

DOCKET NO. 588442

IN RE SAM MATHEW	§	BEFORE THE
D/B/A SAM'S FAST STOP FOOD	§	
PERMIT NO. Q-253341	§	
LICENSE NO. BF306991	§	TEXAS ALCOHOLIC
	§	
WALKER COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0873)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd day of October, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Timothy J. Horan. The hearing convened and adjourned on June 29, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 21, 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. Respondent has filed exceptions.

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.

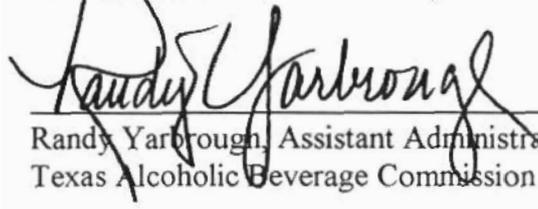
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. Q253341 and License No. BF306991 are herein **CANCELED FOR CAUSE**.

This Order will become final and enforceable on November 13, 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 23rd day of October, 2000.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Timothy J. Horan
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

Hal Ridley
ATTORNEY FOR RESPONDENT
P.O. Box 506
Huntsville, Texas 77342
CERTIFIED MAIL/RRR NO. Z 473 039 256

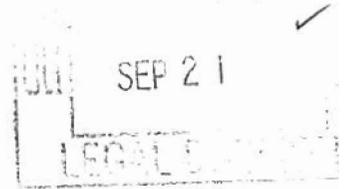
Sam Mathew
d/b/a Sam's Fast Stop Food Mart - Texaco
RESPONDENT
1938 Sam Houston Ave.
Huntsville, Texas 77340
VIA REGULAR MAIL

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



September 21, 2000

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

HAND DELIVERY

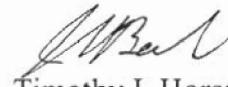
RE: Docket No. 458-00-0873; *TABC vs. Sam Mathew d/b/a Sam's Fast Stop Food Mart-Texaco, Permit No. Q-253341; License No. BF306991; Walker County, Texas (TABC Case No. 588442)*

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 Hal Ridley, attorney for Respondent. For reasons discussed in the Proposal for Decision, the proposal recommends Respondent's permit be canceled.

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,


Timothy J. Horan

Administrative Law Judge

THrk
Enclosure

xc: Christopher Burnett, Staff Attorney, *TABC*, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Hal Ridley, P.O. Box 506, Huntsville, Texas 77342 -**VIA REGULAR U.S. MAIL**
Rommel Corro, Docket Clerk, *State Office of Administrative Hearings*- **VIA HAND DELIVERY**

DOCKET NO. 458-00-0873

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner,	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
SAM MATHEW D.B.A.	§	OF
SAM'S FAST STOP FOOD MART	§	
TEXACO;	§	
PERMIT NO. Q-253341,	§	
LICENSE NO. BF306991	§	
WALKER COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS
Respondent		

PROPOSAL FOR DECISION

This case involves allegations that Sam Mathew d/b/a Sam's Fast Stop Food Mart-Texaco (Respondent), violated §106.03 of the Texas Alcoholic Beverage Code on February 18, 2000, and again on March 9, 2000, by acting with criminal negligence in selling alcoholic beverages to a minor. Petitioner recommended cancellation of Respondent's permit based on the allegations in the case at bar and the history of Respondent's alcoholic beverage code violations.

The Administrative Law Judge (ALJ) finds that Respondent sold alcoholic beverages to a minor with criminal negligence on February 18, 2000, in violation of provisions of the Texas Alcoholic Beverage Code. The Administrative Law Judge does not find sufficient evidence in the record to prove the alleged sale on March 9, 2000. The February 18th sale to a minor in the instant case combined with Respondent's history of alcoholic beverage violations of May 8, 1997, and April 16, 1999, amount to three offenses. After considering the standard penalty chart and the permissible sanctions in §106.13(b) for second and third offenses of this nature, the Administrative Law Judge recommends Respondent's permit be canceled.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to the Texas Alcoholic Beverage Code (the Code) §§6.01, 11.61, and 61.71. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating 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 the Texas Government Code ch. 2003.

Notice of hearing was mailed to Respondent by certified mail, return receipt requested, on April 14, 2000. There are no contested issues of notice or jurisdiction in this proceeding, therefore, those matters are set out in the findings of fact and conclusions of law without further discussion here.

A hearing was held before Timothy J. Horan, Administrative Law Judge, June 29, 2000 at the State Office of Administrative Hearings, Houston Office, 2020 North Loop West, Suite 111, Houston, Texas. Petitioner was represented by attorney Christopher Burnett. Respondent, Sam Mathew d/b/a Sam's Fast Stop Food Mart-Texaco was represented by attorney Hal Ridley. The hearing was concluded the same day and the record was closed on July 14, 2000, after the parties were allowed to submit proposed findings of fact and conclusions of law.

II. SUMMARY OF ALLEGATIONS

The Petitioner alleged that Respondent violated the Code on February 18, 2000, by acting with criminal negligence in selling an alcoholic beverage to a minor at Sam's Fast Stop Food Mart -Texaco. The second allegation concerned another criminally negligent sale of an alcoholic beverage to a minor on March 9, 2000, also at Sam's Fast Stop Food Mart - Texaco.

III. STATUTORY AUTHORITY

Sections 106.03 and 106.13 of the Texas Alcoholic Beverage Code control this proceeding. Section 106.13, authorizes sanctions if a retailer acts with criminal negligence in selling an alcoholic beverage to a minor. The Code permits sanctions in the following circumstances:

Sec. 106.13. SANCTIONS AGAINST RETAILER.

- (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 or a private club registration 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 or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.
- (b) For a second offense the commission or administrator may cancel the license or permit or suspend it for not more than three months. For a third offense within a period of 36 consecutive months the commission or administrator may cancel the permit or suspend it for not more than 12 months.
- (c) The commission or administrator may relax the provisions of this section concerning suspension and cancellation and assess a sanction the commission or administrator finds just under the circumstances if, at a hearing, the licensee or permittee establishes to the satisfaction of the commission or administrator:
 - (1) that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;

(2) that the permittee or licensee was entrapped; or

(3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee. Section 106.13 employs the Penal Code definition of criminal negligence, which provides that "[a] person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." TEX. PENAL CODE ANN. §6.03(d).

IV. DISCUSSION

1. Alleged Sale to Minor on February 18, 2000

TESTIMONY OF AGENT PHILLIPS

Agent Phillips of the Texas Alcoholic Beverage Commission appeared at the June 29th hearing and stated that on February 18, 2000, Sam's Fast Stop Food Mart-Texaco was under surveillance because of prior complaints which he had received. On February 18th, Agent Phillips observed a male, with a youthful appearance, enter and exit the store with something under his shirt. Agent Phillips stopped the car and asked the male if he had purchased alcohol from the store and the male, identified as 16 year old Willie Walker, told him that he had just purchased two bottles of Cisco Wine from Sam's Fast Stop Food Mart-Texaco. Agent Phillips stated that Walker did not have a false I.D. in his possession. Willie Walker told Agent Phillips that he paid the clerk at Sam's Fast Stop Food Mart-Texaco \$17.00 for alcohol and cigarettes. Agent Phillips did not actually observe the store clerk make the alleged sale of alcohol to Willie Walker.

TESTIMONY OF WILLIE WALKER

At the hearing on June 29th, Willie Walker testified that he purchased two packs of cigarettes and two bottles of Cisco Wine from the clerk at Sam's Fast Stop Food Mart between the hour of 8:00 p.m. and 9:00 p.m. Walker stated that he had to negotiate the final price down with the clerk and that they eventually agreed on \$17.00 for the wine and cigarettes. He informed the clerk that he was getting the alcohol and Walker proceeded to the back of the store to get the two bottles of Cisco Wine. Willie Walker then proceeded to exit the store with the wine under his shirt. He said the clerk never asked for him to produce any I.D. and that he has bought alcohol from this store on past occasions.

2. Alleged Sale to Minor on March 9, 2000

TESTIMONY OF OFFICER FOULCH

Officer Foulch of the Huntsville Police Department was on duty on March 9, 2000 and testified that he noticed numerous young adults hanging outside Sam's Fast Stop Food Mart-Texaco as he drove by in his car. Later that day, Officer Walker passed by the store again, and saw that the same young crowd was still outside the store. Officer Foulch observed a young female exit Sam's Fast Stop Food Mart-Texaco, retrieve a windbreaker from her car, and re-enter the store. He then observed a different female exit the store wearing the same windbreaker. Officer Foulch thought this was unusual, especially since the weather was in the mid,70's. He stopped the females, identified as Paula Corley, 17 years old, and Kimberly Darst, 15 years old and asked if they had purchased any alcohol from the store. Kimberly Darst told him that they had not purchased any alcohol and had only bought cigarettes. After further questioning, they told Officer Foulch that they had bought a St. Ives beer, from the store. Officer Foulch did not observe the alleged sale of alcohol at Sam' Fast Stop Food Mart-Texaco.

TESTIMONY OF PAULA CORLEY

Paula Corley testified at the hearing of June 29th and is a 17 year old female, DOB 9/6/82. She originally went to the store on March 9th between 8:00 p.m. and 8:30 p.m. to buy a Dr. Pepper accompanied by her friend, Kimberly Darst. Ms. Corley stated that Kimberly went to the cooler to get the beer but could not recall if she had the beer before or after they paid the clerk for the cigarettes and soda. She is not sure how much she paid to the clerk but believes that they paid \$2.00 or \$3.00. Ms. Corley testified that Ms. Darst put the beer under her jacket and they exited the store.

RESPONDENT'S CONTENTION AND EVIDENCE

Sam Mathew testified at the hearing that he has had a problem with shoplifters at his store and he reports some of these incidents to the police but gives others a break. He submitted a cash register tape made on February 18, 2000 of that day's sales and said it does not reflect any alcohol sale at the time in question. He also submitted a high speed video tape made by his store camera which depicts the inside of his store and shows Willie Walker in the store at the time of the incident. The Respondent asserts that the video contradicts Walker's testimony that he had purchased alcohol from the clerk. Sam Mathew asserts that the video supports his claim that Willie Walker shoplifted the alcohol from the store.

As to the March 9th incident, Sam Mathew states that he was working at Sam's Fast Stop Food Mart-Texaco, but that he did not sell any alcoholic beverage to Kimberly Darst or to Paula Corley. He submitted another cash register tape of the store made on March 9th and states that the cash tape does not reflect an alcohol sale between 8:00 -8:30 p.m., the alleged time of the second violation. Again, he asserts that on March 9, 2000, the two females must have shoplifted the beer from the store.

3. Respondent's Prior Violations of §106.13

The TABC presented a certified record from TABC's custodian of records showing Respondent's permit and violation history since 1996. The certified record included two Commission Orders assessing penalties for alcoholic beverage violation sales made to minors on May 8, 1997, and on April 16, 1999, along with other alcoholic beverage violations made by Respondent.

4. Analysis

The Petitioner was required to prove that the Respondent violated Section 106.03 of the Code by making a criminally negligent sale or delivery of alcohol to a minor. The ALJ must find, based on the circumstances surrounding the conduct, that the Respondent ought to have been aware of a substantial and unjustifiable risk selling alcohol to a minor.

With respect to the February 18, 2000 incident, the evidence showed that TABC Agent Phillips observed a male, with a youthful appearance, leave Sam's Fast Stop Food Mart-Texaco with something under his shirt. Agent Phillips initiated a stop of the male, who was identified as Willie Walker, DOB 8/20/83. Willie Walker told Agent Phillips that he had just purchased two bottles of Cisco Wine from the clerk at Sam's Fast Stop Food Mart-Texaco. Willie Walker testified that he was under 21 years of age at the time he purchased the alcohol, that he negotiated the sale price with the clerk and paid \$17.00 for the alcohol and cigarettes. The clerk working at Sam's Fast Stop Food Mart-Texaco did not ask for any identification. Willie Walker testified that he has bought alcohol in the past from Sam's Fast Stop Food Mart-Texaco. The Respondent's employee who was working at the time of this incident did not testify at the hearing. The cash tape and video submitted by Respondent as evidence is not conclusive to support Respondent's contention that Willie Walker shoplifted the alcohol from the store. It is entirely possible the clerk took the money from Walker for the alcohol but did not ring up the sale on the register. The store video was made on a very high speed and as shown, is not contradictory to the testimony of Agent Phillips or Willie Walker. The testimony of Agent Phillips and of Willie Walker is consistent and credible. The ALJ concludes that the Respondent, with criminal negligence, violated Section 106.03 of the Texas alcoholic Beverage Code by selling an alcoholic beverage to a minor, Willie Walker, on February 18, 2000.

Considering the circumstances surrounding the March 9, 2000 sale, the ALJ cannot conclude that the Respondent acted with criminal negligence in selling the beer to Kimberly Darst and Paula Corley. Paula Corley could not recall many essential facts leading up to the alleged sale of alcohol. She could not recall the exact amount of money paid to the clerk; or whether money was paid before or after Kimberly Darst took the alcohol from the cooler. All she can recall is that Kimberly Darst exited the store with the alcohol concealed under her jacket. Officer Foulch stopped the two females as they were exiting the store and asked them if they had purchased alcohol from the store. Kimberly Darst told Officer Foulch that they had not. Officer Foulch stated that Kimberly Darst lied to him about buying alcohol from Sam's Fast Stop Food Mart-Texaco. Only later, after further questioning, did they tell Officer Foulch that they had bought alcohol from the Sam's Fast Stop Food Mart-Texaco. This original denial about purchasing alcohol severely attacks the credibility of Paula Corley and Kimberly Darst. It should be noted that Kimberly Darst did not testify at the hearing. Sam Mathew asserts the two females took the alcohol without his permission. The Petitioner has

not proven this allegation by a preponderance of the evidence. Therefore, the ALJ concludes that the Petitioner failed to prove the Respondent made a criminally negligent sale of an alcoholic beverage to a minor on March 9, 2000.

V. RECOMMENDATION

The Staff requested cancellation of the permit. Having considered the Petitioner's request, the violation proved in the instant case, and Respondent's history of alcoholic beverage violations, the ALJ recommends that Respondent's Wine only Package Store Permit Q-253341 and Beer Retailer's Off-Premises License BF-306991 be canceled.

VI. FINDINGS OF FACTS

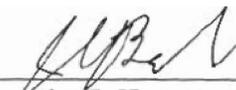
1. Respondent, Sam Mathew, d/b/a Sam's Fast Stop Food Mart-Texaco Corner Food Mart, a convenience store located at 1938 Sam Houston Avenue, Huntsville, Walker county, Texas, is the holder of a Wine Only Package Store Permit, Q-253341 and a Beer Retailer's Off-Premises License, BF-306991 from TABC.
2. On April 14, 2000, the Staff of the Texas Alcoholic Beverage Commission (TABC) notified Respondent of this hearing by certified mail, return receipt requested.
3. On February 18, 2000, Respondent's employee was working behind the check-out counter at Sam' Fast Stop Food Mart-Texaco.
4. On February 18, 2000, Willie Walker entered the Sam's Fast Stop Food Mart-Texaco and purchased two bottles of Cisco Wine, an alcoholic beverage, from Respondent's employee.
5. On February 18, 2000, Willie Walker was a 16 year old minor, DOB August 20, 1983.
6. Respondent's employee did not ask Willie Walker for any identification.

VII. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code (the Code), sections 106.03 and 106.13.
2. The SOAH has jurisdiction over matters related to conducting the hearing in this docket number, including authority to issue proposed findings of fact and conclusions of law pursuant to Texas Government Code ch. 2003.
3. The notice of hearing was properly and timely served on Respondent pursuant to the Administrative Procedure Act in §§2001.051 and 2001.052 of the Texas Government Code.

4. Based upon Findings of Fact Nos.1-6, Respondent sold an alcoholic beverage to a minor, with criminal negligence, on February 18, 2000, in violation of §106.03 and 106.13 of the Code.
5. Respondent's Wine Only Package Store Permit Q-253341 and Beer Retailer's Off-Premises License BF-306991 should be canceled pursuant to §106.13 of the Code.

Signed this 21st day of September, 2000.

su 

Timothy J. Horan
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS