

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
§
VS. § OF
§
GINA AMANDA GARZA GARCIA D/B/A §
KRAMERS KWIK STOP #2 §
(TABC NO. 580546) § ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this action against Permittee Gina Amanda Garza Garcia d/b/a Kramers Kwik Stop #2 [*sic*] (Kramers), asserting her employee, with criminal negligence, sold an alcoholic beverage to a minor and seeking cancellation of the permit. Ms. Garcia asserted that because the seller-server trained employee violated store policy by selling to the minor, she should not be held responsible for his actions. This proposal agrees with the Permittee and recommends no action be taken against her.

I. REASONS FOR PROPOSED DECISION

The hearing convened on December 4, 1998, at the Harlingen City Hall, 502 East Tyler, Harlingen, Texas. Assistant Attorney General Andrew del Cueto represented the Texas Alcoholic Beverage Commission's (TABC's) Staff, and attorney Jose' Luis Garza represented Ms. Garcia. The hearing concluded on the same day, but the record remained open until December 14, 1998, for receipt of proposed findings of fact and briefs from the parties.

A. Evidence

TABC agent Ida Cantu testified she observed a sale of four six-packs of Bud lite beer to eighteen-year old David John Rios on August 14, 1998. He made the purchase at a drive-up window in the Permittee's business, and the clerk, Jose' Reyna, failed to ask Mr. Rios for identification.

Agent Cantu described Mr. Rios as young-looking with "peach fuzz" on his face. He had very short hair, cut almost to his scalp, and was baby-faced. In her opinion, he looked seventeen or eighteen. (Exhibit 10 is Mr. Rios's photograph.) If Mr. Reyna thought Mr. Rios was of age, his misjudgment would, in Agent Cantu's opinion, amount to criminal negligence.

Mr. Reyna, who was twenty-two years old at the time he sold beer to Mr. Rios, had received seller-server training along with other Kramers employees. At the time of the hearing, he had been employed at Ms. Garcia's business for approximately fourteen months as a cashier and stocker. According to Mr. Reyna, Ms. Garcia requires employees to check identification for anyone who appears to be under

twenty-five. Even though the drive-up window was busy on August 14, 1998, Mr. Reyna had asked several people for identification. Some had become angry and left the window without showing him identification.

When making the sale to Mr. Rios, however, Mr. Reyna did not follow the store's policy of requiring identification. Mr. Reyna "felt sure" he recognized Mr. Rios as someone who had previously attended the same high school as he and who, Mr. Reyna believed, had graduated a year before he did.

According to Mr. Reyna, Ms. Garcia owns Kramers and works there every day. Although the store does not have a policy manual, Ms. Garcia daily reminds employees not to sell to minors.

Another Kramers employee, Cynthia Villareal, echoed Mr. Reyna's testimony about the store's policy. Ms. Villareal was trained to "card" everyone who looked young, and Ms. Garcia never encouraged her to sell to minors.

Ms. Garcia, who with her fourteen-year old daughter lives in an apartment above the store, testified that she was working at the inside counter on August 14, 1998, but was unaware of Mr. Reyna's actions. At least every other day, she reminds employees to "card" all young-looking persons. She had never directly or indirectly encouraged sales to minors. All employees are seller-server trained.

Ms. Garcia has three prior violations:

October 19, 1995 - sale to a minor - \$1,050 civil penalty paid in lieu of a seven-day suspension;

May 29, 1998 - sale to minor - \$1,500 civil penalty paid in lieu of a ten-day suspension; and

June 19, 1998 - sale to minor - \$9,000 civil penalty paid in lieu of a sixty-day suspension.

She addressed the 1998 violations in her testimony stating she was away from the store when they occurred. She entered into a settlement agreement with TABC's Staff, rather than contesting the allegations. After the May 29, 1998, violation, Ms. Garcia learned about seller-server training and required her employees to attend.

B. Legal Standards

The TABC 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 in violation of TEX. ALCO. BEV. CODE ANN. (Vernon 1995 and

Vernon Supp. 1998) (Code) §106.13.¹ The reference to permittee in Section 106.13 includes the person holding the license, as well as an agent, servant, or employee of that person. Code §1.04. However, the TABC may relax the provisions concerning suspension and cancellation and assess a sanction found to be just under the circumstances if, at a hearing, the permittee established that an employee violated this code without the knowledge of the permittee. Code §106.13.

Further, as specified in Code §106.14, the actions of an employee who sells to a minor are not attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.

C. ALJ's Recommendation

In spite of Ms. Garcia's prior violation history, the ALJ was convinced by Mr. Reyna's and Ms. Villareal's testimony that Ms. Garcia did not directly or indirectly encourage Mr. Reyna to violate the law. Granted, a policy manual may have reinforced the clearly-stated policy prohibiting sales to minors. However, it is unlikely that any written document would have made the policy better known to the employees who testified.

Mr. Reyna acted upon his own mistaken belief that Mr. Rios was a former schoolmate. While Mr. Rios certainly looked younger than twenty-five, the evidence established neither Ms. Garcia's contemporaneous knowledge of the sale nor her direct or indirect encouragement of it. Thus, the ALJ agrees with Ms. Garcia that the sale should not be attributed to her and recommends that no action be taken against her permit.

¹Criminal negligence is described in TEX. PENAL CODE §6.03(d) as follows:

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 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.

II. Findings of Fact

1. Notice of the hearing was issued October 23, 1998, and sent to Permittee Gina Amanda Garza Garcia, by certified mail, return receipt requested.
2. The hearing convened on December 4, 1998, with both parties present or represented.
3. Ms. Garcia holds wine and beer retailer's off-premise permit BQ-310398, last renewed on August 9, 1998, for the premises known as Kramers Kwik Stop #2 (Kramers) in Rio Grande City, Texas.
4. Ms. Garcia requires employees to check identification of anyone who appears to be under twenty-five.
5. On August 14, 1998, Kramers employee Jose' Reyna sold four six-packs of Bud lite beer to eighteen-year old David John Rios.
6. Although Mr. Rios appeared to be under the age of twenty-five, Mr. Reyna failed to check the minor's identification because he "felt sure" he recognized Mr. Rios as someone who had previously attended the same high school as Mr. Reyna and who had graduated a year before he did.
7. Ms. Garcia was unaware that Mr. Reyna failed to check Mr. Rios's identification.
8. Ms. Garcia requires employees to attend seller-server training.
9. As of August 14, 1998, Mr. Reyna had current seller-server training.
10. The store does not have a policy manual, but Ms. Garcia personally reminds employees at least every other day not to sell to minors.
11. In failing to check Mr. Rios's identification, Mr. Reyna violated the well-known policy of the store.
12. Ms. Garcia did not directly or indirectly encourage Mr. Reyna to sell alcoholic beverages to minors.

III. Conclusions of Law

1. Service of proper and timely notice of the hearing was effected upon Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. Chapter 2001 (Vernon 1998).

2. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §106.13 (Vernon 1995 and Vernon Supp. 1998) (Code).
3. 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 (Vernon 1998).
4. The acts of Ms. Garcia's employee in selling an alcoholic beverage to a minor should not be attributed to Ms. Garcia. Code §106.14.
5. Based on the foregoing, no action should be taken against Ms. Garcia's permit as a result of this proceeding.

SIGNED this 8th day of March, 1999.



SARAH G. RAMOS
Senior ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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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 _____ day of _____, 1999.

TANYA COOPER
Administrative Law Judge
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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4. The acts of Ms. Garcia's employee in selling an alcoholic beverage to a minor should not be attributed to Ms. Garcia. Code §106.14.
5. Based on the foregoing, no action should be taken against Ms. Garcia's permit as a result of this proceeding.

SIGNED this 7th day of January, 1999.


SARAH G. RAMOS
Senior ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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