

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
VINA JUSHBHAI PATEL D/B/A RAVIRAJ; BF-273433 TARRANT COUNTY, TEXAS (TABC CASE NO. 578896)	§ § § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Vina Jushbhai Patel d/b/a Raviraj (Respondent), alleging that Respondent's agent or employee was intoxicated on the licensed premises on three occasions in violation of the Texas Alcoholic Beverage Code (Code). Staff further alleged that Respondent, or her agent or employee, possessed or displayed graphic materials on the licensed premises that were immoral, indecent, lewd, or profane in violation of the Code. Staff requested that Respondent's permit be suspended or canceled. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permit.

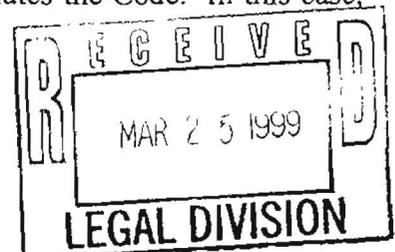
JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch 5 and §§6.01 and 106.13. 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 proceedings.

On February 19, 1999, a hearing convened before Tanya Cooper, ALJ, of the State Office of Administrative Hearings, at 2100 N. Main Street, Suite 10, Fort Worth, Tarrant County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent was represented by John Gamboa, Attorney. Staff presented evidence on that date by testimony provided from witnesses and documentary evidence. The record was closed on March 5, 1999, after the parties were allowed to submit proposed findings of fact and conclusions of law.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized to suspend for not more than 60 days or cancel a permit or license, pursuant to §61.71(a)(1) of the Code, if a licensee or permittee violates the Code. In this case, violations of Code provisions §§104.01(5) and 101.64 are alleged.



Section 104.01(5) of the Code provides that no licensee, nor his agent or employee, may engage in conduct on the premises which is lewd, immoral, or offensive to public decency, including being intoxicated on the licensed premises.

The Texas Alcoholic Beverage Code §101.64 states:

No holder of a license or permit may possess or display on the licensed premises a card, calendar, placard, picture, or handbill that is immoral, indecent, lewd, or profane.

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 51% of the evidence that the alleged violation occurred. Staff bears the burden of proof to show any alleged violations occurred.

When suspension of a permit or a license is authorized, the permittee must be given an opportunity to pay a civil penalty in lieu of suspending the permit. The amount may not be less than \$150 nor more than \$25,000 for each day the permit was to have been suspended. 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 determining the amount of the penalty, Texas Alcoholic Beverage Commission is directed to consider the economic impact a suspension would have on the permittee. [See Code §11.64.]

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds a Beer Retailer's Off Premises License, BF-273433, issued to Respondent doing business as Raviraj, located at 301 W. Division Street, Arlington, Tarrant County, Texas. Staff alleged that Respondent's agent or employee was intoxicated on the licensed premises on the following dates: April 2, 1998, June 10, 1998, and July 7, 1998. Staff also alleged that on June 10, 1998, Respondent, or her agent or employee, possessed graphic materials, video tapes, having covers or packaging on the cassette tapes containing pictures of immoral, indecent, or lewd activities depicted upon them.

On April 2, 1998, Agent M. Montero, Texas Alcoholic Beverage Commission, was on the licensed premises, Raviraj, to conduct a routine inspection of its operations. Rajesh Patel was working as a clerk behind the store's counter. He was assisting customers and taking money for purchases. Mr. Patel was the only employee present and in sole control of the premises at this time. Agent Montero approached Mr. Patel and spoke with him. Agent Montero observed that Mr. Patel's eyes were bloodshot. As Mr. Patel spoke, his speech was slurred and thick-tongued. When Mr. Patel walked, he used the counter to support himself. Agent Montero noticed an odor of alcoholic beverage about Mr. Patel's person. When asked about this odor, Mr. Patel said that he had consumed some alcoholic beverage, beer.

Agent Montero testified that due to Mr. Patel exhibiting characteristics common to intoxication while in a public place, the licensed premises, his condition led Agent Montero to believe that he was a danger, either to himself or others. Agent Montero arrested Mr. Patel for the offense of public intoxication.

On June 10, 1998, Sgt. R. Cloud, Texas Alcoholic Beverage Commission, was driving along W. Division Street in front of the licensed premises, Raviraj. As he drove by the store, he observed Rajesh Patel outside the store going into the store's restroom. Sgt. Cloud saw that Mr. Patel had a beer can in his hand. Sgt. Cloud went back to the premises to speak with Mr. Patel. Sgt. Cloud, a law enforcement agent of eleven years experience, testified that he has had numerous opportunities over the years to be in contact with Mr. Patel. Sgt. Cloud stated that he has observed Mr. Patel at times when he was intoxicated, as well as, times when he was sober.

Sgt. Cloud approached Mr. Patel inside the licensed premises and inquired about seeing him outside the store with a beer can. Mr. Patel denied having a beer. Sgt. Cloud then entered the restroom area where he had observed Mr. Patel earlier. Inside the restroom, Sgt. Cloud found a Miller Lite beer can containing about one-third of its total contents.

Sgt. Cloud described Mr. Patel's condition during this contact. Mr. Patel's balance was unsteady. His manner of walking was described by Sgt. Cloud as a "drunk high-step." Mr. Patel's eyes were glassy and an odor of alcoholic beverage was on his breath. Sgt. Cloud concluded from his observations of Mr. Patel at the premises on June 10, 1998, and from his past opportunities to observe Mr. Patel when he was unimpaired, that Mr. Patel was intoxicated at that time.

While inside the licensed premises on June 10, 1998, Sgt. Cloud observed graphic materials of a immoral, indecent, or lewd nature. Video cassettes were observed openly displayed in a box behind the store's counter. Seventeen video cassettes were inside the box. The outer covers of the individual cassettes contained photographs. These pictures depicted explicit sexual activities, including pictures of oral and vaginal penetration and other sex acts. Sgt. Cloud stated these materials were of the type expected to be found in XXX-rated, adult video houses.

On July 7, 1998, the Arlington Police Department received a complaint from an employee of Dominos Pizza reporting that a disturbance had occurred on the licensed premises, Raviraj. Officer K. Shaw and Sgt. J. Matthews were dispatched to investigate this complaint. The complainant, a pizza delivery person, reported that an argument had occurred between him and the store's operator and that he was chased from the convenience store by the store's operator. The complainant reported that this person was possibly intoxicated due to observing characteristics such as bloodshot eyes, slurred speech, and unsteady balance.

Officer Shaw entered the store and contacted Rajesh Patel. Sgt. Matthew arrived shortly behind Officer Shaw. Mr. Patel was alone at the premises and operating the store. Mr. Patel was visibly intoxicated. His eyes were glassy and red; his speech was slurred; and his movements were lethargic. Shaw took Mr. Patel into custody transporting him to the Arlington City Jail.

Respondent's licensing history, as maintained by the Texas Alcoholic Beverage Commission, reveals that Respondent's permit has previously been suspended. Beginning in 1992, shortly after receiving an initial license, Respondent's license was suspended for five days, or Respondent paid a civil penalty in lieu of suspension, for violations associated with an intoxicated permittee, licensee, or employee on the licensed premises and permitting an open container on the premises. In 1996, Respondent's license was suspended for seven days or Respondent remitted payment of a civil penalty in lieu of suspension for an intoxicated employee being on the premises.

Respondent's license was suspended a third time in 1997. This suspension was for a period of 15 days or Respondent paid a civil penalty in lieu of suspension for a permittee intoxicated on the licensed premises violation.

Respondent elected not to present any evidence during the hearing. Argument was presented on Respondent's behalf. Respondent's counsel questioned the sufficiency of Staff's evidence regarding whether Mr. Patel was intoxicated and how intoxication should be defined. Respondent asserted since no evidence was presented by Staff regarding sobriety evaluations being administered to Mr. Patel or results from any other type of scientific testing, such as an intoxilyzer analysis of Mr. Patel's alcohol concentration offered, that Staff's evidence was insufficient to show Mr. Patel was intoxicated at the times alleged by Staff in its Notice of Hearing.

Respondent concedes that pornographic materials were located on the licensed premises. However, Respondent argues that Staff has failed to establish the ownership of these materials. Respondent further argues that cancellation of this permit, as requested by Staff, is too severe a penalty considering Respondent's circumstances. Operation of the licensed premises is Respondent's only business. Counsel contends that retention of this license is needed in order for Respondent to make a living.

ANALYSIS

1. Intoxicated agent or employee on premises violation.

On three separate occasions, April 2, 1998, June 10, 1998, and July 7, 1998, law enforcement officials were on the licensed premises. Each time these officers encountered Rajesh Patel, and he appeared to be in an intoxicated state. Mr. Patel is Respondent's employee.

Although the term "intoxicated" or "intoxication" may not be defined within the Texas Alcoholic Beverage Code, other legal definitions exist providing guidance for determining the meaning or application of these terms to the facts of this case. The Texas Government Code provides that words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. TEX. GOV'T CODE ANN. §311.011(b) (Vernon 1999). Further, intoxication is a condition that is subject to proof by lay testimony, as well as expert testimony, in legal proceedings.

Criminal offenses, such as public intoxication or driving while intoxicated, are defined by the Texas Penal Code. A person commits the offense of public intoxication by appearing in a public place while intoxicated to the degree that the person is a danger to himself or another. TEX. PENAL CODE §49.02 (Vernon 1999). Public intoxication is often established by evidence that is based upon subjective observations of lay witnesses or law enforcement officials.

The offense of driving while intoxicated relies on a two prong definition of intoxication. One prong of the definition employs scientific testing measures involving assessment of a person's alcohol concentration by means of the number of grams of alcohol contained within a person's body in relationship to a specific number of liters of breath, milliliters of blood, or milliliters of urine. In the alternative, the other prong of the definition uses a subjective analysis of facts surrounding a person's physical and mental condition. TEX. PENAL CODE §49.01(2)(Vernon 1999) defines intoxication as:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body; or

(B) having an alcohol concentration of 0.10 or more.

These definitions, applicable in criminal proceedings, do not require proof by any form of scientific testing to sustain a conviction. Convictions for criminal offenses, such as public intoxication or driving while intoxicated, require proof by a greater standard of evidence: by beyond a reasonable doubt. Since convictions may be based upon subjective evidence such as observations of a person's conduct, the lack of any scientific evidence in this administrative, civil proceeding would not preclude Staff from meeting its burden of proof that Respondent's employee was intoxicated on the licensed premises by a preponderance of the evidence standard that is applicable.

On April 2, 1998, Mr. Patel was working alone on the licensed premises. He exhibited characteristics commonly associated with intoxication: bloodshot eyes; thick-tongued, slurred speech; and unsteady balance. There was an odor of alcoholic beverage on his breath and he admitted to drinking a couple of beers. Agent Montero, TABC, had come to the premises on a routine inspection. He observed Mr. Patel's condition and that he was alone in the store attempting to conduct business with customers and dealing with monetary transactions. These factors reasonably led Agent Montero to believe that Mr. Patel was a danger to himself or others. Agent Montero placed Mr. Patel under arrest for the offense of public intoxication.

On June 10, 1998, Sgt. Cloud, TABC, was passing the licensed premises and observed Mr. Patel drinking a beer outside the premises. Sgt. Cloud, having had occasions to observe Mr. Patel both in an intoxicated and a normal, unimpaired state, believed that he was intoxicated because Mr. Patel was displaying symptoms commonly associated with intoxication: glassy eyes and unsteady balance, and was on the licensed premises in this condition.

On July 7, 1998, Arlington police officers received a citizen's complaint from a pizza delivery person. This complainant reported that just prior to his contact with the officers, Mr. Patel had engaged in an argument with him ending aggressively with Mr. Patel chasing him from the premises. This person reported that Mr. Patel was possibly intoxicated during this incident. Officer Shaw and Sgt. Matthews, Arlington Police Department, went to the premises and spoke to Mr. Patel regarding the complaint. Again, Mr. Patel was alone operating the store and exhibited characteristics commonly associated with intoxicated individuals. His eyes were red and glassed over, his speech was slurred, and he moved in a lethargic, unsteady manner. Mr. Patel was arrested due to his level of intoxication on the premise. He was a danger to himself or others by his aggressive demeanor as reported by the pizza company employee and being alone on the premises in a condition that he could not properly respond to situations in a normal, rational manner.

Each of the events described at the hearing were observed by trained law enforcement officers having experience in situations associated with consumption of alcoholic beverage and its effects. The officers' contacts with Mr. Patel were as a result of random occurrences: a routine premises inspection, an agent coincidentally driving down the roadway and observing Mr. Patel drinking an alcoholic beverage on the premises, and a citizen's complaint. Each time he was

contacted by law enforcement officers, Mr. Patel was visibly exhibiting common characteristics of intoxication, was a danger to himself or others by his condition, and had lost the normal use of his mental or physical faculties. Based upon these reasons, Staff met its burden of proof establishing that Respondent's employee, Mr. Patel, was on the licensed premises while intoxicated.

2. Display or possession of graphic materials on premises violation.

It is clear from the evidence that Respondent or Respondent's agent or employee possessed and displayed graphically immoral, indecent, or lewd materials on the premises. Actual legal ownership of these materials is not required to be established by Staff. Seventeen video cassettes were plainly visible on display in an open box behind the store's counter within the licensed premises. Typically items that are kept behind store counters, such as cigarettes, magazines, or particularly small items, are items that store personnel seek to maintain the greatest degree of control over in order to restrict access and avoid potential theft of the merchandise.

Rajesh Patel, Respondent's employee, was the only person present on the licensed premises at the time the video cassettes were observed. He was in control of the premises' operation on that day. As Mr. Patel was alone in the store, he certainly would have had occasion to be behind the store's counter and observe these materials setting in a manner so easily visible. No steps had been taken to remove the tapes and their containers from sight. Possession and display of the video cassettes by Respondent's employee on the licensed premises was obviously sufficiently established by Staff.

The covers of these videos contained pictures that were graphically lewd or immoral. These photographs depicted ultimate sex acts involving oral and vaginal penetration and could properly be characterized as pornographic in nature. The materials were not of the type of photographic display that would normally be seen in a library or museum, but were of the nature of photographic materials likely to be found within XXX-rated, adult video houses. The evidence in this case supports the conclusion that Respondent's employee, Mr. Patel, possessed and displayed graphic materials of an indecent, lewd or immoral nature on the licensed premises.

RECOMMENDATION

The ALJ recommends that Respondent's license be canceled.

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 and are denied.

FINDINGS OF FACT

1. Vina Jushbhai Patel, d/b/a Raviraj (Respondent) holds a Beer Retailer's Off Premises License BF-273433, for the premises located at 301 W. Division Street, Arlington, Tarrant County, Texas.

2. On January 28, 1999, Respondent was provided with notice of hearing. A hearing was convened before the State Office of Administrative Hearings on February 19, 1999. Both parties appeared and evidence was received. No challenges to the sufficiency of notice or jurisdiction were made by either party.
3. On April 2, 1998, June 10, 1998, and July 7, 1998, Respondent's employee, Rajesh Patel was working alone at the licensed premises.
4. On these days, Mr. Patel was observed by various law enforcement officers intoxicated while on the premises.
5. Mr. Patel exhibited common characteristics of intoxication: red, glassy, bloodshot eyes, slurred speech, poor balance, and the odor of alcoholic beverage on his person was observed by the officers during these occasions.
6. On April 2, 1998, Mr. Patel admitted having consumed alcoholic beverage, beer, on the premises.
7. On June 10, 1998, Mr. Patel was observed drinking alcoholic beverage, a beer, on the premises.
8. On July 8, 1998, Mr. Patel was reported by a citizen to law enforcement officers as being involved in a disturbance and possibly intoxicated on the premises which was investigated and confirmed by law enforcement officers.
9. On each of these dates, Mr. Patel had lost the normal use of his physical or mental faculties and was a danger to himself or others due to the consumption of alcoholic beverages.
10. On these occasions, Mr. Patel was arrested for public intoxication or being intoxicated on the licensed premises.
11. On June 10, 1998, while Mr. Patel was in sole control of the premises' operations, seventeen video cassettes were observed displayed and plainly visible behind the store's counter.
12. The outer packaging of these video cassettes contained photographs depicting explicit sexual activities and were pornographic in nature.
13. Respondent's licensing history as maintained by the Texas Alcoholic Beverage Commission shows repeated violations of this same nature by Respondent or Respondent's agent or employee.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch 5 and §§6.01, 6I.71, 10I.64 and 104.01(5) (Vernon 1999).

2. The State Office of Administrative Hearings had 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 (Vernon 1999).
3. Respondent received adequate notice of the hearing.
4. Based on Findings of Fact Nos. 3 - 10, Respondent's employee was intoxicated on the licensed premises. TEX. ALCO. BEV. CODE ANN. §§104.01(5) and 61.71(a)(17)(Vernon 1999).
5. Based on Findings of Fact Nos. 3, 11, and 12, Respondent or Respondent's employee possessed and displayed materials, video cassettes with graphic photographs on the covers that were immoral, indecent, or lewd. TEX. ALCO. BEV CODE ANN. §§101.64 and 61.71(a)(17)(Vernon 1999).
6. Based on Findings of Fact 3 - 13, Conclusion of Law 4, and Conclusion of Law 5, Respondent Beer Retailer's Off-Premises License, BF-273433, should be canceled.

SIGNED this 24th day of March, 1999.

for 
TANYA COOPER
Administrative Law Judge
STATE OFFICE OF ADMINISTRATIVE HEARINGS