

DOCKET NO. 458-98-0998
(TABC NO. 578512)

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
WEST TEXAS GAS, INC.	§	
PERMIT NO. BQ-265948	§	
MIDLAND COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

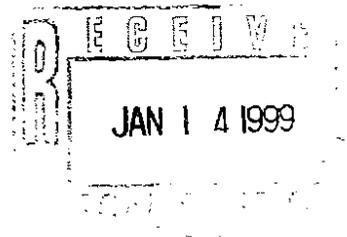
The Staff of the Texas Alcoholic Beverage Commission (Staff), Petitioner, brought this action against, West Texas Gas, Inc., Respondent, to suspend its Wine and Beer Retailer's Off-Premise Permit for violation of the Texas Alcoholic Beverage Code [hereinafter Code]. The Petitioner requests a suspension of Respondent's permit based on sale, with criminal negligence, of an alcoholic beverage to a minor. This proposal recommends that there be no suspension.

I. Procedural History

On October 7, 1998, a hearing was held before the undersigned Administrative Law Judge in the Midland City Hall, Council Chambers, 300 North Loraine, Midland, Texas. The Petitioner was represented by attorney Gayle Gordon. The Respondent was represented by attorney G. William Fowler. Evidence was received and the hearing was closed on the same day.

II. Jurisdiction and Notice

The sufficiency of jurisdiction and of the notice of hearing was stipulated by the parties. Authority and jurisdiction are found in Code Sections 5.31-5.44 and 6.01. Service of proper notice of the hearing was made on Respondent pursuant to Code Section 11.63 and the Administrative Procedure Act, Texas Government Code Sections 2001.051 and 2001.052.



III. Discussion

A. Statutory Provisions

The following provisions are relevant in the consideration of this cause of action:

Code Section 106.13:

SANCTIONS AGAINST RETAILER. (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 or a private club registration 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

. . .

(c) The commission or administrator may relax the provisions of this section concerning suspension or cancellation and assess a sanction the commission or administrator finds just under the circumstances if, at the hearing, the licensee or permittee establishes to the satisfaction of the commission or administrator:

- (1) that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
- (2) that the permittee or licensee was entrapped; or
- (3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee.

Code Section 106.14(a):

ACTIONS OF EMPLOYEE. (a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a minor or, an intoxicated person or the consumption of alcoholic beverages by a minor or an intoxicated person, the actions of an employee shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate the law.

Texas Penal Code Section 6.03(d):

(d) 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 a 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.

Code Section 61.71(a):

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(1) violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period;

...

Code Section 11.64(a):

ALTERNATIVES TO SUSPENSION, CANCELLATION. (a) When the commission or administrator is authorized to suspend a permit or license under this code, the commission or administrator shall give the permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended. The commission or administrator shall determine the amount of the penalty and in doing so shall consider the economic impact a suspension would have on the permittee or licensee. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended. If the licensee or permittee does not pay the penalty before the sixth day after the commission or administrator notifies him of the amount, he loses the opportunity to pay it and the commission or administrator shall impose the suspension.

...

B. Evidence Received

Petitioner's witnesses were TABC temporary undercover agent Rita Box-Rhodes and TABC Odessa District Supervisor Dyer Lightfoot. Respondent presented three of its employees as witnesses: sales clerk Annette Castillo, store supervisor Victoria Curtis, and district supervisor Roy Pirtle.

There was no dispute on the sale of beer to a minor in Respondent's store and that such a sale is prohibited by the Code. There were stipulations on most of the significant evidence and only minor disagreements on the rest of it. On February 13, 1998, undercover agent Rita Box-Rhodes entered West Texas Gas, a convenience store in Iraan and took a six-pack of Coors Light beer cans to the sales counter. The sales clerk, Annette Castillo, asked the agent for identification. The agent showed her a Texas driver's license with a birthdate of 10-1-79. The clerk looked at the license and asked the agent if the date of birth on the license was 1979. She then performed some calculations on an adding machine in trying to ascertain Ms. Box-Rhodes' correct age and finally sold the six-pack to Ms. Box-Rhodes. Victoria Curtis, the supervisor, was standing a few feet from the clerk but did not take any part in the sale. Ms. Box-Rhodes is from Odessa and had no previous acquaintance with either Ms. Castillo or Ms. Curtis. There was no conversation between the agent and either employee other than essential words that had to be spoken between Box-Rhodes and Castillo in order to consummate the transaction.

