

DOCKET NO. 590052

IN RE NKG BUSINESS INC.
D/B/A ONE STOP FOOD STORE
PERMIT NO. BQ406415

COLLIN COUNTY, TEXAS
(SOAH DOCKET NO. 458-01-0499)

§
§
§
§
§
§

BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 21st day of March, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened and adjourned on January 19, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 23, 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. Petitioner filed exceptions on February 23, 2001.

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 Respondent, NKG Business Inc. d/b/a One Stop Food Store, is hereby **WARNED** that future violations may cause the suspension of Permit No. BQ406415.

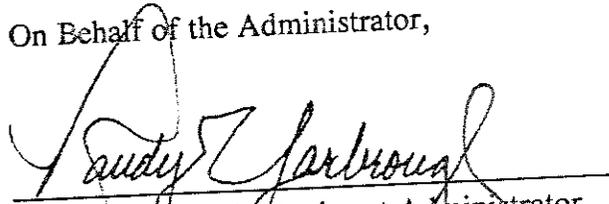
Respondent is **FURTHER WARNED** that the only legal defense of sale to a minor under § 106.03 (b) is apparently a valid Texas Driver's License or ID.

This Order will become final and enforceable on April 11, 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 21st day of March, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
Fort Worth, Texas
VIA FACSIMILE (817) 377-3706

Lance C. Baxter
ATTORNEY FOR RESPONDENT
Baxter, Gibbs & Robison
500 S. Tennessee St.
McKinney, Texas 75069
CERTIFIED MAIL NO. 7000 0520 0024 8847 1950

NKG Business Inc.
d/b/a One Stop Food Store
RESPONDENT
2716 Ave K 'A'
Plano, Texas 75074-5308
CERTIFIED MAIL NO. 7000 0520 0024 8847 1967

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Dallas District Office

DOCKET NO. 458-01-0499

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

VS.

OF

NKG BUSINESS INC.
D/B/A ONE STOP FOOD STORE
DALLAS COUNTY, TEXAS
(TABC CASE NO. 590052)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought to suspend the permit held by NKG Business Inc. d/b/a One Stop Food Store (Respondent) for selling alcoholic beverages to a minor. Staff requested a ten-day suspension of the permit, or that Respondent be penalized \$1,500.00 in lieu of suspension. This proposal finds that Respondent's employee did not act with criminal negligence in the sale to the minor. The Administrative Law Judge (ALJ) recommends Respondent's permit not be suspended.

I. PROCEDURAL HISTORY & JURISDICTION

On January 19, 2001, a public hearing was convened before ALJ Robert F. Jones Jr., at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent appeared through its officer and shareholder Gia Hoa "Tony" Ngo and its counsel, Lance S. Baxter. The record was closed on February 1, 2001. Because notice and jurisdiction were not contested issues, those matters are addressed only in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Applicable Law

The TABC may suspend a permit if the "permittee with criminal negligence sold . . . an alcoholic beverage to a minor." TEX. ALCO. BEV. CODE ANN. § 106.13 (a)(Vernon 2001) (the Code). A person acts with "criminal negligence" "with respect to . . . the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that 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." § 6.03(d), TEX. PEN. CODE ANN.(Vernon 2001).

B. Evidence

On June 30, 2000, Tony Ngo sold alcoholic beverages to Britney Pitts. The sale occurred at the permitted premises, the One Stop Food Store, located at 2716 Avenue K, Suite A, Plano, Collin County, Texas. Ms. Pitts was nineteen years old on June 30, 2000. Mr. Ngo requested identification from Ms. Pitts, and Ms. Pitts produced a Colorado "driver's license," a copy of which was admitted in evidence as TABC Exhibit 3. Ms. Pitts's "driver's license" was a fake.

TABC Enforcement Agent Lindel Davis and Tony Ngo testified. A copy of a security camera videotape which recorded the sale was admitted in evidence as Respondent Exhibit 1. The quality of the recording is poor, and little can be determined from the videotape, aside from the three minute duration of the transaction.

Agent Davis testified that he was outside of the One Stop Food Store as a part of his normal duties. He saw Ms. Pitts drive up to the store, exit her vehicle, and enter the store. He saw Mr. Ngo make the sale of alcoholic beverages to Ms. Pitts. She purchased six twelve-ounce Coors Light beers, and eight twelve-ounce Bartles & James wine coolers. Agent Davis watched Ms. Pitts leave the store and observed her. Ms. Pitts was small in stature, and her dress and appearance were similar to those of teenagers. He believed Ms. Pitts was a minor and confronted her. He learned that Ms. Pitts had used the Colorado identification to make the purchase, that she had a valid Texas driver's license, and that she was nineteen years old. Agent Davis seized the Colorado identification.

Agent Davis discussed the appearance of the Colorado identification. The card was the proper size, had the correct colors, and had the holographic state seal of Colorado embossed within the plastic coating of the card. The card had a magnetic strip and a bar code for scanning on its back. The card carried a putative social security number, license number, and expiration date, and showed Ms. Pitts's birthday was May 25, 1979. The card contained a recognizable picture of Ms. Pitts and her electronically reproduced signature. The card adequately described Ms. Pitts's height, weight, and hair and eye color. While agreeing that the Colorado identification appeared valid, Agent Davis opined that the card should have been rejected because it did not state on its face it was a "driver license" or "identification."¹ Agent Davis further noted that while Ms. Pitts presented a Colorado identification, her motor vehicle carried Texas plates.

Mr. Ngo testified that he cannot judge the age of his Caucasian customers with any accuracy and that he makes it a practice to demand identification from any alcohol purchaser who appears thirty or less. When Ms. Pitts presented her beverages for sale, he demanded identification. When Ms. Pitts offered it for inspection through a clear plastic pocket in her wallet, he requested that she remove it from her wallet. Mr. Ngo examined the Colorado identification and noted the same characteristics, *i.e.*, size, color, state seal, bar code, social security number, and picture, that Agent Davis had cataloged. Mr. Ngo asserted he compared the Colorado identification to an exemplar in

¹ The card has a notation of "none" above a section marked "restrictions." The reverse side of the card notes that a "B" restriction would indicate that the card was "not a drivers license." See TABC Exhibit 3.

a reference book used in the industry.² He believed the identification was genuine and that Ms. Pitts was twenty-one years old. Mr. Ngo stated he did not see the vehicle Ms. Pitts had arrived in and did not think to look for it. He testified that if he had not believed Ms. Pitts to be twenty-one he would not have made the sale.

C. Analysis, Conclusion, and Recommendation

The sole issue is whether Mr. Ngo acted with criminal negligence in making the sale to Ms. Pitts.

The Staff argued Ms. Pitts had a "very" and "extremely" youthful appearance which should have raised Mr. Ngo's suspicions. Mr. Ngo knew or should have known that minors will use fake, out of state licenses to purchase alcohol. When presented with the Colorado identification the Staff argued that Mr. Ngo should have rejected it, because he did not know how a valid Colorado document would appear and because his reference book was dated. Mr. Ngo should have gone further and checked Ms. Pitts vehicle to determine if it had out of state plates, the Staff said. Finally, since Ms. Pitts was so youthful in appearance Mr. Ngo should have ignored the apparently valid Colorado license and declined the sale. The Staff termed the entire transaction "questionable and confusing" and asserted the preferred approach was to not make the sale.

Respondent replied that Mr. Ngo had acted as any ordinary person would have in the circumstances. Mr. Ngo asked Ms. Pitts for identification, and she provided what appeared on close examination to be a valid document. Respondent denied that Ms. Pitts appearance was so youthful as to call the sale into question.

The "risk" in this case was the possibility that the Colorado identification was fake. Both witnesses agreed that the document appeared valid. Mr. Ngo testified credibly that he carefully examined the card for, and found, the characteristics Agent Davis testified made the card look valid. In particular the card had the holographic imprint of the Colorado state seal over Ms. Pitts' photograph, as well as a bar code and scanning tape. The Staff did not demonstrate how Mr. Ngo's actions grossly deviated from the care any other person would have taken in evaluating the card. Mr. Ngo's use of his reference book was a reasonable step to take care that he was not fooled by a fake identification. Since Ms. Pitts was youthful, requesting identification was appropriate. The Staff's argument that her youthful appearance and out of state license required Mr. Ngo to decline the sale ignores the purpose of photographic identification. Mr. Ngo's did not need to leave his position behind the register and exit the store to check Ms. Pitts' vehicle plates. Mr. Ngo was entitled to rely on the apparently valid Colorado card.

The ALJ recommends the TABC not find Mr. Ngo acted with criminal negligence in the sale to Ms. Pitts, and order that Respondent's permit not be suspended.

² The videotape, Respondent Exhibit 1, does not show Mr. Ngo making this comparison. However, the videotape quality is low, and the comparison could have taken place off-camera.

IV. FINDINGS OF FACT

1. By letter dated July 25, 2000, which was sent to NKG Business Inc. d/b/a One Stop Food Store (Respondent), the Staff of the Texas Alcoholic Beverage Commission (Staff) alleged that Respondent, on June 30, 2000, with criminal negligence sold an alcoholic beverage to a minor.
2. On October 23, 2000, the Staff issued a notice of hearing notifying all parties that a hearing would be held on the Staff's allegation and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
3. The hearing was held on January 19, 2001, in Dallas, Dallas County, Texas, before Robert F. Jones Jr., an administrative law judge with State Office of Administrative Hearings (SOAH). Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent appeared through its officer and shareholder Gia Hoa "Tony" Ngo and its counsel, Lance S. Baxter. The record was closed on February 1, 2001.
4. On June 30, 2000, Tony Ngo, as an employee of Respondent, sold alcoholic beverages to Britney Pitts at the permitted premises, the One Stop Food Store, located at 2716 Avenue K, Suite A, Plano, Collin County, Texas.
5. Ms. Pitts was nineteen years old on June 30, 2000.
6. Ms. Pitts had a youthful appearance as reflected by her facial features, stature and apparel.
7. Mr. Ngo requested identification from Ms. Pitts, and that Ms. Pitts produced a Colorado "driver's license."
8. Ms. Pitts's "driver's license" was a fake.
9. The "driver's license" was the proper size; had the correct colors; had the holographic state seal of Colorado embossed within the plastic coating of the card; had a magnetic strip and a bar code for scanning on its back; carried a putative social security number; license number, and expiration date; showed Ms. Pitts's birthday was May 25, 1979; contained a recognizable picture of Ms. Pitts; had her electronically reproduced signature; and adequately described Ms. Pitts's height, weight, and hair and eye color.
10. Mr. Ngo compared the Colorado identification to an exemplar in a reference book used in the industry.
11. Mr. Ngo believed the card was valid and that Ms. Pitts was twenty-one years old.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13 (a)(Vernon 2001) (the Code).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2001).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2001).
4. Based on the foregoing findings, Mr. Ngo did not deviate from the standard of care that an ordinary person would exercise under all the circumstances as viewed from Mr. Ngo's standpoint. § 6.03(d), TEX. PEN. CODE ANN. (Vernon 2001).
5. Based on the foregoing findings and conclusions, Mr. Ngo did not act with criminal negligence in making the sale of alcohol to Ms. Pitts. § 106.13 (a) of the Code.
6. Based on the foregoing findings and conclusions, Respondent's permit should not be suspended.

SIGNED February 23, 2001.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS