

DOCKET NO. 593068

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
	§	
RIZAK ENTERPRISES, INC.	§	
D/B/A LAKEWAY METRO MART	§	
PERMIT NO. BQ-440072	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-2408)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 31st day of July, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Bill Zukauckas. The hearing convened on June 4, 2001, 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 28, 2001. 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.

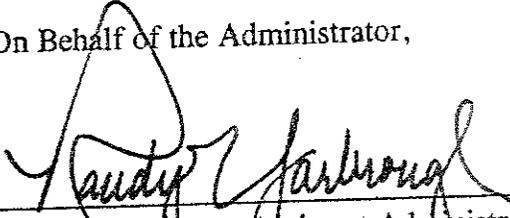
IT IS THEREFORE ORDERED that unless the Respondent pays a civil penalty in the amount of **\$5,250.00** on or before the **26th** day of **September, 2001**, all rights and privileges under the above described permit will be **SUSPENDED** for a period of **thirty-five (35) days**, beginning at **12:01 A.M. on the 3rd day of October, 2001**.

This Order will become final and enforceable on August 22, 2001, 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 31st day of July, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

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

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TABC Legal Section

Licensing Division
Austin District Office

SOAH DOCKET NO. 458-01-2408
TABC CASE NO. 593068

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

V.

**RIZAK ENTERPRISES, INC.
D/B/A LAKEWAY METRO MART
PERMIT NO. BQ-440072
TRAVIS COUNTY, TEXAS**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This case involves allegations that Rizak Enterprises d/b/a Lakeway Metro Mart (Respondent) violated §106.03 of the Texas Alcoholic Beverage Code (the Code) by acting with criminal negligence in selling alcoholic beverages to a minor. The Texas Alcoholic Beverage Commission staff (Staff) recommended cancellation of Respondent's permit based on the allegations in this case and the history of Respondent's alcoholic beverage code violations.

The Administrative Law Judge (ALJ) finds that Respondent, through its employee, sold alcoholic beverages to a minor with criminal negligence on October 20, 2000, in violation of provisions of the Code. The October 20th sale to a minor in the instant case combined with Respondent's history of alcoholic beverage violations of May 28, 1999, and September 23, 1999, total three offenses. After considering the standard penalty chart and the permissible sanctions in §106.13 for a third offense of this nature and the mitigating circumstances of this particular sale, the ALJ recommends Respondent's permit be suspended for a period of 35 days, and Respondent be allowed to pay of a penalty of \$150.00 per day in lieu of that suspension.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

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

A hearing was held before Bill Zukauckas, Administrative Law Judge, on June 4, 2001, at the State Office of Administrative Hearings Austin Hearing complex. Petitioner TABC was represented by attorney Dewey Brackin. Respondent was represented by attorney H. Douglas Pruett. The hearing was concluded the same day and the record was closed.

II. SUMMARY OF ALLEGATIONS

The Petitioner alleged that Respondent, through its employee, violated the Code on October 20, 2000, by acting with criminal negligence in selling an alcoholic beverage to a minor at Respondent's place of business.

III. STATUTORY AUTHORITY

Sections 106.03 and 106.13 of the Code control this proceeding. Section 106.13 authorizes sanctions if a retailer acts with criminal negligence in selling an alcoholic beverage to a minor. The Code permits sanctions in the following circumstances:

Sec. 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 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 in violation of this code 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 three 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. Section 106.13 employs the Penal Code definition of criminal negligence, which provides that "[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." TEX. PENAL CODE ANN. §6.03(d).

IV. DISCUSSION

A. Respondent's Prior Violations of §106.03

The TABC presented a certified record from TABC's custodian of records showing Respondent's permit and violation history since September 30, 1998. The certified record included two Commission Orders assessing penalties for alcoholic beverage violation sales made to minors on May 28, 1999, and on September 23, 1999.

B. Sale to Minor on October 20, 2000

Many of the facts of this case are undisputed:

1. Lake Travis Police Department conducted a sale to minor sting operation on the evening of October 20, 2000, on at least ten convenience stores in the Lake Travis area.
2. That on October 20, 2000, an employee of the Respondent, Haleem Muhammad, sold alcoholic beverages to a Elizabeth Debora Vidarri, born December 5, 1983.
3. Ms. Vidarri was a minor on October 20, 2000.
4. Mr. Muhammad requested Ms. Vidarri to produce identification.
5. Ms. Vidarri produced a valid Texas driver's license indicating a date of birth of December 5, 1983.
6. Respondent's employee looked at the driver's license and then sold the alcoholic beverage to Ms. Vidarri.
7. At the time of the sale to the minor, the Respondent's employee had not yet attended a seller training program as set out in §106.14 of the Code.

C. Analysis

The two issues in this case are how accountable Respondent is for its employee's act of selling alcohol to a minor and, if accountable, what is the appropriate sanction.

1. Respondent's Accountability

The first issue deals with Respondent's accountability for its employee's sale to a minor in this particular instance. Section 106.14 provides some help in this assessment, although Respondent does not meet the full protection requirements of the Code section. Section 106.14 provides that an employer shall not be responsible for the actions of its employee if three conditions are met. First, the statute requires that employees attend a commission-approved seller training program. In this

instance, the testimony from Respondent was that employees are required to attend this training and that Mr. Muhammad was scheduled to attend the course the Monday after the sting operation. Second, the statute requires that the employee have actually attended the course. In this instance, this requirement was not yet met. Consequently, the mandatory protections of the statute are not available to the Respondent, although the ALJ finds the statutory language helpful in determining Respondent's degree of culpability in this instance. Third, the employer cannot have directly or indirectly encouraged the employee to sell alcohol to minors. TABC argued that Respondent's two prior citations for selling alcohol to minors is probative in determining Respondent's propensity for breaking the law or its negligent standard of care regarding its own internal policy towards selling alcohol to a minor.

The ALJ believes the Respondent's two previous citations for sale to minors would tend to make it more vigilant. Although the record did not reflect the circumstances surrounding Respondent's two previous citations for sale to minors, it is reasonable to believe that Respondent knew the possible consequences of a third citation and that the testimony of Respondent's stockholder, Nizar Noorani, reflects Respondent was taking all practical precautions to avoid a third citation. Mr. Noorani presented credible testimony that Mr. Muhammad was its only employee, that he was new, and that he was scheduled for seller training the Monday following the sting operation. Had he completed training prior to the sting operation, Respondent would not likely be accountable for his sale to the minor.

It is impossible to guess the thought processes of Mr. Muhammad when he reviewed the driver's license. The evidence indicates he requested Ms. Vidarri produce a driver's license and took some time looking at the license. Why Mr. Muhammad did not notice that Ms. Vidarri was a minor, or chose to ignore that fact, is unknown. It seems unlikely that he would have asked for identification and then consciously decided, even on his own, to sell the alcohol. The repercussions of his actions were that Respondent terminated his employment. If he was aware that this might happen, he certainly would have no personal interest in intentionally making the sale to a minor. The ALJ believes this was most likely a serious, but simple, negligent oversight.

2. Appropriate Sanction

Petitioner was required to prove that Respondent violated Section 106.03 of the Code by making a criminally negligent sale or delivery of alcohol to a minor. The ALJ must find, based on the circumstances surrounding the conduct, that the Respondent ought to have been aware of a substantial and unjustifiable risk selling alcohol to a minor. The ALJ does so find. But, as discussed above, although Respondent does not qualify for the absolute statutory protections that Section 106.14 provides, Respondent was making a good-faith effort to avoid another violation. Uncontroverted and credible testimony from Mr. Noorani was that Mr. Muhammad was scheduled to attend the required training on the Monday following the sting. So while Respondent does not qualify for absolute protection under the statute, it is hard to imagine what more Respondent could have done short of double checking each ID that any employee asks to see. That would require one of Respondent's owners to be at the store during all hours of operation. One purpose of hiring an employee was to give the owners a break from the store.

The ALJ thinks Respondent has a special duty to avoid three violations within 36 months pursuant to Section 106.13 of the Code. This third violation, however, with its mitigating circumstances, still warrants a penalty. The maximum penalty allowed (cancellation) seems too harsh for the facts of this case. The ALJ believes the mitigating factors discussed above warrant a relaxation of the provisions as contemplated by Section 106.13.

V. RECOMMENDATION

Having considered Petitioner's request, the violation proved in the instant case, and the mitigating circumstances of this particular case, the ALJ recommends that Respondent's Wine and Beer Retailer's Off Premise Permit BQ440072 be suspended for 35 days, with consideration being given to allowing payment of a penalty of \$150.00 per day in lieu of that suspension.

VI. FINDINGS OF FACTS

1. Respondent, Rizak Enterprises, Inc., d/b/a Lakeway Metro Mart, a convenience store located at 903 RR 620 South, Lakeway, Travis county, Texas, is the holder of a Wine and Beer Retailer's Off-Premises License, BQ440072 from the Texas Alcoholic Beverage Commission (TABC).
2. On April 2, 2001, Staff of the TABC notified Respondent of this hearing by certified mail, return receipt requested.
3. A hearing on this matter was held in Austin, Texas, on June 4, 2001, with all parties present.
4. On October 20, 2000, Respondent's employee, Haleem Muhammad, was working behind the check-out counter at Lakeway Metro Mart.
5. Lake Travis Police Department conducted a sale-to-minor sting operation on the evening of October 20, 2000, on at least ten convenience stores in the Lake Travis area, including Respondent's location.
6. On October 20, 2000, Mr. Muhammad sold alcoholic beverages to Elizabeth Debora Vidarri, born December 5, 1983.
7. Mr. Muhammad requested Ms. Vidarri to produce identification.
8. Ms. Vidarri produced a valid Texas driver's license indicating a date of birth of December 5, 1983.
9. Mr. Muhammad looked at the driver's license and then sold the alcoholic beverage to Ms. Vidarri.
10. Ms. Vidarri was a minor at the time of the sale of the alcoholic beverage.

11. Mr. Muhammad had not yet attended a seller training program as set out in §106.14 of the Code but was scheduled to take the course the Monday following October 20, 2000.
12. Respondent terminated Mr. Muhammad as a result of his sale of the alcoholic beverage to the minor.
13. It is Respondent's policy to send employees to seller server training.
14. Respondent has had three violations in the last 36 consecutive months.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) sections 106.03 and 106.13.
2. SOAH has jurisdiction over matters related to conducting the hearing in this docket, including authority to issue proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. The notice of hearing was properly and timely served on Respondent pursuant to the Administrative Procedure Act in TEX. GOV'T CODE ANN §§2001.051 and 2001.052.
4. Based upon Findings of Fact Nos. 5-9, Respondent sold an alcoholic beverage to a minor, with criminal negligence on October 20, 2000, in violation of §106.03 and 106.13 of the Code.
5. Mitigating factors addressed in Findings of Fact Nos. 8, 10, and 11 warrant a relaxation of the recommended penalty for a third offense.
6. Respondent's Wine and Beer Retailer's Off-Premises Permit BQ-440072 should be suspended for 35 days, or in lieu of that suspension that the Respondent should be allowed to pay a penalty of \$150.00 per day in lieu of that suspension pursuant to §106.13 of the Code.

Signed this 28th day of June, 2001.



BILL ZUKAUCKAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS