

DOCKET NO. 458-10-4619

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

V.

**PRO MOBILE, INC.
D/B/A PRO MOBILE, INC.
PERMIT NO. Q-576347 AND BF-576348
DALLAS COUNTY TEXAS**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this action against Pro Mobile, Inc. d/b/a Pro Mobile Inc. (Respondent) seeking cancellation of Respondent's wine and beer retailer's off premise permit, BQ-649179. TABC alleged Respondent, his agent, servant, or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 106.13. This Proposal for Decision finds the Respondent's permit should be cancelled.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The hearing in this matter convened October 8, 2010. Attorney David Duncan represented the staff. The Respondent was represented by attorney Robert Wilson. Administrative Law Judge (ALJ) Kyle J. Groves presided. The hearing was concluded that same day, but the record remained open until October 22, 2010, so the parties could file written closing arguments.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

II. EVIDENCE

TABC's staff offered documentary evidence showing that on January 19, 2007, Respondent was issued wine and beer off-premise permit BQ-649179. Respondent's violation history shows that on February 3, 2008, Respondent agreed to a waiver order stemming from an allegation of sale of alcohol to a minor.

Robert Lowe testified for Petitioner. Mr. Lowe is an agent for TABC. On November 23, 2009, he was involved in a minor sting operation at Respondent's place of business. The minor, Taylor Jones, was 17 years old. Mr. Lowe went into Respondent's place of business with Ms. Jones and observed her purchase a Corona beer from Respondent's clerk.

Ms. Jones testified that, on November 23, 2009, she went into Respondent's place of business and purchased a Corona beer. She said that she was not asked to provide identification. Ms. Jones is approximately 5'11" and 200 pounds. Photographs of Ms. Jones on the day of the sting were presented into evidence.

Agent Jeffery Moore testified that he is an agent for Petitioner. He was also a part of the minor sting operation. He stayed outside when Ms. Jones purchased the alcoholic beverage. After Ms. Jones exited Respondent's place of business, Mr. Moore went into Respondent's place of business and spoke with the clerk, Adam Youssef. Mr. Youssef did not deny selling the beer to Ms. Jones. He told Mr. Moore that he was not seller-servant certified.

Hany Youssef testified that he has owned Pro Mobile for 30 years. He said that he has been the target of six minor stings since 2008. Mr. Youssef believes that he has been unfairly targeted by Petitioner.

Adam Youssef is the son of Hany Youssef and was working as the clerk on November 23, 2009. He testified that Ms. Jones appeared tall enough to not be a minor. He said that at the time of Ms. Jones' purchase, the store was very busy and he was the only one working. He said the sale to

Ms. Jones was an honest mistake. He testified that the same mistake will not happen again. According to Ms. Youssef, the store now always has two clerks working and more people are required to show identification. He said that he is now seller-servant certified.

III. STATUTORY AUTHORITY

TEX. ADMIN. CODE § 61.71 (a) (1) 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 violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period.

TEX. ALCO. BEV. CODE §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.

IV. ANALYSIS

Respondent argues that Petitioner has failed to prove that Respondent and/or his agent, servant, employee was criminally negligent in selling an alcoholic beverage to a minor. Respondent cites TEX. PENAL CODE § 6.03 (d):

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.

It is Respondent's position that Ms. Jones appeared to be old enough to purchase alcohol. Therefore, Adam Youssef did not deviate from the standard of care that an ordinary person would exercise under the same circumstances.

Petitioner argues that an ordinary person would have perceived the risk that Ms. Taylor was a minor and asked to see her identification. According to Petitioner, criminal negligence merely requires that Adam Youssef should to have been aware that Ms. Jones may have been a minor.

There was no evidence presented that either by her appearance or demeanor, Ms. Jones, misled Adam Youssef into believing she was not a minor. Ms. Youssef admitted that he should have asked for her identification and failed to do so because he was the only clerk working at the time and the store was busy. In February 2008, Respondent allegedly sold alcohol to a minor. This should have heightened Mr. Youssef's awareness that he needed to ask for Ms. Jones' identification. Under these circumstances, Mr. Youssef deviated from the standard of care that an ordinary person would exercise. Respondent's permit should be cancelled.

V. PROPOSED FINDINGS OF FACT

1. On June 30, 2010, TABC sent a notice of hearing to Respondent stating that a hearing would be held on this matter on October 8, 2010, at the State Office of Administrative Hearings (SOAH) in Dallas, Texas.
2. The notice also contained a statement of the legal authority and jurisdiction for the hearing, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
3. On October 8, 2010, the hearing convened at SOAH in Dallas, Texas, before the undersigned Administrative Law Judge (ALJ). Staff Attorney David Duncan represented TABC staff.

Attorney Robert Wilson represented Respondent.

4. Pro Mobile, Inc. d/b/a Pro Mobile Inc (Respondent) is the holder of wine and beer retailer's off premise permit, BQ-649179.
5. In March 2008, Respondent agreed to a settlement and waiver of hearing stemming from an allegation that Respondent sold alcohol to a minor.
6. On November 23, 2009, an employee of Respondent sold alcohol to a minor.
7. On November 23, 2009, the employee who sold alcohol to a minor was not seller-servant certified.
8. Ms. Jones, did not mislead Adam Youssef into believing she was not a minor.
9. Adam Youssef admitted that he should have checked Ms. Jones' identification.

VI. 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 November 23, 2009, Respondent, his agent, servant, or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 106.13.
5. Based on the Findings of Fact and Conclusions of Law, Respondent's wine and beer retailer's off premise permit, BQ-649179 should be cancelled.



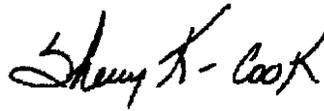
Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings

Issued December 6, 2010

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

SIGNED this the 4th day of January, 2011, at Austin, Texas.

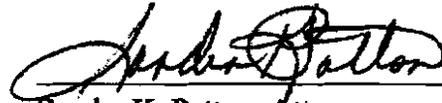
On Behalf of the Administrator,



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that each party or person with an interest in the above matter has been notified of the agency order in the manner indicated below on January 5, 2011.



Sandra K. Patton, Attorney
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SKP/aa