DOCKET NO. 624125

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	**BEFORE THE TEXAS**
	§	
	§	
	§	
	§	
VS.	§	
	§	**ALCOHOLIC**
MAYAN CAPITAL MARKETING, LLC D/B/A KHAN'S GRILL AND THIRSTY BRONC, Respondent	§	
	§	
	§	
	§	
	§	
PERMITS MB810409, LB	§	
	§	
HIDALGO COUNTY, TEXAS (SOAH DOCKET NO. 458-14-3901)	§	
	§	**BEVERAGE COMMISSION**

ORDER

CAME ON FOR CONSIDERATION this 2nd day of June, 2015, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Steven M. Rivas presiding. The hearing on the merits convened on October 29, 2014 and the SOAH record closed that same day. The Administrative Law Judge issued a Proposal for Decision containing Findings of Fact and Conclusions of Law on December 23, 2014. The Proposal for Decision was properly served on all parties and the parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by either party.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

THEREFORE, IT IS ORDERED that **NO ACTION** be taken to suspend Respondent's permits based on the allegation that Respondent sold, served, dispensed or delivered an alcoholic beverage to a minor on or about February 28, 2014.

This Order will become **final and enforceable** on the 26th day of June, 2015, **unless a Motion for Rehearing is filed by the 25th day of June, 2015.**

SIGNED this the 2nd day of June, 2015, at Austin, Texas.

Sherry K-Cook

Sherry K-Cook, Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 2nd day of June, 2015.

Martin Wilson

Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Steven M. Rivas
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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SOAH DOCKET NO. 458-14-3901
TABC CASE NO. 624125

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
	§	
v.	§	**OF**
	§	
MAYAN CAPITAL MARKETING, LLC D/B/A KHAN'S GRILL & THIRSTY BRONC,	§	
Respondent	§	
	§	
PERMIT NO(s) MB810409, LB	§	
HIDALGO COUNTY, TEXAS	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) brought this disciplinary action against Mayan Capital Marketing, LLC d/b/a Khan's Grill & Thirsty Bronc (Respondent), alleging that, on or about February 28, 2014, Respondent, his agent, servant or employee, with criminal negligence sold, served, dispensed or delivered an alcoholic beverage to a minor, in violation of Texas Alcoholic Beverage Code (Code) § 106.13. Based on the evidence, the Administrative Law Judge (ALJ) finds that TABC failed to prove the allegation, by a preponderance of the evidence, and recommends that Respondent's permit not be suspended.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

Jurisdiction and proper notice were not disputed; therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

On October 29, 2014, a hearing was convened in McAllen, Texas, before Steven M. Rivas, an ALJ with the State Office of Administrative Hearings. TABC was represented by John Sedberry,

attorney. Respondent appeared and was represented by attorney Rick Zuniga. The record closed on the same date.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to Code § 106.13(a), TABC may cancel or suspend for not more than 90 days a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises. A person acts with criminal negligence under Code § 1.04(26) if the person acts with a mental state that would constitute criminal negligence under chapter 6 of the Penal Code, which states:

> 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.[1]

III. EVIDENCE

A. Documentary Evidence and Testimony

TABC offered into evidence three exhibits, including the Notice of Hearing issued in the case, the Respondent's permit history, and the incident report. Respondent offered four exhibits, including two summary pages of inspection reports, a copy of Respondent's rules and policies, and a letter of appreciation issued to Respondent for not selling to minors. All exhibits were admitted into evidence.

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[1] Tex. Penal Code § 6.03(d).

Homer Moralez, a TABC enforcement agent, testified that on February 28, 2014, he was working undercover at Respondent's premises, Khan's Thirsty Bronc, located at 1346 West University Drive, Edinburg, Texas. Agent Moralez testified he observed two youthful appearing females purchase alcoholic beverages (Dos Equis beer) from the bar. According to Agent Moralez, the two girls took the beverages to a table near the bar where three other girls were sitting. Agent Moralez testified he reported to another TABC agent, Carlos Navarro, that several youthful appearing females were in possession, and consuming, alcoholic beverages at the premises. Because Agent Moralez was undercover, he identified the females in question to Agent Navarro, and then exited the premises.

Agent Navarro testified that he and two other TABC agents, Vinson Ousley and William McGinnis, entered the premises and made contact with the table identified by Agent Moralez where five youthful looking females were sitting. Agent Navarro wrote in an incident report that after all the girls were interviewed, it was discovered that two of the females at the table were in possession of alcoholic beverages and were minors under the age of 21. Each underage female was issued a citation for minor in possession of alcohol, according to Agent Navarro.

Respondent's policy on the date of the incident was to allow persons 18 years and older to enter the bar, according to Respondent's owner, Ricardo Caballero. Mr. Caballero testified that following the incident, he no longer allows anyone under 21 years of age to enter the bar.[2] Although he was not present on the night in question, Mr. Caballero testified the youthful looking females who purchased alcoholic beverages from the bar were over 21 years of age.[3] On the night in question, the two managers on duty were Cecil Hopkins and Thomas Molina, and according to Mr. Caballero, they were required to consistently and routinely make sure that anyone on the premises and in possession of alcoholic beverages was at least 21 years old.

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[2] The premises consists of a bar and restaurant, according to Mr. Caballero.

[3] Mr. Caballero stated he viewed a surveillance video of the incident, but the video was not offered into evidence.

Mr. Caballero asserted the reason he paid close attention to underage drinking is because the premises is located directly across the street from the University of Texas—Pan American (UTPA), and that many underage students from UTPA visited the bar when the age requirement to enter the premises was 18 and up. In support of his contention that he monitored underage drinking, Mr. Caballero referred to a summary of inspection reports that were conducted at the premises in February 2014.[4] The summary noted in relevant part:

- February 8, 2014, no minors were observed consuming alcoholic beverages;
- February 15, 2014, a sting operation where a minor attempted to purchase alcohol and was refused;[5]
- February 22, 2014, no violations were noted during an inspection;
- February 27, 2014, an undercover operation was performed but no violations were found;
- February 28, 2014, two underage females were cited for minor in possession (the present cause of action).

Mr. Molina, one of Respondent's employees, testified he was a manager on duty on the night in question. He reiterated Mr. Caballero's testimony that one of his job duties was to ensure anyone in possession of an alcoholic beverage was at least 21 years of age. Mr. Molina testified all staff members were required to attend weekly and monthly meetings in order to learn how to prevent underage drinking. He further asserted the managers were required to walk around the bar area and into the bathrooms to make sure nobody under the age of 21 years was in possession of an alcoholic beverage.

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[4] Respondent Ex. 1.

[5] Respondent Ex. 2, a letter of recognition dated March 3, 2014, indicating TABC's Lieutenant Mario Villarreal was pleased to inform Respondent that one of its "employees **refused** to sell alcoholic beverages to the minor." (Emphasis in text)

B. Analysis

The sole issue is whether Respondent or its employee, with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. Although the evidence reflects two underage females were found in possession of alcoholic beverages, the actions of Respondent's employees on the night in question do not rise to the level of criminal negligence. The patrons who purchased alcoholic beverages from the bar, although youthful looking, were not underage, according to Mr. Caballero's uncontroverted testimony. In addition, although TABC's incident report indicates two underage females were found in possession of alcoholic beverages, the report does not establish those were the two females who purchased the alcoholic beverages.

At bottom-line, TABC's position is that Respondent's employees acted with criminal negligence by failing to prevent two underage females from being in possession of alcoholic beverages on the premises. This position is not supported by a preponderance of the evidence. On the contrary, both Mr. Caballero and Mr. Molina testified that they were aware that underage patrons who attended UTPA would frequent the bar. They also asserted one primary job duty for a manager was to actively ensure nobody on the premises under the age of 21 was in possession of alcoholic beverages. They also pointed out that all staff members were required to attend weekly and monthly meetings where the subject of preventing underage drinking was addressed. The fact that TABC had not found any violations in several previous inspections during the month of February 2014 supports Mr. Caballero's contention that he practiced due diligence in attempting to prevent underage drinking from occurring on the premises. The evidence reflects the events that occurred on the night in question were due to an oversight rather than the result of negligence or the higher standard of criminal negligence. Therefore, the ALJ concludes that criminal negligence has not been established by a preponderance of the evidence in this case.

IV. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence is insufficient to prove that, on or about February 28, 2014, Respondent, his agent, servant or employee, with criminal negligence sold, served, dispensed or delivered an alcoholic beverage to a minor. Accordingly, the ALJ recommends that Respondent's permit not be suspended.

V. FINDINGS OF FACT

1. Mayan Capital Marketing, LLC d/b/a Khan's Grill & Thirsty Bronc (Respondent), holds Permit No. MB810409, LB issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 1346 West University Drive, Edinburg, Texas.

2. On June 20, 2014, Respondent received proper and timely notice of the hearing from the TABC.

3. The notice of hearing informed the parties of the date, time, and location of the hearing; the matters to be considered; the legal authority under which the hearing would be held; and the statutory provisions applicable to the matters to be considered.

4. On October 29, 2014, a hearing was convened in McAllen, Texas, before Steven M. Rivas, an Administrative Law Judge with the State Office of Administrative Hearings. TABC was represented by John Sedberry, attorney. Respondent appeared and was represented by attorney Rick Zuniga. The record closed on the same date.

5. On February 28, 2014, two youthful looking females purchased alcoholic beverages from the bar at the premises.

6. The two youthful looking females took the alcoholic beverages to a table where three other females were sitting.

7. Two females at the table were in possession of alcoholic beverages and were minors under the age of 21. These two females received citations for minor in possession.

8. Respondent always had two managers on duty who were required to make sure anyone in possession of an alcoholic beverage was at least 21 years old.

9. Respondent's employees were required to attend weekly and monthly staff meetings in order to learn how to prevent underage drinking.

10. Respondent's owner, Ricardo Caballero, paid close attention to underage drinking because the premises is located directly across the street from the University of Texas—Pan American (UTPA) and many underage students from UTPA visited the bar when the age requirement to enter the premises was 18 and up.

11. In the month of February 2014, TABC performed several inspections in which the following results were noted:

    - February 8, 2014, no minors were observed consuming alcoholic beverages;
    - February 15, 2014, a sting operation where a minor attempted to purchase alcohol and was refused;
    - February 22, 2014, no violations were noted during an inspection;
    - February 27, 2014, an undercover operation was performed but no violations were found;
    - February 28, 2014, two underage females were cited for minor in possession (the present cause of action).

12. Respondent's employees practiced due diligence to prevent underage drinking from occurring on the premises.

13. The incident that occurred on February 28, 2014, was the result of an oversight and not due to criminal negligence.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code §§ 6.01, 61.71, 61.73, and 106.13.

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 Texas Government Code ch. 2003.

3. Notice of the hearing was provided as required by Texas Government Code §§ 2001.051 and 2001.052.

4. Respondent's employees did not deviate from the standard of care that an ordinary person would exercise under all the circumstances as viewed from their standpoint. Tex. Pen. Code § 6.03(d).

5 Respondent did not violate the Code by having an agent, servant, or employee who, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor on February 28, 2014.

6. Based on the foregoing, Respondent's permit should not be suspended.

SIGNED December 23, 2014.

STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS