

**DOCKET NO. 594930**

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
MOHAMMAD RAZZAQ SWATI	§	
D/B/A M.L.K. FOOD MART #3	§	
PERMIT NO. BF-443009	§	
MCLENNAN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-3613)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 8th day of January, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on October 10, 2001, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 11, 2001. 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. On December 18, 2001, Respondent filed Exceptions to the Proposal.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, Exhibits and Exceptions to the Proposal, 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 hereby are denied.

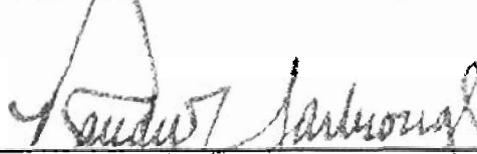
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that License No. BF-443009 is hereby **CANCELED FOR CAUSE**.

**This Order will become final and enforceable on January 29, 2002**, 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 8th day of January, 2002.

On Behalf of the Administrator,



Randy Yarborough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

William F. Brown  
**ATTORNEY FOR RESPONDENT**  
210 North 6th Street  
Waco, Texas 76701  
**VIA FACSIMILE: (254) 756-2193**  
**AND REGULAR MAIL**

Mohammad Razzaq Swati  
d/b/a M.L.K. Food Mart #3  
**RESPONDENT**  
1924 J.J. Fleweller Road  
Waco, Texas 76701  
**CERTIFIED MAIL NO. 7000 1530 0003 1927 5986**

Administrative Law Judge  
State Office of Administrative Hearings  
Waco, Texas  
**VIA FACSIMILE: (254) 750-9380**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Division

Waco District Office  
Licensing Division

**DOCKET NO. 458-01-3613**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>MOHAMMAD RAZZAQ SWATI D/B/A M.L.K. FOOD MART #3 LICENSE NO. BF-443009 MCLENNAN COUNTY, TEXAS (TABC CASE NO. 594930)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (the Commission) requested the license cancellation of Mohammad Razzaq Swati d/b/a M.L.K. Food Mart #3 (Respondent). The Commission's request was based on three allegations: that Respondent violated the Agreed Order in Docket No. 587495 by selling alcoholic beverages before 5:00 p.m. on a school day, warranting cancellation or suspension of Respondent's license based on the general welfare, health, peace, morals and safety of the people, and based on the public sense of decency, violating Texas Alcoholic Beverage Code (the Code) §11.61(b)(7); that Respondent, his agent, servant, or employee, sold, with criminal negligence, an alcoholic beverage to a minor on or about July 17, 2001, in violation of Code §106.13(a); and that Respondent, his agent, servant, or employee, sold, with criminal negligence, an alcoholic beverage to a minor on or about September 6, 2001, in violation of Code §106.13(a). The Administrative Law Judge affirms the Commission's allegations, and recommends that Respondent's license be canceled.

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

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

The hearing was held on October 10, 2001, before Administrative Law Judge (ALJ) Suzan Shinder in the hearings facility of the State Office of Administrative Hearings, in Waco, Texas. The record was closed at the conclusion of the hearing that day. The Commission was represented by Dewey Brackin. Respondent was represented by attorney William F. Brown.

## II. EVIDENCE AND ARGUMENT

The Commission's 10 exhibits were admitted.<sup>1</sup> Respondent's two exhibits were admitted.<sup>2</sup> The Commission called five witnesses: Holly Gorgas, Officer Dennis Taylor, Samson Vielma, Letisha Melcher, and Officer William Rogerson. Respondent called three witnesses: Mubarak Swati, Mohammad Swati, and Wayne Mosley.

It was undisputed that Beer Retailer's Off-Premise License, BF-443009, was issued to Mohammad Razzaq Swati, d/b/a M.L.K. Food Mart #3, 1924 JJ Fleweller Road, Waco, McLennan County, Texas, by the Texas Alcoholic Beverage Commission, on the 23<sup>rd</sup> day of December, 1998, and has been continuously renewed.

**A. Did Respondent violate the Agreed Order in Docket No. 587495 by selling alcoholic beverages before 5:00 p.m. on a school day, warranting cancellation or suspension of its license or permit based on the general welfare, health, peace, morals and safety of the people, and based on the public sense of decency, violating Texas Alcoholic Beverage Code (the Code) §11.61(b)(7) [§61.71(a)(17)]?**<sup>3</sup>

### 1. The Commission's Case

When Respondent most recently filed renewal applications for its permit (and license), the Waco Police Department filed a protest to their issuance, alleging that the place or manner in which Respondent conducted its business warranted the cancellation or suspension of its permit (and license) based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of Code §11.61(b)(7) [§61.71(a)(17)]. Although Respondent denied the allegations in the Agreed Order of October 13, 2000, in Docket No. 587495, Respondent agreed to waive its right to a hearing and agreed not to contest the allegations, agreeing to accept the following terms and conditions:

1. Respondent was not to sell, serve, or deliver alcoholic beverages until at least 5:00 p.m. on school days.
2. Respondent was to have a security guard on duty beginning at 5:00 p.m. throughout the year.

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<sup>1</sup> Respondent's license and violation history, three photographs of the location, a photograph of a 32-ounce bottle of "Old Milwaukee," a xerox copy of Holly Gorgas' identification card, a photocopy of a photograph of Letisha Melcher, a photocopy of a photograph of Amy Dobbs, and two video-tapes.

<sup>2</sup> A "Petition Concerning MLK #3," and a letter to Respondent from the Commission.

<sup>3</sup> Section 61.71(a)(17) of the Code relates to licenses, and §11.61(b)(7) of the Code relates to permits; however, the language is otherwise the same. Based on the Agreed Order of October 13, 2000, at the time of the Agreed Order Respondent not only had a Retail Dealer's Off-Premise License, but also had a Wine Only Package Store Permit. Therefore, much of the Commission's language relates to permits.

Officer William Rogerson has been police officer for 10 years and worked in Respondent's neighborhood, on the bike patrol unit from 1994 until 1999. He was familiar with Respondent's premises, because it is across the street from what was his main patrol area, a Waco Housing Authority property. In 1998 when Mohammad Swati took over the premises, the police made contact with him, because there was a "rush for the property" by drug dealers as soon as they found out it was under new management. The police contacted Mr. Swati to request his permission to arrest persons on the property for criminal trespass. Mr. Swati supported the police in this for a period of time. However, he withdrew his permission for these trespass arrests when his business was adversely affected. Many arrests were made on the premises property for all types of offenses, including many drug violations. Because there were ongoing problems in Respondent's location with persons gathering to gamble and sell narcotics, a "nuisance abatement" suit was filed by the city of Waco. Eventually, a settlement agreement, the above described Agreed Order,<sup>4</sup> was reached on this suit.<sup>5</sup>

On May 8, 2001, Waco Patrol Officer Dennis Taylor, working in an undercover capacity, in plain-clothes, entered Respondent's location on a school day, and purchased Old Milwaukee beer shortly after 4:10 p.m., which is an alcoholic beverage from Respondent's cashier. Although there were ropes looped loosely through the handles of the refrigerated units containing the beer, the doors to the refrigerated area were easily completely opened. The video-tape of this incident corroborated Officer Taylor's version of the condition of the premises and of these events.<sup>6</sup>

The officer was aware of the Agreed Order that prohibited Respondent from selling alcohol before 5:00 p.m. on a school day. Respondent's awareness of this order was evidenced by a sign on the front of a counter in the store stating, "...Beer cannot be sold until 5:00 p.m. Monday through Friday beginning Monday, October 23, 2000. School holidays are not included."<sup>7</sup> However, Officer Taylor purchased beer from Respondent well before 5:00 p.m. that school day.

Mubarak Swati had been Respondent's employee for approximately seven and one-half months at the time of this incident. He admitted that he was the employee, who sold the alcoholic beverage to the officer before 5:00 p.m. on the above school day.<sup>8</sup>

## 2. Respondent's Case

Mubarak Swati has been employed at various convenience stores for nine or ten years. The prohibition against selling alcohol prior to 5:00 p.m. on a school day is unusual, and he had difficulty

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<sup>4</sup>A copy of this Agreed Order was admitted as part of Commission's Exhibit No. 1.

<sup>5</sup>Testimony of Officer William Rogerson.

<sup>6</sup>Officer Dennis Taylor's testimony, and Commission's Exhibits Nos. 2, 6, and 7

<sup>7</sup>Commission's Exhibit No. 5.

<sup>8</sup>Testimony of Mubarak Swati. Mubarak Swati is Mohammad Swati's nephew, but has no premises ownership or control.

remembering it. On May 8, 2001, before 5:00 p.m., the traffic in the store picked up after school was out, as usual. Although he was aware of the prohibition, on that day he simply forgot about it. Mubarak Swati admitted selling alcohol to the officer before 5:00 p.m. on that school day, but he did not recall selling beer to anyone else before 5:00 p.m. that day. Mubarak Swati is paid by the hour and would not benefit monetarily from individual sales. Mohammad Swati made efforts to prevent violating the order that prohibited sale of alcohol before 5:00 p.m.; he told Mubarak Swati not to sell alcohol before 5:00 p.m. on a school day; he put up a sign explaining the prohibition; and he placed a rope through the handles of the refrigerated unit, even though this was not required by the order prohibiting sales of alcohol before 5:00 p.m.<sup>9</sup>

**B. Did Respondent, his agent, servant, or employee, sell, with criminal negligence, an alcoholic beverage to a minor on July 17, 2001, in violation of Code §106.13(a)?**

**1. The Commission's Case**

According to Samson Vielma, on July 17, 2001, Mr. Vielma was working for Respondent, at Respondent's location, as a licensed security guard. Between eight and nine p.m., two young women entered the store and purchased alcoholic beverages<sup>10</sup> from Respondent's cashier, Khalid Khan.<sup>11</sup> Mr. Vielma observed that the cashier did not ask for identification or ask their ages, and the young women did not volunteer this information. The women appeared to be between eighteen and twenty years of age; so Mr. Vielma followed them out of the store, asked their ages, and asked for identification. The young women told the officer that they were eighteen and nineteen years old; one had identification and one did not. As a result, Mr. Vielma called the police.<sup>12</sup>

Letisha Melcher was the 19-year-old woman Mr. Vielma observed, with Ms. Melcher's 18-year-old friend Amy Dobbs.<sup>13</sup> According to Ms. Melcher, Ms. Dobbs was the 18-year-old that Mr. Vielma observed buying the alcoholic beverages from Respondent on that date. On that evening, the women were dressed as if they were going to a party or a dance, wearing skin-tight pants and shirts. Although Ms. Melcher had purchased alcoholic beverages in this location from Respondent on other occasions, she denied ever lying about her age or showing a fake identification in order to accomplish the purchase. Ms. Dobbs paid for the alcoholic beverages on that particular evening because she had been in this location a number of times, and the women believed that the cashier knew Ms. Dobbs as a repeat customer. The cashier and Ms. Dobbs spoke as if they knew one another casually, and the cashier did not ask for Ms. Dobbs identification. After the women went outside, they were stopped by the security guard. They told the security guard their correct ages of

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<sup>9</sup>Testimony of Mubarak Swati and Mohammad Swati.

<sup>10</sup>Smirnoff Ice, and either Coors Light or Keystone.

<sup>11</sup>Khalid Khan was in the custody of Immigration and Naturalization Services at the time of the hearing.

<sup>12</sup>Testimony of Samson Vielma.

<sup>13</sup>Amy Dobbs has since moved to North Carolina, and was not present for this hearing.

19 and 18, and Ms. Melcher showed the guard her identification. Ms. Dobbs did not have identification with her at the time. Commission's Exhibits Nos. 9 and 10 are enlarged copies of these women's pictures from their driver's licenses. These pictures show both women to appear their stated ages of 19 and 18 years of age. Ms. Melcher's date of birth is January 14, 1982,<sup>14</sup> and at the hearing, she appeared to be her stated age.

Another of Respondent's employees, Mubarak Swati, stated that he had sold beer to Ms. Dobbs on other occasions after she had shown him identification with a date of birth in 1979. This identification was not a Texas driver's license, but was some type of "school ID." However, Mr. Swati's testimony was inconsistent regarding whether or not Mr. Khan had ever been shown identification by Ms. Dobbs; first Mr. Swati stated that Mr. Khan had not been shown Ms. Dobbs' identification, later Mr. Swati stated Mr. Kahn had been shown Ms. Dobbs' identification.<sup>15</sup>

## 2. Respondent's Case

Prior to this date, when Mr. Vielma told Mohammad Razzaq Swati that he had seen the same cashier selling alcoholic beverages to minors, Mr. Swati told Mr. Vielma that if he ever saw this again, he should call the police. Mr. Vielma also saw Mr. Swati have a heated conversation with this cashier just after Mr. Vielma reported the problem to Mr. Swati.<sup>16</sup> Respondent inferred that because neither Ms. Dobbs nor Ms. Melcher were arrested for "minor-in-possession," their credibility was suspect; that on July 17, 2001, these women told the police what they believed the police wanted to hear, in order to avoid being arrested.

Mohammad Swati recognized Amy Dobbs driver's license picture. Once, he refused to sell her beer because she looked so young, and she did not have identification. She left the premises and returned with a school identification card. Mubarak Swati and Khalid Khan were both working on premises that day, and Mohammad Swati showed Ms. Dobb's identification to both of them, so that they would know she was old enough to buy alcohol. Mohammad Swati only checked Ms. Dobb's identification one time; after that, he did not feel it was necessary to ask for identification again. Ms. Dobbs' identification was a school identification card; but he did not remember which school it came from. He did remember that this school identification card showed Ms. Dobbs birthday to be February, 1979. When Mohammad Swati asked Ms. Dobbs for a Texas identification card, Ms. Dobbs told him that her Texas identification card was coming in the mail. She said that she was a regular customer, buying beer at the store every weekend, and Mr. Swati should sell her the beer on this occasion without a Texas identification card.<sup>17</sup>

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<sup>14</sup>Testimony of Letisha Melcher.

