

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 6, 1999

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



RE: Docket No. 458-99-1338; TABC vs. Jacqueline Faye Mouton d/b/a Club Success, TABC Case No. 583966

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal For Decision are being sent to Dewey Bracken, Staff Attorney representing the Texas Alcoholic Beverage Commission and Jacqueline Faye Mouton, d/b/a Club Success. For reasons discussed in the Proposal for Decision, I have recommended Respondent's application for mixed beverage permit and a mixed beverage late hours permit be denied.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or replies must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

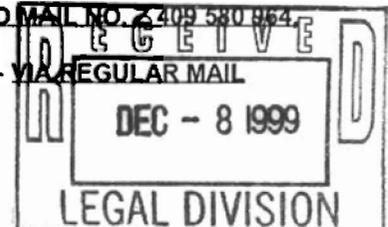
Sincerely,

A handwritten signature in cursive script, appearing to read "Ed Shipper".

Ed Shipper
Administrative Law Judge

ED/rfm
Enclosure

CC: Dewey Bracken, TABC, 5806 Mesa Drive, Suite 160, Austin, TX 78731 - **REGULAR MAIL**
Jacqueline Faye Mouton, 1024 Calvin, Houston, TX 77088 - **VIA CERTIFIED MAIL NO. Z 409 580 964**
RETURN RECEIPT REQUESTED
Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearings - **VIA REGULAR MAIL**



North Loop Office Park
2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001

The hearing commenced and concluded on September 17, 1999, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. After the taking of evidence, the hearing was concluded. The Staff was represented by Dewey Bracken, Texas Alcoholic Beverage Commission Legal Division. The Respondent, Jacqueline Faye Mouton, d/b/a Club Success, was represented by attorney, Herschel Cashin. Judge Shipper presided.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ("the Code"), sections 6.01, 11.46 and 1.01, and TEX GOV'T. CODE ANN., Chapter 2001, et seq. (1998). The State Office of Administrative Hearings 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. ADMIN. CODE, Section 155, et seq.

The Respondent is the applicant for a mixed beverage permit as well as a mixed beverage late hours permit. Respondent was formerly the holder of a wine and beer permit, which has been allowed to expire, and was the holder of such permit on the date of the alleged violation, October 3, 1998. The Notice of Hearing in this matter was mailed to Respondent on or about July 19, 1999.

III. Evidence and Applicable Statutory Provisions

From the Staff:

Documentary Evidence:

- a. TABC Exhibit 1: Photograph of jar of marijuana leaves.
- b. TABC Exhibit 2: Photograph of ziplock bag of loose marijuana leaves.
- c. TABC Exhibit 3: Photograph of approximately \$960.00 counted in the bar at Club Success.
- d. TABC Exhibit 4: Photograph of bottles of rum and gin.
- e. TABC Exhibit 5: Photograph of rolled marijuana cigars
- f. TABC Exhibit 6: Respondent's application for a mixed beverage permit and mixed beverage late hours permit.

Exhibits 1, 2, 4, 5 and 6 were admitted without objection. Exhibit 3 was admitted over objection.

Testimony:

1. Officer Michael D. Douglass, Houston Police Department, Vice Division

Officer Michael D. Douglass testified that he and a partner, Officer Dennis Bounds, entered the premises of Club Success on October 3, 1998, after 2:00 a.m. as undercover officers, and that he and his partner bought a Budweiser beer from a bartender on the premises at 2:05 a.m. and 2:12 a.m. Officer Douglass further testified that alcohol was being sold to all of the approximately 8-10 patrons of Club Success after 2:00 a.m. Officer Douglass also testified that he saw loose marijuana leaves, marijuana cigars, and marijuana cigars being rolled at Club Success when he entered the premises on October 3, 1998. Officer Douglass further testified that Jacqueline Faye Mouton was not on the premises of Club Success when he entered the premises on October 3, 1998. He also testified that Tony Harris was rolling marijuana cigars on October 3, 1998, and that Harris had money in his pocket. Officer Douglass also testified that Arthur Crockett sold beer to himself and his partner, Officer Bounds, on October 3, 1998.

2. Officer Dennis Bounds, HPD Vice Officer

Officer Dennis Bounds testified that he and Officer Douglass entered the premises of Club Success on October 3, 1998, at approximately 2:05 a.m. Officer Bounds testified that he was in an undercover capacity at that time. Officer Bounds testified that there were approximately 10 customers at Club Success when he and Officer Douglass entered Club Success. Officer Bounds further testified that he purchased a Miller Light after 2:00 a.m. from a man who said he was working at Club Success. Officer Bounds also testified that he witnessed other customers purchase alcoholic beverages at Club Success after 2:00 a.m. Officer Bounds testified that he purchased a beer at 2:05 a.m. on October 3, 1998, as well as at 2:12 a.m. on October 3, 1998, before he departed Club Success at approximately 2:15 a.m. Officer Bounds testified that he reentered the premises of Club Success in an open capacity at with approximately 10 other officers to arrest the suspect. Officer Bounds testified that Officer Douglass was there at the time as was Officer E.Z. Domain of the TABC. Officer Bounds further testified that he did not see anyone drinking liquor or selling liquor when he was present. He merely saw patrons drinking beer. Officer Bounds further testified he did not see Jacqueline Mouton on the premises at that time. Officer Bounds testified that Lester Rogers sold him the beer, and that Rogers was arrested and charged with selling beer after 2:00 a.m. Officer Bounds testified that it appeared that Arthur Crockett was the manager of Club Success when he arrived on the premises on October 3, 1998.

3. Eric Z. Domain, TABC Agent

Agent E.Z. Domain testified that he was contacted by the Houston Police Department as to alleged violations of the TABC code, and that he entered the premises of Club Success on October 3, 1998, in an open capacity. Open capacity refers to the fact that Agent Domain was dressed as a police officer. Agent Domain testified that he entered Club Success with Officer Thomas at

approximately 2:25 a.m on October 3, 1998. Agent Domain testified that he observed Mr. Tony Harris putting marijuana in Swisher Sweet cigar leaves. Agent Domain testified that he observed approximately 40 grams of marijuana on the counter and that it was being rolled into Swisher Sweet leaves. Officer Domain testified that he also observed a 1.75 liter bottle of 80 proof Seagrams gin, as well as a 1.75 liter bottle of Malibu Rum, which was 21 % alcohol. Bounds also testified that he observe 5 bottles of Thunderbird wine, which is 17 % alcohol. Officer Bounds observed that it was illegal for the permittee to be in possession of distilled spirits since it had only a beer and wine permit on October 3, 1998. Officer Domain testified that he did not see Jacqueline Faye Mouton on the premises of Club Success on October 3, 1998. Agent Domain testified that it appeared that Arthur Crockett was managing Club Success on October 3, 1998.

TEX. ALCO. BEV. CODE ANN. section 11.46(a) authorizes the Commission to refuse to issue a permit if it has reasonable grounds to believe and finds that any of the following circumstances exist:

...
(3) within the six month period immediately preceding his application the applicant violated or caused to be violated a provision of this code or a rule or regulation of the commission which involves moral turpitude, as distinguished from a technical violation of this code;

...
(8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency;

...
(10) the applicant will sell liquor unlawfully in a dry area or in a manner contrary to law or will knowingly permit an agent, servant or employee to do so;

The staff attorney introduced the Respondent's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit into evidence.. (Exhibit TABC 6. Club Success put on no evidence.

IV. Analysis

As the evidence indicates, Respondent, her agents or employees possessed marijuana, a prohibited a narcotic, in Club Success on October 3, 1998. The Court finds that marijuana possession constitutes a provision of the code involving moral turpitude, which violates Section 11.46(a)(3) of the Code.

Similarly, the undisputed evidence indicates that Respondent, her agents, servants or employees sold , or permitted alcoholic beverages to be sold after 2:00 a.m on October 3, 1998, an offense which violates the general welfare, health, peace, morals, and safety of the people and is contrary to law, in violation of Section 11.46(a)(8) of the Code. And the evidence indicates that Respondent, her agents, servants or employees possessed distilled spirits exceeding 14% alcohol by volume which constitutes a violation of Section 11.46(a)(10) of the Code.

V. Recommendation

Because the License applicant, her agents, servants or employees permitted: 1) alcoholic beverages to be sold on the licensed premises at a time when the sale of such beverages is prohibited; 2) the possession of marijuana, a narcotic as defined by the Texas Alcoholic Beverage Commission rule, on the licensed premises; and 3) the possession of distilled spirits exceeding 14% alcohol by volume on the premises, the license application should be denied.

PROPOSED FINDINGS OF FACT

1. Jacqueline Faye Mouton was the holder of a wine and beer permit on October 3, 1998. That permit was allowed to expire. Ms. Mouton subsequently applied for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit.
2. On or about July 19, 1999, the Staff of the Texas Alcoholic Beverage Commission sent a notice of hearing, by certified mail, return receipt requested, to the Respondent at her address of record, regarding an alleged violation of the Texas Alcoholic Beverage Code, with no showing of actual receipt.
3. The Texas Alcoholic Beverage Commission rules, 16 Tex. Admin. Code, section 37.7, authorize service of the notice of hearing by sending it to the Permittee's last known address as shown by the agency's records.
4. There was credible evidence that the notice of hearing was sent, by certified mail, return receipt requested, to the Permittee's last known address as shown on the agency's records.
5. The hearing on the merits was held on September 17, 1999, at the offices of the State Office of Administrative Hearings, Houston, Harris County, Texas. The Respondent, and her attorney, appeared at the hearing. Dewey Bracken appeared and represented the TABC. Ed Shipper, ALJ, presided.
6. There was credible evidence that on October 3, 1998, the License applicant, her agents, servants or employees permitted 1) the sale or delivery of alcoholic beverages on the premises at a time when the sale or delivery of alcoholic beverages is prohibited; 2) the possession of marijuana, a narcotic as defined by the Texas Alcoholic Beverage Commission, on the licensed premises; and 3) the possession of distilled spirits exceeding 14% alcohol by volume on the licensed premises or adjacent to the licensed premises.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Sections 6.01 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative

hearing on this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003 (Vernon's 1977).

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX GOV'T CODE ANN. Sections 2001.051 and 2001.052.
4. The License applicant has violated TEX. ALCO. BEV. CODE ANN. Section 11.46(a)(3) in that the License applicant, her agents, servants or employees permitted the sale or delivery of an alcoholic beverage on the licensed premises at a time when the sale or delivery of alcoholic beverages is prohibited.
5. The License applicant has violated TEX. ALCO. BEV. CODE ANN. Section 104.01(9) in that the License applicant, her agents, servants or employees possessed marijuana on the, licensed premises, a narcotic, as defined by the Texas Alcoholic Beverage Commission.
6. The License applicant has violated TEX. ALCO. BEV. CODE ANN. Sections 25.04(b) and 61.71(a)(9) in that the License applicant, her agents, servants or employees possessed distilled spirits exceeding 14% alcohol by volume on the licensed premises.
7. Based on the foregoing Findings of Fact and Conclusions of Law, applicant's application for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit should be denied.

SIGNED this 6th day of December, 1999.



ED SHIPPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS