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DOCKET NO. 495683

IN RE YEN NGUYEN	§	BEFORE THE
D/B/A J & J BEER & WINE	§	
PERMIT/LICENSE NOS. Q-436173,	§	
BF436174	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-9090)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 24th day of February 2006, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle J. Groves. The hearing convened on October 7, 2005 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 12, 2005. This Proposal For Decision (**attached hereto as Exhibit "A"**), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Respondent filed Exceptions in this cause.

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.

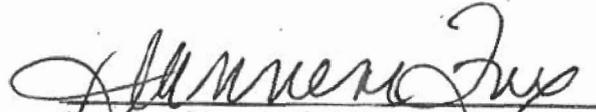
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permits and licenses be **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on March 17, 2006 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.

SIGNED this 24th day of February 2006.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

Yen Nguyen
d/b/a J & J Beer & Wine
RESPONDENT
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Dallas, Texas 75231-7207
VIA CM/RRR NO. 7001 2510 0000 7274 2697

R. Keith Walker
ATTORNEY FOR RESPONDENT
14001 Goldmark Dr., Ste. 140
Dallas, Texas 75240
VIA FAX (469) 330-8354

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

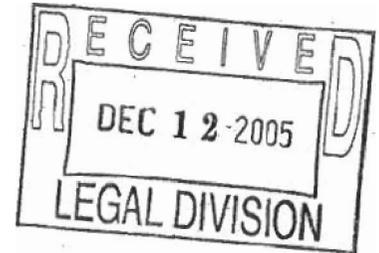
U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
<i>(Domestic Mail Only; No Insurance Coverage Provided)</i>	
OFFICIAL USE	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$
Postmark Here	
Sent To <u>Yen Nguyen</u>	
Street Apt. No. or PO Box No.	
City, State, ZIP+4	
7001 2510 0000 7274 2697	
DN-495683	
PS Form 3800, January 2001 See Reverse for Instructions	

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 12, 2005



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

RE: Docket # 458-05-9090
TABC VS. YEN NGUYEN
D/B/A J & J BEER & WINE
TABC CASE NO. 495683

Dear Ms. Fox:

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 "KJG".

Kyle J. Groves
Administrative Law Judge

KJG/sr
Enclosure

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, Via Fax,
R. Keith Walker, Respondent's Attorney, Via Fax,

DOCKET NO. 458-05-9090



TEXAS ALCOHOLIC BEVERAGE COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

YEN NGUYEN
D/B/A J & J BEER & WINE
PERMIT NOS. Q-436173 & BF-436174
DALLAS COUNTY TEXAS
(TABC NO. 495683)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

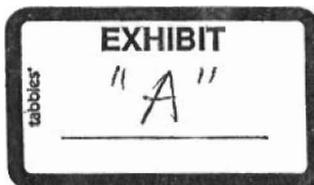
The staff of the Texas Alcoholic Beverage Commission (TABC) brought this action against Yen Nguyen, d/b/a J & J Beer & Wine (Respondent) seeking cancellation of Respondent's Wine Only Package Store Permit, Q-436173, and Beer Retailer's Off-Premise License, BF-436174. TABC alleged Respondent, his agent, servant, or employee, with criminal negligence, sold, served or delivered an alcoholic beverage to a minor on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61 (b)(2), 106.03, 61.71(a)(5) and/or 106.13.

This Proposal for Decision finds the Respondent's permit and license should be canceled.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The hearing in this matter convened on October 7, 2005. Attorney Timothy Griffith represented TABC. The Respondent was represented by Attorney R. Keith Walker. Administrative Law Judge (ALJ) Kyle J. Groves presided. The hearing was concluded and the record closed that same day.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the



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PROPOSAL FOR DECISION

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Findings of Fact and Conclusions of Law without further discussion here.

II. EVIDENCE

Petitioner's Evidence

TABC staff offered documentary evidence showing:

(a) On July 30, 1998, Respondent was issued Wine Only Package Store Permit, Q-436173 and Beer Retailer's Off-Premise License, BF-436174.

(b) On August 24, 2005, Petitioner sent a Notice of Hearing to Respondent asserting that TABC was seeking to cancel Respondent's permit and license.

In addition to the documentary evidence, TABC staff presented the testimony of Christopher Allen. Mr. Allen is an agent for TABC. He testified that on May 5, 2005, he went to Respondent's in reference to a complaint that Respondent had served alcohol to a minor. Mr. Allen parked across the street from Respondent's to observe alcoholic beverage sales taking place at Respondent's drive-through window.

Using a pair of binoculars, Mr. Allen saw a vehicle pull into the drive-through. The driver purchased a 12-pack of Budweiser Select beer. He said that no identification was given by the driver. Mr. Allen stopped the vehicle after it left Respondent's. The driver presented Mr. Allen with identification showing he was Bertin Martinez. Mr. Martinez was 18 years old. Mr. Allen saw a 12-pack of Budweiser Select beer in Mr. Martinez' vehicle. Mr. Martinez admitted purchasing the beer at Respondent's.

Mr. Allen went to Respondent's and spoke to the clerk, Long Phan. Mr. Phan said he always checked for identification and denied selling the beer to Mr. Martinez. Mr. Allen next spoke to Respondent, and she said that no Budweiser Select had been sold. She said that she knew this because no Budweiser Select was sold from her inventory.

Mr. Allen testified that Mr. Phan had not attended seller/servant classes at the time of the incident. He said that the purpose of seller/servant certification is not only to educate those selling alcoholic beverages, but the certification can also serve as a defense for the seller if a sale to a minor occurs.

Respondent's Evidence

Respondent presented the testimony of Mr. Phan. He said he was working for Respondent at the time of the alleged sale. Mr. Phan denied selling the beer to Mr. Martinez. He also said that no Budweiser Select was gone from their inventory. He admitted that at the time of the incident, he had not attended seller/servant classes.

Respondent also testified. She said that at the time of the alleged sale, she was in the cooler. She said that no Budweiser Select was gone from her inventory.

III. STATUTORY AUTHORITY

TEX. ALCO. BEV. CODE ANN. § 11.61 (b) (2) states:

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail renewal permit if it is found, after notice and hearing, that any of the following is true...the permittee violated a provision of this code or a rule of the commission.

TEX. ALCO. BEV. CODE ANN. § 106.03 states:

(a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor. (b) A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents himself to be 21 years old or older by displaying an apparently valid Texas driver's license or an identification card issued by the Texas Department of Public Safety, containing a physical description consistent with his appearance for the purpose of inducing the person to sell him an alcoholic beverage. (c) An offense under this section is a Class A misdemeanor.

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PROPOSAL FOR DECISION

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TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (5) states:

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee...with criminal negligence sold, served, or delivered an alcoholic beverage to a minor.

TEX. ALCO. BEV. CODE ANN. § 106.13 states:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 90 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. (b) For a second offense the commission or administrator may cancel the license or permit or suspend it for not more than six months. For a third offense within a period of 36 consecutive months the commission or administrator may cancel the permit or suspend it for not more than 12 months. (c) The commission or administrator may relax the provisions of this section concerning suspension and cancellation and assess a sanction the commission or administrator finds just under the circumstances if, at a hearing, the licensee or permittee establishes to the satisfaction of the commission or administrator: (1) that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence; (2) that the permittee or licensee was entrapped; or (3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee.

TEX. ALCO. BEV. CODE ANN. § 1.08 states:

For the purposes of administrative actions under this code, a person acts with criminal negligence if the person acts with a mental state that would constitute criminal negligence under Chapter 6, Penal Code, if the act were an offense.

TEX. PENAL CODE § 6.03 (d) states:

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

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PROPOSAL FOR DECISION

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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.

IV. DISCUSSION

The evidence shows that Mr. Allen observed Mr. Phan sell an alcoholic beverage to Mr. Martinez. This is shown by the observations Mr. Allen made concerning the transaction between Mr. Martinez and Mr. Phan. Mr. Allen testified that he saw the sale, and he was even able to identify the brand of beer sold. The same brand of beer was found in Mr. Martinez vehicle. In addition, Mr. Martinez corroborated Mr. Allen's observation by stating that he purchased the beer at Respondent's.

At the time of the incident, Mr. Phan was an employee of Respondent. Mr. Martinez was 18 years of age. Mr. Phan had not attended seller/servant classes. Thus Mr. Phan and Respondent are not afforded the protections that the classes would provide when a sale is made to a minor.

Mr. Phan's sale to Mr. Martinez meets the definition of criminal negligence. He did not ask Mr. Martinez to provide proof that he was 21 years of age. There was no evidence that Mr. Martinez provided Mr. Phan with a fake identification. Mr. Phan should have been aware that the failure to obtain identification from Mr. Martinez was a substantial and unjustifiable risk that a sale to a minor could occur. This constitutes a gross deviation from the standard of care that an ordinary person would exercise under like circumstances.

V. PROPOSED FINDINGS OF FACT

1. Yen Nguyen d/b/a J & J Beer & Wine (Respondent) is the holder of Wine Only Package Store Permit, Q-436173 and Beer Retailer's Off-Premise License, BF-436174.
2. Respondent was notified of the factual allegations against Respondent in the Notice of Hearing issued by Petitioner on August 24, 2005.
3. On October 7, 2005, the hearing in this matter convened before ALJ Kyle J. Groves. Timothy Griffith appeared for Petitioner. Respondent was represented by Attorney R. Keith Walker
4. On May 5, 2005, TABC Agent Christopher Allen observed Respondent's employee, Mr.

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PROPOSAL FOR DECISION

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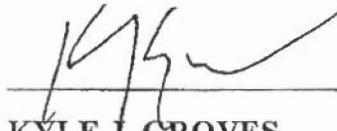
Phan, sell beer to a minor.

5. Mr. Phan did not obtain identification from the minor prior to selling the beer.
6. Mr. Phan had not attended seller/servant classes.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. On May 5, 2005, Respondent violated TEX. ALCO. BEV. CODE ANN. § 106.13.
5. On May 5, 2005, Respondent's employee acted with criminal negligence. TEX. PENAL CODE § 6.03 (d).
6. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Wine Only Package Store Permit, Q-436173, and Beer Retailer's Off-Premise License, BF-436174, should be canceled.

SIGNED DECEMBER 12TH, 2005.



KYLE J. GROVES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Yen Nguyen d/b/a J & J Beer & Wine

DOCKET NUMBER: 458-05-9090

AGENCY CASE NO: 495683

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VIA REGULAR MAIL

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RESPONDENT'S ATTORNEY
VIA FAX (469) 330-8354

as of December 12, 2005