

JMT

DOCKET NO. 492151

IN RE FAIRDON ROCKY BUDRI, ET. AL.	§	BEFORE THE TEXAS
D/B/A FRIENDLY GROCERY STORE	§	
PERMIT NO(S). BF-549702	§	
	§	
	§	ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1586)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this ²⁰12th day of April, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Phyllis W. Cranz. The hearing convened on February 10, 2006, and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 22, 2006. This Proposal For Decision (**attached hereto as Exhibit "A"**), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. **As of this date no exceptions have been filed.**

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

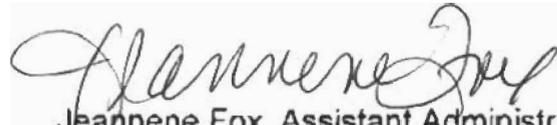
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's Permit should be Cancelled for cause, pursuant to Section 11.46 © of the Code.**

This Order will become final and enforceable on May 11, 2006, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED on this 20th day of April, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Phyllis W. Cranz
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE 817-377-3706

Fairdon Rocky Budri, et. al.
Friendly Grocery Store
RESPONDENT
4105 Boulder Park Dr.
Eules, Texas 76040-8532
CERTIFIED MAIL NO. _____
RETURN RECEIPT REQUESTED

Jerry McClain
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4001
Ph.: 214-678-4044
TABC Legal Section

Licensing Division

Ft. Worth District Office

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were no challenges to the notice of hearing, jurisdiction, or venue. The hearing concluded on February 10, 2006, and the record closed that same day.

II. JURISDICTION

TABC has jurisdiction and authority over this matter pursuant to Subchapter B, TEX. ALCO. BEV. CODE ANN., Chapter 6, § 6.01, and Chapter 61. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, under TEX. GOV'T CODE ANN., ch. 2001.

III. DISCUSSION

A. Applicable Law

TABC is authorized under TEX. ALCO. BEV. CODE ANN. § 61.71(a)(5) to cancel or suspend Respondent's license for the retail sale or service of alcoholic beverages if the Respondent with criminal negligence sold, served, or delivered an alcoholic beverage to a minor,¹ and under TEX. ALCO. BEV. CODE ANN. §106.03, Sale to Minors, and TEX. ALCO. BEV. CODE ANN. §106.13, Sanctions Against Retailer.²

¹ TEX. ALCO. BEV. CODE ANN. §61.71(a)(5) (Version 1995 and Supp. 2004-2005) states that:
GROUNDS FOR CANCELLATION OR SUSPENSION- RETAIL DEALER.

(a) 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:

(5) with criminal negligence sold, served, or delivered an alcoholic beverage to a minor;

² TEX. ALCO. BEV. CODE ANN. §106.03 (Version 1995 and Supp. 2004-2005) states that:

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

TEX. ALCO. BEV. CODE ANN. §106.13 (Version 1995 and Suppl 2004-2005) state that:

SANCTIONS AGAINST RETAILER. (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 of 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 of

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B. Evidence

TABC staff alleged that Respondent is the holder of a Beer Retailer's Off-Premises License BF-549702 issued by TABC. Respondent did not dispute this allegation. Permit records contained in TABC "Exhibit 2" establish that a Beer Retailer's Off-Premises License BF-549702 were issued to Respondent by TABC on January 27, 2004.

TABC staff alleged that on or about April 29, 2005, Respondent, Faridon Budri, with criminal negligence sold an alcoholic beverage to a minor on the licensed premises.

Agent Neva Saenz, TABC, testified that on April 29, 2005, she was working as an undercover agent on a "sting" operation concerning the sale of alcoholic beverages to minors. She stated that she was present when Budri did not request identification and sold a six pack of beer to a minor. The minor, Jason Niemala, was participating as part of an undercover operation investigating the sale of alcoholic beverages to minors for the TABC, and had been photographed that day. (TABC Exhibit 4) His driver's license that he carried with him was photographed that day before entering the licensed premises. (TABC Exhibit 5) The photographs of the minor show a male with a youthful appearance. The driver's license shows a young male who was born in July, 1988, and was 16 years of age on April 29, 2005.

Ms. Imira Farah, an acquaintance who was present at the licensed premise on April 29, 2005, was called by the Respondent. She testified that only youthful appearing customers were asked to present their identification and did not recall the minor being there nor Agent Saenz but did remember Agent Myers of the TABC coming into the licensed premises.

administrator may cancel the permit or suspend it for not more than 12 months

(c) The commission or administrator may relax the provisions of this section concerning suspension and cancellation and assess a sanction the commission or administrator finds just under the circumstances if at a hearing, the licensee or permittee establishes to the satisfaction of the commission or administrator:

- (1) that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
- (2) that the permittee or licensee was entrapped; or
- (3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee.

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Mr. Puder testified that he had never seen Agent Saenz nor the minor on the date in question and that Agent Saenz's testimony concerning the beer's cost was incorrect.

Agent Saenz was called for rebuttal testimony and stated that she could not remember exactly the price of the purchased beer but that her notes as to time, date, and price appeared on the sack containing the beer in TABC Exhibit 5.

C. Analysis, Conclusion, and Recommendation

The relevant facts are clear. Respondent holds a Beer Retailer's Off-Premises License BF-549702 issued by TABC. Respondent sold alcoholic beverages to a youthful appearing person without asking for identification as witnessed by a TABC undercover agent. The Respondent with criminal negligence sold alcoholic beverages to a minor.

Respondent's licensing history reflects several previous violations including a sale to a minor and two violations of the cash law (TABC Exhibit 2). Those three violations were settled and civil penalties paid. During her testimony, Agent Saenz stated that the Respondent had sold alcoholic beverages to a minor three times since September 2, 2004. Only the one sale on September 2, 2004 and the current contested sale appeared in the written record provided by the TABC.

In the notice of hearing, the TABC Staff had requested a cancellation or suspension of the Respondent's license.³ This request for suspension is consistent with the TABC's Standard Penalty Chart⁴ in that a second violation for selling alcoholic beverages to a minor results in a 10-90 suspension of the license. The Standard Penalty Chart is not binding in a SOAH hearing, and any

³ TEX. ALCO BEV. CODE §11.64 (Vernon 1995 and Supp. 2004-2005) ALTERNATIVES TO SUSPENSION, CANCELLATION and TEX. ALCO. BEV. CODE ANN. §106.13 (Vernon 1995 and Suppl 2004-2005) SANCTIONS AGAINST RETAILER.

⁴ 16 TEX. ADMIN. CODE §37.60 (Vernon 1995 and Supp. 2004-2005) (Tex. Alco Bev. Comm'n., Standard Penalty Chart).

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penalty recommended must be based on the record.³

At the conclusion of the hearing during argument, the TABC attorney requested cancellation of the Respondent's permit. The Respondent's prior violation history contains 3 citations. All of the prior violations and the one being contested occurred within 1 year. The Respondent previously sold alcoholic beverages to a minor only eight months ago and has not changed his operational pattern. The April 29, 2005 sale was by the Respondent and not an employee.

Accordingly, the ALJ recommends that Respondent's Beer Retailer's Off-Premises License BF-549702 issued by TABC be cancelled.

IV. FINDINGS OF FACT

1. Faridon Rocky Budri, et. al d/b/a Friendly Grocery Store, (Respondent) holds a Beer Retailer's Off-Premises License BF-549702 were issued to Respondent by TABC on January 27, 2004.

Respondent's permits were issued for the premises located at 1320 Bedford Road, Bedford Texas.

2. On April 29, 2005, Jason Niemela, a youthful appearing male who was born in July, 1988 and is a minor, purchased alcoholic beverages at the licensed premises, Friendly Grocery Store, as part of a TABC undercover operation.
3. On April 29, 2005, Respondent, Faridon Rocky Budri, sold alcoholic beverages to a youthful appearing individual without requesting any identification.
4. Respondent's permit history shows 2 cash law violations and one sale to a minor violation occurring within a 1 year period.
5. On December 15, 2005, Petitioner issued its Notice of Hearing to Respondent concerning this violation at its address of record, 4105 Boulder Park Drive, Euless, Texas 76040-8532, via certified mail, return receipt requested.

³ 14, 537.60 (g)

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On February 16, 2006, a hearing convened before ALJ Phyllis Cranz at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented by Jerry McClain, TABC Staff Attorney. Respondent appeared through its representative, Faridon Rocky Budri.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Chapters 5, 6, and 61.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, under TEX. GOV'T CODE ANN., ch. 2001.

Respondent received proper notice of hearing. TEX. GOV'T CODE ANN. §2001.052.

4. Based upon finding of Fact Numbers 3-4, Respondent violated TEX. ALCO. BEV. CODE ANN. § 61.71(a)(5) and TEX. ALCO. BEV. CODE ANN. §106.05.

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's Beer Retailer's Off-Premises License BF-549702 should be cancelled.

ISSUED ON March 22, 2006


PHYLLIS CRANZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS