

On May 10, 2007, Petitioner issued its notice of hearing, directed to Respondent. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On June 29, 2007, a hearing convened before SOAH ALJ Rex Shaver at the SOAH field office located at 2020 N. Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by Sandra K. Patton, TABC Staff Attorney. Respondent appeared and was represented by its owner Eric VanDorn. Following presentation of evidence the hearing was concluded and the record remained open until July 13, 2007 for the filing of memoranda of law.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71, TABC may cancel or suspend a retail dealer's off-premise license for not more than 60 days if the licensee, "with criminal negligence, sold, served, or delivered an alcoholic beverage to a minor" on the licensed premises. Additionally, pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13, TABC may cancel or suspend a retail license or permit for not more than 90 days if the licensee or permittee, "with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor" on the licensed premises.

Further, criminal negligence is defined in TEX. PEN. CODE ANN. § 6.03(d) 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.

Pursuant to § 11.64 of the Code, when a license or permit suspension is authorized, the licensee or permittee must be afforded the opportunity to pay a civil penalty in lieu of the suspension. In determining the amount of the penalty, the Texas Alcoholic Beverage Commission shall consider the economic impact a suspension would have on the licensee or permittee.

III. EVIDENCE

A. Respondent's Permit/License

Respondent holds a Wine and Beer Retailer's Off Premise Permit, BQ-449616, issued by TABC, for the premises located at 1090 IH 45 South, Huntsville, Walker County, Texas. The permit was originally issued on May 3, 1999, and has been continuously renewed.

B. Alleged Sales to Minor on Licensed Premises

1. Sale to a Minor Occurring on Respondent's premises on September 27, 2006.

On September 27, 2006, TABC Agent Rhonda Pickett entered Respondent's licensed premises to conduct a "minor sting" operation. Agent Pickett, working undercover, entered the premises after Yasinia Beltran, the minor, an 18-year-old female had entered. Before entering the premises Ms. Beltran was instructed by Agent Scott Zella to attempt the purchase of alcoholic beverage. She was instructed to be truthful and only respond to questions without volunteering any information. Ms. Beltran was told not to misrepresent her age and to present her valid Texas driver's license upon request of the cashier.

Within the view of Agent Pickett the minor entered the premises and took a bottle of "Boone's Farm" to the counter. The white male working behind the register asked the minor "Are you 21?" Without waiting for a reply, he stated, "Yeah, you are". The cashier, Mr. Cervantes, testified that the minor made a gesture that he took as a "Yes". He then rang up the sale and told

her how much it would cost. The cashier was later identified as Thomas Cervantes. The minor then took her purchase and left the premises.

Agent Zella met the minor in the parking lot and confirmed through the labeling, markings, and his familiarity with the product, that the minor had purchased a 750ml bottle of “Boone’s Farm Fuzzy Navel”, an alcoholic beverage. Agent Zella entered the premises and identified himself as a TABC agent to the cashier Thomas Cervantes. Agent Zella’s inspection of the store did not reveal any posting of the store’s policy concerning sales of alcoholic beverages to minors.

2. Sale to a Minor Occurring on Respondent’s premises on November 29, 2006.

On November 29, 2006, TABC Agent Rhonda Pickett entered Respondent’s licensed premises to conduct a “minor sting” operation. Agent Pickett, working undercover, entered the premises after Yasinia Beltran, the minor, an 18-year-old female. Before entering the premises, Ms. Beltran was instructed by Agent Scott Zella to attempt the purchase of an alcoholic beverage. She was instructed to be truthful and only respond to questions without volunteering any information. Ms. Beltran was told not to misrepresent her age and to present her valid Texas Driver’s License upon request of the cashier.

Within the view of Agent Pickett, the minor entered the premises, went to the cooler, and proceeded to the cashier’s counter with her selection. The white female working behind the register asked the minor for identification. The cashier looked at the minor’s driver’s license and rang up the merchandise. The minor then paid in cash, took her purchase, and left the premises.

Agent Zella met the minor in the parking lot and confirmed through the labeling, markings, and his familiarity with the product that the minor had purchased a 6-pack of 12 oz bottles of “Smirnoff Triple Black” that were an alcoholic beverage.¹ Agent Zella entered the premises and identified himself as a TABC agent to the cashier later identified as April Verret. Agent Zella’s

¹At the hearing Agent Pickett recalled that the minor had purchased Seagram’s wine coolers.

inspection of the store did not reveal any posting of the store's policy concerning sales of alcoholic beverages to minors.

C. Respondent's Defense

Erik Van Dorn testified that he was not present at the time of the alleged violations. It was his testimony that he had been in operation for nine years. That he did sometimes work the register in his stores. He was not Seller/Server Certified at the time of the alleged violations and was not so certified at the time of his testimony. He stated that he was not aware that his failure to be seller/server certified would preclude the application of the safe harbor provision of the Code.

IV. ANALYSIS

The evidence establishes that Respondent employee sold an alcoholic beverage to the then 18-year-old Yasinia Beltran on Respondent's licensed premises on two occasions. The evidence also establishes that both acts were committed with criminal negligence. On the first occasion the cashier failed to request any proof of age from Ms. Beltran, even though she was prepared to present her valid Texas driver's license which would have shown she was a minor. On the second occasion the minor presented her Texas Driver's License upon request of the cashier and was sold alcoholic beverages even though her birth date of July 7, 1988, was indicated on the license.

The Respondent did not dispute that these sales occurred. The Respondent asserted that during the alleged September 27, 2006 sale, the minor misled the cashier by not responding immediately to the question "Are you 21?" The testimony of the witnesses present at the time of the conversation agree that the minor made no verbal response to the question. The cashier, Mr. Cervantes, testified that the minor made a gesture that he took as a "Yes". The minor testified that before she could respond the cashier stated "Yeah. Your 21". The ALJ finds the minor's version of the conversation more credible, especially since the cashier did not ask for identification to confirm the age of the customer. The sale to the minor on November 29, 2006 took place even though the

clerk asked for and examined the minors driver's license. The clerk's explanation to Agent Zella was that she confused the legal age for purchase of tobacco products for that of the legal age for purchase of alcoholic beverages.

Based on these violations, the ALJ recommends a 60-day suspension of Respondent's permit and license. As an alternative to this suspension, TABC should allow Respondent to pay a \$9000 civil penalty.

V. PROPOSED FINDINGS OF FACT

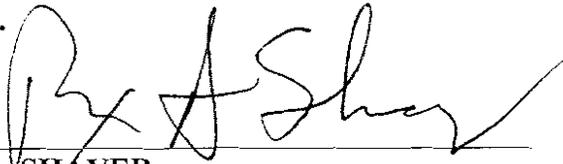
1. Bigeco, Inc. d/b/a Big E's holds a Wine and Beer Retailer's Off Premise Permit, BQ-449616, issued by TABC, for the premises located at 1090 IH 45 South, Huntsville, Walker County, Texas.
 2. The permit was originally issued on May 3, 1999, and has been continuously renewed.
 3. On September 27, 2006, TABC Agent Rhonda Pickett and a minor female, Yasinia Beltran, entered Respondent's premises to conduct a minor sting operation.
 4. Before the minor entered the premises, Agent Scott Zella instructed her to attempt to purchase an alcoholic beverage, to be truthful, and to present her valid Texas driver's license upon request of the cashier.
 5. In view of Agent Pickett the minor entered the premises and took a bottle of "Boone's Farm Fuzzy Navel" to the counter.
 6. On September 27, 2006, Thomas Cervantes, the cashier on duty, was Respondent's agent, servant or employee.
 7. Mr. Cervantes asked the minor "Are you 21?" and without allowing time for a response stated "Yeah. You are."
 8. Mr. Cervantes accepted Ms. Beltran's payment for the bottle of "Boone's Farm Fuzzy Navel".
 9. The minor left the premises with a 750ml bottle of "Boone's Farm Fuzzy Navel", an alcoholic beverage.
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10. On November 29, 2006, TABC Agent Rhonda Pickett and a minor female, Yasinia Beltran, entered Respondent's premises to conduct a "minor sting" operation.
 11. Before the minor entered the premises, Agent Scott Zella instructed her to attempt to purchase an alcoholic beverage, to be truthful, and to present her valid Texas driver's license upon request of the cashier.
 12. In view of Agent Pickett the minor entered the premises and took a six-pack of "Smirnoff Triple Black" to the counter.
 13. On November 29, 2006, April Varret, the cashier on duty, was Respondent's agent, servant or employee.
 14. The April Varret asked the minor for identification.
 15. The minor presented her Texas driver's license upon request of Ms. Varret.
 16. The minor's birth date of July 7, 1988 was indicated on the license.
 17. Ms. Varret accepted Ms. Beltran's payment for the alcoholic beverage.
 18. The minor left the premises with a six-pack of Smirnoff Triple Black, an alcoholic beverage.
 19. On May 10, 2007, TABC staff (Petitioner) issued its notice of hearing, directed to Respondent.
 20. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
 21. On June 29, 2007, the hearing was convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Rex A. Shaver at the SOAH field office located at 2020 N. Loop West, Suite 111, Houston, Harris County, Texas.
 22. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared and was represented by its owner, Erik Van Dorn.
 23. Following the presentation of evidence the hearing was concluded but the record remained open until July 13, 2007, for the filing of memoranda of law.
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VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61(b)(2), 61.71(a)(5), and 106.13.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.
4. Respondent's agents, servants or employees did, with criminal negligence, sell an alcoholic beverage to a minor on the licensed premises on two occasions. TEX. PEN. CODE ANN. § 6.03(d).
5. Respondent's permit and license should be suspended for 60 days. TEX. ALCO. BEV. CODE ANN. §§ 61.71 and 106.13 and 16 TEX. ADMIN. CODE § 37.60.
6. As an alternative to suspension, Respondent should be permitted to pay a \$9,000 civil penalty. TEX. ALCO. BEV. CODE ANN. § 11.64.

SIGNED the 24th of August, 2007.



REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 24, 2007

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

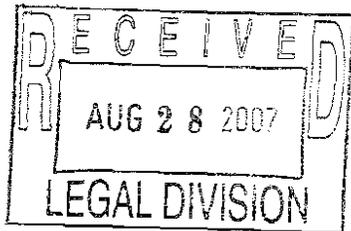
VIA REGULAR MAIL

**RE: Docket No. 458-07-2531; Texas Alcoholic Beverage Commission v. Bigeco Inc.
D/B/A Big E's**

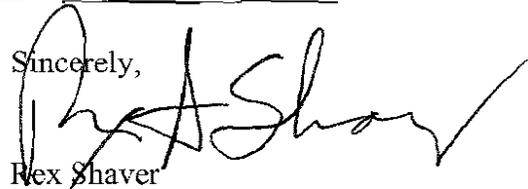
Dear Mr. Steen:

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,


Rex Shaver
Administrative Law Judge

RS/jh
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra K. Patton, Attorney, Texas Alcoholic Beverage Commission, 420 W. 20th Street, Suite 600, Houston, Texas
77006 - **VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Bigeco Inc. d/b/a Big E's, 1090 IH 45 South, Huntsville, Texas 77340- **VIA REGULAR MAIL**
Bigeco Inc. d/b/a Big E's, P.O. Box 6726, Huntsville, Texas 77342- **VIA REGULAR MAIL**