

DOCKET NO. 593146

IN RE T.R.D.S.T. CORPORATION, INC.	§	BEFORE THE
D/B/A CANCUN MEXICAN RESTAURANT	§	
PERMIT NO. MB-266419	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-0114)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 29th day of March, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on December 13, 2001, and adjourned December 13, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 26, 2002. 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 Permit/License Nos. MB-266419 hereby **SUSPENDED**.

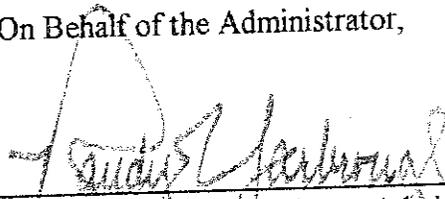
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$4,500.00 on or before the 5th day of June, 2002, all rights and privileges under the above described permit will be **SUSPENDED** for a period of thirty (30) days, beginning at 12:01 A.M. on the 12th day of June, 2002.

This Order will become final and enforceable on April 19, 2002, 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 29th day of March, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

T.R.D.S.T. Corporation, Inc.
d/b/a Cancun Mexican Restaurant

RESPONDENT

2018 White Oaks Hills Ln.
Kingwood, Tx 77339

CERTIFIED MAIL NO. 7000 1530 0003 1929 2259

Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Houston District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 593146 REGISTER NUMBER:

NAME: T.R.D.S.T. Corporation, TRADENAME: Cancun Mexican Restaurant
Inc.

ADDRESS: 9717 Fm. 1960 Bypass, Humble, Texas

DATE DUE: June 5, 2002

PERMITS OR LICENSES: MB-266419

AMOUNT OF PENALTY: \$\$4,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 5TH DAY OF JUNE, 2002, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127
Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

SOAH DOCKET NO. 458-02-0114

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

T.R.D.S.T. CORPORATION, INC.
D/B/A CANCUN MEXICAN RESTAURANT
PERMIT NO. MB-266419
HARRIS COUNTY, TEXAS
(TABC CASE NO. 593146)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against T.R.D.S.T. Corporation, Inc. d/b/a Cancun Mexican Restaurant (Respondent), a licensee of the Commission, alleging that on or about January 13, 2001, the Respondent, its agent, servant or employee, with criminal negligence sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE § 106.13 (a) (Vernon 1995 and Supp.2000) The staff recommended that the Permittee's permit be suspended for between 30 and 60 days or in lieu thereof be permitted to pay a civil penalty of \$150.00 per day for a total penalty of between \$ 4,500.00 and \$9,000.00. The ALJ having found sufficient evidence that the Respondent violated TEX. ALCO. BEV. CODE § 106.13 (a), recommends that the Respondent's permit be suspended for 30 days or in lieu thereof, to have the Respondent assessed a penalty of \$150.00 per day for a total civil penalty of \$4,500.00.

I. PROCEDURAL HISTORY

By Notice of Hearing dated September 25, 2001 the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Respondent that hearing would be held to determine whether disciplinary action should be taken against the Respondent's permit based on an allegation that on, January 13, 2001, the Respondent, its agent, servant or employee with criminal negligence sold an alcoholic beverage to a minor. The Staff asserted that such act constituted grounds for suspension or cancellation of the Mixed Beverage Permit held by the Respondent.

On December 13, 2001 the hearing commenced, pursuant to the Notice of Hearing, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Mr. Dewey Brackin, of the TABC Legal Section. The Respondent, a corporation, was represented by its Secretary, Mr. Rafael Diaz. The hearing was concluded on December 13, 2001, and the record was left open through December 27, 2001.

II. JURISDICTION AND NOTICE

The Commission has jurisdiction over this matter pursuant to §§ 6.01 and 11.61 of the Code and TEX. GOV'T CODE ANN. Chapter 2001 et seq. 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. Chapter 2003.

The Respondent is the holder of Mixed Beverage Permit MB-266419 and held that permit on the date of the alleged violation. On September 25, 2001 the Notice of Hearing in this matter was mailed to the Respondent at 2018 White Oak Hills Ln., Kingwood, TX 77339 and Respondent received the notice pursuant to TEX. GOV'T CODE ANN. Chapter 2001.

III. REASONS FOR DECISION

A. Legal Standard

The Commission may suspend or cancel a permit or license if a Respondent or licensee is found to have violated a provision of the Code or a rule adopted by the Commission. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2), and 61.71(a)(1)

Section 106.13 (a) of the Code provides in relevant part:
...the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that a licensee or Permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. .

Section 1.08 of the Code provides: CRIMINAL NEGLIGENCE DEFINED. For purposes of this code, a person acts with criminal negligence if the person acts with a mental state that would constitute criminal negligence under Chapter 6, Penal Code, if the act were an offense.

Chapter 6, Penal Code Section 6.03 (d) provides DEFINITIONS OF CULPABLE MENTAL STATES 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 justifiable 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 the circumstances as viewed from the actor's standpoint.

B. Evidence

Two exhibits were offered by TABC and both were admitted into evidence without objection. They included: TABC records including copies of the respondent's permit and violation history; and a photocopy of the Texas Driver License of Taylor Amanda Krohn as well as a photocopy of a photograph of Ms. Krohn taken on January 13, 2001. The Respondent offered three exhibits that were admitted into evidence without objection. Respondent's Exhibits consisted of driving record of Rafael Diaz (2) August 8, 2001 letter from a TABC approved Seller/Server training company and a photocopy of an excerpt of Section 106.14 of the Code.

Ms. Taylor Krohn and Agent Thomas Chadwick were testified for the Staff. Mr. Rafael Diaz, Corporate Secretary of the Permittee and its representative at this hearing testified for the Respondent. No other witnesses were called. The undersigned ALJ has taken official notice of the Notice of Hearing issued in this case.

1. TABC's Evidence

TABC Exhibit 1 is an affidavit showing that the Respondent was issued Mixed Beverage Permit MB-266419 on June 12, 1996, and that the Respondent's permit has been continuously renewed since that date. The premises covered by the permit is known as Cancun Mexican Restaurant located at 9717 FM 1960 Bypass, Humble, Texas.

TABC Exhibit 2 is a photocopy of the Texas Driver's License of Taylor Amanda Krohn, bearing her photograph and a birth date of April 9, 1984 and also a photograph of Taylor Amanda Krohn taken on January 13, 2001.

Taylor Amanda Krohn testified that on January 13, 2001, she was sixteen years old. She stated that on that date she, along with agents of the Texas Alcoholic Beverage Commission, took part in a minor sting operation. She entered the premises of Cancun Mexican Restaurant after Michael Lockhart, an undercover TABC Agent. She approached the bar near the middle of the restaurant and asked a man behind the bar for a Bud-Lite. She later learned that this man's name was Rafael Diaz. Mr. Diaz asked for her identification and she gave him her then current Texas driver license.

Ms. Krohn confirmed that TABC Exhibit 2 contained a true and correct copy of the license she gave to Rafael Diaz. Mr. Diaz looked at the driver license and then gave it to her. He told her that the beer cost \$2.50. He then motioned to another man behind the bar who took a bottle of beer out of the cooler and put it in front of her. Ms Krohn then handed Mr. Diaz her money. She did not recall who gave her the change or if she was due any change. The witness then left the premises without consuming any of the beer and reported what had happened to TABC agents waiting outside the premises. Ms. Krohn had no further contact with Mr. Diaz.

Ms. Krohn denied ever telling Mr. Diaz that she was 21 years old or ever showing him a fake or altered identification. She confirmed that TABC Exhibit 2 contained a photocopy of a photograph taken of her on the day of the minor sting operation and that it truly and accurately reflects her appearance on that day.

Thomas Chadwick testified that on January 13, 2001, he was a licensed Texas peace officer in the state of Texas and was employed as an agent of the TABC. On that date he took part in a minor sting operation at the Cancun Mexican Restaurant in the capacity of an open agent. It was his task to enter the premises and identify the person or persons who made the sale to the minor. He testified that after exiting the premises, the minor, Taylor Amanda Krohn, reported to him and his partner, Michel Carr, what had transpired in the restaurant including a description of both Mr. Diaz and the bartender.

The witness and Officer Carr entered the premises and identified both Rafael Diaz and the bartender Mr. David Pena. Mr. Diaz admitted to the witness that he had sold the beer to Ms. Krohn. Mr. Diaz asserted that he had in fact checked Ms Krohn's identification and "That girl was born in 74". When told that the date of birth on the driver license was 1984, Mr. Diaz told the witness "She must have given me a fake ID".

2. Respondent's Evidence

Permittee Exhibit 1 : Texas Department of Public Safety Driver Record of Rafael Diaz dated January 24, 2001.

Permittee Exhibit 2 : Letter dated August 8, 2001 addressed to Cancun Mexican Restaurant from Concepts of Alcohol Safety concerning employees who had completed Seller/Server training during 2001.

Permittee Exhibit 3 : A printed copy of Sec.106.14 of the Texas Alcoholic Beverage Code.

Mr. Rafael Diaz testified that on January 13, 2001 he checked Ms. Krohn's driver license and determined that she was born in 1984. He then told David Pena, a new bartender, that she was born in 1984. Mr. Diaz stated that he walked away thinking that Mr. Pena would not serve beer to Ms. Krohn. Mr. Diaz admitted that on January 13, 2001 his own Seller/Server Certification had expired and that he did not know if David Pena was Seller/Server certified on that date. Mr. Diaz admitted that the training class mentioned in Permittee Exhibit 2 was conducted in August of 2001.

IV. ANALYSIS AND RECOMMENDATION

A. Analysis

In the charge against the respondent set out in the Notice of Hearing the TABC alleged that on or about January 13, 2001, Permittee, T.R.D.S.T. Corporation, Inc. its agent, servant or employee with criminal negligence sold an alcoholic beverage to a minor.

The Permittee's position was that Mr. Diaz checked the identification of the minor and determined that she was born in 1984 and was therefor a minor. It was Mr. Diaz's testimony that he knew the customer was a minor and did not think that Mr. Pena would serve her. Permittee further contended that an employee, David Pena, served a beer to the minor without the approval of Mr. Diaz. In final argument the Permittee contended that the Permittee was entitled to the protection provided in Section 106.14 of the Code. However, no evidence was presented to show that either Mr. Diaz or Mr. Pena were seller/server certified on January 13, 2001, the date of the alleged sale.

TABC may suspend or cancel a permit or license if a Respondent or licensee is found to have violated a provision of the Code or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2).and 61.71(a)(1). The preponderance of the evidence indicates the Respondent violated Section 106.13(a) of the Code (Vernon 1995 and Supp. 2000).

The Staff recommended Respondent be assessed a 30 to 60 day suspension of its permit or in lieu of the suspension be assessed a civil penalty of \$150.00 per day.

B. Recommendation

The ALJ recommends that the Respondent be assessed a thirty day (30) day suspension of its permit or, in lieu of the suspension be assessed a penalty of \$150.00 per day for a total of \$4,500.00.

V. PROPOSED FINDINGS OF FACT

1. T.R.D.S.T. Corporation, Inc. d/b/a Cancun Mexican Restaurant, (Respondent) holds Mixed Beverage Permit MB-266419 issued by the Texas Alcoholic Beverage Commission.
2. On January 13, 2001, Taylor Amanda Krohn, who was born April 9, 1984, was sixteen years of age.

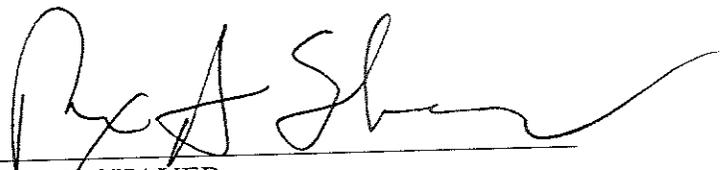
3. On January 13, 2001, Mr. Rafael Diaz was an agent , servant or employee of the Respondent.
4. Mr.. Rafael Diaz looked at the Texas Driver's License of Taylor Amanda Krohn which stated her birth date as "DOB 04-09-84".
5. Rafael Diaz accepted payment for the beer from Taylor Amanda Krohn.
6. Rafael Diaz took the order for a Bud-Lite beer from Ms. Krohn and conveyed that order to another employee, David Pena.
7. David Pena placed the Beer on the bar in front of Ms. Krohn.
8. The conduct of Rafael Diaz was a gross deviation from the standard of care that an ordinary person would exercise under the circumstances as viewed from Mr. Diaz's stand point.
9. The Respondent or its agent received the notice of hearing.
10. The hearing to consider the allegation convened on December 13, 2001 pursuant to the Notice of Hearing, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Mr. Dewey Brackin, of the TABC Legal Section. The Respondent, a corporation, was represented by its Secretary, Mr.. Rafael Diaz.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV CODE ANN. §§6.01(b), 11.61(b)(2).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. 1-8, the Respondent, its agent, servant or employee did, with criminal negligence, sell an alcoholic beverage to a minor.

5. Based on the foregoing Findings of Fact and the Conclusions of Law, TABC is warranted in suspending the Respondent's permit for a period of thirty days, or in lieu of such suspension, assessing the Respondent a monetary penalty of \$ 4,500.00. TEX. ALCO. BEV CODE ANN. §§6.01(b), 11.61(b)(2).and 61.71.

SIGNED this 26TH day of February, 2002.



REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS