DOCKET NO. 458-03-4311

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE
	§	
	§	
	§	
VS.	§	STATE OFFICE OF
KENNETH GLYNN PETTY,	§	
d/b/a DOC HOLIDAY'S, PERMIT	§	
NOS. MB-216788, LB-216789,	§	
& PE-216790, VAL VERDE COUNTY,	§	
TEXAS (TABC CASE NO. 605912)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Petitioner) brought this action against Kenneth Glynn Petty, d/b/a Doc Holiday's (Respondent), alleging that Respondent or its agent, servant, or employee, sold or permitted others to sell and possessed or permitted others to possess, a narcotic on the licensed premises. Petitioner requested that Respondent's permits be canceled because of the gravity of the alleged matters and the Respondent's previous violations. This proposal recommends that the permits be canceled based on the gravity of the violations.

I. PROCEDURAL HISTORY

A hearing convened in this matter on September 30, 2003, at the State Office of Administrative Hearings (SOAH) offices in San Antonio, Texas. Petitioner appeared and was represented by its Attorney, Dewey A. Brackin. Respondent appeared and was represented by its owner, Kenneth Glynn Petty and its office manager, Chris Vincent. The hearing was left open until October 6, 2003, for the parties to submit written briefs. The Petitioner submitted a brief and the hearing finally closed on that date.

The single disputed issue concerning notice is addressed in the discussion section below. Other notice and jurisdiction matters are stated in the fact findings and legal conclusions.

II. DISCUSSION

A. Evidence and Argument

1. Petitioner

The evidence clearly proved Petitioner's allegations that Respondent's employee possessed and sold a narcotic on the licensed premises on April 30, 2003.

Del Rio, Texas, police officer Gabriel Soriano testified he was on patrol on April 30, 2003, when a women, Nereida Pena, motioned him to stop. She was arguing with another woman, Josephine Rosas Rodriguez. When Officer Soriano approached, Ms. Rodriguez began to run. Ms. Pena told him Ms. Rodriguez had just purchased cocaine from a security guard inside Respondent's premises. She said the guard was wearing a yellow shirt with Respondent's name on it. Officer Soriano apprehended Ms. Rodriguez and arrested her for public intoxication. He found a bill folded in her wallet and a green bag, both containing a powdery substance. Ms Rodriguez said she purchased the substance at Respondent's premises from a security guard named "Rudy." Officer Soriano radioed Del Rio Police Officer Pedro Solas with the information and a description of the security guard.

Officer Solas testified Ms. Pena also told him that a security guard at Respondent's premises had sold cocaine to Ms. Rodriguez. Officer Solas went to the premises and found security guard Rudolfo "Rudy" Flores in a storage room. He asked him to step outside. He discovered two small baggies containing a white powdery substance in Mr. Flores' possession and placed him under arrest.

Del Rio Police Department Sergeant John Kirtley testified that tests of the white powdery substances obtained from Mr. Flores and Ms. Rodriguez showed they were cocaine. A Texas Department of Public Safety (DPS) report on the substance obtained from Ms. Rodriguez also showed it was cocaine.[1]

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[1] Ex. 4. At the time of the hearing, Del Rio police had not yet received the results of the DPS test on the substance obtained from Mr. Flores.

Del Rio Police Department Detective Steven Hughes testified he interviewed Mr. Flores at the time of his arrest. He said Mr. Flores stated that everyone at Respondent's was aware of "what was going on," *i.e.*, the cocaine traffic. Detective Hughes said there was a "tremendous amount" of drug traffic at the premises and that he has personally witnessed the traffic. He asserted that "Mexican mafia" members were friends with Respondent's management and Respondent's premises was a hangout for the Mexican mafia. He discussed previous violations by Respondent.

Detective Hughes said he has personally observed that Mr. Petty controls Respondent's premises, including hiring and firing employees.

In Detective Hughes' opinion, the Respondent's premises should be shut down because of the drug traffic. He said there are more problems there than the other major bar in Del Rio and that it is a known place for narcotics distribution.

Texas Alcoholic Beverage Commission Enforcement Division Sergeant Robert Reyes testified he is familiar with Mr. Petty and Respondent's premises. He has been assigned to Del Rio since 1989. He said he has tried to work with Mr. Petty on problems at Respondent's premises, as part of his duties to guide and educate permit holders, including speaking to him numerous times about arrests and other problems. The problems have ranged from minor incidents to major problems, including narcotics violations, thefts, assaults, public intoxication, and selling to minors. He has informed Mr. Petty of numerous complaints on the sale of narcotics.

According to Sergeant Reyes, Mr. Petty believes he is doing the best he can and he means well, but his efforts are inadequate. He needs to monitor his employees more closely and hire better employees. He testified about previous violations, warnings, and criminal investigations.

Sergeant Reyes recommends cancellation of Respondent's permits. He said he has made every effort to assist Mr. Petty in counseling with employees, but it seems the problems keep increasing. He does not believe Mr. Petty is able to prevent problems at Respondent's premises.

2. Respondent

Mr. Petty testified that others have told him that neither Ms. Rodriguez nor Ms. Pena have ever been in Respondent's premises.[2] He pointed out that the Val Verde County Grand Jury indicted Mr. Flores[3] for possession but not distribution of cocaine.

Mr. Petty testified he has been in the bar business for 25 years. He maintained that alcohol and illegal drugs just go together. He said there is not a club in the United States that does not have drug- and alcohol-related problems. He denied knowing that his employees have been selling drugs and asserted that Mr. Flores seemed like a very unlikely person to cause drug problems.

Mr. Petty believes that for some reason, he has gotten on the wrong side of the Texas Alcoholic Beverage Commission. He asserted that his club has been visited by law enforcement authorities more than others. He said Sergeant Reyes has come to the premises with drug-sniffing dogs and has found nothing.

Mr. Petty said he is required by Petitioner to report disturbances and that is the reason there seem to be so many problems at the premises. According to Mr. Petty, disturbances will just happen at a large 400-person-capacity club. He said he tries to control problems as much as he possible, but he cannot check everyone who comes in. He said he has had these problems for just the last six or seven years.

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[2] In an affidavit (Ex. 4), Mr. Flores said the person he sold cocaine to was an ex-waitress at Respondent's premises.

[3] Ex. 5.

B. Analysis

This proposal concludes that Respondent's permits should be canceled based on the seriousness of the violations proved. The evidence showed possession and distribution of cocaine, a Schedule II substance,[4] by Respondent's employee at the premises on the night of April 30, 2003, while he was working as a security guard. The evidence also showed the premises is a known place for drug-trafficking, that a considerable amount of drug distribution has occurred there, and that other employees of Respondent have been aware of this. Detective Hughes has personally witnessed drug trafficking there. Regardless of whether Mr. Petty was personally aware of the problems, it is clear he has not been able to control them.

The matters discussed in the immediately preceding paragraph show the Texas Alcoholic Beverage Commission has grounds to take disciplinary action against Respondent under § 11.61(b)(2) and (7) of the Texas Alcoholic Beverage Code (Code), including canceling his permits. The first basis for disciplinary action is that Respondent violated a provision of the Code. Section 104.01 of the Code prohibits lewd, immoral, or indecent conduct, which is defined to include possession of a narcotic. The second basis is that the place or manner in which the Respondent conducts its business warrants cancellation or suspension based on the general welfare, peace, morals, and safety of the public (place or manner ground). The Texas Alcoholic Beverage Commission rules at 16 TEX. ADMIN. CODE § 35.31(a) and (b)(15) provide that a narcotics-related offense as described in Chapters 481 and 483 of the Health and Safety Code is a place or manner ground for disciplinary action. Possession of cocaine is a narcotics related offense under Chapter 481 of the Health and Safety Code.[5]

Respondent objected that the previous violations were not alleged as a grounds for disciplinary action in the "indictment," *i.e.* the notice of hearing. The objection is valid under

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[4] TEX. HEALTH & SAFETY CODE ANN. § 481.032.

[5] *Id.* §§ 481.102 and 481.112.

§§ 2001.051 and 2001.052 of the Administrative Procedure Act,[6] which requires notice to contain a statement of all matters asserted. The hearing notice did not mention previous violations as a basis for disciplinary action. The ALJ agrees with Respondent that previous violations should not be considered.

This proposal recommends cancellation of Respondent's permits even though previous violations are not considered because of the seriousness of the violations proved.

IV. FINDINGS OF FACT

1. Kenneth Glynn Petty, d/b/a Doc Holiday's (Respondent) holds Mixed Beverage Permit MB-216788, Mixed Beverage Late Hours Permit LB-216789, and Beverage Cartage Permit PE-216790 issued by the Texas Alcoholic Beverage Commission.

2. A hearing was held to consider disciplinary action against Respondent on September 30, 2003.

3. All parties received not less than 10 days' notice 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 a short, plain statement of the matters asserted.

4. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

5. On April 30, 2003, Respondent's employee, working as a security guard, possessed cocaine, a Schedule II narcotic, on the licensed premises.

6. On April 30, 2003, Respondent's employee, working as a security guard, sold cocaine, a Schedule II narcotic, on the licensed premises.

7. The Respondent's premises is a known place for drug-trafficking.

8. There has been a considerable amount of drug distribution at the Respondent's premises.

9. Some of Respondent's employees have been aware of the drug distribution at Respondent's premises.

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[6] TEX. GOV'T CODE ANN. Chap. 2001.

10. Law enforcement personnel have personally witnessed drug trafficking at Respondent's premises.

11. Mr. Petty has not been able to control drug trafficking at Respondent's premises.

V. CONCLUSIONS OF LAW

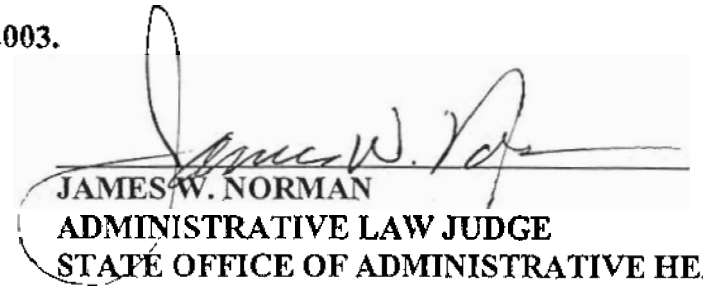
1. The Texas Alcoholic Beverage Commission has authority to take disciplinary action in this case. TEX. ALCO. BEV. ANN. §§ 6.01(b); 11.61(b)(2) and (7); 104.01(9); 28 TEX. ADMIN. CODE § 35.31(a) and (b)(15).

2. The State Office of Administrative Hearings has jurisdiction to issue a proposal for decision in this case containing findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.

3. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Respondent's Permit Nos. MB-216788, LB-216789, and PE-216790 should be canceled. TEX. ALCO. BEV. ANN. §§ 11.61(b)(2) and (7); 104.01(9); 28 TEX. ADMIN. CODE § 35.31(a) and (b)(15).

SIGNED October 16th, 2003.



JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 605912

IN RE KENNETH GLYNN PETTY	§	BEFORE THE
D/B/A DOC HOLIDAY'S	§	
PERMIT NOS. MB-216788, LB-216789	§	
& PE-216790	§	TEXAS ALCOHOLIC
	§	
VAL VERDE COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-4311)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 3rd day of December, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge James W. Norman. The hearing convened on September 30, 2003, and the record was closed October 6, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 16, 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 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 Mixed Beverage Permit No. MB-216788, Mixed Beverage Late Hours Permit No. LB-216789 and Beverage Cartage Permit No. PE-216790 are hereby **CANCELLED.**

This Order will become final and enforceable on <u>**December 24, 2003,**</u> 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.

SIGNED on this the ~~24~~th day of ~~November~~, 2003.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

Kenneth Glynn Petty
d/b/a Doc Holiday's
RESPONDENT
202 E. Gibbs
Del Rio, Texas 78840
CERTIFIED MAIL NO. 7001 2510 0003 8687 2387
RETURN RECEIPT REQUESTED AND REGULAR MAIL

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

San Antonio District Office
Licensing Division