old minor.
3. On August 6, 2010, Respondent had six employees that did not possess currently valid TABC seller-server certificates.
4. On February 7, 2011, 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.
5. The hearing on the merits was convened on May 13, 2011, at the State Office of Administrative Hearings, 2020 North Loop West, Suite # 111, Houston, Texas, before Administrative Law Judge Timothy Horan. The Commission appeared by staff attorney Shelia A. Lindsey. Nick Chagouris, principal owner of Crabbydaddy, appeared for Respondent. Evidence and argument were heard, and the record closed the same day.

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 August 6, 2010, 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 18 days, and that Respondent be given the opportunity to pay an administrative penalty of \$5,400, in lieu of suspension of the license.

SIGNED July 1, 2011.


TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 596707

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
CRABBYDADDY HOLDINGS LLC D/B/A CRABBYDADDY, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. MB659762, FB & LB	§	
	§	
MONTGOMERY COUNTY, TEXAS (SOAH DOCKET NO. 458-11-1624)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 26th day of October, 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 Judge Timothy Horan presiding. The hearing convened on May 13, 2011 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on July 1, 2011. 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 Administrative Law Judge cites 16 Texas Administrative Code §50.10(b) in the “Discussion” section of the Proposal for Decision. This is the Commission’s rule that was in effect at the time the violation occurred in August, 2010. However, this section was repealed effective January 1, 2011. The “safe harbor” provisions of old Chapter 50 were placed in 16 Texas Administrative Code §34.4, also effective January 1, 2011. The equivalent provision of old §50.10(b) is now found in §34.4(f)(2). As to the legal issue in this case, the result is the same. As both old §50.10(b) and current §34.4(f)(2) make clear, Alcoholic Beverage Code §106.14(a) is unavailable as a shelter for a sale to minor violation if any of the permit holder’s employees lack currently valid TABC seller-server certificates at the time the sale occurs.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are 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 motions, requests for entry of

Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent pay a civil penalty in the amount of **\$5,400.00** on or before the 22nd day of November, 2011. If the civil penalty is not paid when due, 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 30th day of November, 2011, 2011 and shall remain suspended for **18** consecutive days.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$5,400.00** 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 **18** consecutive days.

This Order will become final and enforceable on the 21st day of November, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

SIGNED this the 26th day of October, 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 26th day of October, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Timothy Horan
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 N Loop West, Ste. 111
Houston, TX 77018
VIA FACSIMILE: (512) 322-0474

Crabbydaddy Holdings LLC
d/b/a Crabbydaddy
RESPONDENT
25186 IH 45 N, Ste. 4G
Spring, TX 77386
VIA REGULAR MAIL

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