

DOCKET NO. 587934

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| IN RE MARY ESTHER BERNAL | § | BEFORE THE |
| D/B/A EL CABARET | § | |
| PERMIT NO. BG290739 | § | |
| LICENSE NO. BL290740 | § | TEXAS ALCOHOLIC |
| | § | |
| BEXAR COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-00-1000) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 27th day of July, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ruth Casarez. The hearing convened on May 3, 2000 and adjourned May 3, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 30, 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. 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.

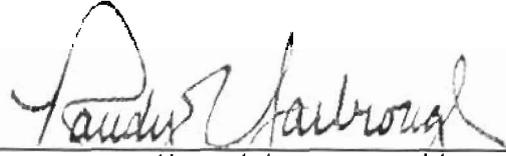
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that all allegations brought against Permit/License Nos. BG290739 and BL290740 in this matter are hereby **DISMISSED** with prejudice for insufficient evidence.

This Order will become final and enforceable on August 17, 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 27th day of July, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

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

Holly Wise, Docket Clerk
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TABC Legal Section

Licensing Division
San Antonio District Office

DOCKET NO. 458-00-1000
(TABC CASE NO. 585366)

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

vs.

MARY ESTHER BERNAL
D/B/A EL CABARET
PERMIT NO. BG-290739;
LICENSE NO. BL 290740
BEXAR COUNTY, TEXAS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) staff (Staff) alleged that Mary Esther Bernal d/b/a El Cabaret (Respondent) permitted consumption of alcoholic beverages in her bar during prohibited hours, and that she purchased, gave, or, with criminal negligence, made available an alcoholic beverage to a minor. Respondent denied the allegations. This proposal recommends that no action be taken because the allegations were not proven by a preponderance of the evidence.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened on May 3, 2000, before Ruth Casarez, Administrative Law Judge, at the State Office of Administrative Hearings office located at 1015 Jackson Keller, Suite 120B, San Antonio, Texas. Staff was represented by Mr. Christopher Burnett, Attorney with the Commission. Ms. Mary Esther Bernal appeared in her own behalf. After the parties presented evidence and arguments, the hearing was concluded, and the evidentiary record closed on May 3, 2000. As there are no contested issues of jurisdiction or notice in this proceeding, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

II. THE ALLEGATIONS AND APPLICABLE LAW

Staff's allegations¹ are that on January 22, 2000, Respondent

- consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by this code [in violation of TEX.ALCO.BEV.CODE ANN.(the Code) §105.06 and 61.71 (a)(18)], and
- ...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 §106.04 or 106.05 of the Code on the licensed premises. [in violation of § 106.13(a)] (emphasis added)

¹It should be noted the language of § 61.71 (a)(18) and of §106.13(a) of the Texas Alcoholic Beverage Code read as set out in this section, and not as recited in the first paragraph of the proposal, which tracks the allegations in the notice of hearing.

Both allegations, if proven, can result in suspension of a person's permit under §11.61 and of a license under §61.71 of the Texas Alcoholic Beverage Code (the Code).

As to the second allegation, §1.08 of the Code indicates that the "criminal negligence" standard that applies is found in the Texas Penal Code. TEX. PEN. CODE § 6.03 defines criminal negligence 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.

III. DISCUSSION

The two issues to be determined in this case are whether the Staff proved by a preponderance of the evidence that:

- A. Respondent permitted consumption of alcoholic beverages on the licensed premises at a time that was prohibited by the Code, and
- B. Respondent with criminal negligence sold, served, dispensed or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate §§106.04 or 106.05 of the Code on the licensed premises

1. **Commission's Evidence:** In response to a complaint that the bar was open during prohibited hours, three officers from the San Antonio Police Department (SAPD) went to location of R's club.

a) Detective Merritt testified that on January 22, 2000, he observed many cars parked at Respondent's premises at about 2:30 a.m. Accompanied by Detective Martinez and Sergeant Ortiz, he approached the bar to investigate further. Detective Merritt went to the front of the bar and looked through the window; he said he saw "lots of people inside the bar." He banged on the door for several minutes, trying to make their presence known. It took a while before someone opened the front door, but finally Ms. Bernal opened it. He identified himself and the others as officers with the SAPD vice squad; he told everyone to stop what they were doing until after they conducted their investigation. He told Ms. Bernal to get back to the bar and stay there. He stated they found about eight persons in the bar; he believes two were minors, but since he did not identify them, he is uncertain they were minors. Citations were issued to Ms. Bernal and several other persons.

On being recalled to the stand, he testified all of the persons in the bar had beers. He knew they were drinking beer because he saw the long-necked beer bottles. He also said that after he banged on the door, he observed Ms. Bernal, who was behind the bar, immediately begin putting beer away, trying to hide it behind the bar. In answer to Ms. Bernal's questions, he said that he could see the people at a table to the left of the bar through the window, and the view was not obstructed.

b) Detective Martinez testified after he entered the bar with Detective Merritt, he spoke with the people seated at the table away from the bar. He stated two appeared to be minors, so he asked

the two young men if they were 21 years of age; one replied that he was, but later changed his story and said he was not. Martinez asked for their ID. The IDs they gave him were from a different country and are called "micas." He believed the ones he saw that evening were from Mexico, but was not certain. He described the micas as green cards that contained the person's first and last name, date of birth and a photograph. He testified the information on the card was in English. Detective Martinez issued four citations for drinking after hours. He testified IDs from a different state or country are acceptable so long as they are valid.

c) Sergeant Ortiz testified he and the other officers watched the bar from a distance for about 10 or 15 minutes before actually moving in to investigate. He did not go into the bar with the other officers; instead he went to the back door to secure it. He found the band members at the back, and at first, he thought they were customers. He told them not to move and they cooperated. He asked if the bar was open, an older man with an accordion said it was, then after realizing he was an officer, he said it was not. S. Ortiz testified there were about twelve people in the bar and about five persons were cited, but at least one citation was torn up because of a mistake. He did not write any tickets. Ortiz said he saw beer on the bar, but also said he could not see what was going on inside the bar. He testified he did not see the alleged minors nor anyone else drinking.

2. Respondent's Evidence

Ms. Bernal testified that on January 22, 2000, when she closed the bar at 2 a.m., there were nine persons still in the bar: four band members, herself, her waitress and three others [an older lady (Oralia) and two young men]. Two or three men and Oralia were sitting at one of the tables, but there were no cans of beer on the table, except a can that had been crushed. Oralia had a cup in her hand. The waitress was picking up some of the cans from the tables. One or two of the band members had gone to the back of the club and the wife of one of the band members was outside by the back door. Ms. Bernal stated she was sitting at the bar with the band leader discussing an upcoming dance when she heard loud knocking. She told the waitress to tell whoever it was they were closed, but the knocking continued. At some point the band member who had gone to the back returned and told her there was a car at the back and someone had asked him if the bar was open. She told him to tell them she was closed.

Ms. Bernal stated the officers never identified themselves as police officers until after she opened the front door. When Officer Merritt entered, he pushed her back and told her, "Don't move-Police Officers." Two other officers, a female and a male officer, also came in with him. After they entered, they went through the entire bar, checking all of her licenses. As she moved away from the door, Officer Merritt told her, "I told you not to move," and he sat her at the corner of the bar; he told her to stay there. She said there was some beer on the bar counter near her, and Merritt asked her if she had been drinking. She responded she had not; he did not give her a citation for drinking, but gave her four other citations. She indicated the officers wrote several other citations, but then tore some of them up. They would not tell her why they tore some up, but not all. She believes she and Oralia were cited. Ms. Bernal testified she sells beer in cans only; she does not sell beer in bottles. Ms. Bernal was not cross examined.

3. Positions of the Parties

Staff argued that three trained police officers had observed persons inside the bar drinking beer after hours and that two of those individuals turned out to be minors. Staff further argued that nothing Respondent presented contradicted the officers' testimony and that Respondent could have disproved

the allegations by bringing witnesses to corroborate her version of the facts, but she did not. Thus, the officers should be believed. Staff further argued that Respondent's indifference to the serious violations warranted a thirty day suspension or the \$4500.00 penalty.

Respondent argued that she had no money to hire an attorney and she did the best she could to defend against the allegations. She argued Officer Merritt has harassed her in the past and continues to do so. She stated she has only had one prior violation, which she plea bargained, but this time, she believed she had to defend herself. She challenged Staff's position that the police officers should be believed instead of her. She vehemently denied serving alcohol after she closed the bar at 2 a.m. and argued that, at most, she may not have checked the patrons' identifications well enough, but she insisted she had not committed the alleged violations.

4. Analysis

A. Did the Commission prove by a preponderance of the evidence that Respondent permitted consumption of alcoholic beverages on the licensed premises during prohibited hours?

Staff has the burden of proving the violations that are alleged in the notice of hearing. That means the elements of each violation must be proven. In this case, Staff failed to meet that burden. As to the first allegation, Staff failed to establish the type of permit under which Respondent operated or the type of area in which her bar was located, as is set out in §105.06 of the Code. All of the evidence presented relied on the general premise or presumption that Respondent was not allowed to sell alcoholic beverages after 2 a.m., but no evidence was presented to prove that fact. The pleadings indicate a permit number, but that is insufficient to indicate what type of permit it is, what hours of operation it permits or the type of area, e.g., standard hours area or extended hours area, in which the bar is situated.

In addition, the evidence concerning consumption of alcoholic beverages was not as strong as Staff characterized it in the closing arguments. The three officers who appeared at the hearing did not directly testify they saw persons drinking beer in the bar. Only Detective Merritt testified he saw persons drinking beer through the window. And, this testimony came only after Ms. Bernal, in cross examining Sergeant Ortiz, Staff's third and final witness, pointed out that no one had said anything about any alcohol being consumed after hours. When he was recalled, Detective Merritt stated he saw the people drinking beer and he knew it was beer because he saw long-necked bottles.

However, neither of the other officers directly testified to having seen anyone drinking beer in the bar or having seen the long-necked bottles. Presumably, Detective Martinez saw the persons at the table drinking some type of alcohol because he wrote them citations. However, he never testified specifically that he saw them drinking beer. Sergeant Ortiz, who secured the back door testified he saw beer on the back porch and on top of the bar, but that he himself saw no one drinking beer. In answer to Ms. Bernal's question about what made the officers think alcohol was being sold at the bar, he answered, "that's why we looked through the window and saw beer." It is unclear whether Ortiz meant that he himself saw the beer or whether he assumed the other officers saw it before they went inside, as his primary assignment was to secure the back of the bar. Although a written report was prepared on the investigation that was conducted that evening, that report, which might have supplied specific details, was not offered into evidence. Thus, the issue becomes one of credibility. When it was pointed out that none of Staff's witnesses had testified to seeing anyone in the bar drinking alcoholic beverages, Detective Merritt testified he was certain all of the people in the bar were drinking beer because he saw the long-necked bottles. However, none of the other officers

testified they saw the long-necked bottles. Ms. Bernal, who appeared forthright and earnest in her presentation, testified she does not sell beer in bottles because of the neighborhood in which the bar is situated. She also stated that Oralia, seated at the table with the young men, had a cup in her hand, but that there were no cans or bottles of beer on that table, other than a crushed can. Ms. Bernal did not deny there were cans of beer on the premises, in fact, she testified there were several cans not far from where she was sitting at the bar. Sergeant Ortiz testified he saw the beer on the bar. Given these circumstances, the evidence that anyone in the bar was drinking beer in long-necked bottles is weak, at best.

B. Did the Commission prove by a preponderance of the evidence that Respondent with criminal negligence sold, served, dispensed or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate §§106.04 or 106.05 of the Code on the licensed premises?

As indicated above, Staff was required to prove that Respondent acted with criminal negligence, as that term is defined in the Penal Code in either selling or serving an alcoholic beverage to a minor or in permitting a minor to possess or consume an alcoholic beverage. The evidence related to this allegation was minimal. Detective Martinez testified he spoke with the persons who were at a table. He gave no details about why he believed the two young men were minors; he simply stated they “appeared to be minors.” After questioning them, he found out they were twenty or nineteen, but he could not remember for sure. He testified they handed him foreign or alien IDs, but the IDs were not introduced into evidence and thus cannot be judged to determine if they were clearly fake identification cards or appeared to be valid. Detective Martinez was quite vague about what type of identification cards the young men gave him. Although he described them as “micas,” with which he seemed familiar, he said the information on them was in English, yet he stated he believed they were from Mexico. His response to that inconsistency as pointed out by Ms. Bernal was simply that he did not know for sure where the cards had been issued. Again, if they had been introduced into evidence, their authenticity, or lack thereof, could have been assessed by the ALJ. If the cards clearly appeared to be bogus, that fact could have been considered in deciding if Respondent had been criminally negligent in allowing the two young men into the bar. However, with the scant evidence that was presented, the ALJ cannot make a finding that Respondent acted with criminal negligence.

Albeit in interpreting a prior version of the Code, courts have set out minimal standards for gauging whether a licensee knowingly sold alcoholic beverages to a minor. The court in Dinh v. State, 695 S.W. 2d 797 [Tex.App.--Hous. (1st Dist.) 1985] stated that “[e]ven in civil proceedings to suspend a liquor license, there must be substantial evidence that the licensee knowingly sold alcohol to a minor. In such a proceeding, where there was testimony that

the boy looked to [the investigator] to be much younger than 21, and for that reason he followed him after he made the purchase, and the boy admitted that he was 18, and it appears that he hadn't been 18 very long

and where the licensee testified that “she did not ask for evidence of age or identification ... it was held that there was no evidence that the licensee “knowingly” sold beer to a minor[,] citing Texas Liquor Control Board v. Coggins, 402 S.W.2d 935, 937 (Tex.Civ.Ap.--El Paso 1966, writ ref'd n.r.e.)”

The Court in Dinh ruled that under the facts of the case before it, appearance alone was insufficient evidence to establish appellant's knowledge. In cases where evidence of knowledge of minority has

been held sufficient, there has been evidence beyond physical appearance. *Id.*, 799. The standard for proving that a permittee or licensee knowingly or with criminal negligence sold or served alcoholic beverages to a minor continues to be as stated in the Dinh case.

In this case, there was no evidence whatsoever as to the young men's appearance. All that was presented was Detective Martinez' statement that they appeared to be minors. Even if they admitted they were under twenty-one, such admission would not prove that Respondent should have known they were minors. Had their photographs or the young men themselves been presented to show how youthful they appeared, that evidence could have established that Respondent had to have known they were minors and nevertheless admitted them into the bar and served them. However, no such evidence was presented and based on the evidence that was presented, the ALJ cannot find Respondent acted with criminal negligence. Thus, the violation of §106.13(a) of the Code was not proven.

IV. FINDINGS OF FACT

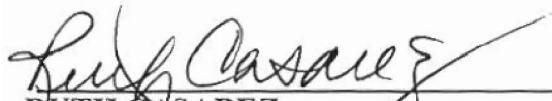
1. Mary Esther Bernal, d/b/a El Cabaret holds Permit No. BG-290739 and License No. 290740 issued by the Texas Alcoholic Beverage Commission (the Commission).
2. A notice of hearing was issued on April 14, 2000, containing a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; a short, plain statement of the matters asserted.
3. The notice of hearing alleged that: on or about January 22, 2000, Respondent, its agent, servant or employee did then and there on the licensed premises permit consumption of alcoholic beverages during prohibited hours in violation of §§105.06, 11.61(b)(2), and 61.71 (a)(18) of the Texas Alcoholic Beverage Code (the Code), and that Respondent purchased, gave, or with criminal negligence, made available an alcoholic beverage to a minor in violation of §§ 106.04 and/or 106.05 of the Code, in violation of §§106.13(a), 11.61 (b)(2) and 61.71(a)(1) of the Code.
4. The hearing referred to in Finding of Fact No. 3 was convened on May 3, 2000, at the State Office of Administrative Hearings, 1015 Jackson Keller, Ste. 150B, San Antonio, Texas. Ms. Mary Esther appeared on her own behalf. Mr. Christopher Burnett, Attorney with the Commission, represented the Staff. The record closed at the conclusion of the hearing.
5. The preponderant evidence did not prove the allegations stated in Finding of Fact No. 3.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35, 61.71 and 11.61 (Vernon 1998 and Supplement 2000).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was effected on Respondent pursuant to Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000), and 1 TEX. ADMIN. CODE § 155.27 (1999).
4. Based on Finding of Fact No. 5, no action should be taken against Respondent in this case

SIGNED and entered this 30th day of June 2000.


RUTH CASAREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS