

DOCKET NO. 458-02-3831

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

BEFORE THE STATE OFFICE

VS.

OF

ARIES ASSOCIATED, INC. D/B/A  
3-AMIGOS FOOD MART  
TARRANT COUNTY, TEXAS  
(TABC CASE NO. 597396)

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought to suspend the permit held by Aries Associated, Inc. d/b/a 3-Amigos Food Mart (Respondent) for allegedly selling alcoholic beverages to a minor. The Staff requested a 30-day suspension of the permit, or that Respondent be penalized \$4,500 in lieu of a suspension. The Administrative Law Judge (ALJ) recommends that Respondent's permit be suspended.

**I. PROCEDURAL HISTORY & JURISDICTION**

Notice and jurisdiction were not contested issues, and those matters are addressed in the proposed Findings of Fact and Conclusions of Law.

On October 11, 2002, a hearing was convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. The Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent appeared through its president, Mobeen Aslam, and its attorneys Stephen F. Shaw and David C. Hill. The record closed on October 11, 2002.

**II. DISCUSSION**

**A. Applicable Law**

The TABC may suspend a permit if the "permittee with criminal negligence sold . . . an alcoholic beverage to a minor." TEX. ALCO. BEV. CODE ANN. §§ 106.03(a), 106.13(a)(Vernon 2002) (the Code). A person acts with criminal negligence:

with respect to . . . the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that 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.



§ 6.03(d), TEX. PEN. CODE ANN. (Vernon 2002). However,

A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents himself to be 21 years old or older by displaying an apparently valid Texas driver's license or an identification card issued by the Texas Department of Public Safety, containing a physical description consistent with his appearance for the purpose of inducing the person to sell him an alcoholic beverage.

§ 106.03(b) of the Code.

B. Evidence

The TABC issued wine-only-package-store permit Q471935 and beer-retailer's-off-premise license BF 471936 to Respondent. Respondent's licensed and permitted premises (3-Amigos) are located at 3704 Decatur Avenue, Fort Worth, Tarrant County, Texas. 3-Amigos is a "drive-through" establishment, in which customers drive by a service window of the premises and are sold alcoholic beverages by Respondent's employees.

On October 5, 2001, Ana Galvan and her brother-in-law, Moses Galvan, drove up to the service window at 3-Amigos.<sup>1</sup> Mrs. Galvan was driving and Mr. Galvan was in the front passenger seat. Mr. Galvan ordered a 16-ounce Bud Light beer from Mobeen Aslam, who was working at the drive-through window at that moment. Mr. Aslam asked Mr. Galvan for identification. Mr. Galvan produced his brother Guillermo's Texas Driver's License 02108041, which stated in bold red print "UNDER 21 UNTIL 05-31-01." Mr. Galvan held his brother's driver's license up to his face while leaning toward Mr. Aslam from the front passenger's seat. Mr. Aslam testified he "checked" the license and that it appeared to be Moses Galvan in the picture. Mr. Aslam did not take the license in hand, but rather compared it to Mr. Galvan at distance of some feet from both. Mr. Aslam made the sale to Mr. Galvan, exchanging the beer for the money through Mrs. Galvan. The Galvans left 3-Amigos and drove to Mr. Galvan's girlfriend's home.

Mr. Galvan testified he used his brother's driver's license for the purpose of purchasing the beer. He believed he and his brother look sufficiently alike to fool a seller.

Ten minutes later TABC Agents Tricia O'Cayce and Tana Watkins parked in 3-Amigos' parking lot, where they could observe sales from the drive-through window. They were not concealed, and were about 30 or 40 feet from the service window. Five minutes after they took position, the Galvans returned to 3-Amigos. Mrs. Galvan was driving and Mr. Galvan was in the front passenger seat. The agents observed the youthful appearance of both Galvans. They then observed the car pull up to the service window. They saw money exchanged for a can in a paper

<sup>1</sup> Mrs. Galvan was born on November 24, 1981, and on October 5, 2001, she was 19 years old. Moses Galvan was born on September 28, 1981; on October 5, 2001, he was 20 years old. Mrs. Galvan was married to Moses' brother, Guillermo. Guillermo Galvan was born on May 31, 1980, and on October 5, 2001, he was over 21 years.

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sack. They observed the top of the can protruding above the paper sack, noticed that it had a silver rim. They did not observe the clerk at the window request or examine identification from the driver or the passenger. They made a stop of the Galvan's vehicle after it left the drive-through lane, but before it left the 3-Amigos' parking lot.<sup>2</sup> Agent O'Cayce observed the interior of the Galvan's vehicle and saw an opened 16 ounce Bud Light in the cupholder closest to Mrs. Galvan, and an unopened 16-ounce Bud Light in a paper sack in the cupholder closest to Mr. Galvan. Agent O'Cayce testified that Mrs. Galvan did not have the odor of an alcoholic beverage on her breath, and Mrs. Galvan was not observed to have consumed any beer.

Mr. Galvan testified that after a brief visit to his girlfriend's home, he and his sister-in-law returned to 3-Amigos to buy another beer. Mr. Aslam and Mr. Galvan both testified that when the Galvan's vehicle pulled up to the stop, Mr. Galvan ordered another 16-ounce Bud Light from the clerk working at the window. Mr. Aslam was standing nearby and, recognizing Mr. Galvan from earlier in the evening, authorized his clerk to make the sale. Once again, the beer and purchase money were exchanged through Mrs. Galvan.

Agent O'Cayce testified that after the Galvan's vehicle was stopped, Mrs. Galvan produced a driver's license which established her name and date of birth. Mr. Galvan, according to the agent, claimed not to have any identification in his possession. Mr. Galvan's name and date of birth were established through questioning Mrs. Galvan and Mr. Galvan separately and comparing their answers. Agent O'Cayce testified she searched Mr. Galvan and the vehicle but could not find any identification for Mr. Galvan. Mr. Galvan testified he had his brother's driver's license in his back pocket.

Agent O'Cayce identified the contents of the opened 16 ounce Bud Light as an alcoholic beverage by smelling its contents, and by its label stating its contents contained more than ½ of 1% of alcohol by volume. She identified the contents of the unopened 16 ounce Bud Light as an alcoholic beverage by its label stating its contents contained more than ½ of 1% of alcohol by volume.

### C. Analysis, Conclusion, and Recommendation

The evidence discloses that no sale of an alcoholic beverage was made to Ana Galvan. Mrs. Galvan acted as a conduit for the exchange of beer for money between Respondent's agents and Moses Galvan. That portion of the notice of hearing charging Respondent with making a sale of an alcoholic beverage to Mrs. Galvan in violation of Sections 106.03(a) and 106.13(a) of the Code should be dismissed.

Moses Galvan was a minor on October 5, 2001. Mr. Aslam (and Respondent's sales clerk on Mr. Aslam's authority) sold two alcoholic beverages to him. Mr. Galvan produced his brother's

<sup>2</sup> Respondent complained that the agents did not have probable cause to make the stop, and accordingly that the results of the agents subsequent investigation should be quashed. As the Staff pointed out this is civil matter, and the legality of the Galvan's detention is not material to the issue of whether Respondent acted with criminal negligence in making the sale. The agents, at least, had reasonable suspicion that a sale to a minor had taken place.

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driver's license for the express purpose of buying the two beers illegally.

1. Did Mr. Aslam act with criminal negligence in making the sales to Mr. Galvan?

A person acts with criminal negligence [with respect to the sale of alcohol to a minor] when he ought to be aware of a substantial and unjustifiable risk that [the sale to the minor] 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 [seller's] standpoint.

§ 6.03(d), TEX. PEN. CODE ANN. (Vernon 2002)(emphasis supplied; section reworded for this context).

Mr. Aslam considered Mr. Galvan to appear youthful enough to request him to produce identification. However, Mr. Galvan only held up the driver's license. Mr. Aslam examined the one inch square photograph on the license from a distance of several feet. He did not take it from Mr. Galvan and examine the photograph closely to compare it to Mr. Galvan's face. He did not take any real opportunity to determine if the physical description on the license of height of 5 feet nine inches matched Mr. Galvan. Nevertheless, Mr. Aslam testified that he "checked" the proffered identification, and that "it appeared to be his."

Since Mr. Aslam did not examine the driver's license closely, his statement that he checked it is not true. The ALJ finds that Mr. Aslam acted with criminal negligence with respect to both sales.

2. Did Mr. Galvan's production of his brother's driver's license excuse the sale to a minor?

[Mr. Aslam did] not commit an offense if [Mr. Galvan] falsely [represented] himself to be 21 years old or older by *displaying* an apparently valid Texas driver's license or an identification card issued by the Texas Department of Public Safety, containing a physical description consistent with his appearance *for the purpose of inducing* [Mr. Aslam] to sell him an alcoholic beverage.

§ 106.03(b) of the Code (emphasis supplied; section reworded for this context).

Mr. Galvan testified that it was his intent to use his brother's drivers license to buy beer. The license in question is "apparently valid." Its expiration date was May 31, 2006. Respondent's Exhibit #1, a color photocopy of the license, shows the "TEXAS" holograph lines across the face of the card. The card does not appear to have been altered. The license's picture and description of Guillermo Galvan are somewhat consistent with Moses Galvan's, although Guillermo's ears stick out farther than Moses's, and Moses' eyebrows are more arched than Guillermo's.

Although the license was "displayed" by Mr. Galvan to "induce" Mr. Aslam to make the sale within the letter of the law, the ALJ cannot find that Mr. Aslam was induced to make the sale

because of the license. Since Mr. Aslam did not examine the license closely, there is no evidence that Mr. Aslam was induced (or persuaded or influenced) to make the sale by its authoritative source (the Texas Department of Public Safety), or its apparent validity, or by its description of Mr. Galvan. The mere production of the license induced Mr. Aslam to make the sale.

The ALJ finds that Mr. Aslam's sales to Mr. Galvan are not excused by § 106.03(b) of the Code.

3. What is an appropriate sanction for Respondent?

No evidence of the economic impact of the proposed suspension upon Respondent was admitted. No evidence of any aggravating or ameliorating circumstances concerning the violation was admitted. Respondent's violation history was admitted as a part of TABC Exhibit 2. Respondent's permit and license were suspended for seven days for a sale to a minor made on June 7, 2001. The suspension was to take effect from October 3, 2001. Respondent was offered the opportunity to pay a civil penalty of \$1,050 on or before September 19, 2001. The penalty was assessed on August 23, 2001.

The TABC's "standard penalty chart" allows a suspension of seven to 20 days for a first violation of § 106.03 of the Code, and a 10-to-90 day suspension for a second violation. 16 TEX. ADMIN. CODE § 37.60. The sale to Mr. Galvan was a "health, safety and welfare violation" which occurred within 36 months of the first violation. The penalty for a second violation is justified. *Id.* § 37.60(c). Respondent was informed in writing of the first violation before the second violation. *Id.* § 37.60(d); TABC Exhibit No. 5. A 30-day suspension, as recommended by the Staff, is within the range for a second violation, and is reasonable considering the Respondent's violation history. The Code allows a civil penalty to be substituted for a suspension, and provides a penalty range of not less than \$150 for each day of a suspension. §§ 11.64(a) and 61.71(b)(5) of the Code. The Staff's recommendation of a \$4,500 penalty is the minimum daily penalty and is reasonable considering the Respondent's violation history.

The ALJ recommends the TABC find Respondent acted with criminal negligence in the sale of alcoholic beverages to Mr. Galvan. The TABC should order that Respondent's permit and license be suspended for 30 days, or alternatively, that Respondent pay a \$4,500 civil penalty.

IV. PROPOSED FINDINGS OF FACT

1. The TABC issued wine-only-package-store permit Q471935 and beer-retailer's-off-premise license BF 471936 to Respondent.
2. Respondent's licensed and permitted premises ( 3-Amigos) are located at 3704 Decatur Avenue, Fort Worth, Tarrant County, Texas.
3. 3-Amigos is a "drive-through" establishment, in which customers drive by a service window of the premises and are sold alcoholic beverages by Respondent's employees.

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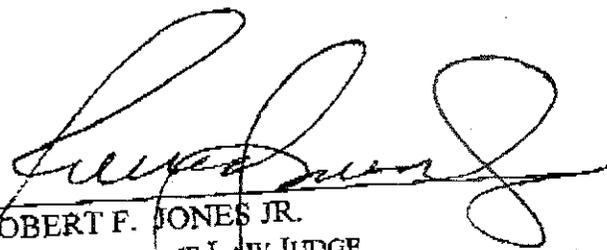
4. Ana Galvan was born on November 24, 1981, and on October 5, 2001, she was 19 years old.
5. Moses Galvan was born on September 28, 1981; on October 5, 2001, he was 20 years old.
6. Mrs. Galvan was married to Moses' brother, Guillermo. Guillermo Galvan was born on May 31, 1980, and on October 5, 2001, he was over 21 years old.
7. On October 5, 2001, Mrs. Galvan and her brother-in-law Moses Galvan drove up to the service window at 3-Amigos.
8. Mrs. Galvan was driving and Moses Galvan was in the front passenger seat.
9. Mr. Galvan ordered a 16-ounce Bud Light beer from Moheen Aslam, who was working at the drive-through window at that moment.
10. Mr. Aslam asked Mr. Galvan for identification.
11. Mr. Galvan produced his brother Guillermo's Texas Driver's License 02108041, which stated in bold red print "UNDER 21 UNTIL 05-31-01." Mr. Galvan held his brother's driver's license up to his face while leaning toward Mr. Aslam from the front passenger's seat.
12. Mr. Aslam did not take the license in hand, and he compared it to Mr. Galvan at distance of some feet from both.
13. Mr. Aslam made the sale to Mr. Galvan, exchanging the beer for money through Mrs. Galvan. The Galvans left 3-Amigos and drove to Mr. Galvan's girlfriend's home.
14. Mr. Galvan used his brother's driver's license for the purpose of purchasing the beer.
15. TABC Agents Tricia O'Cayce and Tana Watkins parked in 3-Amigos' parking lot where they could observe sales from the drive-through window, about ten minutes after the Galvans left.
16. The agents were about 30 or 40 feet from the service window.
17. The Galvans returned to 3-Amigos five minutes after the agents took position.
18. Mrs. Galvan was driving and Mr. Galvan was in the front passenger seat.
19. The agents observed the youthful appearance of both Galvans.
20. The agents observed the car pull up to the service window, and saw money exchanged for a can in a paper sack.

21. The agents observed the top of the can protruding above the paper sack, and noticed that it had a silver rim.
22. The agents did not observe the clerk at the window request or examine identification from the driver or the passenger.
23. The agents made a stop of the Galvan's vehicle after it left the drive-through lane, but before it left the 3-Amigos' parking lot.
24. Agent O'Cayce observed the interior of the Galvan's vehicle and saw an opened 16-ounce Bud Light in the cupholder closest to Mrs. Galvan, and an unopened 16-ounce Bud Light in a paper sack in the cupholder closest to Mr. Galvan.
25. Although the agents could not observe it, when the Galvan's vehicle pulled up to the window, Mr. Galvan ordered another 16-ounce Bud Light from the clerk working at the window.
26. Mr. Aslam was standing nearby, and recognizing Mr. Galvan from earlier in the evening, authorized his clerk to make the sale.
27. The beer and purchase money were exchanged through Mrs. Galvan.
28. Agent O'Cayce identified the contents of the opened 16 ounce Bud Light as an alcoholic beverage by smelling its contents, and by its label stating its contents contained more than ½ of 1% of alcohol by volume.
29. She identified the contents of the unopened 16 ounce Bud Light as an alcoholic beverage by its label stating its contents contained more than ½ of 1% of alcohol by volume.
30. No sale of an alcoholic beverage was made to Ana Galvan.
31. Respondent's agent, Mr. Aslam made two sales of an alcoholic beverage to Moses Galvan, a minor.
32. Mr. Aslam did not examine the driver's license Mr. Galvan produced.
33. The contents of the driver's license did not induce Mr. Aslam to sell an alcoholic beverage to Mr. Galvan.
34. Respondent's permit and license were suspended for seven days for a sale to a minor made on June 7, 2001. The suspension was to take effect from October 3, 2001. Respondent was offered the opportunity to pay a civil penalty of \$1,050 on or before September 19, 2001. The suspension and penalty were assessed on August 23, 2001.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 106 of the Code.
2. SOAH has jurisdiction over all matters relating to the conduct of 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 2001).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2001).
4. Based on the foregoing findings, Respondent deviated from the standard of care that an ordinary person would exercise under all the circumstances as viewed from Respondent's standpoint. § 6.03(d), TEX. PEN. CODE ANN. (Vernon 2001).
5. Based on the foregoing findings and conclusions, Respondent acted with criminal negligence in making the sale of alcohol to Moses Galvan. § 106.13(a) of the Code.
6. Based on the foregoing findings and conclusions, Respondent was not induced to make the sale of alcohol to Moses Galvan by display of an apparently valid driver's license. § 106.03(b) of the Code.
7. Based on the foregoing findings and conclusions, Respondent's permit should be suspended for 30 days, or alternatively Respondent should pay a civil penalty of \$4,500. See §§ 11.64(a), 61.71(b)(5) of the Code; 16 TEX. ADMIN. CODE § 37.60.

SIGNED November 14, 2002.

  
ROBERT F. JONES JR.  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 597396**

IN RE ARIES ASSOCIATES INC.	§	BEFORE THE
D/B/A 3-AMIGOS FOOD MART	§	
PERMIT NO. Q-471935	§	
LICENSE NO. BF471936	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-3831)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 7th day of January 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened on October 11, 2002, and adjourned on October 11, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 14, 2002. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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 No. Q-471935 and License No. BF471936 are hereby **SUSPENDED for thirty (30) days**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$4,500.00** on or before the **2nd day of April, 2003**, all rights and privileges under the above described permit and license will be **SUSPENDED for a period of thirty (30) days, beginning at 12:01 A.M. on the 9th day of April, 2003**.

**This Order will become final and enforceable on January 28, 2003**, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

**SIGNED** this 7th day of January, 2003.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator  
Texas Alcoholic Beverage Commission

/bc

The Honorable Robert F. Jones, Jr.  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FAX (817) 377-3706**

David C. Hill  
**ATTORNEY FOR RESPONDENT**  
8700 N. Stemmons Frwy., Ste. 470  
Dallas, Texas 75247  
**VIA FAX (214) 920-2498**

ARIES ASSOCIATES INC.  
D/B/A 3-AMIGOS FOOD MART  
**RESPONDENT**  
6352 Skylark Cir.  
North Richland Hills, TX 76180-7848  
**CERTIFIED MAIL/RRR NO. 7001 2510 0003 8688 7640**

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Regulatory Division  
Fort Worth District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 597396**

**REGISTER NUMBER:**

**NAME: ARIES ASSOCIATES INC.**

**TRADENAME: 3-AMIGOS FOOD MART**

**ADDRESS: 3704 Decatur Avenue, Fort Worth, Texas 76106-3815**

**DATE DUE: April 2, 2003**

**PERMITS OR LICENSES: Q-471935, BF471936**

**AMOUNT OF PENALTY: \$4,500.00**

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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 2ND DAY OF APRIL 2003, 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**

**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.