

DOCKET NO. 596112

IN RE JOHNNY MENG
D/B/A COOLER LIQUOR
PERMIT NOS. P-257439, E-258162
LICENSE NO. BF310611

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BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION

DALLAS COUNTY, TEXAS

ORDER

CAME ON FOR CONSIDERATION this 9th day of July 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened and adjourned on May 8, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 7, 2002. This Proposal For Decision (attached hereto as Exhibit "A"), 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 Nos.P-257439, E-258162 and License No. BF310611 are hereby **SUSPENDED for seven (7) days**.

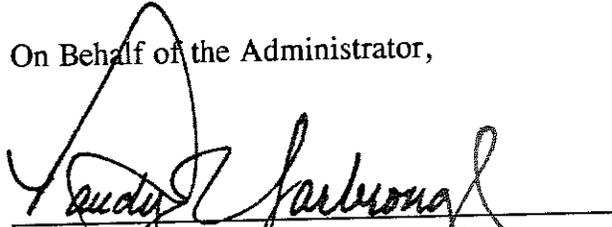
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **4th day of September, 2002**, all rights and privileges under the above described permits and license will be **SUSPENDED for a period of seven (7) days, beginning at 12:01 A.M. on the 11th day of September, 2002**.

This Order will become final and enforceable on July 30, 2002, 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 9th day of July, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme
Administrative Law Judge00
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

William Chu
ATTORNEY FOR RESPONDENT
VIA FACSIMILE (972) 392-9889

JOHNNY MENG
d/b/a Cooler Liquor
RESPONDENT
5423 S. Lamar
Dallas, Texas 75215
CERTIFIED MAIL NO. 7001 2510 0000 7278 8008

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Dallas District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 596112

REGISTER NUMBER:

NAME: JOHNNY MENG

TRADENAME: COOLER LIQUOR

ADDRESS: 5423 S. LAMAR, DALLAS, DALLAS COUNTY, TEXAS 75215

DATE DUE: September 4, 2002

PERMITS OR LICENSES: P-257439, BF310611, E-258162

AMOUNT OF PENALTY: \$1,050.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 4TH DAY OF SEPTEMBER 2002, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
Petitioner	§	
	§	
vs	§	OF
	§	
JOHNNY MENG,	§	
D/B/A COOLER LIQUOR	§	
T.A.B.C. CASE NO. 596112	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against Johnny Meng, d/b/a Cooler Liquor (Respondent), alleging that on or about February 8, 2001, Respondent, with criminal negligence, sold alcoholic beverages to a minor. The Administrative Law Judge (ALJ) finds that Staff has proven the allegations and recommends that Respondent's permits be suspended for 7 days or, in lieu of the suspension, that Respondent pay a civil penalty of \$1,050.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On May 8, 2002, a hearing was held before Jerry Van Hamme, ALJ, State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Respondent's attorney of record, William Chu, did not appear. Johnny Meng appeared pro se. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 106.03(a), a person commits an offense if, with criminal negligence, that person sells an alcoholic beverage to a minor.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13(a), the Texas Alcoholic Beverage Commission (Commission) or administrator may cancel or suspend for not more than 60 days a retail license or permit if it is found, on notice and hearing, that the permittee with criminal



negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71(a)(1), the Commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee violated a provision of this code or a rule of the Commission during the existence of the license sought to be cancelled or suspended or during the immediately preceding license period;

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71(a)(5), the Commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee with criminal negligence sold, served, or delivered an alcoholic beverage to a minor.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 22.07, if a person holding a package store permit who also holds a retail dealer's off-premise license for the same location violates a provision of the code or a rule or regulation of the Commission, the violation is a ground for the suspension or cancellation of both the package store permit and the retail dealer's off-premise license for the premises where the violation was committed.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2), the Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of this code or a rule of the Commission.

III. EVIDENCE

1. Staff's Evidence and Contentions

Officer Carl A. Barnes, vice officer with the Dallas Police Department, testified that on February 8, 2001, he and Barrick Nealy, an 18-year old minor, birth date August 7, 1983, participated in a "Minor Sting" operation at Respondent's establishment. On that date Mr. Nealy had a youthful appearance, appeared younger than 21 years of age, and was wearing a tee shirt, blue jeans, and blue jean jacket. A photo of Mr. Nealy taken on that date, dressed in the clothing he was wearing during the sting operation, was admitted into evidence (TABC Ex. No. 5). Officer Barnes and Mr. Nealy entered Respondent's establishment, and Officer Barnes observed as Mr. Nealy purchased a six pack of 12-ounce bottles of Miller Light beer from Johnny Meng for \$5.08. Mr. Meng did not ask Mr. Nealy for any identification when making the sale.

2. Respondent's Evidence and Contentions

Mr. Meng testified that Officer Barnes was not present when the purchase was made, that the person who made the purchase was not the person shown in the photo of Mr. Nealy (TABC Ex. No. 5), and that the person who made the purchase appeared to be 21 years of age or older, which is why

Mr. Meng did not check his identification.

IV. ANALYSIS

1. Criminal Negligence

Criminal negligence is defined in § 6.03 of the Penal Code as 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.”¹

The “actor’s standpoint,” in the instant case, is Respondent’s. Respondent knows, or certainly should know, that minors attempt to purchase alcoholic beverages from licensed premises. Respondent also knows, or should know, that as a permit holder in a highly regulated industry Respondent has an affirmative obligation to not sell alcoholic beverages to minors. It is incumbent upon the holders of such permits to take the necessary steps, and to make the necessary observations, to ensure that alcoholic beverages are not sold to minors. Respondent failed to exercise the appropriate standard of care in the instant case.

2. Credibility of the Witnesses

The testimony of the witnesses in this matter is mutually exclusive. The ultimate determination of the case, therefore, rests, in part, upon the credibility of the witnesses. Based on the evidence in the record, Staff has presented credible evidence showing that Respondent sold alcoholic beverages to a minor at Respondent’s licensed premises.

¹Tex. Pen. Code Ann. § 6.03(d) (Vernon 2000) states as follows:

A person acts with criminal negligence, or is criminally negligent, 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.

In addition, pursuant to Tex. Pen. Code Ann. § 6.02(d) (Vernon 2000), “criminal negligence” constitutes the lowest degree of culpable mental state of those listed in this section (i.e. intentional, knowing, reckless, and criminal negligence.)

V. RECOMMENDATION

Staff requested that Respondent's permits be suspended for seven days or that Respondent pay a civil penalty of \$1,050. The ALJ recommends that Staff's request be granted, and that Respondent's permits be suspended for seven days or, in lieu of suspension, that Respondent pay a civil penalty of \$1,050.

FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, Johnny Meng, d/b/a Cooler Liquor, 5423 S. Lamar, Dallas, Dallas County, Texas, holds a Package Store Permit, P-257439, and a Beer Retailer's Off-Premise License, BF-310611, issued by the Texas Alcoholic Beverage Commission (Commission) on September 28, 1995.
3. On February 8, 2001, Officer Carl A. Barnes – a vice officer with the Dallas Police Department, and 18-year old Barrick Nealy, whose birth date is August 7, 1983, participated in a "Minor Sting" operation at Respondent's establishment.
4. Mr. Nealy entered Respondent's establishment wearing a tee shirt, blue jeans, a blue jean jacket, and appearing younger than 21 years of age.
5. Mr. Nealy purchased a six pack of 12-ounce bottles of Miller Light beer from Johnny Meng for \$5.08.
6. Mr. Meng did not ask Mr. Nealy for any identification when making the sale.
7. Petitioner instituted disciplinary action against Respondent alleging that Respondent, with criminal negligence, sold alcoholic beverages to a minor.
8. A hearing was held on May 8, 2002, before Jerry Van Hamme, ALJ, State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Respondent's attorney of record, William Chu, did not appear. Johnny Meng appeared pro se. The record was closed on that date.

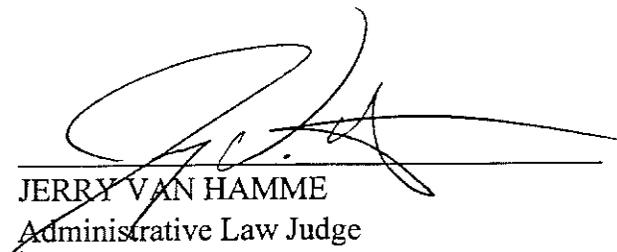
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, §§ 6.01 and 11.61. The State Office of Administrative Hearings has

jurisdiction over all matters related 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.

2. Respondent received adequate notice of the proceedings and hearing.
3. Respondent, with criminal negligence, sold an alcoholic beverage to a minor. TEX. ALCO. BEV. CODE ANN. § 106.03(a).
4. Respondent's license and permit are subject to discipline by the Commission pursuant to TEX. ALCO. BEV. CODE ANN. §§ 106.13(a); 61.71(a)(1) & (5); 22.07; and 11.61(b)(2).
5. Based on the foregoing Findings and Conclusions, Respondent's license and permit should be suspended for seven days, or in lieu of suspension, Respondent should be permitted to pay a civil penalty of \$1,050.

SIGNED this 7 day of June, 2002.



JERRY VAN HAMME
Administrative Law Judge
State Office of Administrative Hearings