

DOCKET NO. 590656

IN RE BRENDA GEORGE	§	BEFORE THE
D/B/A THE BEER SHOP	§	
PERMIT NO. BG151527	§	
	§	TEXAS ALCOHOLIC
	§	
GALVESTON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-0834)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of March 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Stephen J. Burger. The hearing convened and adjourned on January 25, 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. 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.

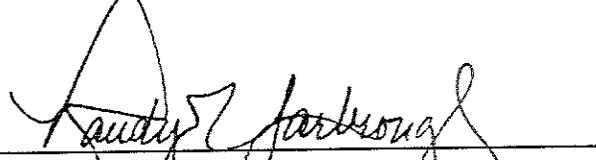
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent receive a **WARNING** with regard to violating § 106.03 (a) of the Texas Alcoholic Beverage Code on June 24, 2000.

This Order will become final and enforceable on April 17, 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 27th day of March, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Stephen J. Burger
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (713) 812-1001

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TABC Legal Section

Licensing Division
Houston District Office

DOCKET NO. 458-01-0834

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

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BEFORE THE STATE OFFICE

VS.

OF

**BRENDA GEORGE
D/B/A THE BEER SHOP
PERMIT NO. BG-151527
GALVESTON COUNTY, TEXAS
(TABC CASE NO. 590656)**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Brenda George, d/b/a The Beer Shop (Respondent) alleging that Respondent, with criminal negligence, sold an alcoholic beverage to a minor. Respondent appeared at the hearing through counsel and, after both sides rested, asserted that the evidence presented was insufficient to support Staff's allegation. This proposal for decision finds that Respondent did not act with criminal negligence in allegedly selling an alcoholic beverage to a minor.

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 in this matter convened on January 25, 2001, at the offices of the State Office of Administrative Hearings in Houston, Harris County, Texas. Staff was represented by counsel, Christopher Burnett. The Respondent was represented by counsel, John Keirnan.

II. THE ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS

There was one allegation in this proceeding, asserting that on June 24, 2000, the Respondent, with criminal negligence, sold an alcoholic beverage to a minor, in violation of TEX. ALCO. BEV. CODE ANN. Ch. 5, §106.03(a) (Vernon 1995 & Supp.2000) (hereinafter referred to as the "Code"). Such a violation may be punished by cancellation or a maximum 60 day suspension of a permit, pursuant to §106.13(a) of the Code. Pursuant to §1.08 of the Code and §6.03(b) of the Penal Code, Staff must prove by a preponderance of the evidence that, under the circumstances, the actions of Respondent created a substantial and unjustifiable risk that the sale of alcohol to a minor would occur.

III. STATEMENT OF THE EVIDENCE AND DISCUSSION

A. Staff's Evidence

Staff's documentary evidence consisted of:

- Exhibit No. 1: Affidavit of Brian L. Guenther, Licensing Department Director for the TABC;
- Exhibit No. 2: Photocopy of a photo of Jennifer King.

The evidence relative to the merits of this case was the live testimony provided by Jennifer King, alleged minor, and Glenn-Anthony Canonizado.

Ms. King testified that on the date in question, she was working with the TABC. She stated she was born on November 30, 1984, and was 15 on June 24, 2000. She entered Respondent's establishment on June 24, 2000, about 8:00 p.m. Agent Canonizado also entered the establishment. Ms. King surreptitiously videotaped the activity. Once seated at the bar, Ms. King asked for a beer, and Respondent asked for her i.d. Respondent examined the i.d., (a Texas i.d., but not a driver's license), and asked Ms. King when she was born. Other questions from Respondent ensued, including the Respondent's statement that Ms. King did not look 26. After examining the i.d. under a light near the cash register, as the bar was dark, the Respondent served a beer to Ms. King, and money was exchanged. Further discussion between King and Respondent continued, until Respondent became suspicious and attempted to return the money.

Ms. King did not have the i.d. at the hearing, as she testified it was misplaced.

Glenn-Anthony Canonizado is an Agent for the TABC. He accompanied King into the bar, unobtrusively. He was asked for identification by Respondent upon requesting service.

B. Respondent's Evidence

Respondent's documentary evidence consisted of:

- Exhibit No. 1: Videotape taken at relevant time by Ms. King.

Respondent, a 62 year old lady, testified that she runs the establishment in question, and that she knows customers must be 21 to be served alcohol. She testified that Ms. King gave her a Texas driver's license, not a Texas i.d., and that after examining it, she thought Ms. King was 26. She admits she may have made a mistake in the computations she performed in determining the age of King.

The videotape is very hard to understand, but upon being reviewed twice during the hearing, Respondent does state that Ms. King "did not look 26."

C. Discussion

After considering all the evidence, I find insufficient evidence that Respondent acted “with criminal negligence” in selling the beer to Ms. King. According to Section 6.03(d) of the Texas Penal Code, a person acts with “criminal negligence...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.”

Here, Respondent asked for identification, and examined it. She apparently made a mathematical mistake and thought Ms. King was 26. The i.d. in question was not produced, so it is impossible to make a determination as to whether the numbers on the i.d. were legible, etc. Furthermore, other than Ms. King’s testimony and her appearance, we do not know exactly what Defendant’s age is, or her date of birth. I observed that Ms. King looked older than 16.

The Administrative Law Judge is of the opinion that in view of the credibility of Respondent, the videotape, and all the other evidence and attendant circumstances, the Staff has not proved its case by a preponderance of the evidence. The evidence shows that on the date in question, Respondent was suspicious from the outset, and continued with her questions to Ms. King regarding age. In this case, criminal negligence is simply not present.

Although all the evidence presented at the hearing was not discussed in this Proposal For Decision, all of the evidence was considered by the Administrative Law Judge in preparing this Decision.

IV. PROPOSED FINDINGS OF FACT

1. Brenda George, doing business as The Beer Shop, located at FM 517 North Side .25 Mile East Gum Bayou, Texas City, Galveston County, Texas, holds a Wine and Beer Retailer’s Permit, BG-151527, issued by the Texas Alcoholic Beverage Commission.
2. On or about November 6, 2000, the Staff sent a notice of hearing to Respondent by certified mail, return receipt requested, and all parties appeared.
3. The hearing on the merits was held January 25, 2001, at 10:00 a.m., at the offices of the State Office of Administrative Hearings, Houston, Harris County, Texas. The Staff was represented by Christopher Burnett. The Respondent was represented by its counsel, John P. Kieman.
4. On June 24, 2000, Respondent sold Jennifer King a beer at The Beer Shop.
5. Respondent requested proof of age from Jennifer King.

6. Respondent believed, based on all attendant circumstances and the identification provided, that Jennifer King was 21 years of age or older.
7. Jennifer King looks older than her claimed age of 16.
8. There is insufficient evidence of Jennifer King's age.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Chapter 5, §§ 6.01 and 106.13 of the Code.
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN., Chapter 2003 (Vernon 1995 & Supp.2000) .
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 1995 & Supp.2000) .
4. Sufficient evidence of Jennifer King's date of birth was not presented.
5. Respondent did not with criminal negligence sell an alcoholic beverage to a minor.

SIGNED this 23 day of February, 2001.



Stephen J. Burger
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS