

DOCKET NO. 606693

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
DINA MIN D/B/A TEXAS SPIRITS, Respondent	§	ALCOHOLIC
	§	
PERMITS NO. P431771, BF431772	§	
	§	
KAUFMAN COUNTY, TEXAS (SOAH DOCKET NO. 458-12-5299)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 26th day of June, 2013, 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 Jerry Van Hamme presiding. The hearing convened on May 4, 2012 and the SOAH record closed the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on July 3, 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. Exceptions were filed by Petitioner on July 19, 2012. No replies were filed, but on August 16, 2012, the Administrative Law Judge filed a letter stating that the Proposal for Decision as originally issued should not be amended.

After review and due consideration of the Proposal for Decision, Petitioner’s Exceptions and the Administrative Law Judge’s letter, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision and such Findings and Conclusions are incorporated 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 **NO ACTION** be taken against Respondent’s Permits P431771 and BF431772 in this proceeding.

This Order will become **final and enforceable** on the 20th day of July, 2013, **unless** a Motion for Rehearing is filed by the 19th day of July, 2013.

SIGNED this the 26th day of June, 2013, at Austin, Texas.



Sherry K-Cook, 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 26th day of June, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Jerry Van Hamme
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150A
Dallas, TX 75235
VIA FACSIMILE: 512-322-2061

Dina Min
d/b/a Texas Spirits
RESPONDENT
1001 South Virginia Street
Terrell, TX 75160
VIA FIRST CLASS MAIL, CMRRR #70120470000133007210

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: sandra.patton@tabc.state.tx.us

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED

JUL 05 2012

FABC HOUSTON
LEGAL

July 3, 2012

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

VIA REGULAR MAIL

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
DINA MIN d/b/a TEXAS SPIRITS
SOAH DOCKET NO. 458-12-5299**

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 black ink, appearing to read "Jerry Van Hamme", written over a horizontal line.

Jerry Van Hamme
Administrative Law Judge

JVH/slp
Enclosure

Xc: ✓ Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL, 427 West 20th Street, Ste 600, Houston, Texas 77008
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL 5806 Mesa Drive, Austin Texas 78731
Dina Min d/b/a Texas Spirits, Respondent, VIA REGULAR MAIL, 1001 South Virginia Street, Terrell, Texas 75160

DOCKET NO. 458-12-5299

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
V.	§	
DINA MIN D/B/A TEXAS SPIRITS,	§	OF
Respondent	§	
(TABC CASE NO. 606693)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Staff) brought this action against Dina Min d/b/a Texas Spirits, 1001 S. Virginia Street, Terrell, Kaufman County, Texas (Respondent), alleging that Respondent’s employee sold an alcoholic beverage to an intoxicated person. Staff requested that Respondent’s permits and certificate be subject to a suspension or a monetary penalty. The Administrative Law Judge (ALJ) finds that Staff has not shown that Respondent’s employee sold alcoholic beverages to an intoxicated person.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On May 4, 2012, a public hearing was held before Jerry Van Hamme, ALJ, at the State Office of Administrative Hearings (SOAH), 6333 Forest Park Road, Dallas, Texas. Staff was represented by Sandra Patton, attorney. Respondent appeared *pro se*. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Texas Alcoholic Beverage Commission may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Alcoholic Beverage Code, a rule of the Commission, or sold or delivered an alcoholic beverage to an intoxicated person. Tex. Alco. Bev. Code § 11.61(b)(1), (14).

The Commission 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 violated a provision of the Code or a rule of the Commission during the existence of the license sought to be cancelled or suspended or during the immediately preceding license period, or sold, served, or delivered an alcoholic beverage to an intoxicated person. Tex. Alco. Bev. Code § 61.71(1), (6).

III. EVIDENCE

A. Petitioner's Evidence

On November 5, 2011, Tony Browning, an enforcement agent for the Commission, conducted an inspection of Respondent's business. Chantaorn Patrick Tes, Respondent's employee, was working as a sales clerk in Respondent's business and knew that Mr. Browning was conducting the inspection. Mr. Browning was standing behind the check-out counter next to Mr. Tes when Michael Hampton and Terrhonda Jackson entered Respondent's establishment. Ms. Jackson purchased alcoholic beverages for herself and Mr. Hampton from Mr. Tes.

Mr. Browning testified that he observed that Mr. Hampton and Ms. Jackson had bloodshot eyes, the odor of an alcoholic beverage on their breath, and slurred speech. In addition, Mr. Hampton looked into a cooler of beer and then asked Mr. Tes where the beer was located, Mr. Hampton opened a cooler of beer and then asked Mr. Tes if the beer inside the cooler was cold, and Mr. Hampton appeared to have unsteady balance.

Subsequent to the purchase of alcoholic beverages and upon exiting the store, Mr. Hampton and Ms. Jackson were detained by Mr. Browning and asked to perform field sobriety tests. Mr. Hampton refused. Ms. Jackson agreed and exhibited six out of six clues of intoxication. A Terrell police officer arrived at the scene and arrested them both for public intoxication. They subsequently paid fines for being publically intoxicated.

B. Respondent's Evidence

Chantaorn Patrick Tes testified that he was employed by Respondent's business and working as a sales clerk on November 5, 2011, when Mr. Browning entered and informed him that he was conducting an inspection of the premises. Mr. Tes then observed Mr. Hampton and Ms. Jackson enter the business. Mr. Tes recognized Mr. Hampton, knew he was a homeless person, and also knew that he and Ms. Jackson, who are cousins, were frequent customers of Respondent's business. Mr. Tes remembered that Mr. Hampton, while in the business, looked in a cooler of beer and asked where a certain brand of beer was located. Mr. Tes further testified that Ms. Jackson purchased alcoholic beverages from him, standing approximately three or four feet on the opposite side of the check-out counter from him and Mr. Browning. He did not observe that either of the customers exhibited any signs of intoxication. He, therefore, sold the alcoholic beverages to Ms. Jackson. He also testified that had he observed any signs of intoxication he would not have sold the alcoholic beverages to Ms. Jackson because he would not sell alcoholic beverages to an intoxicated person with a Commission agent standing right beside him.

IV. ANALYSIS

The issue in this case is not whether Mr. Hampton and Ms. Jackson were intoxicated at the time Mr. Tes sold Ms. Jackson alcoholic beverages, but whether they exhibited sufficient indicia of intoxication at the time of the purchase so as to put Mr. Tes on reasonable notice that they were intoxicated and thereby alert him that the sale of alcoholic beverages should not be made.

Respondent should only be subject to sanctions when it is shown that a sale of an alcoholic beverage was made to an individual who a reasonable person could see had lost the normal use of his or her mental or physical faculties by reason of the introduction of alcohol. Respondent should not be held accountable for selling to an intoxicated person if that person does not exhibit outward manifestations of impairment sufficient to alert Respondent's employees to that person's intoxicated condition. To do otherwise would be to create strict liability upon licensees.

Mr. Browning testified that the customers had bloodshot eyes, the odor of an alcoholic beverage on their breath, and slurred speech. He also said that Mr. Hampton appeared confused because he looked into a cooler of beer and then asked Mr. Tes where the beer was located, and because he opened a cooler of beer and then asked Mr. Tes if the beer inside the cooler was cold. These observations, in Mr. Browning's opinion, were sufficient to show that both Mr. Hampton and Ms. Jackson were intoxicated and that Mr. Tes should not have sold alcoholic beverages to Ms. Jackson. Mr. Tes testified, however, that he did not observe the customers exhibit these signs of intoxication and, given Mr. Browning's presence, would not have sold alcoholic beverages to Ms. Jackson if he had.

Mr. Tes' testimony is persuasive. It is unlikely that he would have sold alcoholic beverages to an intoxicated person with Mr. Browning standing next to him. Furthermore, even assuming that the signs of intoxication as related by Mr. Browning were likewise observable to Mr. Tes, those signs do not show, by a preponderance of the evidence, that the customers were intoxicated. For example, the questions asked by Mr. Hampton that Mr. Browning considered as signs of intoxication (i.e. where in the cooler was the beer located, and whether the beer in the cooler was cold) can be as easily explained as questions concerning where a particular brand of beer was located (as suggested by Mr. Tes) or whether the beer had been in the cooler long enough to be cold. These questions are not necessarily signs of alcohol-induced mental confusion. The other signs of intoxication, i.e. slurred speech, bloodshot eyes, and the odor of an alcoholic beverage on the customers' breath, while sufficient in a criminal encounter to warrant further investigation, do not show, by a preponderance of the evidence, that a reasonable person should have known that the customers were intoxicated.

Such signs would clearly show that alcoholic beverages had been consumed, but do not, alone, show that the individuals had lost the normal use of their mental or physical faculties by reason of the introduction of alcohol.

The fact that Mr. Browning engaged in further investigation by requesting that the customers perform field sobriety tests may have given him results that, as additional evidence, were sufficient to show that the customers were intoxicated; however, those additional results were not available to Mr. Tes at the time of the sale. The basis for Mr. Tes' responsibility lies in what was observable to him at the time of the purchase — whether based on what he knew or should have known at the time of the transaction he acted reasonably by concluding that the customers were not intoxicated — not on events that occurred subsequent to the sale that were not known to him or on the results of field sobriety tests which had not yet been performed.

As such, the evidence presented in the instant case, even viewed in a light most favorable to Staff, is not sufficient to show that Mr. Tes knew or should have known that at the time of the sale it was more likely than not that these two customers were intoxicated. Accordingly, Respondent's employee did not act unreasonably in failing to determine whether Mr. Hampton and Ms. Jackson were intoxicated.

V. RECOMMENDATION

The ALJ recommends that Respondent should not be subject to a suspension or civil fine for selling alcoholic beverages to an intoxicated person.

VI. FINDINGS OF FACT

1. On November 5, 2011, Dina Min d/b/a Texas Spirits (Respondent) held a Package Store Permit and a Beer Retailer's Off Premise License.
2. On that date, Chantaorn Patrick Tes was working as the sales clerk in Respondent's establishment.

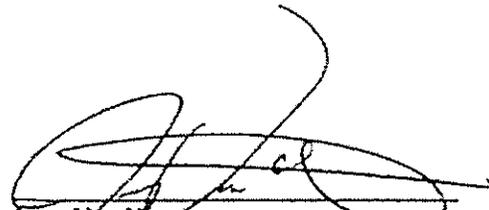
3. Tony Browning, an enforcement agent for the Commission, entered Respondent's establishment to conduct an inspection.
4. Mr. Tes was aware that Mr. Browning was a Commission enforcement agent and that he was inspecting the premises.
5. Mr. Browning was standing behind the check-out counter next to Mr. Tes when Michael Hampton and Terrhonda Jackson entered Respondent's establishment.
6. Ms. Jackson purchased alcoholic beverages for both herself and Mr. Hampton from Mr. Tes.
7. Mr. Hampton and Ms. Jackson stood approximately three or four feet from both Mr. Tes and Mr. Browning during the purchase.
8. Mr. Tes did not observe any indicia of intoxication exhibited by either Mr. Hampton or Ms. Jackson at the time of the purchase.
9. Neither Mr. Hampton nor Ms. Jackson exhibited sufficient indicia of intoxication at the time of the purchase to lead a reasonable person to believe that they were intoxicated.
10. Mr. Tes did not act unreasonably in failing to determine whether Mr. Hampton or Ms. Jackson was intoxicated.
11. Subsequent to the purchase Mr. Browning followed Mr. Hampton and Ms. Jackson out of Respondent's establishment, detained them, and asked them to submit to field sobriety tests.
12. A Terrell police officer arrived on the scene.
13. Mr. Hampton refused to perform any field sobriety tests. Ms. Jackson performed the Horizontal Gaze Nystagmus field sobriety test and exhibited six clues of intoxication.
14. The Terrell police officer arrested Mr. Hampton and Ms. Jackson for public intoxication.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Subchapter B of Chapter 5 § 6.01.

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 ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401.
4. Staff failed to meet its burden of proving that Respondent's employee sold alcoholic beverages to an intoxicated customer. Tex. Alco. Bev. Code §§ 11.61(b)(1), (14); 61.71(1), (6).

SIGNED 3 day of June, 2012.



Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings