

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 31, 1999

Doyme Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

Via Certified Mail
P 906 424 097

RE: Docket No. 458-98-1555; Texas Alcoholic Beverage Commission vs. S.P.I. BARS INC. d/b/a BABES BY THE BAY (TABC Case No. 568772)

Dear Mr. Bailey:

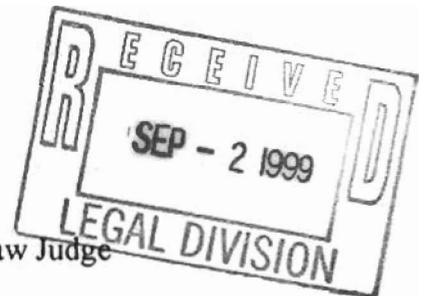
Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Dewey Brankin attorney for Texas Alcoholic Beverage Commission, and to Stewart Diamond attorney for S.P.I. BARS Inc. d/b/a Babes By the Bay. For reasons discussed in the proposal, I recommend a fifteen day suspension of Respondent's license or permit or a fine..

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in black ink, appearing to read "Edel P. Ruiseco".

Edel P. Ruiseco
Administrative Law Judge



EPR:mar
Enclosure

xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - **Facsimile, 512-475-4994**
Dewey Brackin, Staff Attorney, Texas Alcoholic Beverage Commission -
Certified Mail No. P 906 424 098 Return Receipt Requested
Stewart Diamond, Attorney at Law, 2111 Padre Blvd. Suite 5, Southe Padre Island, Tx. 78597 -
CERTIFIED MAIL NO. P 906 424 099, RETURN RECEIPT REQUESTED

DOCKET NO. 458-98-1555

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**S.P.I. BARS INCORPORATED,
D/B/A BABES BY THE BAY
MB-242632 AND LB-242633
CAMERON COUNTY, TEXAS
(TABC DOCKET NO. 568772)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC), as Petitioner, brought this action recommending to the Texas Alcoholic Beverage Commission (Commission) that the mixed beverage permit and mixed beverage late hours permit held by S.P.I. Bars, Incorporated, d/b/a Babes by the Bay, 3901 Padre Blvd., South Padre Island, TX 78597, in Cameron County, Texas (Respondent), be canceled or suspended. Petitioner alleged that Respondent, or its agent, servant and/or employee permitted consumption after hours, solicited a customer to buy drinks, and engaged in prostitution. These acts were alleged to violate Sections 11.61(b)(2) and (7), and Sections 104.01(4) and 105.06, of the TEXAS ALCOHOLIC BEVERAGE CODE (Code).

This proposal recommends that Respondent's license or permit be suspended for 15 days or a fine in lieu thereof, as there was sufficient credible evidence to support several allegations. The credible evidence admitted proved that an employee solicited a customer to buy drinks for consumption by an employee; and that a minor was permitted to work topless on the licensed premises. However, Petitioner did not prove that Respondent's employee permitted or consumed alcoholic beverages during prohibited hours, or that an employee engaged in the solicitation of prostitution on the premises.

I. Notice

Notice of the intention to suspend the Respondent's license for violating §§11.61(b)(7) and (13), and §§104.01(4) and 105.06, of the Code, was sent to Respondent on September 24, 1998.

There are no contested issues of notice, venue or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion.

II. Procedural History

On October 8, 1998, a pretrial conference was conducted by telephone, and orders were issued on October 19th and 22nd, and on November 9th, 10th, December 16, 1998; March 12th and April 26th, 1999. The pretrial order scheduling the pretrial hearing and final hearing was issued on September 17, 1998.

On April 8, 1999, a public hearing was held in Brownsville, Cameron County, Texas, before Edel P. Ruiseco, Administrative Law Judge (ALJ), with the State Office of Administrative Hearings ("SOAH").

Petitioner appeared by Dewey Brackin, of the staff of the Texas Alcoholic Beverage Commission. Respondent appeared by Stuart Diamond, attorney. The parties announced ready and the hearing was concluded on April 8, 1999; the ALJ left the record open until May 31, 1999, to permit the parties time to file proposed findings of fact and conclusions of law. The record was closed on May 31, 1999.

III. Jurisdiction

The Commission has jurisdiction over this matter pursuant to §§11.61(c) and 6.01, of the Code. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(6). The parties stipulated that notice and jurisdiction were proper, and questions of venue were waived by the parties.

IV. Discussion

General: Respondent is a registered sexually oriented business ("SOB") located in Cameron County, Texas. It holds permits MB-242632 and LB-242633, permitting it to sell alcoholic beverages to its patrons. The events that gave rise to the allegations occurred on March 12, 1996, March 21, 1996 and July 11, 1997.

Allegation 1: Petitioner alleged that Respondent violated §§ 104.01(4) and 11.61(b)(2), of the Code, in that Respondent's employee, on March 12, 1996, permitted the consumption of alcoholic beverages during prohibited hours.

Allegation 2: Petitioner alleged that Respondent violated §§ 105.06 and 11.61(b)(2), of the Code, in that, on March 21, 1996, Respondent's employee solicited a customer to buy drinks for consumption by employee.

Allegation 3: Petitioner alleged that Respondent violated Section 11.61(b)(7), of the Code, in that on March 21, 1996, an employee of Respondent engaged in prostitution.

Allegation 4: Petitioner alleged that Respondent violated Section 11.61(b)(7), of the Code, in that on July 11, 1997, Respondent authorized or permitted a minor to work topless on the licensed premises. Petitioner's prehearing statement referred to two minors, Kyleen Czaplick and Katie Loper.

V. Evidence

A. Petitioner's Evidence.

Petitioner offered the testimony of four witnesses (one by video) to support the allegations contained in the Notice of Hearing.

1. Agent Shipton: Agent Timothy Guy Shipton, a TABC agent, testified that he has been a peace officer for nine years, with the Laredo office. The agent testified that he arrived at the Respondent's club at between 2:00 and 2:30 a.m. on March 12, 1996, and his attention was drawn to the club because it's parking lot was full at a time when the club should have been closed. He said he checked his watch, and it was 2:35 a.m., and he entered the club. The club had about 40 patrons and the agent checked the patrons drinks to be sure no alcoholic beverages were being sold. He found none, and that they were drinking soft drinks or water only.

The agent checked both public and private areas of the club, and saw a dancer named Judith, going to the dressing room. The agent said that he identified himself to the dancer and she picked up a drink and drank from a plastic cup. The agent picked up the drink and it smelled of an alcoholic beverage. The agent admitted that defendant claimed to have just finished dancing and she disputed that it was an alcoholic drink. The agent further admitted that he did not test the drink by tasting it, or by having it analyzed, but based the arrest only on his sense of smell. The agent admitted that it was possible for a drink to smell like an alcoholic beverage if it previously had a mixed drink in it, and afterward only non-alcoholic liquid was introduced. He also admitted that Respondent's employees were in the process of picking up drinks when he entered.

2. Agent Guzman: TABC agent Leonard Guzman, testified that he has been an employee of TABC for nine years and a police officer for 18 years, and was temporarily assigned from his San Antonio office to work in Cameron County during the spring break.

On March 21, 1996, at about 10:45 o'clock p.m., the agent responded to another agent's information that prostitution was being solicited in Respondent's club. Before entering, the agent instructed backup agents to come in the club in an hour and identify the persons he was with. The agent entered undercover and sat at a table after ordering a beer. A dancer named Wallace, asked the agent to sit with her and another girl. An employee named Garcia came to the table and asked the agent if he would buy drinks for the girls. The agent agreed, stressing that he did not offer to buy the drinks, and paid for the three drinks which were delivered. The agent then stated that Garcia left the table to do her set of dances. After the dances, Garcia returned and asked if the agent wanted a table dance for \$20.00. The agent agreed and paid. The agent testified that he followed Garcia up a spiral staircase to the second floor, where Garcia sat down on the agent's lap and exposed her genitalia.

The agent testified that after the table dance there was a discussion regarding sexual matters. The agent alleged that Ms. Garcia asked if he liked or wanted to have sexual relations. The agent asked how much sexual relations would cost, and was allegedly told \$100.00. Ms. Garcia said she liked sex, and nothing further was discussed. The testimony was not credible. The agent was sent to make a prostitution case and the agent prearranged with other agents to arrest the persons he was with after one hour. The agent had no information as to which persons were soliciting prostitution, and allegedly made arrangements with two dancers within an hour's time. The agent remembered things not in his report in great detail. Other agents, according to prearranged signals, came in at 11:45 p.m. and identified and arrested Garcia and Wallace for prostitution. No criminal charges were ever brought as a result of the investigation, and none are anticipated. The agent admitted that no money was exchanged, offered or accepted by the women.

3. Trooper Calvin: Trooper Brandon C. Calvin, a Trooper with the Texas Department of Public Safety stationed in Brownsville, Texas, testified that he was a peace officer since February, 1996, where he worked for the South Padre Island Police Department, before becoming a state trooper in September, 1997, his current employment.

The Trooper testified that he previously had had contact with the two minor girls who were alleged to have been dancing nude for Respondent. He testified that he had been to the Respondent's premises and recognized the girls, who he identified as Loper and Kyleen, and that they dressed liked dancers. He had made a traffic stop on a vehicle in which the girls were passengers, and he investigated the situation and found that Loper was a runaway, and the girls stated that they were 16 and 17 years old. Both girls admitted dancing at Respondent's club, but they were released since it was not illegal for underage girls to dance. The Trooper never saw the girls topless, or dance at the club. He testified that "Big John", was the doorman at Respondent's club, and that his name was John Thomas Holloway.

4. Ms. Czaplick: Ms. Kyleen Czaplick, appeared through an oral deposition on videotape, which videotape and the transcript thereof was admitted without objection by Respondent's counsel. Ms. Czaplick admitted running away from her home with three other teenagers, and that all were under 18 years of age. She testified how her friend's car was retained by the Mexican police after they crossed into Matamoros, Mexico, because her friend's father had reported the car stolen. She related how they were running out of money and her two male friends could not obtain employment. Her girlfriend, Katie Loper, who had a false identification card showing that she was over 18 years of age, suggested that they try to find a waitress job and they applied at Respondent's club. Ms. Czaplick told them she was 17 years of age, but the club manager said it would be alright if they came back that afternoon and saw what the work consisted of. The girls returned and watched the dances, but were reluctant to dance because they had never done so before. They came back the next night because they could find no other employment, and asked to dance. They were to fill out applications, but somehow, in the confusion of the interview, they never actually filled out applications. Ms. Czaplick remembered that Katie told the Respondent's manager that she was over 18 years of age. They borrowed costumes from other dancers, who explained what was expected of them, and they danced that night and for two or three nights.

No management personnel i.e., manager or bartender, explained that they had to dance topless. All their instructions and directions were given by other dancers and the disc jockey, who explained that they had to dance two sets, with each set consisting of two songs, and that the first set would be on the main stage and the second set would be on the smaller stage. During the first set, the girls were instructed that they could leave their tops on during the first song, but had to dance topless for the second song. For the second set, the girls could dance topless for both songs if they wished. They were told, by the manager, that they had to do table dances after the two sets. The table dances consisted of private dances for individual customers. At the end of the night they had to pay a part of their earnings to the disc jockey and the bartender. During all the dances the girls never removed their bikini bottoms, but did dance bare breasted the two or three nights they worked at Respondent's club. They were never asked or told to, nor did they, engage in any acts of prostitution or solicitation of prostitution. The implication was that they were allowed to dance to earn money because they had no other job, nor could they obtain work without a fixed place of residence.

B. Respondent's Evidence

The Respondent's evidence consisted of a witness, Mr. Miguel G. Davila.

1. Mr. Davila: Mr. Miguel G. Davila, an employee and manager at Respondent's club for six years, testified that he remembers the incidents reported by TABC. Mr. Davila, stated that he worked as a bartender and manager for the past six years, and he remembers the morning Agent Shipton appeared. Mr. Davila testified that the dancer had just finished dancing and was picking up her drink when the agent stopped her. This dancer places her drink on the speaker during her set, and then picks it up after her dance is completed. On this occasion, she finished, went to the speaker and picked up the drink, and walked off stage. Mr. Davila did not see her take a drink, and specifically did not see her drink in front of the agent, suggesting that he was present at all times. He further indicated that it is common for dancers to use the same plastic cups for drinks, and after hours for soft drinks or water. Mr. Davila stated that a cup would retain the odor of an alcoholic beverage even after the alcohol had been consumed and/or replaced with a soft drink or water, but admitted that he did not remember exactly what was in her cup - water or coca cola. Mr. Davila also testified that the dancers "juice" (encourage patrons to request table dances) which is how they make their money, but they do not leave with patrons. In fact, the dancers leave by a rear door so as not to come in contact with or be approached or bothered by patrons.

Mr. Davila stated that he remembered the girls, Kyleen and Katie, and that they both told him they were over 18 years of age. He stated that 17 year old females could not dance, but could wait tables, and further admitted that both girls danced topless, with their breasts and nipples exposed. He explained that he did not check the girls identification to determine their age, because that was done in the office by someone else. He also did not hire or fire any dancers. He declared that the girls were not forced to remove their clothing, and that if they wanted to leave at any time they could.

C. Arguments of Parties

1. Petitioner: Petitioner argued that all the elements of the violations were proven, and therefore the license of Respondent should be suspended or canceled.

2. Respondent: Respondent argued that, regarding the allegation that two minors were employed to dance topless, the evidence showed that the girls were independent contractors and not employees of Respondent, and therefore Respondent is not responsible for the acts of independent contractors. As to the allegation regarding prostitution, Respondent cited several cases and suggested that the evidence and facts established that the elements of the crime were not met, and therefore no act of prostitution could be supported. Respondent also noted that no charges have ever been filed against the alleged prostitute regarding this incident.

D. Legal Authority:

Respondent's licenses or permits may be suspended or canceled pursuant to the authority in §11.61(b)(2) and (7) of the Code, §35.31 and §35.41 of the Texas Alcoholic Beverage Commission Rules (Rules), which reads in pertinent part as follows:

Sec. 11.61. CANCELLATION OR SUSPENSION OF PERMIT.

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . .

(2) the permittee violated a provision of this code or a rule of the commission;

(7) the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency;

Sec. 35.31. OFFENSES AGAINST THE GENERAL WELFARE

(b) Any of the following offenses shall be regarded as grounds to suspend, cancel, or deny, permits, license, or applications for such, under Sections ... 11.61(b)(7) ... of the Texas Alcoholic Beverage Code if civil or criminal citations have been issued or arrests have been made and if the offense is shown to have been committed on a premise by a permittee ... [or if permittee] knew or should have known that such offense was occurring on the premise and shall be considered offensive to the general welfare, health, peace and safety of the people of the state:

(9) Any other offense included in any ... law ... if such offense is shown to have occurred on the premise and is detrimental to the general welfare, health, peace and safety of the people;

(10) Any other offense included in any law of the United States or the State of Texas that is shown to have occurred on the premise and have a detrimental effect on the general welfare, health, peace, and safety of the people.

Section 35.41. TERMS DEFINED

In the Texas Alcoholic Beverage Code, the following definitions apply:

(a) Lewd or vulgar entertainment or acts-any sexual offense contained in the Texas Penal Code, Chapter 21 or any public indecency offenses contained in the Texas Penal Code, Chapter 43 (See Texas Alcoholic Beverage Code, §104.01(6)).

Pertinent provision of the Texas Penal Code is as follows:

Section 43.02. PROSTITUTION.

(a) A person commits an offense if he knowingly:

- (1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or*
- (2) solicits another in a public place to engage with him in sexual conduct for hire.*

E. Analysis:

Allegation 1: The allegation that Respondent's employee consumed alcoholic beverages during prohibited hours is not supported by evidence. The agent saw defendant pick up a drink of unknown liquid (which he believed was an alcoholic beverage - although the employee denied it) carry it to the dressing room and take a drink. The agent said it smelled of an alcoholic beverage, but admitted that he did not taste the drink or have it analyzed, and conceded that an odor of an alcoholic beverage would remain even after the container was filled with a soft drink or water. The manager for Respondent testified that he saw the incident and that the dancer had her drink on the speaker while she danced, and after her dance she merely picked up the drink and started toward the dressing room when the agent stopped her. The manager did not believe it was during prohibited hours. The agent further conceded that he checked the drinks of other patrons (about 40) and they only had soft drinks or water in their cups.

The suggestion is that clean cups are provided customers during prohibited hours, and therefore there would be no odor from a prior alcoholic beverage, however dancers reuse their containers, which would retain the prior odor of an alcoholic beverage. There was insufficient evidence to support the allegation that a cup thought to contain an alcoholic beverage, actually contained an alcoholic beverage. Therefore, the totality of the evidence showed that the dancer's cup contained water or a soft drink, and not an alcoholic beverage.

Allegation 2: The allegation that Respondent's employee solicited a customer to buy drinks for consumption by employee, is supported by the evidence. There was no contradictory evidence proffered concerning the allegation that Respondent's waitress solicited a customer to buy drinks for consumption by the dancers, therefore the testimony of the agent supports the allegation. The agent was requested to purchase a beer for the employees, and in fact did so.

Allegation 3: The allegation that Respondent's employee engaged in prostitution, was not supported by the evidence. The evidence was not credible that the dancer offered to engage in sexual conduct for a fee. The manager testified that dancers earn money from table dances, which requires that the dancer to "juice" customers, i.e., encourage them to want table dances.

The manager implied that this was common practice amongst the dancers, and that the sexual talk encouraged patrons to purchase table dances, and it was something that patrons wanted and expected.

The Agent remembered things in great detail not in his report, when such things should have been in the report.

Allegation 4: The allegation that Respondent authorized a minor to work topless on the licensed premises is supported by evidence as to the minor, Kyleen E. Czaplicki, but is not supported by evidence as to Katie Loper. The evidence is clear that dancer Kyleen E. Czaplicki was a minor, and that Respondent made no effort to verify ages or to check identification of any type. Ms. Czaplicki had identification, in the form of a Texas driver's license, and her being a minor was confirmed by the Trooper who stopped a vehicle in which she was a passenger. The manager admitted that Ms. Czaplicki danced topless. Whether or not Ms. Czaplicki is an "employee" or a "contractor" is of no importance because Respondent allowed Ms. Czaplicki to dance topless, encouraged her, and allowed her to borrow G-strings from other dancers and to be instructed by other dancers on how to dance topless. Ms. Loper used false identification to prove that she was of age, and therefore no evidence exists that Respondent knew or should have known that she was a minor, nor was any evidence presented that she in fact was a minor.

F. Conclusion:

The credible evidence admitted does not support that Respondent's employee was drinking an alcoholic beverage during prohibited hours; that Respondent's employee solicited prostitution of a patron; or that Ms. Katie Loper danced topless while she was a minor.

The credible evidence admitted supports that Respondent's employee did solicit drinks from a customer for another employee; and that a minor, Ms. Czaplicki, was permitted to dance topless on the licensed premises.

VI. Findings of Fact

1. Respondent is a sexually oriented business ("SOB"), commonly called a gentlemen's club, and holds Permit Nos. MB-242632 and LB-242633.
2. Respondent received a Notice of Hearing on or about September 24, 1998, which advised Respondent of the allegations.
3. The hearing was convened April 8, 1999, at the Municipal Court, Brownsville, Cameron County, Texas. The hearing was closed on May 31, 1999.
4. Dewey Brackin, Staff Attorney, represented the Commission, and Stuart Diamond, Esquire, represented Respondent.
5. On March 12, 1996, two TABC agents and several police officers from the Brownsville Police Department went to premises of Respondent to conduct a routine inspection.
6. Judith, employed by Respondent, was working on the evening of March 12, 1996, and was cited for drinking alcoholic beverages during prohibited hours.

7. On March 12, 1996, Judith did not drink an alcoholic beverage during prohibited hours on the licensed premises.
8. On March 21, 1996, Agent Guzman and another TABC agent went to premises of Respondent to investigate a complaint of prostitution.
9. Agent Guzman sat with a dancer and another girl, a Ms. Garcia, Respondent's employee, who then solicited the Agent to buy drinks for the girls.
10. The Agent did not offer to purchase the drinks, but agreed to pay for the drinks delivered to the table for the Agent and girls.
11. On March 21, 1996, Agent Guzman discussed sexual matters with Ms. Garcia.
12. Respondent's employee, Ms. Garcia, did not engage in prostitution or the solicitation of prostitution with Agent Guzman.
13. Petitioner presented no evidence of what conduct would violate the general welfare, health, peace, morals, and safety of the people or the public sense of decency.
14. On July 11, 1997, Respondent employed two persons, Ms. Czaplicki and Ms. Loper, to dance topless on the licensed premises.
15. On July 11, 1997, Ms. Czaplicki, was a minor, but Ms. Loper had identification which she offered, and which showed her to be over 18 years of age.
16. On July 11, 1997, Ms. Czaplicki and Ms. Loper danced topless with their breasts fully exposed, with the authorization and knowledge of Respondent.

VII. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to TEXAS ALCOHOLIC BEVERAGE CODE §§ 6.01 and 61.71 (Vernon 1995 & Supp 1999)(the Code).
2. The State Office of Administrative Hearings has jurisdiction over this proceeding pursuant to TEX. GOV'T CODE ANN, Chapter 2003 (Vernon 1999).
3. Based on Findings of Fact 2 through 4, proper and timely notice of the hearing was afforded the parties pursuant to the Administrative Procedure Act, Chapter 2001, TEX. GOV'T CODE ANN. (Vernon 1999) and TEX. ADMIN. CODE §155.55(d) (Vernon 1998).
4. Based on Findings of Fact Nos. 5 through 7, Respondent did not permit consumption of alcoholic beverages during prohibited hours on March 12, 1996, in violation of §§104.01(4) and 11.61(b)(2), of the Code.
5. Based on Findings of Fact Nos. 8 through 10, Respondent's employees solicited customer to buy drinks for consumption by employees on March 21, 1996, in violation of §§ 105.06 and 11.61(b)(2), of the Code.
6. Based on Findings of Fact Nos. 8, 11 and 12, Respondent's employee did not engage in prostitution on March 21, 1996, in violation of §11.61(b)(7), of the Code.
7. Based on Findings of Fact Nos. 14 through 16, Respondent knowingly permitted a minor to dance topless on the licensed premises on July 11, 1997, in violation of §11.61(b)(7), of the Code.

8. Based on Findings of Fact Nos. 8 through 10, and 14 through 16, and Conclusions of Law Nos. 5 and 7, Respondent's permits should be suspended for fifteen (15) days.

9. Pursuant to §§11.64(b) and (c)(5), Respondent should have the opportunity to pay a civil penalty of \$150.00 per day of suspension.

IT IS THEREFORE PROPOSED, that Respondent be assessed a penalty of fifteen (15) days suspension, with the opportunity to pay a civil penalty in lieu thereof.

Signed this 26th day of August, 1999.



EDEL P. RUISECO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS