

DOCKET NO. 576647

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
F & J INC.	§	
D/B/A PALMER SHELL	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BQ425628	§	
	§	
GALVESTON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-0541)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 23rd day of February, 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on December 12, 2008 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 30, 2009. This 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. As of this date no exceptions have been filed.

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.

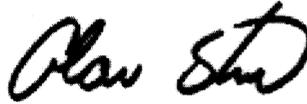
IT IS THEREFORE ORDERED by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's permits are herein **SUSPENDED for sixty (60) days**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$9,000.00** on or before the **7th day of April 2009**, all rights and privileges under the above described permits will be **SUSPENDED for a period of sixty (60) days beginning at 12:01 A.M. on the 15th day of April 2009**.

This Order will become final and enforceable on March 19, 2009, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED this the 23rd day of February, 2009, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

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

Altaf Siddik Adam
ATTORNEY FOR RESPONDENT
P. O. Box 572495
Houston, Texas 77257
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F & J Inc.
d/b/a Palmer Shell
RESPONDENT
3551 Palmer Hwy
Texas City, Texas 77590
VIA REGULAR MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Galveston Outpost

RMP/aa

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 576647

REGISTER NUMBER:

NAME: F & J INC.

TRADENAME: PALMER SHELL

ADDRESS: 3551 PALMER HWY., TEXAS CITY, TEXAS 77590

DUE DATE: APRIL 7, 2009

PERMITS OR LICENSES: BQ425628

AMOUNT OF PENALTY: \$9,000.00

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You **must** pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No

SOAH DOCKET NO. 458-09-0541

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
VS.	§	
	§	
F & J INC.	§	OF
D/B/A PALMER SHELL	§	
PERMIT/LICENSE NO. BQ 425628	§	
GALVESTON COUNTY, TEXAS	§	
(TABC CASE NO. 576647),	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (TABC) brought this disciplinary action against F & Inc. d/b/a Palmer Shell (Respondent), alleging that, on or about April 8, 2008, Respondent's agent, servant or employee sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of the Texas Alcoholic Beverage Code (the Code) § 106.13(a)(b). For the reasons set out below, the Administrative Law Judge (ALJ) finds that the TABC proved the allegation by a preponderance of the evidence and recommends that Respondent's permit be suspended for a period of 60 days

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Respondent holds Wine and Beer Retailer's Office Premise Permit No. BQ-425628, issued by the TABC to F & J Inc. doing business as Palmer Shell, at 3551 Palmer Hwy, Texas City, Galveston County, Texas. The hearing on this enforcement action was held on December 12, 2008 was concluded and the record closed on that date. ALJ Rex A. Shaver presided. TABC was represented by Staff attorney, Ramona Perry and Respondent was represented by attorney Allen D. Russell. No party contested jurisdiction or notice, and those matters are addressed in the Findings of Fact and Conclusions of Law.

II. SUMMARY OF EVIDENCE

The operative facts are not in dispute. On the evening of April 18, 2008, TABC conducted a minor sting operation on the Respondent's service station and grocery. A 16-year old female, working cooperatively with the TABC, entered the business, proceeded to the beer cooler and selected a six-pack of beer. The minor took the beer to the check out counter and upon request of the cashier, Billie L. Thorsen, produced her provisional driver's license. The license was clearly designated as a provisional driver license, indicated the minor's correct date of birth as October 10, 1991, and displayed the vertical photograph orientation required by § 521.233 Tex. Transp. Code for identification of a minor's driver license.

The minor paid the cashier for the beer and exited the business with the six-pack of beer. The present enforcement action was brought against the Permittee, the Respondent in this action. The clerk, Ms. Thorsen, had attended a TABC-approved seller training program, however; on the date in question her certification had lapsed. Therefore no safe-harbor protection under § 106.14 of the Code was available to or claimed by the Respondent.

The Respondent committed another sale to minor violation that occurred on August 25, 2007. This violation resulted in a fine and suspension. During the ten-year period since the permit was issued the Respondent has been cited for sale to minor on three occasions and received written warnings regarding miscellaneous violations on three occasions. In light of the seriousness of the alleged violation, which constitutes an enforcement priority due to the public safety threat posed by underage drinking, and the history of previous violations, the TABC argues that the Respondent's license should be suspended for 60 days.

The Respondent acknowledged that the sale to a minor at issue did occur. Respondent presented evidence in mitigation that the cashier had been seller server certified at one time but that certification had recently lapsed but was later recertified. Respondent also argued that the cashier

was working at this location as a second job and was sleep deprived at the time of the sale. The failure of Respondent to assure that Ms. Thorsen's seller /server certificate was current prevents the Respondent from asserting the safe harbor provision of the Code, but is not a mitigating factor in relation to the violation alleged. That Ms. Thorsen was sleep deprived at the time of sale is not persuasive as to mitigation

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to Section 106.13(a) of the Code, 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 Section .08 of the Code 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.

Section 11.64(b) of the Code provides that the TABC "may relax" provisions relating to suspensions. Section 11.64(c) then provides guidance on when such relaxation is appropriate:

- 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;
 - (3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee;
 - (4) that the permittee or licensee did not knowingly violate this code;
 - (5) that the permittee or licensee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations; or
 - (6) that the violation was a technical one.

IV. ANALYSIS

The ALJ finds that the alleged violation of Texas Alcoholic Beverage Code Sec. 106.13(a)(b) has been established. Based on the photo offered into the record, the minor who made the purchase was youthful in appearance and had presented to the cashier her true and correct minor's provisional driver license bearing her correct date of birth. In spite of checking the driver license, the cashier completed the sale of beer to the minor. There was testimony that the store was not crowded at the time of the sale. The cashier totally disregarded the information contained on the driver license.

Under the circumstances, the ALJ finds that the alleged violation has been established and the permit should be suspended for 60 days. No violation of Sec. 61.71 was alleged, but rather a violation of Sec. 106.13. The ALJ finds that the alleged violation has been established and the permit should be suspended for 60 days and, that in lieu of suspension, Respondent be permitted to pay a fine of \$150 per day for a total of \$9,000.

V. FINDINGS OF FACT

F & J Inc. doing business as Palmer Shell holds Permit No. Wine and Beer Retailer's Off Premise Permit BQ425628, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 3551 Palmer Hwy, Texas City, Texas 77590.

- 2 Notice of the hearing was provided to the parties on October 9, 2008. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a statement of the matters asserted.
- 3 The hearing convened December 12, 2008 was concluded and the record closed that same date. ALJ Rex A. Shaver presided. Ramona Perry represented the TABC, and the Respondent was represented by Alan Russell.
- 4 On April 18, 2008, the Respondent employed Billie Lyn Thorsen as a cashier at the licensed premises.
- 5 On April 18, 2008, a 16 year-old female entered the bar as part of a TABC-sponsored minor-sting operation.
- 6 Ms. Thorsen checked the minor's driver license before selling and delivering beer to the minor.
- 7 The driver license presented by the minor indicated that she was born on October 10, 1991 and was a minor on the date of the sale.
- 8 On November 4, 2000 and, August 25, 2008 Respondent was cited by TABC for Sale to a Minor.

VI. CONCLUSIONS OF LAW

The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01, and 106.13 (a)(b).

- 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. 4-7, Respondent violated §106.13(a)(b) of 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 April 18, 2008.
6. Based on the foregoing Findings of Fact and Conclusions of Law a 60-day suspension is warranted and the ALJ recommends that the Respondent be allowed to pay a \$9000 civil penalty in lieu of suspension of its permit.

SIGNED January 30, 2009.



REX SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS