

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

January 5, 2012

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FABC HOUSTON  
LEGAL

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

VIA INTERAGENCY MAIL

**RE: Docket No. 458-12-0264; Texas Alcoholic Beverage Commission v. Shy Investment, Inc. d/b/a Times Market No. 52, Permit License No. BQ-629538, Nueces County Texas**

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](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Travis Vickery".

Travis Vickery  
Administrative Law Judge

TV/ls  
Enclosure

- xc Sandra K. Patton, Staff Attorney, Texas Alcoholic Beverage Commission, Houston Legal Services, 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 INTERAGENCY MAIL  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL (with Certified Evidentiary Record and 1 - Hearing CD)  
Nathan Burkett, Attorney at Law, P. O. Box 3189, Corpus Christi, TX 78463 - VIA REGULAR MAIL

**DOCKET NO. 458-12-0264**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**

**V.**

**SHY INVESTMENT, INC.  
D/B/A TIMES MARKET NO. 52  
PERMIT LICENSE NO. BQ-629538  
NUECES COUNTY, TEXAS**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Commission or TABC) brought this action against Shy Investment, Inc., d/b/a Times Market No. 52 (Respondent) seeking cancellation of Respondent's wine and beer retailer's off-premise permit, BQ-629538. TABC alleged Respondent, his agent, servant, or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and (5) and 106.13. This Proposal for Decision finds the Respondent's permit should be cancelled.

**I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY**

The hearing in this matter convened on November 9, 2011, at the State Office of Administrative Hearings, 5155 Flynn Parkway, Suite 200, Corpus Christi, Texas. Attorney Sandra Patton represented staff. The Respondent was represented by attorney Nathan Burkett. Administrative Law Judge (ALJ) Travis Vickery presided. The hearing concluded and the record closed the same day.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

## II. DISCUSSION

### A. Legal Background

TEX. ALCO. BEV. CODE § 61.71(a)(1) and (5) state:

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(1) violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period;

(5) with criminal negligence sold, served, or delivered an alcoholic beverage to a minor;

TEX. ALCO. BEV. CODE § 106.13 states:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 90 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

(b) For a second offense the commission or administrator may cancel the license or permit or suspend it for not more than six months. For a third offense within a period of 36 consecutive months the commission or administrator may cancel the permit or suspend it for not more than 12 months.

### B. Evidence and Argument

Respondent holds TABC wine and beer retailer's off-premise permit number BQ-629538 (Permit). Respondent owns and operates a convenience store at 5459 FM 624 in Robstown, Texas (Store). On June 24, 2006, May 24, 2008, October 7, 2010, December 3, 2010, and December 18,

2010, Respondent, or an agent or employee of Respondent, sold alcoholic beverages to a minor. TABC argues that these sales violated TEX. ALCO. BEV. CODE §§ 61.71(a)(1), (a)(5), and 106.13. The June 24, 2006, May 24, 2008, October 7, 2010, and December 3, 2010 violations resulted in the entry of waiver orders by the TABC, which included suspensions of the Permit and/or civil penalties.<sup>1</sup>

The December 18, 2010 violation is the subject of this proceeding. Staff presented the testimony of Lieutenant Larry Lanscomb and Agent Robert Pickett. The principal facts are undisputed. On the evening of December 18, 2010, Agent Pickett stationed himself in the parking lot of the Store. Within 8 minutes of his arrival, a youthful male entered the Store and purchased an 18-pack of Coors Light Beer. As he exited the Store, Agent Pickett approached him and determined he was 19 years old and that the clerk in the Store had not asked him to present identification. Furthermore, neither Respondent's principal owner nor its employees were seller-server certified at the time of the October and December 2010 violations. As a result of the December 18, 2010 violation, under TEX. ALCO. BEV. CODE §106.13, Staff seeks the cancellation of the Permit because it is Respondent's fourth violation within a 36-month period.<sup>2</sup>

Respondent presented the testimony of Sung Kim, Respondent's principal and only owner. The Store is Mr. Kim's only source of income, and he and his wife currently have two children attending college. Mr. Kim testified that although the June 24, 2006 violation involved his personal sale to a minor, it was not under the current license, because he had only recently acquired the Store. In addition, although he was at the Store during the October 10, 2010 violation, he was not the cashier. As for the December 18, 2010 violation, Mr. Kim testified that he was not present at the Store that evening.

Mr. Kim explained that the October and December 2010 sales to minors may have resulted from inattentive employees using cell phones during work hours. As a result of these violations,

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<sup>1</sup> TABC Ex. 1.

<sup>2</sup> TABC Ex. 2-6.

Mr. Kim testified that Respondent replaced the employees responsible with new employees, who are banned from using cell phones during work. There are two shifts at the Store, which is open from 7 a.m. to 10 p.m. Because roughly 90% of the store's alcohol sales occur in the evening, Mr. Kim now works the evening shift 7 days a week. He also installed a closed-circuit camera to record transactions and insure employees are checking identification for alcohol sales to anyone who appears to be less than 30 years old. He also stated that he is now seller-server certified. Since these changes, he notes that there have been no more sales to minors and he opined that they will never happen again.

Finally, Respondent notes that in the past, the TABC has conducted random sting operations on the Store during which Respondent fulfilled its legal obligation to check identification. As a result of Respondent's actions during those sting operations, the TABC sent commendation letters to Respondent on November 19, 2008, May 19, 2009, July 6, 2010, and June 7, 2011.<sup>3</sup>

Lieutenant Lanscomb testified that he has had three personal meetings with Mr. Kim since the October 2010 violation. After the October 7, 2010 violation, Lieutenant Lanscomb met with Mr. Kim, reviewed the Commission's penalty chart, and specifically warned him that a third violation would result in the cancellation of the Permit.

After the December 3, 2010 violation, Lieutenant Lanscomb met with Mr. Kim again in mid-December. At that point, Mr. Kim was very concerned that the Commission would revoke the Permit. However, on behalf of Mr. Kim, the Lieutenant discussed Respondent's situation with his supervisor and requested a lesser penalty. Lieutenant Lanscomb told his supervisor that the Store was Mr. Kim's only source of income and that Mr. Kim had two children in college. Taking these and other factors into account, the Lieutenant obtained a reduced penalty for Respondent. Lieutenant Lanscomb told Mr. Kim that instead of cancellation of the Permit, Respondent would receive a 60-day suspension. The Lieutenant also explained that if Respondent received one more violation within a 36-month period, he would have no choice but to seek cancellation.

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<sup>3</sup> Resp. Ex. 2-5.

After the December 18, 2010 violation, Lieutenant Lanscomb told Mr. Kim that cancellation was the only option. At hearing, the Lieutenant testified that despite Respondent's subsequent remedial measures and satisfactory performance during some sting operations, Respondent has had four violations within a 36-month period and according to the TABC's penalty chart, cancellation was justified after the December 3, 2010 violation.

### III. CONCLUSION

Staff presented a straight-forward case for revocation that is consistent with TEX. ALCO. BEV. CODE § 106.13. Respondent has received four violations for sales to minors within a 36-month period. The Alcoholic Beverage Code only requires three violations to justify cancellation. To his credit, Mr. Kim presented credible testimony that he has taken remedial steps and that he has a family to support that depends on the Permit. However, he received two personal meetings with Lieutenant Lanscomb before the December 18, 2010 violation, during which the Lieutenant explained the consequences of further violations. Lieutenant Lanscomb took Mr. Kim's family circumstances into account in developing a lesser penalty after the third violation. Finally, Lieutenant Lanscomb stated that the remedial measures are too late to remedy the fourth violation. The ALJ agrees. While the ALJ is sympathetic to Respondent's situation, the Permit should be cancelled.

### IV. FINDINGS OF FACT

1. Shy Investment, Inc., d/b/a Times Market No. 52 (Respondent) holds Texas Alcoholic Beverage Commission (TABC) wine and beer retailer's off-premise permit number BQ-629538 (Permit). Sung Kim owns 100% of Respondent (Owner).
2. Respondent owns and operates a convenience store at 5459 FM 624 in Robstown, Texas (Store).
3. On September 19, 2011, the TABC sent a notice of hearing to Respondent stating that a hearing would be held on this matter on November 9, 2011, at the State Office of Administrative Hearings (SOAH) in Corpus Christi, Texas.

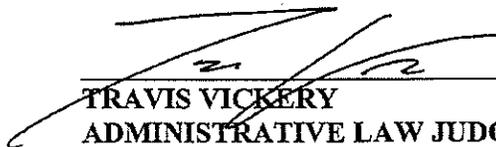
4. The notice also contained a statement of the legal authority and jurisdiction for the hearing, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
5. The hearing in this matter convened on November 9, 2011, at the SOAH offices in Corpus Christi, Texas. Attorney Sandra Patton represented staff. The Respondent was represented by attorney Nathan Burkett. Administrative Law Judge (ALJ) Travis Vickery presided. The hearing concluded and the record closed the same day.
6. On June 24, 2006, May 24, 2008, October 7, 2010, December 3, 2010, and December 18, 2010, Respondent, or an agent or employee of Respondent, sold alcoholic beverages to a minor. Respondent's owner and employees were not seller-server certified at the time of these violations.
7. The June 24, 2006, May 24, 2008, October 7, 2010, and December 3, 2010 violations resulted in the entry of waiver orders by the TABC, which included suspensions of the Permit and/or civil penalties against Respondent stemming from allegations that Respondent sold alcohol to minors.
8. After the October 7, 2010 violation, TABC Lieutenant Larry Lanscomb met with the Owner, reviewed the TABC's penalty chart with him, and specifically warned him that a third violation would result in the cancellation of the Permit.
9. After the December 3, 2010 violation, Lieutenant Lanscomb met with the Owner. On behalf of Respondent, Lieutenant Lanscomb discussed the Owner's family situation with his supervisor and requested a lesser penalty. Lieutenant Lanscomb told his supervisor that the Store was the Owner's only source of income and that the Owner had two children in college. Taking these and other factors into account, Lieutenant Lanscomb obtained approval for a reduced penalty for Respondent. Lieutenant Lanscomb told the Owner that instead of cancellation of the Permit, Respondent would receive a 60-day suspension. Lieutenant Lanscomb also explained that if Respondent received one more violation within a 36-month period, he would have no choice but to seek cancellation.
10. On December 18, 2010, an employee of Respondent sold alcohol to a minor. The employee was not seller-server certified.

## V. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE subchapter B of chapter 5.

2. SOAH has jurisdiction to conduct the administrative 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 ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052.
4. On December 18, 2010, Respondent's employee with criminal negligence sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE § 106.13(a), and the actions of Respondent's employee are attributable to Respondent pursuant to TEX. ALCO. BEV. CODE ANN. § 106.13.
5. Based on the Findings of Fact and Conclusions of Law, the Permit should be cancelled.

**SIGNED January 5, 2012**

  
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**TRAVIS VICKERY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TABC DOCKET NO. 599476

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
SHY INVESTMENT INC. D/B/A TIMES MARKET #52, Respondent	§	ALCOHOLIC
	§	
PERMIT NO. BQ629538	§	
	§	
NUECES COUNTY, TEXAS (SOAH DOCKET NO. 458-12-0264)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of April, 2012, the above-styled and numbered cause.

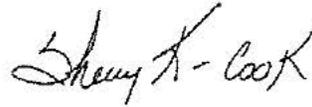
After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Travis Vickery presiding. The hearing convened on November 9, 2011 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 5, 2012. 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 Wine and Beer Retailer's Off-Premise Permit No. BQ629538 issued to Shy Investment Inc. d/b/a Times Market #52 is hereby **CANCELLED**.

Unless a Motion for Rehearing is filed by the 7<sup>th</sup> of May, 2012, this Order will become final and enforceable on the 8<sup>th</sup> day of May, 2012.

SIGNED this the 12th day of April, 2012, at Austin, Texas.



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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 12th day of April, 2012.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Hon. Travis Vickery  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> St., Suite 502,  
Austin, TX 78701  
*VIA FACSIMILE: (512) 322-2061*

Shy Investment, Inc.  
d/b/a Times Market #52  
**RESPONDENT**  
5459 FM 624  
Robstown, TX 78380  
*VIA REGULAR & CERTIFIED MAIL: 7006 2760 0004 7904 2220*

Sandra K. Patton  
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