

DOCKET NO. 587136

IN RE GRACIELA GAONA ONTIVEROS	§	BEFORE THE
D/B/A CHICANO MAGIC	§	
PERMIT NO. BG-293781	§	
LICENSE NO. BL-293782	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0351)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of September, 2000, the above numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Leah Bates. The hearing convened and adjourned on May 16, 2000. Judge Bates made and filed a Proposal For Decision (PFD) containing Findings of Fact and Conclusions of Law on July 10, 2000.

This PFD was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record. The attorney for Petitioner filed Exceptions to Judge Bates's PFD on July 14, 2000. The Respondent did not file any. Judge Bates issued an Amended PFD on September 5, 2000, which was served on all parties. Neither party filed Exceptions to the Amended PFD.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and consideration of the Amended Proposal for Decision, Transcripts, and Exhibits, adopts in part and amends in part the Findings of Fact and Conclusions of Law of Judge Bates:

A. The Assistant Administrator **adopts** the Administrative Law Judge's Proposed Findings of Facts Nos. 1 through 14.

B. Under the authority of Government Code Section 2001.58 (e) (Vernon 2000), the Assistant Administrator **adds and adopts** Findings of Fact Nos. 15 and 16:

Finding of Fact No. 15: Mr. Martinez was an agent, servant, or employee of the Permittee/Respondent.

Discussion: The Record shows that the bartender, Mr. Riojas, believed that Mr. Martinez was married to Graciela Gaona Ontiveros, the Permittee/Respondent, and thus one of the owners. Riojas brought the problem he was having with Mr. Melcher to Martinez's attention, not to Ontiveros, who was also present. Whether

or not Martinez was formally an employee, servant, or agent of the Permittee/Respondent is irrelevant; Martinez assumed that role by stating he would check into the situation with Melcher.

Finding of Fact No. 16: Mr. Melcher was intoxicated on the licensed premises.

Discussion: The Record states that Mr. Riojas, the bartender, became aware that Mr. Melcher was intoxicated after Melcher chugged one beer and became abusive after refusing to pay for it. One beer will not make a person intoxicated. The logical conclusion is that Melcher was intoxicated prior to his altercation with Martinez and was served an alcoholic beverage while intoxicated.

C. The Assistant Administrator **adopts** the Administrative Law Judge's Proposed Conclusions of Law Nos. 1, 2, 3, 4, and 5.

D. Under the authority of Government Code Section 2001.058 (e), the Assistant Administrator **rejects** the Administrative Law Judge's Proposed Conclusions of Law Nos. 6, 7, and 8. In their place, the Assistant Administrator **adds and adopts** the following:

Conclusion of Law No. 6: Mr. Martinez was an agent of the Permittee/Respondent, and acted in the place of the Permittee/Respondent.

Discussion: Section 1.04 (11) of the Alcoholic Beverage Code defines Permittee as "a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person." Martinez, through his actions at the bar, met this definition. In the eyes of the law, Martinez was the Permittee/Respondent.

Conclusion of Law No. 7: The breach of the peace between Martinez and Melcher was not beyond the control of the Permittee/Respondent.

Discussion: As explained above in adopted Conclusion of Law No. 6, Martinez legally acted as the Permittee/Respondent. Therefore, his actions are attributable to the Permittee/Respondent. According to the Record, Martinez had time in which to request police assistance in dealing with Melcher; he chose not to.

Conclusion of Law No. 8: The Permittee/Respondent, through the actions or omissions of Martinez, violated Texas Alcoholic Beverage Code Sections 28.11 and 69.13.

Discussion: Martinez, as the Permittee/Respondent, had control over his own actions; the breach of the peace was therefore under Martinez's control and was the result of his improper actions.

E. Under the authority of Government Code Section 2001.058 (e), The Assistant Administrator adds and adopts Conclusion of Law No. 9:

Conclusion of Law No. 9: The Respondent, by serving an alcoholic beverage to an intoxicated person, violated Texas Alcoholic Beverage Code Section 11.61 (b) (14).

Discussion: Section 11.61 (b) (14) states the Commission may cancel or suspend a permit if "the permittee sold or delivered an alcoholic beverage to an intoxicated person." Melcher was intoxicated at the time he was given a beer. The Alcoholic Beverage Code does not state that a permittee must be aware that a person is intoxicated at the time of sale or delivery.

All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically added or adopted are denied.

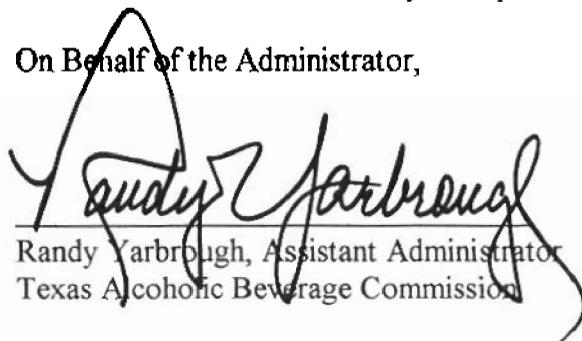
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Permit and License Nos. BG-293781 and BL-293782 are **CANCELED FOR CAUSE**.

This Order will become final and enforceable on September 28, 2000, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made on all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 28th day of September, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Leah Bates, ALJ
State Office of Administrative Hearings
VIA FACSIMILE (512)475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
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TABC Legal Section

Licensing Division
San Antonio District Office

DOCKET NO. 458-00-0351

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

GRACIELA GAONA ONTIVEROS
D/B/A CHICANO MAGIC
(TABC NO. 587136)

ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought cancellation of the wine and beer retailer's permit and the retail dealer's on premises late hours license held by Respondent Graciela Gaona Ontiveros d/b/a Chicano Magic (Respondent) for two alleged violations, a breach of the peace and the sale of an alcoholic beverage to an intoxicated person. Finding the Staff did not sustain its burden of proof, this proposal recommends no action be taken against Respondent's license and permit.

PROCEDURAL HISTORY, NOTICE & JURISDICTION

On February 4, 2000, notice of the hearing was sent by certified mail, return receipt requested, to Respondent at her address of record, 135 Alvarez Place, San Antonio, Texas 78204-2114. Respondent or her agent received the notice on or about February 9, 2000. Because of her attorney's conflicting trial setting, Respondent moved for continuance by motion filed April 20, 2000. The motion was granted, and the hearing was continued from its originally scheduled date of May 1, 2000, to May 16, 2000.

The hearing convened on May 16, 2000, before Administrative Law Judge (ALJ) Leah Bates with the State Office of Administrative Hearings (SOAH) in SOAH offices at 1015 Jackson Keller, San Antonio, Texas. Staff attorney Christopher Burnett represented Staff, and attorney George Taylor represented Respondent. Respondent requested another continuance, arguing she had not received the notice of hearing. The motion was denied. After evidence was received, the hearing concluded on the same day.

A Proposal for Decision was issued July 10, 2000, and Staff filed exceptions on July 14, 2000. Respondent did not reply to the exceptions. This Amended Proposal for Decision is issued in response to Staff's exceptions.

REASONS FOR DECISION

A. Legal Standard

1. Breach of the Peace

Sections 28.11 and 69.13, TEX. ALCO. BEV. CODE ANN. (Vernon 1995), provide for canceling a permit or license when:

a breach of the peace has occurred on the licensed premises or on premises under the licensee's [or permittee's] control and the breach of the peace was not beyond the control of the licensee [or permittee] and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.

2. Sale to Intoxicated Person

The TABC may suspend or cancel a permit or license if an alcoholic beverage was sold or delivered to an intoxicated person. TEX. ALCO. BEV. CODE ANN. §§11.61(b)(14) and 61.71(a) (Vernon Supp. 2000).

B. Evidence

No exhibits were admitted into evidence. In a posthearing order, the ALJ took official notice of the violations letter, dated January 7, 2000; the notice of hearing, dated February 7, 2000; the ALJ's first prehearing order, dated April 3, 2000; the Respondent's Motion for Continuance, dated April 20, 2000; and the ALJ's continuance order, dated April 28, 2000. Three witnesses testified at the hearing.

1. TABC Agent Greg Smith

Mr. Smith has worked as a TABC agent for sixteen years. On November 13, 1999, he responded to a disturbance call about Chicano Magic and was asked by San Antonio police officers to assist with investigating a breach of the peace. He spoke with the bartender and the Respondent. Respondent told Agent Smith a customer, Mario Melcher, had stabbed her boyfriend, Fernando Martinez, and her boyfriend had shot and killed the customer. Mr. Smith also spoke with Mr. Riojas, the bartender.

2. Martin Riojas

Bartender at Respondent's premises, Mr. Riojas was on duty on November 13, 1999. He has worked at the location for six months. He is not seller-server certified and has had no formal training in determining when a person is intoxicated.

Mr. Riojas worked at the back bar, and there was also a front bar. About twelve to fifteen minutes before the shooting, Mr. Riojas noticed Mr. Melcher, a customer he had not

seen before that night, holding a beer. Mr. Riojas had not served the beer to Mr. Melcher and assumed that someone else had purchased it for him or given it to him

Mr. Riojas placed a beer on the bar for another customer, and Mr. Melcher "chugged it down." Mr. Riojas told Mr. Melcher to pay \$1.50 for the beer, and Mr. Melcher began cursing at Mr. Riojas. Mr. Riojas considered paying for the beer himself but, instead, decided to ask Mr. Melcher one more time to pay for the beer. Mr. Melcher refused. At that time, Mr. Riojas realized Mr. Melcher was drunk.

Mr. Riojas told Mr. Martinez, whom he presumed was married to Respondent, and thus, one of the owners, about the incident with Mr. Melcher. He said he was having a problem with someone who drank a beer but refused to pay for it. Mr. Martinez said he would check into it.

Mr. Martinez asked Mr. Melcher if there was a problem and asked Mr. Melcher to come back another day. Mr. Melcher became belligerent and, in Spanish, began cursing at Mr. Martinez. Mr. Riojas saw Mr. Melcher hit Mr. Martinez with an open fist. Mr. Martinez hit him back. They struggled and cursed at each other. Mr. Melcher cut Mr. Martinez with a knife; then, Mr. Martinez shot Mr. Melcher.

In Mr. Riojas's opinion, the events happened so quickly that there was no time to telephone the police; he estimated the fight lasted no more than a couple of minutes. Before the altercation, Mr. Riojas expected Mr. Melcher to leave when Mr. Martinez talked with him.

3. Angelina Vitela

Ms. Vitela, a customer, went to the club about 9:30 p.m. on November 13, 1999. She went to the club almost every weekend and knew both Mr. Martinez and Mr. Melcher. Mr. Melcher was the first cousin of a friend she described as being "like a brother" to her, and she had been around Mr. Melcher on occasion during the past few years. On the evening of November 13, 1999, she had consumed a couple of alcoholic beverages.

Around midnight, Ms. Vitela saw Mr. Riojas and Mr. Melcher exchange words. She saw Mr. Martinez hit Mr. Melcher. Mr. Melcher pushed Mr. Martinez and hit him a few times. According to Ms. Vitela, other people in the club then became involved trying to stop the fight. They had Mr. Melcher back against a wall, and everything began to calm down. At that point, Ms. Vitela thought Mr. Melcher was going to be escorted out of the club; instead, she heard a shot and saw Mr. Melcher fall to the ground. She described the confrontation between Mr. Martinez and Mr. Melcher as lasting about five minutes. She did not see a knife in Mr. Melcher's hand.

C. Analysis

1. Breach of the Peace

Courts have defined a breach of the peace as:

the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. . . by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act of violence, or by any act likely to produce violence. . . The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet. . . or of acts such as tend to excite violent resentment or to provoke or excite others to break the peace. Actual or threatened violence is an essential element. Woods v. State, 152 Tex. Crim. 338; 213 S.W. 2d 685, 687 (1948). Andrade v. State, 6 S.W. 3d 584 (Tex. App.-Houston [14th Dist.] 1999, dis. pct. rel.

Clearly, there was a breach of the peace in Respondent's club on November 13, 1999. Based on the evidence and the definitions, the first disturbance of the public peace in the club occurred when blows were struck.¹ Mr. Riojas testified Mr. Melcher struck the first blow, and Mr. Vitela testified Mr. Martinez struck first. Certainly, if Mr. Martinez struck the first blow, one could infer that Respondent's improper supervision contributed to the breach. However, if Mr. Melcher first struck Mr. Martinez, the breach was unforeseen to Respondent's agent, Mr. Martinez. Foreseeability and the licensee's ability to control the situation determine whether liability will be found. Texas Liquor Control Board v. Luke, 340 S.W.2d 504 (Tex. Civ. App. - Beaumont 1960, no writ); Texas Liquor Control Board v. Rodriguez, 364 S.W.2d 459 (Tex. Civ. App. - San Antonio 1963, no writ); McFarland v. Texas Liquor Control Board, 434 S.W.2d 924 (Tex. Civ. App. - Waco 1968, no writ).

The two eyewitnesses both had interests in the outcome of this case. As Respondent's employee, Mr. Riojas was necessarily interested in continued employment. Ms. Vitela's close friend, a person who is like a brother to her, was related to Mr. Melcher. Because of these biases, neither witness appeared more credible than the other. There was no other evidence to add weight to either party's assertions, and Staff bore the burden of proof. Thus, the ALJ finds Staff failed to prove it was more likely than not that Mr. Martinez struck the first blow and initiated the breach of peace. Staff failed to meet its burden of proving the breach of the peace was not beyond Respondent's control and resulted from her improper supervision of persons permitted to be on the licensed premises.

¹Loud swearing or cursing can breach the peace, Leach v. State, 22 Tex. Ct. App. 279, 3 S.W. 539, 546 (1886), but in this case, the words exchanged between Mr. Melcher and Respondent's agents did not disturb anyone else and did not appear to violate the common peace of the club.

This conclusion is not meant in any way to excuse Mr. Martinez's actions in killing Mr. Melcher. However, the evidence was insufficient to prove the Texas Alcoholic Beverage Commission violation alleged. The evidence did not demonstrate that Respondent could have prevented Mr. Melcher's actions, and Mr. Melcher initiated the breach.

2. Sale to Intoxicated Person

According to Mr. Riojas's, Mr. Melcher "chugged down" a beer that Mr. Riojas had placed on the counter for someone else. Even if Mr. Riojas actually served him, there was no evidence Mr. Melcher was intoxicated at the time he was served. Ms. Vitela did not think Mr. Melcher was intoxicated, and she was familiar with him. Neither witness noted behavior tending to show intoxication until after the beer was served to Mr. Melcher. Consequently, the ALJs finds there was insufficient evidence of selling or serving an intoxicated person.

PROPOSED FINDINGS OF FACT

- 1 Respondent Graciela Gaona Ontiveros d/b/a Chicano Magic (Respondent) holds a wine and beer retailer's permit and a retail dealer's on premises late hours license issued by the Texas Alcoholic Beverage Commission (TABC).
2. On November 13, 1999, a customer, Mario Melcher, refused to pay for a beer he took from the bar at Respondent's club.
3. When the bartender asked him to pay for the beer he had "chugged down," Mr. Melcher refused and cursed at the bartender.
4. The bartender asked for payment a second time, and Mr. Melcher again refused.
5. The bartender asked Respondent's boyfriend, Fernando Martinez, whom the bartender thought was the co-owner, for assistance.
6. When Mr. Martinez asked Mr. Melcher to pay for the beer, Mr. Melcher cursed him and hit him with an open fist.
- 7 Mr. Martinez then hit Mr. Melcher
8. Mr. Melcher cut Mr. Martinez with a knife.
9. After being cut, Mr. Martinez shot and killed Mr. Melcher.
10. The fight lasted no more than a couple of minutes.

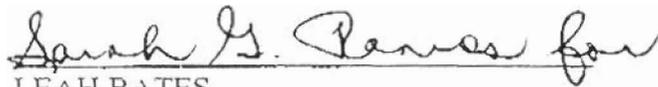
11. Until Mr. Melcher "chugged down" the beer and cursed at bartender, Mr. Melcher had done nothing in the bar to indicate he was intoxicated.
12. On February 4, 2000, notice of the hearing to consider sanctions against Respondent was sent by certified mail, return receipt requested, to Respondent at her address of record, 135 Alvarez Place, San Antonio, Texas 78204-2114.
13. Respondent or her agent received the notice on or about February 9, 2000.
14. The hearing to consider the allegations convened on May 16, 2000, before Administrative Law Judge Leah Bates with the State Office of Administrative Hearings (SOAH) in SOAH offices at 1015 Jackson Keller, San Antonio, Texas. Staff attorney Christopher Burnett represented Staff, and attorney George Taylor represented Respondent.

PROPOSED CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§11.61 and 61.71 (Vernon Supp. 2000).
2. 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(5) (Vernon 2000).
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T. CODE ANN. §2001.051 (Vernon 2000).
4. Staff bore the burden of proof in the proceeding.
5. Mr. Melcher initiated the breach of the peace. TEX. ALCO. BEV. CODE ANN. (Vernon 1995) §§28.11 and 69.13.
6. Mr. Melcher's actions were beyond Respondent's control and did not result from her improper supervision of persons permitted to be on the licensed premises or on premises under her control.
7. There was insufficient evidence to prove a violation of TEX. ALCO. BEV. CODE ANN. (Vernon 1995) §§28.11 and 69.13, concerning a breach of the peace.

- 8 There was insufficient evidence to prove Respondent's agent sold, served, or delivered an alcoholic beverage to an intoxicated person. TEX. ALCO. BEV. CODE ANN. §§11.61(b)(14) and 61.71(a) (Vernon Supp. 2000).

SIGNED this 5th day of September, 2000.



LEAH BATES

Administrative Law Judge

State Office of Administrative Hearings