

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

DAVID J. CARD
D/B/A POOR DAVID'S PUB
DALLAS COUNTY, TEXAS
(TABC CASE NO. 603748)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against David J. Card d/b/a Poor David's Pub (Respondent), alleging that Respondent's employee permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours in violation of the Texas Alcoholic Beverage Code (the Code). This proposal finds that the allegations against Respondent are true. The Administrative Law Judge (ALJ) recommends Respondent's permits be suspended for five days, or in the alternative, Respondent be allowed to pay a penalty of \$750.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice, or venue in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

This matter was scheduled to be heard on October 3, 2003, at 10:00 a.m. On September 22, 2003, the ALJ rescheduled the hearing from October 3, 2003, to October 10, 2003, for judicial economy. Neither party objected.

On October 10, 2003, a hearing convened before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). Staff was represented at the hearing by Timothy E. Griffith, Staff Attorney. Respondent appeared *pro se*. Evidence and argument were received and the record closed on the same date.



II. LEGAL STANDARDS AND APPLICABLE LAW

A person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a.m. and 12 noon and on any other day between 2:15 a.m. and 7 a.m. Proof that an alcoholic beverage was possessed with intent to consume in violation of this section requires evidence that the person actually consumed the beverage.¹ The holder of a mixed beverage permit may also sell wine, beer, ale, and malt liquor for consumption on the licensed premises.² All provisions of the Code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit.³ **No person may sell or offer for sale mixed beverages at any time that is not permitted.** In a county having a population of 500,000 or more, a holder of a mixed beverage late hours permit may sell and offer for sale mixed beverages between midnight and 2 a.m. on any day.⁴ The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Code or a rule of the Commission.⁵

III. EVIDENCE

On September 3, 2003, Staff served Respondent with Requests for Admissions (the Requests), a copy of which (along with proof of service) was admitted into evidence. Respondent failed to deny the allegations contained in Staff's Requests for Admissions. The Requests are deemed admitted and the matters are outlined below.

At the hearing, the following evidence was undisputed by the parties. Respondent's licensed premise is located at 1924 Greenville Avenue, Dallas, Dallas County, Texas. The Texas Alcoholic Beverage Commission (TABC) issued mixed beverage permit, MB 100132, and mixed beverage

¹ TEX. ALCO. BEV. CODE ANN. § 105.06(c).

² TEX. ALCO. BEV. CODE ANN. § 28.01(c)(2).

³ TEX. ALCO. BEV. CODE ANN. § 29.03.

⁴ TEX. ALCO. BEV. CODE ANN. § 105.03(a).

⁵ TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

late hours permit, LB 100133, to Respondent on March 16, 1977. The permits have been continually renewed.

On January 11, 2003, at approximately 2:53 a.m., David Doggett, an agent with the TABC, was conducting inspections of establishments licensed by the TABC for after-hours violations. At approximately 2:53 a.m., he arrived at Respondent's licensed premises, looked through the front glass window and observed a group of people seated directly in front of the bar and about ten feet away. Mark Manders, Kathryn Manders, Clay Farmer and Jeffery Morrison, who were band members, were observed consuming an alcoholic beverage on Respondent's premises. All four were issued citations for consuming an alcoholic beverage during prohibited hours. Jared Brad Shelton was the bartender on duty at the time.

A. Staff's Evidence and Contentions

Agent Doggett testified at the hearing that all of the lights inside the establishment were on at the time, and he could clearly see inside. The bartender, Mr. Shelton, appeared to periodically converse with the group of people as he re-stocked the bar. According to Agent Doggett, Mr. Shelton was positioned at the bar where he either could have or should have personally observed the band members consuming alcoholic beverages. The agent added that in his opinion, it was not possible that Mr. Shelton was not aware of the group's conduct because he was directly facing them from time to time. Agent Doggett added that the four people made no attempt to be secretive about their conduct.

According to Agent Doggett, Respondent, as a mixed beverage late hours permittee, is required to cease the sale of all alcoholic beverages at 2 a.m. and instruct patrons that they have fifteen minutes to consume any open alcoholic beverage. The bartender is then required to clear all open alcoholic beverages from the tables by 2:30 a.m. Staff argues that Respondent's employee and bartender, Mr. Shelton, permitted four people to consume an alcoholic beverage on the licensed premises, in his presence, during prohibited hours in violation of the Code.

B. Respondent's Evidence and Contentions

Mr. Shelton also testified at the hearing. Mr. Shelton has eight years of experience working as a bartender. He has spent the last three-and-a-half years at Poor David's Pub. Mr. Shelton stated that the four people issued citations were band members who had played at the establishment earlier in the night. According to Mr. Shelton, he was doing paperwork at the time that Agent Doggett knocked on the front door for entry into the bar. He was not aware that alcoholic beverages were being consumed by the band members and was very surprised that they were issued citations. He also stated that he was not exactly sure how the four band members obtained the beer. He added that he was standing next to Mark Manders as he [Mr. Shelton] was paying him and was also doing paperwork.

Mr. Shelton speculated that Mark Manders, who regularly plays at the establishment, may have taken the beer when he was behind the bar. According to Mr. Shelton, another possibility was that Mark Manders retrieved the beer from a cooler which he often kept in his truck and brought the beer inside the establishment. Mr. Shelton did acknowledge, however, that he is aware that (1) patrons should not possess or consume alcoholic beverages after 2:15 a.m., and (2) the permittee, or its employee, has a duty to maintain control of the licensed premises at all times. Such control would include, as intimated in the instant case, the possession and consumption of an alcoholic beverage which may have come from an outside source.

David J. Card, owner of Poor David's Pub, also testified at the hearing. Mr. Card stated that he has operated this establishment for over 26 years and has been cited on only one other occasion by the TABC. According to Mr. Card, he was not personally present on January 11, 2003, and he does not deny that alcoholic consumption occurred during prohibited hours. He argues, however, that the alcoholic consumption occurred without the bartender's knowledge. Mr. Card stated that when he is not present at the bar, Mr. Shelton manages the bar in his absence. Mr. Card added that Mr. Shelton is a very good bartender and manager. Mr. Card emphasized that he and Mr. Shelton attempt to comply with the TABC rules to the letter of the law. He further argued that while they may have violated the letter of the law, they did not violate the spirit of the law. Respondent requested consideration of its outstanding record during its 26 years as a permittee.

III. DISCUSSION

The parties agree that an alcoholic beverage was consumed on the licensed premises at approximately 2:53 a.m., during prohibited hours, and that a violation of the Code occurred. Respondent argues that its employee was unaware that the four band members either possessed or consumed the alcoholic beverages. The ALJ does not find the testimony of Respondent's employee, Mr. Shelton, to be credible with regard to what he observed. At the very least, Mr. Shelton should have been aware of the group's conduct. It appears that Mr. Shelton was aware of the fact that Mark Manders goes behind the bar to get alcoholic beverages himself, but also regularly retrieves alcoholic beverages from a cooler which he keeps inside his truck. Respondent is nonetheless liable for the violation. Respondent has an affirmative obligation to ensure its employees are able to make the requisite observations and judgments necessary to prevent violations of the Code. In the instant case, Respondent's employee failed to exercise the appropriate standard of care required in this matter.

Respondent argued that, under the circumstances, its omission was unintentional and not deceitful. Staff responded by noting that Respondent's excuses are no defense to its liability. Staff recommended a suspension of Respondent's permits for five days, or in the alternative, a penalty of \$750. Respondent's violation history was admitted into evidence. The record shows that Respondent had one prior violation for which its permits were suspended for six days between August 9, 2000, and August 15, 2000.

Under the TABC's "standard penalty chart," a violation of § 61.73(b) of the Code calls for a maximum of a three-day suspension for a first violation, a five to ten day suspension for a second violation, and 10 to 15 days for a third violation. See 16 TEX. ADMIN. CODE § 37.60. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended. § 11.64(a) of the Code. The standard penalty chart is not binding. The facts developed in the record are the determining factors "as to the sufficiency of the penalty assessed." 16 TEX. ADMIN. CODE § 37.60(g).

Although the record shows that Respondent's permits were previously suspended for a violation in 2000, Staff does not seek enhancement of the sanction in this case. The sanction

recommended by Staff is reasonable and within the authority of the penalty chart. 16 TEX. ADMIN. CODE § 37.60.

The ALJ recommends Respondent's permits be suspended for five days, or in the alternative, that Respondent be required to pay a penalty of \$750.

IV. PROPOSED FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued mixed beverage permit, MB 100132, and mixed beverage late hours permit, LB 100133, to David J. Card d/b/a Poor David's Pub (Respondent) on March 16, 1977. The permits have been continually renewed.
2. Respondent's licensed premises is located at 1924 Greenville Avenue, Dallas, Dallas County, Texas.
3. On January 11, 2003, at approximately 2:53 a.m., four people seated in front of the bar were consuming alcoholic beverages in Respondent's premises.
4. All four persons were issued citations for consuming an alcoholic beverage during prohibited hours.
5. On that same date, Respondent's employee, Jared Brad Shelton, was the bartender on duty and was also responsible for managing the establishment.
6. On January 11, 2003, Mr. Shelton permitted others to consume alcoholic beverages on the licensed premises during prohibited hours.
7. On August 29, 2003, Staff served its notice of hearing on Respondent by certified mail.
8. The notice alleged that Respondent had violated the Texas Alcoholic Beverage Code. It informed the Respondent the hearing would be held on October 3, 2003, at 10:00 a.m., at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. The notice made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
9. On September 22, 2003, the Administrative Law Judge (ALJ) rescheduled the hearing from October 3, 2003, at 10:00 a.m. to October 10, 2003, at 10:00 a.m. for judicial economy.
10. On October 10, 2003, a hearing convened before ALJ Brenda Coleman, State Office of Administrative Hearings. Staff was represented at the hearing by Timothy E. Griffith, TABC

Staff Attorney. Respondent appeared *pro se*. Evidence and argument were received. The record closed on the same date.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 § 11.61 (the Code).
2. 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, pursuant to TEX. GOV'T CODE ANN. §2003.
3. Respondent received notice of the proceedings and hearing, pursuant to TEX. GOV'T CODE ANN. § 2001.051, and 1 TEX. ADMIN. CODE §§ 155.25(d)(3) and 155.27.
4. Based on Findings of Fact Nos. 3 through 6, Respondent violated §§ 105.03, 105.06 and 11.61(b)(2) of the Code.
5. Based on Conclusion of Law No. 4, Respondent's permits should be suspended for five days, or in the alternative, Respondent should pay a penalty of \$750.

ISSUED December 8, 2003.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 603748

IN RE DAVID J. CARD	§	BEFORE THE
D/B/A POOR DAVID'S PUB	§	
PERMIT NOS. MB100132, LB100133	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-4299)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 30th day of December 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on October 10, 2003, and adjourned on October 10, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 8, 2003. This Proposal For Decision (**attached hereto 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. 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 Permit Nos. MB100132 and LB100133 are hereby **SUSPENDED** for five (5) days.

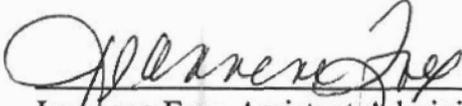
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$750.00 on or before the 18th day of February, 2004, all rights and privileges under the above described permits will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the 25th day of February, 2004.

This Order will become final and enforceable on January 20, 2004, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 30th day of December, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

DAVID J. CARD
D/B/A POOR DAVID'S PUB
RESPONDENT
1924 Greenville Ave.
Dallas, TX 75206-7439
CERTIFIED MAIL/RRR NO. 7001 2510 0007 0098 6325

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 603748

REGISTER NUMBER:

NAME: DAVID J. CARD

TRADENAME: POOR DAVID'S PUB

ADDRESS: 1924 Greenville Ave., Dallas, Texas 75206-7439

DATE DUE: February 18, 2004

PERMITS OR LICENSES: MB100132, LB100133

AMOUNT OF PENALTY: \$750.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 18TH DAY OF FEBRUARY 2004, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711**

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.