

TABC DOCKET NO. 590505

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

§
§
§
§
§
§
§
§
§
§

BEFORE THE TEXAS

VS.

JIHAD ALI HAMDAD
D/B/A SCALCO SUPERMARKET
PERMIT/LICENSE NO(s). Q229671

ALCOHOLIC

JEFFERSON COUNTY, TEXAS
(SOAH DOCKET NO. 458-10-2605)

BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 13th day of July, 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Lindy Hendricks, presiding. The hearing convened on April 23, 2010, and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on June 8, 2010. Exceptions were filed to which the Administrative Law Judge replied and recommended that no changes be made to the Proposal for Decision.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent shall pay a civil penalty in the amount of **\$3,600.00** on or before the 10th day of August, 2010. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above license or permit by the Code will be **SUSPENDED beginning at 12:01 A.M. on 18th day of August, 2010 and shall remain suspended until 12:00 A.M. on the 12th day following.**

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on August 9, 2010, 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.

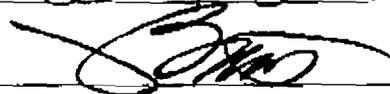
SIGNED this the 13 day of July,
2010, at Austin, Texas.

On Behalf of the Administrator,


Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that each party or person with an interest in the above matter has been notified of the agency order in the manner indicated below on July 13, 2010.


JOAN BATES *JH*
Texas Alcoholic Beverage Commission
Legal Division

Hon. Lindy Hendricks
Administrative Law Judge
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

Jihad Ali Hammad
d/b/a Scalco Supermarket
RESPONDENT
749 Gulfway Drive
Port Arthur, Texas 77640
VIA U.S. FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 590505

REGISTER NUMBER:

NAME: JUHAD ALI HAMMAD

TRADENAME: SCALCO SUPERMARKET

ADDRESS: 749 GULFWAY DRIVE, PORT ARTHUR, TEXAS 77640

DUE DATE: August 10, 2010

PERMITS OR LICENSES: Q229671, BF275207

AMOUNT OF PENALTY: \$3,600.00

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

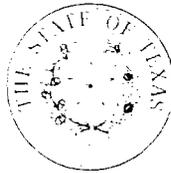
State

Zip Code

Area Code/Telephone No.

State Office of Administrative Hearings

RECEIVED
JUN 11 2010
TABCO HOUSTON
LEGAL



Cathleen Parsley
Chief Administrative Law Judge

June 8, 2010

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

VIA REGULAR MAIL

RE: Docket No. 458-10-2605; Texas Alcoholic Beverage Commission vs. Jihad Ali Hammad d/b/a Scalco Supermarket

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,

A handwritten signature in black ink, appearing to read "Lindy Hendricks".

Lindy Hendricks
Administrative Law Judge

LH/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL** (with Certified Evidentiary Record and __1__ hearing CD)
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Jihad Ali Hammad d/b/a Scalco Supermarket, Respondent, 749 Gulfway Drive, Port Arthur, TX 77640- **VIA REGULAR MAIL**

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § § §	BEFORE THE STATE OFFICE
VS.		OF
JIHAD ALI HAMMAD D/B/A SCALCO SUPERMARKET, Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) brought this action against Jihad Ali Hammad d/b/a Scalco Supermarket (Respondent) alleging that Respondent, its agent, servant, or employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 61.71(a)(5). The Administrative Law Judge (ALJ) finds Petitioner proved the allegation by a preponderance of the evidence and recommends a 12-day suspension, or a \$300 per day civil penalty for a total of \$3,600 in lieu of the suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the Proposed Findings of Fact and Proposed Conclusions of Law sections of this Proposal without further discussion here.

On April 23, 2010, a hearing convened before ALJ Lindy Hendricks at the State Office of Administrative Hearings (SOAH), located at 2020 North Loop West, Suite 111, Houston, Texas 77018. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared in person and represented himself. The record closed on the same date.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71(a)(5), TABC may suspend for not more than 60 days or cancel a license if the licensee¹, “with criminal negligence,” sells, serves, or delivers an alcoholic beverage to a minor. The Code adopts the definition of criminal negligence found in the Texas Penal Code:

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 or unjustifiable risk and 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 perceived by the actor.²

Instead of a suspension, TABC may allow a permittee to pay a civil penalty.³ The amount of civil penalty imposed may not be less than \$150 per day nor more than \$25,000 for each day the permit was to be suspended.⁴

B. Petitioner’s Evidence

TABC staff offered documentary evidence showing Respondent’s permit and history. Respondent holds a Wine Only Package Store Permit Q229671 and Beer Retailer’s Off-Premise License BF275207, for the premises known Scalco Supermarket, located at 749 Gulfway Drive, Port Arthur, Texas. The permit and license were issued by TABC on May 7, 1992, and have been continuously renewed.

¹ Licensee means a person who is the holder of a license, or any agent, servant, or employee of that person. Code § 1.04(16).

² Code § 1.08 and TEX. PEN. CODE ANN. § 6.03(d).

³ 16 TEX. ADMIN. CODE (TAC) § 37.61.

⁴ Code § 11.64(a).

The documentary evidence also included a photograph of the minor taken on the date of the sting operation, a copy of the minor's Texas identification card, and a certified copy of the minor's driver license and identification information from the Department of Public Safety.

In addition to the documentary evidence, TABC staff presented the testimony of TABC agent Nicole Walker and Port Arthur police officer Reagan Sweat.

Agent Walker testified that on November 20, 2009, TABC agents conducted a "minor sting" operation at Respondent's licensed premises. A fifteen-year-old minor assisted in the sting operation. Agent Walker briefed the minor, explaining that the minor should provide her identification card upon request and tell the truth when questioned. Agent Walker made certain that the minor had only cash and an identification card in her possession.

During this operation, the minor presented her Texas "Under 21 Identification Card" to the clerk, showing her date of birth to be January 25, 1994. Respondent's clerk proceeded to sell beer to the minor.

Officer Sweat testified he was inside the licensed premises and observed the alcoholic beverage sales transaction between the minor and Respondent's clerk. According to Officer Sweat, the minor placed an alcoholic beer on the counter, produced her identification card to the clerk, and paid for the beer. Upon receiving the beer and change from the clerk, the minor and Officer Sweat exited the premises.

Agent Walker spoke to the minor after the sting operation, confirmed the sale of alcohol to the minor, and obtained a description of the clerk from the minor. Agent Walker entered the premises and spoke to Linda Adams, the clerk matching the description given by the minor. According to Agent Walker, Ms. Adams was not seller-server trained and stated there was not a posted policy regarding the sale of alcohol to minors.

C. Respondent's Evidence

Respondent testified that he has been in business for 20 years. At the time of the incident, Respondent had a family emergency and was not present at the premises. Respondent testified that Ms. Adams told him the identification card used by the minor showed 1987, making the minor over 21 years of age.

Ms. Adams testified she had been working in that area for over 18 years and thought the minor appeared "too clean" for that area of town. She stated that she does not want minors to have alcohol and does not sell alcohol to minors. Ms. Adams does not believe she sold alcohol to this minor. However, Ms. Adams identified the minor's photograph and identification card as the person to whom she sold alcohol.

Darryl Lee Duke testified on behalf of Respondent and stated that he was a customer in the store on the date of the incident. He testified that he observed Ms. Adams checking the minor's identification card and that she calculated out loud that 1987 would make the minor 22 years old. However, when presented with the photograph of the minor from the date of the incident, Mr. Duke did not believe that to be the same girl who was in the store.

D. Analysis

The evidence shows that Respondent's employee, with criminal negligence, sold alcoholic beverage, *i.e.*, a 24 oz can of beer, to a minor on November 20, 2009. While purchasing the beer, the minor produced her identification card, showing her to be fifteen years old. Officer Sweat and the minor observed the clerk visibly examine the identification card before she took the money and delivered the beer to the minor. The clerk's conduct rises to the level of criminal negligence in that the minor's identification card indicated her date of birth to be January 25, 1994. More importantly, even if Ms. Adams miscalculated, the identification card states on its face in two places "Under 21 Identification Card", "Under 21," and the card is vertical. Ms. Adams identified and did not dispute that the minor depicted in the photograph and the identification card is the same person to whom she sold alcohol. Her failure to perceive the minor's age and the risk posed by selling beer to the minor

is a gross deviation from what a reasonable person would perceive under the same circumstances.

TABC Staff requested that Respondent's permits be suspended for a period of 12 days, or in lieu of suspension, that Respondent pay a penalty assessed at \$300 per day of the recommended suspension, which is \$3,600. The ALJ finds the requested suspension or penalty payment is appropriate.

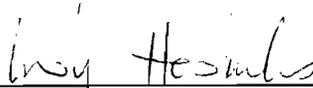
IV. PROPOSED FINDINGS OF FACT

1. Jihad Ali Hammad d/b/a Scalco Supermarket (Respondent) holds a Wine Only Package Store Permit Q229671 and Beer Retailer's Off-Premise License BF275207, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 749 Gulfway Drive, Port Arthur, Texas.
2. On February 17, 2010, Petitioner issued its notice of hearing to Respondent.
3. 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 short, plain statement of the matters asserted.
4. On April 23, 2010, a hearing convened in Houston, Harris County, Texas before ALJ Lindy Hendricks with the State Office of Administrative Hearings field office, located at 2020 North Loop West, Suite 111, Houston, Texas 77018.
5. Petitioner was represented by Sandra Patton, TABC Staff Attorney. Respondent appeared and represented himself. The hearing concluded and the record closed on the same date.
6. On November 20, 2009, Respondent's employee sold beer, an alcoholic beverage, to a 15-year-old minor during an undercover operation involving Respondent's licensed premises.
7. On that date, the minor was under 21 years of age and had a youthful appearance.
8. The minor produced her identification card, which reflected her correct date of birth and stated "Under 21", and the clerk looked at the card.
9. This employee's conduct grossly deviated from the standard of care an ordinary seller of alcoholic beverages would exercise under the same or similar circumstances.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing findings of facts, on November 20, 2009, Respondent's employee, with criminal negligence, sold an alcoholic beverage to a minor, in violation of TEX. ALCO. BEV. CODE ANN § 61.71(a)(5).
5. Based on the foregoing findings of facts and conclusions of law, Respondent's permit and licenses should be suspended for 12 days or Respondent should be allowed to pay \$3,600 (*i.e.* 12 days x \$300/day) in lieu of any permit suspension.

SIGNED June 8, 2010



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS