

DOCKET NO. 499234

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	
	§	OF
ROSE FOOD INC.	§	
D/B/A RAM STORE NO. 7	§	
PERMIT/LICENSE NO(s). BQ517299	§	
BEXAR COUNTY, TEXAS	§	
(SOAH Docket No. 458-06-1805)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 6th day of September, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert M. Brown II. The hearing convened on 12th day of May, 2006 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 14th day of June, 2006. 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. On June 30, 2006, a Motion for Extension of Time to File Exceptions was filed by Respondent and on July 5, 2006, the Motion was granted extending the date until July 10, 2006. 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 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 your permit is hereby suspended for a period of forty (40) days.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$6,000.00 on or before the 4th day of **October, 2006**, all rights and privileges under the above described permit will be **SUSPENDED** for a period of **forty (40) days**, beginning at **12:01 A.M.** on the **11th day of October, 2006**.

This Order will become final and enforceable on 27th day of September, 2006, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this the 6th day of September, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeanne Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK/yt

The Honorable Robert M. Brown II
ADMINISTRATIVE LAW JUDGE
SOAH – San Antonio
VIA FACSIMILE: (210) 308-6854

Manuel V. Rodriguez
ATTORNEY FOR RESPONDENT
879 W. Southcross
San Antonio, TX 78211
VIA FACSIMILE: (210) 922-1990

ROSE FOOD INC.
d/b/a RAM STORE NO. 7
RESPONDENT
18014 LOVETT LANE
SPRING, TX 77379
CERTIFIED MAIL NO. 7001 2510 0000 7275 0340

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
San Antonio District Office

DOCKET NO. 458-06-1805

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

ROSE FOOD INC.
D/B/A RAM STORE NO. 7
PERMIT NOS. BQ-517299
BEXAR COUNTY, TEXAS
(TABC CASE NO. 499234)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (TABC) brought this action against Rose Food Inc. (Respondent) d/b/a Ram Store No. 7. Staff alleged one violation of the Texas Alcoholic Beverage Code (Code) by selling, with criminal negligence, an alcoholic beverage to a minor in violation of §106.13 of the Code. Staff's closing argument included a recommendation that Respondent's permit be suspended for a period of 50 days with an alternative of paying a civil penalty of \$7,500.00 in lieu of the suspension. The undersigned Administrative Law Judge (ALJ) agrees with Staff's allegation, but recommends a 40-day suspension and an alternative penalty of \$6,000.00.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law.

On May 12, 2006, the undersigned ALJ convened the hearing at the State Office of Administrative Hearings (SOAH) office located at 10300 Heritage Boulevard, Suite 250, San Antonio, Texas. TABC was represented at the hearing by Judith L. Kennison, Staff attorney. Attorney Robert A. Valdez represented Respondent. A pre-hearing conference held immediately prior to the hearing was recorded and made part of the record. The hearing concluded and the record closed on that same day.

II. DISCUSSION AND ANALYSIS

Respondent's permitted business premises for its Ram Store No.7 (Store) are located at 4927 Rigsby Road, San Antonio, Bexar County, Texas. Respondent holds a wine and beer retailer's off premises permit BQ-157229, issued by the TABC on July 8, 2002. Its permit has been continuously renewed and was last renewed on July 8, 2005.

Applicable Law

Pursuant to the TEX. ALCO. BEV. CODE ANN (CODE), TABC may suspend or cancel a permit if it is found that the permittee violated a provision of the CODE or TABC rules in accordance with §11.61(b)(2) of the CODE. Selling, serving, dispensing, or delivering, with criminal negligence, an alcoholic beverage to a minor by the Permittee or its agents, servants, or employees is a violation of §106.03 of the CODE. The sanctions are increased under §106.13 of the CODE for a second violation. TABC has the burden to prove any violation by a preponderance of the evidence.

B. TABC Contention and Evidence

Staff alleges that on July 1, 2005, Respondent's employee sold, with criminal negligence, an alcoholic beverage to a minor on the Respondent's permitted premises. The employee's actions are attributable to Respondent as the employee had not attended a TABC approved seller training program. Staff offered three exhibits and called Agent Gregory Francois as a witness.

1. TABC Exhibits.

Only two of the Staff's three exhibits were admitted as there was an objection to TABC Exhibit 3, a copy of a photograph of the purported minor, that was sustained until a proper foundation had been laid for its identification, but was never made. TABC Exhibit 1 is the notice of hearing dated March 28, 2006. TABC Exhibit 2 consists of certified copies of Respondent's current permit and administrative record prior to July 1, 2005, including an agreed order dated March 5, 2003, concerning a CODE violation of a sale of an alcoholic beverage to a minor on December 18, 2002, that suspended Respondent's permit for a period of four days or, alternatively, required a payment of a civil penalty of \$600.00 *in lieu* of the suspension.

2. Testimony of Agent Francois

Agent Francois testified that he observed the entire transaction at Respondent's premises between a certain female minor (CFM) and Respondent's Store employee, Anouar Hasbaoui. However, before he detailed his observations, Respondent made the stipulations in section C below. Thereafter, the agent said he inspected the Store and interviewed Mr. Hasbaoui. He found no posted Store policy concerning the sale of alcohol to minors behind the Store's cash register or in the employees' common areas. Mr. Hasbaoui was not trained in a TABC approved seller program.

C. Respondent's Contention and Evidence

Respondent's counsel acknowledges and expressly stipulated on the record that on July 1, 2005, Respondent's employee asked for the identification of CFM, received her identification that indicated that CFM was underage, and sold an alcoholic beverage to CFM, and that the employee was not trained in a TABC approved seller program. Respondent called Respondent's Store manager, Adel Alzamoury, as a witness.

Mr. Alzamoury testified that he was the manager of the Respondent's Store prior to and after July 1, 2005, and is the present manager. He opined that the Store is dangerous and busy as it is located in a high crime and heavily trafficked area. He fired Mr. Hasbaoui who had sold alcohol to CFM. He said that signs were posted throughout the Store for everyone to read. He strongly disapproved of TABC's policy in using minors for such "sting" operations.

D. Analysis

It is undisputed that the Respondent holds a TABC permit for its business where on July 1, 2005, Respondent's employee sold alcohol to a minor after asking and receiving CFM's identification that indicated that CFM was, in fact, underage; the Respondent's employee was not trained in a TABC approved seller program; and this was the second such incident involving a minor. Therefore, under §106.14 of the CODE, the actions of Respondent's employee shall be attributable to the Respondent who is subject to a higher range of sanctions for criminal negligence and second incident under, respectively, §§1.08, 106.03, and 106.13 of the CODE.

The two matters in contention are the length of suspension of Respondent's permit and the amount of a civil penalty in lieu of that suspension, if any. Staff's recommendation is a 50-day suspension and, alternatively, a civil penalty of \$7,500.00 in lieu of the suspension. While arguing that Staff's recommendation was too harsh a punishment, Respondent did not offer any recommendation. It is noted that the time between the Respondent's first and second violations is nearly two and half years and Respondent's employee was dismissed.

III. RECOMMENDATION

The undersigned ALJ recommends that Staff's allegation be sustained and that either Respondent's permit be suspended for a period of 40 consecutive days or, alternatively, a civil penalty of \$6,000.00 in lieu of the 40-day suspension be paid by Respondent.

IV. FINDINGS OF FACT

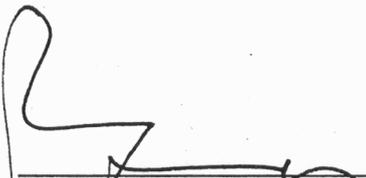
1. Rose Food Inc. (Respondent) d/b/a Ram Store No. 7 (Store) holds a Wine and Beer Retailer's Off Premises Permit BQ-517299 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 4927 Rigsby, San Antonio, Bexar County, Texas.
2. On February 24, 2003, Respondent waived a hearing concerning the allegation of a sale of an alcoholic beverage to a minor on December 12, 2002, on its premises that resulted in TABC's imposition of a 4-day suspension or, alternatively, a civil penalty of \$600.00.
3. On July 1, 2005, Respondent's employee, Anouar Hasbaoui, sold an alcoholic beverage to a minor after the minor had given the employee her identification that showed her to be under the age of 21 years old.
4. Mr. Hasbaoui was not trained under a TABC approved seller program.
5. Mr. Hasbaoui was fired.
6. On March 28, 2006, TABC Staff issued a notice of hearing notifying all parties that a hearing would be held concerning this enforcement action and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.

7. A hearing in this matter was conducted and closed on May 12, 2006, at the State Office of Administrative Hearings, 10300 Heritage Boulevard, Suite 250, San Antonio, Texas, before the undersigned Administrative Law Judge (ALJ) with TABC represented by Staff Attorney, Judith Kennison, and Respondent represented by counsel, Robert A. Valdez.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. (CODE) ch. 5, subch. B.
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 findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. chs. 2001 and 2003.
3. Respondent received adequate notice of the proceedings and hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Under the Findings, Respondent's employee's actions in the sale to a minor are attributed to the Respondent under §106.14 (a) of the CODE.
5. Based upon the Findings and Conclusions of Law, Respondent was proven by a preponderance of evidence to have sold, with criminal negligence, an alcoholic beverage to a minor on July 1, 2005, under §§1.08 and 106.03 of the CODE.
6. Based on the Findings and Conclusions, Respondent should have its Wine and Beer Retailer's Off-Premises Permit BQ-519299 suspend for 40 days and, alternatively, be assessed a civil penalty of \$6,000.00 as a second offense in accordance with §106.13(b) of the CODE. ✓

SIGNED: June 14, 2006.



ROBERT M. BROWN II
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS