

DOCKET NO. 584787

IN RE VICTOR ADENRELE KAIYEWU §
D/B/A KAY MART CONVENIENCE STORE §
PERMIT NO. BQ-445830 §

BEFORE THE

HARRIS COUNTY, TEXAS §
(SOAH DOCKET NO. 458-99-1455) §

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 17th day of February, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex Shaver. The hearing convened on October 25, 1999, and adjourned October 25, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 17, 1999. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No.BQ-445830 is herein **SUSPENDED** for a period of thirty (30) days, beginning at 12:01 A.M. on the 1st day of June, 2000, unless a civil penalty in the amount of \$4,500.00 is paid by the 24th day of May, 2000.

This Order will become final and enforceable on March 8, 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 17th day of March, 2000.

On Behalf of the Administrator,



Randy Yarbrough
Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Rex Shaver
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (713) 812-1001

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

Victor A. Kaiyewu
RESPONDENT
1261 Bluestone Drive
Missouri City, Texas 77459
CERTIFIED MAIL NO. Z 473 040 423

Dewey Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 584787

REGISTER NUMBER:

NAME: Victor Adenrele Kaiyewu

TRADENAME: Kay Mart Convenience Store

ADDRESS: 9700 Telephone Road, Houston, Harris County, Texas 77075-2026

DATE DUE: May 24, 2000

PERMITS OR LICENSES: BQ-445830

AMOUNT OF PENALTY: \$4,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 24TH DAY OF MAY, 2000, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.
MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.



**INTER-OFFICE COMMUNICATION
TEXAS ALCOHOLIC BEVERAGE COMMISSION**

February 15, 2000

TO: Gayle Gordon, Director of Legal
FROM: Randy Yarbrough, Assistant Administrator
SUBJECT: Docket No. 458-99-1455
TABAC Case No. 584787
Victor Adenrele Kaiyeyu d/b/a Kay Mart Convenience
Wine and Beer Retailer's Off Premise Permit (BQ-445830)
Nueces County, Texas

I have read the attached record of the above referenced case and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the license at the above referenced location should be **SUSPENDED**. Please prepare an **ORDER** adopting the Proposal for Decision, suspending the License for a period of **THIRTY (30) days** unless a civil penalty in the amount of \$4,500.00 is paid in lieu of the suspension.

Please make a copy of this decision and submit it along with the order to the respective parties.

A handwritten signature in cursive script that reads "Randy Yarbrough". The signature is written over a horizontal line.

RY

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 17, 1999

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

CERTIFIED MAIL NO. P 622 053 344
RETURN RECEIPT REQUESTED

RE: Docket No. 458-99-1455; TABC vs. Victor Adenrele Kaiyewu d/b/a Kay Mart Convenience, TABC Case No. 584787

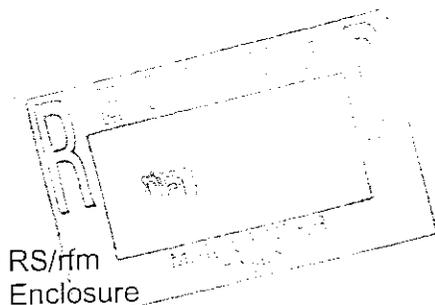
Dear Mr. Bailey:

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 Dewey Brackin, Staff Attorney representing the Texas Alcoholic Beverage Commission and Victor Adenrele Kaiyewu, d/b/a Kay Mart. For reasons discussed in the Proposal for Decision, I have recommended that Respondent's Wine and Beer Retailer's Off - Premise Permit BQ-306235 be suspended for 30 days and that consideration be given to allowing the payment of a penalty of \$150.00 per day in lieu of suspension.

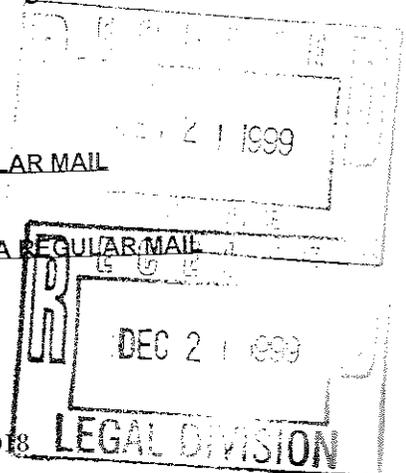
Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or replies must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

Rex Shaver
Administrative Law Judge



CC: Dewey Brackin, TABC, 5806 Mesa Drive, Suite 160, Austin, TX 78731 - **REGULAR MAIL**
Victor Adenrele Kaiyewu, 1261 Bluestone Drive, Missouri City, TX 77459 -
VIA CERTIFIED MAIL NO. P 622 053 345, RETURN RECEIPT REQUESTED
Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearings - **VIA**



North Loop Office Park
2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001

SOAH DOCKET NO. 458-99-1455

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

OF

VICTOR ADENRELE KAIYEWU
D/B/A KAY MART CONVENIENCE
PERM NO. BQ-445830
HARRIS COUNTY, TEXAS
(TABC CASE NO. 584787)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against, Respondent, a licensee of the commission, for selling an alcoholic beverage to a minor. The Staff recommended that the Respondent's permit be suspended for 30 to 60 days. The ALJ having found sufficient evidence that beer was sold to the minor by an agent, servant or employee of the licensee recommends that the permit be suspended for 30 days and also recommends that consideration be given to allowing payment of a fine in lieu of suspension.

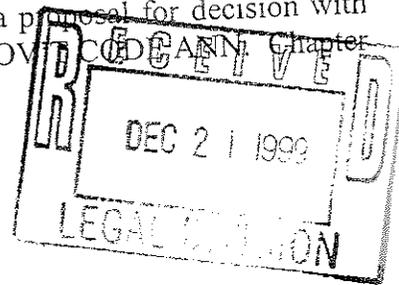
I. Procedural History

By Notice of Hearing dated on the 17th of August, 1999 and by Second Amended Notice of Hearing dated the 5th of October, 1999 the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Victor Adenrele Kaiyewu d/b/a Kay Mart Convenience Store (Respondent) that the Staff would seek disciplinary action against the Respondent's permit because the Respondent, its agent, servant, or employee sold an alcoholic beverage to a minor. The Staff asserted that such act constituted grounds for suspension or cancellation of the Respondent's Wine and Beer Retailer's Off Premise Permit.

The hearing commenced on October 25, 1999, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Dewey Brackin, of the TABC Legal Section. The Respondent, Adenrele Kaiyewu d/b/a Kay Mart Convenience Store, appeared Pro Se.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (The Code) §6.01 and TEX. GOV'T CODE ANN. Chapter 2001 et seq. (1998) . 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. Chapter 2003.



The Respondent is the holder of Wine and Beer Retailer's Off - Premise Permit, BQ-445830 and was the holder of such permit on the date of the alleged violation , 28rd day of May, 1999. The Second Amended Notice of Hearing in this matter was mailed to the Respondent on the 5th day of October, 1999 pursuant to TEX. GOV'T CODE ANN. Chapter 2001.

III. Evidence

From the Staff:

Documentary Evidence:

a. TABC Exhibit 1: *Affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Permit BQ-445830 issued to Adenrele Kaiyewu doing business as Kay Mart Convenience Store..*

b. TABC Exhibit 2: *Texas Alcoholic Beverage Commission Notice of Hearing directed Adenrele Kaiyewu doing business as Kay Mart Convenience Store..*

Both of these exhibits were offered and accepted without objection.

Testimony:

1. Jonathan Gabriel Cooper:

Jonathan Gabriel Cooper testified that he was born on the 1st of April, 1981 and on the 28th of May, 1999 he was 18 years of age. On the 28th of May 1999 he acted as "the minor" in a Minor Sting Operation conducted by the Texas Alcoholic Beverage Commission. In the course of these activities he, along with Agent Lockhart of the TABC, entered the premises of the Kay Mart Convenience Store located at 9700 Telephone Road in Houston, Harris County, Texas. The witness testified that he was instructed to give his correct age and date of birth if requested to do so by the clerk. Mr. Cooper had his Texas Driver's License as proof of age and had no false identification when he entered the premises. Upon entering the premises he selected an alcoholic beverage, a 16 oz. RED DOG beer, took the beverage to the counter and purchased the beer. The person behind the cash register did not ask Mr. Cooper for any identification. Mr Cooper received his change from the cashier and left the store with the alcoholic beverage and returned to the TABC vehicle. When asked if the cashier was in the hearing room Mr. Cooper pointed out Frank Kaiyewu seated at counsel table.

2. Michael Lockhart

Michael Lockhart testified that on the 28th of May, 1999 he was employed as an agent of the Texas Alcoholic Beverage Commission. On that date it was his assignment to accompany and provide supervise the minor, Jonathan Gabriel Cooper, and act as a witness during a Minor Sting Operation. He entered the premises of the Kay Mart Convenience Store at 9700 Telephone Road in Houston, Harris County, Texas. He entered the premises before the minor to reduce chances that he and the minor might be thought to be together. Mr. Lockhart was behind Mr. Cooper in the

checkout line. He saw the cashier sell an alcoholic beverage, RED DOG beer, to the minor for 75 cents and give the minor change from the purchase. Mr Lockhart then purchased a candy bar and exited the premises. The witness identified the cashier who made the sale as Frank Kaiyewu. When he was arrested after the alleged sale the cashier was required to close the store because there was no one to take over for him.

From Respondent:

No Documentary Evidence was offered.

Testimony:

No Testimony was presented by the Respondent.

IV. Statutory Criteria

1. **Section 106.13 of the Code** states, in part:

(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...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. . .

2. **Section 11.61 of the Code** states, in part:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . . (2) the permittee violated a provision of this code or a rule of the commission.

V. Analysis

There are two questions which must be answered here:

(1) Was Jonathan Gabriel Cooper a minor on the 28th day of May, 1998?

It was the undisputed testimony of Jonathan Gabriel Cooper that he was born on April 1, 1981 and was 18 years of age on the 28th of May, 1999.

(2) Did the permittee or licensee, his agent, servant or employee, with criminal negligence sell, serve, dispense, or deliver on the licensed premises, an alcoholic beverage to the minor, Jonathan Gabriel Cooper, on the 28th day of May, 1999?

The testimony of both the minor, Jonathan Gabriel Cooper, and the TABC Agent Michael Lockhart was clear, unambiguous and undisputed. The Respondent presented no evidence to contradict the witnesses against him. The Respondent maintained that while it was "unfortunate"

that his son sold the beer to the minor without asking for identification the criminal action had taken all of his money and that his store was now closed. At the same time he alleged that a suspension would "kill" his business.

PROPOSED FINDINGS OF FACT

1. The Respondent, Adenrele Kaiyewu d/b/a Kay Mart Convenience Store is the holder of Wine and Beer Retailer's Off-Premise Permit BQ-445830.
2. Frank Kaiyewu was an agent, servant or employee of Adenrele Kaiyewu d/b/a Kay Mart Convenience Store on the 28th day of May, 1998.
3. On the 28th day of May, 1998, Jonathan Gabriel Cooper was eighteen years old and therefore a minor.
4. On the 28th day of May, 1998, Jonathan Gabriel Cooper entered the licensed premises located at 9700 Telephone Road, in Houston
5. On the 28th day of May, 1998, Jonathan Gabriel Cooper purchased an alcoholic beverage from Mr. Frank Kaiyewu, who was in sole control of the licensed premises.
6. On the 28th day of May, 1998, the minor was not asked for proof of age prior to the sale of the alcoholic beverage.

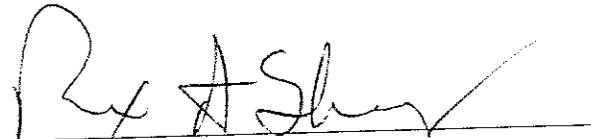
PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 106.13 and 11.61(b)(2) of the TEX. ALCO. BEV. CODE ANN.
2. The State Office of Administrative Hearings has jurisdiction in 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. Chapter 2003 (Vernon's 1999).
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN., Chapter 2001 and 1 TEX. ADMIN. CODE, Chapter 155.
4. On the 28th day of May, 1998 an agent, servant or employee of Adenrele Kaiyewu d/b/a Kay Mart Convenience Store did with criminal negligence sell, serve dispense, or deliver an alcoholic beverage to a minor in violation of §§106.03 and 106.13 of the TEX. ALCO. BEV. CODE ANN.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that Respondent's Wine and Beer Retailer's Off - Premise Permit BQ-306235 be suspended for 30 days and that consideration be given to allowing the payment of a penalty of \$150 per day in lieu of suspension.

Signed this 17th day of December, 1999.



Rex A. Shaver
Administrative Law Judge

RS/rfm/99-1455