

**DOCKET NO. 589432**

IN RE TOMAS CARREON ROMERO	§	BEFORE THE
D/B/A LAS PALMAS BAR	§	
PERMIT NOS. BG-445244 & BL-445245	§	
	§	TEXAS ALCOHOLIC
	§	
POTTER COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-2194)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 21st day of November, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on October 10, 2000, and adjourned October 10, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 23, 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. 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, 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.

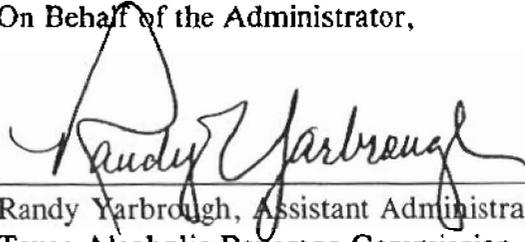
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations in Docket No. 589432 against Permit Nos. BG-445244 and BL-445245 are hereby **DISMISSED**.

**This Order will become final and enforceable on December 12, 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 21st day of November, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a horizontal line. The signature is cursive and somewhat stylized.

Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable B. L. Phillips  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE: (806) 792-0149**

Marvin Williams  
**ATTORNEY FOR RESPONDENT**  
808 1/2 Main Street  
Amarillo, Texas 79401-3418

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Amarillo District Office



odor of an alcoholic beverage on his breath, extremely slurred speech, bloodshot eyes, that he had a hard time maintaining his balance, swayed and that he admitted to drinking. Mann administered field sobriety tasks to Gutierrez and his performance on these tasks led Mann to conclude that Gutierrez was a danger to himself and others. Gutierrez was arrested and charged with being an intoxicated employee on the licensed premises. During a protective search subsequent to the arrest, Gutierrez was found to have a white substance on his person which Mann believed was cocaine. Petitioner's exhibit number one, which was admitted into evidence, is a Texas Department of Public Safety lab report which identifies the substance found on Gutierrez as cocaine. While at the jail processing Gutierrez, Mann was contacted by a jailer who stated that he recognized Gutierrez and that his name was Leonardo Trujillo.

Agent Randy McCarthy testified that he had previously observed Gutierrez behind the bar on the licensed premises taking orders. He distinctly remembered Gutierrez' face and recalled that he had seen him behind the bar a couple of times.

Respondent testified on his own behalf and denied that Gutierrez ever worked for him or that he was ever paid by him. He has known Gutierrez for approximately three months and knows him by the name of "Chito." Respondent specifically refuted the allegation that Gutierrez had ever worked for him as a translator because most of the clientele of the Bar speaks Spanish and therefore there is no need for an translator.

Margarita Alonso is an employee of Respondent who has worked for him for ten months. She testified that the only other employee who has worked with her is Dahlia Soria and that Gutierrez did not work at the bar. On May 18, 2000, Alonso was working at the Bar and observed Gutierrez on the licensed premises. She recalls that Respondent took Gutierrez out of the Bar but that Gutierrez returned about five minutes before the TABC agents entered. Respondent had also instructed her not to serve Gutierrez and not to speak to him if he was offensive. Finally, Alonso testified that Gutierrez was a regular patron of the Bar.

**B. Analysis.** Staff alleged that Francisco Alonso Gutierrez, also known as Leonardo Trujillo and "Chito", had worked for Respondent in the past cleaning up, working behind the bar and translating, and that he was an agent or servant of Respondent. They further alleged that on May 18, 2000, Gutierrez was intoxicated and possessed cocaine while on the licensed premises and therefore Respondent violated the Texas Alcoholic Beverage Code (the Code). Pursuant to TEX. ALCO. BEV. CODE § 104.01 (5) and (9), 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 being intoxicated on the licensed premises and possessing a narcotic (emphasis added). Respondent never denied that Gutierrez was intoxicated or possessed cocaine, but he denied that Gutierrez had ever acted as his agent, servant or employee.

The Code is silent on the definition of agent or servant, but the dictionary defines agent as "one who acts for or in the place of another by authority from him" and servant as "one who serves others." The only evidence to prove that Ramirez fit either definition was the testimony of the two TABC agents that they had previously observed Gutierrez behind the bar on the licensed premises, cleaning up the Bar or translating. Neither of the agents testified that they observed Gutierrez helping Respondent on May 18, 2000, and they were both somewhat vague as to when they had observed Gutierrez working for Respondent or what he was doing. On the other hand, Respondent testified with specificity that he ever employed Gutierrez and instead described him as a frequent patron who might have a drinking problem. Margarita Alonso, Respondent's employee on May 18,

2000 also denied that Gutierrez ever worked for Respondent and also described him as a regular patron who Respondent had found necessary to stop serving him and remove him from the premises.

This evidence is insufficient under the preponderance of the evidence standard to prove that Gutierrez was an employee, agent or servant of Respondent while being intoxicated or possessing a narcotic on the licensed premises. As a result, Staff's recommendation to cancel or suspend Respondent's license and permit is denied.

### **III. FINDINGS OF FACT**

1. On January 22, 1999, the Texas Alcoholic Beverage Commission (Commission) issued a Wine and Beer Retailer's Permit and a Retail Dealer's On-Premise Late Hours License, which have been continuously renewed, to Respondent for the premises known as Las Palmas Bar, 2905 E. Amarillo Boulevard, Amarillo, Potter County, Texas.
2. Respondent received proper and timely notice of the hearing from the Staff for the Commission (Staff) in a notice of hearing, dated August 15, 2000.
3. The hearing was convened on October 10, 2000, at the offices of the State Office of Administrative Hearings in Lubbock, Lubbock County, Texas. Respondent appeared and was represented by Marvin Williams, attorney. Dewey Brackin, Assistant Attorney General, represented the Staff.
4. On May 18, 2000, Mr. Francisco Alberto Gutierrez, also known as Leonardo Trujillo and Chito, was present on the licensed premises while being intoxicated and while possessing a narcotic in the form of cocaine.
5. Gutierrez was a regular patron on the licensed premises who had a history of intoxication and causing problems on the licensed premises.
6. On May 18, 2000, Respondent escorted Gutierrez off of the licensed premises and told his employee Margarita Alonso that she was not to serve him any more and was not to speak to him if he was offensive.
7. On that date, Gutierrez was not acting as the agent, servant or employee of Respondent.

### **IV. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 6.01, 11.61 and 61.71 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over this matter, including the authority to issue a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. § 2003 (Vernon 2000).
3. Proper and timely notice of the hearing was provided as required by TEX. GOV'T CODE ANN §§ 2001.051 and 2001.052 (Vernon 2000).

4. The evidence was insufficient under the preponderance of evidence standard to prove that Gutierrez ever provided a benefit to Respondent or that he ever worked for Respondent.
5. Based on Findings of Fact Nos. 4-7 and Conclusion of Law No. 4, Staff failed to prove that Respondent violated the Code by having a servant, agent, or employee who was intoxicated and in possession of a narcotic on the licensed premises on May 18, 2000.

Signed this 23<sup>rd</sup> day of October, 2000



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B.L. PHILLIPS

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333  
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Doyne Bailey, Administrator

November 17, 2000

Mr. Randy Yarbrough  
Assistant Administrator  
Texas Alcoholic Beverage Commission  
P. O. Box 13127  
Austin, Texas 78711-3127

Re: Docket No. 589432  
TABC v. Tomas Carreon Romero  
d/b/a Las Palmas Bar

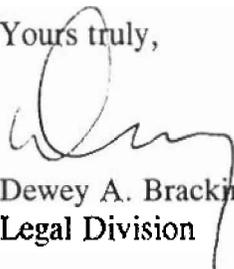
Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause. No exceptions to the Proposal have been filed.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,



Dewey A. Brackin  
Legal Division

DAB/yt

Adopt PFD  
Dismiss  
Randy Yarbrough  
11/17/2000  
An Equal Opportunity Employer

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