

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 10, 1999

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

CERTIFIED MAIL Z 409 580 948
RETURN RECEIPT REQUESTED

RE: Docket No. 458-99-1454; TABC vs. MZ Enterprises, Inc. d/b/a Queen's Beverage Mart Permit No. P-228411, Fort Bend County Texas (TABC No. 581264)

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Dewey Bracken, Staff Attorney representing the Texas Alcoholic Beverage Commission and to Herbert Gee, Attorney representing Respondent with Mohammed Zahid acting as party representative. For reasons discussed in the Proposal for Decision, I have recommended that the permittee's permit No. P-228411 be suspended for ninety days.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

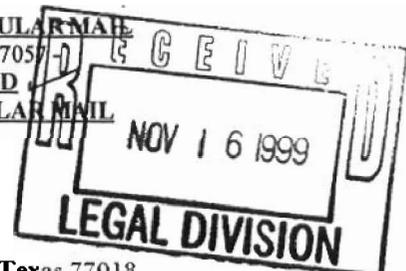
A handwritten signature in black ink that reads "Don Smith".

Don Smith
Administrative Law Judge

DS:rfm/99-1454

Enclosure

cc: Dewey Bracken, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - REGULAR MAIL
Herbert Gee, Gee an& Keepman, P.C., 2620 Fountainview, Suite 250, Houston, TX 77057
VIA CERTIFIED MAIL NO. Z 409 580 949. RETURN RECEIPT REQUESTED
Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearings- REGULAR MAIL



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TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE
	§	
	§	
V.S.	§	
	§	OFFICE OF
MZ ENTERPRISES, INC. D/B/A QUEEN'S BEVERAGE MART PERMIT NO. P-228411	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC or the Commission) brought this action against a licensee of the commission for selling an alcoholic beverage to a minor on two separate occasions. The Staff recommended that the subject license be suspended for ninety days for both offenses. The licensee denied any criminal negligence. After reviewing all the evidence the administrative law judge finds that licensee did commit the alleged violations, and that the subject license should be suspended for ninety days.

I. Procedural History.

On August 10, 1999, the Commission's Staff (the Staff), notified MZ Enterprises, Inc. d/b/a Queen's Beverage Mart (the Respondent) that the Staff would seek disciplinary action against the Respondent's permit because the Respondent or his agent, employee, or servant sold alcoholic beverages to minors. The Staff asserted that such acts constituted grounds for suspension or cancellation of the Respondent's Permit.

The hearing commenced on October 1, 1999, in the offices of the State Office of Administrative Hearings 2020 North Loop West, Suite 111, Houston, Harris County, Texas. After the taking of evidence, the hearing was concluded the same day and the record was closed. The Staff was represented by Mr. Dewey Brackin. The Respondent was represented by Mr. Herbert Gee.

II. Evidence Presented

A. Exhibits

At the hearing, Staff and Respondent offered into evidence the following:

Staff's Exhibit # 1 - Copy of Fake Oklahoma ID

Staff's Exhibit # 2 - Copy of Photo of Colby Fitzgerald

Staff's Exhibit # 3 - Copy of "Under 21" Texas Driver's License

Staff's Exhibit # 4 - Copy of Photo of Brandie Brunkenhoefer

B. Evidence

1. Testimony of Roland Garza:

Roland Garza is an agent for the TABC. On February 27, 1999, he was working a "Cop and Shop Operation" next to Queen's Beverage Mart. A "Cop and Shop Operation" is a operation were the agent posses as a clerk in a store next door to a liquor store in order to catch minors buying alcohol or adults buying alcohol for minors. During the operation he observed a male, who appeared to be a minor, drive up in a Ford Pickup Truck. The male went inside Queen's Beverage Mart, purchased a bottle of Jack Daniels Whiskey, and then left in his truck. TABC stopped the truck and had the male identify himself. The male was Colby Fitzgerald, who admitted he had used a fake I.D. to purchase a 750 ml bottle of Jack Daniels Whiskey. Agent Garza took the fake Oklahoma I.D. card from Colby Fitzgerald. It was the opinion of Agent Garza that no one could mistake Colby Fitzgerald to be under the age of twenty-one. It was also his opinion that the clerk should have known the I.D. to be fake. The I.D. was the type anyone can buy at flea markets. The I.D. does not say that it is a driver's license or identification card, the printing on the card is poor, the photo on the card is off-set, and the card shows no restriction codes on the back. Agent Garza took Colby Fitzgerald back to the store and confronted the clerk. The clerk was Mohammad Qahid. Agent Garza testified that Mr. Qahid knew he was selling alcohol to a person under twenty-one, because there was no mistaking the youthful appearance of Colby Fitzgerald, and because the I.D. was such an apparent fake.

2. Testimony of Colby Fitzgerald:

Colby Fitzgerald is nineteen years old. His date of birth is January 6, 1980. He works at a Pappadeaux Restaurant. On February 27, 1999, he was nineteen years old. He purchased a 750 ml bottle of Jack Daniels at Queen's Beverage Mart with a fake I.D. card he had purchased at a photocopying store on Westheimer. He paid \$15.00 or \$16.00 for the bourbon. He handed the clerk the I.D. card, the clerk looked at him, looked at the I.D. card, and sold him the bourbon.

Colby Fitzgerald testified that he pled guilty to charges of Minor In Possession, and Using Fake Identification Card. His punishment was a thirty day suspension of his driver's license, six hours community service, and attendance at an Alcohol Awareness Course. The photo on the fake Oklahoma I.D. is how he appeared on February 27, 1999. It was his opinion that the clerk knew, or should have known, the I.D. was fake, because the ink on the I.D. was smudged, and there were no markings on the I.D. He did admit that he had previously used the fake I.D. to purchase a beer at a gas station.

3. Brandie Brunkenhoefer:

Brandie Brunkenhoefer was involved in the TABC minor sting operation on September 26, 1998. TABC minor sting operations involve the TABC recruiting minors who physically appear their age. Brandie Brunkenhoefer's date of birth is February 14, 1980. She was eighteen years old on the day of the sting operation. She went into Queen's Beverage Mart with another minor. She went to the cooler, got a six pack of Bud Light beer, and took it to the check out counter. An elderly black lady was on the customer side of the counter. The lady took her money, handed it to the clerk, the clerk rang up a sale without asking her for any identification, the clerk handed the change to the lady, the lady handed the change to the minor, and the minor left with the beer.

Brandie Brunkenhoefer testified that on September 26, 1998, she was involved in five TABC minor sting operations. Exhibit number four is a copy of a photograph taken of her on September 26, 1998 by the TABC. Exhibit number three is her Texas Driver's License on September 26, 1998. She testified that all five establishments sold her alcoholic beverages without asking for her identification. When asked about going out to Clubs, she testified that she has tried to get into twenty-one and over Clubs, but none have admitted her. When asked why no one requested her identification at the liquor stores, she said "I guess I look over twenty-one."

4. Bernice Burger:

Bernice Burger is an agent with the TABC. She testified that on September 26, 1998, a sting operation was conducted at Queen's Beverage Mart. Brandie Brunkenhoefer went into the store and selected a beer. There was an elderly black woman standing at the counter, who was talking to the clerk, and stood in the way when Ms. Brunkenhoefer came up. The clerk ask Ms. Brunkenhoefer if that would be all, did not ask for any identification, and the money was exchanged through the lady. The lady took the money from Ms. Brunkenhoefer, handed it to the clerk, the clerk rang up a sale, handed the change back to the lady, who gave the change to Ms. Brunkenhoefer. A video was made of the transaction.

5. The Video:

A video was made of the sting operating on September 26, 1998 at Queen's Beverage Mart located at 5174 Ave H in Rosenberg, Fort Bend County, Texas. The minor carried the video camera into the Liquor Store. It was daylight. The video shows the clerk walking up to the counter. There is an elderly black lady already at the counter on the customer side. Conversation:

Lady: "May I help you -- I'm the saleslady."
Takes Ms. Brunkenhoefer's money. Turns to clerk.

Lady: "I'm his customer. This is her money."

Clerk: "Come on, I'm looking for a girl to get married."

Lady: "She handed him a \$5.00 bill."

Clerk gives change back to Ms. Brunkenhoefer. Then the other minor buys Marlborough Lights by similar transaction through the lady.

III. Final Argument

Staff recommended a ninety day suspension if there are two violations, and a sixty day suspension if there is only one violation. As to the alleged violation of February 27, 1999, the defense of a minor representing himself to be 21 years old or older, and displaying an apparently valid identification card, does not apply in this situation. As to the alleged violation of September 26, 1998, the defense of selling alcoholic beverages to a parent or to a guardian does not apply, since the lady was clearly not with the minor. If there is any doubt as to age, then it is mandatory the person be carded.

Respondent argued that no criminal negligence was proven. As to the alleged violation of February 27, 1999, the Oklahoma Identification Card appears to be an ordinary I.D., and Mr. Fitzgerald physically appears to be over 21 years of age. The I.D. was sufficient to pass, as shown by Mr. Fitzgerald's ability to buy an alcoholic beverage on a previous occasion. As to the alleged violation on September 26, 1998, the question was raised as to who actually purchased the alcoholic beverage. And, it was argued, that no one asked for Brandie Brunkenhoefer's I.D., because her appearance and demeanor are that of a person 21 years old or older.

IV. Statutory Criteria

1. Section 106.03 of the Code states, in part:

(a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.

(b) A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents himself to be 21 years old or older by displaying an apparently valid Texas driver's license or an identification card issued by the Texas Department of Public Safety, containing a physical description consistent with his appearance for the purpose of inducing the person to sell him an alcoholic beverage.

2. Section 106.13 of the Code states, in part:

(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....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...

(b) For a second offense the commission or administrator may cancel the license or permit or suspend it for not more than three months.

V. Analysis

The offense on February 27, 1999 involved a fake identification card. The identification card appears fake. The card has a picture of an anglo male on a "Oklahoma Native America" card. The printing is smudged, there are misspellings, the photo is offset, and the card is of poor quality. On February 27, 1999, no one could have mistaken Colby Fitzgerald's appearance to be anything else but that of a caucasian male under the age of twenty-one years of age.

The offense on September 26, 1998 involved a minor, an elderly lady, and the clerk. The clerk could not have mistaken the young age of Brandie Brunkenhefer. The clerk was more interested in flirting with Ms. Brunkenhefer than doing his job. The clerk should have asked Ms. Brunkenhefer for some identification. She had her "under 21" Texas Driver's License with her. The clerk knowingly sold to a minor.

The sale on September 26, 1998 was to Brandie Brunkenhefer. The elderly lady was in the store before the girls entered, had been at the counter for some time, and the clerk knew he was making the sale to the minor. Even if the sale had been to the elderly lady, the clerk would have violated the law, because he would have known that the elderly lady was buying the alcohol for an unrelated minor.

PROPOSED FINDINGS OF FACT

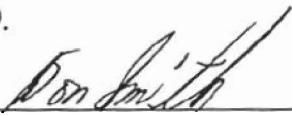
1. MZ Enterprises, Inc. d/b/a Queen's Beverage Mart is the holder of Permit P-228411. As a permittee of the TABC, Respondant is subject to the provisions of the TABC Code.
2. On August 10, 1999, notice of the hearing was properly addressed and sent by certified mail to the Respondent at 5174 Avenue H, Rosenberg, Texas 77471, pursuant to Tex. Gov't Code, Chapter 2001. Also an Order Setting Hearing for October 1, 1999 was served upon all parties, who appeared and took part in the hearing pursuant to the notices and orders.
3. The licensed premises are in Rosenberg, Fort Bend County, Texas. The venue was proper in the offices of the State Office of Administrative Hearings in Houston, Texas.
4. On February 27, 1999, Colby Fitzgerald was a minor when he purchased a bottle Jack Daniels Whiskey at Queen's Beverage Mart. .
5. On February 27, 1999, Mohammed Qahid, the clerk at the Queen's Beverage Mart, sold a bottle of Jack Daniels Whiskey to Colby Fitzgerald, whose physical appearance was that of a male under the age of twenty-one years.
6. On February 27, 1999, Colby Fitzgerald handed Mohammed Qahid an obvious fake identification card.

7. On February 27, 1999, the Respondent's agent, servant, or employee did knowingly sell an alcoholic beverage to a minor on the licensed premises.
8. On September 26, 1998, Brandie Brunkenhoefer was a minor when she purchased a six pack of Bud Light beer at Queen's Beverage Mart.
9. On September 26, 1998, the clerk at Queen's Beverage Mart sold the six pack of Bud Light beer to Brandie Brunkenhoefer, whose physical appearance was that of a female who was under the age of twenty-one years, without requesting any form of identification from her.
10. On September 26, 1998, the Respondent's agent, servant, or employee did knowingly sell an alcoholic beverage to a minor on the licensed premises.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 106.03 and 11.61(b)(2) of the Tex. Alco. Bev. Code.
2. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to Tex. Gov't. Code Ann. Chapter 2001.
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, Tex. Gov't. Code Ann., Chapter 2001 and 1 Tex. Admin. Code, Chapter 155.
4. Venue was proper in Houston, Texas, pursuant to 1 Tex. Admin. Code Section 155.13.
5. Based upon the Findings of Fact, the permittee or licensee did sell an alcoholic beverage to a minor on February 27, 1999 in violation of Section 106.03 of the Tex. Alco. Bev. Code.
6. Based upon the Findings of Fact, the permittee or licensee did sell an alcoholic beverage to a minor on September 26, 1998 in violation of Section 106.03 of the Tex. Alco. Bev. Code.
7. Based upon Conclusions of Law number five and six, the Respondent's Permit P-228411 should be suspended for ninety days.

Signed this 10 day of November, 1999.



Don Smith
Administrative Law Judge