

DOCKET NO. 592480 & 592482

TEXAS ALCOHOLIC BEVERAGE COMMISSION, <i>Petitioner</i>	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
DJ'S BEER & WINE, INC. D/B/A DJ'S BEER & WINE, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. BQ733695	§	
	§	
DALLAS COUNTY, TEXAS (SOAH DOCKET NO. 458-10-5309)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 19TH day of OCTOBER, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Michelle Kallas presiding. The hearing convened on October 5, 2010 and the SOAH record closed on that date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on December 2, 2010. 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. Petitioner filed Exceptions and a Proposed Final Order on December 17, 2010.

I find the arguments set forth in Petitioner's Exceptions and Proposed Final Order persuasive. For the reasons stated in Petitioner's Exceptions and Petitioner's Proposed Final Order, **the ALJ's proposed Finding of Fact No. 4 and Conclusions of Law Nos. 4, 5 and 6 are modified.** The ALJ's proposed **Findings of Fact Nos. 1 and 2, and Conclusions of Law Nos. 1 and 3 are modified** to correct references.

IT IS THEREFORE ORDERED that the following Findings of Fact and Conclusions of Law are adopted, and that Wine and Beer Retailer's Off-Premise Permit BQ733695, held by DJ's Beer & Wine, Inc. d/b/a DJ's Beer & Wine, is hereby **CANCELLED**. 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.

This Order will become final and enforceable on the 14TH day of NOVEMBER, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

FINDINGS OF FACT

1. DJ's Beer & Wine, Inc. (Respondent) holds a Wine and Beer Retailer's Off Premise Permit, BQ-733695, issued by the Texas Alcoholic Beverage Commission (TABC, Petitioner) for the premises located at 3732 Samuell Blvd., Dallas, Dallas County, Texas.
2. Respondent's last known designated mailing address, as reflected in Petitioner's records, is 3732 Samuell Blvd., Dallas, Texas, 75228-6717.
3. On December 23, 2009, Respondent's agent, servant, or employee sold an alcoholic beverage to a minor.
4. On December 23, 2009, Respondent's agent, servant or employee acted with criminal negligence when selling the alcoholic beverage to the minor.
5. On January 4, 2010, and January 26, 2010, TABC Agent Kenneth Sherman served Respondent with a request for documents concerning the ownership and operation of the business.
6. On January 26, 2010, Respondent was informed that it had until February 9, 2010, to respond to the request.
7. On or about February 9, 2010, Respondent, or Respondent's agent, servant, or employee failed to respond to the request for documents and report a change of effective ownership of the business to TABC.
8. On July 30, 2010, Petitioner issued its notice of hearing by certified mail, return receipt requested, to Respondent at Respondent's last known address, setting the hearing on the merits for October 5, 2010.
9. The notice of hearing 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.
10. On August 27, 2010, Petitioner also mailed the notice of hearing to the home address of the business owner, Ralph Balfanz, which was received on August 30, 2010, as evidenced by the signed green card.
11. A hearing convened before Administrative Law Judge (ALJ), Michelle Kallias, with the State Office of Administrative Hearings (SOAH), on October 5, 2010. Petitioner was represented at the hearing by David Duncan, Jr., Staff Attorney. Respondent did not appear and was not represented at the hearing. The record closed on the same date.

CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Ch 5 and §§11.61 and 106.13.
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. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. Ch. 2001, 1 TAC §155.501.
4. Due to Respondent's failure to appear at the hearing, the provisions of 1 TEX. ADMIN. CODE §155.501 in effect at the time of the hearing apply to this case.
5. Based on Findings of Fact Nos. 3 – 7, Respondent violated TEX. ALCO. BEV. CODE §§ 11.61 (b)(2) and 106.13.
6. Respondent's permit should be cancelled.

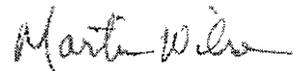
SIGNED this the 19TH day of OCTOBER, 2011, at Austin, Texas.



Sherry K-Cook, Assistant 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 19TH day of OCTOBER, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Michelle Kallas
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150a
Dallas, Texas 75235

VIA FACSIMILE: (512) 322.0471

DJ's Beer & Wine, Inc.
d/b/a DJ's Beer & Wine
RESPONDENT
3732 Samuell Blvd
Dallas, Texas 75228-6717
VIA REGULAR MAIL

Ralph Richard Balfanz
RESPONDENT'S OWNER
2 Deer Place
Ponca City, OK 74604-3229
VIA REGULAR MAIL

David T. Duncan Jr.
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL: DAVID.DUNCAN@TABC.STATE.TX.US

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6717, via certified mail, return receipt requested.¹ The notice of hearing 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, as required by TEX. GOV'T CODE ANN. § 2001.052. On August 27, 2010, the notice was also sent via certified mail to the home address of the business owner, Richard Balfanz. On August 30, 2010, Respondent received the notice of hearing, at the business owner's home address, as evidenced by the signed green card.

On October 5, 2010, a hearing convened before SOAH ALJ Michelle Kallas at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Petitioner was represented at the hearing by David Duncan, Jr., TABC Staff Attorney. Respondent did not appear and was not represented at the hearing. Petitioner presented evidence regarding notice, jurisdiction, and the violations. The record closed on October 5, 2010.

II. APPLICABLE LAW

The Commission, or administrator, may cancel an original or renewal permit if the permittee violates a provision of the Alcohol Beverage Code or a rule of the commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2). According to 16 TAC § 41.48, the holder of a mixed beverage permit or private club permit shall notify the Commission of any change of effective control. Failure to provide any information required may result in suspension or cancellation of the permit.² 16 TAC § 41.48 (j).

Pursuant to TEX. ALCO. BEV. CODE ANN. §106.13, the commission or administrator may

¹ Service of notices of hearing, pleadings, or other documents related to contested cases shall be by certified mail addressed to the permittee's last known address as reflected in the Commission's records. A certificate of service to such address is *prima facie* evidence of adequate service on the permittee. 16 TAC § 37.3.

² "Permit" is defined as a mixed beverage permit or private club permit and subsidiary permits of either. 16 TAC § 41.48 (a)(4).

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suspend a permit if it is found that the permittee, with criminal negligence, sold an alcoholic beverage to a minor.

A permittee acts with criminal negligence when the permittee should have been aware of a substantial and justifiable risk that the circumstances exist or the result will occur. The failure to perceive the risk must constitute a gross deviation from the care an ordinary person would exercise under the same circumstances. TEX. PENAL CODE ANN. §6.03 (d)(4).

III. EVIDENCE

According to the TABC Incident Report (TABC Exhibit #5), TABC Agent Kenneth Sherman inspected the permitted premises on January 4, 2010. During the inspection, he noticed that the certificate of occupancy for the business was in the name of company who was not the permit holder according to TABC records. He spoke with the clerk on duty who informed him that Bill Baldrige owned the business. On January 4, 2010, Agent Sherman served Respondent with a request for documents concerning the ownership and operation of the business.³ On January 26, 2010, Agent Sherman spoke with Mr. Baldrige. Mr. Baldrige informed Agent Sherman that Mr. Balfanz was the business owner and had hired him as the general manager. He stated that the employees had been told he was the owner to give the perception of authority. On January 26, 2010, Agent Sherman served another request for documents and informed Mr. Baldrige that the business had until February 9, 2010, to respond to the request.⁴

At the hearing, TABC Agent Jeff Farmer testified he was familiar with the permit history involved in this case. He testified that the purpose of Agent Sherman's request for documents was to determine the legitimate owner of the business. According to Agent Farmer, Respondent never responded to the request for documents.

³ See, TABC Exhibit #6.

⁴ See, TABC Exhibits #4 and #5.

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Officer Hannah Tamez also testified at the hearing regarding a Dallas Police Department "sale to minor" sting operation conducted on the permitted premises. According to Officer Tamez, on December 23, 2009, at 7:55 p.m., she entered the premises followed by the 18 year old (the minor) who was assisting the police department with the sting operation. She observed the minor take a six pack of beer to the checkout counter. The clerk told the minor how much to pay for the beer and did not ask for identification prior to selling the minor the beer. The minor then exited the premises with the purchased beer. Agent Tamez then identified the clerk who sold the beer to the minor to other officers working the sting.

IV. DISCUSSION

A. Violation under 16 TAC §41.48

Petitioner alleged that Respondent violated 16 TAC §41.48 when it failed to respond to Agent Sherman's request for documents regarding the ownership and operation of the premises. This TABC rule provides that the holder of a mixed beverage permit or a private club permit shall notify the Commission of any change of effective control for the premises. Failure to submit the requested information may result in the cancellation of the mixed beverage or the private club permit.

In this case, Petitioner's reliance on this rule is misplaced. Respondent holds a wine and beer retailer's off premise permit. 16 TAC §41.48 is very clear that it applies only to a mixed beverage permit or a private club permit. Therefore, as Respondent does not hold the required type of permit, Respondent did not violate 16 TAC §41.48 when it failed to respond to Agent Sherman's request.

B. Violation under TEX. ALCO. BEV. CODE ANN. §106.13

Petitioner also alleged that Respondent violated TEX. ALCO. BEV. CODE ANN. §106.13. This section of the Code provides that a permit may be cancelled if a permittee, with criminal negligence,

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sells alcohol to a minor. "Criminal negligence" is acting in a manner in which there is a substantial or justifiable risk that a particular result will occur and the failure to perceive that risk is a gross deviation from the care an ordinary person would have exercised.

In this case, the evidence is clear that, on December 23, 2009, Respondent's clerk sold a six pack of beer to an individual who was only 18 years old. However, the evidence fails to establish that the clerk acted with criminal negligence. Officer Tamez testified that the minor was not asked to produce identification. This alone does not necessarily establish that the clerk acted with criminal negligence. For example, there was no evidence as to the minor's physical appearance on the date of the sting operation. Petitioner failed to provide sufficient evidence to establish that an ordinary person would have perceived the risk that the person buying the alcohol was in fact a minor. Therefore, Petitioner has failed to establish, by a preponderance of the evidence, that Respondent's agent, servant, or employee, with criminal negligence, sold an alcoholic beverage to a minor.

V. FINDINGS OF FACT

1. DJ's Beer & Wine, Inc. (Respondent) holds a Wine and Beer Retailer's Off Premise Permit BQ-733695, issued by the Texas Alcoholic Beverage Commission (TABC, Petitioner) for the premises located at 3732 Samuel Blvd., Dallas, Dallas County, Texas.
2. Respondent's last known designated mailing address, as reflected in Petitioner's records, is 3732 Samuel Blvd., Dallas, Texas, 75228-6717.
3. On December 23, 2009, Respondent's agent, servant, or employee sold an alcoholic beverage to a minor.
4. On that date, Respondent's agent, servant, or employee did not act with criminal negligence when selling the alcohol to the minor.
5. On January 4, 2010, and January 26, 2010, TABC Agent Kenneth Sherman served Respondent with a request for documents concerning the ownership and operation of the business.
6. On January 26, 2010, Respondent was informed that it had until February 9, 2010, to respond to the request.

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7. On or about February 9, 2010, Respondent, or Respondent's agent, servant, or employee failed to respond to the request for documents and report a change of effective ownership of the business to TABC.
8. On July 30, 2010, Petitioner issued its notice of hearing by certified mail, return receipt requested, to Respondent at Respondent's last known address, setting the hearing on the merits for October 5, 2010.
9. The notice of hearing 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.
10. On August 27, 2010, Petitioner also mailed the notice of hearing to the home address of the business owner, Ralph Balfanz, which was received on August 30, 2010, as evidenced by the signed green card.
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VI. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 106.13, as well as 16 TEX. ADMIN. CODE (TAC) § 41.48.
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. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TAC § 155.501 and 16 TAC § 37.3.
4. Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 11.61 (b)(2) and 16 TAC § 41.48.
5. Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 106.13.

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6. Respondent's permits should not be cancelled.

SIGNED December 2, 2010.



Michelle Kallas
Administrative Law Judge
State Office of Administrative Hearings