

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 1, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

VIA CERTIFIED MAIL Z269 601 757

RE: Docket No. 458-98-0569; Texas Alcoholic Beverage Commission vs. Jay S. Yun d/b/a Doc's Food Store #3 (TABC Case No. 572145)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Andrew del Cueto, attorney for Texas Alcoholic Beverage Commission, and to Frank Schor, attorney for Respondent Jay S. Yun d/b/a Doc's Food Store #3. For reasons discussed in the proposal, I recommend Respondent's permits be suspended for a period not to exceed 10 days.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry Van Hamme".

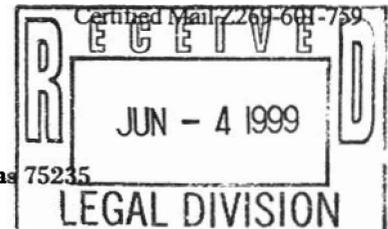
Jerry Van Hamme
Administrative Law Judge

JVH:fgm

Enclosure

cc: Rommel Corro, Docket Clerk, State Office of Administrative Hearings
Andrew del Cueto, Staff Attorney, Texas Alcoholic Beverage Commission
Frank Schor, Attorney at Law, 1620 E. Beltline Rd., Carrollton, Texas 75006

Regular Mail
Certified Mail Z269-601-758



6300 Forest Park Road, Suite B-230 ♦ Dallas, Texas 75235
(214) 956-8616 Fax (214) 956-8611

DOCKET NO. 458-98-0569
TABC CASE NO. 572145

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§ § §	BEFORE THE
vs.	§ § §	STATE OFFICE OF
JAY S. YUN D/B/A DOC'S FOOD STORE #3 PERMIT NO. BQ-317833 DALLAS COUNTY, TEXAS	§ § § §	ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

Petitioner, the Texas Alcoholic Beverage Commission (TABC), brought this action against Respondent alleging Respondent sold an alcoholic beverage to a minor in violation of Tex. Alco. Bev. Code Ann. §106.13 and requesting that Respondent be disciplined accordingly. Petitioner showed, by a preponderance of the evidence, that Respondent sold, with criminal negligence, an alcoholic beverage to a minor. This proposal therefore recommends that Respondent's permit be suspended for 10 days.

I.

PROCEDURAL HISTORY

On April 6, 1998, the TABC's staff (Petitioner) issued a Notice of Hearing to Jay S. Yun, d/b/a Doc's Food Store #3 (Respondent). On April 24, 1998, a public hearing was held before Jerry Van Hamme, Administrative Law Judge, at the Offices of the State Office of Administrative Hearings, 6300 Forest Park Road, Dallas, Texas. The Petitioner was represented by Andrew del Cueto, Attorney. The Respondent was represented by Frank Shor, Attorney. At the close of the hearing, Petitioner requested that the record remain open for receipt of post-hearing briefs. The court ordered that the record remain open for receipt of briefs until May 28, 1998, but that it be closed for receipt of additional evidence.

On July 9, 1998, the initial Proposal For Decision was issued by this court in the above-styled cause. Petitioner filed exceptions to the Proposal For Decision on July 29, 1998. Respondent filed Respondent's Response to Petitioner's Exceptions to Proposal For Decision on August 12, 1998. In response to Petitioner's exceptions, this court is withdrawing the initial Proposal For Decision of July 9, 1998, and replacing it with this Amended Proposal For Decision, which hereby supersedes the previously issued Proposal For Decision.

II.

JURISDICTION

The TABC has jurisdiction over this matter under Tex. Alco. Bev. Code Ann. §5.35; §6.01; and §11.61. The State Office of Administrative Hearings has jurisdiction under Tex. Govt. Code Ann. Ch. 2003 over all matters related to the hearing of this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law.

III.

DISCUSSION

A. Factual Background

Respondent, Jay S. Yun, d/b/a Doc's Food Store #3, 6465 E. Mockingbird, Suite 525, Dallas, Dallas County, Texas, was granted a Wine and Beer Retailer's Off-Premise Permit, BQ-317833, on June 19, 1996. The permit has been continuously renewed from that date.

On September 18, 1996, at approximately 10:00 p.m., Sgt. Busby and Agent Mergerson of the TABC enforcement division stopped at the Respondent's place of business. They observed a vehicle stopped in the parking lot with two young-appearing individuals seated inside. The vehicle was parked off to the side of the parking lot although a number of empty parking spaces were available directly in front of Respondent's store. The officers also noted that the occupants were seated in the front and rear passenger seats but that the driver's seat was empty. Knowing that minors often park at the far end of parking lots to prevent store clerks from seeing them, and assuming that the driver was probably as young as the passengers and was probably in Respondent's store making a purchase, Sgt. Busby approached the vehicle while Agent Mergerson went up to the store to look through the store's front window.

Agent Mergerson observed through the window a "young-appearing" person inside the store purchasing a six-pack of Zigenbock beer from the clerk. During the course of the sale, this person gave the clerk a card, which, from where Agent Mergerson was standing, appeared to be an identification card. As that individual exited the store, Agent Mergerson approached him, identified himself, and asked to see the individual's identification. The individual produced a driver's license containing a photo and physical description of the driver's license-holder. It showed the license holder as having blondish-looking hair and light eyes, and listed his height as five feet nine inches tall. The young-appearing person, however, was, in Agent Mergerson's opinion, about six feet tall and had dark brown hair and dark eyes. Agent Mergerson then requested additional identification, and the individual finally produced his legitimate driver's license, which indicated that he was a minor with a birth date of February 10, 1978.

Agent Mergerson then asked the minor to identify the clerk who had sold him the beer, which

the minor did by pointing out the clerk in the store. The officers then confiscated the beer, poured it out on the spot, issued a citation to the minor for being in possession of the beer and issued a citation to the clerk for selling the beer to the minor.

B. Petitioner's Contentions and Evidence

Petitioner contends that the permit holder has violated §106.13 Tex. Alco. Bev. Code Ann. in that the store clerk exhibited criminal negligence in selling alcoholic beverages to a minor because the identification card proffered by the minor clearly did not match the minor's physical description.¹

C. Respondent's Contentions and Evidence

At the hearing and in the post-hearing brief, Respondent contended that Petitioner failed to prove that Respondent sold alcoholic beverages to a minor. Respondent further asserted that Petitioner's failure to produce the actual bottles seized by the officers from the minor vitiates Petitioner's contention that alcoholic beverages were actually sold to the minor. In the alternative, Respondent argued that even if Petitioner has indeed proven that beer was sold to the minor, that fact alone would not constitute a violation of §106.13 Tex. Alco. Bev. Code Ann. because the evidence does not show that the beer sold to the minor was an alcoholic beverage under §1.04 (1) and (15) Tex. Alco. Bev. Code Ann.²

D. Analysis and Recommendation

I. Alcoholic Beverage

¹§ 106.13. **SANCTIONS AGAINST RETAILER.** (a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

§ 106.05. **POSSESSION OF ALCOHOL BY A MINOR.** (a) Except as provided in Subsection (b) of this section, a minor commits an offense if he possesses an alcoholic beverage.

²§ 1.04. **DEFINITIONS.** In this code:

(1) "Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

(15) "Beer" means a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight, and does not include a beverage designated by label or otherwise by a name other than beer.

The evidence shows that Respondent, through its employee, sold a six pack of Zigenbock beer to a minor. This court may, and hereby does, infer from the evidence that Zigenbock beer is an alcoholic beverage as defined in Tex. Alco. Bev. Code Ann. Sec.1.04(1).³

2. Sale to a Minor

The evidence shows that Respondent, through its employee, sold the alcoholic beverage to a minor. Petitioner presented evidence showing that the purchaser was a minor at the time of the sale. Respondent presented no evidence rebutting Petitioner's evidence.

3. Criminal Negligence

The evidence shows that Respondent, through its employee, sold an alcoholic beverage with criminal negligence to a minor. Criminal negligence is defined in §6.03 of the Penal Code as 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."⁴ The "actor's standpoint," in the instant case,

³ The Court of Criminal Appeals set the standard for inferring alcohol content from circumstantial evidence in Dixon v. State, 262 S.W.2d 488 (Tex. Cr. App. 1953). The court stated:

In [appellant's] argument, appellant stresses the fact that no can was opened and no liquor was tasted or smelled in order to show that the same was intoxicating liquor. This court has long held that whisky is an intoxicating liquor, as well as beer. The record is replete with statements as to 'this whisky' and 'this beer' ... The witnesses called it beer ... many times, and witnesses also identified it as being beer.... It was called that, it was labeled that, and it was so referred to throughout the case. For instance, one witness testified, 'Well, there was approximately ... two cases of Schlitz beer, canned beer; and ten cans of Schlitz beer in the refrigerator.' ... The witness further stated that he found the beer in the refrigerator, approximately ten cans of it'

The witnesses all testified relative to the large amount of whisky, beer, gin and malt liquor found in the house, and this court well knows that whisky, beer and gin are all intoxicants. See Weeks v. State, 140 Tex.Cr.R. 246, 143 S.W.2d 956; Bell v. State, 141 Tex.Cr.R. 59, 146 S.W.2d 1004; Skinner v. State, 144 Tex.Cr.R. 21, 159 S.W.2d 878; Parrack v. State, 154 Tex.Cr.R. 532, 228 S.W.2d 859, and cases therein cited. We think it is established satisfactorily by circumstantial evidence, at least, that the contents of the bottles and cans found in the appellant's house were intoxicating liquors and contained alcohol in excess of one-half of one per cent by volume. Id 490-491 (emphasis added).

⁴§ 6.03(d) states 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.

In addition, pursuant to § 6.02(d) Tx Penal Code, "criminal negligence" constitutes the lowest degree of culpable mental state of those listed in this section (i.e. intentional; knowing; reckless; and criminal negligence.)

is Respondent's. Respondent knows, or certainly should know, that minors attempt to purchase alcoholic beverages from licensed premises. Respondent also knows, or should know, that as a license and permit holder in a highly regulated industry he has an affirmative obligation to not sell alcoholic beverages to minors. It is incumbent upon the holder of such permits and licenses to take the necessary steps, and to make the necessary observations, to ensure that alcoholic beverages are not sold to minors from their licensed premises.

In the instant case, Respondent's employee observed a young-appearing individual attempting to purchase a six-pack of beer using a photo identification that did not match the purchaser's description. By making the sale, without conducting an adequate review of the purchaser's identification or taking note of his obvious signs of youth, Respondent exhibited criminal negligence.

IV.

RECOMMENDATION

This proposal recommends that Respondent's permit and license be suspended for 10 days for selling an alcoholic beverage with criminal negligence to a minor.

V.

PROPOSED FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared, and no party objected to notice.
 2. Respondent, Jay S. Yun, d/b/a Doc's Food Store #3, 6465 E. Mockingbird, Suite 525, Dallas, Dallas County Texas, was granted a Wine and Beer Retailer's Off-Premise Permit, BQ-317833, on June 19, 1996.
 3. On September 18, 1996, at approximately 10:00 p.m., Agent Mergerson of the TABC enforcement division observed a "young-appearing" person inside the Respondent's store purchasing a six-pack of Zigenbock beer from the clerk.
 4. The purchaser gave the clerk what appeared to be an identification card during the purchase.
 5. After the sale was made, Agent Mergerson stopped the purchaser outside the store and asked to see his identification. The purchaser produced a driver's license containing a photo and physical description of the license-holder.
-

6. The license showed the license-holder as having blondish-looking hair, light eyes, and being five feet nine inches tall. The purchaser, however, was about six feet tall and had dark brown hair and dark eyes.
7. Agent Mergerson requested additional identification and eventually identified the purchaser as a minor.
8. An "alcoholic beverage" is defined in §1.04(1)Tex. Alco. Bev. Code Ann. as a beverage containing more than one-half of one percent of alcohol by volume.
9. A "beer" is defined in §1.04(5) Tex. Alco. Bev. Code Ann. as having one-half of one percent or more of alcohol by volume.
10. Zigenbock beer is an alcoholic beverage as defined in §1.04(1)Tex. Alco. Bev. Code Ann.
11. Respondent sold beer to a minor.
12. Respondent, through its employee, did not adequately check the identification proffered by the minor at the time of the sale.
13. The beer was confiscated from the minor and poured out on the spot.
14. Citations were issued to the minor for being in possession of the beer and to the clerk for selling the beer to the minor.
15. Petitioner instituted disciplinary action against Respondent's license alleging that Respondent had, with criminal negligence, sold alcoholic beverages to a minor in violation of §106.13 Tex. Alco. Bev. Code Ann.

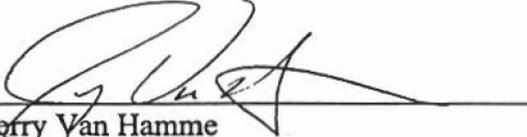
VI.

PROPOSED CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing of 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.
2. Based on Findings of Fact Nos. 1 & 2, the Texas Alcoholic Beverage Commission has jurisdiction over this matter. Tex. Alco. Bev. Code Ann. §§ 5.31 & 5.35.
3. Based on Findings of Fact Nos. 3, through 11, Respondent sold an alcoholic beverage to a minor. Tex. Alco. Bev. Code Ann. §§1.04(1) & (15).

4. Based on Findings of Fact Nos. 3 through 14, Respondent sold an alcoholic beverage to a minor with criminal negligence. Tex. Alco. Bev. Code Ann. §§ 1.04(1) & (15); and §106.03.
5. Based on Findings of Fact Nos. 3 through 14 and Conclusions of Law Nos. 3 & 4, a ten-day suspension of Permit No. BQ-317833 is warranted.

Signed and entered this 28 day of May, 1999.



Jerry Van Hamme
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS