

SOAH DOCKET NO. 458-07-0452

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§ § §	BEFORE THE STATE OFFICE
VS.	§ §	
FNA CONVENIENCE STORES, LLC D/B/A ELDRIDGE SHELL PERMIT NO. BQ489856	§ § § §	OF
FORT BEND COUNTY, TEXAS (TABC CASE NO. 536121)	§ §	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 29th day of May 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on day of February 9, 2007 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 5, 2007. 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, 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 no violation was found.

This Order is final and enforceable on the date that the Order is signed by the Assistant Administrator and parties agree that no Motion for Rehearing will be filed.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

SIGNED on this the 29th day of May 2007.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

RMP/aa

Hon. Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FAX (713) 812-1001

Jim DeFoyd
ATTORNEY FOR RESPONDENT
103 Eastway
Galena Park, Texas 77547
VIA FACSIMILE TRANSMISSION TO 713-672-7420

FNA Convenience Stores, LLC.
d/b/a Eldridge Shell
RESPONDENT
1818 Jourdan Way
Sugar Land, Texas 77479
VIA REGULAR MAIL

Licensing Division

Victoria District Office

DOCKET NO. 458-07-0452

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
 Petitioner	§	
V.	§	
	§	OF
FNA CONVENIENCE STORES, LLC	§	
D/B/A ELDRIDGE SHELL	§	
PERMIT NOS. BQ489856	§	
FORT BEND COUNTY, TEXAS	§	
(TABC NO. 536121)	§	
 Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (TABC) the Petitioner brought this action against FNA Convenience Stores, LLC d/b/a Eldridge Shell (Respondent) seeking a suspension of Respondent's Wine and Beer Retailer's Off-Premise Permit, BQ-489856. TABC alleged that Respondent, its agent, servant, or employee, consumed or permitted consumption of an alcoholic beverage on or near the premises where beer is sold at retail in violation of TEX. ALCO. BEV. CODE ANN. (the Code) §§ 61.71 (a) (1) and 71.01. This Proposal for Decision finds the TABC did not prove that the Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 61.71 (a)(1) or 71.01.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The hearing in this matter convened on February 9, 2007. Attorney Ramona Perry represented TABC. The Respondent was represented by Attorney Jim L. DeFoyd. Administrative Law Judge (ALJ) Rex Shaver 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

A. Petitioner's Evidence

TABC staff offered documentary evidence showing:

(a) On March 20, 2001, Respondent was issued Wine and Beer Retailer's Off-Premise Permit BQ-489856 and that permit has been continuously renewed.

(b) On October 25, 2006, Petitioner sent a Notice of Hearing to Respondent asserting that TABC was seeking a suspension, cancellation or denial of renewal of the permit.

In addition to the documentary evidence, TABC staff presented the testimony of two witnesses.

1. Darryl Darnell

Mr. Darnell is an agent for TABC. He testified that his duties with TABC consist of enforcing the Texas Alcoholic Beverage Code and other applicable rules of the state of Texas. On June 9, 2006, he visited the licensed premise at 2575 Eldridge, Sugar Land, Texas. This visit was part of his efforts in a minor sting operation. He was the undercover agent accompanying a minor into the business to determine whether or not the cashier would sell beer or wine to a minor. The business was situated in a strip shopping mall. Upon approaching the premise, he observed four or five people standing outside of the business at the corner of the building and drinking from cans labeled as beer. These persons were standing at the left side corner of the building approximately 20 feet from the front door of the establishment. The area was lit with natural lighting at 7:00 p.m. The witness further stated that, in his opinion, the store's cashier had an unobstructed view, through the store windows, of the persons drinking alcoholic beverages on the premises and walking back and forth past the store windows.

During his visit to the premises, Agent Darnell observed five or six other patrons inside of the business. Agent Darnell testified that Respondent's cashier refused to sell alcoholic beverages

to the minor. He testified that, without revealing that he was an agent of the TABC, he told the cashier that there were persons drinking outside. The cashier made no response to this information. Agent Darnell and the minor then left the premises. Agent Darnell reported by radio to an open agent, Craig Schmidt, that he had observed three or four persons consuming beer at the corner of the building and on the premises. He also gave Agent Schmidt a description of the cashier and his clothing. Agent Darnell and the minor then left the premises. He and the minor stayed five minutes in the parking lot before leaving the area.

2. Craig Schmidt

Mr. Schmidt is an agent for TABC. He testified that on June 9, 2006, he was working as an open agent in a minor sting operation. He was advised by Agent Darnell that he had observed persons drinking alcoholic beverages on the premises of Eldridge Shell, the holder of a Wine and Beer Retailer's Off-Premise Permit. Mr. Schmidt then drove his vehicle 100 yards to the parking lot at Respondent's place of business. He arrived at the parking lot two to five minutes after receiving the call from Agent Darnell. He observed 3 to 4 persons standing on the sidewalk at the corner of the building consuming alcohol. He entered the premises and contacted Abdullah Abbas who was behind the check-out counter. Mr. Abbas identified himself as an employee of Eldridge Shell. Mr. Schmidt then issued an administrative notice to Mr. Abbas for permitting consumption of alcoholic beverages on the licensed premises. He did not arrest Mr. Abbas, and the persons standing outside the store were given citations.

B. Respondent's Evidence

Respondent offered several photographs depicting views of both the interior and exterior of its place of business. In addition to the photographic evidence, Respondent presented the testimony of two witnesses.

1. Karim Momin

Mr. Momin testified that he is the general manager of all of the stores operated by FNC Convenience Stores, LLC, including the Eldridge Shell. He was not present when the administrative notice was issued. He learned of the alleged violation the next day, when he was told of the administrative notice by Ali Akbar, the owner. He described the location of the store as being on the end of a strip shopping center, sharing a parking lot with several other businesses. It was his experience that 7:00 P.M. was a busy time inside the store. He also testified that when one is looking out the store windows, it would not be possible to see persons standing around the corner. There were signs posted that stated consumption of alcohol on the premises was a violation of the law.

2. Akbar Ali

Mr. Ali testified that he is the owner of Eldridge Shell as well as two Citgo stations. He testified that this store has never received an administrative notice before. He has posted the necessary warning signs and sends all employees to TABC seller/server training. The corner of the building is 50 feet from the cashier counter. It can be difficult to see what is happening at the corner. He has instructed his employees that if they observe a violation, they are not to "accost" anyone. His instructions are that they are to call the police.

III. STATUTORY AUTHORITY

TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (1) 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 . . . permitted an open container of an alcoholic beverage on the licensed premises.

TEX. ALCO. BEV. CODE ANN. § 71.01 states:

The holder of a retail dealer's off-premise license may sell beer in lawful containers to consumers, but not for resale and not to be opened or consumed on or near the premises where sold.

IV. DISCUSSION

Both TABC agents testified that they observed persons standing and walking at one corner of the Respondent's premises. These persons were issued citations by other TABC agents for violating the law concerning consumption of alcoholic beverages. The disputed issue whether or not the agent, servant or employee of the Respondent permitted the open containers of alcohol and consumption of alcohol on or near the premises in violation of the Code.

The word "permit" means to consent, allow, or authorize. The evidence presented by the Petitioner failed to show that Respondent's actions or lack of action directly or indirectly constituted consent, allowance, or authorization. The store posted several signs warning its customers of the legal consequences of consuming an alcoholic beverage on the premises. The witnesses agreed that the alleged consumption of alcohol from open containers took place not in front of the entrance and exit doors but 50 feet away from the cashier counter. Persons standing in that location could be seen by a cashier at the register only with difficulty.

Agent Darnell testified that there were five to six other patrons in the store at the time he and the minor were conducting the minor sting. Agent Darnell told the cashier that persons were consuming alcohol at the corner. This is the time when it can be said that the clerk, Mr Abbas, knew or should have known that a violation was occurring. Agent Schmidt testified that five minutes later he was issuing an administrative notice to the clerk for the violations. Petitioner's evidence did not prove that the clerk knew or should have known about the violation prior to Agent Darnell telling him about it. Without actual or constructive knowledge, the clerk could not be said to have permitted such activity on the premises. Allowing five minutes to pass while attending other patrons does not appear to be an unreasonable delay. Therefore, the ALJ denies Petitioner's request for a suspension of Respondent's permit.

V. PROPOSED FINDINGS OF FACT

1. FNC Convenience Stores LLC d/b/a Eldridge Shell (Respondent) is the holder of Wine and Beer Retailer's Off-Premise Permit, BQ-489856.
2. Respondent was notified of the factual allegations against Respondent in the Notice of Hearing issued by Petitioner on October 25, 2006.
3. On February 9, 2007 the hearing in this matter convened before ALJ Rex Shaver. Attorney Ramona Perry appeared for Petitioner. Respondent was represented by Attorney Jim L. DeFoyd.
4. On June 9, 2006, individuals were consuming alcoholic beverages from open containers on or near the Respondent's permitted premises.
5. On June 9, 2006, Abdullah Abbas was Respondent's agent, servant, or employee working on the premises).
6. There was no evidence that Abdullah Abbas was aware that persons were consuming alcoholic beverages on the premises until a TABC agent informed him of that fact.
7. There were five or six customers in the store at the time the TABC agent informed Abdullah Abbas that persons were consuming alcoholic beverages on the premises.
8. A period of five minutes or less had elapsed between the time Mr. Abbas was told about the alcoholic consumption and the time he was issued a notice of violation.
9. A five minute delay in responding to the information provided by the agent was not an unreasonable length of time for Mr. Abbas to take care of customers already in the store.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to Subchapter B of Chapter 5 of TEX. ALCO. BEV. CODE ANN § 1.01 et
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. Staff did not meet the burden of proving a violation by Respondent of TEX. ALCO. BEV. CODE ANN. § 61.71(a)(1).
5. Staff did not meet the burden of proving a violation by Respondent of TEX. ALCO. BEV. CODE ANN. § 71.01.
6. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Wine and Beer Retailer's Off-Premise Permit, BQ-489856, should be not be suspended.

SIGNED April 5, 2007.



REX SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 5, 2007

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

**RE: Docket No. 458-07-0452; Texas Alcoholic Beverage Commission v. FNA
Convenience Stores LLC d/b/a Eldridge Shell**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

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 "Rex A. Shaver".

Rex A. Shaver
Administrative Law Judge

RAS/jh
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona M. Perry, Attorney, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, Texas
77008 -**VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -
VIA REGULAR MAIL
Jim DeFoyd, DeFoyd & Associates, PC, 103 Eastway, Galena Park, Texas 77547 -**VIA REGULAR MAIL**