DOCKET NO. 458-98-1993

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
	§	
D & R ENTERPRISES OF LA FERIA, INC. d/b/a CHUCK'S ICEHOUSE/VOLLEYBAR & GRILL, PERMIT NOS. MB-255692 & LB-255693	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission or TABC) sought a determination that an employee of D & R Enterprises d/b/a Chuck's Icehouse/Volleybar & Grill (Respondent) was intoxicated on Respondent's premises in violation of § 11.61(b)(13) of the Texas Alcoholic Beverage Code (Code). After considering Staff's presentation and Respondent's arguments that the employee was off-duty, not in the designated drinking area of the premises, and not intoxicated, the Administrative Law Judge (ALJ) recommends Respondent's permits be suspended for 10 days; in lieu of the suspension Respondent should be allowed to pay a penalty in the amount of $1,500.00.

I.
Jurisdiction, Notice, and Procedural History

On November 19, 1998, Administrative Law Judge (ALJ) Deborah L. Ingraham convened a contested hearing in this matter at the State Office of Administrative Hearings sitting in McAllen, Hidalgo County, Texas. Although Respondent's premises is located in Cameron County, the parties agreed to appear for the hearing in nearby Hidalgo County. *See*, TEX. ALCO. BEV. CODE §11.015 (Vernon 1998). Assistant Attorney General Andrew del Cueto appeared on behalf of the Commission's Staff. Charles Law, owner and operator of the permitted premises, represented Respondent. The parties presented evidence and argument, and the record closed that day. There were no contested issues of jurisdiction or notice. Discussion of those subjects has, therefore, been omitted and they are addressed solely in the findings of fact and conclusions of law below.

II.
Background and Analysis

Chuck's Icehouse/Volleybar & Grill is a sports bar located in Harlingen, Cameron County, Texas. According to the allegation in the notice of hearing, one of Respondent's servants, agents, or employees was found intoxicated on the permitted

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premises on October 23, 1995, constituting grounds for the suspension of Respondent's Mixed Beverage Permit and Mixed Beverage Late Hours Permit (permits) under § 11.61(b)(13) of the Code. Staff had the burden to prove by a preponderance of the evidence that this violation occurred and to persuade the ALJ the violation warranted suspension of the permits. TABC Officer Davis Wilson and Harlingen Police Department Detective Alvaro R. Garcia testified for the Staff. Charles Law testified for Respondent, cross-examined the Staff's witnesses, and offered documentary evidence to support Respondent's position opposing a suspension.

This cause arose from the arrest of Clifford Meyer, manager of Respondent's premises in 1995. On October 23, 1995, Detective Garcia's routine patrol duties led him to drive past Chuck's Icehouse where he saw Mr. Meyer escorting a group of people out of the bar and into the parking lot surrounding the bar. The officer then saw Mr. Meyer engage in a shoving match with the group in the parking lot and he investigated. Mr. Meyer identified himself to Officer Garcia as the manager of Chuck's Icehouse and admitted he had been drinking alcoholic beverages that evening. After observing and talking with Mr. Meyer, Officer Garcia arrested him for public and permittee intoxication. Under the Code, if a permittee is intoxicated on the premises, the commission or administrator may suspend an original or renewal permit for up to 60 days, or may cancel the permit. The Code has defined a permittee to include an agent, servant, or employee of the permit holder.[1] TEX. ALCO. BEV. CODE §§ 11.61(b)(13) and 1.04(11)(Vernon 1995).

In response, Respondent first contended Mr. Meyer was off-duty and could not be considered an intoxicated employee unless he was on-duty. Second, it challenged the proof that its manager was intoxicated. Third, Respondent argued the parking lot where the shoving match occurred was not part of the designated drinking area and the manager was, therefore, not on the permitted premises.

It was undisputed that Mr. Meyer was Respondent's employee. In Staff's view, whether an employee is on-duty or off-duty is immaterial under the Code when determining a violation. The ALJ has located no case law addressing whether an employee imbibing alcoholic beverages at his employer's premises while off-duty violates § 11.61(b)(13). However, she need not reach this question because she finds from the evidence that, even if the manager was not scheduled to work that evening,

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[1]Courts define an agent as someone authorized by another to transact business or manage some affair for the other person, a servant as one employed by a master to perform service in his affairs and whose physical conduct in the performance of this service is controlled or is subject to the right of control of the master, and an employee as a person who works for another in return for compensation and is subject to control of the other person. Skruck v. State, 740 S.W.2d 819, 822 (Tex. App. - Houston [1st] 1987, pet. ref'd), *citing* Ackley v. State, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980). The term "employee" includes "servant" and "agent." Ackley, supra. The word "servant" is in most cases practically synonymous with the word "employee." Northwestern National Life Ins. Co. v. Black, 383 S.W.2d 806 (Tex. Civ. App. - Texarkana 1964, writ ref'd n.r.e.).

he was effectively on-duty and acting in his capacity as manager when he ejected patrons from the premises, identified himself to the officer as the manager of the premises, surrendered his set of keys to a woman in the bar, and instructed her to close the bar for the evening.

Second, the ALJ considered the sufficiency of the evidence of the manager's intoxication. According to Staff, the Texas Penal Code's definition of intoxication in § 49.01(2)(A) controls in determining whether a permittee or its employee was intoxicated in violation of § 11.61(b)(13). In 1995, the year of this arrest, the Penal Code defined intoxicated as "(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (B) having an alcohol concentration of 0.10 or more." When the arresting officer encountered Respondent's manager in the parking lot, he smelled a strong alcoholic beverage odor on his breath, heard his slurred speech, noticed his bloodshot eyes, saw his unsteady balance, and observed him engaged in an a shoving match with several people in the parking lot. (Ex. 2) Mr. Meyer also admitted he had been drinking. Officer Garcia concluded he was "highly intoxicated," a state the officer considered dangerous. He did not perform any field sobriety tests and arrested Mr. Meyer for public intoxication and a Code violation.[2]

Because no field sobriety tests were performed, Respondent questioned the arresting officer's determination that Mr. Meyer was intoxicated. Officers are trained to use field sobriety or divided attention tests to observe a detainee's mental and physical faculties. During the incident in this case, the officer had sufficient opportunity to observe Mr. Meyer's mental and physical faculties to reach the conclusion he was highly intoxicated without performing the battery of field sobriety tests. The evidence was, therefore, sufficient to prove it was more likely than not Respondent's manager was intoxicated.

In its third point, Respondent asserted that the parking lot in which the altercation occurred was not part of the designated drinking area covered by the permits. If its manager was intoxicated, his conduct could not have violated the Code because he was not intoxicated on the permitted premises. Section 11.49 of the Code defines the term "premises" as the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are

[2] Officer Garcia's report cites a violation of § 104.01(5) of the Code. Section 104.01(5) prohibits a retailer and his agents, employees, and servants from being intoxicated on the licensed premises because of its lewd, immoral, and offensive nature. Neither party addressed or discussed this discrepancy. Since Staff pled a violation of § 11.61, the ALJ weighed the evidence and made her recommendation based only on the allegations in Staff's notice of hearing.

directly or indirectly under the control of the same person. The parking lot directly outside of the building housing Chuck's falls within this definition. *See, Richardson v. State*, 823 S.W.2d 773,776 (Tex.App.-- Fort Worth 1992, n.w.h).

Respondent further argued it had designated the parking lot to be excluded from the permitted premises as allowed by § 11.49(b). The Commission must approve such a designation and, presumably, the designation must be ascertainable by the regulating agency. Respondent did not tender sufficient evidence establishing permission from the Commission, nor did he proffer an approved schematic diagram showing the officially excluded portion. While photographs entered into evidence show a portion of the parking lot as a used car lot, Officer Garcia testified that no used cars were parked in the lot on the night he arrested Mr. Meyer. Thus, the ALJ found the Staff's argument on this issue persuasive, and Respondent's evidence on this point incomplete. Finally, evidence of mitigating factors under Code § 11.64(c) was not apparent in the record.

III.
Recommendation

The Staff carried its burden of proof and urged the imposition of a 10 day suspension or a penalty of $1,500.00 in lieu of the suspension. Neither party presented evidence of the economic impact a suspension would have on Respondent. Respondent's representative did, however, state he held permits for another premises. His concern over the inclusion of those permits in this case (they are not included) led the ALJ to believe Respondent has another income-producing business. In the ALJ's opinion, the length of the suspension suggested by Staff and the relatively low penalty Respondent can pay to avoid the suspension are reasonable and are, therefore, the course of action the ALJ recommends to the Commission.

IV.
Findings of Fact

1. D & R Enterprises of La Feria, Inc. (Respondent) holds Mixed Beverage Permit No. MB-255693 and a Mixed Beverage Late Hours Permit No. LB-255693, issued by the Texas Alcoholic Beverage Commission (Commission) in 1995, and renewed each year thereafter, for the premises known as Chuck's Icehouse/Volleybar and Grill located at 1002 Morgan Boulevard in Harlingen, Cameron County, Texas.

2. The Commission's Staff sent Respondent appropriate notice of the hearing on October 21, 1998, and identified in the notice the time, location, and nature of the hearing, including the statutes and rules involved and the allegations made by the Staff.

3. The hearing convened November 19, 1998, at a hearing site in Hidalgo County, Texas, selected by the State Office of Administrative Hearings, and agreed to by both Assistant Attorney General Andrew del Cueto, who represented the Staff, and Charles Law, owner and operator of the premises covered by the permits.

4. On October 23, 1995, Clifford Meyer (the manager) was employed by Respondent to manage Chuck's Icehouse/Volleybar & Grill.

5. On October 23, 1995, the manager was performing managerial duties on the premises at approximately 2:15 a.m.

6. Around 2:15 a.m. on October 23, 1995, the manager ejected several patrons from the bar into the parking lot surrounding the building housing the bar.

7. The parking lot was part of the premises known as Chuck's Icehouse/Volleybar and Grill.

8. Prior to 2:15 a.m., the manager had consumed alcoholic beverages.

9. The manager had a strong alcoholic beverage odor on his breath, slurred his words when he spoke, walked with unsteady balance, had bloodshot eyes, and became involved in an altercation with the patrons in the parking lot.

10. The manager was arrested for public and permittee intoxication.

11. Upon his arrest, the manager tendered the keys for the premises to a woman inside the bar and instructed her to close the premises for the evening.

12. While on the premises on October 23, 1995, Respondent's manager did not have the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body.

V.
Conclusions of Law

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to Subchapter B of Chapter 5 and §§ 6.01 and 61.13 of the Texas Alcoholic Beverage Code (Code).

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a Proposal for Decision with proposed Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5) (Vernon 1998 and Vernon 1999).

3. Based on Findings of Fact Nos. 2 and 3, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 (Vernon 1998).

4. At or about 2:15 a.m. on October 23, 1995, Clifford Meyer was working for D & R Enterprises of La Feria, Inc. d/b/a Chuck's Icehouse/Volleybar and Grill (Respondent) as an employee, agent, or servant.

5. On October 23, 1995, the parking lot was part of the premises covered by the permits and was not designated for exclusion from the permitted premises as allowed by TEX. ALCO. BEV. CODE § 11.49(b)(Vernon 1995).

6. On October 23, 1995, Respondent's employee, Clifford Meyer was intoxicated on the premises covered by Respondent's permits.

7. On October 23, 1995, Respondent violated TEX. ALCO. BEV. CODE § 11.61(b)(13) which prohibits a permittee, or the permittee's employee, agent or servant, from being intoxicated on a premises covered by the permits.

8. Based upon Finding of Fact Nos. 4 through 11, Respondent's Mixed Beverage Permit No. MB-255693 and Mixed Beverage Late Hours Permit No. LB-255693 should be suspended for 10 days, and Respondent should be allowed to pay a penalty of $150.00 for each of the 10 days in lieu of a suspension.

SIGNED this 24th day of March, 1999.

Deborah L. Ingraham
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS