

**DOCKET NO. 591570**

IN RE PETER DYER PASSANO  
D/B/A HERO'S ICE  
PERMIT NO. BG-278602

BEXAR COUNTY, TEXAS  
(SOAH DOCKET NO. 458-01-1113)

§  
§  
§  
§  
§  
§  
§

BEFORE THE  
  
TEXAS ALCOHOLIC  
  
BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 30th day of April, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Leah Davis Bates. The hearing convened on February 6, 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 March 29, 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. No exceptions to the Proposal were filed by either party.

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 the allegations are hereby **DISMISSED with prejudice**.

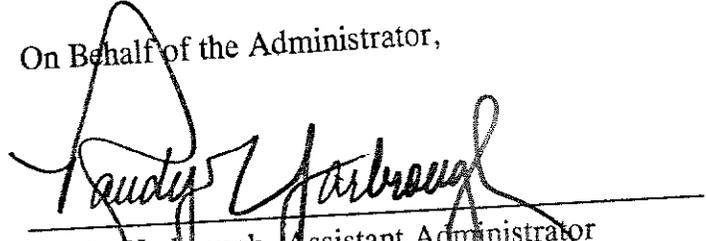
**IT IS FURTHER ORDERED** that Respondent is hereby **WARNED** that further sales to minors will result in suspension or cancellation of the permits.

This Order will become final and enforceable on March 20, 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 30th day of April, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Leah Davis Bates  
Administrative Law Judge  
State Office of Administrative Hearings, San Antonio  
**VIA FACSIMILE: (210) 308-6854**

Wallace T. Jacobs  
**ATTORNEY FOR RESPONDENT**  
2914 Eastex Freeway #102  
Beaumont, Texas 77703  
**CERTIFIED MAIL NO. 7000 1530 0003 1927 3029**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
San Antonio District Office

DOCKET NO. 458-01-1113

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	OF
	§	
PETER DRYER PASSANO	§	
D/B/A HERO'S ICE	§	
PERMIT NO. BG-278602	§	
BEXAR COUNTY, TEXAS	§	
(TABC CASE NO. 591570)	§	ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this disciplinary action against Peter Passano d/b/a Hero's Ice (Respondent), alleging that his agent or employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of Texas Alcoholic Beverage Code §106.13(a). TABC requested that Respondent's permit be suspended, or in lieu of suspension, that Respondent pay a civil penalty. This proposal finds that a criminally negligent sale to a minor did not occur, therefore, the Administrative Law Judge recommends that no action be taken against Respondent's permit.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01, and §106.13. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There are no contested issues of notice or jurisdiction in this proceeding.

On February 6, 2001, a hearing convened before Leah Bates, Administrative Law Judge (ALJ), of the State Office of Administrative Hearings, at 1015 Jackson Keller, San Antonio, Bexar County, Texas. Petitioner was represented at the hearing by Dewey Brackin, TABC Staff Attorney. Respondent was represented by attorney Wallace Jacobs. Evidence was received and the record was closed on February 6, 2001.

LEGAL STANDARDS

TABC is authorized to cancel or suspend a permit or license for not more than 60 days, pursuant to TEX. ALCO. BEV. CODE §106.13, if a licensee or permittee violates the Code. In this case, a violation of TEX. ALCO. BEV. CODE ANN. §61.71(a)(5), is alleged. That section makes it a violation to, with criminal negligence, sell or deliver an alcoholic beverage to a minor.

Criminal negligence is defined in TEX. PENAL CODE ANN. §6.03(d) as:

conduct, or results of conduct, when an actor 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 viewpoint.

In this case, two questions exist. The first question is whether Respondent's agent or employee sold or delivered an alcoholic beverage to a minor. It is undisputed in this case that a sale to a minor did occur. Second, if any sale or delivery occurred, whether Respondent's employee or agent was aware of a substantial risk that he was selling alcohol to a minor, and whether the failure to perceive that risk was a gross deviation from the standard of care that an ordinary person would exercise in these circumstances, as viewed from the viewpoint of the person making this type of sale.

### EVIDENCE AND ANALYSIS

Respondent holds Beer Retailer's Off-Premises License, BG-278602, issued to Peter Dyer Passano, doing business as Hero's Ice, 4672 S. Foster Road, San Antonio, Bexar County, Texas. TABC alleged that Respondent's agent or employee, with criminal negligence, sold an alcoholic beverage to a minor on September 16, 2000. The uncontradicted facts in this case are as follows.

On September 16, 2000, as a part of a sting operation, a minor Mr. Gabriel Gonzales, entered into Hero's Ice and attempted to purchase a beer. Prior to Mr. Gonzales entrance, TABC Agent Poster also entered, to observe the transaction. The clerk working at that time was Mr. John Passano, seventy-six years old, father of the Respondent.

According to Mr. Gonzales testimony, he entered Hero's Ice and asked where the beer was located. Mr. Passano told him where the beer cooler was located. Mr. Gonzales took a Budlight beer to the counter. While at the counter, Mr. Passano requested identification and Mr. Gonzales produced his Texas driver's license, which shows his date of birth as February 10, 1982. Mr. Passano checked the identification, he then sold Mr. Gonzales the beer. Mr. Gonzales then left the store and got into a vehicle with the TABC agent. Immediately realizing his mistake, Mr. Passano then also exited the store and approached the vehicle that Mr. Gonzales had entered.

Mr. Passano testified that when Mr. Gonzales entered the store, he was already suspicious of the TABC agent who was looking at merchandise. Mr. Passano further stated that the agent had made him suspicious because that he had not seen a vehicle approach the store and the stores' extensive video equipment also was not indicating a vehicle. This fact, combined with the agent simply standing around the front of the store, was alarming and suspicious to Mr. Passano. He went on to state that he did ask Mr. Gonzales for identification, and that Mr. Gonzales produced a Texas drivers license, showing Mr. Gonzales year of birth as 1982. Mr. Passano then turned around to check the date of birth against a "We Card" Calendar.

Mr. Passano and photographic evidence introduced at the hearing established that the " We

Card " calendars are provided as a tool for merchants to assist in determining the correct date for legal sales of both tobacco and alcohol. Mr. Passano testified that he saw the date for the sale of tobacco, which is 1982, and being distracted by the TABC agent still loitering around the merchandise, confused that date with the date for sale of alcohol, which is 1979. Photographs in evidence also show Mr. Passano with a driver's license in his hand and turning around to face the "We Card " calendar.

TABC's burden is to show that it is more likely than not that Respondent's agent was criminally negligent in making a sale of alcoholic beverages to a minor. TABC has not met that burden. Mr. John Passano was acting as Respondent's agent as he operated the licensed premises on September 16, 2000. Although alcoholic beverages were sold to a minor, the undisputed facts show Mr. John Passano made an attempt to request identification from Mr. Gonzales. The confusion of Mr. Passano as to the correct date for the sale of alcohol as compared to the sale of tobacco products, may rise to the level of negligence under the statutory definition, but fails to rise to the required "criminal negligence." This sale was not made with criminal negligence.

#### RECOMMENDATION

The ALJ recommends that a license suspension not be imposed.

#### FINDINGS OF FACT

1. Peter Passano, d/b/a Hero's Ice (Respondent) holds a Beer Retailer's Off-Premises License No. BG-278602
2. On October 25, 2000, TABC gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing.
3. On September 16, 2000, Respondent's agent, Mr. John Passano was working at Hero's Ice.
4. On September 16, 2000, Mr. John Passano checked Mr. Gabriel Gonzales date of birth on his driver's license.
5. On September 16, 2000, Mr. John Passano confused the date for the sale of tobacco with the date for the sale of alcohol.
6. On September 16, 2000, Mr. John Passano sold Mr. Gabriel Gonzales a Budlight beer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01 and §106.13.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting 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.
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3 - 6, Respondent's agent sold alcoholic beverages to minors but did not do so with criminal negligence. TEX. ALCO. BEV. CODE ANN. §§1.04(11); 26.03(b); and 61.71(a)(5).
5. Based on Findings of Fact Nos. 3 - 6 and Conclusion of Law No. 4, Respondent's Beer Retailer's Off-Premises License number BG-278602 should not be suspended.

SIGNED this 29<sup>th</sup> day of March 2001

  
\_\_\_\_\_  
LEAH DAVIS BATES  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS