

DOCKET NO. 583599

IN RE MARIA DEL CARMEN NUNEZ OCHOA	§	BEFORE THE
D/B/A SIX PACK STORE	§	
PERMIT NO. BQ439369	§	
	§	TEXAS ALCOHOLIC
	§	
HIDALGO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-3362)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd day of October, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl Corbitt. The hearing convened on May 8, 2000. The hearing wrecessed to June 6, 2000, for the presentation of additional evidence. On June 6, 2000, the hearing reconvened and no new evidence was received. The record closed on July 3, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 25, 2000. 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. A Brief in Support of Exclusion of Evidence was filed on June 20, 2000.

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.

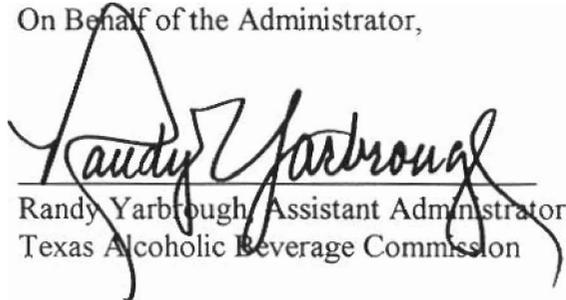
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations regarding Permit No. BQ439369 be hereby **DISMISSED**.

This Order will become final and enforceable on November 13, 2000, 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 23rd day of October, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Earl Corbett
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
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Stephen Leas
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P.O. Box 2257
McAllen, Texas 78502-2257
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Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

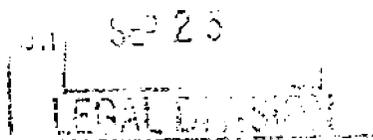
Licensing Division
McAllen District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 25, 2000



Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

**RE: Docket No.458-99-3362; TABC vs. Maria Del Carmen Nunez Ochoa
D/B/A Six Pack Store, BQ-439369**

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Christopher Burnett, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Stephen Leas attorney for Respondent. For reasons discussed in the Proposal for Decision, this proposal recommends no action be taken against the Respondent.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

Earl Corbitt
Administrative Law Judge

ECrk
Enclosure

xc: Christopher Burnett, Staff Attorney, *TABC*, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Stephen Leas, P.O. Box 2257, McAllen, Texas 78502-2257-**VIA REGULAR U.S. MAIL**
Rommel Corro, Docket Clerk, *State Office of Administrative Hearings*- **VIA HAND DELIVERY**

DOCKET NO. 458-99-3362

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
MARIA DEL CARMEN NUNEZ OCHOA D/B/A SIX PACK STORE BQ-439369	§	ADMINISTRATIVE HEARINGS
	§	
	§	

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the Wine and Beer Retailer's Off-Premise Permit held by Maria Del Carmen Nunez Ochoa d/b/a Six Pack Store (the Respondent) based on allegations the Respondent, with criminal negligence, sold, served, dispensed, or delivered alcoholic beverages to minors. The Respondent denied the allegations. This proposal recommends no action be taken against the Respondent.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

On January 13, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent, at P. O. Box 1381, Mercedes, Texas 78570. The Respondent received proper and timely notice of the hearing. The hearing convened on May 8, 2000, before Administrative Law Judge (ALJ) Edel P. Ruiseco at the offices of the State Office of Administrative Hearings (SOAH) at 1508 Dove Avenue, McAllen, Texas. Neither party contested notice, jurisdiction, or venue. Staff Attorney Christopher Burnett represented the staff of TABC (the Staff.) Stephen Leas, attorney, represented the Respondent. After the receipt of evidence, the hearing was recessed to June 6, 2000, for the presentation of additional evidence. On June 6, 2000, the hearing reconvened and no new evidence was received. The record was left open to receive briefs from the parties. On June 22, 2000, the Respondent filed its brief in support of the exclusion of evidence. TABC filed no response and the record closed on July 3, 2000.

On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt for preparation of the proposal for decision. The undersigned ALJ has reviewed the record in the case including the audio tape of the hearing and the exhibits.

II. REASONS FOR DECISION

A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 61.71(a)(1).

The Code states at Section 106.13:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 days a retail license or 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....

B. Evidence

The evidence consisted of the testimony of two witnesses and the offer of four exhibits. TABC offered the testimony of Agent, Aida Cantu. Maria Del Carmen Nunez Ochoa testified on behalf of the Respondent. The undersigned ALJ has taken official notice of the Notice of Hearing issued in this case.

1. TABC's Evidence

Agent Aida Cantu testified that on an unspecified date she received a complaint indicating the Respondent had, on October 16, 1998, sold alcoholic beverages to minors. She interviewed two young men, Omar Isaac Arevalo, age 17, and Joseph Damian DeLeon, age 17. Agent Cantu obtained a sworn statement from the two minors. Agent Cantu also took the two minors to the Respondent's establishment, but they were unable to identify the person who allegedly sold the alcoholic beverages to them.

The Staff offered into evidence the written sworn statements taken from the minors by Agent Cantu as Exhibits Nos. 1 and 2. One statement was dated November 13, 1998. The other was dated April 6, 1999. The minors were not present to testify at the hearing. The Respondent objected to the two exhibits on the grounds that they were hearsay and the officer making the allegations against the Respondent was the same person as the officer who administered the oaths for the two affidavits.

ALJ Ruiseco withheld a ruling on the admissibility of Exhibits Nos. 1 and 2 pending receipt of a brief on their admissibility from the Respondent and a response from the Staff. The Respondent filed its brief on June 22, 2000. The Staff filed no response. ALJ Ruiseco ruled Exhibits Nos. 1 and 2 were not admissible.

The Staff offered into evidence, without objection, Exhibit No. 3, two photographs of Omar Isaac Arevalo, one of the minors, and Exhibit No. 4, a photograph of Joseph DeLeon, the other minor.

2. The Respondent's Evidence

Maria Del Carmen Nunez Ochoa denied selling alcoholic beverages to minors. She denied selling alcoholic beverages to the young men portrayed in Exhibits Nos. 3 and 4. She testified she was present at her establishment on the date when a TABC Agent came in and stated that a woman between the ages of 40 and 50 had sold beer to minors. The minors, who were with the Agent, did not identify Ms. Ochoa as the person who sold the beer. Ms. Ochoa testified the only other employee of the Respondent is her daughter, aged 22. The TABC Agent and the minors left the establishment without identifying anyone as the person who allegedly sold the beer.

III. ANALYSIS AND RECOMMENDATION

A. Analysis

Exhibits Nos. 1 and 2 are unmitigated hearsay. When objected to, they are wholly inadmissible. That being said, there is no reason to further discuss the internal flaws they contain or the unfairness associated with the complainant administering the oath to the affiants.

The Staff had the burden of proof in this case. The Staff failed to show that the Respondent, with criminal negligence, sold alcoholic beverages to minors on October 16, 1998. ALJ Ruiseco allowed additional time after the hearing on the merits for the parties to locate the two minors to obtain their testimony. No one located the two. They gave no testimony. They were not cross-examined. The Respondent was not allowed to confront its accusers. There is insufficient evidence to support any adverse action against the Respondent in this case.

B. Recommendation

The undersigned ALJ recommends no action be taken against the Respondent's permit as a result of the allegations that served as a basis for the instant hearing.

IV. PROPOSED FINDINGS OF FACT

1. Maria Del Carmen Nunez Ochoa d/b/a Six Pack Store (the Respondent) holds a Wine and Beer Retailer's Off-Premise Permit issued by the Texas Alcoholic Beverage Commission (TABC).

2. On January 13, 2000, the staff (the Staff) of TABC issued a notice of hearing asserting the Respondent was criminally negligent in selling alcoholic beverages to a minor, stating the time and place of the hearing, and setting forth the legal authority and jurisdiction under which the hearing was to be held.
3. The Respondent timely received the notice of hearing described in Finding of Fact No. 2.
4. The hearing on the merits convened on May 8, 2000, before Administrative Law Judge Edel P. Ruisecco at an office of the State Office of Administrative Hearings, 1508 Dove Avenue, McAllen, Texas.
5. On an unspecified date, TABC Agent Aida Cantu received a complaint that the Respondent, on October 16, 1998, had sold beer to minors.
6. Agent Cantu interviewed and took sworn statements from Omar Isaac Arevalo, age 17, on November 13, 1998, and Joseph De Leon, age 17, on April 6, 1999.
7. Neither Omar Isaac Arevalo nor Joseph De Leon testified at the hearing on May 8, 2000.
8. No one identified any employee, agent, or servant of the Respondent as the person who allegedly sold alcoholic beverages to minors.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Findings of Fact Nos. 5-8, there is insufficient evidence to conclude the Respondent, or its agent, employee, or servant, with criminal negligence, sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. §106.13.

5. Based on the foregoing, no disciplinary action should be taken against the Respondent's permit.

SIGNED this 25th day of September, 2000.



EARL A. CORBITT
Administrative Law Judge
State Office of Administrative Hearings

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge
September 25, 2000

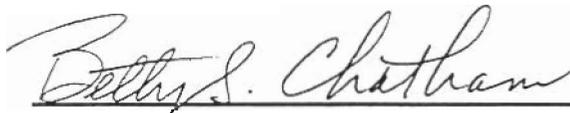
TO: Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

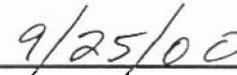
On this date the following item(s) were delivered to you regarding; **Docket No. 458-99-3362; TABC vs. Maria Del Carmen Nunez Ochoa D/B/A Six Pack Store BQ-439369**

1. Proposal for Decision

Your signature below acknowledges receipt of the above-referenced item(s) from the State Office of Administrative Hearings.



Signature of Receiving Party



Date

EC/rk