

DOCKET NO. 600038

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
CEDO'S STOP LLC D/B/A CEDO'S STOP II, Respondent	§	ALCOHOLIC
	§	
PERMIT NO. BQ719474	§	
	§	
MIDLAND COUNTY, TEXAS (SOAH DOCKET NO. 458-11-4986)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 22nd day of June, 2012, the above-styled and numbered cause.

Petitioner alleged in Docket No. 600038 (SOAH Docket No. 458-11-4986) that Respondent, with criminal negligence, sold an alcoholic beverage to a minor on January 15, 2010. In Docket No. 600045 (SOAH Docket No. 458-11-4987), Petitioner alleged the same violation occurred on November 17, 2010. In Prehearing Order No. 2, the Administrative Law Judge granted Petitioner's Agreed Motion to Consolidate Dockets. The two dockets were consolidated under SOAH Docket No. 458-11-4986 (TABC Docket No. 600038).

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge B.L. Philips presiding. The hearing convened on September 20, 2011 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 26, 2011. 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. As of this date no exceptions have been filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that the privileges granted by the Commission and activities authorized under the above permit will be **SUSPENDED** beginning at 12:01 A.M. on August 15, 2012, and shall remain suspended for **twenty eight (28) consecutive days, UNLESS** Respondent pays a civil penalty in lieu of suspension in the amount of **\$8,400.00** on or before August 7, 2012.

If this Order is appealed and judgment is rendered by the District Court affirming the Order, the privileges granted by the Commission and activities authorized under the above permit by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18th) day** following the date the judgment is rendered by the District Court, and shall remain suspended for **twenty eight (28) consecutive days, UNLESS** Respondent pays a civil penalty in lieu of suspension in the amount of **\$8,400.00** on or before the **tenth (10th) day** following the date the judgment is rendered by the District Court.

This Order will become final and enforceable on the 17th day of July, 2012, unless a Motion for Rehearing is filed on or before the 16th day of July, 2012.

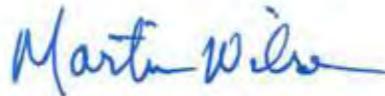
SIGNED this the 22nd day of June, 2012, at Austin, Texas.



Sherry K-Cook, Interim Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 22nd day of June, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Hon. B. L. Phillips
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, Texas 78701
VIA FACSIMILE: 512-322-2061

Cedo's Stop, LLC
d/b/a Cedo's Stop II
RESPONDENT
2470 E. 11th Street
Odessa, TX 79761
VIA REGULAR MAIL

Angela M. Shimek
ATTORNEY FOR RESPONDENT
3800 East 42nd Street, Suite 409
Odessa, Texas 79762-5982
VIA REGULAR MAIL
AND VIA FACSIMILE: 432-363-2150

Shelia A. Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Division

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 26, 2011

RECEIVED

SEP 29 2011

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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

VIA REGULAR MAIL

RE: Docket No. 458-11-4986, Re: Cedo's Stop LLC d/b/a Cedo's Stop II

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "B.L. Phillips".

B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

BLP/vu

Enclosure

cc: Shelia Lindsey, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008
- **VIA REGULAR MAIL**
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL** (with Certified Evidentiary Record and 1 Hearing CD/s)
Angela Shimek, 3800 East 42nd St., Suite 409, Odessa, TX 79762 - **VIA REGULAR MAIL**

300 W. 15th Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
www.soah.state.tx.us

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

VS.

**CEDO'S STOP LLC
D/B/A CEDO'S STOP II
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Petitioner) brought this disciplinary action against Cedo's Stop LLC d/b/a Cedo's Stop II (Respondent) alleging that, on or about January 15, 2010, and November 17, 2010, Respondent or their servant, agent or employee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor, in violation of Texas Alcoholic Beverage Code (the Code) §§ 106.13. Based on the evidence, the Administrative Law Judge (ALJ) finds that the Petitioner proved the allegations by a preponderance of the evidence and recommends that Respondent's permit be suspended or a civil penalty paid.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

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

On September 20, 2011, a hearing convened before the State Office of Administrative Hearings (SOAH), B. L. Phillips presiding ALJ. Petitioner appeared at the hearing and was represented by Shelia A. Lindsey, attorney. Respondent appeared at the hearing and was represented by Angela M. Shimek, attorney. After presentation of evidence and argument, the hearing was concluded, and the record was closed.

II. 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 : (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. However, under TABC Rule 50.10 (c), proof by the Commission that an employee or agent of the licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice in a 12-month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

III. DISCUSSION AND ANALYSIS

A. Background

The following facts were not disputed at the hearing. Respondent's licensed premises, known as Cedo's Stop II, are located at 4321 W. Illinois Street, Midland, Midland County, Texas. Respondent holds a Wine and Beer Retailer's Off Premise Permit, issued by the TABC. On or about January 15, 2010, and again on November 17, 2010, Respondent's employees sold an alcoholic beverage to a minor.

B. Petitioner's Evidence and Contentions

Petitioner presented the testimony of several witnesses and documentary evidence to prove the violations. Agent Martin Herrman of the Texas Alcoholic Beverage Commission testified that he participated in the minor sting operation at the licensed premises on January 15, 2010. Kaitlin Ackerly, age 17, was the minor employed for the purposes of conducting the minor sting, and a photo of her taken at the time of the operation depicts a young woman who appears to be a minor. Herrman entered the licensed premises with Ms. Ackerly and observed her attempt to purchase a can of beer. The store clerk examined Ms. Ackerly's driver's license, which was in a vertical format indicating that the holder was a minor, and then completed the purchase. Herrman testified that it was later determined that the clerk had an expired seller-server certification.

Ms. Ackerly testified that she was the person involved in the minor sting operation on January 15, 2010, and that she was seventeen years old on that date. She handed her driver's license to the clerk when asked for it, and the clerk examined it before completing the sale of a beer to Ackerly.

Agent Jonathan Simcik of the Texas Alcoholic Beverage Commission testified that he participated in the minor sting operation at the licensed premises on January 15, 2010. Simcik made contact with the clerk, identified as Cathy Lopez, after Agent Herrman contacted him to

confirm the sale and identify the clerk. He conducted a search of the licensed premises after issuing the administrative notice of the violation and did not observe the posted rules required to take advantage of the safe harbor provisions relating to sale of alcoholic beverages to minors. Simcik confirmed that Ms. Lopez was not seller-server certified at the time of the minor sting operation. A judgment from the County Court of Midland County was offered into evidence establishing that Ms. Lopez was found guilty of the offense of sale of an alcoholic beverage to a minor.

Sgt. Darrin Clements of the Midland Police Department testified that he was assigned to the minor sting operation at the licensed premises of November 17, 2010. Sgt. Clements observed and videotaped the sale of an alcoholic beverage to the minor. He testified that the minor had a driver's license with a vertical format indicating that she was a minor.

Officer Jimmy Young of the Midland Police Department testified that he was assigned to the minor sting operation at the licensed premises of November 17, 2010. He observed the minor, identified as Cheyenne Kinsey, drive up to the drive-thru of the licensed premises on that date and observed the clerk, identified as Evelyn Mendoza, complete the sale of an alcoholic beverage to Ms. Kinsey. Officer Young met with Ms. Kinsey after the sale and took possession of the alcoholic beverages purchased by her from the licensed premises. He also counted the money given to Ms. Kinsey to complete the sale to verify the purchase.

Ms. Kinsey testified that she was the person involved in the minor sting operation on November 17, 2010, and that she was seventeen years old on that date. She was not asked for her identification by the clerk prior to the purchase of a six-pack of Smirnoff Ice. A photo of Ms. Kinsey taken at the time of the operation depicts a young woman who appears to be a minor.

C. Respondent's Evidence and Contentions

Respondent presented the testimony of Ms. Dias, who testified that she was the vice-president of the operation which included the licensed premises. She was informed by both clerks when they were caught in the minor sting operations. She stated that it was the

responsibility of the clerks to ensure that their seller-server certification was current, but she did not dispute that neither clerk was seller-server certified at the time of the minor sting operations. She testified that the average employee of the licensed premises works for approximately ten days and that it is very difficult to keep trained employees.

D. Analysis

After considering the evidence, the ALJ concludes that Petitioner proved that Respondent violated the Code by the sale of an alcoholic beverage to a minor on two occasions by two different employees of the licensed premises. The evidence demonstrates that the employee on January 15, 2010, examined the driver's license of the minor, which indicated that she was a minor, and then completed the sale of an alcoholic beverage to her. The employee on November 17, 2010, did not even ask for identification from the minor before completing the sale of an alcoholic beverage to her. The action of both employees by not heeding a license showing that the purchaser was a minor and not even examining the license of a purchaser who clearly appeared to be minor constitutes criminal negligence sufficient to satisfy the Code. Neither employee was seller-server certified on the dates of the transaction. The fact that the licensed premise has had difficulty keeping trained employees on the job does not excuse them from compliance with the law.

IV. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence was sufficient to prove that on or about January 15, 2010 and November 17, 2010, Respondent, their servant, agent or employee 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. The ALJ agrees that the recommendation of Petitioner that Respondent's permit be suspended for a period of 28 days or that Respondent be allowed to pay a civil penalty of \$8400.00 should be adopted.

V. FINDINGS OF FACT

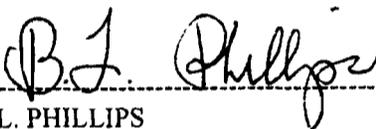
1. Cedo's Stop LLC d/b/a Cedo's Stop II holds a Wine and Beer Retailer's Off Premise Permit, issued by TABC for the premises located at 4321 W. Illinois Street, Midland, Midland County, Texas.
2. Respondent received proper and timely notice of the hearing from TABC in a notice of hearing dated July 15, 2011.
3. The hearing on the merits convened September 20, 2011, before the State Office of Administrative Hearings, at the Justice of the Peace Court, Midland, Texas. The TABC was represented by attorney Shelia A. Lindsey. Respondent was represented by attorney Angela M. Shimek. The record closed on the same date.
4. On or about January 15, 2010, Ms. Cathy Lopez was employed on the licensed premises as a sales clerk.
5. On that date, Ms. Lopez was not seller-server certified.
6. Ms. Kaitlin Ackerly entered the licensed premises and purchased an alcoholic beverage from Ms. Lopez.
7. Ms. Lopez took Ms. Ackerly's driver's license, which was in a vertical format showing that she was a minor, and examined it before handing it back to her and completing the sale.
8. On that date, Ms. Ackerly was 17 years old.
9. On or about November 17, 2010, Ms. Evelyn Mendoza was employed on the licensed premises as a sales clerk.
10. On that date, Ms. Mendoza was not seller-server certified.
11. Ms. Cheyenne Kinsey drove up to the drive thru window of the licensed premises and purchased an alcoholic beverage from Ms. Mendoza.
12. Ms. Mendoza did not ask for or examine Ms. Kinsey's identification before completing the sale.
13. On that date, Ms. Kinsey was 17 years old.

14. The TABC investigation concluded that a sale of an alcoholic beverage to a minor occurred on the licensed premises on January 15, 2010 and November 17, 2010.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH has jurisdiction over all matters relating to the conduct of 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. 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 Nos. 4-14, Petitioner proved by a preponderance of the evidence that Respondent violated the Code when, with criminal negligence, Respondent's servant, agent or employee sold, served, dispensed, or delivered an alcoholic beverage to a minor.
5. The ALJ recommends that Respondent's permit be suspended for a period of 28 days or that Respondent be allowed to pay a civil penalty of \$8400.00.

Signed: SEPTEMBER 26, 2011



B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS