

DOCKET NO. 584386

IN RE FARHAD NAYEBKHYLL	§	BEFORE THE
D/B/A CHERRY'S GROCERY	§	
PERMIT NO. Q-405766	§	
LICENSE NO. BF405767	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-1648)	§	BEVERAGE COMMISSION

ORDER

**CAME ON FOR CONSIDERATION** this 26th day of September, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Mark S. Richards. The hearing convened on December 27, 1999, and adjourned December 27, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 30, 2000. 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. 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.

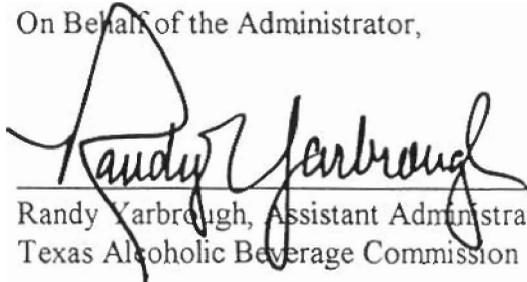
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. Q-405766 and License No. BF405767 are herein **CANCELED FOR CAUSE**.

This Order will become final and enforceable on October 17, 2000, 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 26th day of September, 2000.

On Behalf of the Administrator,

  
Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Mark S. Richards  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (214) 956-8611**

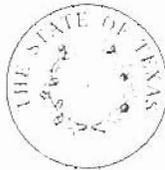
Holly Wise, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
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Frank Shor  
**ATTORNEY FOR RESPONDENT**  
Herald Hall  
1620 East Belt Line Road  
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Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Dallas District Office

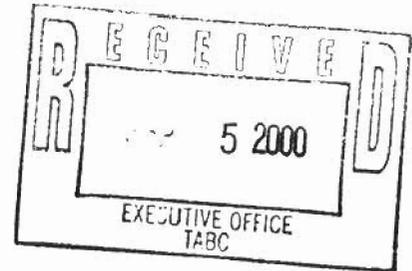
# State Office of Administrative Hearings



SEP - 6

Shelia Bailey Taylor  
Chief Administrative Law Judge

August 30, 2000



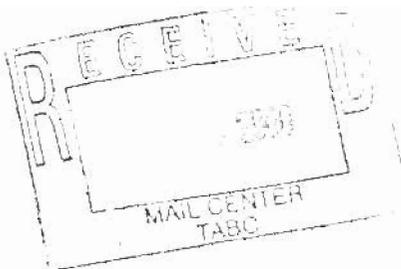
Doyne Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731

Re: **Docket No. 458-99-1648; Texas Alcoholic Beverage Commission vs. Farhad Nayebkhyll  
d/b/a Cherry's Grocery; (TBAC Case No. 585790)  
584386**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Frank Shor, attorney for the respondent. For reasons discussed in the proposal, this proposal recommends that Respondent's Permit No. Q-405766 and License No. BF-405767 be canceled.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.



Sincerely,

A handwritten signature in black ink, appearing to read "Mark S. Richards".

Mark S. Richards  
Administrative Law Judge

MSR/mc  
Enc.

cc: Holly Wise, State Office of Administrative Hearings, Austin, Texas - Fax  
Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - Fax  
Frank Shor, Attorney for Respondent - Fax

**DOCKET NO. 458-99-1648**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**

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**BEFORE THE STATE OFFICE**

**VS.**

**OF**

**FARHAD NAYEBKHYLL  
D/B/A CHERRY'S GROCERY  
PERMIT NO. Q-405766  
LICENSE NO. BF-405767  
DALLAS COUNTY, TEXAS  
(TABC CASE NO. 584386)**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Farhad Nayebkhyll, DBA Cherry's Grocery (Respondent) alleging that on April 8, 1999, Respondent, its agent, servant or employee, with criminal negligence sold, served or delivered an alcoholic beverage to a minor, in violation of TEX ALCO. BEV. CODE ANN. (Code), §106.03 and §106.13. TABC proved its allegation by preponderance of the evidence and pursuant to the evidence and findings set forth herein, this proposal recommends that Respondent's permit and license be canceled.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened on December 27, 1999, at the offices of the State Office of Administrative Hearings in Dallas, Dallas County, Texas. TABC was represented by its counsel, Timothy Griffith, Respondent by its counsel, Frank Shor, and the hearing was conducted by Mark S. Richards, Administrative Law Judge. Post trial briefs and proposed findings and conclusions were filed by both parties and the record was closed on February 24, 2000.

**II. THE ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS**

There was one allegation in this proceeding, asserting that on April 8, 1999, Respondent, through Fawad M. Ata, its agent, servant, or employee, sold, served or delivered an alcoholic beverage to a minor, in violation of §106.03(a) of the Code. Such a violation may be punished by cancellation or a maximum 60 day suspension of a license and/or permit pursuant to §106.13 of the Code. Section §106.14 of the Code provides an affirmative defense for an employer under certain circumstances.

16 Tex. Admin. Code §50.9© addresses one specific manner in which TABC may negate a Permittee's attempt to assert it had not directly or indirectly encouraged violation of the law, to wit, by proof that an employee of Permittee sold alcoholic beverages to a minor more than twice in a 12-month period. Section §1.04 of the Code provides definitions of "beer" and alcoholic beverage". Section §6.03 of the Texas Penal Code provides the definition of "criminal negligence".

### III. DISCUSSION

#### A. PETITIONER'S EVIDENCE

TABC's documentary evidence consisted of the Notice of Hearing, Certified copies of Respondent's permit, license, and violation history, and a Texas driver's license ( TABC Exhibit 3) belonging to Alfonzo McLemore, Jr., who was the minor who made the purchase. The violation history since Respondent became Permittee reflects sales to minors on March 6, 1997, May 5, 1998, October 29, 1998 and April 8, 1999.

TABC's first live witness was Mr. McLemore, whose date of birth is January 14, 1981, and who was therefore eighteen years old at the time of the incident. He testified that on April 8, 1999, he purchased a six pack of Coors Light Beer from Petitioner's clerk, Mr. Ata, for \$6.16. The clerk was behind the counter at TABC's establishment and asked to see McLemore's driver's license. He showed the clerk his current driver's license (TABC Exhibit 3), which reflects his date of birth as 01-14-81 and contains the phrases "Under 21 until 01-14-02" and "Under 21 Driver's License", together with name, expiration date of 01-14-05 and physical description. He was working with the Dallas Police Department on the date in question to see if he could buy beer, (a "minor sting operation"). On cross-examination, he testified that he had completed high school and had now completed the first semester of college.

He carried two driver's licenses with him on April 8, 1999, one of which was his old one, which had expired, and the other TABC Exhibit 3. He went to 10-13 stores on April 8, 1999, attempting to buy beer. He took no notes of the various incidents and gave the Coors beer he bought from Respondent to a police officer. He has not seen it since and did not test it in any way. During cross-examination, McLemore furnished to Respondent's attorney the second driver's license which he was carrying on April 8, 1999. It was introduced into evidence as Respondent's Exhibit No. 1, and contains the same information as TABC Exhibit 3 except that its expiration date is 01-14-99 and it does not contain the references to being under 21; the date of birth is again clearly reflected as 01-14-81. He stated again that the license he showed to Respondent was the valid one, i.e., TABC Exhibit 3.

TABC's second witness was Gay Casel. She testified that she is employed by TABC and is familiar with the permit history at Respondent's location. A permit was originally issued for the

premises in 1994 to FJV, Inc. Nayebkhyll was a shareholder of FJV. FJV had problems in that they had three sales to minors in a six month period. TABC was going to proceed with a cancellation of their permit but at that time they switched ownership and Respondent became the sole owner. A permit was issued to Respondent in December of 1996. Casel recommends cancellation of the permit since this is actually the fourth sale to a minor under the present Permittee in a 36 month period, and she is aware that prior to that there were at least three such sales at the licensed premises, although the listed owner for those was a corporation of which Respondent was a shareholder. She feels the violations constitute both health and safety hazards.

On cross-examination, Ms. Casel stated that three sale to minor cases have been initiated previously against Respondent and that each was "restrained"<sup>1</sup> but not dismissed, and no sanction was imposed upon Respondent as a result. She was directed to page nine of TABC Exhibit 2 and agreed that it reflected that Mr. Farad Ata, who is the clerk accused of making the sale in this case, was recognized by the Administrator of TABC in a "Violation Notice" dated July 20, 1998, as having attended a commission approved seller training program. She did not test the beer purchased by the minor and does not know whether anyone else did.

## B. RESPONDENT'S EVIDENCE

Respondent's documentary evidence consisted of the driver's license noted above as Exhibit 1, a one page piece of paper containing copies of Mr. Farad Ata's Texas driver's license, social security card, home and work telephones numbers, and a "class attendance receipt" for a TABC Alcohol Sellers' Certified Training course indicating that on September 16, 1997, Mr. Ata "passed" a four hour course which he attended on behalf of "Omer's Groceries", (Respondent's Exhibit 2). Respondent's Exhibit 3 is an affidavit of Farhad Nayebkhyll, Respondent, stating he requires his employees to attend an approved Sellers' Training Program within 30 days of initial employment and he has not directly or indirectly encouraged anyone to violate any law.<sup>2</sup>

A final instrument that became part of the record on the date of the hearing was a Trial Amendment, which Respondent was allowed to file over TABC's objection, allowing Respondent

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<sup>1</sup> Cases by TABC against employers are "restrained" when a violation (sale to minor) occurs and TABC determines that the employee who committed the violation is "seller-server" trained, ie, has been through the training mandated by TABC. TABC will, when there have been few previous violations, "restrain" any administrative action against the employer but require him/her to sign an affidavit to the effect that he/she is aware of the violation, does not encourage or condone it and will see to it that it does not recur. The affidavit is a public record of the violation and, if subsequent violations occur, the affidavit(s) may be used by TABC to show "indirect encouragement" to violate the law by the employer.

<sup>2</sup> A portion of the affidavit was redacted and this is reflected on the face of the instrument.

to present a "TABC Approved Seller Training Program" (or "seller-server") defense, pursuant to §§106.14(a) of the Code. Petitioner's position was that this is an affirmative defense which had not been plead and therefore no evidence touching upon it should be admitted; TABC was granted a running object to any evidence listed in furtherance of this defense.

Respondent testified that on April 8, 1999, Farad Ata was working for him; that he requires employees to attend a TABC approved seller training program within 30 days of initial employment; that he thought that Ata had attended such a program since Ata furnished him with a class attendance receipt indicating attendance on 09-16-97; and that he does not encourage employees to violate the law. He stated that he had been the Permittee of this business since December 27, 1996; that prior to that, from 1994 to 1996, the Permittee was George W. Bates on behalf of FJV, Inc.; and that his connection with the previous Permittee was that he was a shareholder, but not an officer, of FVJ, Inc.

Respondent's second witness was the employee, Farad Ata. He testified that he works for Cherry's Grocery and has worked there for about three years; that his employer is Mr. Nayebkhyll; that he was employed in August of 1997, and that he went to a TABC approved training program on August 24, 1997. He has finished high school. Mr. Nayebkhyll has not encouraged him to break the law and asked him to check everyone's ID. He has previously seen the driver's license depicted in TABC Exhibit 3 but not the one depicted in Respondent's Exhibit 1.

### C. CONTENTIONS OF THE PARTIES

TABC contends that all necessary elements of its case, as reflected above, have been proved and that in view of the numerous violations in the past, taken in conjunction with this one, Respondent's license and permit should be canceled. Respondent's position is that, as reflected in its pre-hearing statement of position, and post-trial brief, it does not contend that the transaction made the basis of this hearing did not occur. It bases its defense on two contentions which are in the nature of affirmative defenses. First, it contends that §106.14 of the Code provides it with immunity or at least a defense, (the "seller-server defense"). Second, that even assuming TABC's basic allegations have been adequately proven, they don't necessarily establish a violation of the Code since TABC has not proved that Coors Light Beer is an "alcoholic beverage", as defined by the Code.<sup>3</sup> Respondent requests that it receive no sanctions.

### IV. DISCUSSION

During the hearing, Respondent cross-examined the minor concerning the fact the he had two

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<sup>3</sup> This second contention was first raised in the post-trial brief.

drivers licenses with him at the time of the incident, and introduced the second, (expired) license as his first exhibit. The minor testified that the license he had shown to the clerk was the valid one, (TABC Exhibit 3), which states on its face that the licensee is "UNDER 21". The expired license has no such specific language. The question was rendered moot when the clerk, Mr. Ata, testified that the license he was presented was the valid one with the "UNDER 21" language on its face. However, it should be noted that both licenses bear the minor's date of birth, 01-14-81, on their faces; therefore, regardless of which ID was furnished, the clerk had the minor's date of birth in front of him and if he is unable to arrive at a customer's age when he has been told the date of birth, he should not be employed in a position in which age may be an issue. In short, either of the identification forms would have been sufficient, regardless of whether they contained the gratuitous "UNDER 21" language, and the refusal or inability of Respondent's employee to determine a customer's age when furnished with their date of birth is a sufficiently "gross deviation from the standard of care that an ordinary person would exercise" to constitute criminal negligence. Further, as noted by TABC, it shows actual knowledge.

Respondent's next contention is that due to the wording of the definition of "alcoholic beverage" and "beer" in the Code a beer may not be an alcoholic beverage, and TABC would need to introduce evidence showing that the beer in question contained more than one-half of one percent of alcohol by volume in order to prevail. Section 1.04(1), of the Code defines "alcoholic beverage" as a "alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted". Section 1.04(15) defines "beer" as "a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight, and does not include a beverage designated by label or otherwise by a name other than beer".

There are two primary problems with this position, one procedural and the other going to the merits. The procedural problem is that in making this contention, Respondent is relying upon an affirmative defense with no support in the pleadings and without evidence to even raise a fact issue. An affirmative defense is essentially a plea in avoidance, and must be set forth affirmatively by the party relying upon it in order to avoid a situation of surprise or "ambush". Rule 94, Texas Rules of Civil Procedure, provides a non-exclusive list of examples of such defenses. An affirmative defense allows the Defendant to avoid liability even if Plaintiff's allegations are true, (See O'Connor's Texas Rules 1999, Chapter 3, Section 5). Here, in response to special exceptions, TABC specified that the alcoholic beverage it contended was sold to a minor was Coors Light Beer. During the course of the hearing, Respondent was allowed to amend its pleadings in order to reflect another affirmative defense, (the "Seller-Server" defense set forth in §106.14 of the Code). There was no motion from Respondent to be allowed to assert the "definition" defense in question here; further there is a complete dearth of evidence from Respondent to even raise a fact issue, the only testimony which might have a bearing being that TABC's witnesses were not aware of anyone who had tested the Coors Light Beer. Respondent in essence raised the issue for the first time in its post-trial brief. The brief itself is in the nature of argument, and, of course, does not constitute evidence.

Further, while Rule 67, TX Rules of Civil Procedure, addresses instances in which an issue

may be tried by consent, the total lack of probative evidence presented here precludes any such result.

In view of the preceding discussion, it is not necessary to address the merits of the distinction which Respondent urges between "alcoholic beverage" and "beer". However, it will be touched upon briefly for clarification. This case, of course, is a civil case and the standard of evidence is by a preponderance. However, the parties are directed to the case of Dixon vs. State, 262 S.W. 2d 488 (TX. Cr. App. 1953), a criminal case requiring an even higher standard. There, The Court of Criminal Appeals was faced with a contention similar to Respondent's in that Appellant argued that "no can was opened and no liquor was tasted or smelled in order to show that the same was intoxicating liquor".<sup>4</sup> The Court of Criminal Appeals stated that "this court has long held that whiskey is an intoxicating liquor, as well as beer" and added that "this court well knows that whiskey, beer, and gin are all intoxicants", (citations omitted), concluding that it was established by circumstantial evidence that "the contents of the bottles and cans...were intoxicating liquors and contained alcohol in excess of one-half of one percent by volume". The appellate court took a common sense approach to the question which this ALJ will follow.

Respondent's final defense is based upon §106.14(a) of the Code, which reads as follows:

§106.14(a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing or delivery of alcoholic beverages to a minor or an intoxicated person or the consumption of alcoholic beverages by a minor or an intoxicated person, the actions of an employee shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program
- (2) The employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employees to violate such law.

In this regard, Respondent directs attention to §50.9© of the Rules, which state, in pertinent part, as follows :

Proof by the commission that an employee or agent of a Licensee/Permittee sold ... alcoholic beverages to a minor...more than twice within a twelve-month period shall constitute prima facie evidence that the Licensee/Permittee has directly or indirectly encouraged violation of the relevant laws.

These sections constitute the so called "Seller-Server defense". In its brief, Respondent takes

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<sup>4</sup> Apparently the point Respondent was attempting to reach here when he asked the witnesses whether the Coors Light Beer had been tested.

the position that “ the only way for Respondent to lose the defense presented in §106.14 is for the same agent to commit multiple sales to the same minor within a year”. Respondent claims that this is a well recognized “safe harbor”to which it is entitled.

Under the evidence presented here Respondent has proved §106.14 (1) and (2). With regard to (3), the only evidence presented by Respondent was the clerk’s conclusion that Mr. Nayebkhyll did not directly or indirectly encourage him to violate the law and that he encouraged him to check the IDs of potential customers.

It is necessary first to address Respondent’s interpretation of §50.9© (the “Rule”), and particularly his position that there is a same employee/same minor requirement therein. At the outset, the Rule speaks only to constituting a prima facie case; it in no way implies that direct or indirect violation of the relevant laws may not be established in some other manner. Here, there is evidence of a continuing pattern of sales to minors. If Respondent’s position should be accepted, it would mean that it would be possible for an establishment with six employees to make as many of 13 sales to minors within a twelve month period before the employer could be called to account. As was the case with Respondent’s “Definition” defense, common sense may be applied here and its application makes it clear that this was not the intent of the Legislature.

Moreover, the mere assertion by Respondent’s employee that he was not directly or indirectly encouraged to violate the law by his employer, whom he says told him to check IDs, is insufficient to establish that such encouragement did not, in fact, occur. See TABC v Daddy Rabbit’s Pub, SOAH Docket No. 458-98-1440, as follows:

The third criteria dealing with encouragement, directly or indirectly, to violate the law, requires more evidence to establish than testimony that it was Respondent’s policy for employees to obtain identification from its patrons. Clearly this provision would be meaningless if this were all that was necessary to exempt a permittee from liability or sanction.

In their briefs, both parties alluded to the case of Pena v. Neal, 901 S.W. 2d 663 (TEX. APP. --San Antonio 1995, writ denied) . Respondent points out that this was a summary judgment case and dealt only with the quantum of proof necessary to establish a genuine issue of material fact. However, some of the language in the case is relevant to the interpretation of the statute by the court. The following language from Pena is instructive: “The statute’s words plainly demonstrate the employer must do more than simply require attendance at the training programs. It cannot then turn its back on all actions of the ‘trained’ seller-employees, safe in the assumption that even if employee violations of the alcoholic beverage code do occur, recovery against the employer will be barred and the employer cannot be held liable. This cannot be the intention of the legislature.”

As to the evidence necessary to negate encouragement to violate liquor laws see Gonzales v. South Dallas Club, 951 S.W. 2d 72 (TEX. APP.--Corpus Christi 1997, no writ), where the court stated:

Encouragement to violate the liquor laws ... may take many subtle forms. Negation of any direct or indirect encouragements would require a more detailed factual analysis of the circumstances under which alcoholic beverages were being sold and served. Ramirez's statement that appellee held weekly meetings to discuss conformance with TABC regulations tells us nothing about appellee's policy regarding compliance with the code. We hold that appellee failed to conclusively prove the last element of its affirmative defense.

In its first brief, discussing Pena, Respondent notes that the court there specifically recognized a legislative intent to provide a safe harbor for employees with Code§106.14(a)(3). This is undoubtedly true, but its application will vary according to the facts of each case. Here, with the exception of the negative response of Respondent's witnesses to the question as to whether they have been directly or indirectly encouraged to violate the law, together with Respondent's testimony that he required his employees to attend an approved training program and Mr. Ata's statement that he was required to check everyone's IDs, there is no affirmative evidence of a lack of indirect encouragement to violate the law. In this regard, the evidence showed that the Respondent had been either the sole or partial owner of the premises for some five years; that repeated violations for sales to minors had occurred in that time; and there was no evidence as to what, if anything, Respondent had done or intended to do to rectify the situation or if it was even concerned by it. Here, Mr. Ata, who ignored the date of birth clearly reflected upon the license handed to him, appears to still be employed by Respondent, and there was no evidence that he or any other employee of Respondent has been admonished or retrained or that some action, however minute, had been taken to rectify the situation and see that it did not recur. As noted in TABC's brief, Respondent's primary purpose at this hearing was to shift responsibility from himself for the violation by virtue of the statute. There was no evidence that Respondent appreciated the danger involved in sales to minors and intended to do anything to remedy this and previous problems of the same nature. This "business as usual" attitude does not, in this writer's opinion, conform in anyway to the intent of the legislature when it created a "safe harbor" with the seller-server defense, and its assertion is not justified here. A simple denial by an employee, tracking the statute, that he has not directly or indirectly been encouraged by his employer to violate this law is insufficient and, if this is all that were required, the commission would be left without recourse even in flagrant situations.

Often, as here, a failure to act, as opposed to taking affirmative action, will constitute the "subtle" encouragement referred to in Gonzalez, cited above. In this case, there was ample evidence that this instance occurred as alleged in TABC's Notice of Hearing, that Respondent had been financially involved in the business conducted on the premises since 1994, and that violations such as the one addressed here were of a recurring nature. Respondent presented no evidence to indicate that the problem had been or would be addressed, or that he was even concerned with its ramifications.<sup>5</sup> Under this state of the record, the Administrative Law Judge recommends cancellation of Respondent's license and permit.

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<sup>5</sup> Other than his concern for his loss of license.

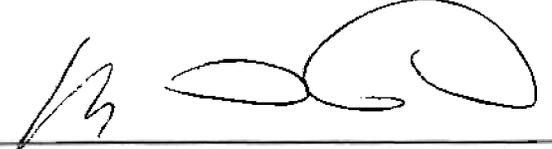
## V. PROPOSED FINDINGS OF FACT

1. Farhad Nayebkhyll DBA Cherry's Grocery holds Wine, Only Package Store Permit No. Q-405766, Beer Retailer's Off Premise License No. BF-405767 for the premises known as Cherry's Grocery, ("the Premises") located at 1326 Martin Luther King Jr. Blvd., Dallas, Dallas County, Texas. The Permit and License were issued on December 27, 1996 and have been continuously renewed.
2. Prior to December 27, 1996, the Premises held a License and Permit under the name of FJV, Inc., of which corporation Farhad Nayebkhyll, Respondent, was a shareholder.
3. On August 20, 1999, Notice of Hearing was properly addressed and sent by certified mail to Respondent, and pursuant to the Notice all parties appeared at the hearing.
4. On April 8, 1999, Alfonso McLemore, Jr. was an 18 year old minor when he purchased a six-pack of Coors Light Beer from Respondent.
5. Prior to the sale, Farad Ata, Respondent's employee, requested and was handed the minor's Texas driver's license, (Class C, No. 17924523), which had the words "Under 21 drivers license" and "Under 21 until 01-14-02" together with a date of birth and picture on its face.
6. The minor, who appeared in person at the hearing, has a youthful appearance.
7. Between 1994 and December 27, 1996, Cherry's Grocery was involved in three sale to minor incidents in one six-month period which resulted in restraints, and TABC was proceeding with a cancellation of the license and permit of FJV, Inc.
8. Thereafter, Nayebkhyll applied personally for the permit and license which he was granted.
9. The present sale to minor incident, which occurred on April 8, 1999, was the fourth such incident since the permit and license were issued to Nayebkhyll.
10. The first three incidents since Nayebkhyll became permittee occurred on March 6, 1997, May 6, 1998, and October 29, 1998; the May 6, 1998 sale was made by Mr. Ata, the seller in this case, and the other two sales were made by two different employees.
11. All three of the previous incidents were restrained each time on the basis of the "safe harbor" found in §106.14(a) of the Code which Respondent is now again asserting.
12. There was no evidence presented addressing what steps, if any, Respondent intends to take to prevent the recurrence of this repeated violation by his employees, whether by sanctions, additional training, or otherwise.

## VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to § 106.13 of the Code.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including 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.
3. Service of proper and timely Notice of the hearing was effected upon Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN., Chapter 2001.
4. Based on Finding of Fact Numbers 4 through 6, Respondent sold beer to a minor in violation of §106.03 (a).
5. This violation of April 8, 1999 was the fourth offense of this nature by Respondent in a period of less than 36 consecutive months, authorizing Commission to cancel the permit and license or to suspend them for not more than 12 months pursuant to §106.13 (b) of the Code.
6. Based upon Finding of Fact Numbers 7, 9, 10, 11 and 12, Respondent has indirectly encouraged its employees to violate the provisions of the Code relating to sales of alcoholic beverages to a minor, and Respondent is therefore not entitled to the mitigating provisions of §106.14 (a) of the Code.
7. Based upon the foregoing, Respondent's permit and license should be canceled.

SIGNED THIS 30 day of August, 2000.

  
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Mark S. Richards  
Administrative Law Judge  
State Office of Administrative Hearings