

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 17, 1999

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

CERTIFIED MAIL NO. P 622 053 344
RETURN RECEIPT REQUESTED

RE: Docket No. 458-99-1455; TABC vs. Victor Adenrele Kaiyewu d/b/a Kay Mart Convenience, TABC Case No. 584787

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 Brackin, Staff Attorney representing the Texas Alcoholic Beverage Commission and Victor Adenrele Kaiyewu, d/b/a Kay Mart. For reasons discussed in the Proposal for Decision, I have recommended that Respondent's Wine and Beer Retailer's Off - Premise Permit BQ-306235 be suspended for 30 days and that consideration be given to allowing the payment of a penalty of \$150.00 per day in lieu of suspension.

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 replies must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

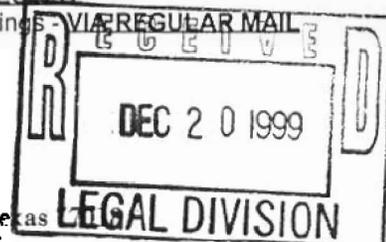
Sincerely,

A handwritten signature in black ink, appearing to read "Rex Shaver".

Rex Shaver
Administrative Law Judge

RS/rm
Enclosure

CC: Dewey Brackin, TABC, 5806 Mesa Drive, Suite 160, Austin, TX 78731 - **REGULAR MAIL**
Victor Adenrele Kaiyewu, 1261 Bluestone Drive, Missouri City, TX 77459 -
VIA CERTIFIED MAIL NO. P 622 053 345, RETURN RECEIPT REQUESTED
Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearings - **VIA REGULAR MAIL**



North Loop Office Park
2020 North Loop West, Suite 111 ♦ Houston, Texas
(713) 957-0010 Fax (713) 812-1001

SOAH DOCKET NO. 458-99-1455

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VICTOR ADENRELE KAIYEWU	§	OF
D/B/A KAY MART CONVENIENCE	§	
PERM NO. BQ-445830	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 584787)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against, Respondent, a licensee of the commission, for selling an alcoholic beverage to a minor. The Staff recommended that the Respondent's permit be suspended for 30 to 60 days. The ALJ having found sufficient evidence that beer was sold to the minor by an agent, servant or employee of the licensee recommends that the permit be suspended for 30 days and also recommends that consideration be given to allowing payment of a fine in lieu of suspension.

I. Procedural History

By Notice of Hearing dated on the 17th of August, 1999 and by Second Amended Notice of Hearing dated the 5th of October, 1999 the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Victor Adenrele Kaiyewu d/b/a Kay Mart Convenience Store (Respondent) that the Staff would seek disciplinary action against the Respondent's permit because the Respondent, its agent, servant, or employee sold an alcoholic beverage to a minor. The Staff asserted that such act constituted grounds for suspension or cancellation of the Respondent's Wine and Beer Retailer's Off Premise Permit.

The hearing commenced on October 25, 1999, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Dewey Brackin, of the TABC Legal Section. The Respondent, Adenrele Kaiyewu d/b/a Kay Mart Convenience Store, appeared Pro Se.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (The Code) §6.01 and TEX. GOV'T CODE ANN. Chapter 2001 et seq. (1998) . The State Office of Administrative Hearings has jurisdiction over 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 2003.

The Respondent is the holder of Wine and Beer Retailer's Off - Premise Permit, BQ-445830 and was the holder of such permit on the date of the alleged violation , 28rd day of May, 1999. The Second Amended Notice of Hearing in this matter was mailed to the Respondent on the 5th day of October, 1999 pursuant to TEX. GOV'T CODE ANN. Chapter 2001.

III. Evidence

From the Staff:

Documentary Evidence:

a. TABC Exhibit 1: *Affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Permit BQ-445830 issued to Adenrele Kaiyewu doing business as Kay Mart Convenience Store..*

b. TABC Exhibit 2: *Texas Alcoholic Beverage Commission Notice of Hearing directed Adenrele Kaiyewu doing business as Kay Mart Convenience Store..*

Both of these exhibits were offered and accepted without objection.

Testimony:

1. Jonathan Gabriel Cooper:

Jonathan Gabriel Cooper testified that he was born on the 1st of April, 1981 and on the 28th of May, 1999 he was 18 years of age. On the 28th of May 1999 he acted as " the minor" in a Minor Sting Operation conducted by the Texas Alcoholic Beverage Commission. In the course of theses activities he, along with Agent Lockhart of the TABC, entered the premises of the Kay Mart Convenience Store located at 9700 Telephone Road in Houston, Harris County, Texas. The witness testified that he was instructed to give his correct age and date of birth if requested to do so by the clerk. Mr. Cooper had his Texas Driver's License as proof of age and had no false identification when he entered the premises. Upon entering the premises he selected an alcoholic beverage, a 16 oz. RED DOG beer, took the beverage to the counter and purchased the beer. The person behind the cash register did not ask Mr. Cooper for any identification. Mr Cooper received his change from the cashier and left the store with the alcoholic beverage and returned to the TABC vehicle. When asked if the cashier was in the hearing room Mr. Cooper pointed out Frank Kaiyewu seated at counsel table.

2. Michael Lockhart

Michael Lockhart testified that on the 28th of May, 1999 he was employed as an agent of the Texas Alcoholic Beverage Commission. On that date it was his assignment to accompany and provide supervise the minor, Jonathan Gabriel Cooper, and act as a witness during a Minor Sting Operation. He entered the premises of the Kay Mart Convenience Store at 9700 Telephone Road in Houston, Harris County, Texas. He entered the premises before the minor to reduce chances that he and the minor might be thought to be together. Mr. Lockhart was behind Mr. Cooper in the

checkout line. He saw the cashier sell an alcoholic beverage, RED DOG beer, to the minor for 75 cents and give the minor change from the purchase. Mr Lockhart then purchased a candy bar and exited the premises. The witness identified the cashier who made the sale as Frank Kaiyewu. When he was arrested after the alleged sale the cashier was required to close the store because there was no one to take over for him.

From Respondent:

No Documentary Evidence was offered.

Testimony:

No Testimony was presented by the Respondent.

IV. Statutory Criteria

1. **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. . .

2. **Section 11.61 of the Code** states, in part:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . . (2) the permittee violated a provision of this code or a rule of the commission.

V. Analysis

There are two questions which must be answered here:

(1) Was Jonathan Gabriel Cooper a minor on the 28th day of May, 1998?

It was the undisputed testimony of Jonathan Gabriel Cooper that he was born on April 1, 1981 and was 18 years of age on the 28th of May, 1999.

(2) Did the permittee or licensee, his agent, servant or employee, with criminal negligence sell, serve, dispense, or deliver on the licensed premises, an alcoholic beverage to the minor, Jonathan Gabriel Cooper, on the 28th day of May, 1999?

The testimony of both the minor, Jonathan Gabriel Cooper, and the TABC Agent Michael Lockhart was clear, unambiguous and undisputed. The Respondent presented no evidence to contradict the witnesses against him. The Respondent maintained that while it was "unfortunate"

that his son sold the beer to the minor without asking for identification the criminal action had taken all of his money and that his store was now closed. At the same time he alleged that a suspension would "kill" his business.

PROPOSED FINDINGS OF FACT

1. The Respondent, Adenrele Kaiyewu d/b/a Kay Mart Convenience Store is the holder of Wine and Beer Retailer's Off-Premise Permit BQ-445830.
2. Frank Kaiyewu was an agent, servant or employee of Adenrele Kaiyewu d/b/a Kay Mart Convenience Store on the 28th day of May, 1998.
3. On the 28th day of May, 1998, Jonathan Gabriel Cooper was eighteen years old and therefore a minor.
4. On the 28th day of May, 1998, Jonathan Gabriel Cooper entered the licensed premises located at 9700 Telephone Road, in Houston
5. On the 28th day of May, 1998, Jonathan Gabriel Cooper purchased an alcoholic beverage from Mr. Frank Kaiyewu, who was in sole control of the licensed premises.
6. On the 28th day of May, 1998, the minor was not asked for proof of age prior to the sale of the alcoholic beverage.

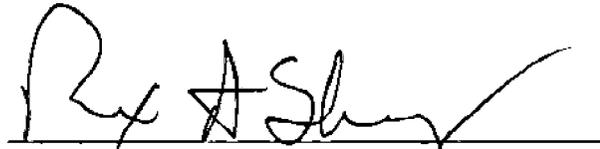
PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 106.13 and 11.61(b)(2) of the TEX. ALCO. BEV. CODE ANN.
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 2003 (Vernon's 1999).
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. On the 28th day of May, 1998 an agent, servant or employee of Adenrele Kaiyewu d/b/a Kay Mart Convenience Store did with criminal negligence sell, serve dispense, or deliver an alcoholic beverage to a minor in violation of §§106.03 and 106.13 of the TEX. ALCO. BEV. CODE ANN.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that Respondent's Wine and Beer Retailer's Off - Premise Permit BQ-306235 be suspended for 30 days and that consideration be given to allowing the payment of a penalty of \$150 per day in lieu of suspension.

Signed this 17th day of December, 1999.

A handwritten signature in black ink, appearing to read "Rex A. Shaver", written over a horizontal line.

Rex A. Shaver
Administrative Law Judge