

DOCKET NO. 458-05-9090

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

v.

**YEN NGUYEN
D/B/A J & J BEER & WINE
PERMIT NOS. Q-436173 & BF-436174
DALLAS COUNTY TEXAS
(TABC NO. 495683)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this action against Yen Nguyen, d/b/a J & J Beer & Wine (Respondent) seeking cancellation of Respondent's Wine Only Package Store Permit, Q-436173, and Beer Retailer's Off-Premise License, BF-436174. TABC alleged Respondent, his agent, servant, or employee, with criminal negligence, sold, served or delivered an alcoholic beverage to a minor on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61 (b)(2), 106.03, 61.71(a)(5) and/or 106.13.

This Proposal for Decision finds the Respondent's permit and license should be canceled.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The original hearing in this matter convened on October 7, 2005. Attorney Timothy Griffith represented TABC. The Respondent was represented by attorney R. Keith Walker. Administrative Law Judge (ALJ) Kyle J. Groves presided. The hearing was concluded and the record closed that same day.

A Proposal for Decision was issued on December 12, 2005, and it was adopted by order

dated February 24, 2006. Upon appeal, this matter was remanded to consider additional evidence. A second hearing was convened on November 14, 2006. Attorney Diane Brown represented TABC and attorney R. Keith Walker represented Respondent. ALJ Kyle J. Groves presided. The hearing was concluded and the record closed that same day.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

II. EVIDENCE

Petitioner's Evidence

TABC staff offered documentary evidence showing:

(a) On July 30, 1998, Respondent was issued Wine Only Package Store Permit, Q-436173 and Beer Retailer's Off-Premise License, BF-436174.

(b) On August 24, 2005, Petitioner sent a Notice of Hearing to Respondent asserting that TABC was seeking to cancel Respondent's permit and license.

In addition to the documentary evidence, TABC staff presented the testimony of Christopher Aller. Mr. Aller is an agent for TABC. He testified that on May 5, 2005, he went to Respondent's in reference to a complaint that Respondent had served alcohol to a minor. Mr. Aller parked across the street from Respondent's to observe alcoholic beverage sales taking place at Respondent's drive-through window.

Mr. Aller had been observing Respondent's for approximately 10 minutes when, using a pair of binoculars, he saw a vehicle pull into the drive-through. The driver purchased a 12-pack of Budweiser Select beer. He said that no identification was given by the driver. This was the only sales transaction that Mr. Aller observed during the time he was parked across the street. He testified that it would not have been possible for another transaction to take place without him observing it from his vantage point. Mr. Aller stopped the vehicle after it left Respondent's premises. The driver

presented Mr. Aller with identification showing he was Bertin Martinez, who was 18 years old. Mr. Aller saw a 12-pack of Budweiser Select beer in Mr. Martinez' vehicle. Mr. Martinez admitted purchasing the beer at Respondents'.

Mr. Aller went to Respondents' and spoke to the clerk, Long Phan. Mr. Phan said he always checked for identification and denied selling the beer to Mr. Martinez. Mr. Aller next spoke to Respondent, and she said that no Budweiser Select had been sold. She said that she knew this because no Budweiser Select was sold from her inventory.

Mr. Aller testified that Mr. Phan had not attended seller/server classes at the time of the incident. He said that the purpose of seller/server certification is not only to educate those selling alcoholic beverages, but the certification can also serve as a defense for the seller if a sale to a minor occurs.

Respondent's Evidence

Respondent presented the testimony of Mr. Phan. He said he was working for Respondent at the time of the alleged sale. Mr. Phan denied selling the beer to Mr. Martinez. He also said that no Budweiser Select was gone from their inventory. Mr. Phan testified that he always asks for identification from customers unless he knows them from prior sales. Mr. Phan believes it is possible that he sold the beer to another individual who then gave the beer to Mr. Martinez. He admitted that at the time of the incident, he had not attended seller/server classes.

Respondent also testified. She said that at the time of the alleged sale, she was in the cooler. She said that no Budweiser Select was gone from her inventory, and it would not have been possible for the alleged sale to have taken place without her knowledge. She further testified that less than five percent of her total beer sales were of Budweiser Select, and she does not recall ever selling that type of beer to a Hispanic.

III. STATUTORY AUTHORITY

TEX. ALCO. BEV. CODE ANN. § 11.61 (b) (2) states:

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail renewal permit if it is found, after notice and hearing, that any of the following is true...the permittee violated a provision of this code or a rule of the commission.

TEX. ALCO. BEV. CODE ANN. § 106.03 states:

(a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor. (b) A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents himself to be 21 years old or older by displaying an apparently valid Texas driver's license or an identification card issued by the Texas Department of Public Safety, containing a physical description consistent with his appearance for the purpose of inducing the person to sell him an alcoholic beverage.

TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (5) states:

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.

TEX. ALCO. BEV. CODE ANN. § 1.08 states:

For the purposes of administrative actions under this code, a person acts with criminal negligence if the person acts with a mental state that would constitute criminal negligence under Chapter 6, Penal Code, if the act were an offense.

TEX. PENAL CODE § 6.03 (d) states:

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.

IV. DISCUSSION

The evidence shows that Mr. Aller observed Mr. Phan sell an alcoholic beverage to Mr. Martinez. This is shown by the observations Mr. Aller made concerning the transaction between Mr. Martinez and Mr. Phan. Mr. Aller testified that he saw the sale, and he was even able to identify the brand of beer sold. The same brand of beer was found in Mr. Martinez vehicle. In addition, Mr. Martinez corroborated Mr. Aller's observation by stating that he purchased the beer at Respondents'.

At the time of the incident, Mr. Phan was an employee of Respondent. Mr. Martinez was 18 years of age. Mr. Phan had not attended seller/server classes. Thus Mr. Phan and Respondent are not afforded the protections that the certification would have provided for a sale to a minor.

Mr. Phan's sale to Mr. Martinez meets the definition of criminal negligence. He did not ask Mr. Martinez to provide proof that he was 21 years of age. There was no evidence that Mr. Martinez provided Mr. Phan with a fake identification. Mr. Phan should have been aware that the failure to obtain identification from Mr. Martinez resulted in a substantial and unjustifiable risk that a sale to a minor could occur. This constitutes a gross deviation from the standard of care that an ordinary person would exercise under like circumstances.

V. PROPOSED FINDINGS OF FACT

1. Yen Nguyen d/b/a J & J Beer & Wine (Respondent) is the holder of Wine Only Package Store Permit, Q-436173 and Beer Retailer's Off-Premise License, BF-436174.
2. Respondent was notified of the factual allegations against Respondent in the Notice of Hearing issued by Petitioner on August 24, 2005.
3. On October 7, 2005, the hearing in this matter convened before Administrative Law Judge Kyle J. Groves. Timothy Griffith appeared for Petitioner. Respondent was represented by Attorney R. Keith Walker
4. Upon appeal, this matter was remanded to consider additional evidence. A second hearing was convened on November 14, 2006. Attorney Diane Brown represented Petitioner and attorney R. Keith Walker represented Respondent. ALJ Kyle J. Groves presided. The hearing was concluded and the record closed that same day.
5. On May 5, 2005, Respondent's employee, Mr. Phan, sold beer to a minor.

6. Mr. Phan did not obtain identification from the minor prior to selling the beer.
7. Mr. Phan had not attended seller/server classes.

V. PROPOSED CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. On May 5, 2005, Respondent violated TEX. ALCO. BEV. CODE ANN. § 106.03.
5. On May 5, 2005, Respondent's employee acted in a manner that 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. TEX. PENAL CODE § 6.03 (d).
5. On May 5, 2005, Respondent's employee acted with criminal negligence. TEX. PENAL CODE § 6.03 (d).
6. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Wine Only Package Store Permit. Q-436173, and Beer Retailer's Off-Premise License. BF-436174, should be canceled.

SIGNED JANUARY 9TH, 2007



KYLE J. GROVES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Yen Nguyen d/b/a J & J Beer & Wine

DOCKET NUMBER: 458-05-9090

AGENCY CASE NO: 495683

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RESPONDENT
VIA REGULAR MAIL

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RESPONDENT'S ATTORNEY
VIA FAX (469) 330-8354

as of January 09, 2007

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

January 10, 2007

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

RE: TABC Vs. Yen Nguyen ,
D/B/A J & J Beer & Wine
SOAH Docket No. 458-05-9090
TABC Case No. 495683

Dear Ms. Fox:

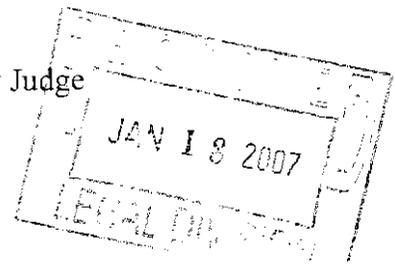
Enclosed please find the PROPOSAL FOR DECISION in the above reference cause for the consideration of the Texas Alcoholic Beverage Commission.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read "K Groves", written over a faint grid background.

Kyle Groves
Administrative Law Judge



KG/sr

Enclosure

cc: Diane Brown, Staff Attorney for Texas Alcoholic Beverage Commission **Via Fax:**
Yen Nguyen, d/b/a J & J Beer & Wine, Respondent, **Via Regular Mail;** and
R. Keith Walker, Respondent's Attorney, **Via Fax**