

DOCKET NO. 458-98-2315

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
LAS 4 MILPAS D/B/A	§	
LAS 4 MILPAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Las 4 Milpas (Respondent), alleging Respondent's employee sold an alcoholic beverage to a nonmember on the licensed premises constituting operation of an open saloon, in violation of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permits be suspended for a period of 30 days. This proposal finds that Respondent's employee did sell an alcoholic beverage to a nonmember on the licensed premises constituting operation of an open saloon. The Administrative Law Judge (ALJ) recommends suspension of Respondent's permits for a period of 15 days. The ALJ further recommends that Respondent be given an opportunity to pay a civil penalty in lieu of suspension in the amount of \$ 2,250.00.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61(b)(2), 32.17(a), and 32.17(b). 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, under TEX. GOV'T CODE ANN. §2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

On March 25, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Dewey Brackin, TABC Staff Attorney. Respondent appeared by its agent, Louis Lesmes, and by George Solares, its attorney of record. Evidence was received from both parties on that date. The record was closed on April 8, 1999, after the parties were allowed to submit additional written materials consisting of trial briefs and proposed findings of fact and conclusions of law.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under §11.61 of the Code to cancel or suspend for not more than 60 days, a private club registration permit if it is found that the permittee club has sold alcoholic beverages so as to constitute an open saloon pursuant to

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§32.17(a)(1) of the Code. An open saloon is defined in §32.17(b) of the Code as any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink, or sold or offered for sale for on-premises consumption.

In this case, Respondent raised an affirmative defense to the disciplinary action sought by Staff. Respondent asserted that if the proof showed Respondent's employee had sold an alcoholic beverages so as to constitute an open saloon, Respondent should not be held liable for the acts of its employee, because Respondent alleged those acts were unauthorized.

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Private Club Registration Permit N-153948 issued to an incorporated association of persons doing business as Las 4 Milpas (the Club). The Club also holds Private Club Late Hours Permit NL-153949, and Beverage Cartage Permit PE-153950. The Club is located at 110 West Jefferson, Dallas, Dallas County, Texas. Staff alleged that Respondent's agent or employee sold alcoholic beverage to a nonmember of the Club constituting the operation of an open saloon.

On July 25, 1997, TABC Enforcement Agents Daniel Garcia, and Tina Saldivar entered the licensed premises, Las 4 Milpas, at the West Jefferson address. Garcia and Saldivar seated themselves at a table, and Maria Martinez Diaz, a waitress at the Club, appeared and asked for their order. Diaz did not inquire of Garcia or Saldivar if they were members of the Club, nor did Diaz request to inspect Garcia or Saldivar's membership cards. Diaz did not ask if Garcia and Saldivar wished to become members of the Club. Garcia and Saldivar placed an order with Diaz of a Tecate beer for Garcia, a Margarita for Saldivar, and some appetizers. Garcia testified Diaz served him either a bottle or a can purporting to contain Tecate beer, served Saldivar a mixed drink, and the two of them some appetizers. Garcia and Saldivar paid Diaz \$ 2.50 for the beer, and \$ 3.50 for the mixed drink. Garcia drank the liquid in the Tecate container, and identified it by its sight, smell, taste, and container as beer. Garcia testified that the liquid was beer, an alcoholic beverage.¹ After Garcia and Saldivar had consumed the beer and the mixed drink, they left the Club, established contact with an outside agent, and returned to the Club. Diaz was then positively identified as the person who sold the beer to Garcia, and arrested.

¹ "Beer" means a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight, and does not include a beverage designated by label or otherwise by a name other than beer. TEX. ALCO. BEV. CODE ANN. § 1.01(15). "Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted. § 1.01(1). See also § 101.43(a), (b)(3)(4): "No manufacturer or distributor, . . . , may sell or otherwise introduce into commerce a brewery product that is misbranded. A product is misbranded if it misrepresents the standard of quality of products in the branded container; or it is so labeled as to purport to be a product different from that in the container."

Respondent presented the testimony of Louis Lesmes, President of the Club. Lesmes identified Diaz as a waitress at the Club. Lesmes terminated Diaz after the sale to Garcia. Lesmes testified that all servers at the Club were instructed to inquire from customers whether they were members of the Club, without exception. If the patron answered "yes," the servers were to fill the customers order. If the answer was "no," the customers were to be given a membership application to fill out if they wished service. This procedure had been in place since a similar "open saloon" complaint in October 1995 resulted in a four day suspension and \$ 600.00 fine. Lesmes testified that Diaz did not follow the rules in effect on July 25, 1997, and that her act was without authorization. Lesmes further testified that the Club's servers, subsequent to July, 1997, are now required to make a customer produce a membership card, and not just rely on a customers verbal assurance of membership.

ANALYSIS

Operation of Open Saloon

TABC's evidence shows that Agent Garcia was sold an alcoholic beverage, beer, for consumption on the licensed premises on July 27, 1997. This sale of alcoholic beverages was made by Maria Martinez Diaz, an employee of Respondent. At the time this sale was made, Diaz did not inquire of Garcia if he was a member of the Club, nor did Diaz request to inspect Garcia's membership card. Diaz did not ask if Garcia wished to become a member of the Club. Garcia was not a member of the Club, a guest of any club member, or a family member of a club member at the time the alcoholic beverages were provided to him by Diaz.

No provisions of the Code or the Rules governing operation of this licensed premises provide any affirmative defense to exempt or protect a permit holder from the actions of its employee concerning this type of violation. Although Respondent may have instructed its employees to verify the identity of all of its patrons, it is clear from the evidence that Diaz did not follow these instructions. Diaz made no inquiry into whether Garcia was a club member, or other person that she could legally serve alcoholic beverages on the premises. A licensee or permittee is responsible for the acts of its employee, even though the acts were contrary to the licensee's instructions. *Bradley v. Tex. Liquor Control*, 108 S.W.2d 300. 306(Tex. Ct. App.-- Austin 1937). Finally, the instructions which Diaz disobeyed were insufficient to comply with the law, because Diaz was not instructed to demand inspection of membership cards. Instead, Diaz was allowed by the Club's rules to rely upon the purported member's verbal assurance of membership.

Respondent's violation history

The Club was licensed on July 22, 1983, and its permits have been continuously renewed since that time. An "open saloon violation" is noted on Respondent's history in October 1995.

Staff requested a 30-day suspension of Respondent's permits for the violation. Petitioner's rules establish a range of enforcement penalties. See TEX. ALCO. BEV. CODE ANN., § 11.64(a); see e.g. **Standard Penalty Chart**, 16 T.A.C. § 37.60. A first violation of operating an establishment as an illegal open saloon has a recommended sanction of a 5-day permit suspension; a second violation has a minimum suggested penalty of 15 days Permit suspension, ranges up to a maximum penalty of permit cancellation. Since Petitioner has requested a suspension, Respondent may have the option of paying civil penalty in lieu of suspension of \$150 to \$ 25,000 per day of suspension as provided in Code §11.64. If the penalty is not paid before the sixth day after the permittee is notified of the amount, the permittee loses the opportunity to pay it, and the permit's suspension shall be imposed. In arriving at the recommendation below, the ALJ considered the following factors:

Respondent's fifteen year history, as maintained by the TABC, shows one other reported instance of operating as an open saloon. Respondent offered evidence of remedial actions taken on its part to ensure violations of these type do not occur in the future.

RECOMMENDATION

The ALJ recommends that a license suspension of 15 days be imposed on Respondent. The ALJ recommends that Respondent be given an opportunity to pay a civil penalty in the amount of \$ 2,250.00 in lieu of suspension before the sixth day after the TABC notifies Respondent of its order.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be denied.

FINDINGS OF FACT

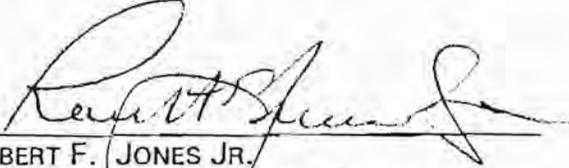
1. Las 4 Milpas (Respondent), an incorporated association, holds Private Club Registration Permit N-153948, Private Club Late Hours Permit NL-153949, and Beverage Cartage Permit PE-153950.
2. On December 28, 1998, Staff of the Texas Alcoholic Beverage Commission (Staff) gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing through its President Louis Lesmes, and its attorney of record.
3. On July 25, 1997, Respondent's employee, Maria Martinez Diaz, was working at Las 4 Milpas located at 110 West Jefferson, Dallas, Dallas County, Texas.
4. On July 25, 1997, Diaz sold and served Daniel Garcia, an agent of the Texas Alcoholic Beverage Commission, an alcoholic beverage, i.e., beer.
5. On July 25, 1997, Garcia was not a member of Las 4 Milpas, a guest of any member of Las 4 Milpas, or a family member of any member of Las 4 Milpas.
6. Diaz did not ask Garcia if he was a member of Las 4 Milpas, a guest of any member of Las 4 Milpas, or a family members of any member of Las 4 Milpas before selling or serving Garcia an alcoholic beverage.
7. Respondent's violation history as maintained by the TABC shows one previous open saloon violation occurring in October 1995.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61(b)(2), 32.17(a), and 32.17(b).
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. Ch. 2003.
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3, 4, 5, and 6, Respondent's agent sold alcoholic beverage to a nonmember on the licensed premises, constituting operation of an open saloon contrary to TEX. ALCO. BEV. CODE ANN §32.17.

5. Based on Findings of Fact Nos. 3, 4, 5, and 6, and Conclusion of Law No. 4, Respondent's Private Club Registration Permit N-153948, Private Club Late Hours Permit NL-153949, and Beverage Cartage Permit PE-153950 should all be suspended for 15 days.
6. Based on Conclusion of Law No. 5 and TEX. ALCO. BEV. CODE ANN. §11.64, Respondent should be permitted to pay a civil penalty of \$ 2,250.00 (Two Thousand Two Hundred Fifty Dollars) in lieu of the suspension of its license.

SIGNED this 23rd day of April, 1999.


ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS