

SOAH DOCKET NO. 458-98-1695

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.S.	§	
	§	OF
	§	
THANH PHUONG NGUYEN D/B/A JENSEN FOOD MARKET PERMIT NO. Q-401551 LICENSE NO. BF-401552 HARRIS COUNTY, TEXAS TABC CASE NO. 572185)	§	ADMINISTRATIVE HEARINGS

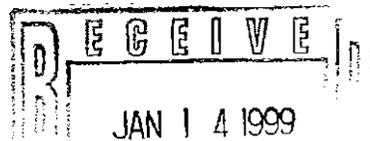
PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against a licensee of the Commission for selling an alcoholic beverage to a minor. The Staff recommended that the subject license and permit be suspended for 20 days. The licensee appeared at the hearing pro se and was not represented by counsel. Having found that the beer was sold to the minor by an agent, servant or employee of the licensee, the ALJ recommends that the permit be suspended for a period of 20 days.

I. Procedural History

On March 13, 1997, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Thanh Phuong Thi Nguyen, d/b/a Jensen Food Market (the Respondent) that the Staff would seek disciplinary action against the Respondent's permit because the Respondent sold an alcoholic beverage to a minor. The Staff asserted that such act constituted grounds for suspension or cancellation of the Respondent's Wine Only Package Store Permit and its Beer Retailer's Off Premise License.

The hearing commenced on October 28, 1998, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. After the taking of evidence, the hearing was concluded but the record was left open until 5:00 p.m. on that same day for the filing of post hearing briefs from the Petitioner and Respondent. No post hearing briefs having been filed either party, the record was closed at 5:00 p.m. on October 28, 1998. The Staff was represented by Clyde Bureson, Assistant Attorney General of Texas. The Respondent, Thanh Phuong Thi Nguyen, d/b/a Jensen Food Market, appeared pro se.



II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Ann. (The Code) §6.01 and Tex. Gov't Code Ann. Chapter 2001 et seq. (1998) . 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 pursuant to TEX. GOV'T CODE ANN. Chapter 2003.

About September 28, 1998, notice of the hearing was properly addressed and sent by certified mail to the Respondent at 2915 Fannin Street, Houston, Texas, pursuant to TEX. GOV'T CODE ANN. Chapter 2001. An Order Setting Hearing and Setting Out Prehearing Requirements was properly served upon all parties, who appeared and took part in the October 28, 1998 hearing pursuant to those notices and orders.

III. Discussion

A. Evidence

1. Testimony of Millford L. Sistrunk:

Milford Sistrunk testified that on December 7, 1996, he was employed by the Houston Police Department as a police officer assigned to the Vice Division. On that date he was, in the course of his duties, engaged in a sale of alcoholic beverage to minors sting operation. As a part of that sting operation, he had recruited a minor, Tyrell Garrison, whose date of birth was August 1, 1981, to enter stores selling alcoholic beverages and attempt to purchase an alcoholic beverage. Officer Sistrunk testified that Tyrell Garrison was fifteen years of age on December 7, 1996, and had the appearance of being well under the age of twenty-one years. The Officer further testified that Tyrell Garrison had no facial hair on December 7, 1996.

Officer Sistrunk testified that he entered the Jensen Food Market at 2710 Jensen Drive in Houston Harris County, Texas a few minutes prior to the entry of the minor. The officer saw the minor approach a bin containing cans of beer and remove an alcoholic beverage, a 16-ounce can of Miller beer. The minor then got in line at the check out counter and Officer Sistrunk got in line behind him with an item to purchase. He saw the minor give the cashier a one dollar bill. The cashier rang up the sale and returned change to the minor while the clerk placed the can of beer in a paper bag and handed it to the minor. At no time did the cashier or clerk ask the minor for proof of age. Both Officer Sistrunk and Tyrell Garrison then left the store.

2. Testimony of Tyrell Garrison

Tyrell Garrison testified that on December 7, 1996, he was fifteen years of age having been born on August 1, 1981. Mr. Garrison testified that he had no facial hair on December 7, 1996. The

minor testified that he entered the Jensen Food Market and selected a can of Miller beer from a barrel. He gave the cashier a one dollar bill and received back his change and the can of beer in a paper bag. No one, including the cashier, asked him for identification or proof of age. Mr. Garrison further testified that he had no identification or proof of age with him at the time of the purchase.

3. **Other evidence**

a. **TABC Exhibit 1: Affidavit of Licensing Department Director for the Texas Alcoholic Beverage Commission regarding the Permit Q-401551 and License BF- 401552 issued to Thanh Phoung Thi Nguyen doing business as Jensen Food Market.**

b. **TABC Exhibit 2: Texas Alcoholic Beverage Commission Request for Hearing with attachments; Administrative Notice No. 103549; Texas Alcoholic Beverage Commission Offense Report; Texas Alcoholic Beverage Commission Narrative; Houston Police Department Current Information Report**

4. **Evidence from Respondent**

No evidence was presented by the Respondent, Thanh Phuong Thi Nguyen d/b/a Jensen Food Market

IV. Statutory Criteria

1. **Section 106.13 of the Code states, in part:**

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit...if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor in violation of this code. . .

2. **Section 11.61 of the Code states, in part:**

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . . (2)the permittee violated a provision of this code or a rule of the commission;. . .

V. Analysis

There are two questions which must be answered here.

(1) Was Tyrell Garrison a minor on December 7, 1996?

It was the undisputed testimony of Tyrell Garrison that he was fifteen years of age on December 7, 1996, having been born on August 1, 1981.

(2) Did the permittee or licensee, with criminal negligence sell, serve, dispense, or deliver an alcoholic beverage to the minor, Tyrell Garrison, on December 7, 1996?

The uncontradicted testimony of both Officer Sistrunk and Tyrell Garrison was clear and unambiguous. Both testified that the minor entered the licensed premises, selected a 16-ounce can of Miller High Life beer, an alcoholic beverage, from a barrel, paid the clerk with one dollar bill and received change back from the clerk. The Tyrell Garrison then exited the licensed premises with the can of Miller High Life beer.

PROPOSED FINDINGS OF FACT

1. Thanh Phuong Thi Nguyen, d/b/a Jensen Food Market (the Respondent) is the holder of Wine Only Package Store Permit, Q-401551 and Beer Retailer's Off-Premise License BF-401552.
2. Thanh Phuong Thi Nguyen, d/b/a Jensen Food Market (the Respondent) received notice as required by Tex. Gov't Code § 2001.052(a).
3. Hung Nguyen was an agent, servant, or employee of Thanh Phuong Thi Nguyen, d/b/a Jensen Food Market, the Respondent, on December 7, 1996.
4. On December 7, 1996, Tyrell Garrison was a minor, fifteen years of age.
5. On December 7, 1996, Hung Nguyen accepted a one dollar bill from Tyrell Garrison in exchange for a 16 ounce can of an alcoholic beverage and returned change from that bill to the minor.
6. Hung Nguyen, agent, servant or employee of Thanh Phuong Thi Nguyen, d/b/a Jensen Food Market, the Respondent, failed to make any attempt to confirm the age of the minor.
7. On December 7, 1996, Tyrell Garrison left the Food Spot #2 with a 16-ounce can of an alcoholic beverage.

PROPOSED CONCLUSIONS OF LAW

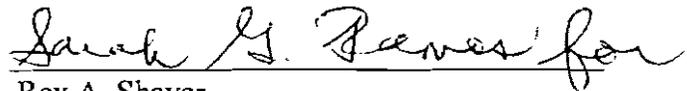
1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Sections 106.13 and 11.61(b)(2) of the Tex. Alco. Bev. Code Ann.
2. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to Tex. Gov't. Code Ann. Chapter 2001.

3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, Tex. Gov't. Code Ann. Chapter 2001 and 1 Tex. Admin. Code, Chapter 155.
4. Based upon Finding of Fact numbers 3, 4, 5, 6 and 7 the permittee or licensee did sell, serve, dispense, or deliver an alcoholic beverage to a minor in violation of §§ 106.03 and 106.13 of the Tex. Alco. Bev. Code Ann.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that the Respondent's Wine Only Package Store Permit and Beer Retailer's Off-Premise License should be suspended for a period of 20 days.

Signed this 14th day of January, 1999.



Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings