

DOCKET NO. 458-07-3381

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
 Petitioner	§	
V.	§	
	§	OF
WAVERLY BUSINESS INC.	§	
D/B/A WAVERLY POWER FULE	§	
PERMIT NO. BQ561926	§	
WALKER COUNTY, TEXAS	§	
(TABC NO. 563634),	§	
 Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this action against Waverly Business, Inc., d/b/a Waverly Power Fuel (Respondent), for selling an alcoholic beverage to a minor. The Administrative Law Judge (ALJ) finds that TABC proved its case, and recommends cancellation of Respondent’s permit.

I. PROCEDURAL HISTORY

On September 28, 2007, the hearing was held in the offices of the State Office of Administrative Hearings in Houston, Texas. Ramona Perry, attorney, appeared and represented the Staff. Attorney Ronald Monshaugen appeared for Respondent. The record closed on the same day.

II. DISCUSSION

A. Legal Standard

The issue is whether Respondent’s employee sold an alcoholic beverage to a minor with criminal negligence, thereby violating TEX. ALCO. BEV. CODE ANN. § 106.13(a)(b). 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. TEX. PEN. CODE ANN. § 6.03 (d).

B. TABC's Evidence

1. Dustin Shrell

Agent Shrell is employed by the Texas Alcoholic Beverage Commission as an agent. His duties include enforcing the Alcoholic Beverage Code and inspecting licensed facilities for compliance. He testified that on April 24, 2007, he was present at Waverly Power Fuel for a minor sting operation. Prior to conducting the sting operation, Agent Shrell observed the minor's Texas driver's license. The license showed the minor to be under 21 years of age. In Agent Shrell's opinion, the minor had a youthful appearance and could not have been mistaken for an adult over the age of 21.

During the sting operation, Agent Shrell was stationed a block away from Waverly Power Fuel. After the minor sting transaction, Agent Shrell was advised by Agent Zella of the time of the violation of selling to a minor, the type of alcoholic beverage purchased, the price, and the seller description. Agent Shrell was then to enter the establishment to provide the store with notice of the violation.

Agent Shrell observed the described seller behind the counter of the store conducting transactions. The individual was later identified as Sripali Rankothge, an employee of Waverly Power Fuel. Agent Shrell issued an administrative notice and a criminal citation to the seller. He also observed that the clerk did not have seller/server training certification and the store failed to post required policies and procedures.

2. Steven Countz

Deputy Countz is employed with the Walker County Constable's Office as a Senior Deputy. He testified that on April 24, 2007, he was working undercover as part of a minor sting operation at Waverly Power Fuel. His job was to watch an attempt by a minor to purchase an alcoholic beverage. He accompanied the minor into the establishment to confirm the transaction. Deputy Countz observed the minor take a bottle of an alcoholic beverage to the counter for purchase. The minor presented her Texas driver's license, and it was reviewed by the clerk. The clerk completed the transaction by accepting cash from the minor and then placed the alcoholic beverage in a brown paper bag. He stated that the clerk handed the alcoholic beverage in the bag to the minor, and she then exited the store with the purchase. Deputy Countz later observed the beverage to be a bottle of MD 20/20, an alcoholic beverage.

3. Michael Scott Zella

Agent Zella is employed by the Texas Alcoholic Beverage Commission as an Enforcement Agent. He testified that on April 24, 2007, he took part in a minor sting operation at Waverly Power Fuel. His job was to examine the identification of the minor prior to the sting and instruct the minor regarding the proper procedures. The minor was advised to be truthful about her age and to provide proper identification. In his opinion, the minor had a youthful appearance and could not have been mistaken for an adult 21 years or older. Agent Zella did not accompany the minor into the establishment, but he observed the minor and Deputy Countz enter the store. The minor was also observed exiting the establishment with a bottle of an alcoholic beverage. After the transaction, Agent Zella was given a description of the clerk who sold the beverage and the alcoholic beverage that was purchased. The beverage was confirmed to be MD 20/20, which is a wine. He testified that he advised Agent Shrell of the pertinent information.

In addition, Agent Zella testified regarding prior violations at Waverly Power Fuel. He stated that the Respondent had prior violations on June 18, 2005 and August 19, 2005, for sale to a minor.

Agent Zella added that Respondent's employees were not seller certified on those date, and Respondent also failed to post policies pertaining to sales to minors and procedures as required TABC.

4. Yesenia Beltran

Yesenia Beltran testified that she was 18 years old at the time of the sting. She entered the premises of Waverly Power Fuel and purchased a bottle of MD 20/20, an alcoholic beverage, from the store clerk. The store clerk requested identification from the minor. Ms. Beltran stated that she presented her Texas drivers license that showed her to be 18 years old. The clerk glanced at the license and gave it back to her. She further stated that the transaction for the wine was completed, and she left the store with the alcoholic beverage. Upon exiting the store, Ms. Beltran identified the clerk to Agent Zella and gave him the alcoholic beverage that was purchased.

A picture of Yesenia Beltran taken on the day of the sting and a copy of her driver's license was admitted into evidence. On the license it states, "Under 21 Driver License" and "Under 21 until 07-07-09."

C. Respondent's Evidence

Barkat Momin

Mr. Momin is the president and a shareholder of Waverly Business, Inc., a corporation. The corporation is the holder of permits and/or licenses at 30 other establishments. Mr. Momin stated that he does not personally work at the Waverly Power Fuel location. He stated that the current violation and all prior violations were the result of an employee's actions and not those of an officer of the corporation. The corporation did not give the employees consent to sell to a minor. The act of selling to a minor violated the Alcoholic Beverage Code and the corporation's policies. The corporation did not know of the act nor personally participate in the sale to a minor.

In addition, Mr. Momin offered letters mailed to the Respondent from the Commission, congratulating Respondent for not selling an alcoholic beverage to a minor on specific dates. Documents were also presented to show that Mr. Momin and his employees are now TABC seller-server certified. Mr. Momin testified that the store posted several policies and has taken several other measures to ensure that alcohol will not be sold to minors. In his opinion, the corporation has made a good faith effort to prevent the sale to minors. On cross-examination, Mr. Momin conceded that most of the remedial actions taken were current.

D. Arguments & Recommendation

It is clear that the wine was sold to Ms. Beltran. The Respondent did not deny that the clerk sold the minor an alcoholic beverage on April 24, 2007. The evidence also showed that Ms. Rankothge was an employee of Waverly Power Fuel. Respondent did not dispute this fact. The actions of Ms. Rankothge, in her capacity as an employee of Waverly Power Fuel, created a substantial and unjustifiable risk of a sale of an alcoholic beverage to a minor, and the risk was of such a nature and degree that the failure to perceive it constituted 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, as contemplated by TEX. PEN. CODE ANN. § 6.03 (d). The employee's actions are attributable to the Respondent because Ms. Rankothge was not seller-server certified.

Respondent's final argument addressed the Commission's recommendation for cancellation. Respondent argued that cancellation of the permits would be a harsh punishment and would result in a severe financial burden to the corporation. The previous violations occurred in 2005. The violation in question occurred in 2007, which is a significant amount of time after the 2005 violations. Respondent opined that the time between the violations, the lack of the corporations knowledge of the sale, and the measures taken before and after the April 24, 2007, violation should be considered in determining punishment. Respondent relied on section 11.64 of the TABC code which states in pertinent part:

The commission may relax any provision of the code relating to the suspension or cancellation of the permit. . .if the commission finds that any of the circumstances described in Subsection (c) exist¹

Staff argued that the cited section does not apply in this case because the Respondent did not present facts to show that the circumstances listed in the cited section exist. The ALJ agrees. While it is commendable that Respondent has taken several remedial actions to educate his employees and to prevent the sale of alcoholic beverages to minors, it does not negate the fact that the Respondent sold an alcoholic beverage to a minor on three separate occasions. Even after two prior violations of sales to a minor, Respondent did not make any attempts to properly train its employees or post required policies and procedures. The Respondent only took actions after the third violation, and very near the hearing date, which does not demonstrate good faith nor due diligence.

Given the fact that this is not Respondent's first violation of selling to a minor, the ALJ recommends that the proper sanction for this offense is a cancellation of Respondent's alcoholic beverage permits. This action is authorized by code § 61.71 of the Alcoholic Beverage Code.

III. FINDINGS OF FACT

1. On April 24, 2007, Yesenia Beltran, whose date of birth is July 7, 1988, purchased an alcoholic beverage (MD 20/20) at Waverly Power Fuel.
2. Waverly Business, Inc., d/b/a Waverly Power Fuel (Respondent), holds Permit No. BQ-561926 issued by the Texas Alcoholic Beverage Commission.
3. At the time of the purchase, Yesenia Beltran appeared younger than 21 years old.

¹ (c) (1) the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
 (2) the permittee or licensee was entrapped;
 (3) an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee;
 (4) the permittee or licensee did not knowingly violate the code;
 (5) the permittee or licensee had demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations, or
 (6) the violation was a technical one.

4. Respondent's clerk inspected the driver's license presented by Ms. Beltran, which showed her to be 18-years-old, and further stated, "Under 21 Driver License" and "Under 21 until 07-07-09."
5. Respondent's employee should have known there was a substantial and unjustifiable risk that she was selling an alcoholic beverage to a minor.
6. Respondent's employee was not seller-server certified on April 24, 2007.
7. On July 26, 2007, Staff issued a notice of hearing that included the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
8. On September 28, 2007, a public hearing was held before Administrative Law Judge Roshunda Pringle, at the offices of the State Office of Administrative Hearings, Houston, Harris County, Texas. Staff was represented by Ramona Perry, attorney. Respondent was represented by Ronald Monshaugen, attorney. The record was closed on that date.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. § 6.01.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042(5).
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.051.
4. Respondent's employee sold an alcoholic beverage to a minor with criminal negligence, as defined in TEX. PENAL CODE ANN. § 6.03(d), thereby violating TEX. ALCO. BEV. CODE § 106.13.
5. Respondent's Permit No. BQ-561926 should be cancelled. TEX. ALCO. BEV. CODE §§ 11.61, 61.71, and 106.13

SIGNED this ____ day of November, 2007.

**ROSHUNDA PRINGLE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**