<sup>15</sup>Testimony of Mubarak Swati.

<sup>16</sup>Testimony of Samson Vielma.

<sup>17</sup>Testimony of Mohammad Swati

**C. Did Respondent, his agent, servant, or employee, sell, with criminal negligence, an alcoholic beverage to a minor on or about September 6, 2001, in violation of Code §106.13(a)?**

**1. The Commission's Case**

Seventeen-year-old Holly Gorgas, a senior in high-school, who appears her stated age, participated in a "sting" operation of the Waco Police Department on September 6, 2001. Her role in the sting was to enter various establishments and attempt to purchase alcohol, while being video-taped by a plain-clothes-officer, who accompanied her. Although she went to several locations that day, Respondent's was the first location she entered. She purchased a six-pack of Smirnoff Ice, an alcoholic beverage, from Respondent's cashier on that date, Mohammad Swati, showing her military identification card to him at his request. The date of birth on the military identification card was December 16, 1983, which is Ms. Gorgas accurate date of birth. Ms. Gorgas has never shown fake identification at that location, and had never purchased alcohol in that location prior to this incident.<sup>18</sup> The video of this purchase shows Ms. Gorgas in casual, age appropriate dress, appearing to be her stated age of 17, and generally corroborates her version of the events.<sup>19</sup>

**2. Respondent's Case**

Mohammad Swati remembered selling alcohol to Ms. Gorgas. He asked to see her identification, because she looked so youthful, and she showed him her military identification card. Based on the identification, he believed that she was in the military, that she knew the law, and that she had read his signs in the store, stating that a person had to be twenty-one years old to purchase alcohol. Mr. Swati had to have Ms. Gorgas show him the date of birth on her identification card, because it was on the back. He claimed that he also asked Ms. Gorgas if she was old enough to buy alcohol, and she shook her head to indicate that she was old enough.<sup>20</sup> Mr. Swati admitted that the date of birth on Ms. Gorgas identification showed her to be under twenty-one years of age, and that he should not have sold her any alcoholic beverages; he stated that it was just a mistake on his part.

Law enforcement "stings" are common against the Respondent, and Mohammad Swati has reminded his employees that there is a school next door, they are not to sell alcohol before 5:00 p.m., and they are not to sell alcohol to minors. During one sting in May of 2001, the store employees did not sell alcohol to the minor involved in the sting, and the Texas Alcoholic Beverage Commission sent him a letter thanking him for abiding by the Code.<sup>21</sup>

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<sup>18</sup>Testimony of Holly Gorgas.

<sup>19</sup>Commission's Exhibit No. 3.

<sup>20</sup>Although the audio is not always understandable on Respondent's Exhibit No. 3 (the video of the transaction), this video does not support Mohammad Swati's assertion that he asked her if she was old enough to buy alcohol.

<sup>21</sup>Testimony of Mohammad Swati.

#### **D. Do Respondent's Acts Warrant Cancellation Of Its License?**

With the exception of the instant case, Respondent's history includes various administrative violations, some of which were resolved by the October 13, 2000, Agreed Order, as follows: In March of 1999, Respondent waived a hearing and accepted a penalty for a Code violation described as "possession of drugs by employee"; in October, 2000, the Commission agreed to dismiss, without prejudice, the Commission's Code violation case, described as "possession of narcotic paraphernalia" as long as the terms and conditions of the above Agreed Order were met by Respondent; in that same Agreed Order, Respondent waived its right to a hearing, and agreed not to contest the allegations that the place or manner in which Respondent conducted its business warranted cancellation or suspension based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of the Code; in that Agreed Order, Protestant, City of Waco Police Department, agreed to dismiss without prejudice, its protest against issuance of the renewal permits/ licenses, as long as the terms and conditions of the Agreed Order were met by Respondent; in December, 2000, Respondent waived a hearing and accepted a penalty for a Code violation described as "issued bad check"; in May, 2001, Respondent waived a hearing and accepted a penalty for a Code violation described as "place and manner of operation: Violation of agreement (violation of city ordinance)" with a violation date of February 13, 2001.

The Commission argued that the prior history of Respondent's premises, the two recent sales of alcohol to minors within a three month period, and the violation of the agreed order, demonstrate Respondent's inability to follow the law, and support cancellation of Respondent's permits.

Respondent asked that penalties other than cancellation be considered, and based this request on several assertions. Among other things, Respondent argued that its premises was "under a microscope," and that because its location was across the street from "one of the more notorious housing projects," and close to a recently built school, this made it more difficult to conduct business. Respondent further argued that some "credit" should be given for attempts to abide by the law. Respondent asserted that its license has never been suspended before; Mohammad Swati pays the security guard, he emphatically tells his employees that they are not to sell alcohol to minors, and that they are not to sell alcohol prior to 5:00 p.m. on school days.

Mohammad Swati has been operating the business premises known as Mohammad Razzaq Swati d/b/a M.L.K. Food Mart #3 (the store) for approximately three years, and has no other income. He owns the property and the building, and has no partners. Because of the proximity of a school, if Respondent's license is canceled, Respondent cannot get another license; additionally, anyone who purchased the property at a later date would not be able to get a license to sell alcohol. If Mr. Swati cannot sell beer at the store, he will lose everything, because, "they are 99% beer drinkers over there." As a result, he does not believe that he could stay in business if he could not sell alcohol. He has a petition signed by more than six-hundred persons, asking to keep the store open.<sup>22</sup> The petition states that: the petition signers are Respondent's customers; they oppose any attempt by the city or state to close Respondent; Respondent is not a public nuisance; and the signers need the

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<sup>22</sup>Testimony of Mohammad Swati

Respondent kept open. The petition does not say that the signers oppose removing or further limiting Respondent's ability to sell alcohol.<sup>23</sup>

Finally, Respondent argued that a lesser penalty should be considered because Respondent is attempting to craft a plan to avoid other Code violations. Wayne Mosely owns a seller-server training school, and believes that if Mr. Swati will take his training to heart, this would make a significant difference in avoiding violations.<sup>24</sup> Mohammad Swati spoke with Wayne Mosely about devising a plan to avoid Code and Rule violations in the future. Mr. Mosely told him that he could devise such a plan, and Mr. Swati is willing to work with Mr. Mosely to this end. Mubarak Swati is not seller-server certified, but Respondent has a plan to get him seller-server certified in the future.

### III. DISCUSSION

Mohammad Swati, has been the owner and operator of the premises known as Mohammad Razzaq Swati d/b/a M.L.K. Food Mart #3 (the store), at all relevant times. Mubarak Swati, who is Mohammad Swati's nephew, has been employed at the store from the Fall of 2000, until the current date. Khalid Khan was employed at the store from prior to, and including, July 17, 2001, until he was recently detained by the Immigration and Naturalization Service.

Pursuant to Code §1.04(11), the acts and omissions of Mohammad Swati, Mubarak Swati, and Khalid Khan were the acts and omissions of Respondent licensee, Mohammad Razzaq Swati d/b/a M.L.K. Food Mart #3, which include the acts of Respondent's agents, servants, or employees.

**A. Did Respondent violate the Agreed Order in Docket No. 587495 by selling alcoholic beverages before 5:00 p.m. on a school day, warranting cancellation or suspension of its license or permit based on a violation of Texas Alcoholic Beverage Code (the Code) §11.61(b)(7) [§61.71(a)(17)]?**

Section 61.71(a)(17)<sup>25</sup> of the Code, in summary, states that the Commission may suspend or cancel a license if it is found that the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

It was not contested that Mubarak Swati sold an alcoholic beverage to an undercover officer on a school day, before 5:00 p.m. on May 8, 2001, on the store premises. Respondent's obligation to observe this restriction was more than an informal accommodation to the whims of a nearby school. It was a legally binding agreement by virtue of which Respondent was able to renew its license. Pursuant to that agreement, Respondent waived its right to a hearing, and agreed not to

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<sup>23</sup>Respondent's Exhibit No. 2.

<sup>24</sup>Testimony of Wayne Mosely.

<sup>25</sup>Section 61.71(a)(17) of the Code relates to licenses, and §11.61(b)(7) of the Code relates to permits; however, the language is otherwise the same.

contest the allegation that the place or manner in which Respondent conducted its business warranted cancellation or suspension based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, in violation of the Code. Respondent will not be heard to contest this allegation now. Because of Mubarak Swati's sale of alcohol prior to 5:00 p.m. on a school day on May 8, 2001, in violation of the Agreed Order, Respondent's violation of the Code is as it is stated in the Agreed Order of October 13, 2000, in Docket No. 587495.

**B. Did Respondent, his agent, servant, or employee, sell, with criminal negligence, an alcoholic beverage to a minor on July 17, 2001, and on September 6, 2001, in violation of Code §106.13(a)?**

Section 106.13(a) of the Code, in summary, states that the Commission may cancel or suspend a license if it is found that the licensee with criminal negligence sold an alcoholic beverage to a minor. Respondent did not assert any of the Code's defenses to this allegation.<sup>26</sup>

"Criminal negligence" is the lowest degree of culpability defined by the Texas Penal Code (Penal Code), which is also the definition for the purpose of the Texas Alcoholic Beverage Code.<sup>27</sup> The Penal Code defines criminal negligence as a person's action, 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. A person acts with criminal negligence if he should have been aware of the risk surrounding his conduct, but failed to perceive it.<sup>28</sup>

It was not disputed that Respondent sold alcoholic beverages to a minor (Ms. Dobbs) on July 17, 2001, and to a minor (Ms. Gorgas) on September 6, 2001. Respondent's location was next to a housing project that logically would be filled with families, including a number of young people. Minors were not excluded from the premises. Respondent acknowledges the risk that minors would

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<sup>26</sup>Section 106.14 of the Code provides that, under these circumstances, the actions of an employee shall not be attributable to the employer if: the employer requires its employees to attend a commission-approved seller training program; the employee has actually attended such a training program; and the employer has not directly or indirectly encouraged the employee to violate such law. There was no evidence that Respondent's employees were required to, or had attended such training.

It could be arguable that it is a defense to sell an alcoholic beverage to a minor who "falsely represents himself to be twenty-one years old...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..." See Code §106.03(b). However, there is no evidence that either Ms. Gorgas or Ms. Dobbs ever presented either to Respondent.

<sup>27</sup>TEX.PENAL CODE ANN. §6.03(d); Code §1.08.

<sup>28</sup>See *Ford v. State*, 14 S.W.3d 382 (Tex.App.-Houston [14<sup>th</sup> District] 2000) and *Edmonson v. State*, 955 S.W.2d 472, 473 (Tex.App.-Austin 1997, no pet.).

use whatever subterfuge was available to them, including fake identification, in order to purchase alcoholic beverages. Based on this, Respondent should have been aware of a substantial risk that minors would attempt to purchase Respondent's alcoholic beverages.

Respondent's conduct on July 17, 2001, when Respondent's employee Khalid Khan sold the youthful appearing Ms. Dobbs alcoholic beverages, without asking for any identification, was a criminally negligent act. An ordinary person under similar circumstances would have demanded that Ms. Dobbs produce valid identification to verify that she was at least 21 years old, before selling her an alcoholic beverage. Additionally, Respondent should have had a heightened awareness of the risk surrounding Mr. Khan's conduct, because, prior to this sale, Respondent's security guard told Mohammad Swati that he had seen Mr. Khan selling alcohol to minors.

Respondent's conduct on September 6, 2001, when Mohammad Razzaq Swati sold the youthful appearing Ms. Gorgas alcoholic beverages, even after she showed him identification with a date of birth that made her a minor, was a criminally negligent act. An ordinary person under similar circumstances would not have sold Ms. Gorgas alcoholic beverages after she produced identification verifying that she was less than 21 years of age.

### **C. Do Respondent's Acts Warrant Cancellation Of Its License?**

Although the list of violations for penalties in the standard penalty chart<sup>29</sup> is not binding in this instance, it is instructive. Mitigating circumstances may justify deviations from the standard penalty chart, but repeated violations within a specified period of time, and repeated health, safety, and welfare violations are cited as justifications for more severe penalties, to include cancellation.<sup>30</sup>

Section 106.13(a) of the Code, in summary, states that the Commission may cancel or suspend a license for not more than 60 days (for a first offense), cancel or suspend a license for not more than three months (for a second offense), and cancel or suspend a license for not more than twelve months (for a third offense within a period of 36 consecutive months), if it is found that the licensee with criminal negligence sold an alcoholic beverage to a minor.

Section 61.71(a)(17)<sup>31</sup> of the Code, in summary, states that the Commission may suspend for not more than 60 days or cancel a license if it is found that the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. The standard penalty chart would allow a 15 day suspension, to a cancellation of a license, on the first violation of this section of the Code.

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<sup>29</sup> 16 TEX. ADMIN. CODE (TAC) §37.60(a).

<sup>30</sup> See 16 TAC §37.60(c) and (d); 16 TAC §37.60 (f); and 16 TAC §37.61(b) and (c).

<sup>31</sup> Section 61.71(a)(17) of the Code relates to licenses, and §11.61(b)(7) of the Code relates to permits; however, the language is otherwise the same.

All of Respondent's violations (with the exception of the December, 2000, violation described as issuing a bad check) have been health, safety, and welfare violations.<sup>32</sup> According to the Commission's rules, a repeat violation by a licensee justifies the penalty for a second or third violation if it is a health, safety and welfare violation and occurs within 36 months of the first violation.<sup>33</sup> Respondent has only been licensed since December 23, 1998, and Respondent's first violation was February 18, 1999; in March of 1999, Respondent waived a hearing and accepted a penalty for this Code violation described as "possession of drugs by employee." This was less than 36 months before Respondent's last two violations, when Respondent sold alcohol to minor Holly Gorgas on July 17, 2001, and to minor, Amy Dobbs, on September 6, 2001.

Section 106.13(c) of the Code, in summary, states that the Commission may relax the provisions of this section concerning suspension and cancellation, and assess a lesser sanction, if the permittee establishes that: the violation could not reasonably have been prevented by the permittee by the exercise of due diligence; that the permittee was entrapped; or that an agent, servant, or employee of the permittee violated the Code without the knowledge of the permittee. However, Respondent cannot benefit from Section 106.13(c) of the Code.

Mohammad Swati sold alcohol to Holly Gorgas with Ms. Gorgas' identification card, identifying her as a minor, in his hand. Mohammad Swati must also share in Mr. Khan's responsibility for Mr. Khan's sale of alcohol to Amy Dobbs on July 17, 2001. This is not only because Mr. Khan was Respondent's employee, but is also based on Mohammad Swati's conduct. On a prior occasion, Mohammad Swati sold alcoholic beverages to Ms. Dobbs. On that occasion, he initially refused to sell her beer because she looked so young, and because she did not have identification. At that time, she left the premises and returned with some type of school identification. Mubarak Swati and Khalid Khan were both working on premises that day, and Mohammad Swati showed Ms. Dobbs' school identification to both of them, *so that they would know she was old enough to buy alcohol*. This effectively discouraged Respondent's employees from requesting sufficient identification from Ms. Dobbs, or from other youthful appearing persons with less than a Texas driver's license or identification card. Mohammad Swati only checked Ms. Dobbs' identification that one time; after that, he did not feel it was necessary to ask for identification again. Therefore, Ms. Dobbs was never asked for, and never produced any type of Texas driver's license or Texas identification card for Mohammad Swati. Mubarak Swati also appeared to rely on Mohammad Swati's example regarding Ms. Dobbs. Mubarak Swati stated that he had sold Ms. Dobbs beer prior to July 17, 2001, after she had only shown him a school identification card. In summary, Mohammad Swati, Mubarak Swati, and Khalid Khan had all sold the youthful appearing minor Amy Dobbs alcohol after she produced only a school identification card, or no identification.

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<sup>32</sup>16 TAC §37.60(a).

<sup>33</sup>16 TAC §37.60(c).

Prior to July 17, 2001, the security guard, Mr. Vielma told Mohammad Swati that he had seen Khalid Khan selling alcoholic beverages to minors. Mohammad Swati did not terminate Mr. Khan for this behavior. Instead, when Mr. Swati told Mr. Vielma that if he ever saw this again, he should call the police. This did not outweigh Mohammad Swati's bad example, and does not absolve Respondent of responsibility. This is especially true because the lax procedures regarding accepting less than a Texas driver's license from youthful appearing persons, as evidenced by Mohammad Swati's example in selling to Ms. Dobbs, would make Respondent especially attractive to minors who wanted to buy alcoholic beverages.

Mohammad Swati's various prophylactic measures, intended to prevent the sale of alcohol to minors, and intended to prevent the sale of alcohol before 5:00 p.m. on school days, were grossly insufficient, and did not insulate Respondent from responsibility. Mohammad Swati asserts that he tried to keep Respondent from violating the Code in the past, and that he has plans to take actions to avoid Code violations in the future. However, Mr. Swati's actions speak volumes to the contrary.

Based on all of the above, a suspension of Respondent's license would be insufficient, and Respondent's license should be canceled.

#### IV. FINDINGS OF FACT

1. Beer Retailer's Off-Premise License, BF-443009, was issued to Mohammad Razzaq Swati, d/b/a M.L.K. Food Mart #3, 1924 JJ Fleweller Road, Waco, McLennan County, Texas, by the Texas Alcoholic Beverage Commission, on the 23<sup>rd</sup> day of December, 1998, and has been continuously renewed.
2. After the hearing was continued on Respondent's motion from its original hearing date of August 24, 2001, Respondent received proper and timely notice from the Texas Alcoholic Beverage Commission's (the Commission's) First Amended Notice of Hearing on October 2, 2001.
3. The hearing was held on October 10, 2001, before Administrative Law Judge (ALJ), Suzan Shinder, in the hearings facility of the State Office of Administrative Hearings, in Waco, Texas. Both parties participated in the hearing, and the record closed the same day.
4. Mohammad Swati has been the owner and operator of the premises known as Mohammad Razzaq Swati d/b/a M.L.K. Food Mart #3 (the store), at all relevant times. Mubarak Swati, who is Mohammad Swati's nephew, has been employed at the store from the Fall of 2000, until the current date. Khalid Khan was employed at the store from prior to, and including, July 17, 2001, until he was recently detained by the Immigration and Naturalization Service.
5. When Respondent most recently filed renewal applications for its license and permit, the Waco Police Department filed a protest to their issuance, alleging that the place or manner in which Respondent conducted its business warranted cancellation or suspension based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of Code §11.61(b)(7).

6. Although Respondent denied the above allegations in the October 13, 2000, Agreed Order, in Docket No. 587495, Respondent agreed to waive its right to a hearing and agreed not to contest the allegations, agreeing to accept the following terms and conditions:
  - a. Respondent was not to sell, serve, or deliver alcoholic beverages until at least 5:00 p.m. on school days.
  - b. Respondent was to have a security guard on duty beginning at 5:00 p.m. throughout the year.
7. On May 8, 2001, Respondent violated the above Agreed Order when Respondent's employee, Mubarak Swati, sold alcohol to an undercover officer before 5:00 p.m., on a school day.
8. Respondent's location near a housing project was convenient to a large number of minors; minors were not excluded from entering the premises; there is a high risk that minors will use subterfuge, including fake identification cards, to attempt to buy alcoholic beverages; the practice of accepting less than a Texas driver's license or a Texas identification card for youthful appearing persons made the premises attractive to minors seeking to buy alcohol; and, sometime prior to September 6, 2001, Respondent's security guard told Mohammad Swati that employee Khalid Khan was selling alcohol to minors.
9. On July 17, 2001, Respondent's cashier, Khalid Khan sold alcoholic beverages to youthful appearing, 18-year-old Amy Dobbs without asking for, or seeing any identification for Ms. Dobbs.
10. On September 6, 2001, Mohammad Swati, working as cashier on the premises, sold youthful appearing 17-year-old Holly Gorgas alcoholic beverages after she produced identification that showed her to be 17-years-old.
11. Respondent's first violation was February 18, 1999; in March of 1999, Respondent waived a hearing and accepted a penalty for this Code violation, described as "possession of drugs by employee."
12. On October 13, 2000, in the Agreed Order, Docket No. 587495, Respondent waived its right to a hearing, and agreed not to contest the allegation that the place or manner in which Respondent conducted its business warranted cancellation or suspension based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of the Code.
13. In May, 2001, Respondent waived a hearing and accepted a penalty for a Code violation described as "place and manner of operation: violation of agreement (violation of city ordinance)" with a violation date of February 13, 2001.

## V. CONCLUSIONS OF LAW

The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.

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. ch. 2003.

3. Notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Pursuant to Code §1.04(11), the acts and omissions of Mohammad Swati, Mubarak Swati, and Khalid Khan, were the acts and omissions of Respondent licensee, Mohammad Razzaq Swati d/b/a M.L.K. Food Mart #3, which include the acts of Respondent's agents, servants, or employees.
5. Based on Findings of Fact Nos. 5-7, when Mubarak Swati sold alcohol to an undercover officer before 5:00 p.m., on a school day, on May 8, 2001, Respondent violated the Agreed Order of October 13, 2000, in Docket No. 587495, warranting cancellation or suspension of Respondent's license based on the general welfare, health, peace, morals, safety of the people, and based on the public sense of decency, violating Code §61.71(a)(17), which is analogous to Code §11.61(b)(7).
6. Based on Finding of Fact No. 8, Respondent should have been aware that there was a substantial and unjustifiable risk that Respondent's actions, with respect to Respondent's sales of alcohol, would result in the sale of alcohol to minors. This risk was of such a nature and degree that the failure to perceive it constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances in Respondent's position.
7. Based on Findings of Fact Nos. 9-10, and Conclusion of Law No. 6, Respondent sold with criminal negligence, an alcoholic beverage to a minor on July 17, 2001, and again on September 6, 2001.
8. Based on Findings of Fact Nos. 5-13, and Conclusions of Law Nos. 4-7, Respondent had at least three health, safety, and welfare violations within a period of less than thirty-six months.

9. Based on Findings of Fact Nos. 1-13, and Conclusions of Law Nos. 1-8, Respondent's license should be canceled.

SIGNED and entered this 11th day of December, 2001.

A handwritten signature in black ink, appearing to read "Suzan Moon Shinder", is written over a light gray rectangular background.

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SUZAN MOON SHINDER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS