

DOCKET NO. 613800

IN RE RUBEN ACOSTA	§	BEFORE THE
D/B/A EL ALAMEDA BAR	§	
PERMIT NO. BG-507773, BL	§	
	§	TEXAS ALCOHOLIC
	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-1094)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of June, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on March 2, 2006, and the record was closed on March 23, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 19, 2006. 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, 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.

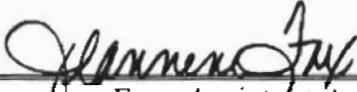
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Wine and Beer Retailer's Permit and Retail Dealer's On-Premise Late Hours License are hereby **CANCELLED**.

This Order will become final and enforceable on July 7, 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 16th day of June, 2006.

On Behalf of the Administrator,



Jeanne Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC/yt

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

Ruben Acosta
El Alameda Bar
RESPONDENT
3215 Alameda
El Paso, Texas 79905
CERTIFIED MAIL NO. 7001 2510 0000 7275 0517
RETURN RECEIPT REQUESTED

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

El Paso District Office

7001 2510 0000 7275 0517

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 613800

Postmark Here

Send To: Ruben Acosta
Street, Apt. No. or PO Box No.
City, State, Zip+4
El Paso, TX 79905

PS Form 3800, January 2001 See Reverse for Instructions

OFFICIAL USE

CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

SOAH DOCKET NO. 458-06-1094

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	
	§	OF
RUBEN ACOSTA d/b/a EL ALAMEDA	§	
BAR	§	
	§	
EL PASO COUNTY, TEXAS	§	
(TABC CASE NO. 613800)	§	ADMINISTRATIVE HEARINGS
Respondent	§	

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission ("Petitioner") brought this enforcement action against Ruben Acosta d/b/a El Alameda Bar ("Respondent"), alleging that Respondent failed to report a breach of the peace which occurred on the licensed premises. The Petitioner seeks the cancellation for cause of the permits based on lewd, immoral, indecent conduct,¹ failure to report a breach of the peace² and the general welfare, health, peace morals and safety of the people.³ The cancellation of the permit and license would prevent the bar from selling alcoholic beverages.

After a contested case hearing and review of the applicable law, hereto, this proposal for decision recommends cancellation of the Wine and Beer Retailer's Permit and cancellation of the Retail Dealer's On Premise Late Hours License.

¹ TEX. ALCO. BEV. CODE ANN. § 104.01(3).

² TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(12) and 61.71(a)(31).

³ TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7), 61.71(a)(17) and 16 TEX. ADMIN. CODE §§ 35.31(c)(11) and

I. NOTICE AND JURISDICTION

A notice of hearing was issued on January 26, 2006, by the Texas Alcoholic Beverage Commission, apprising all parties of Petitioner's allegations and of the hearing date. Notice and jurisdiction were not contested issues and are addressed in the findings of fact and conclusions of law without further discussion here.

II. PROCEDURAL HISTORY

On March 2, 2006, a contested case hearing was convened in this matter at the State Office of Administrative Hearings in El Paso, Texas. Petitioner was represented by W. Michael Cady, staff attorney. The Applicant appeared and proceeded *pro se*. Administrative Law Judge ("ALJ") Veronica S. Najera presided. The record closed on March 23, 2006.

III. DISCUSSION

A. Background

Respondent operates a bar establishment within the City and County of El Paso, Texas.⁴ Respondent holds a Wine and Beer Retailer's Permit⁵ and a Retail Dealer's On Premise Late Hours License.⁶ The permit and license were originally issued on January 23, 2002.

B. Evidence

Petitioner proffered 14 exhibits: the Notice of Hearing (Exhibit No.1); Respondent's

El Alameda Bar is located at 3222 Alameda Avenue, El Paso, El Paso County, Texas.

⁵ See Petitioner's Exhibit No. 2, Wine and Beer Retailer's Permit BG-507773.

⁶ See Petitioner's Exhibit No. 2, Retail Dealer's On Premise Late Hours License BL-507774.

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administrative record (Exhibit No. 2); photographs (Exhibit No. 3); 04-07-03 police report (Exhibit No. 4 and 5); 04-06-03 police report (Exhibit No. 6); 11-06-02 police report (Exhibit No. 7); 09-04-02 police report (Exhibit No. 8); 08-31-02 police report (Exhibit No. 9); 07-28-02 police report (Exhibit No. 10); 08-09-04 police report (Exhibit No. 11); 09-19-04 police report (Exhibit No. 12); an administrative warning document (Exhibit No. 13); and an administrative notice document (Exhibit No. 14). All were admitted into evidence. TABC Enforcement Agent Wesley Rappe and El Paso Police Officer Chris Johnson testified for Petitioner. Respondent also testified.

IV. EVIDENCE AND ARGUMENT

A. Petitioner's case

The Petitioner seeks the cancellation of Respondent's permit and license based on the fact that Respondent failed to report a breach of the peace with a deadly weapon on October 10, 2004. To support its position, the Petitioner relies on the testimony of the police officer who conducted the investigation. The evidence shows, as recounted in the following paragraphs, that a violent crime occurred on the licensed premises,⁷ and that Respondent did not report the breach of the peace to Petitioner. Specifically, the El Paso Police Department was notified by the personnel at the attending hospital of the crime, and the department, in turn, notified Petitioner. The evidence also shows a history of aggravated assaults on the licensed premises which were not reported to the Texas Alcoholic Beverage Commission.

First, El Paso Police Officer Chris Johnson testified that on October 10, 2004, he responded to the crime by conducting an investigation of the incident. The testimony revealed that the police department was informed of the crime by the attending hospital. The victim received severe

⁷ TEX. ALCO. BEV. CODE ANN. § 11.49 [Premises Defined]. In this code, "premises" 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.

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stomach wounds during a physical altercation⁸ incident at Respondent's bar. Officer Johnson testified that he went to the hospital at 5:30 a.m. to begin the investigation. Then he proceeded to the victim's home where he met with the victim's spouse, who was unaware of the incident.

The officer testified that he was able to identify the person the victim had been with the night before by checking the phone records. The call history revealed the name of a friend, Arturo Aguilera, who had been with the victim at the time the crime occurred. It was this friend who transported the victim to the hospital. The friend told Officer Johnson that they had been at El Alameda Bar and that the crime occurred inside the bar.

Officer Johnson arrived at the bar on or about 6:00 a.m. on October 10, 2004. He observed blood drops on the bar stools and the floor adjacent to the bar area inside the establishment. The blood drops continued to the outside, specifically, they were in front of the entrance to the bar on the street.

Next, TABC Enforcement Agent Wesley Rappe testified that he received a report of the crime from the El Paso Police Department, and once he began a search of violent crimes at the licensed premises, he discovered a history of unreported crimes. Aside from the October 10, 2004, incident, the police reports illustrate the following unreported crimes occurred at the licensed premises:

07-28-02	aggravated assault ⁹	patron assaulted inside the bar
08-31-02	aggravated assault	female patron assaulted inside the bar
09-04-02	aggravated assault	gang related fight inside the bar
11-06-02	aggravated assault	patron assaulted inside the bar

⁸ Photographs of the victim's garments show the severity of the cuts. The garments were heavily covered in blood and severely torn by knife stabs. See Exhibit No. 3c, 3p and 3q.

⁹ Aggravated assault is defined in TEX. PEN. CODE ANN. § 22.02. AGGRAVATED ASSAULT.
 (a) A person commits an offense if the person commits assault as defined in § 22.01 and the person: (1) causes serious bodily injury to another, including the person's spouse; or (2) uses or exhibits a deadly weapon during the commission of the assault. (b) An offense under this section is a felony of the second degree.

04-06-03	aggravated assault	fight between prison gangs inside the bar with knives
04-07-03	aggravated assault	patron struck with a glass bottle in the mouth inside the bar
08-09-04	aggravated assault	patron assaulted with knife inside the bar
09-19-04	aggravated assault	patron assaulted inside the bar

Agent Rappe further testified that after he discovered this pattern of non-reported breaches of the peace at the bar, he met with Respondent, and he advised Respondent of his responsibility under the Code to report breaches to the Texas Alcohol Beverage Commission. He said that Respondent was uncooperative and was adamant that the October 10, 2004, incident did not occur inside the bar. Agent Rappe said that at that time, Respondent explained the blood inside the bar by saying that "they started fighting inside the bar." Respondent received an administrative warning¹⁰ on the last two unreported incidents.¹¹ Respondent also received an administrative notice for the failure to report the October 10, 2004, breach of the peace.¹²

B. Respondent's case

To explain why blood was in the bar, Respondent said that someone had a nose bleed. Respondent was adamant that the crime occurred outside, in front of the bar. He said that he was not aware that he had to report these incidents to Petitioner. He said that he has now hired a manager and placed cameras in the establishment. Respondent alleges that he was misled by TABC agents because he was told not to "worry about it."

V. LEGAL STANDARD

The Texas Alcoholic Beverage Commission asserts various grounds for the cancellation:

¹⁰ See Exhibit No. 13, administrative warning document.

¹¹ See Exhibits Nos. 11 and 12, aggravated assaults which occurred on 08-09-04 and 09-19-04.

¹² See Exhibit No. 14, this notice gives a cancellation for cause recommendation.

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- First, it seeks cancellation based on lewd, immoral, indecent conduct which specifically includes the displaying of a pistol or other deadly weapon as a prohibited conduct.¹³
- Second, it seeks cancellation based on the place or manner/general welfare, health, peace, morals and safety of the people; disorderly conduct and any weapons offense are offenses against the general welfare.¹⁴
- Third, it seeks cancellation based on Respondent's failure to promptly report to the Commission a breach of the peace occurring on the licensed premises.¹⁵
- Fourth, cancellation is sought on general grounds for a violation of a provision of this Code¹⁶ or a rule of the commission.¹⁷

VI. ANALYSIS

Respondent actually did not offer any legal argument to rebut the allegations. Aside from stating that he was not aware that he had to report breaches of the peace to the licensing agency, he did not appear to take responsibility for not reporting the breaches of the peace. Respondent's testimony with regard to the blood inside the bar is contradictory to Agent Rappe's version of the

¹³ TEX. ALCO. BEV. CODE ANN. § 104.01(3) [Regulation of Retailers], states that 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 rudely displaying or permitting a person to rudely display a pistol or other deadly weapon in a manner calculated to disturb persons in the retail establishment.

¹⁴ TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) [Cancellation and Suspension of Permits], states that the commission or administrator may cancel an original or renewal permit if it is found, after notice and hearing, that the place and manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Section 61.71(a)(17) [Cancellation and Suspension of Licenses: Retail Dealer] has the exact general welfare/place and manner language as contained in § 11.61(b)(7) applicable to licenses. Any disorderly conduct or any weapons offense have been defined as offenses against the general welfare in 16 T.A.C. §§ 35.31(c)(11) and (13).

¹⁵ TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(21) [Cancellation and Suspension of Permits] and 61.71(a)(31) which has the same language but applies to licenses.

¹⁶ "Code" refers to the Texas Alcoholic Beverage Code.

¹⁷ TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) [Cancellation and Suspension of Permits] states that the commission or administrator may cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of this code or rule of the commission. Section 61.71(a)(1) has the exact language applicable to licenses, but adds a time frame.

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situation. At the hearing, Respondent attributed the blood on the bar stools and floor to a nose bleed. Agent Rappe testified that Respondent told him the incident had begun in the bar. The undersigned ALJ finds Agent Rappe credible. Nonetheless, both inside and in front of the bar are areas defined by the Code as part of the premises because they are appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of Respondent. Testimony revealed that the patrons of the bar parked on a vacant lot next to the bar. Thus, Respondent benefitted from the use of these exterior areas, the adjacent parking lot and the front of the bar, and exercised some control, directly or indirectly, over these areas.

Respondent argues it had no knowledge that it had to report a breach of the peace. This argument is not persuasive. It is quite obvious that an alcoholic beverage license or permit carries with it certain responsibilities, and the licensee or permittee, has the responsibility to apprise himself/herself of those responsibilities.

Respondent correctly argues that Respondent has not taken responsibility for his actions. The fact that Respondent has nine breaches of the peace, none of which were reported to the Texas Alcoholic Beverage Commission, shows Respondent's disregard for the rules, and lack of due diligence in the prevention of aggravated assaults on its licensed premises.

Disorderly conduct and any weapon offense are specifically defined as place or manner offenses against the general welfare. Additionally, the Texas Alcoholic Beverage Commission's standard penalty chart, although not binding to this proceeding, gives guidance to the appropriate penalty to be assessed. Cancellation is recommended after the third violation of failure to report a breach of the peace. Respondent has nine such failures.

Therefore, the failure to report the October 10, 2004, breach of the peace, is a situation which justifies a finding that Respondent engaged in lewd, immoral and indecent conduct. Furthermore, the pattern of failing to report prior aggravated assaults evidences that the manner in which the business has been conducted warrants cancellation of the permit and license based on the general welfare. Respondent's history of repeated violations supports this finding.

C. Recommendation

For the reasons stated in the preceding section, the ALJ recommends cancellation of the Wine and Beer Retailer's Permit and cancellation of the Retail Dealer's On Premise Late Hours License.

VII. FINDINGS OF FACT

1. Respondent holds a Wine and Beer Retailer's Permit BG-507773 and a Retail Dealer's On Premise Late Hours License BL-507774 issued by the Texas Alcoholic Beverage Commission for the premises located at 3222 Alameda Avenue in El Paso, El Paso County, Texas.
2. On January 26, 2006, the staff of the Texas Alcoholic Beverage Commission sent notice informing Respondent of the hearing time, date and location; of the allegations it intended to prove, the legal grounds for the action; and of the right to be represented by counsel, as well as a short statement of the matters asserted.
3. On March 2, 2006, a contested case hearing was convened in this matter before the State Office of Administrative Hearings in El Paso, Texas.
4. The record closed on March 23, 2006.
5. On October 10, 2004, an aggravated assault occurred on the licensed premises.
6. The El Paso Police Department was notified by the personnel at the attending hospital of the October 10, 2004, crime, and the Department, in turn, notified Petitioner.
7. Respondent did not report the October 10, 2004 breach of the peace to the Texas Alcoholic Beverage Commission.
8. On July 28, 2002, an aggravated assault occurred on the licensed premises.
9. Respondent did not report the July 28, 2002, breach of the peace to the Texas Alcoholic Beverage Commission.
10. On August 31, 2002, an aggravated assault occurred on the licensed premises.
11. Respondent did not report the August 31, 2002, breach of the peace to the Texas Alcoholic Beverage Commission.

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12. On September 4, 2002, an aggravated assault occurred on the licensed premises.
13. Respondent did not report the September 4, 2002, breach of the peace to the Texas Alcoholic Beverage Commission.
14. On November 6, 2002, an aggravated assault occurred on the licensed premises.
15. Respondent did not report the November 6, 2002, breach of the peace to the Texas Alcoholic Beverage Commission.
16. On April 6, 2003, an aggravated assault occurred on the licensed premises.
17. Respondent did not report the April 6, 2003, breach of the peace to the Texas Alcoholic Beverage Commission.
18. On April 7, 2003, an aggravated assault occurred on the licensed premises.
19. Respondent did not report the April 7, 2003, breach of the peace to the Texas Alcoholic Beverage Commission.
20. On August 9, 2004, an aggravated assault occurred on the licensed premises
21. Respondent did not report the August 9, 2004, breach of the peace to the Texas Alcoholic Beverage Commission.
22. On September 19, 2004, an aggravated assault occurred on the licensed premises.
23. Respondent did not report the September 19, 2004, breach of the peace to the Texas Alcoholic Beverage Commission.
24. Respondent received an administrative warning from the Texas Alcoholic Beverage Commission for the August 8, 2004 and September 19, 2004 unreported breaches of the peace.
25. Respondent received an administrative notice from the Texas Alcoholic Beverage Commission for the failure to report the October 10, 2004, breach of the peace.

VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.

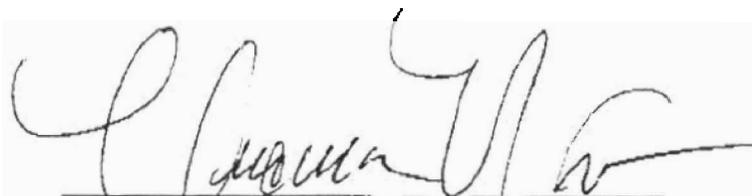
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2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the Findings of Fact, Respondent failed to report a breach of the peace which occurred on October 10, 2004 on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 104.01(3), 11.61(b)(2), (7), (21), 61.71(a)(1), (17)(31) and 16 TEX. ADMIN. CODE § 35.31(c)(11) and (13).
5. Based on the Findings of Fact, Respondent failed to report eight breaches of the peace on 07-28-02, 08-31-02, 09-04-02, 11-06-02, 04-06-03, 04-07-03, 08-09-04 and 09-19-04, all of which occurred on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 104.01(3), 11.61(b)(2), (7), (21), 61.71(a)(1), (17)(31) and 16 TEX. ADMIN. CODE §§ 35.31(c)(11) and (13).
6. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner should cancel Respondent's Wine and Beer Retailer's Permit BG-507773 and the Retail Dealer's On Premise Late Hours License BL-507774.

SIGNED May 19, 2006.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE