

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
RAUL N. RAMIREZ D/B/A	§	
RAUL'S CORRAL MEXICAN FOOD & STEAKS, BE213701	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 576852)	§	ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Raul N. Ramirez d/b/a Raul's Corral Mexican Food & Steaks (Respondent), alleging that Respondent's employee, with criminal negligence, sold an alcoholic beverage to a minor in violation of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permit be suspended for a period of 20 days, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$3,000. The Administrative Law Judge (ALJ) recommends suspension of Respondent's permit for a period of 20 days. The ALJ further recommends that Respondent be given an opportunity to pay a civil penalty in lieu of suspension in the amount of \$3,000.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch 5, §§6.01 and 106.13. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal of decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There were no contested issues of notice or jurisdiction in this proceedings.

On January 19, 1999, a hearing convened before Tanya Cooper, ALJ, of the State Office of Administrative Hearings, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented by Antonius B. Massar, Attorney. Evidence was received from both parties on that date by testimony provided by witnesses and documentary evidence. The record was closed on February 19, 1999, after the parties were allowed to submit proposed findings of fact and conclusions of law.

## LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized to cancel or suspend a permit or license for not more than 60 days, pursuant to §61.71(a)(5) of the Code, if a licensee or permittee violates the Code. In this case, a violation of Code provision §106.13 is alleged. That section makes it a violation to, with criminal negligence, sell or deliver an alcoholic beverage to a minor. Criminal negligence is defined in TEX. PENAL CODE ANN. §6.03(d) as:

conduct, or results of conduct, when an actor 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 viewpoint.

The standard of proof required to establish a violation is that required in a civil case: the preponderance of the evidence. The trier of fact must ask if, weighing all the evidence, the party with the burden of proof has shown by 51% of the evidence that the alleged violation occurred. Staff bears the burden of proof to show the alleged violation occurred.

When suspension of a permit or a license is authorized, the permittee must be given an opportunity to pay a civil penalty in lieu of suspending the permit. The amount may not be less than \$150 nor more than \$25,000 for each day the permit was to have been suspended. If the penalty is not paid before the sixth day after the permittee is notified of the amount, the permittee loses the opportunity to pay it, and the permit's suspension shall be imposed. In determining the amount of the penalty, Texas Alcoholic Beverage Commission is directed to consider the economic impact a suspension would have on the permittee. [See Code §11.64.]

## EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds a Beer Retailer's On Premises License, BE-213701, issued to Respondent doing business as Raul's Corral Mexican Food & Steaks, 200 Corinth, Dallas, Dallas County, Texas. Staff alleged that Respondent's employee, with criminal negligence, sold, served, or delivered an alcoholic beverage to a minor on June 17, 1997.

On June 17, 1997, Detective D.S. Town, Dallas Police Department, Vice Division, was assigned to work as an observer in a "sting" operation involving businesses authorized to sell alcoholic beverages. Detective Town, along with a selected minor confidential informant, Rebecca Gage, entered into the licensed premises, Raul's Corral Mexican Food and Steaks, on 200 Corinth, Dallas, Dallas County, Texas, for that purpose.

Ms. Gage was sixteen years old at the time of this activity. She was youthful in appearance and was dressed in typical teenager attire consisting of a white undershirt, pink sweater, and blue jeans. Ms. Gage had her valid Texas driver's license that reflected its provisional status, contained a side-angle photo of her, and indicated her correct date of birth, 6-29-80, in her possession while in the licensed premises. Detective Town was working in an undercover capacity dressed in plain clothes.

Mario Medeles was working at the licensed premises on that day. He was behind the store's counter waiting on customers, taking money, and operating the store's cash register. Ms. Gage approached the counter with a six-pack of Coor's Light beer, an alcoholic beverage. Detective Town was a few feet behind Ms. Gage and to her side observing the interaction between Ms. Gage and Mr. Medeles.

As Ms. Gage waited to purchase the beer, Mr. Medeles asked to see her identification. She produced her Texas driver's license as requested. Mr. Medeles examined Ms. Gage's license, returned it to her, and accepted payment of the alcoholic beverage receiving approximately \$4.77 from Ms. Gage. Ms. Gage left the premises with the alcoholic beverage. Mr. Medeles was later arrested for sale of alcoholic beverage to a minor.

Mr. Medeles testified that he has been employed by Respondent for ten years and is the store manager. He stated that he is not good with numbers and uses a calculator to determine customers' ages if he questions whether they are under age and attempting to purchase alcoholic beverage. Mr. Medeles testified that he used a calculator to check Ms. Gage's age, but conceded that he was not watching the calculator's numbers as he entered her date of birth into the calculator. He cited distracting factors such as other customers in the store and dealing with lottery purchases.

Mr. Medeles stated when he looked at his calculator, the age for Ms. Gage was shown to be "27". He stated that he commented to Ms. Gage about her youthful appearance, but did not specifically question her regarding whether she was 21 years of age. Ms. Gage thanked Mr. Medeles for the compliment without further comment between either of them regarding her actual age. As Ms. Gage exited from the store, another customer, Roy Miller, commented to Mr. Medeles regarding Ms. Gage's youthful appearance. Mr. Medeles stated to Mr. Miller that he had checked her date of birth on his calculator and that she was over 21 years of age.

Mr. Miller further testified that he is a regular customer at the licensed premises. He stated that he had observed Mr. Medeles using a calculator on several occasions to determine ages of persons purchasing alcoholic beverages.

Respondent contends that although a sale of alcoholic beverage to a minor may have occurred, Mr. Medeles' actions were not criminally negligent, but rather resulted from mistake or accident. Respondent argues that Mr. Medeles acted reasonably and prudently in light of his difficulty with numbers by using a calculator to determine ages.

From Mr. Medeles' testimony, it is clear that he had not attended any type of seller-server training prior to this incident that could provide Respondent with a defense to the actions of any of Respondent's employees. Further, Mr. Medeles stated that he had never been informed by Respondent or anyone else regarding the meaning of provisional status as noted on Texas driver's licenses or the significance of photographs contained in Texas driver's licenses that were not full frontal views of the license holders.

Respondent's licensing history, as maintained by the Texas Alcoholic Beverage Commission, reveals that Respondent's permit has previously been suspended. The prior suspension occurred in 1990 and was for five days. The basis for this suspension was a sales violation, selling alcoholic beverage for the purpose of resale. No evidence regarding the economic impact any suspension of Respondent's permit might have on his business was presented for consideration in these proceedings.

## ANALYSIS

It is clear from the evidence that Mr. Medeles, Respondent's employee, sold an alcoholic beverage, beer, to Ms. Gage. At the time of this sale, Ms. Gage was a minor. The only issue to be determined is whether Mr. Medeles acted with criminal negligence in selling the alcoholic beverage to Ms. Gage. The evidence in this case supports the conclusion that Mr. Medeles acted with criminal negligence in selling an alcoholic beverage to Ms. Gage.

Ms. Gage, working with an undercover police officer, was sixteen years old at the time she was able to purchase the beer at Respondent's premises. She was very youthful in appearance. This fact was noted even by Respondent's employee, Mr. Medeles, as well as another customer in the store, Mr. Miller.

Mr. Medeles' testimony that he is not good with numbers may be correct. His use of a calculator to check ages is commendable if he is unsure of his ability to make these calculations mentally, but it is unlikely that he would not be able to mentally calculate that 97 (the year of this event) minus 80 (the year Ms. Gage was born) and realize that the number 27, as reflected by his calculator, was incorrect.

Further, Mr. Medeles allowed other activities in the store to distract him. By his own admission he was not watching as he entered the numbers into his calculator to determine Ms. Gage's age. Absolute reliance on the results obtained from the calculator would only be reasonable if proper care was exercised in using the equipment while making any calculations.

A reasonably prudent seller of alcoholic beverages would exercise even greater caution when confronted with a purchaser whose appearance was so obviously younger than the age Mr. Medeles thought Ms. Gage was, as based upon his calculation. It is not uncommon for underage purchasers to present identification that contains false information regarding age to store personnel when attempting to make alcoholic beverage purchases. Therefore, in this instance further inquiry into Ms. Gage's actual age was certainly warranted to avoid the possibility of a sale to an underage person. Mr. Medeles' failure to do so was a gross deviation from the standard of conduct that should be observed in the sales of alcoholic beverages.

## RECOMMENDATION

The ALJ recommends that a permit suspension of 20 days be imposed on Respondent. The ALJ recommends that Respondent be given an opportunity to pay a civil penalty in the amount of \$3000 in lieu of suspension before the sixth day after the TABC notifies Respondent of its order.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be and are denied.

## FINDINGS OF FACT

1. Raul N. Ramirez, d/b/a Raul's Corral Mexican Food and Steaks (Respondent) holds a Beer Retailer's On Premises License BE-213701, for the premises located at 200 Corinth, Dallas, Dallas County, Texas.

2. On June 12, 1998, Respondent was provided with notice of hearing. A hearing was convened before the State Office of Administrative Hearing on January 19, 1999. Both parties appeared and presented evidence. No challenges to the sufficiency of notice or jurisdiction were made by either party.
3. On June 17, 1997, Respondent's employee, Mario Medeles, was working at the licensed premises.
4. On that day, Mr. Medeles sold Rebecca Gage an alcoholic beverage, a six-pack of beer.
5. At the time of this sale, Ms. Gage was sixteen years old.
6. Ms. Gage was participating in a "sting" operation with Dallas Police Department officers at businesses authorized to sell alcoholic beverages.
7. She was youthful in appearance and dressed in "teenage" attire, blue jeans, white undershirt, and pink sweater.
8. Ms. Gage was below 21 years of age as demonstrated by her valid Texas driver's license that she presented to Mr. Medeles at his request.
9. Upon inspection of Ms. Gage's identification, Mr. Medeles calculated her age as 27 years old.
10. Mr. Medeles did not inquire further into Ms. Gage's actual age even though he thought that her appearance was particularly youthful in relation to the age he had mistakenly calculated for her.

#### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch 5, §6.01 and §106.13 (Vernon 1999).
2. The State Office of Administrative Hearings had jurisdiction over all matters relation to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch 2003 (Vernon 1999).
3. Respondent received adequate notice of the hearing.
4. Based on Findings of Fact Nos. 3 - 10, Respondent's employee sold an alcoholic beverage to a minor and did so with criminal negligence. TEX. ALCO. BEV. CODE ANN. §§1.04(11); 26.03(b); and 61.71(a)(5) (Vernon 1999).
5. Based on Findings of Fact Nos. 3 - 10 and Conclusion of Law No. 4, Respondent's Beer Retailer's On-Premises License should be suspended for 20 days.

6. Based on Conclusion of Law No. 5 and TEX. ALCO. BEV. CODE ANN. §11.64, Respondent should be permitted to pay a civil penalty of \$3,000 in lieu of suspension of his license.

SIGNED this 8<sup>th</sup> day of March, 1999.

*for* Michael J. Bonland  
TANYA COOPER  
Administrative Law Judge  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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