

DOCKET NO. 598244

IN RE WUEST'S OF SAN MARCOS	§	BEFORE THE
D/B/A WUEST'S OF SAN MARCOS	§	
PERMIT NO. BF-436598	§	
	§	TEXAS ALCOHOLIC
	§	
CALDWELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-2638)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 30th day of July, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Wendy K. L. Harvel. The hearing convened on June 19, 2002, 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, 2002. 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 License No. BF-436598 is hereby **SUSPENDED**.

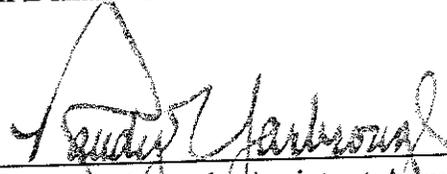
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,500.00 on or before the 25th day of September, 2002, all rights and privileges under the above described license will be **SUSPENDED** for a period of ten (10) days, beginning at 12:01 A.M. on the 2nd day of October, 2002.

This Order will become final and enforceable on August 19, 2002, 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 30th day of July, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Wendy K. L. Harvel
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

Wuest's of San Marcos
Wuest's of San Marcos
RESPONDENT
312 W. Cedar Street
Seguin, Texas 78155-3796
CERTIFIED MAIL NO. 7001 2510 0000 7276 6526
RETURN RECEIPT REQUESTED

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Austin District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 598244 REGISTER NUMBER:

NAME: Wuest's of San Marcos TRADENAME: Wuest's of San Marcos

ADDRESS: 950 Pierce Street, Luling, Texas 78648

DATE DUE: September 25, 2002

PERMITS OR LICENSES: BF-436598

AMOUNT OF PENALTY: \$1,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 25TH DAY OF SEPTEMBER, 2002, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

SOAH DOCKET NO. 458-02-2638
TABC CASE NO. 598244

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

V.

WUEST'S OF SAN MARCOS

§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This case involves allegations that Wuest's of San Marcos (Respondent) violated §106.03 of the Texas Alcoholic Beverage Code (the Code) by acting with criminal negligence in selling an alcoholic beverage to a minor. The Texas Alcoholic Beverage Commission staff (Staff) recommended a suspension for ten days of Respondent's permit based on the allegations in this case.

The parties stipulated to all facts in this case, but could not reach an agreement on the length of the suspension period. The hearing was held to allow the Administrative Law Judge (ALJ) to hear the evidence and to recommend a suspension period for the violation. The ALJ finds that Respondent, through its employee, sold alcoholic beverages to a minor with criminal negligence on December 1, 2001, in violation of the Code. This is Respondent's first violation, although Respondent did receive a warning in 1999, for another undisclosed violation. After considering the evidence in this case, the ALJ recommends Respondent's permit be suspended for a period of ten 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 Wendy K. L. Harvel, ALJ, on June 19, 2002, at the State Office of Administrative Hearings in Austin, Texas. The Texas Alcoholic Beverage Commission (TABC) was represented by attorney Dewey Brackin. Respondent appeared *pro se*. The hearing concluded and the record closed the same day.

II. SUMMARY OF ALLEGATIONS

Petitioner alleged that Respondent, through its employee, violated the Code on December 1, 2001, by acting with criminal negligence in selling an alcoholic beverage to a minor at Respondent's place of business in Luling, Texas.

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 circumstance:

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 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.

IV. DISCUSSION

A. Respondent's Prior Violations of §106.03

The Respondent has no prior violations.

B. Sale to Minor on December 1, 2001

The facts of this case are undisputed and are set forth in the findings of fact and conclusions of law without further discussion here.

C. Analysis

The only issue in this case is the appropriate sanction for the violation of the Code. Petitioner requests a suspension of 10 days. The standard penalty chart found in the TABC Rules provides for a penalty range between 7 and 20 days for the first violation.¹ At the hearing, Lieutenant David Ferrero of the TABC testified that he believed the appropriate penalty is a 10 day suspension. He testified that the 10 day suspension is the lowest that will be recommended for a sale to a young minor.² He testified that when a sale is made to an older minor between the ages of 18 and 20, a shorter penalty is recommended. Furthermore, Patricia Calloway, the employee who sold the alcohol, did not attempt to verify the age of Ms. Geesee, by checking for identification. On cross-examination, Lieutenant Ferrero testified that mitigating circumstances for violations include: the permittee's history of violations; the permittee's reputation in the community; and whether the permittee provides seller-server training for its employees.

Robert Wuest, Respondent's owner, testified that Wuest's grocery stores have sold alcohol since

¹ 16 TEX. ADMIN. CODE § 37.60.

² Laine Marie Geesee, the minor who purchased the alcohol, was 16 years old.

1964, and have had no previous violations. He also testified that, at the TABC's request, he started in-house seller-server training for his employees. Ms. Calloway had been certified twice in the recent past through seller-server training, but was not currently certified.³ Mr. Wuest provided documentary evidence showing that Ms. Calloway was terminated the day following the sale.⁴ Mr. Wuest argued that he believes the TABC should consider Ms. Calloway's prior certifications as a mitigating factor. Mr. Wuest believes the proposed 10 day suspension is too harsh, and argues the appropriate sanction is no sanction or "something small." He did not testify, however, what an appropriately small sanction would be.

The ALJ finds that based on the evidence presented a 10 day suspension is warranted. The standard penalty chart, which the ALJ uses for guidance, recommends a penalty between 7 and 20 days for a first offense. This offense was the first offense for Wuest's in the almost 40 years it has sold alcohol. That record should be recognized in the proposed sanction. Another mitigating factor is the swift action taken by Wuest's in immediately terminating Ms. Calloway. The third mitigating factor is Wuest's regularly scheduled training course for its employees. Weighing against the lightest sanction is the age of Ms. Geesee, which was 16.⁵ The ALJ finds that a 10 day suspension is a relatively light sanction. The Code permits a suspension for up to 90 days for this violation. The violation was small, but was serious enough to warrant a sanction. Ten days is a light sanction for selling alcohol to a young minor, and it is the appropriate sanction in this case.

V. RECOMMENDATION

Having considered Petitioner's request, the violation proved in the instant case, and the mitigating circumstances, the ALJ recommends that Respondent's Beer Retailer's Off Premise Permit BF436598 be suspended for 10 days, and that Respondent be allowed to pay a penalty of \$150.00 per day in lieu of that suspension.

VI. FINDINGS OF FACT

1. Respondent, Wuest's of San Marcos, a grocery store located at 950 Pierce Street, Luling Texas, is the holder of a Beer Retailer's Off-Premises License, BF436598 from the Texas Alcoholic Beverage Commission (TABC).
2. On April 18, 2002, 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 19, 2002, with all parties present.
4. On December 1, 2001, Respondent's employee, Patricia Calloway, was working behind the check-out counter.
5. The TABC conducted a sale-to-minor sting operation on the evening of December 1, 2001, at

³ Wuest Ex. 2.

⁴ Wuest Ex. 1.

⁵ TABC Ex. 2 contains a picture of the minor, who appears to be younger than 21.

Respondent's location.

6. On December 1, 2001, Ms. Calloway sold alcoholic beverages to Laine Marie Geesee, born in September 1985.
7. Ms. Calloway did not request Ms. Geesee to produce identification.
8. Ms. Geesee was a minor at the time of the sale of the alcoholic beverage.
9. Ms. Calloway was not currently certified through seller-server training as set out in TEX. ALCO. BEV. CODE §106.14.
10. Respondent terminated Ms. Calloway as a result of her sale of the alcoholic beverage to the minor.
11. Respondent holds regularly scheduled seller-server training programs.
12. Respondent has had no previous violations.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) sections 106.03 and 106.13.
2. The State Office of Administrative Hearings (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 the findings of fact, Respondent sold an alcoholic beverage to a minor, with criminal negligence on January 1, 2001, in violation of §§106.03 and 106.13 of the Code.
6. Respondent's Beer Retailer's Off-Premises Permit BF436598 should be suspended for 10 days, or in lieu of that suspension the Respondent should be allowed to pay a penalty of \$150.00 per day, pursuant to §106.13 of the Code.

Signed this 28th day of June, 2002.


WENDY K.J. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS