

**DOCKET NO. 458-03-3199**

|  |   |                                |
|--|---|--------------------------------|
| <b>TEXAS ALCOHOLIC BEVERAGE</b>              | § | <b>BEFORE THE STATE OFFICE</b> |
| <b>COMMISSION</b>                            | § |                                |
|  | § |                                |
| <b>V.</b>                                    | § | <b>OF</b>                      |
|  | § |                                |
| <b>MARIA R. VARGAS</b>                       | § | <b>ADMINISTRATIVE HEARINGS</b> |
| <b>D/B/A BUCHANAN'S SHAMROCK</b>             | § |                                |
| <b>PERMIT NOS. MB-512788 &amp; LB-512789</b> | § |                                |
| <b>HIDALGO COUNTY, TEXAS</b>                 | § |                                |
| <b>(TABC CASE NO. 603686)</b>                | § |                                |

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Maria R. Vargas, d/b/a Buchanan's Shamrock (Respondent) alleging that Respondent, with criminal negligence, gave or made an alcoholic beverage available to a minor. This proposal for decision finds that Respondent did not act with criminal negligence in giving or making available an alcoholic beverage to a minor.

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

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened on July 21, 2003, at the offices of the Texas Alcoholic Beverage Commission, 6521 N. 10<sup>th</sup> Street, McAllen, Hidalgo County, Texas. Staff was represented by counsel, Dewey Brackin. The Respondent was present and was represented by Miguel Rodriguez, manager for the Respondent.

**II. THE ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS**

There was one allegation in this proceeding, asserting that on January 16, 2003, the Respondent, with criminal negligence, furnished an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. Ch. 5, §106.06(a) (hereinafter referred to as the "Code"). Such a violation may be punished by cancellation or a maximum 90 day suspension of a permit, pursuant to §106.13(a) of the Code. Pursuant to §1.08 of the Code and §6.03(γ) of the Penal Code, Staff must prove by a preponderance of the evidence that, under the circumstances, the actions of Respondent created a substantial and unjustifiable risk that giving or making available alcohol to a minor would 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.

### III. STATEMENT OF THE EVIDENCE AND DISCUSSION

#### A. Staff's Evidence

Staff's documentary evidence consisted of a not-to-scale map of the Respondent's establishment. The evidence relative to the merits of this case was the live testimony provided by TABC Agent Knox.

Agent Knox testified that on January 16, 2003 she entered the Respondent's establishment at 11:50 p.m. where she noticed there was a large crowd of youthful appearing persons. Agent Knox was in uniform and had her badge showing. She observed a small framed individual in a green military type jacket sitting at the bar. This individual had no facial hair and appeared to her to be younger than 21 years of age. This individual was later identified as Emil Tijerina. Mr. Tijerina's date of birth is November 26, 1983; therefore he was 19 years old at the time. Agent Knox observed that Mr. Tijerina had a beverage in a clear cup or mug approximately two feet away from him. The color of the beverage was consistent with beer. She observed that the beer was closer to him than to the other end of the bar. There were no other persons in the direct vicinity of Mr. Tijerina. She observed Mr. Tejerina for three to seven minutes, but did not see him pick up, hold, or drink from the beer.

The bartender on duty that evening was Javier Rodriguez. Agent Knox observed Mr. Rodriguez pass by Mr. Tijerina several times during the observation. Agent Knox testified that after several passes, Mr. Rodriguez removed the beer from in front of Mr. Tijerina, but that he did so only because he saw the TABC Agent observing the situation. Agent Knox thought Mr. Rodriguez threw the beer away.

Agent Knox approached Mr. Tijerina and asked him to step outside with her at which time she obtained his identification. She performed a PASS test, which is a passive alcohol sensor which detects alcohol on a person's breath. The results of the PASS test showed that Mr. Tejerina had alcohol in his system. Mr. Tijerina never admitted that he possessed the alcohol at the Respondent's establishment, but he did admit to consuming alcohol, although he did not specify where he consumed it. Agent Knox cited Mr. Tijerina for Minor in Possession of Alcohol.

Agent Knox then proceeded to interview Mr. Rodriguez. She stated that Mr. Rodriguez denied that he sold the beer to Mr. Tijerina. Agent Knox stated that Mr. Rodriguez told her that the beer belonged to a homeless person who had left it on the bar. Agent Knox issued an administrative citation to Mr. Rodriguez and left the scene.

#### B. Respondent's Evidence

Respondent's documentary evidence consisted of an additional not-to-scale map of the Respondent's establishment. The evidence relative to the merits of this case was the live testimony provided by Javier Rodriguez.

Mr. Rodriguez testified that on that night the beverage in question was purchased by an individual who was waiting for a bus at the nearby bus station. Mr. Rodriguez described the individual as an oilfield worker who had been on the job for several weeks and was headed back home to Alice, Texas that evening via bus. After purchasing the beer, that individual realized that he lost his bus tickets. The individual asked Mr. Rodriguez to keep his beer while he went back to the bus station to look for the tickets. Mr. Rodriguez stated he left the beer up on the bar, closer to the bartender's side of the bar, awaiting the individual's return.

Mr. Rodriguez stated that he knew the TABC Agents who were in the area from the moment they arrived. That evening, just prior to the arrival of the TABC, several young people had just arrived, coming to visit one of the waitresses. Mr. Tijerina walked up to the bar and took the last available seat. This was in the vicinity of the beer in question. Mr. Rodriguez stated that Mr. Tijerina was with another individual at the time. Mr. Rodriguez also stated that Mr. Tijerina appear to him to be at least of 21 years of age.

Mr. Rodriguez observed Agent Knox come into the bar and stand about 15- 20 feet away from Mr. Tijerina. Agent Knox stared at Mr. Tijerina for about four minutes. Mr. Rodriguez did pass a few times, picked up some empty bottles and the beer in question. He placed the beer in the sink area under the bar.

Mr. Rodriguez observed Agent Knox talking to Mr. Tijerina outside the bar. Mr. Rodriguez stated that he told Agent Knox who the beer belonged to and described what he was wearing. He stated that he told the Agent he expected him to return for the beer.

Mr. Rodriguez stated that he gave the beer to the owner who returned from the bus station about an hour after he had left. By this time, the Agent had left the scene.

### **C. Discussion**

According to Section 6.03(d) of the Texas Penal Code, a person acts with "criminal negligence...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."

The issue here is whether the actions in this case constitute criminal negligence. The parties agree that Mr. Tijerina was under the age of 21 and that there was an alcoholic beverage, a beer, near him as he sat at the bar that night. What the parties disagree about is whether under the facts of this case the actions of the Respondent constitute giving or making an alcoholic available beverage to a minor.

The TABC asserts that because Agent Knox observed Mr. Tijerina sitting at the bar, within two feet of the beer and that because Mr. Tijerina had alcohol in his system, the TABC has shown by a preponderance of the evidence that an alcoholic beverage was made available to a minor.

The Respondent asserts that the beverage belonged to someone else and Mr. Tijerina never purchased, owned, picked up, touched or drank the beer; therefore it was not made available to him.

The only evidence that the beer was made available to Mr. Tijerina was that he was in the vicinity of the beer during the short observation by Agent Knox. There is simply no other evidence that the alcoholic beverage was made available to him by the Respondent. The standard is whether this constituted a gross deviation from the standard of care that an ordinary person would exercise under the circumstances. Clearly, allowing any minor in the vicinity of an alcoholic beverage can create the risk that the minor could consume it. The evidence here that the beverage was in the proximity of the minor for a few minutes does not seem to be an extraordinary risk that overcomes the standard of care required by the Respondent.

After considering all the evidence, The Administrative Law Judge finds insufficient evidence that Respondent acted "with criminal negligence." Staff has not proved its case by a preponderance of the evidence.

Although all the evidence presented at the hearing was not discussed in this Proposal For Decision, all of the evidence was considered by the Administrative Law Judge in preparing this Decision.

#### IV. FINDINGS OF FACT

1. Maria R. Vargas, doing business as Buchanan's Shamrock, located at 1415 Austin Street, McAllen, Hidalgo County, Texas, holds permit numbers MB-5:2788 and LB-512789 issued by the Texas Alcoholic Beverage Commission.
2. On or about May 20, 2003, the Staff sent a notice of hearing to Respondent by certified mail, return receipt requested, and all parties appeared.
3. The hearing on the merits was held July 21, 2003, at 2:30 p.m. at the offices of the Texas Alcoholic Beverage Commission, 6521 N. 10<sup>th</sup> Street, McAllen, Hidalgo County, Texas. Staff was represented by counsel, Dewey Brackin. The Respondent was represented by Miguel Rodriguez, manager for Respondent.
4. On January 16, 2003, the Respondent was open for business. Mr. Emil Tijerina was sitting at the bar.
5. Mr. Tijerina's date of birth is November 26, 1983; therefore he was 19 years of age on the date in question.
6. There was an alcoholic beverage, a beer, on the bar within two feet of Mr. Tijerina.
7. TABC Agent Knox observed Mr. Tijerina seated at the bar, and the beer in his vicinity for a few minutes.

8. The beer was removed from the presence of the minor by the bartender, Javier Rodriguez.
9. Mr. Tijerina did not touch or drink the beer.
10. The beer was not purchased by Mr. Tijerina.
11. The beer was not made available to Mr. Tijerina by the Respondent.

#### V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Chapter 5, §§ 6.01 and 106.13 of the Code.
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN., Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN, §2001.051 and §2001.052 .
4. On January 16, 2003, Respondent did not with criminal negligence give or make available an alcoholic beverage to Emil Tijerina, a minor.

SIGNED this 22 nd day of September, 2003.



Melissa M. Ricard  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 603686**

|                                  |   |                     |
|----------------------------------|---|---------------------|
| IN RE MARIA RITA VARGAS          | § | BEFORE THE          |
| D/B/A BUCHANAN'S SHAMROCK        | § |                     |
| GRILL & SPORTS PUB               | § |                     |
| PERMIT NO. MB-512788 & LB-512789 | § | TEXAS ALCOHOLIC     |
|                                  | § |                     |
|                                  | § |                     |
| HIDALGO COUNTY, TEXAS            | § |                     |
| (SOAH DOCKET NO. 458-03-3199)    | § | BEVERAGE COMMISSION |

**ORDER**

**CAME ON FOR CONSIDERATION** this 25th day of September, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on July 21, 2003, and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 22, 2003. This 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.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Mixed Beverage Permit No. MB-512788 and Mixed Beverage Late Hours Permit No. LB-512789 are hereby **DISMISSED**.

**This Order will become final and enforceable on October 16, 2003**, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 25<sup>th</sup> day of September, 2003.

On Behalf of the Administrator,



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Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/YT

The Honorable Melissa M. Ricard  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE : (361) 884-5427**

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**REGULAR MAIL**

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Legal Division, Texas Alcoholic Beverage Commission

Licensing Division

McAllen District Office