The issue comes down to how to characterize the actions of Castillo in making the decision she could sell the beer to Box-Rhodes.

Castillo had been hired just two days before the sale. She took the TABC-approved seller training course on February 17, 1998, four days after the prohibited sale. TABC District Supervisor Dyer Lightfoot testified that there is no legal requirement that a beer retailer send an employee to seller training school. He also said that there is no customary practice among retailers to send new sales clerks to seller training school before allowing them to sell beer. The district supervisor for West Texas Gas, Roy Pirtle, said it was his company's policy to send all sales clerks to seller training school. Castillo was sent to the first available school. The class is given only on Wednesdays, and it thus sometimes takes a week to ten days before a clerk can take it. Pirtle said the store had never encouraged the sale of beer to minors. TABC records show the company has been in business since 1991 and has only one previous minor violation, which the Staff said should be disregarded in deciding this case..

Castillo testified that she had graduated from high school in 1995 and after that had taken a course in cosmetology. She said the driver's license she was presented by the agent that day was different from the one that was admitted into evidence. She said the original one did not have Box-Rhodes facing at an angle as did the one in Petitioner's Exhibit Number 4. She also said she remembered the license she saw had a birthdate of 1973 or 1974. On cross-examination, it was brought out that in fact Box-Rhodes had a license which had recently expired. Somehow she had been able to keep it, and she actually produced it at the hearing. The expired license had her looking straight ahead. There was no dispute that the person pictured on both licenses was Box-Rhodes. Both licenses had the birthdate of 10-1-79. In person, Box-Rhodes looked to be anywhere from 16 to 24 years of age.

C. Analysis

It is clear that the driver's license presented to Castillo had a birthdate of 10-1-79. Both licenses presented at the hearing had that same date of birth. It is, therefore, not significant whether Box-Rhodes was looking straight ahead in her photo or at a sidewise angle. Even assuming that Castillo was actually presented with the license which had Box-Rhodes looking straight ahead, it makes no difference because the date of birth was the same, 10-1-79, and both pictures were of Box-Rhodes. Castillo was mistaken in either perceiving or remembering that the license had a birthdate of 1973 or 1974.

Castillo properly asked Box-Rhodes for identification, looked at it, asked the agent if the date of birth was 1979, and used an adding machine or calculator to try to ascertain the agent's correct age. The Texas Penal Code definition of criminal negligence, quoted above, requires that a person act in a manner that is a "gross deviation from the ordinary standard of care". In this case, Castillo did everything that a sales clerk is expected to do when selling alcoholic beverages to a young person. The only thing she did wrong, judging from her outward behavior, was to actually make the sale. Otherwise, she correctly asked for identification. She was given a Texas driver's license, a widely accepted form of identification in Texas. The license had a photo which looked like Box-Rhodes. Castillo asked Box-Rhodes if the birthdate was 1979. She could have also asked the agent what her age was but that might only bring a lie from a minor intent on getting away with buying alcohol. The best approach was for Castillo to determine the correct age from the driver's license for herself. She tried to make this calculation in a responsible manner through the use of an adding machine.

The Staff claims that Castillo was criminally negligent because she sold beer to a young woman who looked like she was under 21. It is true that Box-Rhodes looked like she could be in her late teens, but as often happens, she looked like she could fall in a range of ages going from 16 to as high as 24. At any rate, Castillo took the right course of action in handling a young person by asking for identification. This is certainly not a gross deviation from ordinary conduct by any stretch of the imagination. Consequently, Castillo cannot be said to have been criminally negligent.

At this point in the transaction, there are only two choices left for characterizing the ultimate sale of the beer. Either there was a mistake made by Castillo in her calculations, or she *intentionally* decided to sell the beer to a minor. There was no evidence that Castillo had any motive to sell the beer to Box-Rhodes. She did not know her from before. There was no friendly conversation between the two. It was a cold commercial sale from every indication. Nor was there a shred of evidence that Ms. Castillo might have in general been intent on subverting the law.

Castillo had only been on the job for two days. She had never worked as a sales clerk before. She had attended cosmetology school. She may not have been adept at handling an adding machine and may understandably have been nervous in a new job setting. Every indication is that the explanation for the sale was that she simply performed an erroneous subtraction on the adding machine.

Neither can West Texas Gas be held criminally negligent. The Staff asserted that it should be so held because it put a young inexperienced woman on the sales floor to sell beer and that it did so before sending her to seller training school. Mr. Pirtle was credible when he said West Texas Gas sent every sales employee to seller training school. Castillo went to the school four days after the sale took place, which means that it is probable she had already been scheduled to attend before the date of the sale. Agent Lightfoot testified it was not illegal to put a clerk on the floor without seller training. More importantly, he admitted there was no business practice that he was aware of by which stores refrained from allowing new clerks to sell alcoholic beverages. Therefore, to allow a new clerk without seller training to sell beer is not a gross deviation from the ordinary conduct for a business. Consequently, West Texas Gas did not act with criminal negligence. Neither was there a bit of evidence that West Texas Gas encouraged its employees to sell alcohol to minors. It has had a clean record since it first obtained a permit in 1991.

It should be pointed out that the Respondent came very close to complying with Code Section 106.14(a) (cited above). The section states that if an employer meets three requirements, it can be excused from the conduct of the employee. The Respondent clearly met two of those requirements in requiring its employees to attend a seller training program and in not encouraging Castillo to violate the law. The third requirement is that "the employee has actually attended such a training program". Castillo went to the course four days after the sale and in all probability was scheduled to attend the course by the date of the sale.

D. Recommendation

Neither Annette Castillo nor Respondent West Texas Gas, Inc. acted with criminal negligence. The Respondent has a good past record. It is recommended that there be no suspension of its permit.

FINDINGS OF FACT

1. West Texas Gas, Inc., which has a store located at 206 W. 6th Street, Iraan, Pecos County, Texas, was issued Wine and Beer Retailer's Off-Premise Permit No. BQ-265948 by the Texas Alcoholic Beverage Commission (TABC) on June 24, 1991, and it has been continuously renewed since that date.
2. On October 7, 1998, a hearing was held before the undersigned Administrative Law Judge in the Midland City Hall, Council Chambers, 300 North Loraine, Midland, Texas. The Petitioner was represented by Assistant Attorney General Gayle Gordon. The Respondent was represented by attorney G. William Fowler. Evidence was received and the hearing was closed on the same day.
3. On Friday, February 13, 1998, at the West Texas Gas store in Iraan, Texas, an employee of the store, Annette Castillo, sold a six-pack of Coors Light beer to temporary, undercover TABC Agent Rita Box-Rhodes.

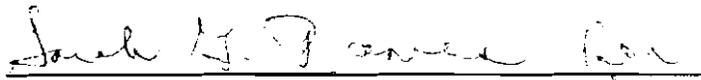
4. Castillo asked Box-Rhodes for identification.
5. Box-Rhodes presented a Texas driver's license with her recognizable photograph on it.
6. The birthdate on the license was 10-1-79, which made Box-Rhodes 18 years old.
7. Castillo asked Box-Rhodes if the year stated on the driver's license as part of the date of birth was 1979.
8. Castillo tried to calculate the age of Box-Rhodes with an adding machine.
9. Castillo made an error in her calculations and came up with an age for Box-Rhodes that was more than 21.
10. Castillo did not intend to sell beer to a minor.
11. Castillo was hired two days before the sale which precipitated this case.
12. This was the first action against the Respondent for a significant TABC violation since it first obtained its permit in 1991.
13. Respondent requires that its sales employees attend a Commission-approved seller training program.
14. Respondent schedules its new sales employees to attend a seller training course as soon as possible after they are hired.
15. Castillo completed the seller training course on February 17, 1998, four days after the sale.
16. Respondent did not directly or indirectly encourage its employee Annette Castillo to violate the law.
17. It is not customary business practice for a store selling wine and beer to prevent new sales clerks from selling beer prior to attending a seller training course.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code [Code] Sections 5.31--5.44 and 6.01.
2. Service of proper notice of the hearing was made on Respondent pursuant to Code Section 11.63 and the Administrative Procedure Act, Texas Government Code Sections 2001.051 and 2001.052.

3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to Code Section 5.43(a) and the Tex. Govt. Code Chapter 2003.
4. Based upon Findings of Fact Nos. 4-6 and 8-11, Annette Castillo was not criminally negligent when she sold beer to Rita Box-Rhodes.
5. Based upon Findings of Fact Nos. 4-6, and 8-17, Respondent West Texas Gas, Incorporated, was not criminally negligent when its employee Annette Castillo sold beer to Rita Box-Rhodes.
6. Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's permit should not be suspended.

SIGNED this 13th day of January 1999.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS