

DOCKET NO. 613098

IN RE LASER MAGIC, INC.
D/B/A LASER MAGIC
PERMIT NOS. MB475022, LB475023

§
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§
§

BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION

TARRANT COUNTY, TEXAS
(SOAH DOCKET NO. 458-06-0611)

SECOND AMENDED ORDER

CAME ON FOR CONSIDERATION this 29th day of June, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Monica Garza. The hearing convened on December 9, 2005 and both parties were given additional time to prepare written closing arguments. The case adjourned January 30, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 30, 2006. 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. **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 Respondent's permits shall be suspended for a period of 3 days commencing at 12:01 on August 23, 2006, unless a civil penalty in the sum of \$450.00 is paid by the Respondent to The Commission on or before 12:01 a.m. on August 16, 2006.

This Order will become final and enforceable on July 21, 2006, 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.

SIGNED on this 29th day of June, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Monica Garza
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE 817-377-3706
Ph.: 817-731-1733

Laser Magic Inc.
d/b/a Laser Magic
RESPONDENT
6025 Camp Bowie Blvd.
Ft. Worth, Texas 76116-5621
CERTIFIED MAIL NO. _____
RETURN RECEIPT REQUESTED

John L. Gamboa
RESPONDENT'S ATTORNEY
VIA FACSIMILE 817-885-8504
Ph.: 817-885-8500

Tim Griffith
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4001
Ph.: 214-678-4043
TABC Legal Section

Licensing Division

Ft. Worth District Office

DOCKET NO. 613098

IN RE LASER MAGIC, INC.	§	BEFORE THE TEXAS
D/B/A LASER MAGIC	§	
PERMIT NOS. MB475022, LB475023	§	
	§	
	§	ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0611)	§	BEVERAGE COMMISSION

AMENDED ORDER

CAME ON FOR CONSIDERATION this 12th day of May, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Monica Garza. The hearing convened on December 9, 2005 and both parties were given additional time to prepare written closing arguments. The case adjourned January 30, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 30, 2006. 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. **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

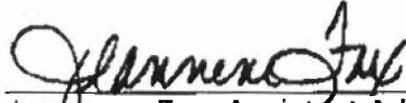
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits shall be suspended for a period of 3 days commencing at 12:01 on June 28, 2006, unless a civil penalty in the sum of \$450.00 is paid by the Respondent to The Commission on or before 12:01 a.m. on June 21, 2006.**

This Order will become final and enforceable on June 2, 2006, 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

SIGNED on this 12th day of May, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Monica Garza
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE 817-377-3706
Ph.: 817-731-1733

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d/b/a Laser Magic
RESPONDENT
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Licensing Division

Ft. Worth District Office

SOAH DOCKET NO. 458-06-0511
TABC DOCKET NO. 613098

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

BEFORE THE STATE OFFICE

v.

OF

LASER MAGIC, INC. D/B/A
LASER MAGIC, Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Laser Magic, Inc. d/b/a Laser Magic (Respondent), alleging that Respondent allowed the occurrence of a breach of the peace on its licensed premises. Petitioner further alleged that Respondent failed to promptly report this breach of the peace to TABC. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) finds Respondent is not responsible for the occurrence of the breach of the peace on its licensed premises. However, the ALJ finds that Respondent did not promptly report the breach of the peace to TABC. For this reason, the ALJ recommends a three-day suspension of Respondent's permits. As an alternative to this suspension, TABC should allow Respondent to pay a \$450.00 civil penalty.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61(b)(21) and 28.11. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On November 9, 2005, Petitioner issued its notice of hearing, directed to Respondent and its attorney, John Gamboa. The notice contained a statement of the time, place, and nature of the

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hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On December 9, 2005, a hearing convened before SOAH ALJ Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Mr. Gamboa. Following presentation of evidence, the parties were given additional time to file written closing arguments. The record closed on January 30, 2006.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 28.11, TABC may suspend or cancel a mixed beverage permit if it finds that the following circumstance exists:

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

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(21), TABC may suspend or cancel an original or renewal permit if "the permittee failed to promptly report to the commission a breach of the peace occurring on the permittee's licensed premises."

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III. EVIDENCE

A. Respondent's Permits

Respondent holds a Mixed Beverage Permit, MB-475022, and a Mixed Beverage Late Hours Permit, LB-475023, issued by TABC, for the premises located at 6025 Camp Bowie Blvd., Fort Worth, Tarrant County, Texas. These permits were originally issued on June 30, 2000, and they have been continuously renewed. Respondent has no previous violation history.

B. Testimony Regarding the Assault of Denver Shеды on Respondent's Premises

Thomas Chilton and Denver Shеды testified regarding an assault of Denver Shеды on Respondent's premises. This assault occurred on June 6, 2004.

On that date, Mr. Chilton and Mr. Shеды were attending a concert on Respondent's premises. Mr. Chilton was 16 years of age; Mr. Shеды was 17 years of age. These young men were attending the concert with a group of friends, including Taylor York. Mr. Chilton admits consuming alcoholic beverages prior to meeting Mr. Shеды and Mr. York at Respondent's premises. He opined that Mr. Shеды and Mr. York appeared to have consumed alcoholic beverages as well.

During the concert, these young men were standing near a "mosh pit." The mosh pit was described as an area where patrons get inside a pit to run against each other. Mr. Chilton described this mosh pit as part of the fun. He indicated that although those patrons participating in the mosh pit action may have bumps and bruises at the end of the night, they did not receive serious injuries, such as concussions. Both Mr. Chilton and Mr. Shеды testified that they did not actually get inside the mosh pit.

During the course of the evening, Mr. Chilton and Mr. Shеды testified that a third party

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approached Mr. York. They indicated that this third party had been intimidating other patrons during the course of the evening. While they could not hear the content of the conversation, they both opined that Mr. York seemed intimidated by the third party. Both witnesses indicated there was no physical contact between Mr. York and the third party. They testified that Mr. York motioned to security personnel, noting that the security personnel escorted the third party away from Mr. York. As indicated by Mr. Chilton, it is not difficult to find security on Respondent's premises when you need them. Both witnesses testified they thought the situation was under control once security became involved.

Following the alleged intervention by security personnel, Mr. Chilton and Mr. Sheddy testified that the third party quickly returned, and he appeared to be heading toward Mr. York. At this point, Mr. Sheddy confronted the third party, indicating they did not want any trouble. Mr. Sheddy then immediately received an unexpected blow to the jaw by the third party.

Following this alleged assault, Mr. Chilton and Mr. Sheddy testified to seeking medical attention and police intervention for Mr. Sheddy. The immediate outcry from Mr. Sheddy following the assault was that he wanted to press charges.

Rick Sheddy, Mr. Sheddy's father, testified that his son received a compound fracture to his jaw and lost two teeth due to the assault. He indicated that oral surgery was required to put his son's jaw back together.

C. Fort Worth Police Department Incident Reports

The following information is contained in the Fort Worth Police Department Original Narrative Report regarding the assault on Denver Sheddy. On June 6, 2004, at 1:13 a.m., Officer G.J. Rusnak and Corporal M.A. Neerman were dispatched to Respondent's premises on an assault call. Upon their arrival at 1:16 a.m., they met with the complainant, Denver Sheddy. Mr. Sheddy reported that at approximately 1:00 a.m., he was watching a concert on Respondent's

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premises when he was approached by the suspect. He described the suspect as a white male, 22 years of age, 5'11" in height, weighing 210 pounds. Mr. Sheddy reported that the suspect was attempting to start a fight with his friend. Mr. Sheddy reported telling the suspect that he did not want to fight. He reported the suspect then struck him in the mouth with a closed fist, without provocation, causing bleeding and injury to his mouth. The officers also spoke with Taylor York. Mr. York reported the same information, describing the suspect as a white male, 21 years of age.

The following information is contained in the Fort Worth Police Department Supplement #01 Narrative Report. On June 7, 2004, Detective W.A. Hix was assigned to conduct a follow-up investigation of the assault on Denver Sheddy. Detective Hix noted that a suspect vehicle was listed in the Original Narrative, but that the connection between the suspect and suspect vehicle was not documented.

On June 10, 2004, Detective Hix spoke to Rick Sheddy. In reference to the suspect vehicle, Mr. Sheddy reported that the suspect was seen leaving in that vehicle. Mr. Sheddy reported that his son had received a fractured jaw which required surgery. He indicated that his son's jaw was wired shut and he was unable to speak.

Detective Hix traced the suspect vehicle back to Jeffrey Anderson, described as a white male 30 years of age, 6'2" in height, weighing 240 pounds. Detective Hix discovered that Mr. Anderson worked security on Respondent's premises.

On June 14, 2004, Detective Hix interviewed Denver Sheddy. Mr. Sheddy identified Mr. Anderson as his assailant via a photo lineup. Detective Hix also interviewed Taylor York, Chad Bradford, Tyler Smith, Thomas Chilton, and Nicole Lunday. Each witness was interviewed independently and positively identified Mr. Anderson as the assailant. Taylor York reported that Mr. Anderson had challenged several other people to fights throughout the night prior to the assault on Mr. Sheddy. Thomas Chilton reported that prior to the assault on Mr. Sheddy, Mr.

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Anderson was assaulting other people and that the security staff would pull him away and let him go back. Based on this interview, Mr. Anderson was charged with Aggravated Assault with Serious Bodily Injury.

The following information is contained in the Fort Worth Police Department Original Narrative regarding an assault on John Machovsky. On June 6, 2004, while on an assault call on Respondent's premises, Officer G.J. Rusnak and Corporal M.A. Neerman were approached by John Machovsky. Mr. Machovsky reported that at approximately 1:20 a.m., he was attacked by unknown subjects while attending a concert on Respondent's premises. At the scene, Corporal Neerman interviewed Jeffrey Anderson, listed as 2nd in charge of security, as a witness to the incident.

D. Respondent's Failure to Report Breach of the Peace

TABC Agent Ralph May testified that Respondent did not report the breach of the peace involving Denver Shoddy to TABC.

IV. ANALYSIS

Having considered the testimony and police reports, the ALJ finds insufficient credible evidence to demonstrate that Respondent is responsible for the assault of Denver Shoddy on its licensed premises. However, the ALJ finds that a breach of the peace did occur on the licensed premises and that Respondent failed to promptly report this breach of the peace to TABC.

Regarding Respondent's alleged responsibility for the breach of the peace, the ALJ finds there are numerous conflicts contained within the testimony and police reports. All of this evidence was introduced by Petitioner.

Denver Shoddy and Mr. Chilton both testified that Respondent's security personnel

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involved themselves in an incident regarding the third party assailant and Mr. York prior to the assault on Mr. Sheddy. If this information is true, the security personnel had prior notice of a potential problem involving the third party assailant, and they should have monitored his activities. However, this information is not alleged in the police report that was made immediately following the assault. The report, comprised of information relayed by Mr. Sheddy and Mr. York, states that the suspect attempted to start a fight with Mr. York. The report then states that Mr. Sheddy was attacked without provocation after attempting to intervene. No mention is made of security personnel's involvement with the incident. Because of the discrepancy between testimony provided approximately 19 months following the incident and the report provided to police immediately following the incident, the ALJ is unable to find that security personnel had prior notice of a potential problem between the third party assailant and Mr. York's group of friends.

The police report further indicates that in a June 14, 2004 interview with Detective Hix, Mr. York and Mr. Chilton both reported that the third party assailant had caused problems on Respondent's premises throughout the night. They did not allege that the third party assailant had caused any specific problems with their group of friends prior to the assault on Mr. Sheddy. Mr. Chilton specifically reported that the third party assailant, referenced as Mr. Anderson, had been assaulting other people. He reported that security personnel would pull him away and let him go back. At the hearing, Mr. Chilton testified that the third party assailant had been bothering other patrons during the night, but he did not mention intervention by security personnel other than the alleged intervention prior to the assault on Mr. Sheddy. Further, the hearing testimony indicates that they (Mr. York, Mr. Sheddy, and Mr. Chilton) felt the situation was under control once security became involved. If Mr. Chilton's report to Detective Hix that security had continually pulled Mr. Anderson away from patrons throughout the night and then allowed him to return was true, then the young men would have no reason to believe the situation was under control after the alleged intervention by security personnel. Again, due to the conflict between the hearing testimony and the police reports, the ALJ is uncertain as to the circumstances surrounding the incident

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There is also a conflict regarding the description and identification of the suspected assailant. Although the identification of the assailant is not at the essence of this case, it does weigh against the credibility of Petitioner's evidence.

Rick Shedd advised Detective Hix that the suspect was seen leaving Respondent's premises in the suspect vehicle described by Officer Rusnak in the Original Narrative. Detective Hix traced the vehicle back to Mr. Anderson. However, while Officer Rusnak and Corporal Neerman were on Respondent's premises immediately following the assault on Denver Shedd, they were approached by Mr. Machovsky to investigate a separate assault. During this investigation, Corporal Neerman interviewed Mr. Anderson as a witness to the assault on Mr. Machovsky. If Mr. Anderson had fled the scene following the assault on Mr. Shedd, the ALJ finds it most unusual that he was present on the scene to be interviewed by the same officers responding to the assault call on Mr. Shedd.

Further, Denver Shedd and Mr. York described the suspect as a 21-to-22-year-old white male 5'11" in height, weighing 210 pounds. Mr. Anderson was identified as the assailant by Mr. Shedd and his witnesses in a photo lineup. Mr. Anderson's reported physical characteristics contrast with those of the suspect reported by Mr. Shedd and Mr. Chilton. The police report describes Mr. Anderson as a 30-year-old white male, 6'2" in height, weighing 240 pounds.

Due to each of these contradictions contained in Petitioner's evidence, the ALJ is unable to determine the circumstances surrounding the assault on Mr. Shedd. There is insufficient credible evidence to demonstrate that Respondent could have reasonably prevented the assault on Mr. Shedd. However, the ALJ does find that a breach of the peace did occur and that Respondent failed to promptly notify TABC of this breach of the peace. Because Respondent has no previous violation history, the ALJ recommends a three-day suspension of Respondent's permits. As an alternative to this suspension, TABC should allow Respondent to pay a \$450.00 civil penalty.

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V. PROPOSED FINDINGS OF FACT

1. Laser Magic, Inc. d/b/a Laser Magic (Respondent) holds a Mixed Beverage Permit, MB-475022, and a Mixed Beverage Late Hours Permit, LB-475023, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 6025 Camp Bowie Blvd., Fort Worth, Tarrant County, Texas.
2. These permits were originally issued on June 30, 2000, and they have been continuously renewed.
3. Respondent has no previous violation history.
4. On June 6, 2004, Denver Sheddy, Thomas Chilton, and Taylor York were attending a concert on Respondent's premises.
5. While attending this concert, Mr. Sheddy was assaulted by a third party.
6. As a result of this assault, Mr. Sheddy suffered a compound fracture to his jaw and lost two teeth.
7. TABC staff (Petitioner) did not offer credible evidence regarding the circumstances surrounding the assault on Mr. Sheddy.
8. Petitioner did not prove that Respondent could have reasonably prevented the assault on Mr. Sheddy.
9. Respondent failed to promptly report this breach of the peace to TABC.
10. On November 9, 2005, Petitioner issued its notice of hearing, directed to Respondent and its attorney, John Gamboa.
11. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
12. On December 9, 2005, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas.

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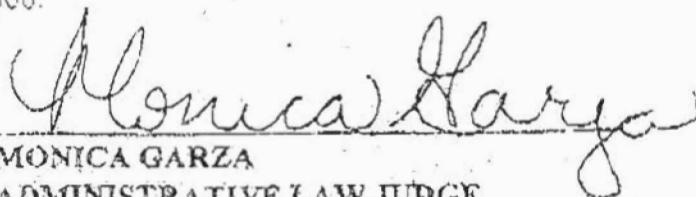
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13. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Mr. Gambor.
14. Following presentation of evidence, the parties were given additional time to file written closing arguments. The record closed on January 30, 2006.

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61(b)(21) and 28.11.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.
4. Respondent is not responsible for the breach of the peace occurring on its licensed premises. TEX. ALCO. BEV. CODE ANN. § 28.11.
5. Respondent failed to comply with TABC reporting requirements regarding the breach of the peace. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(21).
6. Respondent's permits should be suspended for three days. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(21) and 16 TEX. ADMIN. CODE § 37.60.
7. As an alternative to suspension, Respondent should be permitted to pay a \$450.00 civil penalty. TEX. ALCO. BEV. CODE ANN. § 11.64.

SIGNED March 30, 2006.



MONICA GARZA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS