

DOCKET NO. 579115

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|-------------------------------|---|---------------------|
| IN RE DAUNTLESS CORPORATION | § | BEFORE THE |
| D/B/A WEST HILL EXXON | § | |
| PERMIT NO.BQ-306235 | | |
| | § | TEXAS ALCOHOLIC |
| | § | |
| WALKER COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-99-0070) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 17th day of November 1999, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on July 20, 1999 and adjourned July 20, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 20, 1999. This 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. 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 Permit No. BQ-306235 is herein **SUSPENDED** for ten (10) days beginning on February 24, 2000, unless a penalty of \$1,500.00 is paid by February 17, 2000.

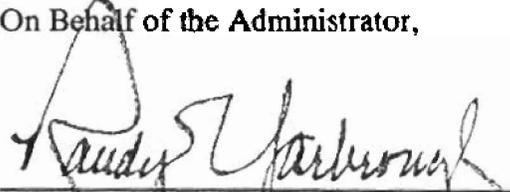
This Order will become final and enforceable on December 8, 1999, unless a Motion for Rehearing is filed before that date.

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

WITNESS MY HAND AND SEAL OF OFFICE on this the 17th day of November, 1999.

On Behalf of the Administrator,




Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE (713) 812-1001

Shanee Woodbridge, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Dauntless Corporation
d/b/a West Hill Exxon
RESPONDENT
1408 IH 45
Huntsville, TX 77340
CERTIFIED MAIL/RRR NO. Z 473 038 668

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Bryan District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER:579115

REGISTER NUMBER:

NAME: DAUNTLESS CORPORATION TRADENAME:WEST HILL EXXON

ADDRESS: 1408 IH 45, Huntsville, Texas 77340

DATE DUE: February 17, 2000

PERMITS OR LICENSES: BQ-306235

AMOUNT OF PENALTY: \$1,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to a pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 17TH DAY OF FEBRUARY 2000, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711**

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

SOAH DOCKET NO. 458-99-0070

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE
COMMISSION §
§
V.S. §
§ OFFICE OF
DAUNTLESS CORPORATION D/B/A §
WEST HILL EXXON §
PERMIT NO. BQ- 306235 §
WALKER COUNTY, TEXAS §
(TABC CASE NO. 579115) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Petitioner) brought this action against Respondent, a permittee of the commission, for selling, on the licensed premises, an alcoholic beverage to a minor on April 25, 1998; the alleged sale being in violation of §106.03 and §106.13 of the Texas Alcoholic Beverage Code. The Staff recommended that the permit be suspended for 60 days. The permittee appeared at the hearing by its authorized representative. Having found that an alcoholic beverage was sold to a minor on the licensed premises by an agent, servant or employee of the licensee with criminal negligence, the Administrative Law Judge recommends that the permit be suspended for a period of 10 days and that consideration be given to allowing the payment of a penalty of \$150.00 per day in lieu of that suspension.

I. Procedural History

On June 15, 1998, the Staff of the Commission (Staff), notified Dauntless Corporation, d/b/a West Hill Exxon (Respondent), that Staff would seek suspension or cancellation of the Respondent's Wine and Beer Retailer's Off-Premise Permit because an agent, servant or employee of Respondent with criminal negligence sold an alcoholic beverage to a minor on the licensed premises.

The hearing commenced on July 20, 1999, in the Commissioner's Court Room, in the Walker County Courthouse, 1100 University Avenue, Huntsville, Texas. The Staff was represented by Mr. Dewey Brackin. The Respondent, Dauntless Corporation, d/b/a West Hill Exxon, was represented by its authorized agent, Mr. Adrian Heath. After the taking of evidence, the hearing was concluded, but the record was left open until August 3, 1998 at 5:00 p.m. for the filing of post hearing briefs and proposed findings of fact and conclusions of law by the parties. No post hearing filings were received by the ALJ.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Tex. Also. Bev. Code Ann. (the Code) §6.01 and Tex. Gov't. Code Ann. Chapter 2004 et seq.

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AL DIVISION

(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.

On January 15, 1998, notice of hearing was properly addressed and sent by certified mail to the Respondent at West Hill Exxon, 1408 IH-45, Huntsville, Texas 77340. This matter was set by the State Office of Administrative Hearings for hearing on February 18, 1999 and after subsequent pre-hearing conferences and motion to transfer venue, all parties were properly noticed for the hearing on July 20, 1999, in Huntsville, Texas. Both parties appeared and announced ready.

III. Evidence

From the Staff:

Documentary Evidence:

TABC Exhibit 1: *Photograph of Brian Dale Smallwood taken on April 25, 1998*

TABC Exhibit 2: *Affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Permit BQ-306235 issued to Dauntless Corporation doing business as West Hill Exxon.*

TABC Exhibit 3: *Videotape from exterior of West Hill Exxon showing Mr. Smallwood entering and leaving with an alcoholic beverage in a can.*

Testimony:

1. Brian Dale Smallwood :

Brian Dale Smallwood testified that on April 25, 1998 he was eighteen years of age having been born on March 15, 1980. He was a volunteer who took part in the "minor sting" operation conducted by the Huntsville Police Department on April 25, 1998. One of the locations at which he was able to purchase an alcoholic beverage was the West Hill Exxon. Before entering the West Hill Exxon he stated the name so that his voice would be recorded on the videotape being made by one of the officers taking part in the "operation". Mr. Smallwood entered West Hill Exxon, selected a single can of Budweiser beer stood as number three in line for the cashier, gave the cashier money and received the beer. No request was made for him to show proof of his age. The witness pointed out Mr. Adrian Heath as the cashier who sold him the Budweiser beer.

On the day of the "operation" he was 6 foot tall and weighed 220 lbs. He had no tattoos and removed his goatee prior to the "operation" at the request of the Huntsville Police Department. On that same date he exhibited male pattern baldness bringing his hairline well off of his forehead and with hair loss at the crown of his head as well. Mr. Smallwood entered 22 licensed premises and attempted to buy an alcoholic beverage. At 11 premises he was asked for proof that he was 21 years of age and being unable to provide it was not able to complete the transaction. At 11 of the

premises he was able to purchase the alcoholic beverage without being required to show proof that he was 21 years of age.

2. Agent Jerry K. Phillips - Texas Alcoholic Beverage Commission

Jerry K. Phillips testified that he worked with Officer Jim Barnes of the Huntsville Police Department and the volunteer minor Brian Dale Smallwood during the “minor sting operation” on April 25, 1998. He concurred with the witnesses Smallwood and Barnes as to the physical description of the minor at the time of the operation. Prior to the operation he briefed Mr. Smallwood that he was to be truthful if asked his age and to show his Texas driver’s license if identification was requested. He searched Mr. Smallwood and determined that upon entering the store the minor had in his possession only a \$10 bill and his Texas driver’s license. Phillips videotaped Mr. Smallwood entering and leaving the store but he was unable to videotape the purchase itself because of his location and the physical layout of the store.

Mr. Smallwood left the store and returned to Phillip’s vehicle with a can of Budweiser beer and change from the bill. This witness testified that the height and weight of Mr. Smallwood was not unusual for an 18 year old male. However, he advised the Huntsville police officers that Mr. Smallwood should shave off his goatee before the operation. Witness Phillips stated that there was no officer in the store at the time of the purchase and the minor was not under constant surveillance. On cross examination Phillips stated that while it was possible that Mr. Smallwood did not purchase the beer, Smallwood returned with a beer and the correct amount of change.

From Respondent:

Documentary Evidence:

Respondent Exhibit 3: *Minor Sting Operation Guidelines (March 1997).*

Respondent Exhibit 4: *Narrative Report of TABC Agent Phillips*

Testimony:

1. Officer Jim Barnes - Huntsville Police Department

Officer Jim Barnes testified that he took part in the “minor sting operation” on April 25, 1998 at the West Hill Exxon. He testified that in his opinion Brian Smallwood did not appear to be over the age of 21 at the time of the purchase. The witness stated that Huntsville is a college town with many eighteen year old males standing 6 foot tall and weighing 220 lbs. He noted that Mr. Smallwood was exhibiting male pattern baldness but that while not the rule, this is not uncommon among 18 year old males. Witness Barnes testified that he saw the minor take the beer to the cashier,

who he identified as Adrian Heath, for purchase. He testified that he could not recall if there was a sales receipt from West Hill Exxon for the sale to Mr. Smallwood. He stated that the operation also made use of one minor aged 16 who was only able to complete 1 purchase out of 22 attempts. The 16 year old minor and Mr. Smallwood attempted to make purchases at different licensed premises.

2. Oma Lou Cheney - Manager of Western Beverages

Oma Lou Cheney testified that she is the manager of Western Beverages, a package liquor store, in Huntsville, Texas. She held that position on April 25, 1999 when that store was the target of a minor sting during the same operation that resulted in the allegations against the Respondent. The witness was not present at West Hill Exxon at the time of the alleged violation. The witness was not present at her own store, Western Beverages, when an alleged violation occurred as the result of a sale to the minor Brian Dale Smallwood. She testified that she observed videos of the sale and saw Mr. Smallwood on that tape as well as in the hearing room and hallway on the day of the hearing. In her opinion the minor's height, weight and receding hairline on April 25, 1998 gave him an appearance of having attained an age of 21 years. The witness further testified that the cashier at her store was fired as a result of the sale to Mr. Smallwood.

3. Corey Perkins- Sting Operation Minor Volunteer

Corey Perkins testified that he was born on July 2, 1981 and on April 25, 1998 he was 16 years of age. He took part in the minor sting operation as a volunteer. He believes that out of 22 attempts to purchase alcohol he was only successful on one occasion. He and Brian Smallwood took turns so that out of 44 establishments they each entered 22. In his opinion Brian Smallwood looks like a 19 or 20 year old and he would ask him for identification before selling alcoholic beverages to him. He was not present during the operation at West Hill Exxon and had no personal knowledge of the events underlying the alleged violation.

4. Adrian Heath-Cashier and Representative of Respondent

Adrian Heath testified that he is the operator of West Hill Exxon and was acting as cashier on April 25, 1998, the day of the minor sting operation. He testified that he had no independent recollection of making any sale to Mr. Smallwood. That when alcoholic beverages are scanned into the cash register at West Hill Exxon the register requests a birth date to be entered. The register has an override key so that the cashier can dispense with that requirement when of the opinion that the purchaser is of legal age for the transaction. There are signs displayed in the store saying that they will ask for identification from customers 30 years of age and under. This policy is not adhered to and the signs are merely to avoid the ire of disgruntled customers. On cross examination the witness indicated that the minor, Brian Smallwood, looked to be between the 27 and 30 years of age on the day of the sting operation. It was the store policy to give sales receipts only upon request of the customer. Mr. Heath also testified about the good reputation of the store in the community and of efforts both before and after the sting operation to comply with state and federal laws concerning the sale of alcoholic beverages and tobacco products.

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. . .

III. Discussion

On April 25, 1998 the Huntsville Police Department, with the assistance of Texas Alcoholic Beverage Commission employees conducted a "Minor Sting" operation. During this operation a total of forty-four premises were subjected to the sting. Two minors were used to enter the premises. Each minor would attempt to purchase beer at a different location. The minor in the case of this Permittee was Brian Dale Smallwood, born March 15 , 1980. Mr. Smallwood himself, as well as others, described Mr. Smallwood at the time of the sting to be 6 foot tall, weighing 220 lbs. and having no facial hair or visible tattoos. Mr. Smallwood testified that he exhibited male pattern baldness at the time of the sting.

Mr. Smallwood entered the premises, a food store associated with an Exxon service station, removed a beer from the cooler, waited in line behind three other customers and then purchased the beer from Mr. Adrian Heath. At no time did Mr. Heath or any other person ask the minor for proof of age. Mr Smallwood then exited the premises and gave the beer to the Huntsville Police officers. The police officers then entered the premises and issued a citation to Mr. Heath.

The Respondent's representative maintained that this minor did not appear to be under the age of 21 years at the time of the purchase. The respondent compared the physical attributes of the minor Brian Smallwood to those of the minor Corey Perkins. There can be no doubt that Smallwood appears older than Perkins. There can also be no doubt that this Huntsville Police Department sting operation did not follow the guidelines set out in the "Minor Sting ,Operation Guidelines of the Texas Alcoholic Beverage Commission" (March 1997) Defendant's Exhibit 3. Whether or not one minor looks older than another is not an issue to be determined here nor is the decision of the Huntsville Police Department to make alterations from TABC guidelines when running a minor sting operation. This hearing was to determine if the Respondent was criminally negligent in making the sale to Mr. Smallwood.

The evidence showed that twenty-one (21) of twenty-two (22) sellers were concerned enough to ask for the identification of Mr. Perkins. While fewer were concerned enough to ask Mr. Smallwood for identification. It must be pointed out that of twenty-two (22) sellers eleven (11) asked the minor, Mr. Smallwood, for identification.

Because it is a college town Huntsville has a large population of persons between 18 and 21 years of age. These persons make up a population that may attempt to make purchases of

alcoholic beverages. The Huntsville Police Department made use of Brian Smallwood and used him pretty much as they found him. They did not make him taller. They did not make him heavier. They did not shave hair from his head. In fact they required him to remove facial hair before beginning the sting operation.

If this operation showed anything it was that almost 100% of the sellers in Huntsville were likely to spot a 16 year old attempting to purchase alcohol while only half would ask an 18 year old for identification before selling alcoholic beverages. The Respondent had many opportunities to avoid the illegal sale. The Respondent could have made use of the "date of birth" entry requirement that was a part of its cash register system. The cashier could have actually followed the stores posted intent to request identification from customers 30 years of age or under. Most importantly the cashier could have used his power of observation that should have at least put a question in his mind as to the age of the minor. The cashier, Mr. Heath testified that in his opinion the 18 year old minor appeared to be between 27 and 30 years of age.

The evidence at this hearing lead to the conclusion that while West Hill Exxon had the intention to comply with the law, it failed to do so in the hustle and bustle of daily activity. The evidence also indicates that this minor had the same physical attributes as many of the 18 to 20 year old males living in Huntsville and that the sale took place as alleged. It is recommended that the suspension be for only 10 days and that consideration be given to allowing the payment of a \$150 per day in lieu of that suspension.

PROPOSED FINDINGS OF FACT

1. Dauntless Corporation, d/b/a West Hill Exxon is the holder of Wine and Beer Retailer's Off-Premise Permit BQ-306235.
2. Adrian Heath was an agent, servant or employee of Dauntless Corporation, d/b/a West Hill Exxon on the 25th day of April 1998.
3. On the 25th day of April 1998 Brian Smallwood was a minor, eighteen years of age.
4. On the 25th day of April 1998 Brian Smallwood entered the premise of Dauntless Corporation, d/b/a West Hill Exxon obtained an alcoholic beverage, a can of Budweiser beer and stood in line for the cashier.
5. On the 25th day of April 1998 Brian Smallwood purchased the beer from the cashier Mr. Adrian Heath.
6. On the 25th day of April 1998 Brian Smallwood presented an appearance that should have caused an ordinary person exercising standard care to either request proof of age or refrain from selling alcoholic beverages to him.
7. The minor, Brian Smallwood, did not falsely represent 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 cashier to sell him an alcoholic beverage.

8. Mr. Adrian Heath, the cashier, failed to request proof of age from the minor before completing the sale.
9. Mr. Adrian Heath ought to have perceived a substantial and unjustifiable risk that a sale of alcohol to Mr. Brian Smallwood would constitute sale to a minor.
10. The failure of Mr. Adrian Heath to perceive the substantial and justifiable risk constituted a gross deviation from the standard of care that an ordinary person would have exercised under all the circumstances as viewed from his point of view.

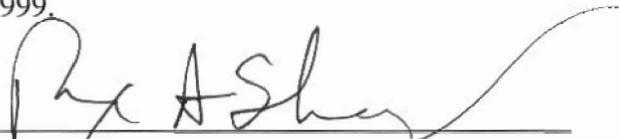
PROPOSED CONCLUSIONS OF LAW

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 April 25, 1998 an agent, servant or employee of Dauntless Corporation, d/b/a West Hill Exxon did with criminal negligence sell, serve or deliver an alcoholic beverage to a minor in violation of Sections 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 10 days and that consideration be given to allowing the payment of a penalty of \$150 per day in lieu of suspension.

Signed this 20th day of October 1999.


Rex A. Shaver
Administrative Law Judge