

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

October 18, 1999

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

Via Certified Mail
P 906 424 110

RE: Docket No. 458-99-0507; Texas Alcoholic Beverage Commission vs. R.B.L. TEX-MEX LOUNGE, INC. d/b/a TEX MEX LOUNGE (TABC Case No. 581841)

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 Andrew Del Cueto attorney for Texas Alcoholic Beverage Commission, and to Juan E. Gonzalez attorney for R.B.L TEX -MEX Lounge Inc. d/b/a TEX-MEX Lounge . For reasons discussed in the proposal, I recommend a civil penalty of ten(10) days suspension.

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,

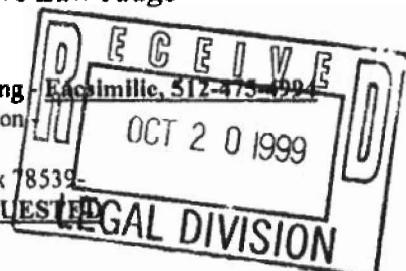
A handwritten signature in black ink, appearing to read "Edel P. Ruiseco".

Edel P. Ruiseco
Administrative Law Judge

EPR:mar

Enclosure

xc: **Shance Woodbridge, Docket Clerk, State Office of Administrative Hearing**
Andrew Del Cueto, Staff Attorney, Texas Alcoholic Beverage Commission
Certified Mail No. P 906 424 111 Return Receipt Requested
Juan E. Gonzalez, Attorney at Law, 420 W. University Dr., Edinburg, Tx 78539
CERTIFIED MAIL NO. P 906 424 112, RETURN RECEIPT REQUESTED



DOCKET NO. 458-99-0507

TEXAS ALCOHOL BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
VS.	§	OF
R.B.L. TEX-MEX LOUNGE, INC. D/B/A TEX-MEX LOUNGE	§ §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Petitioner, Texas Alcoholic Beverage Commission (TABC), through its Staff, seeks to cancel mixed beverage permits held by R.B.L. TEX-MEX LOUNGE, INC., d/b/a Tex-Mex Lounge (Respondent). Staff alleged that Respondent, on October 25, 1998, permitted employees to engage in prostitution and an employee made sexual contact with the intent to gratify sexual desires. Finding the Petitioner failed to prove that employees of Respondent solicited prostitution or engaged in lewd conduct, but Petitioner proved that an employee of Respondent engaged in sexual contact, for which this proposal recommends a civil penalty of ten (10) days suspension.

REASONS FOR RECOMMENDATION

The hearing for this case was convened before Administrative Law Judge Edel P. Ruiseco (ALJ) on May 17, 1999. Andrew del Cueto, Esq., an Assistant Attorney General, represented TABC. The hearing was conducted in McAllen, Texas, and Juan E. Gonzalez, Esq., represented Respondent. The hearing was closed the same day. The parties were allowed until July 31, 1999, to provide proposed findings of fact or briefs, on which date the record was closed.

The parties agreed that the State Office of Administrative Hearings (SOAH) had jurisdiction of the subject matter; that venue was proper in McAllen, Hidalgo County, Texas; and that the parties received notice of the allegations and hearing date.

As outlined in the Findings of Fact, the testimony of the TABC Enforcement Agents Art Munsell and Sonia Salinas; and respondent's witnesses, Maria Dalila Campos (Dalila), Melchor Cepeda, and Robert Garza, all support the ALJ's recommendation.

Respondent strongly disputed the allegations of the Petitioner, that employees engaged in prostitution, lewd conduct and made sexual contact with a patron. The basis for the allegations is a short visit to Respondent's premises, where the agent arrived October 25th, between 1:45-50 a.m., and left before the 2:00 a.m. closing.

The primary dispute was the activities of the Agent on the licensed premises during the time the Agent remained on the premises. The Agent admitted that he entered right before closing, and explained that he was delayed because they had arrested many violators at another location. Agent did not specifically recall the time he entered (about 1:45-50 a.m.), left (before closing-2:00 a.m.), or the time spent regarding each alleged violation. Agent stated he observed the following violations and did these acts during the time inside the premises. Agent entered and saw several bouncers but was not asked to pay an entrance fee; looked over the premises and saw about 25 customers; selected and sat at a table near the bar, but went to the bar for a drink after failing to be waited upon; while at the bar saw a dancer (Natalie) pull a patron's head into her breasts and "crotch" area while dancing on stage; asked another dancer (Tiger) for a table dance and chit-chatted with her for a few minutes but was rejected because she had to go on stage; returned to his table, and was approached by another dancer (Dalila) for a table dance; he agreed and followed her upstairs (two levels) to the loft area where he sat on a sofa; he watched Dalila undress, had one or two table dances, and propositioned and negotiated with Dalila for sex; Agent then described where he was staying, gave his room number and arranged for a meeting with her at 2:15 a.m.; then left the premises - all in less than 15 minutes. There was no corroboration, the allegations were disputed, and there were no witnesses except the parties involved.

Agent testified that, during the table dance, Dalila rubbed her breasts in his face and on his penis and genitalia, and danced provocatively, which was, he opined, to sexually arouse him. Agent then asked Dalila if she dated (testifying that 'dating' is a euphemism for sexual intercourse), and she responded affirmatively. Agent then asked the cost, and Dalila allegedly responded, \$150 for a dance and \$300 for everything else. Agent testified he then asked what "everything else" meant and was allegedly told sexual activity in coarse and vulgar language. Agent explained that he had room 122 at the Best Western motel in Weslaco on Highway 83, and arranged to meet her at 2:15 a.m.

Dalila denied telling the Agent she would perform sexual acts, admitted telling him that she charged \$150 for private parties, denied stating that she would charge \$300 for anything let alone sex, and was greatly offended by the words attributed to her by the Agent. Dalila adamantly denied agreeing to perform any sexual act, and appeared genuinely insulted by the crude language used to describe specific sex acts. She stated she never uses those words, and further that she never used such vulgarity, not even with her boyfriend.

As to the sexual contact alleged, Dalila admitted that her hair may have touched Agent's genitalia and she may have put her hands on his thighs, but denied that she took his head and placed it between her breasts or grabbed his penis. She further testified that she has not been charged with the crime of prostitution, and didn't even know that's what the allegation was until recently told by the manager.

Agent's view of the stage and participants, from about 10 feet away, was insufficient to show that there had been sexual contact with the genitalia when Natalie placed a patron's head between her legs.

No testimony was offered to describe how the law defines, nor what the public construes as, *lewd, immoral, or offensive to public decency*, and the words have long been held to be unconstitutionally vague, *Wishnow v. State*, 704 S.W.2nd 425 (Tex.App. 14Dist. Houston, 1985).

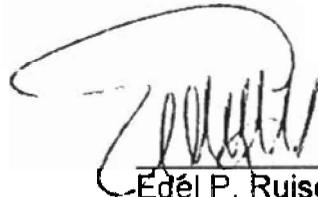
FINDINGS OF FACT

1. R.B.L. Tex-Mex Lounge, Inc., doing business as Tex-Mex Lounge, RR2, Box 689, Edinburg, Hidalgo County, Texas, was issued a Mixed Beverage Permit, MB226884, a Mixed Beverage Late Hours Permit, LB226885, and a Beverage Cartage Permit PE226886 on December 21, 1997.
2. On January 7, 1999, TABC's Staff sent notice of the hearing to Respondent at its address of record, RR2, Box 689, Edinburg, Texas 78539, and an amended notice of hearing was sent on May 6, 1999.
3. The hearing convened on May 17, 1999. Both parties were present and represented by counsel.
4. On October 25, 1998, TABC agent Art Munsell (Agent) was assigned to inspect the licensed premises in an undercover capacity. TABC agent Sonia Salinas acted as the arresting agent, for any violations that occurred.
5. On October 25, 1998:
 - a. Agent entered Respondent's premises at about 1:50 a.m.
 - b. Agent walked to a table, sat down, and when not waited upon, walked to the bar and ordered a beer.
 - c. Agent was served a beer and he observed the first dancer pull a patron's head into her breasts and crotch area, which he deemed to be lewd conduct.
 - d. Agent contacted a second dancer and asked for a table dance, which was refused because the dancer was scheduled to dance the next song.
 - e. Agent made contact with a third dancer, later identified as Dalila, and asked for a table dance.
 - f. Agent followed Dalila upstairs to a loft area where a table dance was conducted.
 - g. During the table dance Dalila touched Agent's genitalia with intent to arouse and gratify Agent.
 - h. After the table dance, Agent initiated a conversation regarding dating and sexual conduct, asked Dalila for a date, and left the building.
7. Dalila did not offer or agree to perform the sexual acts described by the Agent.
8. Dalila did not engage in acts of lewd conduct which were immoral, or which were offensive to public decency, on October 25, 1998.

CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §106.14 (Vernon 1998).
2. The State Office of Administrative Hearings 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 (Vernon 1998).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 AND 2001.052 (Vernon 1998).
4. The Respondent did not violate §43.02(a)(1), 11.61(b)(7) and 104.01(6) of the Code, but Respondent did violate §11.61(b)(2) of the Code.
5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's permits should be suspended for ten (10) days.

SIGNED this 14th day of October, 1999.



Edel P. Ruiseco, ALJ, Corpus Christi
State Office of Administrative Hearings