

DOCKET NO. 595187

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
DANIEL S. BOSCHERT, INC.	§	
D/B/A DANIEL S. BOSCHERT, INC.	§	
PERMIT NOS. Q-108837 & BF-098371	§	
DALLAS COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-3851)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of January, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on October 5, 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 December 21, 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 Permit/License Nos. Q-108837 & BF-098371 are hereby **CANCELED FOR CAUSE**.

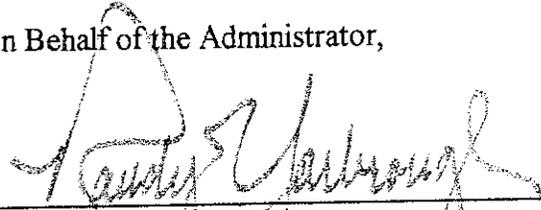
IT IS FURTHER ORDERED that all rights and privileges under the above described permit and license will be **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on February 12, 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 22nd of October, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Daniel S. Boschert, Inc.
RESPONDENT
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Administrative Law Judge
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DOCKET NO. 458-01-3751

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

DANIEL S. BOSCHERT, INC.
D/B/A DANIEL S. BOSCHERT, INC.
Q-108837 and BF-098371
DALLAS COUNTY, TEXAS
(TABC CASE NO. 595187)

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff or TABC) brought this disciplinary action against Daniel S. Boschert (Respondent), alleging that Respondent's employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of the Texas Alcoholic Beverage Code (Code) and of the TABC Rules (Rules). Staff requested that Respondent's permit be canceled. This proposal finds that Respondent's employee did sell an alcoholic beverage to a minor and that this sale was criminally negligent. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permit and license.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC 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 were no contested issues of notice or jurisdiction in this proceeding.

On August 20, 2001, the Staff issued its Notice of Hearing. The notice, directed to Respondent, advised that on October 5, 2001, at 9:30 a.m., a hearing would be held by the State Office of Administrative Hearings, 6333 Forest Park Road, Suite 150A, Dallas, Texas, to determine if the allegations against Respondent were true. On October 5, 2001, a hearing convened before Brenda Coleman, ALJ, of the State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150A, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented by its agent, Daniel S. Boschert, President. Evidence was received from both parties and the record was closed on that date.

II. DISCUSSION

A. Background. Respondent holds a Beer Retailer's Off Premise License, number BF-098371, and a Wine Only Package Store Permit, number Q-108837, issued by the TABC for the premises known as Daniel S. Boschert, Inc., located at 4232 Lemmon Avenue, Dallas, Dallas

County, Texas. TABC is authorized to cancel or suspend a permit or license for not more than 60 days, pursuant to §61.71(a)(5) of the Code, if a licensee or permittee violates the Code. In this case, a violation of Code provision, §106.13, 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, Respondent raised an affirmative defense to the disciplinary action sought by Staff. Respondent asserted that provisions of Code §106.14 apply to this situation. This section provides as follows:

(a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a minor . . . or the consumption of alcoholic beverages by a minor . . . , the actions of an employee shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.

The standard of proof required to establish a violation is that required in a civil case: the preponderance of the evidence. The trier of fact must ask if, weighing all the evidence, the party with the burden of proof has shown by 51% of the evidence that the alleged violation occurred. Staff bears the burden of proof to show the alleged violations occurred. This same standard of proof applies in establishing an affirmative defense; however, the burden of proof is on the party claiming the defense, or the Respondent in this case.

B. Stipulations. The parties stipulated to the following:

- (1) Respondent's employee, on February 13, 2001, with criminal negligence, sold an alcoholic beverage to a minor.
- (2) The Respondent's employee who sold, served or delivered an alcoholic beverage to a minor on February 13, 2001, Jimmy Ernest Stuart, possessed a current TABC seller certification at the time of the incident.

(3) The only issues are:

- (A) Whether the actions of the employee should be attributable to the employer under § 106.14(a) of the Code and the Rules;
- (B) If the actions of the employee should be attributable to the employer, then what should the appropriate penalty be?

The Respondent requests that this case be restrained;¹ Staff requests cancellation of Respondent's permit.

C. Staff's Case. Staff alleges that on February 13, 2001, an employee of Respondent, Jimmy Earnest Stuart,² with criminal negligence, sold an alcoholic beverage, a 32 ounce bottle of Bud Light Beer, to Brian Eric Dalton, a seventeen year old undercover minor involved in a minor sting operation. Staff's documentary evidence consisted of (1) written stipulations, (2) the Notice of Hearing, (3) Respondent's Permit, License and violation history on file with the TABC, (4) a document showing that the seller certification of Respondent's employee, Randall L. Eudy, expired on October 28, 2000, and (5) a Dallas Police Department Prosecution Report regarding the February 13, 2001, sale. According to Staff's evidence, Respondent's employee did check Mr. Dalton's driver's license, which is stamped "Provisional Driver License" and shows Mr. Dalton to be under the legal drinking age, but Respondent's employee sold the beer to Mr. Dalton anyway.

Staff argues that the Rules require that all employees be seller-server certified in order to satisfy the first prong of the seller-server defense and that on February 13, 2001, not all of Respondent's employees were seller-server certified. Staff directs attention to § 106.14(a)(3), direct or indirect encouragement of the employee to violate the law, and argues that Respondent's violation history, coupled with the fact that not all of Respondent's employees were seller-server certified on February 13, 2001, demonstrates such subtle and indirect encouragement, which would negate entitlement to the seller-server defense. Respondent's violation history shows the following sale to minor violations and actions/results:

¹The TABC may restrain cases against employers when a violation (sale to minor) occurs and the TABC determines that the employee who committed the violation is "seller-server" trained, i.e., has been through the training mandated by the TABC. When deemed appropriate, the TABC does not seek an administrative sanction against the employer.

²TABC Exhibit Four, the Dallas Police Department Prosecution Report, identifies Jimmy Earnest Stuart as the seller of the alcoholic beverage to a minor on February 13, 2001. At the hearing, Mr. Boschert stated that the employee involved in the incident was Herman Painter. For purposes of this Proposal For Decision, Mr. Stuart is accepted as the seller. The ALJ would note that if, in fact, Mr. Painter was the seller on February 13, 2001, this would be Mr. Painter's second sale to a minor violation within an approximate two month period; Mr. Painter was identified as the seller of the alcoholic beverage to a minor which occurred on December 6, 2000, the most recently restrained case against Respondent because Mr. Painter was seller-server certified. This would also serve to contradict Respondent's testimony that any employee caught selling an alcoholic beverage to a minor is terminated.

December 6, 2000	Sale to Minor	Restrained/Seller-Server ³
April 26, 2000	Sale to Minor	Settled: 10 Days/\$1500
February 24, 2000	Sale to Minor	Restrained/Seller-Server
January 24, 2000	Sale to Minor	Restrained/Seller-Server
June 15, 1999	Sale to Minor	Settled: See Below
April 27, 1999	Sale to Minor	Settled: 50 Days/\$7500
April 1, 1999	Sale to Minor	Settled: See Above
April 24, 1997	Sale to Minor	Settled: 7 Days/\$1050

Staff further argues that, in spite of Respondent's policy and training with regard to the sale of alcoholic beverages to minors, Respondent's conduct, as evidenced through Respondent's violation history, speaks louder than any words; that Respondent's conduct evidences habitual and repetitive violation of the law, "the worst case this attorney has ever brought before an ALJ on past history;" that three of the prior eight sale to minor violations by Respondent have been restrained; that previous suspensions have not worked; therefore, cancellation of Respondent's permit is warranted.

D. Respondent's Case. Respondent argues that the TABC should not be authorized to take any disciplinary action due to Respondent's compliance with the "seller-server" defense as provided for in §106.14 of the Code because it had complied with Code provisions relating to seller-server training of all employees. Mr. Boschert stated all employees of Respondent had attended seller-server training pursuant to Respondent's policy that all its employees are certified through this training. Further, he stated that no employee had ever been encouraged to violate the law, directly or indirectly.

When asked whether, on February 13, 2001, all of Respondent's employees were, in fact, seller-server certified, Mr. Boschert stated that he was just informed by a TABC representative a few days before the scheduled hearing that one of his employees, Randall L. Eudy, was not certified on February 13, 2001. As reflected in Staff's Exhibit 5, Mr. Eudy's certification expired on October 28, 2000. Mr. Boschert stated that he was unaware of the status of Mr. Eudy's certification prior to notification by the TABC representative, and that apparently, Respondent had transposed the numbers in error; it is Respondent's policy that everyone is certified. Mr. Boschert further stated that he immediately contacted Mr. Eudy to request that Mr. Eudy bring in his certificate as proof of his certification; however, Mr. Eudy quit instead.

Mr. Boschert discussed Respondent's policy regarding the sale of alcoholic beverages to minors and Respondents attempt to prevent such sales, after the first incident occurred a couple of years ago, as follows: (1) four signs are posted around the store informing the public that minors cannot buy beer at the store; (2) Respondent's Exhibit Two, a copy of a sign that is posted over the top of cash registers, was offered to show that employees are to check driver's licenses for transactions involving the sale of beer and cigarettes; (3) all employees are given a copy of the Employee Handbook, Respondent's Exhibit Three, Section II (D), which lays out the company policy concerning the sale of alcohol to minors. The handbook states as follows:

³The ALJ notes that at the time this violation occurred, not all of Respondent's employees were seller-server certified because the certification for Randall L. Eudy had expired on October 28, 2000.

"Age restrictions should be followed at all times. It is 18 to smoke and 21 to drink alcohol. You must ask for ID on anyone under the age of 30. Failure to ID can and has cost former employees over \$2000. We do not pay this fine if you sell to a minor. In fact, you are terminated if you are fined for selling to a minor. Check the ID as well. Many teens will give you the ID to see if you will actually check it. Do so. We provide machines that help in this process, use them. For those that work at a location that sells Beer and Wine, you are required to get and hold a current TABC certification."

(4) employees are instructed to verify a customer's age, if the customer does not appear to be 30 years of age or older, by running the driver's license or identification card presented through the Card Com Viage Verifier, a machine which Respondent purchased for this reason. Employees are also told that if the customer's card does not go through the machine, do not complete the sale; (5) store meetings are held twice a month and the sale of alcohol to minors is always a topic; (6) the TABC requirements are discussed with all newly hired employees; (7) company policy, enacted after the first sale to minor incident, requires that any employee caught selling alcohol to minors be terminated; and (8) on two occasions, Mr. Boschert has gone to the office of the TABC for assistance and has adopted a lot of the TABC's suggestions.

Respondent also presented evidence at the hearing through testimony provided by Steve Johnson, an employee of Daniel S. Boschert, Inc. for the past ten years. Respondent sought to show through Mr. Johnson's testimony that an enforcement action should not be taken against it due to the actions of its employee on February 13, 2001, because, as stated by Mr. Johnson, the Respondent "has done everything humanly possible to discourage selling liquor to minors; nobody condones it; we go by these procedures presented." According to Mr. Johnson, "little" meetings are held every week; the sale of alcohol to minors is talked about every day. Mr. Johnson also stated that he uses the Card Com Viage Verifier religiously because he knows that if he sells alcohol to a minor, he might go to jail, be fined, lose his job and be unemployed.

E. Analysis. Respondent's employee, on February 13, 2001, sold an alcoholic beverage to a minor. This matter was stipulated by the parties prior to the presentation of evidence in this case. The only remaining issue regarding this violation is whether Respondent is entitled to exemption from any sanction as a result of compliance with the "seller-server" defense.

I. Whether the actions of the employee should be attributable to the employer:

The Rules, specifically, 16 TAC 50.10(c) provides that proof by the commission that an employee or agent of a licensee/permittee sold an alcoholic beverage to a minor more than twice within a 12-month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws. Staff introduced evidence at the hearing of eight prior violations involving the sale of an alcoholic beverage to a minor by Respondent over four years, four of which have occurred over a 12-month period.

16 TAC 50.10(d) goes on to state that the following practices constitute prima facie evidence of indirect encouragement of the law within the meaning of § 106.14(a)(3) of the Alcoholic Beverage Code:

- (1) the licensee/permittee fails to insure that all employees possess currently valid certificates of training issued and maintained in conformity with this chapter;
- (2) the licensee/permittee fails to adopt and post, within view of its employees policies and procedures designed to prevent the sale of alcoholic beverages to minors, and that express a strong commitment by the licensee/permittee to prohibit such sales;
- (3) the licensee/permittee fails to insure that employees have read and understood the licensee/permittees policies and procedures regarding sales to minors.

All employees of Respondent were not, in fact, trained according to provisions of Code §106.14. Although, Mr. Boschert testified that (1) it is Respondent's policy that all employees be seller-server certified, (2) out of Respondent's seven employees, only one was not certified on February 13, 2001, and (3) that Respondent, due to some error, was unaware that the employee's certification had expired, his testimony carries little weight. Additionally the third criteria dealing with encouragement, directly or indirectly, to violate the law, requires more evidence than testimony to establish that it was Respondent's policy for employees to obtain identification from its customers. Clearly, this provision would be meaningless if this were all that was necessary to exempt a permittee from liability or sanction.

Respondent's violation history speaks more convincingly regarding the operation of the premises. Respondent's premises was licensed on June 27, 1978, and its permits have been continuously renewed since that time. Over a four year period of time, beginning in 1997, a pattern of violations involving the sale of alcoholic beverages to minors has occurred. This pattern demonstrates a continuous lack of diligence to verify the age of customers in the normal course of business at the premises.

Respondent's contention that it should be exempted from any sanctions due to its compliance with Code and Rule provisions creating a "seller-server" defense was not sufficiently established. The criteria set out by statute and rule is purposely broad to allow permittees to implement practices sufficient for their particular businesses, yet still meet the objective of preventing sales of alcoholic beverages to minors. The following language from *Pena v. Neal*, 901 S.W.2d 663 (Tex. App. San Antonio 1995, writ denied) is instructive:

The statute's words plainly demonstrate the employer must do more than simply require attendance at the training programs. It cannot turn its back on all actions of the "trained" seller-employees, safe in the assumption that even if employee violations of the alcoholic beverage code do occur, recovery against the employer will be barred and the employer cannot be held liable. This cannot be the intention of the legislature.

While the Respondent did show some evidence of its policy and practices with regard to the sale of alcoholic beverages to minors, the evidence was not sufficient to negate indirect encouragement to violate the law. Although Respondent makes a relevant argument that the seller of the alcoholic beverage to the minor on February 13, 2001, was seller-server certified, it carries little weight. The

actions of Respondent's employee should be attributable to the Respondent.

II The appropriate penalty:

The standard penalty chart provides for a suspension of the permit or license for seven to twenty days for a first violation involving the sale of an alcoholic beverage to a minor; ten to ninety days for a second violation; and sixty days to twelve months, or cancellation for a third offense. 16 TEX. ADMIN. CODE § 37.60. Staff requested cancellation of Respondent's permit for this violation.

In arriving at the recommendation below, the ALJ considered several factors. Respondent's history, as maintained by the TABC, shows a continuing pattern of selling alcoholic beverages to minors at this premises. Eight violations of this nature, prior to this action, have occurred at the premises. Four violations have occurred within a 12-month period.

Further, Respondent failed to offer evidence of mitigating circumstances or of any remedial actions taken on its part to ensure that violations of this type do not occur in the future. There was no evidence as to what, if anything, Respondent has done or intended to do to rectify the situation of repeated violations for sales to minors, especially since the last violation of December 6, 2000, was restrained. Respondent's employee, on February 13, 2001, ignored the information clearly reflected upon the driver's license handed to him. Contrary to Respondent's training and established procedures, Respondent's employee requested identification from an individual who was 17 years of age, but sold the alcoholic beverage to the minor anyway. There was no specific evidence that this particular employee has been admonished, that any of Respondent's employees have been retrained or that any action has been taken to ensure that the situation does not recur. To the contrary, of significant importance were Mr. Boschert's closing statements, in which he mentioned that he believes that the Respondent has taken all the appropriate actions and that, in his opinion, the Respondent has done more at its location "to prevent this from happening than anybody I know."

III. RECOMMENDATION

The ALJ recommends cancellation of Respondent's permit.

IV. PROPOSED FINDINGS OF FACT

1. Respondent, Daniel S. Boschert, Inc. d/b/a Daniel S. Boschert, Inc., holds a Beer Retailer's Off-Premise License, number BF098371, and a Wine Only Package Store Permit, number Q108837, issued by the Texas Alcoholic Beverage Commission for the premises located at 1622 Market Center Boulevard, Dallas, Dallas County, Texas.
2. On August 20, 2001, Staff of the Texas Alcoholic Beverage Commission (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 through its agent and representative, Daniel S. Boschert, President.
3. On February 13, 2001, Respondent's employee, Jimmy Earnest Stuart, was seller-server certified.

4. On that date, Mr. Stuart, with criminal negligence, sold an alcoholic beverage to a minor.
5. On February 13, 2001, Respondent's employee, Randall L. Eudy, was not seller-server certified because his certification had expired on October 28, 2000.
6. Respondent's violation history, as maintained by the TABC, shows eight previous sale to minor violations occurring over a four year period from April, 1997 to December, 2000.
7. Respondent has sold an alcoholic beverage to a minor more than twice within a 12-month period.
8. Respondent has indirectly encouraged violation of the law.
9. The actions of Respondent's employee, Jimmy Earnest Stuart, should be attributable to the Respondent.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC 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 No. 4, Respondent's employee sold an alcoholic beverage to a minor and did so with criminal negligence, contrary to TEX. ALCO. BEV. CODE ANN. §§1.04(11), 61.71(a)(5) and 106.13(a).
5. Based on Findings of Fact Nos. 5-9 and Conclusion of Law No. 4, Respondent's Beer Retailer's Off Premise License, number BF-098371, and Wine Only Package Store Permit, number Q-108837, should be cancelled.

ISSUED this 21st day of December, 2001.



BRENDA COLEMAN
Administrative Law Judge
State Office of Administrative Hearings