

DOCKET NO. 615449

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
DMTT FAMILY CORPORATION D/B/A HOLLYWOOD FOOD STORE, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT Q699898, LICENSE BF699899	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-13-3092)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of August, 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 Timothy Horan presiding. The hearing convened on April 19, 2013 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 May 29, 2013. 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. No exceptions were 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 Fact 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 and license by the Code will be **SUSPENDED** beginning at 12:01 A.M. on October 2nd, 2013 and shall remain suspended for **TEN (10)** consecutive days, **UNLESS** Respondent pays a civil penalty in the amount of **\$3,000.00 ON OR BEFORE** September 24th, 2013.

If this Order is appealed and judgment is issued affirming the Order, the privileges granted by the Commission and activities authorized under the above permit and license by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18th)** day following the date the judgment is signed and shall remain suspended for **TEN (10)** consecutive days, unless Respondent pays the civil penalty in the amount of **\$3,000.00** on or before the **tenth (10th)** day following the date the judgment is signed.

This Order will become **final and enforceable** on the 18th day of September, 2013, **unless a Motion for Rehearing is filed by the 17th day of September, 2013.**

SIGNED this the 28th day of August, 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 28th day of August, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

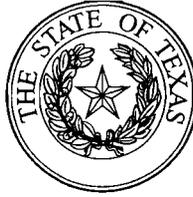
Timothy Horan
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

DMTT Family Corporation
d/b/a Hollywood Food Store
RESPONDENT
2003 W Alabama
Houston, Texas 77098
VIA FIRST CLASS MAIL, CMRRR # 70120470000133006749

Lonnie Knowles
ATTORNEY FOR RESPONDENT
1314 Texas Avenue, Suite 1112
Houston, Texas 77002
VIA FIRST CLASS MAIL, CMRRR # 70120470000133006770
AND
VIA FACSIMILE: (713) 224-6475

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: ramona.perry@tabc.state.tx.us

State Office of Administrative Hearings



RECEIVED

JUN 09 2013

Cathleen Parsley
Chief Administrative Law Judge

**TABC HOUSTON
LEGAL**

May 29, 2013

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-13-3092; Texas Alcoholic Beverage Commission vs. DMTT Family Corporation d/b/a Hollywood Food Store

Dear Ms. Cook:

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 "Timothy Horan", written over a horizontal line.

Timothy Horan
Administrative Law Judge

TH/mr
Enclosure

xc Ramona Pery, 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)
Lonnie Knowles, Attorney for Respondent, 1314 Texas Avenue, Suite 1112, Houston, Texas 77002 -**VIA
REGULAR MAIL**

2020 North Loop West Suite 111 Houston, Texas 77018
713.957.0010 (Telephone) 713.812.1001 (Fax)
www.soah.state.tx.us

II. DISCUSSION

A. Applicable Law

Pursuant to Texas Alcoholic Beverage Code (Code) § 106.13, TABC may 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 § 6.03(d)(4).

B. Evidence

Respondent holds a wine only package store permit number Q-699898 (Permit), which includes a beer retailer's off premise license (license). Respondent owns and operates Hollywood Food Store (Store) at 2003 W. Alabama, in Houston, Harris County, Texas. On May 27, 2009, Respondent served or sold alcoholic beverages to a minor. This violation resulted in the entry of waiver orders by TABC, which included suspensions of the Permits/Licenses and/or civil penalties.¹

On August 24, 2012, TABC conducted a sting operation to locate businesses selling alcoholic beverages to minors—anyone under the age of 21. TABC agents Chalen Gulley and Robert Hardcastle together with a volunteer, 15-year-old Grant Lightfoot (minor) and conducted the sting operation at Respondent's store.

Agent Gulley testified that he was in an undercover capacity and entered Respondent's store at approximately 3:22 p.m. on August 24, 2012, and that Agent Hardcastle was outside the store.

The minor was told by the TABC agents to enter the store and try to purchase alcohol. The minor was instructed to show identification if asked by the clerk and was further told not to lie about

his age. TABC agents took the minor's photo to document what he looked like the afternoon of the sting operation, along with a copy of his Texas under 21 Identification Card.² Agent Gulley stated that the minor, a black male, was dressed in a blue t-shirt, basketball shorts and shoes, was youthful in appearance, and that in his opinion looked under 21 years of age.

Agent Gulley entered the store first and observed two Asian females at the register. Agent Gulley observed the minor get a can of Bud Light from the cooler, place the beer on the counter, and purchase the beer from the clerk. Agent Gulley testified that the clerk never asked the minor for any identification to ascertain his age and that he was in the store the entire time the minor was in there. After the purchase, Agent Gulley left the store and met with Agent Hardcastle to give him a description of the clerk who sold the alcoholic beverage to the minor.

Agent Hardcastle stated that after he received the description of the clerk from Agent Gulley, he went into the store, identified the clerk as Thuan Le, and gave her a citation for the violation. Agent Hardcastle testified that he did not see any written policies pertaining to the sale of alcohol to minors posted anywhere inside the store. Ms. Le told Agent Hardcastle that she was neither TABC seller-server trained, nor was she aware of any store policies pertaining to the sale of alcohol to minors.

Tu Dang, owner of Hollywood Food Store, testified that she was not at the store at the time of the alleged violation. Ms. Dang stated that Ms. Le was employed as a clerk at the store on the night of the alleged violation and had worked at the store for two weeks. She said Ms. Le was no longer employed at the store. Ms. Dang stated that she had written a note and placed it on the cash register informing employees not to sell alcohol to minors, but that no other training was given by Respondent.

C. Discussion and Recommendation

The preponderance of the evidence supports a finding that Respondent's agent, servant, or

¹ TABC Ex. 2.

² TABC Ex. 3-4.

employee, with criminal negligence, sold an alcoholic beverage to a minor on August 24, 2012. The ALJ finds TABC met its burden of proof.

The minor, Mr. Lightfoot, was 15 years old when he entered the Store and purchased an alcoholic beverage. TABC agents testified that the minor appeared youthful in appearance and under the age of 21. It is undisputed that Ms. Le was employed by Respondent, and failed to request identification from the minor, even though the minor was prepared to present his Texas under 21 Identification Card.

At the time of the violation, none of Respondent's employees had attended any TABC training nor was there any policy at the store to prevent or to ensure that alcoholic beverages would not be sold to minors. Ms. Dang testified that she had put a note on the cash register informing employees not to sell to minors, however; Agent Hardcastle stated that he did not see any written policies or notes pertaining to sale of alcohol to minors anywhere in the store on August 24, 2012. The clerk also told the TABC agent that she was not aware of any store policies pertaining to the sale of alcohol to minors, and told Agent Hardcastle that she had neither received any training from the employer nor was she TABC seller-certified.

A permit or license to sell alcoholic beverages comes with the responsibility to ensure that alcoholic beverages are not sold to minors. Respondent had the duty to ensure that its employees were aware of, and followed, the laws prohibiting the sale of alcohol to minors. Respondent's employees should be expected to use a simple preventative measure of looking at the customer and asking for identification prior to selling alcoholic beverages to any young person to prevent the sale of alcoholic beverages to a minor. The employee's failure to ask the minor's age or to request any identification created a substantial and unjustifiable risk that alcohol would be sold to a minor. The employee's conduct grossly deviated from the standard of care an ordinary seller of alcoholic beverages would exercise under the same circumstances.

The ALJ recommends that Respondent's license and permit should be suspended for a period of 10 days, or in lieu of a suspension, Respondent pay a civil penalty in the amount of \$3,000.

III. FINDINGS OF FACT

1. DMTT Family Corporation d/b/a Hollywood Food Store (Respondent), holds a Wine Only Package Store Permit, Q-699898, which includes a Beer Retailer's Off Premise License, issued by Texas Alcoholic Beverage Commission (TABC) for the premises located at 2003 W. Alabama, Houston, Harris County, Texas.
2. On August 24, 2012, TABC conducted a sale to minor sting operation at the 2003 W. Alabama, Houston, Texas.
3. On August 24, 2012, Respondent's employee, Thuan Le, sold an alcoholic beverage to 15-year-old Grant Lightfoot (minor).
4. Ms. Le did not ask the minor, who was youthful looking, to produce identification to verify his age when she sold the alcoholic beverage to him.
5. On that date, Ms. Le was not TABC seller-certified.
6. Ms. Le should have been aware that her failure to ask the minor for identification created a substantial and unjustifiable risk that alcohol would be sold to a minor.
7. Ms. Le's conduct grossly deviated from the standard of care an ordinary seller of alcoholic beverages would exercise under the same or similar circumstances.
8. Respondent did not have any policies or procedures in place to prevent or discourage the sale of alcohol to minors.
9. On March 11, 2013, TABC sent a notice of hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in TABC's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, the matters asserted, and the legal authorities under which the hearing was to be held.
10. The hearing on the merits convened April 19, 2013, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, suite # 111, Houston, Texas, before Administrative Law Judge (ALJ) Timothy Horan. TABC was represented at the hearing by Ramona M. Perry, TABC Staff Attorney. Respondent was represented by Lonnie Knowles, attorney. The record closed on April 19, 2013.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant ch. 5 and §§ 11.61(b)(2), 106.03, and 106.13 of the Texas Alcoholic Beverage Code (Code).

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. Admin. Code ch. 2003.
3. Respondent received proper and timely notice of the hearing pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin Code ch. 155.
4. Respondent's employee sold an alcoholic beverage to a minor with criminal negligence as defined in Tex. Penal Code § 6.03(d), thereby violating § 106.13 of the Code.
5. Respondent's permit and license should be suspended for a period of 10 days, or in lieu of a suspension, Respondent should pay a civil penalty in the amount of \$3,000.

SIGNED May 29, 2013.


TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS