

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
	§	
	§	
v.	§	OF
	§	
JIMMY DOYLE HARRISON, DBA	§	
CADDO LAKE GROCERY	§	
PERMIT NO. BQ-293029	§	
MARION COUNTY, TEXAS	§	
(TABC CASE NO. 578025)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Commission (TABC) brought this action against a permittee for selling alcoholic beverages to a minor. The facts were not disputed, and the Staff recommends suspension of the permit for twenty days due to Respondent's prior violation for sale to a minor in 1995. The Permittee argued that any sale of alcoholic beverages to the minor was not done with criminal negligence and that no suspension should result or in the alternative, the suspension be minimal. This proposal recommends that no action be taken because criminal negligence was found.

I.

PROCEDURAL HISTORY, JURISDICTION AND NOTICE

There are no contested issues of notice or jurisdiction in this proceeding; therefore, those matters are referred to in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing of this case began on August 11, 1998, in the District Courtroom in the County Courthouse of Marion County in Jefferson, Texas, before Richard Farrow, the Administrative Law judge assigned. Staff was represented by Andrew Del Cueto, Assistant Attorney General for Texas. Respondent, Jimmy Doyle Harrison, appeared in person and by and through his attorney, William Gleason.

The hearing was commenced, evidence was received, and arguments were made. The hearing was adjourned that date with the record left open for ten days in order to give Staff time to copy video tapes introduced into evidence and substitute such copies for the originals. The record, thereafter, was closed on August 21, 1998.

II.

DISCUSSION OF THE EVIDENCE

On February 20, 1998, TABC Enforcement Agent McGee, who testified at the hearing, sent Christopher M. Garner, a minor born September 27, 1981, into Caddo Lake Grocery in Marion County, Texas, to attempt to purchase alcohol. Garner was instructed by Agent McGee to tell the truth if asked his age and to provide his driver's license if asked for proof of age or identification.

Mr. Garner went into the permitted premises on February 20, 1998, obtained a six-pack of Miller Lite beer from the cooler, and took the beer to the register. The lady behind the register, Respondent's wife, Margariet Harrison, asked for Garner's identification and he presented it to her. According to the testimony of Agent McGee, Mr. Garner and Mr. Harrison, she took the identification, turned to a calculator, and entered some numbers. Ms. Harrison testified that she used the calculator to figure Garner's age. She then returned to Mr. Garner, gave him back his driver's license, and said, "Well, you just are 21," or something to that effect. He replied, "Yeah." She took his money and rang up the sale. She produced a sales slip and asked Garner if he wanted to enter some store promotion or contest and have a chance to win some money. He apparently did because he signed the receipt on the back and wrote his telephone number on it. He then left the store with the beer, leaving the receipt with Ms. Harrison.

Very soon thereafter, an agent of the TABC informed her that she had just sold beer to a sixteen-year old. She responded that the identification he had shown her indicated he was 21 years old and she wrote on the back of the receipt the date of birth that she had seen and used in calculating Garner's age -01-23-77.

The TABC Agent in charge of the operation, upon hearing of this, directed that Agent McGee pat down Mr. Garner for any other identification in his possession, which he did and found none. A short time later, a second agent did a more thorough search of Garner's clothing and found no other identification.

Mr. Garner testified that the identification presented to Ms. Harrison was his valid Texas driver's license with the date of birth of 9-27-81 on it. Ms. Harrison, while willing to concede that she could have made a mistake in reading the date of birth on the identification, was not wholly convinced that the driver's license presented to her had that date on it.

III.

ANALYSIS AND RECOMMENDATIONS

The TABC or Administrator may cancel or suspend a 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

TEX. ALCO. BEV. CODE ANN. Sec. 106.03. Criminal negligence is defined in Sec. 6.03(d) of the Texas Penal Code 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.

Ms. Harrison did perceive the risk that an underage person may be attempting to unlawfully purchase an alcoholic beverage because, although Mr. Garner stood six feet, one inch tall, weighed one hundred seventy pounds, and had a shadow on his upper lip, he did appear youthful to the degree that she felt the need to see his identification to confirm whether or not he was over 21. Not trusting her mental math, she relied on her calculator to perform the arithmetic and determined that he was just over 21. Again, such conduct indicates her awareness of the seriousness of the risk and her conduct to meet that risk does not constitute a gross deviation from the standard of care of an ordinary person as set out in the statute.

Viewed in the light most favorable to the TABC and setting aside the question of a second identification, Mrs. Harrison's actions amounted to a mistake in reading the identification date of birth. Not all mistakes can be included in the definition of criminal negligence. Her actions indicate a perception of the risks involved and a reasonable course of action in requiring an identification, checking the age by date on the identification, and calculating that age by use of a calculator - all intended to avoid the risk of selling alcoholic beverages to a minor. That she miscalculated, misread the date on the identification, or otherwise made a mistake in figuring Garner's age does not, in this instance and in these circumstances, amount to criminal negligence as defined in the Penal Code.

IV.

FINDINGS OF FACT

1. Notice of the hearing was sent to Respondent, Jimmy Doyle Harrison, D/B/A Caddo Lake Grocery, by certified mail, return receipt requested, on July 3, 1998. There were no objections as to defective or improper notice, and Respondent waived any such objection.
2. Respondent holds Wine and Beer Off Premise Permit No. BQ-578032 and has held such at all times relevant.

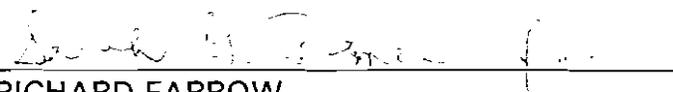
3. On February 20, 1998, Margariet Harrison, an agent, servant, or employee of Respondent, sold alcoholic beverages (Miller Lite Beer) to Christopher M. Garner, a minor, whose date of birth is September 27, 1981. Mr. Garner was sixteen years old at the time.
4. Mr. Garner was youthful in appearance and did not appear significantly older than his age.
5. Ms. Harrison asked Mr. Garner for identification and was presented a Texas driver's license.
6. Ms. Harrison took the driver's license and, using a calculator, determined that Mr. Garner was just over 21.

V.

CONCLUSIONS OF LAW

1. Service of proper and timely notice of hearing was effected upon Respondent pursuant to TEX. GOV'T. CODE ANN., Chapter 2001.
2. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Secs. 11.61, 6.01, and 106.13.
3. 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.
4. Based on Findings of Fact Nos. 3, 4, and 5, Respondent, with criminal negligence, sold alcoholic beverages to a minor in violation of TEX. ALCO. BEV. CODE ANN. Sec. 106.03.
5. Based on Conclusion No. 4 and based on Findings of Fact Nos. 2-5, the suspension of Respondent's license is not warranted.

SIGNED this 10th day of December 1998.



RICHARD FARROW
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS