

**DOCKET NO. 585790**

IN RE ROBERT MANRIQUEZ	§	BEFORE THE
D/B/A LADY LUCK	§	
PERMIT NO. BG436361	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1367)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 11th day of September, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on June 28, 2000, and the record was closed on July 28, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 16, 2000. 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. Exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, 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.

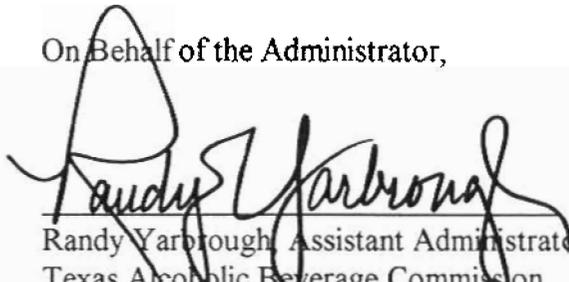
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations regarding Permit No. BG436361 be hereby **DISMISSED with prejudice**.

**This Order will become final and enforceable on October 2, 2000**, 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 11<sup>th</sup> day of September, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya Cooper  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (817) 626-7448**

Holly Wise, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
**VIA FACSIMILE (512) 475-4994**

Steven Swander  
**ATTORNEY FOR RESPONDENT**  
505 Main St., Ste. 250  
Ft. Worth, Texas 76102-5403  
**CERTIFIED MAIL/RRR NO, Z473 042 927**

Robert A. Manriquez  
d/b/a Lady Luck  
**RESPONDENT**  
5700 Maiden Lane  
Fort Worth, Texas 76131

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Fort Worth District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

August 17, 2000



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

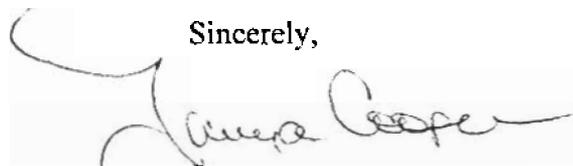
**RE: Docket No. 458-00-1367; Texas Alcoholic Beverage Commission vs. Robert Manriquez  
d/b/a Lady Luck; (TABC Case No. 585790)**

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 Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Steven Swander, Attorney for the Respondent. For reasons discussed in the proposal, I recommend that Respondent's Wine and Beer Retailer's Permit, BG-436361, should not be suspended.

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,



Tanya A. Cooper  
Administrative Law Judge

TC:ds  
Enclosure

XC: Holly Wise, State Office of Administrative Hearings, Austin, Texas - Fax; Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - fax; Steven Swander, Attorney for Respondent, Fax.

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§ § § § § § § § §	BEFORE THE STATE OFFICE
V.		OF
ROBERT MANRIQUEZ D/B/A LADY LUCK (TABC CASE NO. 585790)		ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this disciplinary action against Robert Manriquez, d/b/a Lady Luck (Respondent), alleging that Respondent's employee was intoxicated on the licensed premises in violation of the Texas Alcoholic Beverage Code (Code). TABC Staff requested that Respondent's permits be suspended for 10 days, or that Respondent pay a civil penalty in lieu of any suspension in the amount of \$1500. This proposal finds that no violation of the Code occurred, therefore the Administrative Law Judge (ALJ) recommends that Respondent's permit not be suspended.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01, 11.61, and 61.71 (Vernon 2000). The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. § 2003.021 (Vernon 2000). There are no contested issues of notice or jurisdiction.

On June 28, 2000, a hearing convened before Tanya Cooper, Administrative Law Judge (ALJ), of the State Office of Administrative Hearings, at 2100 North Main Street, Suite 10, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented at the hearing by Steven H. Swander, Attorney at Law. The record was closed on July 28, 2000.

## APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 61.71(a)(1) (Vernon 2000), TABC is authorized to suspend a permit or license for not more than sixty days if it is found that the permittee or licensee violated a provision of the Code or TABC rules. TABC alleges in this instance that Respondent's employee was intoxicated on the premises<sup>1</sup> contrary to the Code.

## EVIDENCE

Respondent holds a Wine and Beer Retailer's Permit, BG-436361, for a premises located at 426 S. Jennings, Fort Worth, Tarrant County, Texas. TABC alleges that Respondent violated Code provisions because his employee, Bobby K. Mitchell, was intoxicated on the licensed premises on May 28, 1999. It was stipulated by the parties that Bobby K. Mitchell was intoxicated on May 28, 1999<sup>2</sup>.

On May 28, 1999, a group of people, including Bobby K. Mitchell, had gathered around a motor vehicle on a vacant lot outside the licensed premises, Lady Luck. This vehicle, belonging to Mr. Mitchell, was up on blocks being worked on, but this activity was reported to police as a vehicle being "stripped". Officer P. Whitehead, Fort Worth Police Department, was dispatched to this location to investigate the activity as a possible stolen vehicle and testified at the hearing.

When Officer Whitehead arrived, he observed several persons drinking around the vehicle. The vehicle and crowd were a few feet from the Lady Luck's back door. Large cans and bottles of beer were observed. While investigating the reported suspicious activity relating to the vehicle, Officer Whitehead contacted Bobby Mitchell. Officer Whitehead stated that Mr. Mitchell came out of the premises and approached him. Mr. Mitchell identified himself to the officer as being the owner of the vehicle and working at Lady Luck as a bartender.

During this contact, Officer Whitehead observed that Mr. Mitchell was intoxicated. He arrested Mr. Mitchell for public intoxication. Mr. Mitchell pled guilty to that offense on June 4, 1999.

Donna Rains testified at the hearing. She was employed by Respondent as a bartender on May 28, 1999, and relieved Mr. Mitchell from bartending duties at the bar on that day at

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<sup>1</sup>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, but not limited to, any of the following acts:

(5) being intoxicated on the licensed premises;

... TEX. ALCO. BEV. CODE ANN. § 104.01(5) (Vernon 2000)

approximately 4:00 p.m. Mr. Mitchell advised her that he had hired someone to work on his vehicle and left from the bar at that time. Ms. Rains did not see Mr. Mitchell in the premises until several hours later when he entered the bar to find Respondent, Robert Manriquez.

According to Ms. Rains, Mr. Mitchell entered the bar twice to look for Respondent at the request of police officers, but that he did not seem intoxicated. Ms. Rains conceded that she did not know if Mr. Mitchell had been drinking outside the premises, but testified that he had not been served alcoholic beverages inside the premises during her bartending shift. Ms. Rains telephoned Respondent to return to the bar for Mr. Mitchell.

Ms. Rains described the area where the vehicle was parked. The vehicle was on a slab behind the bar where a garage had once stood. She testified the area was approximately thirty feet from the bar's back door and not a part of the licensed premises. On occasion, she stated however, that bar patrons might park their cars there in order to be in a shady area.

Robert Manriquez, the owner of Lady Luck, testified. He stated that he had employed both Mr. Mitchell and Ms. Rains as bartenders. On May 28, 1999, Mr. Manriquez was at the bar and Ms. Rains was on duty tending bar. It was dusk when he arrived and he observed the vehicle and the crowd with alcoholic beverages behind the building. He went back to the group, including Mr. Mitchell, and advised them that they should not be out there with alcoholic beverages warning that they might be arrested for public intoxication. The area was approximately thirty feet from his premises. He was informed by persons in the group that they were not on his property and that he should mind his own business. Mr. Manriquez observed a police patrol unit nearby. The police unit flashed light on the group. At this point, Mr. Manriquez returned inside his business believing the police were handling the situation.

Mr. Manriquez stated that he then left Lady Luck to check on another business. Shortly after leaving Lady Luck, he received a call from Ms. Rains on his cellular telephone asking him to return to the bar and talk with police officers. Upon his return, Mr. Manriquez spoke to police officers, observed Mr. Mitchell's condition, and saw various containers of alcoholic beverage in the area. Mr. Mitchell was intoxicated. Mr. Manriquez testified that Mr. Mitchell would not have been allowed to work in that condition. He further stated that the alcoholic beverages being consumed by Mr. Mitchell and others in the group were not from his licensed premises' bar stock due to these beverages being in larger containers than those sold at Lady Luck.

### ANALYSIS

The issues to be determined in this case are:

1. Whether Mr. Mitchell was on the licensed premises, and
2. If Mr. Mitchell was on the licensed premises, whether he was an employee of Respondent.

“Premises”, as defined by the Code, means the grounds, and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. TEX. ALCO. BEV. CODE §11.49(a) (Vernon 2000). The Code does not provide a definition for the term “employee”. However, generally associated with any employment relationship is the right of an employer to control the details and means of accomplishing the work task. An employee is subject to the control of the employer while performing the functions of employment (i.e. the course and scope of employment). Employment is defined as the activity in which one is engaged or the use of the services of another and includes devotion to a particular activity or person. See *Miriam Webster's Collegiate Dictionary, Tenth Edition*.

On May 28, 1999, Mr. Mitchell was observed at two locations. Most of the time in question in this case he was outside the bar near his vehicle. No evidence was produced to show actual ownership of the property where Mr. Mitchell's vehicle was parked, and despite patrons at Lady Luck occasionally parking vehicles in this area adjacent to the bar, insufficient evidence was produced showing that this area was a part of the licensed premises. On two occasions, Mr. Mitchell entered inside Lady Luck to find Mr. Manriquez. In evaluating all the testimony presented, it appears more probable that Mr. Mitchell was entering into the premises at the direction of police officials and solely for the purposes of locating Mr. Manriquez during the police investigation concerning the stolen vehicle complaint and the activities observed taking place behind Respondent's business. It is only during these brief periods of time that Mr. Mitchell was on the licensed premises.

Having determined that Mr. Mitchell technically entered onto the licensed premises, the next issue is whether he was employed by Respondent so as to be considered an employee during those times. When employed by Respondent, Mr. Mitchell was hired to perform services as a bartender. A bartender's primary job task is generally associated with serving and selling alcoholic beverages for the licensed premises. As Mr. Mitchell entered onto the premises on the evening of May 28, 1999, he was off duty from the bar. He was not selling or serving alcoholic beverage for Respondent. Alcoholic beverages, although being consumed by the group with Mr. Mitchell, were not obtained from Lady Luck's bar stock. For several hours Mr. Mitchell had been engaged in activities not controlled by Respondent and was in furtherance of his own interests, namely working on his car. At no point after being relieved by Respondent's other bartender, Ms. Rains, was Mr. Mitchell working in the furtherance of Respondent's business interests.

Because of these factors, despite Mr. Mitchell being intoxicated and on the premises, he was not an in the course of any employment of Respondent so as to be deemed an employee. As a result, this ALJ determines that Respondent, not having any right to control Mr. Mitchell's off-duty conduct, did not violate provisions of the Code.

#### RECOMMENDATION

The ALJ recommends that Respondent's permit not be suspended for the reasons stated

above. Any other requests for entry of specific findings of fact or conclusions of law, any other requests for general or specific relief, if not expressly set forth below, are denied.

### FINDINGS OF FACT

1. Robert Manriquez d/b/a Lady Luck (Respondent) holds a Wine and Beer Retailer's Permit BG-436361 for a premises located at 426 Jennings, Fort Worth, Tarrant County, Texas.
2. On May 19, 2000, the Texas Alcoholic Beverage Commission (TABC) gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing. Respondent was represented at the hearing by counsel, Steven H. Swander.
3. On May 28, 1999, Bobby K. Mitchell worked as bartender for Respondent at the licensed premises, Lady Luck.
4. Mr. Mitchell was relieved from bartending duties on May 28, 1999, at approximately 4:00 p.m. and was not observed inside Lady Luck for several hours.
5. While off duty from work as a bartender for Respondent, Mr. Mitchell was engaged in activities not subject to Respondent's control; he worked on his car at a location not a part of the licensed premises and had become intoxicated.
6. After several hours of engaging in the activities described in Finding of Fact 5, Mr. Mitchell entered the licensed premises for the purpose of locating Respondent for police officials.
7. Mr. Mitchell was intoxicated at the time he entered into the premises.
8. Based upon Findings of Fact 3, 4, 5, 6, and 7, Mr. Mitchell was not fulfilling job related activities for Respondent on the licensed premises when he was on the premises intoxicated.
9. Based upon Findings of Fact 3, 4, 5, 6, 7, and 8, Respondent did not have an employee that was intoxicated on the licensed premises.

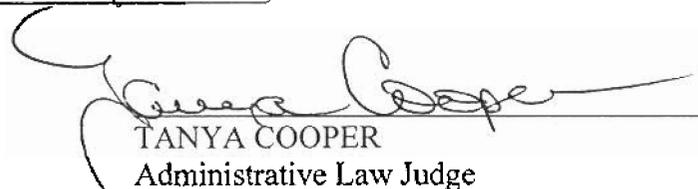
### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01, 11.61, and 61.71 (Vernon 2000).
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE

ANN. Chapter 2003 (Vernon 2000).

3. Notice of the hearing was provided as required by the Administrative Procedures Act. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 (Vernon 2000).
4. Based on Findings of Fact Nos. 3 through 9, Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 104.01(5)(Vernon 2000).
5. Based on Findings of Fact Nos. 3 through 9, and Conclusion of Law 4, Respondent did not operate his business in violation of the Code or any rule of the Commission in violation of TEX. ALCO. BEV. CODE ANN. §§ 25.04 and 61.71 (Vernon 2000).
6. Based on Findings of Fact Nos. 3 through 9, and Conclusions of Law No. 4 and 5, Respondent's Wine and Beer Retailer's Permit, BG-436361, should not be suspended.

SIGNED this 16<sup>th</sup> day of August, 2000.

  
TANYA COOPER  
Administrative Law Judge  
State Office of Administrative Hearings