

DOCKET NO. 565806

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
JMNI INC.	§	
D/B/A JAKE'S SPORTS CAFE	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB533746	§	
LUBBOCK COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-07-4061)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on 23rd day of October 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 30th day of November 2007. The 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. Exceptions were filed by Respondent. The Administrative Law Judge denied Respondent's Exceptions.

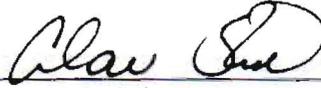
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those 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 your permit(s) and/or license(s) are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on February 13, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this January 18, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

JLK\bc

The Honorable B. L. Phillips
Administrative Law Judge
State Office of Administrative Hearings
8212 Ithaca, Suite W3
Lubbock, TX 79423
VIA FAX (806) 792-0149

Scott Stephenson
JMNI INC.
RESPONDENT
d/b/a JAKE'S SPORTS CAFE
5025 50th St 'A'
Lubbock, TX 79414

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

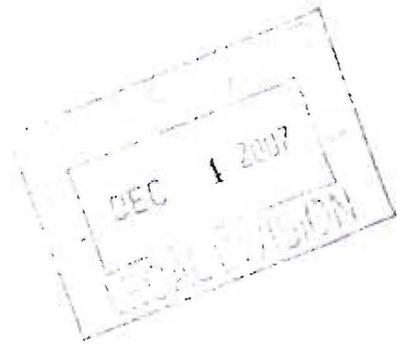
12-21-07

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 30, 2007



VIA REGULAR MAIL

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

RE: Docket No. 458-07-406I, JMNI INC. D/B/A Jake's Sport's Cafe'

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,

B.L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

- xc W. Michael Cady, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-**VIA REGULAR MAIL**
- Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-**VIA REGULAR MAIL**
- Scott Stephenson, JMNI INC. 5025 50th St., 'A', Lubbock, TX 79414-**VIA REGULAR MAIL**

II. HEARING AND EVIDENCE

On October 23, 2007, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by W. Michael Cady, attorney. Respondent was represented by Scott Stephenson, President of JMNI, Inc. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 106.13(a), TABC may cancel or suspend a permit if it is found that the permittee with criminal negligence sold, served, dispensed; or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises. A person acts with criminal negligence under Code § 1.08 if the person acts with a mental state that would constitute criminal negligence under chapter 6 of the Penal Code, which 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.

Section 106.14 states that, for the purposes of the provisions relating to sales, service, dispensing, or delivery of alcoholic beverages to a minor or intoxicated person, the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if : (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law. However, under TABC Rule 50.10 (c), proof by the Commission that an employee or agent of the

licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice in a 12-month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

Pursuant to the Code § 11.46 (b)(7) , the Commission may suspend a permit if it finds that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

IV. EVIDENCE

A. Documentary Evidence

Petitioner offered into evidence nine exhibits, including the Notice of Hearing issued in the case, the Respondent's permit history, photos depicting the minor who participated in the minor sting operation, and reports of the officers involved in the operation. Respondent offered into evidence photos showing the area where they were selling alcoholic beverages and a copy of the Policies and Procedures For The Sale And Service Of Alcoholic Beverages that Respondent posted. All offered exhibits were admitted into evidence.

B. Chris Schultz, TABC Agent

Agent Schultz testified that, on June 16, 2007, he went to Buffalo Springs Lake, where Respondent was selling alcoholic beverages at an outdoor event under a temporary beer and wine permit, in order to conduct a minor sting operation. He met with the minor, Marissa Villegas, to

ensure that she had her actual identification on her showing that she was a minor, and then commenced the operation. He observed Ms. Villegas present her identification to an employee of Respondent, who placed an armband in her signifying that she was of age to consume alcoholic beverages. Ms. Villegas then paid for a beer, and it was delivered to her by Respondent's employee, Kimberly Pascasio. Ms. Pascasio informed the TABC agents involved in the operation that she was seller-server trained, a fact verified by TABC. Agent Schultz made a report of the incident and stated therein that he observed an individual, later identified as Ms. Pascasio, look at Ms. Villegas' identification, place an armband that would indicate that she was of age to consume alcoholic beverages on her arm, and then permit her to purchase a beer.

C. Graig Francis, TABC Agent

Agent Francis was also involved in the minor sting operation on June 16, 2007, along with Agent Schultz and Ms. Villegas. He observed Ms. Villegas attempt to purchase beer from one of the locations set up for beer sales by Respondent at the outdoor event, where she was refused after showing her identification indicating that she was a minor. He then observed her go to a second location also operated by Respondent where she showed her identification to the employee and had an armband indicating that she was eligible to purchase alcoholic beverages placed on her by the employee. Ms. Villegas was handed a beer by an employee after making the purchase.

D. Doyce Vandivere, TABC Agent

Agent Vandivere witnessed the sale of the alcoholic beverage to Ms. Villegas by Respondent's employee, who he identified as Kimberly Pascasio. He contacted Ms. Pascasio, who advised that she was seller-server certified, and he issued a seller-server revocation to her.

E. Anthony Bates, TABC Agent

Agent Bates was the agent who gave the administrative violation notice to Respondent's employee, Alex Hancock. He observed that there were no rules for the sale of alcoholic beverages posted at the location where the sale of alcoholic beverages to the minor occurred, and Hancock confirmed that they did not have them posted at that location.

F. Buster Deleon

Mr. Deleon was Respondent's employee on the day of the minor sting operation, and he was stationed at a recreational vehicle that served as a main office for the three ancillary locations operated by Respondent at Buffalo Springs Lake to sell alcoholic beverages. He acknowledged that Alex Hancock and Kimberly Pascascio were employed by Respondent on the day in question at that location. Mr. Deleon testified that the three ancillary sales locations were operating under one permit issued to Respondent and that the policies for sale of alcoholic beverages was posted at the recreational vehicle, where he had an office set up.

G. Scott Stephenson

Mr. Stephenson is the owner of Jake's Sports Café. He offered into evidence photos showing the location of the recreational vehicle and the three sales locations operated by Respondent at Buffalo Springs Lake on the date in question. He testified that the policies for sale of alcoholic beverages were posted that day at the recreational vehicle.

V. ANALYSIS

Regarding the issue of whether permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises, the only issue is whether the administrative action should be restrained because the employee who committed the act was seller-server certified. Respondent admitted that the employee, Ms. Pascasio, was the agent, servant, or employee of Respondent on the date in question and did not dispute that she sold a beer to Ms. Villegas, the minor working with TABC to accomplish the minor sting operation. The witnesses at the hearing identified Ms. Pascasio as the individual who checked Ms. Villegas' identification, which clearly identified her as a minor, then placed an armband on her signifying that she was of age to purchase alcoholic beverages before selling and delivering a beer to her. Ms. Pascasio's actions on that day rise to the level of criminal negligence in that she ought to have been aware that Ms. Villegas was a minor because her identification disclosed that fact, but Ms. Pascasio still put an armband on Ms. Villegas that marked her as of age to consume alcoholic beverages and sold her a beer. Ms. Villegas was free to continue to purchase alcoholic beverages because of the armband placed on her by Ms. Pascasio, a clear failure to perceive the risk of allowing a minor to commit an illegal act.

Pursuant to Code § 106.14, the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if: (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law. However, under TABC Rule 50.10 (c), proof by the Commission that an employee or agent of the licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice in a 12-month period, constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

The evidence shows that Respondent had administrative violations for a sale to a minor on March 24, 2007; a sale to an intoxicated person on June 8, 2007; and, with criminal negligence, allowing a minor to consume an alcoholic beverage on the licensed premises on June 8, 2007. The proof of three violations of this nature within a twelve-month period constitutes prima facie evidence that Respondent has directly or indirectly encouraged violation of the relevant laws and, thus, this administrative violation cannot be restrained.

Regarding the issue of whether the place or manner in which Respondent conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, the evidence was sufficient to prove that Respondent violated the Code, and his permit should be cancelled. This is the third violation within a twelve month period of the Code prohibitions against sale of an alcoholic beverage to a minor and an intoxicated person and, with criminal negligence, permitting a minor to consume or possess an alcoholic beverage on the licensed premises. The fact that another violation occurred within eight days of the administrative violations on June 8, 2007, indicates that Respondent does not exercise sufficient control of his operation to prevent such violations from being repeated. This is especially serious when the violations include sale of alcoholic beverages to intoxicated persons and minors because of the risk that they will be a danger to themselves or others. Respondent has a duty and responsibility to the public to ensure that the operation under a TABC permit does not violate the general welfare, health, peace, morals, and safety of the people or the public sense of decency. The evidence proves that Respondent has failed in this duty.

VI. PROPOSED FINDINGS OF FACT

1. JMNI, Inc. d/b/a Jake's Sports Café, Lubbock County, Texas, holds Permit No. MB-533746, issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 5025 50th Street "A", Lubbock, Lubbock County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated September 6, 2007.

3. The hearing on the merits convened October 23, 2006, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney W. Michael Cady. The Respondent was represented by Scott Stephenson, President of JMNI, Inc. The record closed on the same day.
4. On or about June 16, 2007, Respondent operated at an outdoor event at Buffalo Springs Lake, Texas, under a temporary beer and wine on-premises license/permit for the sale of alcoholic beverages in designated areas.
5. Respondent employed a bartender by the name of Kimberly Pascasio at the licensed premises on or about June 16, 2007.
6. On that same date, Marissa Villegas was participating in a minor sting operation conducted by the Texas Alcoholic Beverage Commission at the Buffalo Springs Lake outdoor event.
7. Ms. Villegas carried identification, verified by TABC agents, showing that she was a minor when she entered the licensed premises where Ms. Pascasio was working that day.
8. Ms. Pascasio checked Ms. Villegas' identification, which clearly identified her as a minor, then placed an armband on her, signifying that she was of age to purchase alcoholic beverages, before selling and delivering a beer to her.
9. Ms. Pascasio failed to act as an ordinary person would have by permitting a minor to illegally purchase, possess, and consume alcoholic beverages, which constitutes a severe risk to the minor and the public.
10. Respondent has three violations within a twelve month period of the Code prohibitions against sale of an alcoholic beverage to a minor and an intoxicated person and, with criminal negligence, permitting a minor to consume or possess an alcoholic beverage on the licensed premises.
11. Respondent did not exercise sufficient control over the operation of the licensed premises and the employees thereof to prevent the violations.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the 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 TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-9, Respondent violated the Code by having an agent, servant, or employee who, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor on June 16, 2007.
5. Based on Findings of Fact No. 9-11, Respondent violated the Code by conducting his business in a manner that warrants the cancellation of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.
6. Based on the foregoing, cancellation of Respondent's permit is warranted.

SIGNED: November 30th, 2007



B. L. Phillips
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS