

DOCKET NO. 458-04-1597

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

V.

**SAMIR HAMOUDEH ISMAIL d/b/a
SHINER FOOD STORE
PERMIT NO. BQ-473961**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This is an enforcement action brought by the Texas Alcoholic Beverage Commission (TABC) against Samir Hamoudeh Ismail, d/b/a Shiner Food Store (Respondent), for selling beer to a minor. The Administrative Law Judge (ALJ) finds that TABC proved its case, and that its recommended penalty, suspension of Respondent's permit for three weeks or payment of a civil penalty of \$3,150 in lieu of suspension, should be assessed against Respondent.

I. PROCEDURAL HISTORY

On January 22, 2004, the hearing was held on the 4th floor of the William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Dewey A. Brackin, attorney, appeared and represented TABC. Respondent appeared *pro se*. The record closed on the same day.

II. DISCUSSION

ISSUE: Did Respondent's employee sell an alcoholic beverage to a minor with criminal negligence, thereby violating TEX. ALCO. BEV. CODE ANN. § 106.03?

Legal Standard

“Criminal negligence” is defined in the Penal Code as follows:

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. 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.¹

Evidence

Austin Police Officer James Kerby testified that on May 9, 2003, he and a partner had responded to a call in an undercover vehicle and were located at the northwest corner of Fifth Street and West Mary in Austin, Texas, which is about ten feet from the front door of Respondent's convenience store (Shiner's). They observed a young-looking male leaving the store with two twelve-packs of beer and decided to investigate the sale.

They went around the corner and then approached the young man, David Walker, who had taken the beer to his car. Walker admitted he was 17 years old.² He had two twelve-packs of Bud Light beer with him, and he admitted that he was a minor and had purchased the beer from Respondent's store.

At that point, Officer Kerby telephoned a TABC agent and asked him to take over the investigation. When TABC agent Mark Gohlke arrived, the police gave him the beer. Agent Gohlke confiscated it, stored it at TABC, and brought it to the hearing as demonstrative evidence.

TEX. PENAL CODE ANN. § 6.03(d) (Emphasis added).

² His birth date is March 7, 1986.

David Walker testified at the hearing, and the ALJ noted that he was very young looking – slight of build and with no facial hair. He said that he bought the beer from the clerk at Shiner’s for cash. He did not display any identification, and the clerk did not ask him for any identification. Walker admitted that he went to Shiner’s because he had heard that the clerk there had sold alcohol to minors in the past. Walker had never bought beer before, and he had never displayed a fake identification card.

Agent Gohlke talked to the clerk, Mr. Fouth. He obtained a surveillance videotape that captured the incident, which was played at the hearing.³ The tape did not have sound, and it did not show the heads of the two individuals involved in the transaction. However, David Walker answered questions about the videotape, pointing out that it showed him dressed as he remembered – in shorts, a t-shirt, and sandals. It showed that he walked up to the counter and paid the clerk for the beer without displaying any identification. After investigating the situation, Agent Gohlke gave David Walker a citation for minor in possession of alcohol.

Respondent’s Arguments

Respondent testified that he has operated his store for almost 20 years, and that store employees always ask for identification from minors. However, he was not working there at the time of the incident, and he did not know whether Mr. Fouth sold the beer to David Walker.

Respondent’s primary argument was that the videotape did not prove TABC’s case, because it did not show the faces of the two people involved in the beer sale.

Discussion & Recommendation

It is a defense to a sale to minor violation if the minor falsely displays an apparently valid identification card indicating the minor is 21 years old or older that contains a description consistent

³ TABC Ex. 3.

with his appearance for the purpose of inducing the person to sell him an alcoholic beverage.⁴ David Walker denied having shown any identification, however. Furthermore, the videotape, which he identified as having shown his transaction with the clerk at Shiner's, did not give any indication that identification had been requested.

Respondent admitted that he was not present in the store at the time of the incident. He did not call the employee who made the sale, Mr. Fouth, to testify. Only testimony from Mr. Fouth might have rebutted the evidence presented by TABC.

David Walker appeared even younger than most 17 year olds. Logically, the store's clerk should have been aware that there was a substantial and unjustifiable risk that he was selling an alcoholic beverage to a minor. There was no hesitation on the clerk's part during the sale – just a quick exchange of money. Therefore, TABC proved its case.

Given the fact that this is Respondent's first violation, the ALJ agrees with TABC that the proper punishment for this offense is a 21-day suspension of Respondent's alcoholic beverage permit, or payment of a civil penalty of \$3,150 in lieu of the suspension.

III. FINDINGS OF FACT

1. On May 9, 2003, David Walker, whose date of birth is March 7, 1986, purchased an alcoholic beverage (two twelve-packs of Bud Light beer) at the Shiner Food Store.
2. Samir Hamoudeh Ismail, d/b/a Shiner Food Store (Respondent), holds Permit No. BQ-473961 issued by the Texas Alcoholic Beverage Commission.
3. David Walker is very young looking – slight of build and with no facial hair.
4. Respondent's clerk did not ask Mr. Walker for any identification when he sold him the beer. There was no hesitation on the clerk's part during the sale – just a quick exchange of money.
5. As referenced in Findings 1, 3, and 4, Respondent's employee should have been aware there was a substantial and unjustifiable risk that he was selling an alcoholic beverage to a minor.

⁴ TEX. ALCO. BEV. CODE ANN. § 106.03(b).

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. §6.01.
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. TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5).
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. §2001.051.
4. Respondent's employee sold an alcoholic beverage to a minor with criminal negligence as defined in TEX. PENAL CODE ANN. § 6.03(d), thereby violating TEX. ALCO. BEV. CODE §106.03.
5. Respondent's Permit No. BQ-473961 should be suspended for 21 days, but Respondent should have the option of paying the standard civil penalty in lieu of the suspension – \$3,150. TEX. ALCO. BEV. CODE §§ 11.61 and 11.64.

SIGNED this 16th day of March, 2004.


BARBARA C. MARQUARDT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 605403

IN RE SAMIR HAMOUDEH ISMAIL	§	BEFORE THE TEXAS
D/B/A SHINER FOOD STORE	§	
	§	
PERMIT NOS. BQ-473961	§	ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH Docket No. 458-04-1597)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of May, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Barbara C. Marquardt. The hearing convened on January 22, 2004, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 16, 2004. 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, 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 Wine and Beer Retailer's Off-Premise Permit No. BQ-473961 is hereby **SUSPENDED**.

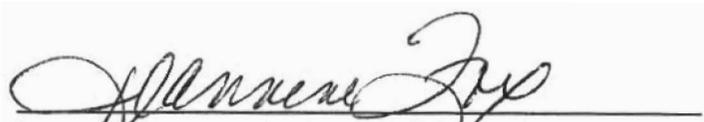
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$3,150.00 on or before the 23rd day of June, 2004, all rights and privileges under the above described permit will be **SUSPENDED** for a period of twenty-one (21) days, beginning at 12:01 A.M. on the 30th day of June, 2004.

This Order will become final and enforceable on May 26, 2004, 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 5th day of May, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Samir Hamoudeh Ismail
d/b/a Shiner Food Store

RESPONDENT

915 W. Mary St., Ste. A
Austin, Texas 78704

CERTIFIED MAIL NO. 7001 2510 0003 0098 4567
RETURN RECEIPT REQUESTED

Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE: (512) 475-4994

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Austin District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 605403

REGISTER NUMBER:

NAME: Samir Hamoudeh Ismail

TRADENAME: Shiner Food Store

ADDRESS: 915 W. Mary St., Suite A, Austin, Texas 78704

DATE DUE: June 23, 2004

PERMITS OR LICENSES: BQ-473961

AMOUNT OF PENALTY: \$3,150.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 23RD DAY OF JUNE, 2004, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.
MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.