

DOCKET NO. 613348

N W N S ENTERPRISE INC.
D/B/A ACE FOOD MART #2
PERMIT/LICENSE NO(s). Q501698, bf501699

§ BEFORE THE TEXAS
§
§
§ ALCOHOLIC
§
§
§
§ BEVERAGE COMMISSION

ORANGE COUNTY, TEXAS
(SOAH DOCKET NO.458-06-1391)

ORDER

CAME ON FOR CONSIDERATION this 14th day of August 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on April 7, 2006 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 June 22, 2006. The Proposal For Decision, attached 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. 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 your permit(s) and/or license(s) are hereby **SUSPENDEND** for **thirty (30) days**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$6,000.00 or before the 15th day of August 2006, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **thirty day (30) days**, beginning at 12:01 A.M. on the 23rd day of August 2006.

This Order will become final and enforceable on 3rd day of August 2006, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this the 14th day of July 2006.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Hon Rex A. Shaver
State Office of Administrative Hearing
2020 North Loop West, Suite 111
Houston, Texas 77018
Via Facsimile: (713) 812-1001

N W N S Enterprise Inc.
RESPONDENT
d/b/a Ace Food Mart #2
230 Decker Rd
Vidor, TX 77662-7605
CERTIFIED MAIL NO. 7005 3110 0000 6409 0949

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Beaumont District Office

RP

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

RECEIVED
JUN 28 2006
LEGAL DIVISION

June 22, 2006

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-06-1391; Texas Alcoholic Enterprises Inc. d/b/a Ace Food Mart #2

W N S

613348

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in t and underlying rationale.

mentation

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,

Rex Shaver

Rex Shaver
Administrative Law Judge

9/14

RS/mc
Enclosure

xc: Ramona Perry, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, Texas 77008 -

VIA REGULAR MAIL

Ronald Monshaugen, Attorney at Law, 1225 North Loop West, Suite 640, Houston, Texas 77008 -VIA REGULAR MAIL

JUN 28 2006

including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

Respondent holds a Wine Only Package Store Permit Q 501698 and Beer Retailer's Off-Premise License BF 401699, issued by the TABC, for the premises located at 1810 S. Main, Vidor, Orange County, Texas. The permit and license were originally issued on the 16th day of October, 2001, and both have been continuously renewed. The violation history consists of two Administrator's Orders in Docket Nos. 611573 and 606370.

There are no contested issues of notice in this proceeding. Those matters are set out in the findings of fact and conclusions of law without further discussion.

On April 7, 2006, a hearing convened before SOAH ALJ Rex Shaver at the SOAH office located at 2020 N. Loop West, suite 111 Houston, Texas 77018. The Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Ronald Monshaugen. After presentation of evidence and argument the record remained open until April 21, 2006 for the filing of briefs and memoranda of law.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (1) TABC may suspend or cancel a mixed beverage permit if it finds after notice and hearing:

[T]hat the licensee violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled or suspended.

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13:

§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 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. . .

(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.

III. PETITIONER'S EVIDENCE

A. Documentary Evidence:

TABC Exhibit 1: Respondent's Permit and License History

B. Testimony Regarding the Alleged Violation:

TABC agent Artie B. Freeman testified that on October 12, 2004, he was an enforcement agent with TABC and was investigating a possible connection between Respondent's business and an automobile accident. As a part of the investigation he entered the premises at 1810 S. Main, Vidor, Orange County, Texas. He made contact with the clerk standing at the cash register, Liaqat Ali, and determined that Mr. Ali was the only employee on duty and the person in charge of the premises. While he was behind the counter speaking with Mr. Ali, the witness observed a youthful looking male customer enter the premises. He observed the customer go to the alcoholic beverage cooler and take a 40 oz. bottle of Ice House Ale from the cooler. The customer then brought the bottle to the counter. Agent Freeman noted that the bottle was labeled as an alcoholic beverage. The customer, later identified as Beau Barron, paid with change from his pocket and Mr. Ali placed the bottle in a bag on the counter before Mr. Barron who then picked up the bag and headed towards the front door.

The Agent Freeman observed Mr. Barron to have a youthful face and stature and to be wearing shorts and no shirt. Mr. Freeman approached Mr. Barron and asked for identification. Mr. Barron told the agent that he had no identification. He did give the agent his name, date of birth (07-05-84) and a driver's license number. It was determined that this information was correct by inquires to both the Department of Public Safety and the Vidor Police Department. The Vidor Police Department advised him that they had prior contacts with Mr. Barron and confirmed his birth date from the records of the police department. Mr. Barron was then issued a citation for being a minor in possession of an alcoholic beverage and Mr. Ali was given an Administrative Notice for sale to a minor.

IV. RESPONDENT'S EVIDENCE

A. Documentary Evidence:

Respondent Exhibit 1: TABC Seller Training Certification for employee Rebecca L. Nelson.

Respondent Exhibit 2: TABC Seller Training Certification for employee Racheal C. Ware.

Respondent Exhibit 3: TABC Seller Training Certification for employee Liaqat Ali.

Respondent Exhibit 4: TABC Responsible Alcoholic Beverage Service poster.
(Admitted as Offer of Proof)

Respondent Exhibit 5: TABC Complaint Screen Inquiry 077551.

Respondent Exhibit 6: TABC Complaint Screen Inquiry 082475.

Respondent Exhibit 7: TABC Complaint Screen Inquiry 083170.

Respondent Exhibit 8: TABC Certificate Inquiry Re: Linda Chaison.

B. Testimony Regarding the Alleged Violation:

Mr. Liaqat Ali testified that he is an employee of the Respondent, N W N S Enterprise, Inc. d/b/a Ace Food Mart #2 and regularly works at the business. On October 12, 2004, he was working for the Respondent along with Rebecca Nelson, Rachel Ware and Linda Chaison. Linda Chaison was a new hire and only worked a few days a week. He did not recall her date of hire. She was not TABC Seller Certified on October 12, 2004, the time of this Administrative notice, but attended the class and was certified shortly afterward. It was Respondent's policy to have all employees complete TABC seller training.

The witness admitted that he had received a prior citation for sale to a minor. His supervisor, who is his uncle, had become very angry with him. He lives with his uncle and they did not speak for two weeks after that citation. His uncle frequently told him and the other employees that they were not to sell alcohol to minors. He became confused and unable to concentrate when Agent Freeman came behind the counter and began asking him questions. Mr. Ali said there were 2 or 3 customer in the store at the time of the sale to Mr. Barron and he would not have knowingly sold alcohol to a minor with a TABC agent standing behind the counter with him. He did not check Mr. Barron's identification to ascertain his date of birth.

V. ANALYSIS

The Respondent had requested that the actions of the employee not be attributed to it under the provisions of Section 106.14 of the Code. The employee, Linda Chaison, received her seller training October 19, 2004 or one week after the date of the sale made the basis of this hearing. The testimony of Mr. Ali was that Ms Chaison was an employee on October 12, 2004 but he was unable to provide an exact date of hire. It was therefore impossible to determine if the Respondent had required the employee Ms. Chaison to attend a seller training program in a timely manner.

Artie Freeman testified that he was standing next to the clerk, Mr. Ali, when he sold a bottle of Ice House Ale to Mr. Barron who he later identified as a minor. Mr. Freeman recognized the bottle of ale as an alcoholic beverage. Mr. Ali testified that he was an employee of the Respondent and that he made the sale without checking the age of the customer. He claimed to be distracted and confused by the questions being asked by the TABC agent. TABC Exhibit 1 includes only two prior violations. One occurred on July 14, 2004 for a counterfeit trade mark violation and the other on July

26, 2003 for a sale of an alcoholic beverage to a minor. The violation in this case occurred on October 12, 2004. In light of the fact that since October 16, 2001 there has been only two alcohol related violations the ALJ recommends a 30 day period of suspension or payment of a \$6000.00 civil penalty rather than the 180 day suspension recommended by the Staff.

VI. PROPOSED FINDINGS OF FACT

1. Respondent holds a Wine Only Package Store Permit Q 501698 and Beer Retailer's Off-Premise License BF 401699, issued by the TABC, for the premises located at 1810 S. Main, Vidor, Orange County, Texas. The permit was originally issued on the 16th day of October, 2001, and both have been continuously renewed.
2. On October 12, 2004, Liaqat Ali was performing the duties of a cashier at the premises at 1810 S. Main, Vidor, Orange County, Texas.
3. On October 12, 2004, TABC Agent Artie Freeman observed the sale, by Liaqat Ali, of a bottle of Ice House Ale, an alcoholic beverage to Beau Barron.
4. On October 12, 2004, Beaux Barron was under the age of 21 years having been born on July 5, 1984, and had a youthful appearance.
5. On February 13, 2006, Petitioner issued its notice of hearing directed to Respondent at the mailing address contained in the TABC records and a copy to Respondent's attorney of record.
6. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
7. On April 7, 2006, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Rex Shaver at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Harris County, Texas.
8. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared by counsel Ronald Monshaugen.

9. On April 7, 2006, following presentation of evidence and argument of counsel, the hearing was concluded and to allow for the filing of memoranda and responses the record remained open until April 21, 2006.

VII. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 61.71 (a) (1) and 106.13.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.
4. Respondent, his agent, servant or employee, with criminal negligence sold or delivered beer to a minor on the licensed premises on October 12, 2006 in violation of § 106.13 of the Code.
5. ALJ recommends a 30 day suspension of Respondent's permit. As an alternative to this suspension, TABC should allow Respondent to pay a \$6,000 civil penalty. TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (1) and 16 TEX. ADMIN. CODE § 37.60.

SIGNED June 22, 2006.



REX SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

