

DOCKET NO. 588271

IN RE CRAFT OIL COMPANY
D/B/A STAR STOP #12
PERMIT NO. BQ317661

ORANGE COUNTY, TEXAS
(SOAH DOCKET NO. 458-00-1490)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of December, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica B. Dorsey. The hearing convened and adjourned on August 25, 2000. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 3, 2000. That Proposal for Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record. Both Petitioner and Respondent filed Exceptions.

The Administrative Law Judge then made and filed an Amended Proposal for Decision on November 30, 2000. That Amended Proposal for Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record. Respondent alone filed Exceptions to the Amended Proposal for Decision.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the original Proposal for Decision, the Amended Proposal for Decision, Exceptions and Replies, Transcripts, and Exhibits, entirely adopts the Administrative Law Judge's Findings of Facts, which are contained in the Amended Proposal for Decision, and incorporates those Findings of Fact into this Order.

The Assistant Administrator adopts the Administrative Law Judge's Conclusions of Law Nos. 1 through 5, which are contained in the Amended Proposal for Decision, and incorporates Conclusions of Law Nos. 1 through 5 into this Order.

The Assistant Administrator rejects the Administrative Law Judge's Conclusion of Law No. 6. The Administrative Law Judge's Conclusion of Law No. 6 is rejected, because it is not properly a Conclusion of Law, it is merely a penalty recommendation.

Based on the Findings of Fact and conclusions of law, it is found that the permit should be canceled.

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. BQ317661 is herein **CANCELED FOR CAUSE**.

This Order will become final and enforceable on January 18, 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.

SIGNED on this the 28th day of December, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/vr

The Honorable Veronica B. Dorsey
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
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Christopher Burnett
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TABC Legal Section

Licensing Division
Houston District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 30, 2000

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

VIA REGULAR MAIL

**RE: Docket No. 458-00-1490; TABC vs. Craft Oil Company, d/b/a Star Stop #12;
Permit No. BQ-317661**

Dear Mr. Bailey:

Please find enclosed an Amended 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 George B. Barron, attorney for the Respondent. For reasons discussed in the Proposal for Decision, this amended proposal recommends a sixty-day suspension of Respondent's Wine and Beer Retailer's Off-Premise Permit BQ-317661.

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,

Veronica Dorsey *by T. Huron*

Veronica B. Dorsey
Administrative Law Judge

VD\mc
Enclosure

xc: Christopher Burnett, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA REGULAR MAIL
George B. Barron, 108 N. 7th Street, P.O. Box 279, Orange Texas 77631-0279 - VIA REGULAR MAIL
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA FACSIMILE

SOAH DOCKET NO. 458-00-1490

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

V.S.

CRAFT OIL COMPANY
D/B/A STAR STOP #12
PERMIT NO. BQ-317661
(TABC CASE NO. 588271)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Staff) brought this disciplinary action against Craft Oil Company, d/b/a Star Stop #12 (Respondent), alleging a violation of § 106.03 (a) of the Texas Alcoholic Beverage Code (the Code). Staff alleged that on July 22, 1999, Respondent's agent/employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of the Code, and the sale was the proximate cause of the minor's death on the same day. Respondent contended the actions of his former agent/employee and the minor on July 22, 1999, come within the purview of § 106.03 (b) of the Code. Therefore, his clerk is entitled to assert the defense under § 106.03 (b) of the Code, and she did not commit an offense when she sold an alcoholic beverage to the minor. The proposal finds Respondent's agent/employee did, with criminal negligence, sell an alcoholic beverage to a minor in violation of § 106.03 (a). In addition, the proposal finds the actions of the minor and the clerk were not in accordance with 106.03 (b) of the Code. As a result, this proposal recommends a sixty-day suspension of Respondent's Wine and Beer Retailer's Off-Premise Permit BQ-317661.

I. PROCEDURAL HISTORY

A hearing in this matter convened on August 25, 2000. The hearing was held in Houston, Texas. Veronica B. Dorsey, Administrative Law Judge, (ALJ) for the State Office of Administrative Hearings (SOAH) in Houston, Texas, conducted the hearing. Staff appeared through its attorney, Christopher Burnett. Respondent appeared, through its attorney, George B. Barron. The record closed on September 1, 2000.

II. JURISDICTION

Staff amended its Notice of Hearing, deleting the allegation under Roman Numeral II, leaving the single allegation under Roman Numeral I. The single allegation being whether Respondent violated Texas Alcoholic Beverage Code § 106.03 (a) (Vernon 1995 and Supp. 2000).

There are no contested issues of notice or jurisdiction in this proceeding. Matters pertaining to notice and jurisdiction are set out in the findings of fact and conclusions of law without further discussion.

III. DISCUSSION

1. Factual Background

Selinda Mc Neil was an employee with Star Stop #12 from July, 1999, until November, 1999; Ms. Mc Neil's job duties included selling alcoholic beverages. By July 22, 1999, Ms. Mc Neil had sold a minor, hereafter identified as D.W., alcoholic beverages on between 15-20 occasions. Ms. Mc Neil's recollection is that she requested identification from D.W. either three, or between six to eight times, prior to July 22, 1999. Ms. Mc Neil sold D.W. an uncertain amount of beer without requesting identification on July 22, 1999.

On July 22, 1999, Lindsey Brooke Purser, an acquaintance of D.W., observed D.W. leaving Star Stop #12, carrying "Icehouse Beer." Later that night, D.W. brought alcoholic beverages to a house party where Ms. Purser and other minors were present. D.W., without permission, took the keys to a friend's motor vehicle and was killed in an automobile accident.

2. Statutory Provisions and Applicable Rules

Texas Alcoholic Beverage Code § 106.03 (a) provides:

- (1) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.
- (a) 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.

Petitioner's Contentions

Staff asserted that on the date of July 22, 1999, Respondent, through his agent/employee, failed to request identification and sold alcoholic beverage(s) to a minor. The action of Respondent's clerk constituted a violation of the Code, despite her past request for identification. Further, since a serious consequence resulted from Respondent's agent/employee's actions, Respondent's license should be canceled.

Respondent's Contentions

Respondent's position is that Respondent's agent/employee was aware of the risk of someone under 21 years of age trying to purchase an alcoholic beverage with false identification. Her awareness led her to check D.W.'s identification on several occasions prior to July 22, 1999. Moreover, the minor represented himself to be over 21 years of age by presenting an apparently valid Texas driver's license or identification card. The combined actions of Respondent's agent/employee and the minor negate an offense under the Code.

Analysis and Determination

Because of the nexus or interplay between Texas Alcoholic Beverage Code § 106.03 (a) and (b), the ALJ will discuss the issues raised under both provisions simultaneously.

Issue 1: Did Respondent's agent/employee, with criminal negligence, sell D.W. a minor, an alcoholic beverage in violation of § 106.03 (a) of the Code?

Answer: Yes.

Issue 2: Did D.W. falsely represent 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 Respondent's agent/employee to sell him an alcoholic beverage?

Answer: No.

The evidence is uncontroverted that Selinda Mc Neil sold alcoholic beverages to D.W., a minor, between 15-20 times. Texas Penal Code 6.03 reads

“a person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct when he ought to be aware of a substantial and unjustifiable risk that 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.”

Ms. Mc Neil was aware minors might enter Star Stop #12 and attempt to purchase alcoholic beverages with false identification. Both Respondent and Ms. Mc Neil should have been substantially aware that Ms. Mc Neil's inexperience as well as her lack of training and instruction could have made her unqualified to determine the validity of D.W.'s Texas driver's license or State of Texas issued identification card. Ms. Mc Neil testified that she began her employment with Star Stop on July, 1999. She had been employed with Star Stop #12 only 22 days when she sold D.W., for the last time, an uncertain amount of beer on two to three.

Since the evidence in the case is clear that Ms. Mc Neil never checked D.W.'s identification on July 22, 1999, the ALJ looked closely at the evidence relating to Ms. Mc Neil's past request for his identification. See *Edmondson v. The State of Texas*, 943 S.W.2d 211 1997 Tex. App. LEXIS 1811. She was uncertain the number of times she had examined his identification. She recalled examining the identification either three or six to eight times. Ms. Mc Neil's testimony raised the question of how she came to conclude D.W.'s identification showed him to be over 21 years of age. She never received instructions or orders from her employer on how to check identification. Specifically, she testified to not receiving instructions, "other than just the date and the picture." Respondent's specific date and picture instructions are not before the ALJ for consideration. Despite whatever instructions Ms. Mc Neil received regarding checking dates, when she was specifically cross-examined concerning D.W.'s birth date, she responded, "I know he was over 21 years of age, but you can add up the years right there." In light of her inability to compute his age from his birth date, how was Ms. Mc Neil able to assess the apparent validity of the card D.W. produced? Her testimony left the ALJ unconvinced she was able to make a quick and accurate determination. Therefore, the ALJ was unconvinced D.W. had falsely represented himself to be 21 years old or older.

3. Conclusion

The ALJ has determined that Respondent's clerk, with criminal negligence sold alcoholic beverages to D.W. on July 22, 1999. In addition, the ALJ determined Respondent did not establish the relevant defense. Evidence to show the existence of past violations on the part of Respondent is not a part of the record in the case. The ALJ recommends a sixty-day suspension of Respondent's permit. The basis for this recommendation is contained in TEX. ALCO. BEV. CODE §§ 26.03 (b) and 61.71 (5).

IV. FINDINGS OF FACT

1. Craft Oil Company, d/b/a Star Stop #12 holds the following permit from Texas Alcoholic Beverage Commission: B-317661.
2. TABC sent a complaint letter to Craft Oil Company on March 22, 2000.
3. A Notice of Hearing was sent to counsel for Craft Oil Company by certified mail, return receipt requested, and was received by counsel.
4. Selinda Mc Neil began employment with Craft Oil Company, d/b/a Star Stop #12 in July, 1999; her employment included the sale of alcoholic beverages.
5. Prior to July 22, 1999, Ms. Mc Neil had sold D.W., a minor, alcoholic beverages between 15-20 times; she recalled requesting his Texas driver's license or Texas Department of Public Safety issued identification card on either three or between six to eight occasions.
6. Ms. Mc Neil did not know how to compute D.W.'s age from the birth date, which appeared on his Texas driver's license or Texas Department of Public Safety issued identification card.

7. Respondent never required Ms. Mc Neil to attend seller/server training or provided her with specific instructions on examining identification.
8. On July 22, 1999, D.W. entered Star Stop #12, and Selinda Mc Neil sold D.W. an unknown amount of alcoholic beverages without requesting identification.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding. TEX. ALCO. BEV. CODE ANN., Chapter 5, subchapter B §§ 6.01 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. § 2003.
3. Notice of Hearing was provided as required by TEX. GOV'T CODE ANN. §§ 200.051 and 2001.052.
4. Based on Findings of Fact Nos. 4-8, Respondent's clerk, with criminal negligence, sold D.W., minor, alcoholic beverages in violation of TEX. ALCO. BEV. CODE §106.03 (a).
5. Also based on Findings of Fact Nos. 4-8, the actions of Respondent's clerk and the minor do not satisfy the statutory conditions under TEX. ALCO. BEV. CODE §106.03 (b), and Respondent is not entitled to the defense contained therein.
6. Based on Conclusions of Law 4 and 5, a sixty-day suspension of Respondent's license is warranted.

SIGNED this 30th day of November, 2000.

Veronica Dorsey by T. Honan
VERONICA B. DORSEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS