

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 12, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

Certified Mail No. Z133586763

RE: **Docket No. 458-99-1501; Texas Alcoholic Beverage Commission vs. Richard Martinez Alcantar
d/h/a Jan's Place (TABC Case No. 584383)**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Gayle Gordon, Legal Director for Texas Alcoholic Beverage Commission and to Robert D. Miller Attorney for Respondent.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

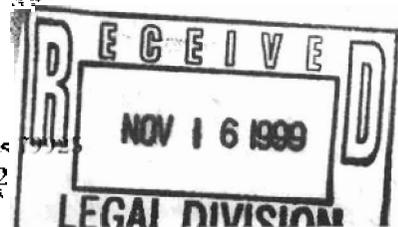
/Louis R. Lopez
Administrative Law Judge

LRL:et

Enclosure

xc: Shance Woodbridge, Docket Clerk, State Office of Administrative Hearing -REGULAR MAIL
Gayle Gordon, Legal Director, Texas Alcoholic Beverage Commission -CERTIFIED MAIL NO. Z 133 586 767
Robert D. Miller, Atty. - CERTIFIED MAIL NO. Z 133 586 728, RETURN RECEIPT REQUESTED

Willows Office Complex
9434 Viscount, Suite 102 ♦ El Paso, Texas
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. DOCKET NO. 458-99-1501
(TABC NO. 584383)

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
RICHARD MARTINEZ ALCANTAR dba JAN'S PLACE PERMIT NO. BG-408634 HOWARD COUNTY, TEXAS	§ § § § §	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The TEXAS ALCOHOLIC BEVERAGE COMMISSION (TABC), Petitioner, brought this action against, RICHARD MARTINEZ ALCANTAR dba JAN'S PLACE, Respondent, to cancel a Wine and Beer Retailer's Permit for violation of the Texas Alcoholic Beverage Code [hereinafter Code]. The Petitioner requested cancellation of Respondent's permits based on permitting, with criminal negligence, a minor to possess and consume an alcoholic beverage. This proposal recommends that there be a suspension of 60 days with a civil penalty of \$100 per day.

On October 6, 1999, a hearing was held in Midland, Texas before an administrative law judge with the State Office of Administrative Hearings. The parties had no objection on jurisdiction and stipulated that the requirements for proper notice of hearing had been met.

Discussion

A. Statutory Provisions

The following provisions are relevant in the consideration of this cause of action:

Code Section 106.03:

SALE TO MINORS. (a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.

(c) [A] violation of this section is a misdemeanor punishable by a fine of not less than \$100 nor more than \$500, by confinement in jail for not more than one year, or by both.

Code Section 106.06:

PURCHASE OF ALCOHOL FOR A MINOR; FURNISHING ALCOHOL TO A MINOR. (a) Except as provided in Subsection (b) of this section, a person commits an offense if he purchases an alcoholic beverage for or gives or with criminal negligence makes available an alcoholic beverage to a minor.

(b) A person may purchase an alcoholic beverage for or give an alcoholic beverage to a minor if he is the minor's adult parent, guardian, or spouse, or an adult in whose custody the minor has been committed by a court, and he is visibly present when the minor possesses or consumes the alcoholic beverage.

(c) A violation of this section is a misdemeanor punishable by a fine of not less than \$100 nor more than \$500.

Texas Penal Code Section 6.03(d):

(d) A person acts with criminal negligence, or is criminally negligent, 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 a 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.

B. Evidence

Petitioner's major witnesses were Mary Ann Escovedo and Timothy J. Rios. Respondent was the only one who testified on his own behalf.

Few of the facts were disputed at the hearing. On the night of February 27, 1999, Mary Ann Escovedo was the bartender at Jan's Place. The permittee, Respondent Richard Alcantar, was not present that night. Escovedo testified that she served beer that evening to a table of approximately seven men. She stated that she never asked any of the men for any proof of birth date nor did she even directly ask them their age. She assumed they were over the legal drinking age of 21 years because they were friends of her brother who was more than 21. The policy of Jan's Place was to allow minors to come inside without asking them proof of age before entering. Timothy J. Rios paid Escovedo for most of the beer that was served at the table at which Antonio "Tony" Rodriguez was seated. Rios drank beer himself. Escovedo saw Rodriguez drinking beer from a glass. She also saw a bottle of Christian Brothers brandy on the table from which some of the young men were taking shots. Escovedo knew both of the men. Rodriguez talked and

walked normally and did not look drunk. Both Rios and Rodriguez were 20 years old at the time.

Rios had held a birthday party at his house for his daughter that afternoon. Rodriguez arrived at three o'clock. Rios estimated that Rodriguez had eight or nine beers at the party. At 7:00 p.m., the two men, along with four others, went to Jan's Place. Rodriguez rode in Rios' car. Rios estimated that Rodriguez had three or four beers at Jan's before they returned to the Rios home at 8:30. Rodriguez left in his own car as soon as they arrived at the Rios house. Rodriguez did not appear intoxicated to Rios at any time.

Soon after leaving the Rios house, Rodriguez hit a boy on a bicycle and several blocks away hit a car. He fled the scene in both collisions. The boy was pronounced dead a few hours after being hit. Blood taken from Rodriguez showed an alcohol content of .24.

Richard Alcantar testified that he was always admonishing bartenders to be sure not to serve minors. He did not, however, give any further detail on how he trained his bartenders nor did he provide any written instructions. He did not state what sanction there was for a bartender who served minors. Mr. Alcantar said that the monthly gross receipts in Jan's Place were between \$2,600 and \$2,800.

C. Analysis

Bartender Mary Ann Escovedo was criminally negligent in selling beer to Rios and allowing Rodriguez to drink in the bar. She never even asked the young men's ages much less ask them for identification before they drank alcohol. Her attitude was much too lax as shown in these actions, and it was an unwarranted assumption that all of them were more than 21 because she knew one of them was 21.

The actions of the bartender are attributable to the Respondent, and therefore, he must be considered criminally negligent in selling and providing beer to two minors. Consequently, he must suffer a legal sanction. The question then is whether he should suffer cancellation of his permit or only a suspension. In Mr. Alcantar's favor, it is taken into account that he was not present that evening and that his bartender may well have decided to serve the minors in spite of it being prohibited because they were acquaintances of hers. It will also count in his favor that he has never been cited for serving a minor before, that neither Rios nor Rodriguez showed any signs of intoxication, that most of the alcohol imbibed by Rodriguez was before arriving at Jan's Place, and that both men were less than a year from becoming 21. It is also important that the violation which contributed to Rodriguez' intoxication--furnishing alcohol to a minor--is punishable only by a fine which does not exceed \$500.

There was a tragic result from Rodriguez' driving that night--the death of a boy--but given the various mitigating circumstances, the Respondent's permit should not be canceled. The recommended suspension will likely have a definite impact on the Respondent and his income, in addition to the lawsuit that is being pursued against him by the dead boy's parents.

A civil penalty in lieu of suspension will be recommended in spite of wording in the 1997 amendment to Code Sec. 11.64. That amendment states that payment of a civil penalty shall be allowed except in the case of certain violations. The list of violations includes the two involved in this case, 106.03 and 106.06. The amendment, however, does not peremptorily prohibit the allowance of a civil penalty but instead states that the "commission shall adopt rules addressing when suspension may be imposed pursuant to this section without the opportunity to pay a civil penalty." Those rules have not yet been implemented, and consequently, Section 11.64 will be interpreted as allowing the assessment of a civil penalty. Allowance of a civil penalty was a requirement for all violations under Section 11.64 prior to 1997.

D. Recommendation

It is recommended that there be a suspension of Respondent's permit for 60 days, and in lieu of suspension, a civil penalty of \$100 per day, for a total penalty of \$6,000.

FINDINGS OF FACT

1. Richard Martinez Alcantar dba Jan's Place, is located at 2711 Wasson Road, Big Spring, Howard County, Texas, and was issued Wine and Beer Retailer's Permit No. BG-408634 by the Texas Alcoholic Beverage Commission (TABC) on March 4, 1997. It has been regularly renewed. As a permittee of TABC, Respondent is subject to the provisions of the Code.
2. On October 6, 1999, a hearing was held before Administrative Law Judge Louis Lopez in the Midland City Hall, Council Chambers, 300 North Loraine, Midland, Texas. The Petitioner was represented by attorney Gayle Gordon. The Respondent was represented by attorney Robert D. Miller. Evidence was received, and the hearing was closed on the same day. The parties stipulated that the requirements for proper notice of hearing had been met.
3. On the night of February 27, 1999, Mary Ann Escovedo was the bartender at Jan's Place. Respondent Richard Alcantar was not present that night.
4. The policy of Jan's Place was to allow minors to come inside without asking them for proof of age before entering.
5. On the same day at 3:00 in the afternoon, Antonio "Tony" Rodriguez went to the home of Timothy J. Rios for a birthday party and drank eight or nine beers there.
6. At 7:00 p.m., Rodriguez rode in Rios' car to Jan's Place, where he drank three or four beers before the two men returned to the Rios home at 8:30.

7. Mary Ann Escovedo served beer to a table of approximately seven men but never asked any of them for any documentary proof of birth date nor did she even ask them their age.
8. Rios paid Escovedo for most of the beer that was served at the table at which Rodriguez was seated, and he openly drank some beer himself.
9. Rodriguez drank beer from a glass, and there was an open bottle of Christian Brothers brandy on the table from which some of the young men were taking shots.
10. Timothy Rios was born on March 7, 1978, which made him 20 years old on the day under consideration, and Antonio Rodriguez was born on February 26, 1979, which made him 20 years and one day old. Escovedo knew both of the men.
11. Rodriguez talked and walked normally throughout the day and did not look drunk.
12. Rodriguez left in his purple Hyundai from the Rios house as soon as they arrived and soon after that hit a boy in a bicycle who later died. Several blocks away, Rodriguez hit a car. He fled the scene in both collisions.
13. Blood was taken from Rodriguez at 9:47 p.m. and was analyzed in the Texas Department of Public Safety laboratory in Lubbock as having an alcohol content of .24 grams per 100 milliliters of blood.
14. Mary Ann Escovedo was an employee of Respondent on February 27, 1999.
15. Based on her lax attitude and unwarranted assumptions about the ages of young patrons, bartender Mary Ann Escovedo was criminally negligent (1) in selling beer to Timothy Rios and (2) in allowing Tony Rodriguez to drink in the bar.
16. The monthly gross receipts in Jan's Place are between \$2,600 and \$2,800.
17. Respondent has the following factors in his favor:
 - a. he was not present that evening,
 - b. he regularly admonished bartenders in his employ to be sure not to serve minors,
 - c. his bartender was acquainted with Rios and Rodriguez and this may have been a factor in not asking them for identification, in spite of being instructed not to serve minors,
 - d. he had not been cited for serving a minor before the night in question,
 - e. neither Rios nor Rodriguez showed any signs of intoxication in the bar,

- f. most of the alcohol imbibed by Rodriguez was before arriving at Jan's Place,
- g. Rodriguez did not drive away from Jan's Place,
- h. both Rodriguez and Rios were less than a year from becoming 21, the legal drinking age.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to any or all of the following: Texas Alcoholic Beverage Code [Code] Sections 5.31--5.44, 6.01, 11.61, and 61.71.
2. Service of proper notice of the hearing was made on Respondent pursuant to Code Section 11.63 and the Administrative Procedure Act, Texas Government Code Sections 2001.051 and 2001.052.
3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to Code Section 5.43(a) and the Tex. Government Code Chapter 2003.
4. Respondent, through his employee, sold an alcoholic beverage to Timothy J. Rios with criminal negligence in violation of Code Section 106.03.
5. Respondent, through his employee, made alcoholic beverages available to Antonio "Tony" Rodriguez with criminal negligence in violation of Code Section 106.06.
6. Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's permit should be suspended for 60 days, and in lieu of suspension, a civil penalty be assessed of \$100 per day, for a total of \$6,000.

SIGNED this 11th day of November, 1999.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS