

DOCKET NO. 579360

IN RE PATEL INTERNATIONAL, INC.	§	BEFORE THE
D/B/A SONIC FOOD STORE	§	
PERMIT NO. BQ-279263	§	
	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-0880)	§	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 Shaver. The hearing convened on May 28, 1999 and adjourned May 28, 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 the allegations against Permit No. BQ-279263 are hereby **DISMISSED**.

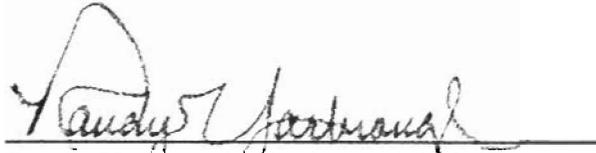
This Order will become final and enforceable on December 8, 1999, unless a Motion for Rehearing is filed before that date.

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
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SOAH DOCKET NO. 458-99-0880

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
§
§
PATEL INTERNATIONAL, INC. § OF
D/B/A SONIC FOOD STORE §
PERM NO. BQ-279263 §
HARRIS COUNTY, TEXAS §
(TABC CASE NO. 579360) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against a licensee of the commission for selling an alcoholic beverage to a minor. The Staff recommended that the subject license and permit be suspended for 20 days and that no recommendation be made allowing a fine in lieu of suspension. The ALJ having found insufficient evidence that beer was sold to the minor by an agent, servant or employee of the licensee, the ALJ recommends no action be taken against the licensee.

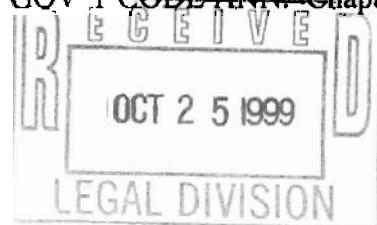
I. Procedural History

On May 13, 1999, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Patel International, Inc. D/B/A Sonic Food 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 May 28, 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 with the record left open until 5:00 p.m. on that same day for the filing of post hearing briefs from the Petitioner and Respondent. No post hearing briefs having been filed by either party, the record was closed at 5:00 p.m. on May 28, 1999. The Staff was represented by Andrew Del Cueto, Assistant Attorney General of Texas. The Respondent, Patel International, Inc. D/B/A Sonic Food Store, was represented by attorney David Wyborny.

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-279263 and was the holder of such permit on the date of the alleged violation , 23rd day of May, 1998. The Notice of Hearing in this matter was mailed to the Respondent on the 13th day of May, 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-279263 issued to Patel International doing business as Sonic Food Store.*

b. **TABC Exhibit 2:** *Texas Alcoholic Beverage Commission Notice of Hearing directed to Patel International doing business as Sonic Food Store.*

Both of these exhibits were offered and accepted without objection.

Testimony:

1. Agent Brian Tullis:

Agent Brian Tullis testified that minors often try to purchase beer and other alcoholic drinks. He testified that when on a sting operation (which was not the case here) the TABC will use a video camera and an agent in the store to provide proof of the purchase by the minor. This witness specifically stated that he had no knowledge of this case other than a subpoena he had served on the witness Winfred Donahue at the Harris County Boot Camp.

2. Winfred Donahue

Winfred Donahue appeared at the hearing in the custody of officers from the Harris County Boot Camp facility. Mr. Donahue stated that on the night in question he had not yet attained the age of twenty-one years. That on the night in question, he and two friends had gone to the Respondent's place of business to buy alcoholic beverages. While at the store he took a bottle of Thunderbird wine to the counter. Mr. Donahue testified that he was never asked for identification by anyone in the Respondent's store. He paid for the Thunderbird wine. The clerk placed the wine in a paper bag and gave him his change and he left the store. In the parking lot he was approached by "police" in a grey car who asked how he had obtained the Thunderbird wine. The witness testified that he told the "police" that he had bought the wine in the Respondent's store. He also stated that he saw no one in the store hand anything to anyone other than the clerk. He stated that he neither saw a "girl" in the store or heard anyone say "There are cops outside".

From Respondent:

No Documentary Evidence was offered.

Testimony:

1. Rosemary Uwaezuoke

Rosemary Uwaezuoke testified that she was the clerk on duty the night of the incident made the basis of this proceeding. Mrs. Uwaezuoke stated that four "boys" knocked at the door of the store which was locked because it was approaching closing time. A friend of the owner unlocked the door to let in the customers. She testified that she recognized some of the customers from previous visits and had on one occasion told one of them that he could not purchase alcohol. One of these customers brought cookies, chips, Old English beer and Thunderbird wine to the counter. She asked him if he was buying all of this and he said he was. She asked for identification and he produced a drivers license indicating his age at 21 years and some months. This customer paid for the purchases. Before she gave him his change a "girl" ran into the store and said "Cops...There are cops out there". The customer who purchased the alcoholic beverages left the cookies, chips and Old English on the counter and left the store without his change. This witness testified that she recognized the witness Winfrid Donahue and that while he was present on that occasion, he was not the person who purchased the Thunderbird wine.

2. Donald Olaye

Donald Olaye testified that he was in the store on the night in question and that he had unlocked the door to admit four people to the store. He was not an employee of the store but a friend of the owners, Mr. and Mrs. Uwaezuoke. One of the four persons brought alcoholic beverages and other items to the counter. The counter area is walled off from the rest of the store by bullet-proof glass with a tray for passing items across the counter. The customer buying the alcoholic beverage handed Mr. Olaye identification which indicated that he was over the age of 21 years. Mr. Olaye passed the identification through the change tray to Mrs. Uwaezuoke. That person paid for all the items and then picked up some of the beer and handed it to one of the other customers. At that time a "girl" came into the store and told the purchaser that "There are cops out there" at which point the purchaser rushed out of the store along with the unidentified female. Mr. Winfred Donahue was brought into the hearing room and Mr. Olaye stated that he was not the person who purchased the alcoholic beverages that night.

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 Winfrid Donahue a minor on the 23rd day of May, 1998?

It was the undisputed testimony of Winfrid Donahue that he was nineteen years of age on 23rd day of May, 1998.

- (2) Did the permittee or licensee, with criminal negligence sell, serve, dispense, or deliver an alcoholic beverage to the minor, Winfrid Donahue, on the 23rd day of May, 1998. The testimony of the minor, Winfrid Donahue, can not be reconciled with that of the clerk, Rosemary Uwaezuoke, and the witness, Donald Olaye. This is not a Minor Sting operation. Had it been so, there would have been video tape and the testimony of an agent who witnessed the sale. In this situation we have no video tape and no testimony of any law enforcement officer or even an officer's written report. The only testimony that a sale to a minor took place is from the minor himself. It must be noted that the minor was escorted to the hearing by law enforcement officers because he was an inmate of the Harris County Boot Camp. The TABC Agent who was at the scene was not subpoenaed and the Assistant Attorney General advised the ALJ that the agent was no longer with the TABC. The testimony of this witness was offered by telephone. Respondent objected, saying that Respondent did not agree to the telephonic testimony and such testimony did not meet the standard set forth in Section 155.45 of SOAH Rules. The ALJ sustained that objection and no testimony was taken from that witness.

PROPOSED FINDINGS OF FACT

1. Patel International, Inc. d/b/a Sonic Food Store is the holder of Wine and Beer Retailer's Off-Premise Permit BQ-279263.
2. Patel International, Inc. d/b/a Sonic Food Store received proper and timely notice on the 13th day of May, 1999, by Certified Mail RRR No. Z 473 067
3. Rosemary Uwaezuoke was an agent, servant or employee of Patel International, Inc. d/b/a Sonic Food Store on the 23rd day of May, 1998.
4. On the 23rd day of May, 1998., Winfrid Donahue was a minor, nineteen years of age.
5. On the 23rd day of May, 1998., Winfrid Donahue left the premise of Patel International, Inc. d/b/a Sonic Food Store with a bottle of Thunderbird Wine.
6. On the 23rd day of May, 1998, an unnamed customer, in the company of Winfrid Donahue, purchased beer and wine after presenting a driver's license indicating the unnamed customer was over the age of 21 years.

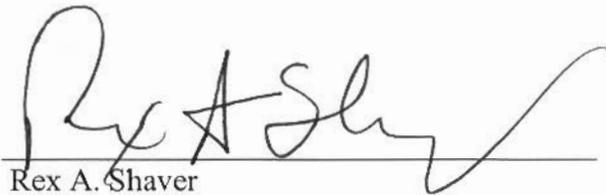
PROPOSED CONCLUSIONS OF LAW

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. Based upon the Proposed Findings of Fact and Proposed Conclusions of Law there was insufficient credible evidence that Rosemary Uwaezuoke, an agent, servant or employee of Patel International, Inc. d/b/a Sonic Food Store sold, served, dispensed, or delivered 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 no action be taken to suspend or revoke the Respondent's Wine and Beer Retailer's Off - Premise Permit BQ-279263.

Signed this 20th day of October, 1999.



Rex A. Shaver
Administrative Law Judge