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DOCKET NO. 496441

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

PRIMERA ENTERPRISES INC.
D/B/A J. B.'S LOUNGE
PERMIT/LICENSE NO(s). MB207443
EL PASO COUNTY, TEXAS
(SOAH Docket No. 458-06-1084)

OF

ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 5th day of June, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on March 1, 2006 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 12, 2006. The Proposal For Decision, attached as **Exhibit "A"**, 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 Respondent's permit(s) and/or license(s) be **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on June 26, 2006, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this 5th day of June, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC\bc

The Honorable Veronica S. Najera
Administrative Law Judge
VIA FAX (915) 834-5657

Ronald E. Henry
ATTORNEY FOR RESPONDENT
800 N. Mesa, Suite 200
EL Paso, Texas
VIA FAX (915) 543-6309

PRIMERA ENTERPRISES INC.
RESPONDENT
d/b/a J. B.'S LOUNGE
6746 EDGEMERE
EL PASO, TX 79925-3622
CERTIFIED MAIL NO. 7001 2510 0000 7274 1485

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

El Paso District Office



**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

BEFORE THE STATE OFFICE

V.

**PRIMERA ENTERPRISES INC.
d/b/a J.B.'S LOUNGE**

OF

**EL PASO COUNTY, TEXAS
(TABC CASE NO. 496441)
Respondent**

ADMINISTRATIVE HEARINGS

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PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission ("Petitioner") brought this enforcement action against Primera Enterprises d/b/a J.B.'s Lounge ("Respondent"), a sexually-oriented business, alleging possession of drugs. The Petitioner seeks the cancellation for cause of the permits based on lewd, immoral, indecent conduct,¹ and the general welfare, health, peace morals and safety of the people.² The cancellation of the permit and license would prevent the club from selling alcoholic beverages.

After a contested case hearing and review of the applicable law hereto, this proposal for decision recommends cancellation of the Mixed Beverage Permit and cancellation of the Mixed Beverage Late Hours Permit.

I. NOTICE AND JURISDICTION

A notice of hearing was issued on January 18, 2006, by the Texas Alcoholic Beverage

¹ TEX. ALCO. BEV. CODE ANN. § 104.01(9).

² TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and 16 TEX. ADMIN. CODE § 35.31(c)(15).

Commission, apprising all parties of Petitioner's allegations and of the hearing date. Notice and jurisdiction were not contested issues and are addressed in the findings of fact and conclusions of law without further discussion here.

II. PROCEDURAL HISTORY

On March 1, 2006, a contested case hearing was convened in this matter before the State Office of Administrative Hearings in El Paso, Texas, Petitioner was represented by W. Michael Cady, staff attorney. The Applicant was represented by Ronald E. Henry, attorney. Administrative Law Judge (ALJ) Veronica S. Najera presided. The record closed on March 15, 2006, to allow Respondent to supplement the administrative record.

III. DISCUSSION

A. Background

Respondent operates a sexually-oriented business within the City and County of El Paso, Texas.³ Respondent holds a Mixed Beverage Permit⁴ and a Mixed Beverage Late Hours Permit.⁵ The permits were originally issued on March 5, 1989, and have been continuously renewed.⁶

B. Evidence

Petitioner proffered four exhibits: Respondent's administrative record (Exhibit No.1); an abstract of the administrative record (Exhibit No. 2); the Notice of Hearing (Exhibit No. 3); and

³ J.B.'s Lounge is located at 6746 Edgemere, El Paso, El Paso County, Texas.

⁴ See Petitioner's Exhibit No. 1, Mixed Beverage Permit MB-207443.

⁵ See Petitioner's Exhibit No. 1, Mixed Beverage Late Hours Permit LB-207444.

⁶ Both permits were renewed on May 2, 2006.

police reports (Exhibit No. 4). All were admitted into evidence. TABC Enforcement Agent Wesley Rappe, El Paso Police Officer Raul Castro, and El Paso Police Officer Paul Martinez testified for Petitioner. Petitioner also called Enrique Silva Jr. as an adverse witness. Maria Rodriguez, an employee of J.B.'s Lounge, testified for Respondent via the use of certified language interpreter.

IV. EVIDENCE AND ARGUMENT

A. Petitioner's case

The Petitioner seeks the cancellation of Respondent's permits based on the fact that Respondent's employee, the disc jockey, was found to be in possession of narcotics inside the establishment on May 17, 2005. To support its position, the Petitioner relies on the testimony of the police officers who conducted the investigation. The evidence shows, as recounted in the following paragraphs, that cocaine was found in the establishment. Specifically, two "baggies" each containing 12 and 13 individual diamond folds, respectively, were found inside a brown leather bag. One "baggie" contained 14.2 grams, and the other "baggie" contained 9.7 grams of cocaine.⁷ Another diamond fold was found in the disc jockey's wallet. This diamond fold contained .07 grams of cocaine. The brown leather bag was found on the disc jockey's booth.

First, El Paso Police Officer Raul Castro and El Paso Police Officer Paul Martinez, both testified that on May 17, 2005, they were dispatched to Respondent's establishment in response to an anonymous call regarding a "narcotic deal in progress." Both officers said that the information provided via dispatch was detailed in nature and revealed that the disc jockey was selling drugs out of a "brown bag." The testimony revealed that various officers entered the business, and once inside, they approached Diego Silva, the disc jockey. Officer Castro observed that Mr. Silva was nervous. Officer Castro testified that he saw the diamond folds in the leather saddle bag which was on the disc jockey's booth, and one diamond fold was found in Mr. Silva's

⁷ Specifics regarding the total weight of the narcotic are derived from Exhibit No. 4.

wallet. Officer Martinez also said that Diego Silva was behind the disc jockey's booth and that the bag was in plain view with the diamond folds visible once the light was flashed on the bag. Officer Martinez testified that upon being asked, Diego Silva said the bag belonged to him. Officer Martinez further testified that the cocaine was individually wrapped for individual user sale and that the diamond fold found in Diego Silva's wallet was similarly wrapped as those found in the brown bag. Both Officers said that the powdery substance field tested positive for cocaine.

Next, TABC Enforcement Agent Wesley Rappe, testified that Respondent has a history of Code⁸ violations. Agent Rappe went through Respondent's administrative record,⁹ which encompasses the following violations:

1. On May 19, 2004, Respondent entered into an Agreement and Waiver of Hearing for various violations, agreeing to a sixty day suspension or a civil penalty of \$300,000.00, and to an additional sixty days suspension and a civil penalty of \$15,000.00. This agreement settled the following violations:

- 12-05-02, sale/delivery of drugs by employee;
- 01-08-03, sale/delivery of drugs by employee;
- 01-08-03, soliciting an A/B by licensee/employee;
- 01-09-03, sale/delivery of drugs by employee;
- 02-12-03, sale/delivery of drugs by employee;
- 09-16-03, permit public lewdness, sexual contact, obscene act;
- 09-16-03, permit public lewdness, sexual contact, obscene act.

2. On August 28, 2002, Respondent entered into an Agreement and Waiver of Hearing agreeing to a sixty day suspension or a civil penalty of \$9,000.00. This settled a Code violation for public lewdness, sexual contact and obscene act.

3. Respondent was cited for public lewdness, sexual contact and obscene act in October 2000, for which his permits were suspended for 20 days or a civil penalty in the amount of \$3,000.00 was to be paid. Respondent was also cited for a sale to an intoxicated person on the same date. Respondent received a restrained action for this violation.

⁸ The "Code" is the Texas Alcoholic Beverage Code.

⁹ Specifics with regard to suspensions and civil penalties are derived from Orders and Agreements which are contained in Petitioner's Exhibit No. 1.

4. In 1999, Respondent received a 61 day suspension or a civil penalty of \$9,150.00 for soliciting alcohol beverage by employee, place and manner violation, and prostitution.

5. In 1997, Respondent received a 50 day suspension or a civil penalty of \$7,500.00 for permitting public lewdness.

6. In 1996, Respondent received a 7 day suspension or a civil penalty of \$1,050.00 for having an intoxicated employee on the premises.

7. In 1996, Respondent received a 45 day suspension or a civil penalty of \$6,750.00 for a violation of happy hour rule and public lewdness.

Agent Rappe, who has more than 22 years experience with narcotic enforcement, pointed out that the fact that the bag was left open and accessible in the disc jockey's area, shows that the disc jockey felt comfortable enough in his environment so as not to make an effort to conceal the narcotic.

B. Respondent's case

Mr. Enrique Silva, Jr., the manager of establishment, testified. He confirmed that Diego Silva had worked at J.B.'s Lounge for more than one year, and that the disc jockey is his cousin. He said that the disc jockey was hired by his father, the actual permittee. Mr. Silva, Jr. worked the night of the incident. He testified that he did not know that the disc jockey possessed cocaine and that he was fired after the May 2005 incident. He said that he remembers seeing him with a bag, but assumed he was carrying music. He also testified about a contract that J.B.'s Lounge has which puts the employees on notice that they will be terminated, but did not know the details of the contract.

Maria Rodriguez, a waitress at the establishment, testified. She has worked at J.B.'s Lounge since 1989, and worked the night shift the date of the incident at issue. She testified that Diego Silva had been working as the disc jockey for about two years. She saw the officers come into the bar and approach Diego Silva. The brown bag was on the chair in the disc jockey's booth and remained there when the disc jockey was being questioned. She said that the bag was open.

She saw the officers check the bag. She further testified that a dancer was up with the disc jockey when the Officers arrived. She testified it is routine for the “girls” to talk to the disc jockey to request music, but it is not routine for the “girls” to go up to the booth. She stated that employee bags are now sometimes checked.

V. LEGAL STANDARD

The Texas Alcoholic Beverage Commission asserts two grounds for the cancellation:

- First, it seeks cancellation based on lewd, immoral, indecent conduct which specifically defines the possession of a narcotic as a prohibited conduct.¹⁰
- Second, it seeks cancellation based on the general welfare, health, peace, morals and safety of the people which specifically defines any narcotic offense as an offense against the general welfare.¹¹

Under TABC administrative rules, “narcotic” is defined as “any substance defined in the Texas Controlled Substance Act.”¹² Cocaine is one of the controlled substances defined in the Texas Controlled Substance Act.¹³

Furthermore, “premises” is defined as the grounds and all buildings, vehicles and

¹⁰ TEX. ALCO. BEV. CODE ANN. § 104.01(9) [Regulation of Retailers], states that no person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency including the possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.

¹¹ TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) [Cancellation and Suspension of Permits], states that the commission or administrator may cancel an original or renewal permit if it is found, after notice and hearing, that the place and 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. Any narcotics related offense has been defined as an offense against the general welfare in 16 T.A.C. § 35.31(c)(15).

¹² 16 T.A.C. § 35.41(b).

¹³ TEX. HEALTH & SAFETY CODE ANN. § 481.002.

appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.¹⁴

VI. ANALYSIS

Respondent argues it had no knowledge that its employee possessed the narcotic. This argument is not persuasive. The proper test of whether a permittee “permits” certain conduct is not his actual observation or knowledge of the violations but rather whether he knew *or should have known* of them.¹⁵ There is no affirmative requirement of knowledge in the applicable statute.

There was no specific evidence presented with regard to actions that Respondent took to prevent the sale of narcotics in the establishment at issue. The manager of the establishment was not able to point to what measures and/or procedures Respondent had implemented to prevent the possession of drugs. The fact that Respondent had been cited for the same violation previously supports the argument that Respondent did not show due diligence in the prevention of possession of narcotics on its licensed premises. The employer must take some affirmative actions, that is, do more than simply state that the possession and/or sale of drugs is prohibited. It is apparent from the testimony, that the “manager” did not have a lot of interaction with the employees because, as he testified, he was busy working the bar area.

Persuasive is the fact that the applicable Code has specifically defined any narcotic related offense as lewd, immoral, indecent conduct and as a place or manner offense against the general welfare. There is no dispute that cocaine was found within the establishment. There is also no dispute that the narcotic belonged to Respondent’s employee. Whether or not the sale of the narcotic was effectuated is irrelevant for this proceeding because the Code prohibits possession.

¹⁴ TEX. ALCO. BEV. CODE ANN. §11.49.

¹⁵ *Conway v. State*, 738 S.W.2d 692,693 (Tex.Cr.App. 1987).

Therefore, the possession of the narcotic by an employee of the permittee on the licensed establishment is a situation which justifies a finding that Respondent engaged in lewd, immoral and indecent conduct. Furthermore, the possession of the narcotic evidences that the manner in which the business has been conducted warrants cancellation of the permit and license based on the general welfare. Respondent's history of repeated violations supports this finding.

C. Recommendation

For the reasons stated in the preceding section, the ALJ recommends cancellation of the Mixed Beverage Permit and cancellation of the Mixed Beverage Late Hours Permit.

VII. FINDINGS OF FACT

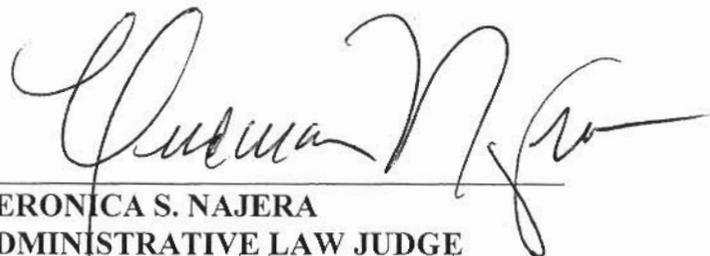
1. Respondent holds a Mixed Beverage Permit MB-207443 and a Mixed Beverage Late Hours Permit LB-207444 issued by the Texas Alcoholic Beverage Commission for the premises located at 6746 Edgemere in El Paso, El Paso County, Texas.
2. On January 18, 2006, the staff of the Texas Alcoholic Beverage Commission sent notice informing Respondent of the hearing time, date and location; of the allegation(s) it intended to prove, the legal grounds for the action; and of the right to be represented by counsel, as well as a short statement of the matters asserted.
3. On March 1, 2006, a contested case hearing was convened in this matter before the State Office of Administrative Hearings in El Paso, Texas.
4. The record closed on March 15, 2006.
5. Two El Paso Police Officers testified, and they had first hand knowledge of the investigation which resulted in Respondent's employee, Diego Silva, being charged with possession of a narcotic.
6. On May 17, 2005, El Paso Police Officers found two "baggies" each containing 12 and 13 individual diamond folds, respectively, inside a brown leather bag. One "baggie" contained 14.2 grams, and the other "baggie" contained 9.7 grams of cocaine.

7. Another diamond fold was found in the disk-jockey's wallet. This diamond fold contained .07 grams of cocaine.
8. The brown leather bag was found on the disk-jockey's booth in the licensed premises.
9. The brown leather bag, and its contents, belonged to Respondent's employee, the disc jockey.
10. The employee was working as the disc jockey when the officer first made contact with him.
11. The powdery substance found inside all the folds tested positive for cocaine.
12. On May 19, 2004, Respondent entered into an Agreement and Waiver of Hearing for various violations, agreeing to a sixty day suspension or a civil penalty of \$300,000.00, and to an additional sixty days suspension and a civil penalty of \$15,000.00. This agreement settled the following violations: 12-05-02, sale/delivery of drugs by employee; 01-08-03, sale/delivery of drugs by employee; 01-08-03, soliciting an A/B by licensee/employee; 01-09-03, sale/delivery of drugs by employee; 02-12-03, sale/delivery of drugs by employee; 09-16-03, permit public lewdness, sexual contact, obscene act; 09-16-03, permit public lewdness, sexual contact, obscene act.
13. On August 28, 2002, Respondent entered into an Agreement and Waiver of Hearing agreeing to a sixty day suspension or a civil penalty of \$9,000.00. This settled a Code violation for public lewdness, sexual contact and obscene act.
14. Respondent was cited for public lewdness, sexual contact and obscene act on October 2000, for which his permits were suspended for 20 days or a civil penalty in the amount of \$3,000.00 was to be paid. Respondent was also cited for a sale to intoxicated person on the same date. Respondent received a restrained action for this violation.
15. In 1999, Respondent received a 61 day suspension or a civil penalty of \$9,150.00 for soliciting alcohol beverage by employee, place and manner violation, and prostitution.
16. In 1997, Respondent received a 50 day suspension or a civil penalty of \$7,500.00 for permitting public lewdness.
17. In 1996, Respondent received a 7 day suspension or a civil penalty of \$1,050.00 for having an intoxicated employee on the premises.
18. In 1996, Respondent received a 45 day suspension or a civil penalty of \$6,750.00 for a violation of happy hour rule and public lewdness.

VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 5.31 and 5.35.
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 Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE §§ 2001.051 and 2001.052.
4. Based on the Findings of Fact, Respondent's employee possessed a narcotic on the licensed premise in violation of TEX. ALCO. BEV. CODE §§ 104.01(9), 11.61(b)(7), and 16 TEX. ADMIN. CODE § 35.31(c)(15).
5. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner should cancel Respondent's Mixed Beverage permit MB-207443 and its Mixed Beverage Late Hours Permit LB-207444.

SIGNED May 12, 2006.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 12, 2006

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA FACSIMILE NO. 512-206-3350
AND REGULAR MAIL

RE: Docket No. 458-06-1084
Texas Alcoholic Beverage Commission v. Primera Enterprises Inc. d/b/a J.B.'s Lounge

Dear Ms. Fox:

Please find enclosed the Proposal for Decision on the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica S. Najera", written over a horizontal line.

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN/cr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA Docket Change Form**

Michael Cady, Attorney, TABC Legal Division, 5806 Mesa, Suite 160, Austin, Texas - 79912-**VIA FACSIMILE NO. 512-206-3498**

Mr. Ronald E. Henry, Attorney, 800 N. Mesa, El Paso, Texas 79902 - **VIA FACSIMILE NO. 915-543-6309**