

*Proposed  
File*

DOCKET NO. 458-03-1849

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	OF
	§	
BEATRICE AVALOS BENAVIDEZ	§	ADMINISTRATIVE HEARINGS
D/B/A GIL'S CLUB	§	
PERMIT NOS. BG-416052 & BL-416053	§	
NUECES COUNTY, TEXAS	§	
(TABC CASE NO. 599129)	§	

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Beatrice Avalos Benavidez d/b/a Gil's Club (Respondent), a drinking establishment in Nueces County, Texas. Staff alleged that on February 10, 2002, a breach of the peace occurred on the licensed premises, which was not beyond the control of the Respondent, and which resulted from the improper supervision of persons on the premises. Staff further alleged that Respondent failed to promptly report the breach of the peace.

A hearing in this case was held before Melissa M. Ricard, Administrative Law Judge, on March 14, 2003, at the State Office of Administrative Hearings, 1225 Agnes Street, Suite 109, Corpus Christi, Texas. Staff appeared and was represented by their attorney, Dewey Brackin. Respondent was represented by her attorney, Jacobo Muñoz. The record closed on April 14, 2003.

After announcements, each party made an opening statement. Both parties agreed the breach of the peace was caused when a two patrons from the club had a dispute in Respondent's parking lot. There was no issue whether the parking lot is part of the licensed premises or whether Respondent is responsible for all acts of its agents, servants, and employees. Basically, the issue is whether Respondent should be held liable for a domestic dispute that occurred in the public parking lot of the licensed premises.

**EVIDENCE**

The facts were established by the testimony of Ms. Maria Trevino, Mr. Julian Lugo, Agent Dina Ahrens and Officer M. Ramos. Almost all of the testimony was consistent and is laid out here with any discrepancies noted. The facts show that just before 1:00 a.m. on Sunday, February 10, 2002, Wendy Rios and Julian Lugo were patrons at the Respondent's premises. Both of them had been there before, and they were known as regular customers. Maria Trevino was the manager on duty and also tending bar. There were five to six other patrons in the club at this time.

Mr. Lugo was playing pool with another woman and Ms. Rios was sitting at the bar when an argument ensued. At one point, Ms. Rios picked up a bar stool to throw at Mr. Lugo, who was

12 - 15 feet away.<sup>1</sup> Ms. Trevino witnessed this, and told Ms. Rios to put the stool down and to behave. A few minutes later, Ms. Trevino came out from behind the bar to serve some drinks, and was struck in the arm by an object thrown by Ms. Rios at Mr. Lugo.<sup>2</sup>

Ms. Trevino then asked Ms. Rios to leave. Ms. Rios did exit the club. Ms. Rios returned a short time later still wanting to talk to Mr. Lugo and then exited again. A few minutes later, Mr. Lugo was told by someone that there was somebody "messaging" with his truck, therefore he went outside, carrying a pool stick from the Club. Mr. Lugo stepped outside, found Ms. Rios there, and they continued their argument. Ms. Rios wanted her purse out of Mr. Lugo's truck. They were only a few feet outside the Club's front door.

During the argument, his cell phone fell, and he put the pool stick down to pick up the phone. Ms. Rios picked up the pool stick and struck him on the head with it. Mr. Lugo suffered a four inch gash on the left side of his head. He went back into the bar to clean up. The incident was called into the police by a bar across the street from the Club. Ms. Trevino observed Mr. Lugo enter the Club with blood on his head and neck. He went into the restroom and when he returned to the bar area, Ms. Trevino asked Mr. Lugo to leave. Ms. Trevino testified she intended to call the police, but she did not have the opportunity as they showed up a few minutes after the incident occurred.

Ms. Rios was found by Corpus Christi Police Department Texas Police Officer M. Ramos at a major intersection several blocks away. Ms. Rios displayed signs of intoxication: slurred speech, bloodshot eyes and an odor of alcohol. Officer Ramos returned with Ms. Rios to the scene and located Mr. Lugo. Mr. Lugo indicated that he was leaving the Club and was followed outside by Ms. Rios who hit him with the pool stick. Ms. Rios corroborated Mr. Lugo's version of the events. Officer Ramos contacted Ms. Trevino who stated that she did not know how serious the confrontation between Ms. Rios and Mr. Lugo had gotten outside. Ms. Rios was charged with aggravated assault since the pool stick is considered a weapon. Officer Ramos advised Ms. Trevino that the incident needed to be reported to the TABC.

The next day, four staples were put into Mr. Lugo's head to close his wound. Later, the charges against Ms. Rios were dropped, and the couple still continue to date.

The Respondent is the owner of the bar. She testified that she called the TABC Corpus Christi Office on Monday, February 11, 2003 between 8:30 a.m. and 9:30 a.m, spoke with a receptionist and left a message for an Agent to call her back. She received no return call.

TABC Agent Dina Ahrens investigated the incident based upon the filed police report. Her investigation revealed the above facts, except that her investigation found that the object thrown by

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<sup>1</sup>Mr. Lugo testified that there was "no drama" with regard to him and Ms. Rios in the Club. Clearly his testimony on this point is not credible in light of the recollections of other witnesses and the events that transpired. At best, Mr. Lugo was oblivious to what was going on; at worst, Mr. Lugo was deliberately ignoring Ms. Rios, thereby escalating the conflict.

<sup>2</sup>At the time of the incident it was reported that the object was a beer bottle, but during the hearing Ms. Trevino testified it was an ashtray.

Ms. Rios at Mr. Lugo inside the Club was a beer bottle. During her investigation, Agent Ahrens found that Ms. Trevino had been unresponsive to the situation, claiming that she could not "babysit" patrons outside the club and that she does not usually call the police. In Agent Ahren's opinion, the incident was within the control of Ms. Trevino and Ms. Trevino should have called the police when the bar stool and the bottle were thrown inside the Club, but she failed to do so. It was also Agent Ahren's opinion that since the assault occurred right outside the open front door of the Club and was witnessed from across the street, Ms. Trevino should have been more aware of it. Also, Agent Ahrens testified that the TABC had no record of any contact from the Respondent regarding the incident.

The certified TABC license and permit file admitted into evidence shows no prior violations, except a cash law violation in 1999. The Respondent testified that this violation involved a bad check that was overlooked, and that there no other incidents involving a breach of the peace.

## DISCUSSION

### A. Parties' positions

#### 1. Staff's position

The Respondent is liable because Ms. Trevino simply told Ms. Rios to leave, instead of calling the police. Staff further argues that the assault was a result of the improper supervision of the club's manager, Ms. Trevino and that it was within her control. Ms. Rios and Mr. Lugo had been arguing and confrontational all evening. Further, when the bar stool was almost thrown, and later when the beer bottle was thrown, the confrontation became more than a verbal altercation. At that point the police should have been called. At a minimum, when Ms. Trevino asked Ms. Rios to leave, given the situation, she should have ensured that Ms. Rios did in fact leave, instead of allowing her return into the club and to wait for Mr. Lugo. Ms. Trevino had two or three opportunities to diffuse the situation, therefore, when she did not, the aggravated assault was the direct and proximate result of her failure to act when she had a duty to do so.

TABC further argued that the incident was not immediately reported, but it could offer no evidence to rebut the Respondent's testimony that she called and left a message the next business day after the incident.

#### 2. Respondent's position

The assault was not known by Ms. Trevino at the time that it occurred and it could not have been reasonably anticipated. They were regular patrons, and when she asked Ms. Rios to leave, Ms. Trevino had no reason to believe that Ms. Rios would not leave. Ms. Rios was not screaming at or threatening Mr. Lugo when she left. There were at least 15- 20 minutes after Ms. Trevino asked Ms. Rios to leave when nothing happened. Ms. Trevino did not see Mr. Lugo leave the club, and could not know they were outside fighting. The event was not anticipated or controlled by the Respondent, and that there was no way the Respondent could have prevented the incident from happening.

Respondent further argued that the TABC was contacted the next business day after the incident.

## B. ALJ's Analysis

A licensee is responsible for a breach of the peace that has occurred on the licensed premises or on premises under the licensee's control if the breach of the peace was not beyond the control of the licensee and it resulted from improper supervision of persons permitted to be on the licensed premises or on premises under the licensee's control. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 24.11, 61.71(a)(1), & 69.13 (the Code). The central issues in this case are whether the incident was beyond the control of the Respondent and whether it resulted from improper supervision.

While an establishment can not always anticipate what patrons may do in a domestic dispute, a licensee must use some discretion when tempers escalate and it is likely that someone could get hurt. What is disturbing about this incident is that there were two separate acts of physical violence in which the only response was to send the perpetrator outside. When Ms. Rios returned, still there was no response other than to send her outside again. Respondent argues that there was no reason to believe that Ms. Rios would not leave the premises. However, there was reason to believe that she had no intention of leaving when she returned after being sent out.

Further, the Respondent argues that Ms. Rios and Mr. Lugo were known patrons, and MS. Trevino had no reason to believe their dispute would escalate in the manner that it did. However, because the patrons were known as a couple, Ms. Trevino should have known that Ms. Rios might not be able to leave without Mr. Lugo. At the very least she should have checked about how Ms. Rios leave, if indeed she wanted her to leave the premises. It seems entirely reasonable that Ms. Trevino should have realized that Ms. Rios was outside waiting for Mr. Lugo. Further, the bar was not that busy and Ms. Trevino either let Mr. Lugo go outside a few minutes later carrying a pool stick or failed to notice it.

Another disturbing aspect of this case is the fact that the Respondent never called the police, even after the assault. If the establishment across the street reported it, then it was of such an obvious nature that the Respondent either knew about it or should have known about it.

In conclusion, it is this ALJ's opinion that a breach of the peace occurred on the licensed premises, which was not beyond the control of the Respondent and which resulted from the improper supervision of persons on the premises.

With regard to the allegation that the Respondent failed to report the incident to the TABC, the weight of the evidence shows the Respondent did attempt to contact the TABC the next business day after the event.

## C. Sanctions

The TABC may cancel or suspend Respondent's permits for a breach of the peace pursuant to §§ 28.11, 32.17(a)(8), & 32.24 of the Code. Under the TABC's "standard penalty chart", a violation of § 28.11 of the Code involving "a simple breach of the peace with no serious bodily injury or deadly weapon involved" calls for a suspension of 10 to 15 days for a first offense. A violation of § 28.11 of the Code involving "an aggravated breach of the peace with a serious bodily injury or involving a deadly weapon" calls for a suspension of 45 to 60 days for a first offense. *See* 16 TAC § 37.60. The Penal Code defines a "deadly weapon" as "anything that in the manner of its

use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07(17)(B)(Vernon 2002). "Bodily injury" means "physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(8). "Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* § 1.07(46).

A civil penalty should have an economic impact similar to what suspension would have on the Respondent. "The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended." § 11.64(a) of the Code.

### RECOMMENDATION

Staff believes that the assault was of an aggravated nature because of the use of the pool stick, and recommends a sanction of 45- 60 days. However, while the injury was very serious, the ALJ does not agree that it constituted serious bodily injury or that the pool stick was a deadly weapon. Therefore, this ALJ cannot follow the penalty recommendation that the Staff's attorney suggested, but does agree with the Staff's attorney that the Respondent should be penalized for improper supervision. Given the lack of previous violations, a ten day suspension or \$1500.00 fine seems appropriate.

With regard to the "failure to report" violation, this ALJ finds that the TABC failed to present sufficient evidence that this violation occurred.

### FINDINGS OF FACT

1. Beatrice Avalos Benavidez, doing business as Gil's Club, 4664 Kostoryz, Corpus Christi, Nueces County, Texas, holds Wine and Beer Retailer's Permit (BG-416052) and Retail Dealer's On-Premise Late Hours License (BL-416053) issued by the Texas Alcoholic Beverage Commission (TABC).
2. On May 20, 2002, Petitioner sent Respondent written notice that on February 10, 2002, a breach of the peace occurred on the licensed premises, which was not beyond the Permittee's control, and resulted from the Permittee's improper supervision of the persons on the premises in violation of Texas Alcoholic Beverage Code § 28.11 and 16 Texas Administrative Code § 35.31(b).
3. Respondent requested a hearing to contest the allegations.
4. Notice of the hearing was sent to Respondent on January 29, 2003.
5. On April 14, 2003, a hearing convened before Administrative Law Judge Melissa M. Ricard, State Office of Administrative Hearings, at 1225 Agnes Street, Suite 109, Corpus Christi County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Dewey

Brackin. Respondent was represented at the hearing by attorney Jacobo Muñoz. The record closed on May 14, 2003.

6. On February 10, 2003, Maria Trevino was employed by Respondent as a manager and bartender on the licensed premises.
7. On February 10, 2003, Wendy Rios and Julian Lugo engaged in an argument on the licensed premises. At the time they were at least 12 feet apart.
8. When Ms. Rios picked up a bar stool to throw at Mr. Lugo, Ms. Trevino told her to put it down and to behave.
9. Ms. Rios threw a beer bottle at Mr. Lugo which hit Ms. Trevino. Ms. Trevino then asked Ms. Rios to leave and Ms. Rios left.
10. Later, Ms. Rios came back into the club looking for Mr. Lugo and left again.
11. Mr. Lugo exited the premises with a pool stick in hand and found Ms. Rios outside the club where the argument continued.
12. Ms. Rios hit Mr. Lugo over the head with the pool stick causing a four-inch gash that required four staples to close.
13. The location of the incident was just a few feet outside the front door and was part of the licensed premises.
14. The outside incident was reported to the police by an establishment across the street.
15. Ms. Rios was found by the police several blocks away.
16. Mr. Lugo returned to the club and used the restroom to clean up, after which he was asked by Ms. Trevino to leave.
17. Ms. Trevino never called the police.
18. Ms. Trevino should have called the police when the argument became physical while the parties were still in the club.
19. Ms. Trevino should have been more aware of the escalating conflict and done more to prevent the incident, simply sending Ms. Rios outside was not an adequate response to the situation.
20. The incident was not beyond the control of the Respondent because Ms. Trevino should have ensured that Ms. Rios did not leave the premises entirely or should have or diffused the situation another way.
21. The incident resulted from the improper supervision of persons on the premises.

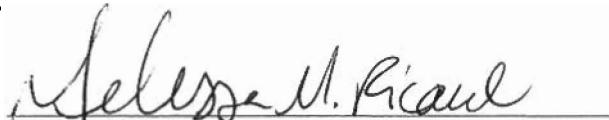
The Respondent because Ms. Trevino should not have allowed Mr. Lugo to step outside with a pool stick.

23. The Respondent has had no other violations involving a beach of the peace.

### CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 28.11.
2. SOAH has jurisdiction to conduct the administrative 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. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. § § 2001.051 and 2001.052.
4. Venue was proper in Corpus Christi, Texas, pursuant to 1 TEX. ADMIN. CODE § 155.13.
5. A breach of the peace occurred on the licensed premises that was not beyond the control of the permittee and that resulted from improper supervision of persons permitted to be on the licensed premises. TEX. ALCO. BEV. CODE ANN. § 28.11.
6. The breach that occurred was a simple breach of the peace under TEX. ALCO. BEV. CODE ANN. § 28.11.
7. Based on the Findings of Fact and the above Conclusions of Law, the Respondent's permits should be suspended for ten days, or in the alternative, Respondent should be required to pay a civil penalty of \$1,500.00 in lieu of suspension.

**SIGNED** this 12<sup>th</sup> day of June, 2003.

  
Melissa M. Ricard  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 599129**

IN RE BEATRICE AVALOS BENAVIDEZ § BEFORE THE  
D/B/A GIL'S CLUB §  
PERMIT NO. BG-416052 & BL-416053 §  
§ TEXAS ALCOHOLIC  
§  
NUECES COUNTY, TEXAS §  
(SOAH DOCKET NO. 458-03-1849) § BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 16th day of July, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on March 14, 2003, and the record closed on April 14, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 12, 2003. 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 BG-416052 & BL-416053 are hereby **SUSPENDED**.

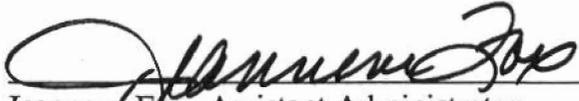
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of \$1,500.00 on or before the 8th day of October, 2003, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of ten (10) days, beginning at 12:01 A.M. on the 15th day of October, 2003.

**This Order will become final and enforceable on August 6, 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 and by mail as indicated below.

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 16<sup>th</sup> day of July, 2003.

On Behalf of the Administrator,



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Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Melissa M. Ricard  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (361) 884-5427**

Jacobo Munoz  
**ATTORNEY FOR RESPONDENT**  
719 Shoreline Blvd., Suite 500  
Corpus Christi, Texas 78401  
**VIA FACSIMILE: (361) 884-5152**

Beatrice Avalos Benavidez  
d/b/a Gil's Club  
**RESPONDENT**  
4209 Townsend  
Corpus Christi, Texas 78415  
**CERTIFIED MAIL NO. 7001 2510 0003 8688 9309**  
**RETURN RECEIPT REQUESTED**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Division

Corpus Christi District Office  
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 599129

REGISTER NUMBER:

NAME: Beatrice Avalos Benavidez

TRADENAME: Gil's Club

ADDRESS: 4664 Kostoryz, Corpus Christi, Texas 78415

DATE DUE: October 8, 2003

PERMITS OR LICENSES: BG-416052 & BL-416053

AMOUNT OF PENALTY: \$\$1,500.00

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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 8TH DAY OF OCTOBER, 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

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

**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.