

DOCKET NO. 588356

IN RE JUDE UGOEZE NWACHUKWU	§	BEFORE THE
D/B/A BUD'S BEER BARN	§	
LICENSE NO. BF436676	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1365)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of September, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened by telephone on June 9, 2000, and adjourned June 9, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 18, 2000. 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, 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.

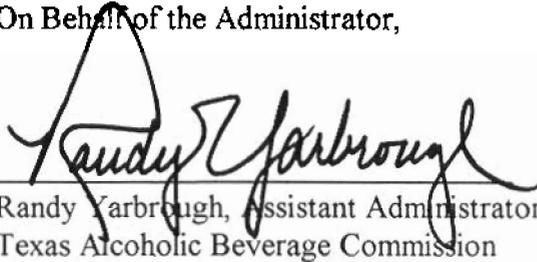
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **15th day of November, 2000**, all rights and privileges under the above described license will be **SUSPENDED** for a period of seven (7) days, beginning at **12:01 A.M. on the 22nd day of November, 2000**.

This Order will become final and enforceable on October 3, 2000, 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 12th day of September, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Jude Ugoeze Nwachukwu
d/b/a Bud's Beer Barn
RESPONDENT
1622 Market Center Blvd.
Dallas, Texas 75207-3916
CERTIFIED MAIL/RRR NO. Z 473 042 937

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Dallas District Office

SOAH DOCKET NO. 458-00-1365

TEXAS ALCOHOLIC § BEFORE THE STATE OFFICE
BEVERAGE COMMISSION §
§
VS. §
§
JUDE UGOEZE NWACHUKWU § OF
D/B/A BUD'S BEER BARN §
LICENSE NO. BF436676 §
DALLAS COUNTY, TEXAS §
(TABC CASE NO. 588356) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Respondent, Jude Ugoeze Nwachukwu d/b/a Bud's Beer Barn, for selling an alcoholic beverage to a minor. Staff recommended the license be suspended for a period of seven days, or, in lieu of a suspension, Respondent pay an administrative penalty of \$1,050. The Administrative Law Judge (ALJ) agrees with Staff and recommends the license be suspended for seven days, or, in lieu of suspension, that the Respondent pay an administrative penalty of \$1,050.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further discussion.

On May 19, 2000, the Staff issued its Notice of Hearing. The notice, directed to Jude Ugoeze Nwachukwu d/b/a Bud's Beer Barn, advised that on June 13, 2000, at 2:30 p.m., a hearing would be held by the State Office of Administrative Hearings (SOAH), 6300 Forest Park Road, Suite B-230, Dallas, Texas, to determine if the allegations against Respondent were true. On June 9, 2000, at 1:30 p.m., a telephone prehearing conference was conducted by Brenda Coleman, an administrative law judge (ALJ) with the State Office of Administrative Hearings. Both parties appeared by telephone. Staff was represented at the telephone prehearing conference by Timothy E. Griffith, an attorney for Staff. Respondent was not represented by an attorney.

During the prehearing conference, the parties agreed to waive the hearing scheduled for June 13, 2000, and entered into stipulations of evidence on the record regarding the allegations against Respondent. After stipulations were reached, the parties agreed that the only disputed issue in the case was regarding the penalty to be assessed. Testimony was received from Respondent. The record was closed on June 9, 2000.

II. APPLICABLE LAW

The Texas Alcoholic Beverage Commission (TABC) is authorized under TEX. ALCO. BEV. CODE ANN. § 61.71(a)(5)(Vernon 2000)(the Code) to cancel or suspend a permit or license for not more than sixty days if a licensee or permittee violates the Code. In this case, a violation of Code provision § 106.13 is alleged. That section makes it a violation to, with criminal negligence, sell or deliver an alcoholic beverage to a minor. Criminal negligence is defined in TEX. PENAL CODE ANN. § 6.03(d) as:

conduct, or results of conduct, when an actor 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 viewpoint.

When suspension of a permit or a license is authorized under the Code, the permittee or licensee shall be given the opportunity to pay a civil penalty rather than have the permit or license suspended. In cases in which a civil penalty is assessed, the TABC shall determine the amount of the penalty, and in doing so, shall consider the economic impact a suspension may have on the permittee or licensee. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended. If the permittee or licensee does not pay the penalty before the sixth day after the TABC notifies him of the amount, the TABC shall impose the suspension. TEX. ALCO. BEV. CODE ANN. § 11.64(a)(Vernon 2000)(the Code).

The TABC Rules provide a standard penalty chart. The standard penalty chart provides for a suspension of the permit or license for seven to twenty days for a first violation involving the sale of an alcoholic beverage to a minor; ten to ninety days for a second violation; and sixty days to twelve months, or cancellation for a third offense. 16 TEX. ADMIN. CODE § 37.60 (Vernon 1999). While the standard penalty chart is not binding on the ALJ, the chart should be given weight when considering the penalty to be assessed.

The TABC may relax the statutory penalties of the Code and assess a sanction it finds just, if, after notice and hearing, the permittee or licensee establishes:

- (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 the Code without knowledge of the permittee or licensee. TEX. ALCO. BEV. CODE ANN. § 106.13(c)(Vernon 2000); *see also* § 11.64(b) & (c).

III. EVIDENCE

Respondent holds a Beer Retailer's Off Premise License, No. BF436676, issued by the TABC for the premises known as Bud's Beer Barn, located at 1622 Market Center Boulevard, Dallas, Dallas County, Texas.

On May 18, 1999, an employee of Respondent, with criminal negligence, sold an alcoholic beverage to a minor. Respondent was not personally present at the time of the sale, but was informed of the sale by the employee after the sale occurred. Respondent's employee failed to check identification contrary to Respondent's training and instructions to her. By selling an alcoholic beverage to a minor, with criminal negligence, Respondent's employee violated the Code.

Respondent stated that he has been in the business of selling alcoholic beverages for approximately eight years and has done everything he is required to do in making sure that the rules of the Commission and the laws of the State of Texas are followed in his business. He testified that this is his first offense and that, due to his current financial condition, the penalty recommended by Staff is too excessive for a first offense under the Code. Respondent did not explain what his current financial condition is.

Respondent testified that he now has in place a policy requiring his employees to attend Commission sponsored alcohol training in an effort to ensure that another incident does not occur. This training is in conjunction with the in-house training provided to Respondent's employees.

The only evidence presented for consideration regarding the economic impact any suspension of Respondent's license might have on his business is Respondent's statement that he lost practically everything that he has worked for approximately two years ago because he lost the lease and had to move. Respondent disagrees with the period of suspension recommended by Staff. According to Respondent, Staff's recommended civil penalty in the amount of \$1,050 is too high a price for him to pay. Respondent suggests a civil penalty in the amount of \$350. No testimony establishing the basis for this amount was offered.

IV. ANALYSIS

Petitioner's burden in this case is to show that it is more likely than not that a criminally negligent sale to a minor occurred. Petitioner met that burden. The evidence supports the conclusion that Respondent's employee acted with criminal negligence by selling an alcoholic beverage to a minor on May 18, 2000. According to a stipulation of evidence, Respondent's employee did not request identification from an individual who was a minor. Failure to perceive that the individual was under age was such a gross deviation from the standard of care an ordinary person would exercise under the circumstances that it constitutes criminal negligence. Respondent is statutorily responsible for the acts of his employee; but because this is Respondent's first violation, the violation appears to be more of an isolated instance rather than the result of an ongoing lack of concern or management of Respondent's business.

Respondent failed to produce evidence regarding his policy concerning identification of purchasers prior to sales, the steps taken to bring that policy to employees' attention and steps taken to enforce that policy. Respondent did testify that TABC-approved training will be implemented as a corrective measure to prevent this type of violation in the future. However, Respondent's testimony was offered in order to provide mitigating circumstances when the penalty is assessed. The recommended penalty for the first violation involving a sale to a minor is a seven to twenty day suspension. Respondent's mitigation evidence is not persuasive. From Respondent's testimony, it is clear that he had not attended any type of seller-server training prior to this incident that could provide Respondent with a defense to the actions of any of Respondent's employees.

Staff's recommendation in this case follows the standard penalty chart and is the lowest statutory penalty allowable. From a preponderance of the evidence, circumstances justifying a relaxation of Code provision §§ 106.03 and 106.13 for suspension of Respondent's license have not been shown. The violation could have reasonably been prevented by the licensee by the exercise of due diligence. Respondent's suggested civil penalty, which is considerably lower than the TABC's statutory minimum of \$150 for each day the permit or license would be suspended, is unjustified and unacceptable. While a recommendation of cancellation of Respondent's license for Respondent's first violation of this type would be deemed by the ALJ to be excessive, the ALJ does not believe that Staff's recommendation of seven days suspension is excessive under the circumstances.

V. RECOMMENDATION

Since the evidence shows Respondent's employee sold alcohol to a minor, but Respondent has received no other citations or enforcement actions, the ALJ recommends that a license suspension of seven days be imposed on Respondent. The ALJ further recommends that Respondent be given an opportunity to pay a civil penalty in the amount of \$1,050 in lieu of suspension before the sixth day after the TABC notifies Respondent of its order.

VI. PROPOSED FINDINGS OF FACT

1. Respondent, Jude Ugoeze Nwachukwu d/b/a Bud's Beer Barn, holds a Beer Retailer's Off-Premise License, No. BF436676, issued by the Texas Alcoholic Beverage Commission (the Commission), for the premises located at 1622 Market Center Boulevard, Dallas, Dallas County, Texas.
2. On May 19, 2000, a notice of hearing was issued to Respondent by Staff. This notice informed Respondent of the matters asserted against him and provided him with the time, place and nature of the hearing.
3. On June 9, 2000, a telephone prehearing conference was conducted by Brenda Coleman, Administrative Law Judge. Both parties appeared for the conference. The parties agreed to waive the scheduled hearing and entered stipulations of evidence on the record. Staff was represented at the conference by Timothy E. Griffith, an attorney with the Commission's

Legal Division. Respondent was not represented by an attorney. There are no contested issues of notice or jurisdiction. The parties agreed the only disputed issue is the penalty to be assessed. Testimony was received from Respondent. The record was closed on June 9, 2000.

4. On May 18, 1999, Respondent's employee sold an alcoholic beverage to a minor.
5. Respondent's employee failed to check identification contrary to her training and Respondent's policies.
6. Respondent, through his employee, sold an alcoholic beverage to a minor.
7. Respondent has no history of previous enforcement actions.
8. Respondent's testimony regarding the economic impact a suspension of his license would have on his business was limited and insufficient to provide justification for mitigation of the penalty in this case below the minimum recommended and sought by Staff.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §§ 6.01 and 106.13.
2. The State Office of Administrative Hearings has jurisdiction over matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003 (Vernon 2000).
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 4 - 6, Respondent's employee sold an alcoholic beverage to a minor, with criminal negligence. TEX. ALCO. BEV. CODE ANN. §§ 1.04(16); 61.71(a)(5) and 106.13(a).
5. Based on Findings of Fact Nos. 4 - 6, and Conclusion of Law No. 4, Respondent's Beer Retailer's Off-Premises License number BF436676 should be suspended for seven days.
6. Based on Conclusion of Law No. 5 and TEX. ALCO. BEV. CODE ANN. § 11.64, Respondent should be given an opportunity to pay a civil penalty in the amount of \$1,050 in lieu of the suspension.

SIGNED this 18th day of August, 2000.

Brenda Coleman

BRENDA COLEMAN

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS