

DOCKET NO. 587146

IN RE ESTANISLAO AMAYA	§	BEFORE THE
D/B/A EL BRINDIS	§	
PERMIT NO. BG448494	§	
	§	TEXAS ALCOHOLIC
	§	
HIDALGO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0591)	§	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 A. Corbitt. The hearing convened on May 8, 2000. The record was left open for briefs and the record closed on June 1, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 20, 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. Petitioner filed Exceptions to the Proposal for Decision on September 26, 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, except Conclusion of Law #7, 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.

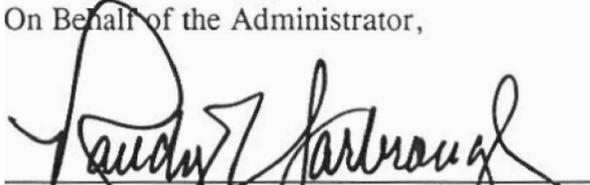
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent receive a **WARNING** in the above-captioned cause with regard to violating Section 106.05 of the Texas Alcoholic Beverage Code (Vernon 1995 and Supp. 2000).

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 Corbitt
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

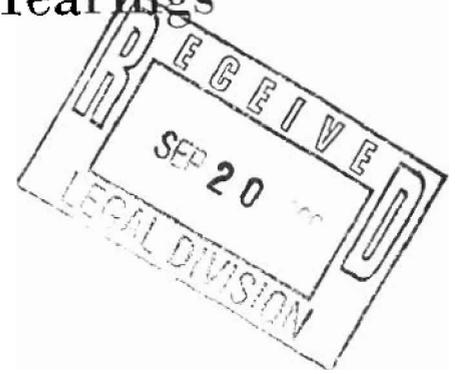
Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

W. Lassiter Holmes
ATTORNEY FOR RESPONDENT
212 West Nolana
McAllen, Texas 78504
CERTIFIED MAIL/RRR NO. Z 473 042 998

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 20, 2000

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

HAND DELIVERY

RE: *Docket No. 458-00-0591; Estanislao Amaya, d/b/a El Brindis BG-448494*
58714p

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 W. Lassiter Holmes, attorney for Respondent. For reasons discussed in the Proposal for Decision, I recommend that 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,


for Earl Corbitt
Administrative Law Judge

EC/rk
Enclosure

xc: Christopher Burnett, Staff Attorney, *TABC*, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY
W. Lassiter Holmes, 212 West Nolana, McAllen, Texas, 78504 - VIA REGULAR U.S. MAIL
Rommel Corro, Docket Clerk, *State Office of Administrative Hearings* - VIA HAND DELIVERY

DOCKET NO. 458-00-0591

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

ESTANISLAO AMAYA
D/B/A EL BRINDIS
BG-448494

§
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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the wine and beer retailer's permit held by Estanislao Amaya d/b/a El Brindis (the Respondent) based on allegations that the Respondent, with criminal negligence, allowed a minor to possess and consume an alcoholic beverage on the licensed premises. The Staff of TABC (the Staff) sought to have the Respondent's permit suspended for twenty-one days or, in lieu thereof, to have the Respondent assessed a penalty of \$3,150.00. The Respondent asserted the alcoholic beverage was purchased by the minor's parent who had remained in the minor's presence until TABC agents entered upon the scene. This proposal recommends no action be taken against the Respondent.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

On March 8, 2000, notice of the hearing was sent by certified mail, return receipt requested, to Juan Ramiro Ledesma, attorney for the Respondent, at Route 25, Box 719, Mission, Texas 78572. 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. W. Lassiter Holmes, attorney, represented the Respondent. After receipt of the evidence, the record was left open to receive briefs from the parties. No such briefs were submitted and the record closed on June 1, 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.

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 11.61(b)(2).

At Section 106.04, the Code provides:

- (a) A minor commits an offense if he consumes an alcoholic beverage.
- (b) It is an affirmative defense to prosecution under this section that the alcoholic beverage was consumed in the visible presence of the minor's adult parent, guardian, or spouse.

At Section 106.05, the Code provides:

- (a) Except as provided in Subsection (b) of this section, a minor commits an offense if he posses an alcoholic beverage.
- (b) A minor may possess an alcoholic beverage:...(2) if the minor is in the visible presence of his adult parent, guardian, or spouse, or other adult to whom the minor has been committed by a court....

Regarding the responsibilities of permittees and licensees as they relate to minors, 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 or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

B. Evidence

The evidence consisted of the testimony of four witnesses. TABC offered the testimony of two of its Agents, Charlotte Knox and Sonia Salinas. The Respondent offered the testimony of Estanislao Amaya and Sabrina Rodriguez. No exhibits were offered into evidence. The undersigned ALJ has taken official notice of the Notice of Hearing issued in this case.

1. TABC's Evidence

On October 1, 1999, TABC Agents Charlotte Knox and Sonia Salinas conducted an unannounced inspection at the Respondent's establishment. Agent Knox testified that when she

entered the premises, she observed among the patrons a youthful appearing person with a wine cooler on the table in front of her. She was seated at a table with two men. Agent Knox smelled the drink and determined it was an alcoholic beverage. She invited the young woman outside where she learned her name was Perla Dinorah Casas Rodriguez. Ms. Rodriguez was arrested when it was learned that she was 18 years old. Agents Knox and Salinas testified no one identified themselves as the parent of Ms. Rodriguez. They also testified they did not see who served Ms. Rodriguez the alcoholic beverage nor did they see Ms. Rodriguez consume any of the beverage. She was arrested for being a minor in possession of an alcoholic beverage.

2. The Respondent's Evidence

Estanislao Amaya testified that Sabrina Rodríguez, mother of Perla Rodriguez, was present in the bar on the night that TABC agents arrested Perla Rodriguez for being a minor in possession of an alcoholic beverage. Mr. Amaya testified Sabrina Rodriguez ordered and paid for the wine cooler which was served to Perla Rodriguez. Sabrina Rodriguez, when last seen by Mr. Amaya, was seated at a table with Perla and two men.

Sabrina Rodriguez testified she is the mother of Perla Dinorah Casas Rodriguez. On the night Perla was arrested for being a minor in possession of an alcoholic beverage, she had ordered and paid for the wine cooler for her daughter. She was seated with her daughter and two men at a table when the TABC agents entered the bar. Ms. Rodriguez testified she went to the restroom to avoid the TABC agents because she is an undocumented foreign national subject to deportation. She also testified she did not go to the jail where her daughter was taken because she feared being taken into custody for being undocumented. She did not want to be deported.

III. ANALYSIS AND RECOMMENDATION

A. Analysis

If all of the witnesses are found to be credible, and the undersigned ALJ, having only the hearing tape upon which to make that judgment, has no reason to find otherwise, then the Respondent did not violate TEX. ALCO. BEV. CODE ANN. §106.13. The alcoholic beverage in the minor's possession was delivered to her by her mother who remained in her visible presence at all times until the TABC Agents entered the bar. Sabrina Rodriguez and Perla Rodriguez were compliant with TEX. ALCO. BEV. CODE ANN. §§106.04(b) and 106.05(b)(2) prior to the entry of the TABC Agents. The mother, upon seeing the TABC agents, and unbeknownst to the Respondent, fled to the restroom leaving her minor daughter in unsupervised possession of the alcoholic beverage. Under the facts of this case, the Respondent was not criminally negligent in allowing the minor, Perla Rodriguez, to be in possession of an alcoholic beverage.

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. Estanislao Amaya d/b/a El Brindis (the Respondent) holds a Wine and Beer Retailer's Permit issued by the Texas Alcoholic Beverage Commission (TABC).
2. On March 8, 2000, the staff (the Staff) of TABC issued a notice of hearing asserting the Respondent was criminally negligent in allowing a minor to consume or possess an alcoholic beverage on the licensed premises, 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. Ruiseco at an office of the State Office of Administrative Hearings, 1508 Dove Avenue, McAllen, Texas.
5. On October 1, 1999, the TABC Agents Charlotte Knox and Sonia Salinas, during a routine inspection of the Respondent's premises, observed a minor, Perla Dinorah Casas Rodriguez, with an alcoholic beverage on the table in front of her.
6. The alcoholic beverage described in Finding of Fact No. 5 was a wine cooler that had been ordered and purchased for the minor by the minor's mother, Sabrina Rodriguez.

Sabrina Rodriguez remained in the visible presence of her daughter, Perla Dinorah Casas Rodriguez, from the time the wine cooler had been purchased and served until Agents Knox and Salinas entered the Respondent's premises.
8. When the TABC Agents entered the Respondent's premises, Sabrina Rodriguez went to the restroom to avoid contact with the TABC Agents.
9. Sabrina Rodriguez did not notify any agent, employee, or servant of the Respondent that she was going to the restroom.
10. Sabrina Rodriguez is an undocumented foreign national who did not want to be deported.
11. There was no evidence the minor consumed any of the wine cooler.
12. TABC Agents Knox and Salinas arrested Perla Dinorah Casas Rodriguez, who was 18 years of age, for being a minor in possession of an alcoholic beverage.

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 11.61.
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 Finding of Fact No. 11, there is insufficient evidence to conclude that Perla Dinorah Casas Rodriguez consumed an alcoholic beverage in violation of TEX. ALCO. BEV. CODE ANN. §106.04(a).
5. Based on Findings of Fact Nos. 6 and 7, between the time the wine cooler was purchased and the time the TABC Agents entered the Respondent's premises, Perla Dinorah Casas Rodriguez did not possess an alcoholic beverage in violation of TEX. ALCO BEV. CODE ANN. §106.05(a).
6. Based on Findings of Fact Nos. 6-11, and Conclusions of Law Nos. 4 and 5, the Respondent did not, with criminal negligence, permit a minor, Perla Dinorah Casas Rodriguez, to violate TEX. ALCO. BEV. CODE ANN. §§106.04 or 106.05.
7. Based on the foregoing, no disciplinary action should be taken against the Respondent's permit.

SIGNED this 20th day of September, 2000.

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

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

September 20, 2000

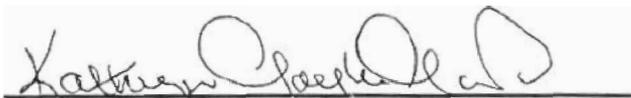
TO: Christopher Burnett
Assistant Attorney General
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

HAND DELIVERY

On this date, a copy of the proposal for decision was delivered to you on the following matter:

1. **Docket No. 458-00-0591; Estanislao Amaya, d/b/a El Brindis BG-448494**

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



Signature of Receiving Party



Date

ECrk

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge
September 20, 2000

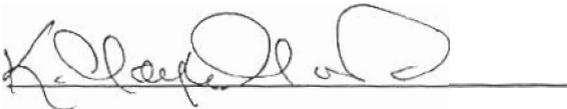
TO: Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

HAND DELIVERY

On this date, a proposal for decision was delivered to you on the following matter:

1. **Docket No. 458-00-0591; Estanislao Amaya, d/b/a El Brindis BG-448494**

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



Signature of Receiving Party

EClrk



Date

DOCKET NO. 458-00-0591

BEVERAGE § BEFORE THE STATE OFFICE
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§ ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Texas Alcoholic Beverage Commission (TABC) sought suspension of the permit held by Estanislao Amaya d/b/a El Brindis (the Respondent) based on criminal negligence, allowed a minor to possess and consume alcohol on the licensed premises. The Staff of TABC (the Staff) sought to have the Respondent suspended for twenty-one days or, in lieu thereof, to have the Respondent's license revoked for a fine of \$3,150.00. The Respondent asserted the alcoholic beverage was consumed by a minor who had remained in the minor's presence until TABC agents arrived. The Staff's proposal recommends no action be taken against the Respondent.

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LEGAL HISTORY, NOTICE & JURISDICTION

Notice of the hearing was sent by certified mail, return receipt requested, to the Respondent, at Route 25, Box 719, Mission, Texas 78572. The Respondent received timely notice of the hearing. The hearing convened on May 12, 2010, before 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 the hearing. Staff Attorney Christopher Burnett represented the Staff. W. Lassiter represented the Respondent. After receipt of the evidence, the record was left open for briefs. No such briefs were submitted and the record closed on June 1, 2010.

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The case was assigned to ALJ Earl A. Corbitt for preparation of the record. The assigned ALJ has reviewed the record in the case including the audio

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