

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of All Licenses Held by
Megusta Mexican Cuisine, Inc., d/b/a
Megusta Mexican Restaurant, for
Premises Located at 433 Robert Street
S., Saint Paul, License I.D. No. 18491.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick, acting as a hearing officer for the Saint Paul City Council, commencing at 9:30 a.m. on Wednesday, December 29, 1999, at the Saint Paul City Hall/Ramsey County Courthouse, Room 41, 15 West Kellogg Boulevard, St. Paul, Minnesota. The hearing was held pursuant to a Notice of Hearing dated November 12, 1999.

Virginia D. Palmer, Assistant St. Paul City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City's Office of License, Inspections and Environmental Protection (LIEP). Modesto E. Reyes, Owner of Megusta Mexican Cuisine, Inc., 433 Robert Street South, Saint Paul, Minnesota 55107, appeared on behalf of the Licensee (hereinafter "Megusta" or "Licensee"). The record closed on December 29, 1999, with the close of the hearing.

NOTICE

This Report contains a recommendation and not a final decision. The final decision will be made by the Saint Paul City Council, which may affirm, reject, or modify the Findings and Conclusions contained herein. The Council will consider the evidence in this case and the hearing examiner's recommended Findings of Fact and Conclusions, but will not consider any factual testimony not previously submitted to and considered by the Administrative Law Judge. The Licensee will have an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or interpretation of the facts and may present argument related to the recommended adverse action. The Council's decision as to what, if any, adverse action shall be taken will be by resolution under § 310.05 of the St. Paul Legislative Code. To ascertain when the Council will consider this matter, the parties should contact the Saint Paul City Council, Room 310, St. Paul City Hall/Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102.

STATEMENT OF ISSUES

The issues in this matter are whether Licensee served alcohol to persons not yet of legal age, whether the means used to check compliance are appropriate, and, if so, what penalty is appropriate.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge (ALJ) makes the following:

FINDINGS OF FACT

1. The License Inspection and Environmental Protection Office for the City of Saint Paul (LIEP) is in the process of completing an annual "compliance check" of all the licensed alcohol vendors in the City. As conducted by LIEP, all vendors are subject to one compliance check. Those vendors that fail the initial compliance check are required to complete alcohol awareness training and subject to a follow-up compliance check. Adverse action against the licenses of vendors is taken only if the second compliance check is failed by the vendor.

2. Megusta Mexican Cuisine, Inc. is a corporation doing business as Megusta Mexican Restaurant at 433 Robert Street South, Saint Paul, Minnesota 55107. The corporation is owned by Modesto Reyes. Arturo Reyes, Modesto Reyes' brother, works in the restaurant. Megusta has a Restaurant (B) license and a Malt On-Sale license. The Malt On-Sale license authorizes Megusta to sell beer that does not exceed 3.2 percent alcohol content (by weight).^[1] Megusta's licenses remain valid pending the outcome of this proceeding.

3. In April, 1999, Sergeant James Ramstad of the Saint Paul Police Department (SPPD) conducted a compliance check of Megusta, by sending underage persons into the restaurant and having them attempt to buy beer. Megusta failed the compliance check when the server provided beer to those underage persons without requesting proof of age. Due to that failure, Megusta was issued a warning and required to complete alcohol awareness training.^[2] Megusta completed that training on July 23, 1999.^[3] Arturo Reyes was one of the servers who completed that training.

4. On October 21, 1999, Sergeant Ramstad and Sergeant Stuart Burke of the SPPD were conducting compliance checks of establishments serving alcohol. Assisting these officers were two persons, ages 20 and 19, who entered each establishment and attempted to purchase alcohol. Each compliance checker was instructed to order beer, and wait to see if the server requested proof of age. If proof of age was requested, the compliance checkers were to inform the server that they had no identification with them. The compliance checkers were instructed to be truthful and not to claim that they were of legal age. Each team of compliance checkers was equipped with a transmitting body microphone to allow the police officers to monitor the conversation between the server and the compliance checkers.

5. At about 6:00 p.m. on October 21, 1999, Sergeants Burke and Ramstad and the two compliance checkers arrived at Megusta on Robert Street. The compliance checkers were carrying no identification and the only money they carried had been provided by the officers.

6. The officers and compliance checkers parked in a lot across Robert Street from Megusta. From that position, the officers could see into the restaurant through the front windows. The compliance checkers entered Megusta and sat down at a table in

full view of the officers. The officers saw the server approach the table. The male compliance checker ordered two "Coronas," a brand of beer served by Megusta. The officers saw the server place the two bottles of beer in front of the compliance checkers and step away. The officers could not hear the conversation between the compliance checkers and the server due to the background noise and music in the restaurant, but they did hear three distinct taps on the microphone. Those taps were the prearranged signal between the compliance checkers and the officers that alcohol had been served and was in the control of the compliance checkers.

7. Upon hearing the signal, the officers left their vehicle and crossed Robert Street to enter Megusta. As they approached the front door, the officers could see into the restaurant and noted that the compliance checkers were alone at their table with the beer. As the officers entered the door the server, Arturo Reyes, came back to the compliance checker's table and began to ask them for identification. They responded that they had none, as they had been instructed.

8. The officers informed the server that he had provided underage persons alcohol and that the restaurant would be cited. Arturo Reyes objected to the officers that the compliance checkers looked old enough to purchase beers and asked that the officers provide identification for the checkers to prove they are underage. Sergeant Ramstad asked the male compliance checker whether any request for identification had been made prior to the server putting the beer on the table. The compliance checker indicated that no identification had been asked for prior to the officers entering the restaurant.

9. On October 28, 1999, the Saint Paul City Attorney's Office issued a Notice of Violation to the respondent. The Notice stated that on October 22, 1999, an employee sold alcohol to an underage person in violation of state law^[4] and the Saint Paul Legislative Code.^[5] The Notice stated that since this was the respondent's first violation, LIEP would be recommending a \$500 fine. Megusta notified LIEP that it sought to appeal the finding of a violation.

10. On November 12, 1999, the Assistant City Attorney, Virginia D. Palmer, issued a Notice of Hearing in this matter. The Notice of Hearing identified the violation as occurring on October 22, 1999.

11. The misidentification of the date of occurrence in the notices in this matter did not cause any confusion for Licensee. Licensee was not prevented from fully contesting the alleged violation due to the erroneous date.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Saint Paul City Council have authority to consider the charges against the respondent and the penalty, if any, that should be paid the city pursuant to Sec. 310.05 of the St. Paul Legislative Code.

2. LIEP has complied with all relevant substantive and procedural legal requirements.

3. The respondent received adequate and timely notice of the hearing and of the charges against it.

4. LIEP has the burden of proof to establish, by a preponderance of the evidence, that the respondent violated state law and the St. Paul Legislative Code.^[6]

5. Under Sec. 409.26(b)(3), the presumptive penalty for the first illegal sale of alcohol is a \$500 fine.

6. For purposes of Sec. 409.26(b)(3) of the Saint Paul Legislative Code, there are no substantial or compelling reasons for deviating from the presumptive penalty in this case.

7. Because the Licensee's violation is covered by the matrix of Sec. 409.26, under Sec. 310.05(k)(vii) of the Saint Paul Legislative Code the Licensee may be required to pay all the costs of this proceeding.

8. Licensee violated Minn. Stat. § 340A.503 and Sec. 409.26 of the Saint Paul Legislative Code on October 21, 1999, when it sold alcohol to persons under 21 years of age.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Saint Paul City Council order Licensee to pay a \$500 fine. The Saint Paul City Council may, at its discretion, order the Licensee to pay the costs of this proceeding.

Dated this ____ day of January, 2000

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped, two tapes

MEMORANDUM

The facts of this matter are not significantly in dispute. The server at Megusta took the order for beer from two underage persons and brought back two beers. The server maintained at the hearing that he asked for identification from the compliance checkers after putting one of the beers on the table. The server's testimony is contradicted by that of the officers who conducted the compliance check.^[7] The officers both saw the beers on the table and the server was out of sight. This situation lasted

from the time the compliance checker gave the prearranged signal to when the officers entered the restaurant. As the officers entered the restaurant, the server returned to the table and asked the two underage persons for proof of age.

State law and Saint Paul City Ordinance are clear that underage persons are not to be served alcohol by licensees. Two beers were left with the underage persons while the server went to another table. By leaving the beer with the compliance checkers and stepping away from the table, the server had delivered the beer into the possession of those underage persons and had lost any ability to control the consumption of the beer by those persons. Those acts constitute violations of the prohibitions against service alcohol to underage persons.^[8] Coming back to the table to ask for proof of age does not cure the violation.

The use of compliance checkers is reasonable to allow LIEP some means of determining whether underage sales of alcohol are being made by licensees. The close monitoring and careful instruction of the underage persons involved acts to protect licensees from undue disruption to their businesses.^[9]

While the Notice of Violation and the Notice of Hearing both contained an error as to the date of the violation, Megusta was not prejudiced by this error. The facts of the situation were fully known by Licensee and there were no difficulties in preparing for the hearing that were caused by the error. The Licensee has received adequate notice of the alleged violation and a full opportunity to defend against the allegation.

LIEP has demonstrated by a preponderance of the evidence that Megusta served alcohol to underage persons in violation of Sec. 409.26(b)(3) of the Saint Paul Legislative Code and Minn. Stat. § 340A.503. The presumptive penalty is \$500.00, and there are no facts in the record that suggest deviation from that penalty is appropriate. Sec. 310.05(k)(vii) of the Saint Paul Legislative Code permits the City Council to assess the costs of this proceeding against Licensee. That assessment is at the sole discretion of the Council.

S.M.M.

^[1] Saint Paul Legislative Code, Sec. 410.01.

^[2] City Exhibit 5.

^[3] *Id.*

^[4] Minn. Stat. § 340A.503.

^[5] Section 409.26.

^[6] *In re Kaldahl*, 418 N.W.2d 532, 535 (Minn. Ct. App. 1988).

^[7] The testimony of a patron at the restaurant was contradictory, at one point indicating the officers immediately entered the restaurant when the beer was being served and at another point suggesting some short time passed before the officers entered the restaurant.

^[8] Minn. Stat. § 340A.503; Saint Paul Legislative Code, Sec. 409.26.

^[9] Another method of determining whether underage sales are occurring is for SPPD officers to seize the licensed premises during business hours and examine identification of any patrons who appear to be close to legal age. The choice of enforcement method is within the discretion of the SPPD and LIEP.