

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

October 19, 1999

Doyme Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731

**CERTIFIED MAIL,**  
**RETURN RECEIPT**  
**Z 283 051 834**

**Docket No. 458-99-0881; Texas Alcoholic Beverage Commission vs. Chereah, Inc. d/b/a Tristar Beer & Wine Liquor Store; TABC Case No. 583318**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Stephen F. Shaw, Attorney for the Respondent. For reasons discussed in the proposal, I recommend that Respondent's Package Store Permit Number P-264485, and Beer Retainer's Off Premise License Number BF-316786 should be canceled for cause.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.



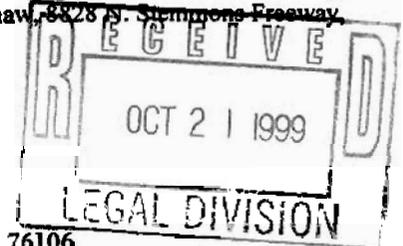
Sincerely,

A handwritten signature in black ink, appearing to read "Tanya A. Cooper".

Tanya A. Cooper,  
Administrative Law Judge

TC:ds  
Enclosure

xc: Shanee Woodbridge, State Office of Administrative Hearing - **Regular Mail**; Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - **CMRR# Z 283 051 835**; Stephen F. Shaw, ~~8828 S. Stemmons Freeway,~~ Suite 320, Dallas, Texas 75247- **CMRR # Z 283 051 836**



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DOCKET NO. 458-99-0881

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
CHEREAH, INC., D/B/A TRISTAR BEER & WINE LIQUOR STORE P-264485 & BF-316786 DALLAS COUNTY, TEXAS (TABC CASE NO. 583318)	§ § § § §	ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC Staff) brought this disciplinary action against Chereah, Inc., d/b/a Tristar Beer & Wine Liquor Store (Respondent), alleging that its agent or employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of Texas Alcoholic Beverage Code §106.13(a). In the alternative, TABC Staff additionally alleged that Respondent had engaged in a device, scheme, or plan which surrendered control of the employees, premises, or business of the permittee to persons other than the permittee, contrary to provisions of Texas Alcoholic Beverage Code §109.53. TABC Staff requested that Respondent's permits be canceled for cause in the event either violation was found to have been committed. This proposal finds that Respondent or its agent made a criminally negligent sale of alcoholic beverage to a minor, but does not find that Respondent has engaged in a device, scheme, or plan that surrendered control of the premises to persons other than permittee. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permits.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01, and §106.13 (the Code). The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There are no contested issues of notice or jurisdiction in this proceeding.

On September 3, 1999, a hearing convened before ALJ Tanya Cooper, in the State Office of Administrative Hearings, located at 6300 Forest Park Road, Suite B230, Dallas, Dallas County, Texas. Petitioner was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney.

Respondent appeared and was represented by counsel, David Hill, Attorney at Law. Evidence was received from both parties through witness testimony and documentary evidence. The record was closed on September 17, 1999, after the parties were allowed an opportunity to submit written proposed findings of facts and conclusions of law.

### LEGAL STANDARDS AND APPLICABLE LAW

The Texas Alcoholic Beverage Commission is authorized to cancel or suspend a permit or license for not more than 60 days pursuant to TEX. ALCO. BEV. CODE ANN. §§11.61 and 61.71(a)(5), if a licensee or permittee violates the Code. In this case, a violation of TEX. ALCO. BEV. CODE ANN. §106.13, that Respondent did, with criminal negligence, sell, serve, or deliver an alcoholic beverage to a minor is alleged.

Criminal negligence is defined in TEX. PENAL CODE ANN. §6.03(d) as

conduct, or results of conduct, when an actor 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 viewpoint.

TABC Staff, in the alternative, alleged that if Respondent's agent or employee did not sell or deliver alcoholic beverage to a minor, then Respondent had engaged in a device, scheme, or plan that surrendered control of the employees, premises, or business of the permittee to persons other than Respondent, contrary to §109.53 of the Code. This allegation is also referred to as a subterfuge in the operation of a licensed premises. The term "subterfuge" is not defined within the provisions of the Code; however, its common meaning is defined as a deception in order to . . . escape, or evade; or a deceptive device or stratagem. (See Webster's Collegiate Dictionary, Tenth Edition).

Section 109.53 of the Code states

It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit of the premises covered by such a permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission or the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices herein after declared to constitute unlawful trade practice. . . . Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation, and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. (Emphasis added).

The standard of proof required to prove a violation is that required in a civil case: the

preponderance of the evidence. The trier of fact must ask if, weighing all the evidence, the party with the burden of proof has shown by the greater weight of the evidence that the alleged violation occurred.

In this case, several questions exist. These questions are:

1. Did Respondent's agent or employee sell or deliver an alcoholic beverage to a minor?  
and;
2. If any sale or delivery occurred, was Respondent's employee or agent aware of a substantial risk that he was selling or delivering alcohol to a minor, and was the failure to perceive that risk a gross deviation from the standard of care that an ordinary person would exercise in these circumstances, as viewed from the viewpoint of the person making this type of sale? or;
3. If a sale or delivery of alcoholic beverage was not made by Respondent's agent or employee in violation of the Code, did Respondent allow someone other than an agent, employee, or servant of Respondent, to exercise control of the licensed premises or the permittee's business being conducted on the licensed premises?

#### EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Package Store Permit, P-264485, and Beer Retailer's Off Premises License, BF-316786, issued to Chereah, Inc., doing business as Tristar Beer & Wine Liquor Store, 3324 Samuell Blvd., Dallas, Dallas County, Texas, ("Tristar"). TABC Staff alleges that Respondent's agent or employee, with criminal negligence, sold or delivered an alcoholic beverage to a minor, on February 13, 1999, or in the alternative, if the a sale or delivery to minor was not made by Respondent's agent or employee that a subterfuge existed in the operation of Respondent's business on the licensed premises.

On February 13, 1999, Agent L. Mergerson and Sgt. J. Busby, Texas Alcoholic Beverage Commission, were parked in an unmarked vehicle on a parking lot near the license premises, Tristar, monitoring an ongoing undercover operation at another nearby location via radio contact. Agent Mergerson and Sgt. Busby first observed two youthful appearing individuals inside Tristar. Two other individuals, were also inside the premises and appeared to be working. Sgt. Busby stated the situation seemed unusual to him for several reasons. First, the patrons appeared very youthful. Second, the business was being operated by persons not of the general ethnic makeup of the community which is black and Hispanic. Lastly, a new model motor vehicle was backed into a parking position in front of Tristar, rather than parked in a normal manner.

As Agent Mergerson and Sgt. Busby observed the events in Tristar, one person was behind the store's counter at the cash register. The other person was moving about the premises. The youthful persons, later identified as Jason Sprouse and Amber Dody, exited from the premises and

were followed by the person seen moving about the store. This individual was later identified as Matthew Thomas.

A conversation took place between Mr. Thomas and the two younger persons in front of the store. While talking together outside the licensed premises, a Dallas Police Department patrol unit was in the nearby parking lot. Mr. Thomas reentered Tristar, placed several alcoholic beverages into a box, and exited from the premises with the beverages placing them in the vehicle that was backed up in front of Tristar. Mr. Thomas, along with Mr. Sprouse and Ms. Dody, got into the vehicle and drove away from the location. The vehicle appeared to make a circle around the block where Tristar is located.

During this time, the marked patrol unit left from the area. After a short time, the vehicle with Mr. Thomas, Mr. Sprouse, and Ms. Dody returned to the front of Tristar. Mr. Thomas exited from the vehicle at the curb and Mr. Sprouse drove it away with the alcoholic beverages inside the vehicle. Agent Mergerson contacted Mr. Thomas as he was reentering the licensed premises. Sgt. Busby stopped the vehicle and contacted Mr. Sprouse. An investigation of the transaction was undertaken by Agent Mergerson and Sgt. Busby at this point.

Mr. Thomas indicated to Agent Mergerson that he was an employee of the licensed premises. This information was also confirmed to Agent Mergerson by the other individual working on the premises with Mr. Thomas at the store's cash register. When asked about the possible violation of selling alcoholic beverages to a minor, Mr. Thomas first claimed that the beverages were his, but later stated that he had been instructed by Dallas police officials that it was permissible to make this type of transaction provided that he, a person over twenty-one years of age, placed the beverages inside the vehicle.

Sgt. Busby obtained identification from Mr. Sprouse verifying that he was a minor at the time of this event. Mr. Sprouse was obviously youthful in appearance and demeanor. He reported purchasing the alcoholic beverages, a bottle of Vodka, a six-pack of Bud Ice Light beer, and Zima malt beverage, from Mr. Thomas. These items were recovered from Sprouse's vehicle and possession by Sgt. Busby. Sprouse indicated that no identification was requested by Mr. Thomas prior to the sale, although his identification was in his possession and was produced at Sgt. Busby's request showing that he was under twenty-one years of age.

Respondent's agent, Martin Uthup, testified that he was not at the store February 13, 1999. Mr. Uthup stated that this business is a "family business" controlled by him and operated nearly exclusively by either himself or his wife. On occasions when he or his wife cannot be present on the premises, Mr. Uthup's cousins work on their behalf. His cousins are authorized to make sales of the premises' merchandise, including alcoholic beverages, and maintain control of the premises. There are no paid employees.

On February 13, 1999, Mr. Uthup's cousin, Joseph, was working in place of Mr. Uthup or his wife. When asked, Mr. Uthup was uncertain of Joseph's last name, believing it was either

Matthew or Thomas. He stated, however, that the person named Matthew Thomas identified to Agent Mergerson and on the premises during this incident was unknown to him. No evidence was presented by Respondent to establish what, if any, policies were in place for persons working on the premises regarding obtaining identification in sales of alcoholic beverages.

Mr. Uthup did not testify regarding the economic impact any suspension of Respondent's permits might have on this business. Given however that this business is licensed as a package store, it is reasonable to infer that a primary source of its revenue should be from sales of alcoholic beverages. As a result, a suspension or cancellation of Respondent's permits would have a great impact on Respondent's business. However Respondent's violation history, as maintained by TABC Staff, reveals prior enforcement actions have been taken against Respondent for other Code violations including a previous violation of a similar nature as alleged in this instance. In 1997, Respondent's permits were suspended for seven days for a sale to minor violation. In addition to this seven-day suspension, Respondent's permits have been suspended for a lessor period for a Code violation unrelated to sales of alcoholic beverages.

### ANALYSIS

From the evidence presented, Staff has met its burden of proof establishing that a criminally negligent sale or delivery of alcoholic beverage was made to a minor by Respondent's agent on the licensed premises. This transaction began with a minor, Mr. Sprouse, entering into the licensed premises, Tristar Beer & Wine Liquor Store. Although the transaction may have been further negotiated and ultimately completed outside the physical confines of the premises, it is clear that an agent of the licensed premises took store merchandise consisting of alcoholic beverages from the licensed premises and delivered these beverages to a minor.

Two individuals were working on the premises on February 13, 1999. One person was working behind the store's counter and the other moving about the store. Mr. Sprouse entered and then exited from the premises. He was followed from Tristar by the individual observed moving about the store working, and later identified as Mr. Thomas. After a conversation between Mr. Sprouse and Mr. Thomas took place in front of the licensed premises, Mr. Thomas reentered the store and packed a box of alcoholic beverages. This activity is consistent with the actions of a person authorized to exercise control over premises merchandise. Then Mr. Thomas delivered the packed box to Mr. Sprouse placing it into Mr. Sprouse's vehicle that was backed up in front of the store. When Mr. Sprouse and Mr. Thomas ultimately parted company, Mr. Sprouse was in control of the alcoholic beverages and driving the vehicle away from the licensed premises. Mr. Thomas was returning inside the premises.

When contacted about the violation, both men inside the licensed premises stated that Mr. Thomas was a Tristar employee. From the evidence produced, Respondent may as a technical matter, not have any employees; but nevertheless, Mr. Thomas was acting as Respondent's agent. While observed at Tristar, Mr. Thomas' actions were consistent with performing work in furtherance of Respondent's business, including exercising control over the licensed premises' merchandise.

Respondent, as a corporate entity, must, by necessity, rely on agents to perform all of its activities. Mr. Uthup is its primary agent and acts on Respondent's behalf. Mr. Uthup's wife also acts as an agent for Respondent when she is operating the licensed premises. On occasions when Mr. Uthup or Mrs. Uthup are not present, other family members operate the licensed premises.

On February 13, 1999, Mr. and Mrs. Uthup were not present. Two other individuals were operating the premises. Both men indicated that they were authorized to be there and business was being conducted. Although Mr. Uthup denied knowing an individual named Matthew Thomas, or authorizing him to conduct any business on behalf of Respondent, that portion of his testimony lacks credibility when viewed in conjunction with his inability to provide the last names of his other family members he did authorize to be working from time to time at Tristar, believing their last names were "Matthew" or "Thomas", but not "Matthew Thomas".

Mr. Sprouse paid Mr. Thomas for the alcoholic beverage before he was allowed to leave from the vicinity of the premises with the alcoholic beverage in his sole possession. No identification was requested; although Mr. Sprouse did possess identification showing he was below twenty-one years of age. Further, Mr. Thomas' actions in completing this transaction with Mr. Sprouse and his statements to Agent Mergerson show that this sale was made by him with criminal negligence.

Mr. Sprouse was obviously under the lawful age to purchase alcoholic beverage due to his youthful appearance and demeanor. He had entered the store, but no consummation of the transaction was allowed inside the premises. Instead, Mr. Thomas followed Mr. Sprouse outside the store and spoke with him in front of the premises. Then Mr. Thomas returned inside the premises, boxed the alcoholic beverages, and then delivered the box to Mr. Sprouse by placing it into his vehicle. The statements made to Agent Mergerson indicate that Mr. Thomas was aware that sales to minors were prohibited and offered alternative explanations for allowing Mr. Sprouse to leave from the premises with the beverages in his possession. At first, Mr. Thomas claimed the beverages were for himself. At a later point during the investigation, he abandoned the claim that the beverages were his and related that other law enforcement officials had outlined the practice of delivering alcoholic beverage directly into a vehicle was sufficient to avoid any responsibility for unlawful sale of alcoholic beverages to a minor.

Based upon these factors, TARC Staff has met its burden to show that it is more likely than not that Respondent's agent was criminally negligent in making a sale of alcoholic beverage to a minor. Mr. Thomas was acting as Respondent's agent as he operated the licensed premises on February 13, 1999. He and another person were working at the premises. Alcoholic beverages, vodka, beer, and malt liquor, were purchased by Mr. Sprouse. Mr. Sprouse was a minor when the sale of alcoholic beverage was made, as evidenced by his valid identification information produced to Sgt. Busby on his request. This sale was made with criminal negligence due to the apparent youthful appearance of Mr. Sprouse, Mr. Thomas' failure to check his identification, and delivery of the alcoholic beverages directly from the licensed premises into Mr. Sprouse's vehicle as it was parked in front of the licensed premises. By his conduct, Mr. Thomas was aware, or should have

been aware, that he created a substantial, unjustifiable risk, if not a certainty, that alcoholic beverages were being delivered and sold to a minor.

Having met its burden regarding the first allegation, establishing that Respondent's agent committed this violation, the alternative pleading relating to subterfuge cannot be established in connection with this incident. Exclusive control of the premises and its business was maintained by Respondent or its agents on February 13, 1999. No further discussion of this alternative allegation will be made by the ALJ in this Proposal for Decision.

TABC Staff requested cancellation for cause of Respondent's permit. The ALJ agrees with Staff and recommends that Respondent's permits be canceled. In reaching this recommendation the ALJ considered the following as relevant factors:

1. Respondent's violation history contains previous enforcement actions, including a permit suspension for sale of alcoholic beverages to a minor; and
2. The lack of any evidence showing any measures being taken to prevent this type of violation from occurring in the future.

### RECOMMENDATION

The ALJ recommends that Respondent's permits be canceled.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be and are denied.

### FINDINGS OF FACT

1. Chereah, Inc., d/b/a Tristar Beer & Wine Liquor Store (Respondent) holds a Package Store Permit, Permit No. P-264485, and Beer Retailer's Off-Premises License No. BF-316786.
2. On June 11, 1999, TABC Staff gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice, appeared at the hearing through its agent, Martin Uthup, and was represented by counsel.
3. Respondent's premises was under the exclusive control of its agent, Martin Uthup, or his designated agents, on February 13, 1999.
4. On February 13, 1999, Respondent's agent, Matthew Thomas, was working at Tristar Beer & Wine Liquor Store.

5. On February 13, 1999, Mr. Thomas delivered and sold Jason Sprouse alcoholic beverages, a bottle of Vodka, six-pack of Bud Ice Light beer and six-pack of Zima, malt beverage.
6. At the time of the sale and delivery, Mr. Sprouse was under 21 years of age as demonstrated was by his valid Texas identification card.
7. Mr. Sprouse was youthful in appearance and demeanor.
8. Mr. Thomas did not ask for any proof of age from Mr. Sprouse prior to delivering alcoholic beverages from the licensed premises into Mr. Sprouse's vehicle and selling alcoholic beverages to him.
9. Respondent's violation history reveals two prior permit suspensions, including a previous suspension for a sale to minor violation.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01 and §106.13.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3 - 8, Respondent's agent delivered and sold alcoholic beverages to a minor and did so with criminal negligence violating TEX. ALCO. BEV. CODE ANN. §§1.04(11); 11.61; 26.03(b); and 61.71(a)(5).
5. Based on Findings of Fact Nos. 3 - 9 and Conclusion of Law No. 4, Respondent's Package Store Permit, P-264485, and Beer Retailer's Off-Premises License, BF-316786 should be canceled for cause.

SIGNED this 19<sup>th</sup> day of October, 1999.

  
TANYA COOPER  
Administrative Law Judge  
State Office of Administrative Hearings