

DOCKET NO. 587353

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
ZK INTERNATIONAL, INC D/B/A SPLENDORA FOOD MART, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT NO. BQ610039 MONTGOMERY COUNTY, TEXAS (SOAH DOCKET NO. 458-10-2603)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 19TH day of OCTOBER, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Timothy Horan presiding. The hearing convened on June 25, 2010 and the SOAH record closed on that date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 3, 2010. The 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. Exceptions were filed by Petitioner on August 9, 2010. Respondent replied to Petitioner’s exceptions on August 16, 2010. On September 2, 2010, the ALJ filed a response to Petitioner’s exceptions, recommending that no changes be made to the Proposal for Decision. Petitioner submitted a Proposed Order Modifying Proposal for Decision on September 20, 2010, and on September 22, 2010, Respondent’s Objections to Petitioner’s Proposed Order Modifying Proposal for Decision was filed.

Although the specific facts of this case support the ALJ’s proposed Findings of Fact and Conclusions of Law in this case, I do not agree with the ALJ’s general analysis of the law. There are clearly circumstances where it is appropriate to strictly apply the 0.08 alcohol concentration portion of the definition found in Tex. Penal Code §49.01(2)(B) by itself to determine if an alcoholic beverage was sold, served or delivered to an intoxicated person. [See Proposal for Decision, *TABC v. Sportswest Family Center, Ltd. d/b/a Sportswest*, SOAH Docket No. 458-08-3219 (TABC Docket No. 574356) (July 6, 2009), at pages 10 – 11, and cases cited therein.] To the extent that the ALJ’s analysis purports to establish a standard, or can be read as a general pronouncement of law beyond the facts of this case, it is overbroad and is an incorrect statement of the law. Nonetheless, I agree with the ALJ’s conclusion that *in the specific facts of this case*,

applying the 0.08 alcohol concentration portion of the definition found in Tex. Penal Code §49.01(2)(B) by itself would be inappropriate.

Therefore, after review and due consideration of the Proposal for Decision, the exceptions and reply thereto, the ALJ's response to those documents, Petitioner's Proposed Order and Respondent's objections thereto, I adopt the ALJ's proposed Findings of Fact and Conclusions of Law that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All other motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party that are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED that **NO ACTION** be taken against Respondent's Wine and Beer Retailer's Off-Premise Permit No. BQ610039.

This Order will become final and enforceable on the 14TH day of NOVEMBER, 2011, unless a Motion for Rehearing is filed **before** that date.

SIGNED this the 19TH day of OCTOBER, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 19TH day of OCTOBER, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Timothy Horan
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322.0474

ZK International Inc.
d/b/a Splendora Food Mart
RESPONDENT
14651 Hwy 59 North
Splendora, Texas 77372
VIA REGULAR MAIL

Ronald A. Monshaugen
ATTORNEY FOR RESPONDENT
1225 North Loop West, Suite 640
Houston, Texas 77008
VIA FACSIMILE: (713) 880-5297

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section
VIA EMAIL: SANDRA.PATTON@TABC.STATE.TX.US

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 3, 2010

RECEIVED

AUG 11 2010

SABO HOUSTON
LEGAL

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

VIA REGULAR MAIL

RE: Docket No. 458-10-2603; ZK International Inc. d/b/a Splendor Food Mart

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507, a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


Timothy Horan
Administrative Law Judge

TH rlm
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX
77008- **VIA REGULAR MAIL**
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
78731- **VIA REGULAR MAIL**
Ronald Monshaugen, 1225 North Loop West, Suite 640, Houston, TX 77008 -**VIA REGULAR MAIL**

2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001
<http://www.soah.state.tx.us>

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may suspend a permit if a permit holder's agent, servant, or employee sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6). "Intoxicated" is defined as (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any combination of two or more of those substances, or any substance into the body, or (B) having an alcohol concentration of 0.08 or more. TEX. PENAL CODE § 49.01(2) (A) and (B).

III. EVIDENCE

The parties stipulated the facts, and the following is a synopsis of the stipulation.

On Wednesday, July 1, 2009, at approximately 11:06 pm, Trooper Smith and his partner, Trooper Taylor, were parked at the Chevron fuel station in Splendora, Montgomery County, Texas. Trooper Smith observed a white male, later identified as Patrick Wayne Arnold, driving a maroon van drive from FM 2090 into the parking lot of the fuel station and park. Trooper Smith noticed the passenger side stop lamp was defective. The driver exited the vehicle and walked inside the fuel station. Trooper Smith observed the driver of the van exit the store carrying a plastic bag. The driver got back into the driver seat and Trooper Smith again observed the stop lamp was defective. The driver backed out of the parking space and began to drive away.

Trooper Smith approached the vehicle and contacted the driver who displayed multiple signs of intoxication. The driver had difficulty opening the door and rolling the window down and also had a blank stare. Once the driver finally exited the vehicle, the driver almost walked into Trooper Smith. He was unsteady as he stood, had difficulty following simple instructions, and had a strong odor of an alcoholic beverage on his breath. The driver told Trooper Smith that he had "a little" to drink. When Trooper Smith spoke to the driver, the driver's speech was slurred and the driver had difficulty following his instructions. Trooper Smith identified the driver as Patrick Wayne Arnold

by his Texas photo identification card.

Trooper Smith had the driver perform the N.H.T.S.A. standardized field sobriety tests. Trooper Smith explained the instructions for the Horizontal Gaze Nystagmus (HGN) and the driver stated that he understood. Trooper Smith's observed that the driver had equal tracking and equal pupil size in both eyes; lacked smooth pursuit in both eyes; that the driver had distinct and sustained nystagmus at maximum deviation in both eyes; had onset of nystagmus prior to 45 degrees in both eyes; and did have vertical nystagmus present. Trooper Smith had the driver stand in position for the walk and turn test. Mr. Arnold could not stand in position and continuously asked to use the bathroom. When he attempted to stand in position, he had difficulty and swayed from side to side as he stood. He refused to listen to the instructions for this test and refused to perform the test.

The plastic bag found in the vehicle contained two six packs of Busch beer along with the receipt. The driver was transported to Kingwood Hospital where he provided a voluntary specimen of his blood at 12:05 am on 07/02/2009. The blood specimen was placed into the evidence container and marked as evidence. The blood specimen showed 0.26 grams of alcohol per 100 milliliters of blood, which is over the legal limit.

Mr. Arnold purchased two six packs of beer from the Respondent moments before his arrest for driving while intoxicated. The store video showing Mr. Arnold entering the store, going to the beer cooler, taking beer from the cooler, paying the cashier, and exiting the store does not show him exhibiting any signs of intoxication at the time of purchase. The parties also stipulated that the Respondent's employee did not observe any signs of intoxication of Mr. Arnold while he was in the store or at the time of the purchase. The employee who sold the beer was not TABC seller certified, and no criminal charges were filed against the store clerk for selling the beer.

IV. ANALYSIS

Petitioner argues that because Mr. Arnold's blood alcohol content was over 0.08, the Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6), and that strict

liability would apply to the clerk for selling alcohol to an intoxicated person.

The parties stipulated that the customer was over the 0.08 level of alcohol concentration at the time of the beer purchase. However, the store clerk did not observe any signs of intoxication of the customer, and the store video does not reflect any signs of Mr. Arnold's intoxication either entering or leaving the premises. Mr. Arnold did not exhibit any loss of his normal use of his physical or mental faculties by reason of the introduction of alcohol at the time of the purchase. These facts are undisputed and agreed to by the parties.

Staff argues that they have met the burden and the business establishment is liable *per se* for selling alcohol to an intoxicated person because the customer was above the 0.08 legal limits for intoxication when he purchased the beer from the store clerk even though he did not exhibit any classic signs of intoxication at the time of purchase. The ALJ disagrees. The appropriate standard is what a reasonably prudent person would do. In applying the strict 0.08 standard, without any outward visible signs of intoxication, Staff would require sellers of alcoholic beverages to test all customers before selling any alcoholic beverages even when customers do not exhibit any signs of intoxication at the time of purchase. Testing would be the only way a seller of alcohol could be certain that an individual was intoxicated. Applying the 0.08 definition in the manner proposed by TABC would be unreasonable and unduly burdensome. The only reasonable interpretation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6) is one that subjects a seller of alcohol to sanctions when it is shown that the seller served alcohol to an individual who did not have the normal use of his mental and physical faculties by reason of the introduction of alcohol. The 0.08 definition must be used in tandem with this standard. There must be some evidence of intoxication, either by personal observation or by the number of alcoholic drinks served to an individual, in conjunction with the 0.08 definition, in order to hold the Respondent liable for his employee selling alcohol to an intoxicated person.

The employee who sold the beer to the customer was not TABC seller certified pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14. The TABC seller certification is training given to employees to help prevent the sale of alcohol to a minor or to an intoxicated person. It trains employees to

look for certain clues in the sale of alcohol that would suggest an individual to be intoxicated. Unlike a bartender serving alcohol by the drink to an individual in a bar environment where there is knowledge of the number of drinks served to a person that may be a factor as to intoxication, the case presented is a one-time carry out beer purchase. The customer did not exhibit any signs of intoxication to the store clerk and neither did the store clerk detect any odor of alcohol on the customer's breath. No classic signs of intoxication were present for the store clerk to observe. The TABC seller training course would be inconsequential because there were no obvious signs of intoxication to be observed. The store clerk had no way of knowing the level of alcohol concentration of the customer when he sold beer to him, even if he had taken the TABC course.

In summary, the evidence did not establish that the employee of Respondent should have known Mr. Arnold to be intoxicated. Since Staff bore the burden of proof, the ALJ recommends no action against the Respondent as result of the allegation of selling alcohol to an intoxicated person.

V. RECOMMENDATION

The ALJ recommends that Petitioner not be allowed to suspend Respondent's permit.

VI. FINDINGS OF FACT

1. ZK International Inc. d/b/a Splendor Food Mart (Respondent) is the holder of a Wine and Beer Retailer's Off Premise Permit, No. BQ-610039, for the premises located at 14651 Hwy 59 North, Splendor, Montgomery County, Texas.
2. A Notice of Hearing dated February 16, 2010, was issued by the Staff of Texas Alcoholic Beverage Commission (Petitioner) notifying Respondent that a hearing would be held on whether Respondent's permit should be suspended because Respondent's agent, servant, or employee sold, served, or delivered an alcoholic beverage to an intoxicated person, on July 1, 2009. The Notice of Hearing informed Respondent of the time, place, and nature of the hearing.
3. On June 25, 2010, a public hearing was held before Administrative Law Judge (ALJ) Timothy Horan in Houston, Texas. The Petitioner appeared at the hearing, and was represented by Staff attorney Sandra Patton. Respondent was represented by attorney Ronald Monshaugen. Both sides announced ready, evidence was presented, and the record

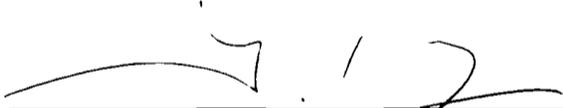
closed that same day.

4. On July 1, 2009, Patrick Wayne Arnold, purchased beer from an employee of Respondent at Splendor Food Mart.
5. On July 1, 2009, Patrick Wayne Arnold had an alcohol concentration above 0.08 when he purchased beer from Splendor Food Mart
6. On July 1, 2009, while at Splendor Food Mart, Patrick Wayne Arnold did not exhibit any signs of intoxication nor did he exhibit any signs that he did not have the normal use of his physical or mental faculties by reason of the introduction of alcohol.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction to conduct the 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. Proper and timely notice of the hearing was given to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.051 and 2001.052; and 1 TEX. ADMIN. CODE § 155.501
4. On July 1, 2009, Respondent or Respondent's agent, servant, or employee, did not sell, serve, or deliver an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6).
5. Petitioner is not authorized to suspend Respondent's permit for a Wine and Beer Retailer's Off Premise Permit No. BQ-61003 for the premises known as ZK International Inc. d/b/a Splendor Food, located at 14651 Hwy North, Splendor, Montgomery County, Texas.

SIGNED August 3, 2010.



TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS