

DOCKET NO. 571253

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

AISHA INC.
D/B/A MINUTE MARKET
PERMIT/LICENSE NO(s). BQ557866

BRAZORIA COUNTY, TEXAS
(SOAH DOCKET NO. 458-08-2471)

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BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 2nd day of March, 2009, the above-styled and numbered cause.

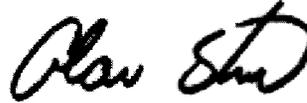
After proper notice was given, this case was heard by Administrative Law Judge Timothy Horan. The hearing convened on June 13, 2008 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 6, 2008. 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 and Reply to Exceptions were filed to which the Administrative Law Judge replied and recommended that no changes be made to the Proposal for Decision

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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 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 Respondent's permits and licenses be **CANCELED FOR CAUSE**.

This Order will become final and enforceable on March 26, 2009, unless a Motion for Rehearing is filed before that date.

SIGNED this the 2nd day of March, 2009, at
Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE TO (713) 812-1001

Ronald Monshaugen
ATTORNEY FOR RESPONDENT
1225 North Loop West, Suite 604
Houston, Texas 77008
VIA FACSIMILE TO (713) 880-5297

Aisha Inc.
d/b/a Minute Market
RESPONDENT
1702 Brazosport Blvd
Freeport, TX 77541
VIA FIRST CLASS MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 6, 2008

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

VIA REGULAR MAIL

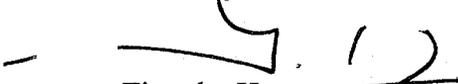
RE: Docket No. 458-08-2471; Texas Alcoholic Beverage Commission vs. Aisha, Inc. d/b/a Minute Market

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

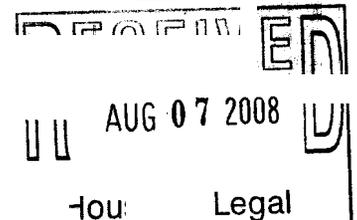
Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


Timothy Horan
Administrative Law Judge

TJH/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Ronald Monshaugen, Attorney for Respondent, 1225 North Loop West, Suite 640, Houston, TX 77008 -**VIA REGULAR MAIL**



II. HEARING AND EVIDENCE

On June 13, 2008, a hearing was convened before ALJ Timothy Horan, at the State Office of Administrative Hearings, 2020 North Loop West, Suite # 111, Houston, Texas. Petitioner was represented by Ramona Perry, attorney. Respondent appeared and was represented by attorney Ronald Monshaugen. 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:) 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.

IV. EVIDENCE

A. Background

The parties stipulated that Respondent or its employee, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor on the licensed premises on November 10, 2007. The sole issue in this case is whether or not the provisions of Section 106.14 should apply to Respondent. Specifically, did the Respondent require its employees to attend a seller training program?

B. Documentary Evidence and Testimony

Petitioner offered into evidence four exhibits, including the green card for 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 a photo of the beer that was purchased by the minor. Respondent offered eleven exhibits which dealt with employee training certifications, store policies pertaining to the sale of alcohol, and pictures of the cash register. All exhibits were admitted into evidence.

TABC Agent Mittlemaier testified that on November 10, 2007, he went to Respondent's store, Minute Market, which is located at 1702 Brazosport Boulevard, Freeport, Texas to conduct a minor sting operation. He had instructed a minor, Cory Womack, to purchase a beer at Respondent's store. The minor was 17 years of age and youthful in appearance. Agent Mittelmaier observed the minor take a beer from the cooler, place it on the counter, and pay the cashier for the beer. The employee, Andres Gomes, took the money from Cory Womack and did not ask for any

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D. Analysis

The parties stipulated that Respondent or its employee, with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. Respondent admitted that the employee, Andres Gomes, was the agent, servant, or employee of Respondent on the date in question and did not dispute that he sold a beer to a minor. Mr. Gomes' actions on that day rise to the level of criminal negligence in that he did not ask him for identification before selling the minor an alcoholic beverage. The only issue is whether section 106.14 of the Code should apply, specifically, that the employer required its employees to attend a seller training program. The evidence is clear that Agent Mittelmaier observed G. Patel standing behind the counter next to the cashier. He saw G. Patel open up a small brown bag for the cashier and placed the beer in the bag for the minor. Agent Bower also observed G. Patel behind the cash register. According to Agent Bower, G. Patel was working as a cashier and was selling alcohol to customers. He was not acting in the capacity of a store stocker or maintenance man. G. Patel was working as a cashier for Respondent on November 10, 2007, and was observed selling alcohol to customers. G. Patel was not TABC seller-certified on November 10, 2007.

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. Section 106.14 has three components. One of the components is that employees must become TABC seller-certified. It is undisputed that G. Patel was not TABC seller-certified on November 10, 2007.

The testimony and documentary evidence demonstrates that the licensed premises had two prior incidents of sale of an alcoholic beverage to a minor. Though this does not constitute prima facie evidence that Respondent has directly or indirectly encouraged violation of this law, these

violations, including the present case, are either indicative of Respondent's inability to properly supervise the licensed premises or his direct or indirect encouragement to his employees to violate the law and sell to minors. Therefore, the affirmative defense is not applicable in the present case.

V RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence was sufficient to prove that on or about November 10, 2007, Respondent, his agent, servant or employee, with criminal negligence sold, served, dispensed or delivered an alcoholic beverage to a minor and because the licensed premises had two prior incidents of sale of an alcoholic beverage to a minor, the ALJ recommends that Respondent's permit be cancelled

VI. PROPOSED FINDINGS OF FACT

Aisha Inc. dba Minute Market, Brazoria County, Texas, holds Wine and Beer Retailer's Off Premise Permit No. BQ-557866, issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 1702 Brazosport Boulevard, Freeport, Brazoria County, Texas.

- 2 Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated April 18, 2008.
- 3 The hearing on the merits convened June 13, 2008, at the State Office of Administrative Hearings, 2020 North Loop West, Suite # 111, Houston, Texas. The TABC was represented by attorney Ramona Perry. The Respondent appeared and represented by attorney Ronald Monshaugen. The record closed on the same day.
- 4 On or about November 10, 2007, Respondent employed Andres Gomes at the licensed premises.
- 5 Cory Womack, 7 years of age, entered the licensed premises and purchased beer from Mr. Gomes.
6. Mr. Gomes did not check Mr. Womack's identification before selling and delivering beer to him.

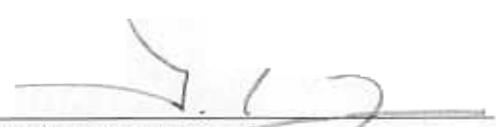
- 7 Mr. Gomes failed to act as an ordinary person would have by permitting a minor to illegally purchase, possess, and/or consume alcoholic beverages, which constitutes a risk to the minor and the public.
- 8 Within a twelve month period, Respondent has had two violations of the Code prohibition against sale of an alcoholic beverage to a minor.
- 9 Respondent's employee, G. Patel, was not TABC seller-certified on November 10, 2007.
- 10 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

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. 4-10, 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 November 10, 2007.
5. Based on the foregoing, cancellation of Respondent's permit is warranted

SIGNED: AUGUST 6, 2008


TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS