

DOCKET NO. 589228

IN RE ONI INC.	§	BEFORE THE
D/B/A THE BUFFALO CLUB/ THE COLORADO ROOM	§	
PERMIT NOS. MB238238, LB238239, PE238240, CB238241	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1937)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of December, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ann Landeros. The hearing convened and adjourned on October 5, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 17, 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 were filed on November 21, 2000.

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 Nos. MB238238, LB238239, PE238240, and CB238241 are herein **SUSPENDED for fifty (50) days**.

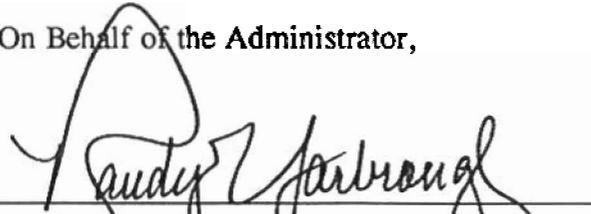
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$15,000.00** on or before the **14th day of March, 2001**, all rights and privileges under the above described permits will be **SUSPENDED for a period of fifty (50) days, beginning at 12:01 A.M. on the 21st day of March, 2001**.

This Order will become final and enforceable on January 1, 2001, 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 12th day of December, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Ann Landeros
Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE (512) 475-4994

Geoffrey King
ONI, Inc.
d/b/a The Buffalo Club/The Colorado Room
RESPONDENT
405 E. 7th Street
Austin, Texas 78701-3316
CERTIFIED MAIL/RRR NO. Z 280 626 775

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

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Austin District Office

DOCKET NO. 458-00-1937

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

ONI INC., D/B/A BUFFALO CLUB /
THE COLORADO ROOM,
RESPONDENT

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (Staff/ TABC or Commission) brought this disciplinary action against ONI Inc., d/b/a Buffalo Room/The Colorado Room (Respondent), alleging that its employee sold, with criminal negligence, an alcoholic beverage to a minor in violation of §§ 11.61 and 106.03 of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permits be revoked. This Proposal finds that a criminally negligent sale to a minor did occur and recommends Respondent's permits be suspended.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter under §§ 6.01 and 11.61 of the Code. The State Office of Administrative Hearings has jurisdiction under TEX. GOV'T CODE ANN. §2003.021. There are no contested issues of notice or jurisdiction in this proceeding.

The hearing in this matter was held October 5, 2000, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Ann Landeros at the SOAH Hearings Facility, 1700 N. Congress Avenue, Suite 1100, Austin, Texas. Assistant General Counsel Christopher Burnett represented Petitioner. Respondent's owner, Geoffrey King, appeared pro se as Respondent's designated representative. After receipt of evidence, the record closed October 5, 2000.

II. DISCUSSION

A. Background

Respondent holds the following Commission permits: mixed beverage permit No. MB 238238; mixed beverage late hours permit No. LB238239; beverage cartage permit No. PE238240; and caterers permit No. CB238241. Respondent's business premises, a club or bar, is located at 405 East 7th Street in Austin, Texas, an area commonly known as the Sixth Street entertainment area. Mr. King owns ONI Inc., and operates the Buffalo Club (club). He was at the club on April 28, 2000, when Respondent's employee, bartender David Yelberton, was accused of selling alcohol to nineteen-year-old male named Mica Bonaviri.

B. Applicable Legal Standards For Sale To Minor Violation

The Commission may suspend or revoke permits if the permittee violates the Code or the Commission's rules. Code at §§ 6.01 and 11.61. Code § 106.03¹ forbids sale of alcohol to persons under twenty-one years of age. Sale of alcohol to a minor due to the seller's criminal negligence violates both the civil and criminal statutes. It is a defense that the minor procured the sale of alcohol by producing an apparently valid Texas driver's license or identification card as proof the minor is twenty-one years or older.

Under the Code, a person acts with criminal negligence if that person acts with a mental state that would constitute criminal negligence under chapter 6 of the Penal Code. Pursuant to TEX. PENAL CODE ANN. § 6.03(d), 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.

C. Sale To Minor With Criminal Negligence Proven

The evidence established that Respondent's employee acted with criminal negligence when he sold alcohol to a minor. Because Respondent's bar served alcoholic beverages and was frequented by minors, there was a substantial risk that an underage patron might try to procure alcohol from Respondent's employees. Respondent's management instituted a wristband system to verify the age of its patrons to safeguard against sale of alcohol to minors. Respondent's employees were to check identification at the door and issue red and white wristbands only to those persons entitled to purchase or consume alcohol because they were twenty-one years of age or older. Before selling or serving alcohol, Respondent's employees were to check that the customer had the wristband.

When Respondent's bartender sold alcoholic beverages to a minor without checking for the wristband, that bartender deviated from the standard of care Respondent's management had established. By failing to enforce Respondent's wristband identification system, Respondent's employee acted with criminal negligence. Under the Commission's rules, Respondent is liable from its employees' criminal negligence with regard to sale of alcohol to minors.

¹ The statute reads: "Sale to Minors (a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor. (b) A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents 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 person to sell him an alcoholic beverage. (c) An offense under this section is a Class A misdemeanor."

1. Sale to Minor Proven

On April 28, 2000, Austin Police Department (APD) Officer Neil Neyens, working undercover in plain clothes, entered Respondent's premises with another undercover officer. Respondent's doorman asked for and received identification from the two officers before allowing them inside the club. After receiving the officers' identification, Respondent's doorman provided them with a red and white wristband. This wristband indicated they were over twenty-one years old and legally allowed to purchase alcohol.

Seated at a table about twelve to fifteen feet from both the entrance and the bar, Officer Neyens testified he had a clear view of activities at the door and at the bar. When Officer Neyens entered, the club was about half full, with most of the patrons congregated at a party in a back room. Officer Neyens believed many of the patrons in the back room were under twenty-one years old.

From his table, Officer Neyens observed a group comprised of a male (later identified as Mica Bonaviri) and four females enter after being waved through without presenting any identification to the doorman. This group took seats at a table next to the officers. To Officer Neyens, each member of the group looked younger than twenty-one years old. None of the group had a wristband.

As Officer Neyens watched, Mr. Bonaviri approached the bar and placed an order with the bartender, Mr. Yelberton. Without checking for a wristband or other identification, Mr. Yelberton poured a liquid from a bottle marked "vodka" into the type of glass used for "Kamikaze" drinks and gave the glasses to Mr. Bonaviri, who paid for the drinks, then carried them to his friends. Mr. Bonaviri began to consume one drink and his companion, Ms. Holland, drank the other.

Because both Mr. Bonaviri and Ms. Holland appeared underage, Officer Neyens telephoned TABC Agent Tim Humphries, who was waiting outside with APD Officer Jonathan Martin and asked them to come into the bar to investigate alcohol consumption by minors. While Agent Humphries and Officer Martin investigated the party in the back room, Officer Neyens took Mr. Bonaviri and his companions outside and asked their ages. To prove his age, Mr. Bonaviri opened his wallet and showed Officer Neyens another person's identification card. While looking at Mr. Bonaviri's false identification, Officer Neyens saw another identification card in the wallet and asked to see it. The second card was Mr. Bonaviri's actual Texas driver's license, which showed he was nineteen years old. Ms. Holland presented identification showing she was twenty years old. Agent Humphries assisted Officer Neyens by issuing minor-in-possession tickets to Mr. Bonaviri and Ms. Holland.

After speaking to the minors, Officer Neyens took Mr. Yelberton outside for questioning. Both to Officer Neyens at the scene and later to Mr. King, Mr. Yelberton denied serving alcohol to a minor. Mr. Yelberton was not arrested then but was told an arrest warrant would issue later for sale of alcohol to a minor. While Officer Neyens and Mr. Yelberton were talking, Mr. King

approached and tried to intercede on Mr. Yelberton's behalf. Officer Neyens asked Mr. King not to interrupt and threatened him with arrest if he continued to try to join the conversation. Mr. King believed Mr. Yelberton, who had eleven or twelve years experience in the bar business and was a conscientious employee, when he denied selling alcohol to a minor.

2. Criminally Negligent Sale Proven

Respondent's club was frequented by minors who were allowed in but not given the red and white wristbands. The presence of minors in a club that sold alcohol created a substantial risk that a minor would procure alcohol while in the club. Respondent's wristband system limited sale of alcohol to those customers of legal drinking age. Given Respondent's clientele included minors, to sell alcohol to a customer without a wristband was to act with criminal negligence. As an experienced bartender, Mr. Yelberton should have been aware that failure to abide by Respondent's system and look for Mr. Bonaviri's wristband created a substantial and unjustifiable risk that a minor might be served alcohol.

Respondent's wristband system established a standard of care for detecting underage patrons. When Mr. Yelberton, a trained, experienced bartender, failed to check for the wristband or a valid identification, he engaged in a gross deviation from Respondent's standard of care, which created a substantial risk that a minor would acquire alcohol while in the club.

Respondent argued that Mr. Bonaviri's possession of the false identification was evidence that Mr. Yelberton was duped into serving alcohol to Mr. Bonaviri. However, Officer Neyens saw Respondent's doorman allow Mr. Bonaviri and Ms. Holland enter the club without presenting identification and without receiving the red and white wristband that identified them as of legal drinking age. Officer Neyens then saw Mr. Bonaviri purchase the alcoholic beverages without presenting either identification or the red and white wristband to Mr. Yelberton. Because there was no evidence Mr. Yelberton ever saw Mr. Bonaviri's false identification, there is no reason to believe that Mr. Bonaviri misled Mr. Yelberton about his age. Absent either identification in the form of a valid Texas driver's license or identification card or a red and white wristband, Mr. Yelberton should not have served anyone alcohol on Respondent's premises.

Mr. Bonaviri did not appear to be at least twenty-one years old. Failing to verify Mr. Bonaviri's age also constituted a gross deviation from the standard of care that an ordinary person would have exercised under all the circumstances as viewed from Mr. Yelberton's standpoint. Service of alcohol to Mr. Bonaviri constituted an act of criminal negligence on Mr. Yelberton's part.

D. **Appropriate Sanction**

Staff asked that Respondent's permits be revoked. Respondent asked that no discipline be imposed. This Proposal recommends Respondent's permits be suspended for thirty days and Respondent be given the option of paying a fine of \$9,000 (\$300 per day of suspension) in lieu of the suspension.

1. Respondent's Disciplinary History

The evidence established that over the last seven years, multiple citations for TABC health, safety, and welfare violations have been written at Respondent's premises. Although Respondent has been cited many times for violating the Code, Staff failed to establish the disposition of most of the citations and TABC's own penalty chart did not support cancellation of Respondent's permits.

TABC agents Humphries and Kirk Dalschau and APD Officer Neyens all testified that Respondent has a reputation for having a high number of minors in its club and for serving alcohol to minors. The officers' opinion was bolstered by TABC's disciplinary history for Respondent, which showed that: (1) from 1993 to July 2000, twenty-five minor in possession of alcohol citations were written at the club; (2) from May 1995 to April 2000, the club was cited three times (including the incident that was the subject of this case) for selling alcohol to a minor; and (3) the club was cited for possession of drugs by an employee in 1994. Although the disposition of most these citations was unclear, Respondent paid fines in lieu of having its permit suspended for three separate violations: sale to minor; possession of drugs by an employee; and allowing a minor to possess or consume alcohol on the premises. (TABC Exh. 1).

2. Legal Standards For Assessing Sanction

The Commission's rules at 16 TEX. ADMIN. CODE (TAC) ch. 37, subch. B set forth a penalty chart to be used by the Commission's employees in recommending sanctions. Under the Commission's penalty chart criteria, Respondent is not subject to a sanction for a third violation because its prior violations were too remote in time. According to the penalty chart, the appropriate sanction for Respondent's sale to minor violation is a suspension of its permit.

While chapter 37 is not binding on the ALJ, it can be used for guidance in determining the appropriate sanction in this matter.² For health, safety, and welfare violations, cancellation is recommended for a third violation if it occurs within thirty-six months of the first violation. 16 TAC § 37.60(c). The only known discipline imposed on Respondent for health, safety, and welfare violations occurred in 1994, 1995, and 1996, more than thirty-six months before the violation at issue in this case.

The Code and Commission rule allow the imposition of a fine in lieu of suspension for a permittee who sold alcohol to a minor. Code at § 11.64; 16 TAC § 37.61(a). In determining whether a fine is appropriate, the Commission is to look at the type of permit, the type of violation, the permittee's disciplinary history, and any aggravating or ameliorating circumstances. Code at §

² 16 TAC § 37.60(g) states that the standard penalty chart does not bind a hearing examiner, the administrator, or his designee as to penalties for any violation determined to have occurred by the facts presented in an administrative hearing and the record of that proceeding shall be the determining factor as to the sufficiency of the penalty assessed.

11.64; 16 TAC § 37.61(b).³ Fines in lieu of suspension may range from \$150 to \$25,000 a day for each day of suspension imposed. When imposing the fine in lieu of suspension, the Commission shall consider the suspension's economic impact on the permittee. The Commission may relax the permit's suspension or cancellation in consideration of the following: (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; (3) that an agent, servant, or employee of the permittee or licensee violated the code without the knowledge of the permittee or licensee; (4) that the permittee or licensee did not knowingly violate the code; or (5) that the violation was a technical one. Code at § 11.64(b) and (c).

3. Recommended Sanction

While Respondent should be sanctioned in this matter, Staff failed to prove cancellation is the appropriate sanction. The evidence supports a suspension of Respondent's permits for a period of thirty days or, in lieu of the suspension, imposition of a \$9,000 fine (\$300 per suspension day).

For its previous health, safety, and welfare violations, Respondent received short suspensions for which it paid relatively small fines. The numerous citations issued on Respondent's premises indicates there is some sort of ongoing problem there, although the extent and seriousness of that problem could not be ascertained because the disposition of most of the citations was not shown. Both TABC and APD perceive Respondent as having a problem with serving alcohol to minors. Respondent seems to need some additional motivation to implement the types of procedures that will reduce the number of citations issued on its premises.

There was no evidence that any of the considerations listed in § 11.64(b) and (c) of the Code, applied to Respondent. Respondent's employee could have prevented the sale by exercising due diligence in checking for the wristband or identification. Respondent was not entrapped nor was this merely a technical violation. Respondent's employee knew he should check for a wristband before serving alcohol to a patron.

In this case, the Commission may recommend either a suspension or a fine in lieu of a suspension for the sale-to-minor violations. The prior suspensions were for ten days or less and the fines paid were under \$2000. Apparently, these sanctions were not serious enough to motivate Respondent to take the steps necessary to police itself more effectively. The suspension length and

³ According to 16 TAC § 37.61(c), aggravating or ameliorating circumstances may include but are not limited to: (1) whether the violation was caused by intentional or reckless conduct by the licensee or permittee; (2) the number, kind and frequency of violations of the Alcoholic Beverage Code and rules of the commission committed by the licensee or permittee; (3) whether the violation caused the serious bodily injury or death of another; and/or (4) whether the character and nature of the licensee's or permittee's operation are reasonably calculated to avoid violations of the Alcoholic Beverage Code and rules of the commission.

fine amount should be large enough to make it worthwhile for Respondent to institute necessary reforms without being ruinous. While there was no evidence as to Respondent's revenue, a thirty-day suspension should have a significant impact on Respondent's business, as should a \$9,000 fine.

III. PROPOSED FINDINGS OF FACT

1. ONI Inc., d/b/a Buffalo Club/Colorado Room (Respondent) holds the following permits issued by the Texas Alcoholic Beverage Commission (Commission): mixed beverage permit No. MB 238238; mixed beverage late hours permit No. LB238239; beverage cartage permit No. PE238240; and caterers permit No. CB238241.
2. Respondent's business premises, the Buffalo Club/Colorado Room (club) is a bar or club located at 405 East 7th Street, Austin, Texas.
3. Geoffrey King owns ONI Inc., and operates the club.
4. Mr. King appeared pro se as Respondent's designated representative at the hearing in this matter held October 5, 2000. Respondent did not contest notice or jurisdiction.
5. Mr. King and Respondent's employee, bartender David Yelberton, were both working at the club on April 28, 2000.
6. The club allowed persons under the age of twenty-one to enter its premises.
7. To prevent its underage patrons from obtaining alcohol in the club, Respondent's management established a standard of care and instituted a procedure whereby: (a) Respondent's doorman would check the patron's identification and issue a red and white wristband to identify those patrons who were at least twenty-one years old; and (b) Respondent's bartenders would not serve a patron an alcoholic beverage unless the patron had a red and white wristband or other valid identification.
8. While working at the club on April 28, 2000, Mr. Yelberton sold alcoholic beverages to Mica Bonaviri, a nineteen year old male.
9. At the time he purchased the alcoholic beverages from Mr. Yelberton, Mr. Bonaviri did not have either a valid identification showing he was at least twenty-one years old or a red and white wristband.
10. At the time he sold the alcoholic beverages to Mr. Bonaviri, Mr. Yelberton did not check to see if Mr. Bonaviri was at least twenty-one years of age by checking to see that Mr. Bonaviri had either a valid identification or the club's red and white wristband in his possession.

By failing to follow Respondent's policy of only selling alcohol to patrons who had the red and white wristband, Mr. Yelberton deviated from Respondent's standard of care to prevent sale of alcohol to minors.

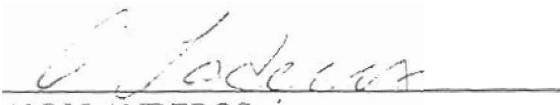
12. Respondent's disciplinary history includes: (1) twenty-five minor in possession of alcohol citations from 1993 to July 2000; (2) from May 1995 to April 2000, three citations (including the incident that was the subject of this case) for selling alcohol to a minor; and (3) an employee in possession of drugs citation in 1994.
13. Of the citations listed in Finding of Fact No. 12, only the following three were shown to have resulted in a sanction: possession of drugs by an employee in 1994; sale to minor in 1995; and allowing a minor to possess or consume alcohol on the premises in 1996.
14. For each of the violations listed in Finding of Fact No. 13, Respondent's permits were suspended for ten days or less. For each violation, Respondent chose to pay a fine of \$1,500 in lieu of the suspension.
15. Based on the number of citations written at the club, Respondent has a reputation in the Austin law enforcement community for having a problem with serving alcohol to minors.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to the TEX. ALCO. BEV. CODE ANN. (Code) §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Based on Findings of Fact Nos. 6-11, Respondent violated § 106.03 of the Code because its employee acted with criminal negligence when he sold alcohol to a person under twenty-one years of age on Respondent's premises.
6. Based on Conclusion of Law No. 5, the Commission may suspend Respondent's permits, pursuant to §§ 6.01 and 11.61(b) of the Code.

7. Based on Finding of Fact No. 13, because Respondent was not shown to have been sanctioned for a violation occurring within thirty-six months, the Commission may impose either a suspension or a fine in lieu of suspension on Respondent, pursuant to § 11.64 of the Code and 16 TAC §§ 37.60(c) and 37.61(a).
8. Based on Findings of Fact Nos. 12-15 and Conclusion of Law Nos. 5-7, the Commission should suspend Respondent's permits for thirty days and Respondent should be allowed to pay a \$9,000 fine (\$300 per day of suspension) in lieu of the suspension.

SIGNED this 17 Day of November, 2000.


ANN LANDEROS
Administrative Law Judge
State Office of Administrative Hearings