

DOCKET NO. 458-98-2302

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
RUTH PEREZ-BECK, D/B/A FAST TRACK (TABC CASE NO. 577734)	§	ADMINISTRATIVE HEARINGS

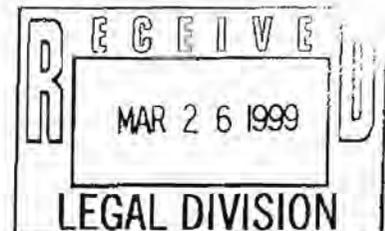
PROPOSAL FOR DECISION

The Petitioner, Texas Alcoholic Beverage Commission, (TABC or Staff) brought this disciplinary action against Ruth Perez-Beck d/b/a Fast Track (Respondent). Staff alleged a breach of the peace has occurred on the Respondent's licensed premises and that the breach of the peace was not beyond the control of the Respondent. Staff requested that Respondent's permits be canceled. This proposal finds that (1) a breach of the peace has occurred on the Respondent's licensed premises, (2) the breach of the peace was not beyond the control of the Respondent, and (3) the breach of the peace resulted from Respondent's improper supervision of persons permitted to be on the licensed premises. The Administrative Law Judge (ALJ) recommends suspension of Respondent's permits.

JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN., §§ 6.01, 71.09, and 69.13. The State Office of Administrative Hearings (SOAH) 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. No contested issues of notice and jurisdiction were raised prior to the hearing.

On February 4, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 2100 North Main Street, Suite 10, Fort Worth, Tarrant County, Texas. Staff was represented at the hearing by its attorney, Timothy Griffith. Respondent appeared and was represented by counsel, Steven Swander. Evidence was received from both parties on that date. The parties were allowed to submit additional written materials consisting of proposed findings of fact and conclusions of law. The record was closed on February 18, 1999.



LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under TEX. ALCO. BEV. CODE ANN., § 69.13, to cancel or suspend a the license of a retail beer dealer if TABC finds that a "breach of the peace"¹ has occurred on the licensed premises and that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises. TEX. ALCO. BEV. CODE ANN., § 71.09 applies § 69.13 to a retail dealer holding an off-premise license, such as Respondent (*see below*).

The standard of proof required to establish a violation is that required in a civil case: the preponderance of the evidence. The trier of fact must ask if, weighing all the evidence, the party with the burden of proof has shown by the greater weight and degree of the credible evidence that the alleged violation occurred. Staff bears the burden of proof to show the alleged violation occurred.

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Wine Only Package Store Permit No. Q-402985, and Beer Retailer's Off Premise License No. BF-402986, for her premises, Fast Track (Fast Track), located at 1525 East Berry, Fort Worth, Tarrant County, Texas. Fast Track is a small convenience store which sells to the general public. Staff alleged that Respondent's employees committed a breach of the peace at Fast Track on January 2, 1998, that since Respondent's employee's stand in the "same shoes" as Respondent (under TEX. ALCO. BEV. CODE ANN., § 1.04(16)), the breach of the peace was "was not beyond the control of the licensee," and that the breach of the peace was as if it had been committed by Respondent.

Respondent argues that the breach of the peace was beyond Respondent's control, that Respondent had no reason to believe such a breach of the peace was going to occur, that the manner in which the breach of the peace occurred was contrary to store policy, and that Respondent did not fail to supervise her employees.

Staff presented testimony from Respondent and Michael Henderson, and offered documentary evidence. Respondent also relied upon the testimony of Respondent and Michael Henderson, and also offered testimony from Idris Mustafa and John L. Burgess. Respondent offered no documentary evidence. The testimony of Respondent and Michael Henderson are uncontradicted with respect to the events surrounding the beach of the peace.

¹"Breach of the peace" is not defined in the Alcoholic Beverage Code. Generally a "breach of the peace" is defined as "a violation or disturbance of the public tranquility and order." *Black's Law Dictionary* (Rev. 4th ed. 1968). TEX. P. CODE § 42.01(a)(9)&(10) defines the crime of disorderly conduct as occurring when "a person intentionally or knowingly: discharges a firearm in a public place . . . , or displays a firearm or other deadly weapon in a public place in a manner calculated to alarm."

Breach of the Peace

1. Fast Track, its Employees and Patrons

Fast Track, located at 1525 East Berry, Fort Worth, Tarrant County, Texas, is a small convenience and take-out food store, located in a high crime, low income area. The store was opened by Respondent in the Spring of 1997. Respondent operates a similar store a short distance away from Fast Track, and divides her time between the two. Mohammad Abdallah, Respondent's brother-in-law, manages Fast Track for Respondent. Amgahd Mohammad and Michael Henderson work for Respondent as store clerks. At the time of the incident, Amgahd Mohammad had been an employee of Respondent for seven months; Michael Henderson had been employed by Respondent for about the same length of time. Since Fast Track is in a high crime area, Respondent's policy with respect to all troubles or disturbances is for the employee to call the police, and have the police handle the problem. For example, if a shoplifter is noticed in the store, he may be detained; however, once a shoplifter is outside the store he is not to be pursued and a complaint is to be made to the police. If a robbery is threatened Respondent's employees are to give the robber the money, and call the police after the threat is over. Amgahd Mohammad and Michael Henderson were aware of these policies.

For a short time, a gun was kept in the store, for protection when cash was taken from the store for deposit in the bank. Respondent testified the gun was removed from the premises in August, 1997. Michael Henderson testified that Mohammad Abdallah, the store manager and Respondent's brother-in-law, had replaced the gun, in October of 1998. Henderson testified the gun, a .38 caliber pistol, was kept on top of the store safe, within reach of anyone behind the counter. Respondent and Henderson testified that Respondent was unaware of the presence of the gun. Henderson testified his co-worker Amgahd Mohammad was aware of the gun's presence and location.

John Murphy and James O. Davis were occasional patrons of Fast Track. John Murphy was a driver for a labor concern, and frequently stopped at Fast Track in the mornings. James O. Davis resided in Fast Track's neighborhood, and was known to Michael Henderson and patrons of the store.

2. Events prior to January 2, 1998

About one week to ten days prior to January 2, 1998, John Murphy and James O. Davis both were present at the Fast Track. Davis requested a lift to work from Murphy. Murphy consented and left the Fast Track with Davis. A short while later, Murphy returned to Fast Track, on foot. Murphy told Henderson, who had witnessed the earlier exchange between Murphy and Davis, that Davis had assaulted and robbed him. The incident was reported to the police. Respondent and Amgahd Mohammad were aware of the alleged robbery.

3. Breach of the peace on January 2, 1998

On January 2, 1998, Respondent, Amgahd Mohammad, and Michael Henderson were present at Fast Track. Respondent left Fast Track at about 7:15 a.m., to visit her other store. After Respondent had left Fast Track, Henderson saw Davis approaching the store and, as Davis entered Fast Track, identified Davis to Mohammad as the person who had robbed John Murphy. Mohammad attempted to delay Davis inside the store, as Mohammad had called the police and also tripped a security alarm. Davis was seeking to purchase a beer from the store, and was tendering payment, when Mohammad produced Abdallah's gun, pointed it at Davis, and told Davis to halt. Davis had not produced a weapon of his own, and had not threatened Mohammad or Henderson. Davis responded by running out of the store, followed closely by Mohammad and Henderson. As Davis exited the store, he was shot by Mohammad. Davis died at the scene. Respondent was notified of the incident at 7:40 a.m.

4. Respondent's Character Evidence

Respondent called Idris Mustafa and John L. Burgess as character witnesses. Mustafa was acquainted with both Amgahd Mohammad and James O. Davis. Mustafa testified that Mohammad was peaceable, seemed to be a good man, and taught Mustafa about the Koran. Mustafa testified less favorably about Davis, although Mustafa did not directly testify concerning a bad reputation attached to Davis. John L. Burgess testified as to his high opinion of Respondent's honesty and integrity.

ANALYSIS

The evidence shows that James O. Davis was shot by Respondent's employee, Amgahd Mohammad, on Respondent's premises, using a gun kept on the premises and supplied by Respondent's manager, Mohammad Abdallah. This was a breach of the peace. The evidence shows that the use of force was not within the policy that Respondent had established. The evidence shows that the breach of the peace was only peripherally connected with or to the sale of beer and wine.

The testimony of Respondent and Henderson was offered to prove that Respondent was unaware of the presence of the gun in the Fast Track. Respondent's interest in establishing that proposition is evident, and is the foundation of the Respondent's contention that she did not fail to adequately supervise her employees. However, (1) the gun was placed in the store by Abdallah, Respondent's manager, whose actions are referable to Respondent, and (2) the gun was not hidden by Abdallah, but was on top of the safe in which the store's cash receipts were kept, an area into which Respondent would be likely to delve in the normal course of business. The ALJ has some doubt that Respondent did not in fact know of the gun's presence. If Respondent did not truly know of the gun, Respondent in the exercise of her oversight and supervision of her own store should have known of the gun's presence. The presence and use of a fire arm was contrary to Respondent's own policy, which prohibited the use of force, especially when the supposed criminal was outside the store premises. If the gun had not been present and unsecured, Mohammad would not have been able to point it at Davis, and could not have shot him.

TABC argues that since Respondent's employee's stand in the "same shoes" as Respondent (under TEX. ALCO. BEV. CODE ANN., § 1.04(16)), the breach of the peace was "was not beyond the control of the licensee," and that the breach of the peace was as if it had been committed by Respondent. The applicable definition, found in TEX. ALCO. BEV. CODE ANN., § 1.04(16), states:

"Licensee" means a person who is the holder of a license provided in this code, or any agent, servant, or employee of that person.

In a form of circular logic, the TABC inserts the definition of "licensee" into TEX. ALCO. BEV. CODE ANN., § 69.13, "Breach of Peace: Retail Establishment," as follows:

The commission or administrator may suspend or cancel the license of a retail beer dealer after giving the licensee notice . . . if it finds that a breach of the peace has occurred on the licensed premises or on premises under the licensee's control and that the breach of the peace was not beyond the control of the *[agent, servant, or employee of the] licensee* and resulted from *his [the agent's, servant's, or employee's]* improper supervision of persons permitted to be on the licensed premises or on premises under his control.

Respondent protests TABC's reasoning, with cause. "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE ANN., § 311.011(a). "In enacting a statute, it is presumed the entire statute is intended to be effective; [and] a just and reasonable result is intended." TEX. GOV'T CODE ANN., § 311.021(2) & (3). TABC's reading of § 69.13, renders the phrases "licensee's control," "the control of the licensee," and "resulted from his improper supervision of persons" without meaning. Respondent's liability under § 69.13 rests upon her position as a supervisor of the licensed premises.

The Respondent failed to supervise her employees, in particular her manager, Abdallah. The shooting death of Davis was not beyond Respondent's control, because Respondent could have required that no guns be kept at the store and enforced that policy. Assuming that Respondent knew of the presence of the gun, Respondent could have required that the gun be kept locked away in the safe, available only to the manager, rather than available to anyone behind the counter. Assuming that Respondent was unaware of the gun's presence, proper supervision of Respondent's store and employees would have led to Respondent discovering the gun. On the other hand, Respondent had no direct control over the intentional or accidental *use* of the firearm by Mohammad. Mohammad's shooting of Davis was Mohammad's act, not Respondent's. Further, the shooting of Davis was not connected to Respondent's alcohol permits, because it did not result from a lapse by Respondent or her employees in selling alcohol. Respondent's violation history, contained in Petitioner's Exhibit #2, does not reveal any other violations involving acts of violence. For these reasons, the ALJ concludes that cancellation of Respondent's permits is too harsh a punishment, and recommends that Respondent's permits be suspended for a period not to exceed

30 days, or Respondent be assessed a civil penalty of \$ 4,500.00² in lieu of a suspension. See TEX. ALCO. BEV. CODE ANN., § 11.64(a); see e.g. Standard Penalty Chart, 16 T.A.C. § 37.60.

RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for a period not to exceed 30 days, or Respondent pay a civil penalty in lieu of a suspension.

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, are denied.

FINDINGS OF FACT

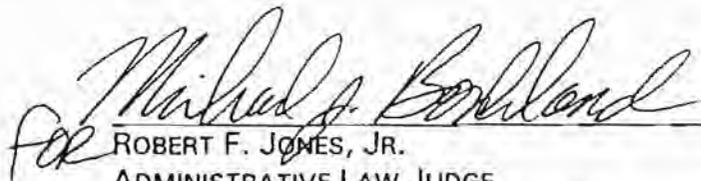
1. Ruth Perez-Beck (Respondent) holds Wine Only Package Store Permit No. Q-402985, and Beer Retailer's Off Premise License No. BF-402986, for her premises, Fast Track (Fast Track), located at 1525 East Berry, Fort Worth, Tarrant County, Texas.
2. On December 15, 1998, Staff of the Texas Alcoholic Beverage Commission (TABC) gave Respondent notice of the hearing by certified mail, return receipt requested. A hearing was scheduled by the State Office of Administrative Hearings (SOAH) and convened on February 4, 1999. Both parties appeared at the hearing. Both parties consented to SOAH taking jurisdiction over the trial of the case. Evidence was received and the record was closed on February 18, 1999.
3. On January 2, 1998, a breach of the peace occurred on the licensed premises, committed by an employee of Respondent.
4. The breach of the peace described in Finding Number 3, took place when Respondent's employee, Amgahd Mohammad, shot a store patron, James O. Davis, with a gun kept on the licensed premises by Respondent's store manager, Mohammad Abdallah.
5. Respondent knew, or should have known, of the presence of the gun on the licensed premises.
6. Respondent took no steps to have the gun removed or kept in a secure place, or no steps to assure that a gun was not on the premises.
7. The breach of the peace was not beyond Respondent's control.

²TEX. ALCO. BEV. CODE ANN., § 11.64(a) proscribes a minimum penalty of \$ 150.00 per day for each day of the proposed suspension.

CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN., §§ 6.01, 71.09, and 69.13.
2. The State Office of Administrative Hearings (SOAH) 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.
3. Respondent received adequate notice of the proceedings and hearing.
4. Based upon Findings of Fact Nos. 3 -7, Respondent violated TEX. ALCO. BEV. CODE ANN., § 69.13.
5. Based upon Findings of Fact Nos. 3 -7, and Conclusion of Law No. 4, Respondent's Wine Only Package Store Permit No. Q-402985, and Beer Retailer's Off Premise License No. BF-402986, should be suspended for a period not to exceed 30 (Thirty) days, or Respondent pay a civil penalty of \$ 4,500.00 (Four Thousand Five Hundred Dollars) in lieu of a suspension.

SIGNED on the 26th day of March, 1999.


FOR ROBERT F. JONES, JR.

ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS