

DOCKET NO. 585637

IN RE VANDY LY	§	BEFORE THE
D/B/A SUNSHINE LIQUOR #2	§	
PERMIT NO. P-266410	§	
LICENSE NO. BF318546	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1001)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of November, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl A. Corbitt. The hearing convened and adjourned on June 15, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 12, 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. 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.

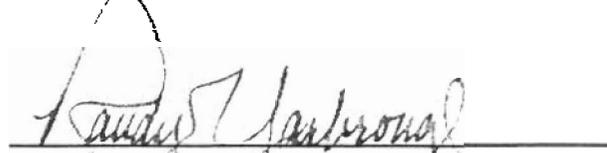
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit/License Nos. P-266410 and BF318546 are herein **SUSPENDED** for a period of three (3) days, beginning at 12:01 A.M. on the 30th day of November, 2000, unless the Respondent pays a civil penalty in the amount of \$450.00 on or before the 28th day of November, 2000.

This Order will become final and enforceable on December 5, 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 14th day of November, 2000.

On Behalf of the Administrator,

A handwritten signature in cursive script, appearing to read "Randy Yarbrough", is written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Earl A. Corbitt
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

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

Danny Easterling
Easterling & Easterling, P.C.
ATTORNEY FOR RESPONDENT
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CERTIFIED MAIL/RRR NO. Z 473 039 311

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

November 13, 2000

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: **Docket No. 458-00-1001; *TABC vs. Vandy Ly d/b/a Sunshine Liquor #2, P-266410; BF-318546***

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Christopher Burnett, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Danny Easterling, Attorney for the Respondent. For reasons discussed in the Proposal for Decision, the Respondent requested a three day suspension or, in lieu thereof, a penalty of \$450.00. This proposal agrees with the recommendation of the Respondent.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,


Earl A. Corbitt
Administrative Law Judge

ECrk

Enclosure

xc: **Christopher Burnett, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY**
Danny Easterling, Easterling & Easterling, P.C., 1018 Preston, 6th Floor, Houston, Texas 77002-1877-VIA REGULAR U.S. MAIL
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA HAND DELIVERY

DOCKET NO. 458-00-1001

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
VANDY LY D/B/A SUNSHINE LIQUOR #2 P-266410, BF-318546	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the Package Store Permit and the Beer Retailer's Off Premise License held by Vandy Ly d/b/a Sunshine Liquor #2 (the Respondent) based on an allegation the Respondent sold an alcoholic beverage to a minor. The Staff of TABC (the Staff) sought to have the Respondent's permit suspended for seven days or, in lieu thereof, to have the Respondent assessed a penalty of \$1,050.00. The Respondent requested a three day suspension or, in lieu thereof, a penalty of \$450.00. This proposal agrees with the recommendation of the Respondent.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

On April 14, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent at 10900 West Bellfort, Houston, Texas 77099. The Respondent received the notice. The hearing convened on June 15, 2000, before Administrative Law Judge (ALJ) Ed Shipper at the offices of the State Office of Administrative hearings (SOAH) at 2020 North Loop West, Suite 111, Houston, Texas. Staff Attorney Christopher Burnett represented the Staff. The Respondent was represented by Danny Easterling, attorney-at-law. The record closed at the end of the hearing.

On October 3, 2000, the matter was assigned to ALJ Earl A. Corbitt for preparation of the proposal for decision. The undersigned ALJ has reviewed the audio taped record.

II. REASONS FOR DECISION

A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2) and 61.71(a)(1).

Section 106.13(a) of the Code provides:

(a) . . . 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

B. Evidence

The parties stipulated that the facts alleged by the Staff were true. No exhibits were admitted into evidence. No testimony was offered by either party. The ALJ has taken official notice of the contents of the Notice of Hearing.

1. The Respondent's Position

Counsel for the Respondent argued that the minor to whom the Respondent sold alcoholic beverages had on several previous occasions in the recent past purchased alcoholic beverages from the Respondent using a well made false driver's license. On the day in question, the Respondent recognized the minor and did not ask for identification. Counsel asserted the Respondent cooperated fully with TABC and now closely checks identification on all sales. Counsel asserted further that this is the first time the Respondent has been accused of a violation of the Code and that the Respondent is experiencing financial difficulty because of the illness of the Respondent's spouse. Counsel requested the penalty be reduced to a three day suspension or, in lieu thereof, a forfeiture of \$450.00.

2. The Staff's Position

The Staff Attorney stated on the record that he could not recommend a penalty less than that requested, but that he would not oppose or appeal a lesser penalty assessed by the ALJ.

III. ANALYSIS AND RECOMMENDATION

A. Analysis

The parties stipulated that the Respondent violated TEX. ALCO. BEV. CODE ANN. §106.13(a). There is no other evidence in the record. Even though Vandy Ly was present and could have testified to the events described by the Respondent's counsel, she did not do so. The proposal for decision is required to be based on the evidence and the matters officially noticed. Argument of counsel is not evidence.

In regard to the penalty to be assessed, the Staff Attorney for TABC tacitly agreed on the record to accept, as being appropriate, a lesser penalty than he recommended.

B. Recommendation

The undersigned ALJ recommends the Respondent be assessed a three day suspension or, in lieu of the suspension, a forfeiture of \$450.00.

IV. PROPOSED FINDINGS OF FACT

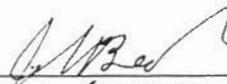
1. Vandy Ly d/b/a Sunshine Liquor #2 (the Respondent) holds a Package Store Permit and a Beer Retailer's Off Premise License issued by the Texas Alcoholic Beverage Commission (TABC).
2. On September 25, 1998, the Respondent sold an alcoholic beverage to a minor without requiring the minor to produce proper identification.
3. On April 14, 2000, notice of the hearing to consider sanctions against the Respondent was sent by certified mail, return receipt requested, to the Respondent at its address of record, 10900 West Bellfort, Houston, Texas 77099.
4. The Respondent or its agent received the notice of hearing.
5. The hearing to consider the allegations convened on June 15, 2000, before Administrative Law Judge Ed Shipper with the State Office of Administrative Hearings (SOAH) in SOAH offices at 2020 North Loop West, Houston, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent was represented by Danny Easterling, attorney-at-law.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 11.61 and 61.71.
2. 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. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Finding of Fact No. 2, the Respondent, with criminal negligence, sold an alcoholic beverage to a minor in violation of TEX. ALCO BEV. CODE ANN. 103.13(a).

5. Based on the foregoing findings of fact and conclusions of law, TABC is warranted in suspending the Respondent's permit for a period of three days, or in lieu of such suspension, assessing the Respondent a monetary penalty of \$450.00. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2), and 61.71(a)(1).

SIGNED this 13th day of November, 2000.



EARL A. CORBITT
Administrative Law Judge
State Office of Administrative Hearings