

DOCKET NO. 591572

IN RE EVA REYNA PARDO	§	BEFORE THE
D/B/A 1-2-3 BAR	§	
PERMIT NO. BG448723	§	
LICENSE NO. BL448724	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-1025)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 25th day of June 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kerry D. Sullivan. The hearing convened and adjourned on April 17, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 30, 2001. 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 No. BG448723 and License No. BL448724 be hereby **SUSPENDED**.

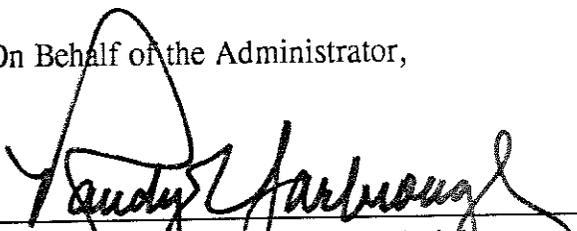
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **19th** day of **September, 2001**, all rights and privileges under the above described permit and license are hereby **SUSPENDED** for a period of seven (7) days, beginning at **12:01 A.M. on the 26th day of September, 2001**.

This Order will become final and enforceable on **July 16, 2001**, 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 25th day of June, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Kerry D. Sullivan
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

Gammon Guinn
Law Offices of Guinn & Gonzales
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RESPONDENT
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San Antonio, Texas 78221-3142
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Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
San Antonio District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 591572

REGISTER NUMBER:

NAME: EVA REYNA PARDO

TRADENAME: 1-2-3 BAR

ADDRESS: 140 New Laredo Hwy., San Antonio, Texas 78207-3109

DATE DUE: September 19, 2001

PERMITS OR LICENSES: BG448723, BL448724

AMOUNT OF PENALTY: \$1,050.00

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 19TH DAY OF SEPTEMBER 2001, 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, 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.

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
	§	
VS.	§	OF
	§	
	§	
EVA REYNA PARDO	§	
DBA 1-2-3 BAR	§	
(TABC CASE NO. 591572)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought to suspend the permit held by Eva Reyna Pardo d/b/a 1-2-3 Bar (Respondent) for allegedly permitting a minor to “possess and/or consume” an alcoholic beverage at the Respondent’s bar in San Antonio, Texas. The Staff requested a seven-day suspension of the permit, or that Respondent be penalized \$1,050.00 in lieu of suspension. The Administrative Law Judge (ALJ) recommends approval of the Staff’s recommendation.

I. PROCEDURAL HISTORY & JURISDICTION

On April 17, 2001, a public hearing was convened before ALJ Leah Bates at the offices of the State Office of Administrative Hearings, 1015 Jackson Keller, Ste. 102-B, San Antonio, Texas. The Staff was represented by Gayle Gordon, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent was represented by Gammon Guinn, attorney. There are not contested issues pertaining to notice or jurisdiction. Accordingly, those matters are set out in the proposed findings of fact and conclusions of law without further discussion here. Following the conclusion of the hearing, the matter was transferred to ALJ Kerry D. Sullivan for preparation of the proposal for decision.

II. DISCUSSION

A. Applicable Law

The TABC may suspend a permit if the “permittee . . . with criminal negligence permitted a minor to (consume or possess an alcoholic beverage) on the licensed premises.” TEX. ALCO. BEV. CODE ANN. § 106.13 (a)(Vernon 2001) (the Code). “Criminal negligence” is defined in the following manner:

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.

§ 6.03(d), TEX. PEN. CODE ANN. (Vernon 2001).

B. The Evidence

TABC presented the testimony of a City of San Antonio police detective, a TABC officer, and the beer-drinking minor in question. The testimony of these witnesses established the following facts. On the evening of September 16, 2000, Detective Troy Merek and TABC officer Joseph Reilly visited the 1-2-3 Bar in response to a complaint alleging, among other things, sale of alcoholic beverages to a minor. Upon entering the bar, the officers immediately noticed a youthful-looking male later identified as Eric Ramirez sitting alone at a table near the door drinking a bottle of beer. Within about five minutes of entering the bar, Officer Merek approached Mr. Ramirez and asked for his identification. Mr. Ramirez produced a valid driver's license that indicated he was twenty years of age.

Mr. Ramirez testified at the hearing that he arrived at the bar about 30 to 40 minutes prior to the officers. He testified that he brought the beer in with him, and that he bought no alcoholic beverages at the bar. Mr. Ramirez testified that Mr. David Pardo, the husband of the licensee, was tending bar the entire time Mr. Ramirez was there. The bar was well lit, and Mr. Pardo had an unobstructed view of Mr. Ramirez, whose table was about 25 feet from where Mr. Pardo stood behind the bar. There were only about eight people in the bar. Mr. Ramirez testified that he "was hoping" the bar management did not see him drinking his beer, but he described no attempt to conceal his consumption of the beer. To the contrary, Officer Reilly described the scene when he arrived as a "glaringly obvious" case of a minor in possession of an alcoholic beverage.

C. Analysis, Conclusion, and Recommendation

In the ALJ's view, the passive sort of activity alleged here is in some tension with the typical concept of criminal negligence-- where, at least in the reported cases, there is generally more active participation by the Defendant.¹ But Section 106.13 of the Code specifically envisions that passive activity--*i.e.*, the mere sufferance of underage drinking on a licensed premises, can constitute a violation of the Code.

Given this framework, the ALJ concludes that the Permittee's complete failure to investigate and prohibit Mr. Ramirez from drinking on the licensed premises violates the standard set out in Section 106.13 of the Code. The evidence establishes that Mr. Ramirez was underage and had a

¹ See "Notes of Decisions" following § 6.03, TEX. PEN. CODE ANN. (Vernon 1994 and 2001 Supp.)

youthful appearance. He had been in the bar and in plain view of the bartender for approximately 35 to 45 minutes prior to the intervention by the officers. Neither Mr. Pardo nor any other employee of the bar took any action to investigate Mr. Ramirez's age or to restrain him from drinking in the bar. The bar was not crowded, the lighting was good, and the permittee called no witnesses in defense of the TABC's allegations and evidence.

Under these circumstances, the ALJ finds that the Commission has met its burden of proof. The ALJ also finds that the relatively lenient requested sanction of a \$1,050 fine or seven day suspension of the permit are appropriate under the circumstances.²

III. FINDINGS OF FACT

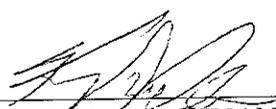
1. On September 16, 2000, Staff of the Texas Alcoholic Beverage Commission (TABC) issued an administrative notice to Eva Reyna Pardo d/b/a the 1-2-3 Bar, stating that an administrative case was being submitted for an alleged violation of permitting a minor to "possess/consume" an alcoholic beverage inside Ms. Pardo's Bar.
2. On November 27, 2000, the Staff of the TABC issued a notice of hearing notifying all parties that a hearing would be held on the Staff's allegation and informing the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the matters asserted.
3. The hearing was originally set for January 16, 2001, but was continued to April 17, 2001, on which date the hearing was held in San Antonio, Bexar County, Texas, before an administrative law judge with State Office of Administrative Hearings (SOAH). The Staff was represented by Gail Gordon, an attorney with the TABC Legal Division. Respondent was represented by attorney Gammon Guinn.
4. On September 16, 2000, Eric Ramirez, a youthful-looking twenty year old individual, entered the Permittee's bar with a 12 ounce bottle of beer.
5. Mr. Ramirez sat at a table in the bar and drank the beer he brought in for approximately 35-45 minutes.
6. The bar was well lighted, and Mr. Ramirez sat in plain view of the bartender.
7. No employee of the bar questioned Mr. Ramirez's age or attempted to prohibit him from drinking the beer he brought into the bar.

² See §§ 11.64(a) and 61.71(b)(5) of the Code and 16 TEX. ADMIN. CODE § 37.60.

IV. 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, the Permittee's bartender deviated from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the bartender's standpoint. § 6.03(d), TEX. PEN. CODE ANN. (Vernon 2001).
5. Based on the foregoing findings and conclusions, the Permittee, or her agent, servant, or employee, acted with criminal negligence in permitting Mr. Ramirez to possess and consume an alcoholic beverage on the licensed premises. § 106.13 (a) of the Code.
6. Based on the foregoing findings and conclusions, the Permittee's permit should be suspended for seven days, or Respondent should be penalized \$1,050.00 in lieu of suspension. See §§ 11.64(a), 61.71(b)(5) of the Code; 16 TEX. ADMIN. CODE § 37.60.

SIGNED May 30, 2001.



KERRY D. SULLIVAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS