

This Order will become **final and enforceable** on the 15th day of March, 2016, **unless a Motion for Rehearing is filed by the 14th day of March, 2016.**

SIGNED this the 18th day of February, 2016, at Austin, Texas.



Sherry K-Cook, Executive Director
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 18th day of February, 2016.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Beth Bierman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701
VIA FACSIMILE: (512)322-2061

H. Tracy Richardson, III
ATTORNEY FOR RESPONDENT
327 FM 2004 Rd.
Lake Jackson, TX 77566
VIA FIRST CLASS MAIL, CMRRR # 70150640000460344839

Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Judith.kennison@tabc.texas.gov

On July 22, 2015, a hearing was convened in Austin, Texas, before ALJ Beth Bierman. TABC was represented by Judith Kennison, attorney. Respondent appeared and was represented by attorney Tracey Richardson. The record closed on the same date.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to Code § 61.71(a)(1) and (5), TABC may cancel or suspend for not more than 60 days a permit if it is found that the permittee, with criminal negligence, sold, served, or delivered an alcoholic beverage to a minor, or violated a Code provision or TABC rule. Under Code § 106.14, actions of an employee in violation of the Code are not attributable to the employer if certain conditions are met (the Safe Harbor affirmative defense).

III. EVIDENCE

A. Documentary Evidence

TABC offered into evidence 5 exhibits, all of which were admitted.¹ Respondent did not offer any exhibits. No witness testified.

The parties agreed to the following stipulations:²

1. Respondent, Buc-ee's Ltd. d/b/a Buc-ees, Inc.,³ holds a Beer Retailer's Off-Premises License, number BQ-470629 issued by TABC for the premises located at 2318 W. Main, Port Lavaca, Calhoun County, Texas.
2. On June 25, 2015, Staff of the TABC gave Respondent notice of the hearing by certified mail, return receipt requested.

¹ TABC Exhibit 1 is the Notice of Hearing. TABC Exhibit 2 is the Respondent's permit history. TABC Exhibit 3 is the parties' agreed stipulations. TABC Exhibits 4 and 5 are the Proposal for Decision and the final Order in SOAH Docket No. 458-14-4102, *Texas Alcoholic Beverage Comm'n v. Buc-ee's, Ltd., d/b/a Buc-ee's #17, License No. BF536309, Caldwell County, Texas* (May 19, 2015).

² TABC Ex. 3.

³ The parties' stipulation did not specifically refer to store #12.

3. On June 29, 2013, Respondent's employee, Jennifer Wesley, was seller-server certified.
4. On that date, Ms. Wesley, with criminal negligence, sold an alcoholic beverage to a minor.
5. Respondent's violation history, as maintained by TABC, shows one previous sale to a minor violation on March 6, 2004.
6. Respondent has not directly or indirectly encouraged the violation of state law.

B. Analysis

The sole issue is whether a record of the June 29, 2013 violation involving sale to a minor may be maintained by TABC and included on Respondent's permit history. Although Staff agreed that the Safe Harbor provision applied, it argued that the sale to a minor should be part of the public record by including it on Respondent's permit because the public has a right to know if the store it is patronizing has had a problem with sale to minors. Staff further argued that it must keep track of any violations because if there are 3 more violations within a 12-month period, there is a presumption that the business is encouraging sales to minors.⁴ Finally, Staff urged it was important for TABC to keep record of violations in order to determine whether there has been a pattern of mismanagement, and to determine whether sanctions should be enhanced.⁵ If TABC were not allowed to keep a record of violations, then, Staff reasoned, every new violation would incorrectly appear to be a first offense.

Respondent argued that because the Safe Harbor affirmative defense applied, TABC could not maintain a record of the violation or place a notation of that violation on its permit history. To do so, Respondent reasoned, constitutes taking an action against Respondent despite the Safe Harbor defense. Respondent further argued that TABC was violating its own rules by not removing violations older than 12 months from the permit, citing TABC Rule 16 Texas Administrative Code § 34.4(c). That provision states:

⁴ 16 Tex. Admin. Code § 34.4(c).

⁵ Code § 106.14(c).

Proof by the commission that an employee performed an action described in paragraph (1) or (2) of this subsection on three or more occasions within a 12-month period shall create a rebuttable presumption that the license or permit holder has indirectly encouraged a violation of the law within the meaning of Alcoholic Beverage Code §106.14(a)(3).

The ALJ finds that TABC may maintain a record of the violation in this matter, and may note that violation on Respondent's permit history. This issue was previously addressed by the TABC in SOAH Docket No. 458-14-4102.⁶ There, TABC's Executive Director ordered that a record of the violation be maintained. Further, the ALJ finds no support for Respondent's argument that maintaining a record of the violation and noting that violation on the permit violates TABC Rule 16 Texas Administrative Code § 34.4. That rule addresses whether a rebuttable presumption is created given the existence of 3 or more violations within a 12-month time period. The rule does not preclude TABC from maintaining a record of violations older than 12-months, nor does it preclude TABC from noting a violation on Respondent's permit history.

IV. RECOMMENDATION

Having reviewed the evidence and considered the parties' arguments, the ALJ finds that the evidence is sufficient to prove that, on or about June 29, 2013, Respondent, his agent, servant or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor. Accordingly, the ALJ recommends that Respondent's permit history reflect that this violation occurred.

⁶ TABC Exs. 4-5.

V. FINDINGS OF FACT

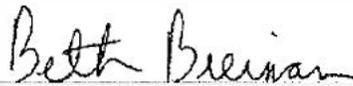
1. Respondent, Buc-ee's Ltd. d/b/a Buc-ees, #12 holds a Beer Retailer's Off-Premises License, number BQ-470629 issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 2318 W. Main, Port Lavaca, Calhoun County, Texas.
2. On June 25, 2015, Staff of the TABC gave Respondent proper and timely notice of the hearing by certified mail, return receipt requested.
3. The notice of hearing informed the parties of the date, time, and location of the hearing; the matters to be considered; the legal authority under which the hearing would be held; and the statutory provisions applicable to the matters to be considered.
4. On July 22, 2015, a hearing was convened in Austin, Texas, before Beth Bierman, an Administrative Law Judge with the State Office of Administrative Hearings (SOAH). TABC was represented by Judith Kennison, attorney. Respondent appeared and was represented by attorney Tracey Richardson. The record closed on the same date.
5. On June 29, 2013, Respondent's employee, Jennifer Wesley, was seller-server certified.
6. On June 29, 2013, Ms. Wesley, with criminal negligence, sold an alcoholic beverage to a minor.
7. Respondent's violation history, as maintained by TABC, shows one previous sale to a minor violation on March 6, 2004.
8. Respondent has not directly or indirectly encouraged the violation of state law.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code (Code) §§ 5.43 and 11.015.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to Texas Government Code ch. 2003.
3. Notice of the hearing was provided as required by Texas Government Code §§ 2001.051-2001.052.

4. Respondent's employee, agent, or servant, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor in violation of Code § 61.71(a)(5).
5. Respondent satisfied the requirements of the affirmative defense of Safe Harbor pursuant to Code § 106.14.
6. The Commission is not precluded from maintaining a record of the violation.
7. The Commission may include the violation in Respondent's permit history.

SIGNED September 18, 2015.



BETH BIERMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 18, 2015

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 458-15-4360; Texas Alcoholic Beverage Commission, Petitioner v. BUC-EE'S LTD. D/B/A BUC-EE's #12, Respondent

Dear Ms. Cook:

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,

A handwritten signature in cursive script that reads "Beth Bierman".

Beth Bierman
Administrative Law Judge

BB/eh
Enclosure

xc 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 (1 Hearing CD)
H. Tracy Richardson, Deputy General Counsel, BUC-EE's, LTD., 327 FM 2004, Lake Jackson, TX 77566 - VIA REGULAR MAIL