DOCKET NO. 580237

IN RE SHEER DLITE PERMIT NOS. N-162956, NL162957, PE162958	§ § § § §	BEFORE THE TEXAS ALCOHOLIC
DALLAS COUNTY, TEXAS (SOAH DOCKET NO. 458-99-1335)	§ §	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of March 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on November 18, 1999 and adjourned December 10, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 2, 2000. 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, Transcripts, and Exhibits, 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.

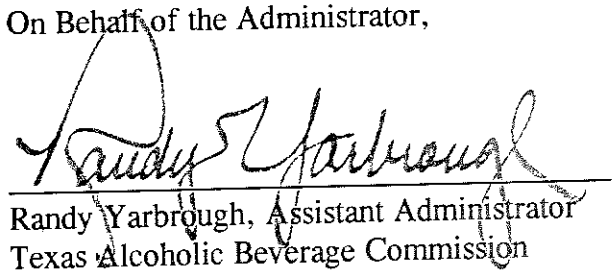
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-162956, NL162957, and PE162958, are herein **SUSPENDED for 60 days unless a civil penalty in the amount of $108,492.60 is paid in lieu of the suspension.**

This Order will become final and enforceable on April 10, 2000. 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 22nd day of March, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Roger Albright
James Johnston
ATTORNEY FOR RESPONDENT
3301 Elm St.
Dallas, Texas 75226-1637
CERTIFIED MAIL/RRR NO. Z 473 040 668

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Dallas District Office

INTER-OFFICE COMMUNICATION
TEXAS ALCOHOLIC BEVERAGE COMMISSION

March 20, 2000

TO: Gayle Gordon, Director of Legal

FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-1335
TABC Case No. 580237
Sheer DLite
Private Club Registration Permit (N-162956), Private Club Late Hours Permit (NLP-162957) and Beverage Cartage Permit (PE-162958)
Dallas County, Texas

I have read the attached record of the above referenced case and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the license at the above referenced location should be **SUSPENDED**. Please prepare an **ORDER** adopting the Proposal for Decision, suspending the License for a period of **SIXTY (60) days** unless a civil penalty in the amount of $108,942.60 is paid in lieu of the suspension.

Please make a copy of this decision and submit it along with the order to the respective parties.

Randy Yarbrough

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DOCKET NO. 458-99-1335

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
SHEER DLITE	§	
PERMIT NOS. N-162956, NL-162957,	§	
& PE-162958	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 580237)	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against Sheer Dlite (Respondent), alleging that on or about May 12, 1998, Respondent, its agent, servant, or employee engaged in or permitted conduct on the premises which was lewd, immoral, or offensive to public decency, in that Respondent, its agent, servant, or employee engaged in lewd or vulgar acts, solicited a customer to buy drinks for consumption by Respondent's employee, and permitted solicitation of persons for immoral or sexual purposes, all in violation of the Texas Alcoholic Beverage Code (Code) and the Texas Alcoholic Beverage Commission Rules (Rules). Staff contends that Respondent has a history of violations over the last ten years, and therefore requested that Respondent's permits be canceled, or that Respondent pay a civil penalty of $108,492.60, or that Respondent's permits be suspended for 60 days. This proposal finds that Respondent, its agent, servant, or employee engaged in or permitted conduct on the premises which was lewd, immoral, or offensive to public decency. It is hereby recommended that Respondent's permits be suspended for 60 days, or that Respondent pay a civil penalty of $108,492.60.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On November 18, 1999, a hearing was convened before Jerry Van Hamme, Administrative Law Judge (ALJ), State Office of Administrative Hearings, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Respondent was represented by counsel, James Johnston and Roger Albright. Evidence was received from both parties on that date. The record was closed on December 10, 1999, after the parties were allowed to submit additional written materials consisting of proposed findings of fact and conclusions of law.

II. LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized to cancel or suspend a permit for not more than 60 days for violating any provision of the Code or Rules.[1] Engaging in or permitting conduct on the premises that is lewd, immoral, or offensive to public decency constitutes a violation of the Code. Conduct of this nature includes soliciting any person to buy drinks for consumption by the retailer or its employees, permitting solicitations of persons for immoral or sexual purposes, and permitting lewd or vulgar entertainment or acts on the premises.[2] Lewd and vulgar entertainment includes any sexual offenses contained in the Texas Penal Code, Chapter 21.[3] Sexual offenses contained in the Texas Penal Code include public lewdness and sexual contact.[4]

Staff bears the burden of proof, by a preponderance of the evidence, to show the alleged violations occurred.

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[1]**TEX. ALCO. BEV. CODE ANN., Sec. 11.61 CANCELLATION OR SUSPENSION OF PERMIT.**
(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

***

(2) the permittee violated a provision of this code or a rule of the commission;

[2]**TEX. ALCO. BEV. CODE ANN., Sec. 104.01. LEWD, IMMORAL, INDECENT CONDUCT.** 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, but not limited to, any of the following acts:

***

(4) solicitation of any person to buy drinks for consumption by the retailer or any of his employees;

***

(6) permitting lewd or vulgar entertainment or acts;
(7) permitting solicitations of persons for immoral or sexual purposes;

[3]**16 TEX. ADMIN. CODE, Sec. 35.41** The following words and terms, when used in this chapter, shall have the following meanings, except when the context clearly indicates otherwise.
(1) Lewd and vulgar entertainment or acts--Any sexual offenses contained in the Texas Penal Code, Chapter 21, or any public indecency offenses contained in the Texas Penal Code, Chapter 43. See Texas Alcoholic Beverage Code, §104.01(6)

[4]**TEX. PENAL CODE §21.07 (Vernon 1998)**
A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:

***

3. act of sexual contact.

TEX. PENAL CODE §21.01(2) (Vernon 1998)
Sexual contact means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

III. EVIDENCE AND PARTIES' CONTENTIONS

A. Staff's Evidence

1. Respondent's Prior Violations

Since 1990, Respondent has been subject to a total of 41 suspension days or $6,150.00 in civil penalties. In particular, Respondent was given a five day suspension or $750.00 civil penalty on August 3, 1990, for three drink solicitation offenses and a sexual contact offense; a 15 day suspension or $2,250.00 civil penalty on August 26, 1991, for a breach of the peace offense; a seven day suspension or $1,050.00 civil penalty on May 8, 1996, for serving an intoxicated person; and a 14 day suspension or $2,100.00 civil penalty on September 26, 1996, for drink solicitation, sexual contact, and operating an open saloon.

2. Respondent's Annual Sales of Alcoholic Beverages

Mr. Cavazos, a TABC enforcement agent, testified that Respondent's annual renewal permit application showed Respondent had alcoholic beverage sales of $660,000.00 in the year preceding the date of this offense. Respondent therefore averaged approximately $1,808.21 in alcoholic beverage sales per day during the prior year ($660,000 divided by 365 days per year = $1,808.12 per day).

3. Events of May 12, 1998

On May 12, 1998, two Dallas vice squad officers, Joe F. Thompson and Terry Vice, entered Respondent's premises and seated themselves at a table within view of the stage and bar. Nancy Tucker, an employee and topless dancer at Respondent premises, joined them at their table. In the course of the conversation both officers talked with Ms. Tucker about, among other things, the size of officer Vice's penis, making reference to it's comparing favorably to the size of officer Thompson's. Officer Vice initiated the sexual content of the conversation.

The parties are in agreement concerning these events. The parties are not in agreement concerning what happened next.

Both officers testified that during this conversation Nancy Tucker reached with her right hand toward officer Thompson and with her left hand toward officer Vice, grabbed both men in the crotch, and, while rubbing their genital areas, said to officer Thompson, it's "not so small." Officer Vice testified that Ms. Tucker rubbed his genitals twice with her hand and once with her foot.

Both officers further testified that during the conversation Ms. Tucker also specifically requested that the officers buy her a drink. Officer Thompson ordered her two -- a bourbon and coke and a shot of tequila. The officers paid for the drinks. All of this happened in the public area of the premises, observable to those responsible for managing the premises.

As the officer's were leaving, and after Ms. Tucker had returned to the stage to continue

dancing, officer Vice testified he approached the stage and was solicited by Ms. Tucker for sexual purposes. He reached an agreement with Ms. Tucker, on behalf of officer Thompson who was not part of the conversation, that $400 would cover the cost for Ms. Tucker to, as officer Vice put it, "screw both of us at the same time."

A criminal complaint was subsequently filed against Ms. Tucker based on the above-cited allegations.

C. Respondent's Evidence

Nancy Tucker appeared at the hearing, testified under oath, and categorically denied the officers' testimony. She testified she saw the two officers seated at the table and joined them, but had already concluded they were police officers. She made this decision based on 22 years experience as a topless dancer. She went to their table for the purpose of finding out if they were, in fact, officers. Although she admitted telling them she was thirsty and that she drank bourbon and coke, she denied ever asking them to buy her a drink. She further denied that she ever touched the officers as alleged, and denied that she solicited the officers for sexual purposes.

Ann Marie Lindsey, Respondent's day manager, testified that she saw the officers at their table and that Ms. Tucker told her the two officers looked like police officers. Ms. Lindsey agreed, and intentionally sat at the bar approximately ten feet from the officer's table to watch as Ms. Tucker joined them at their table. She at no time observed Ms. Tucker touch the officers as alleged. She also testified it was illegal for a dancer to solicit drinks from customers, and that she had not had any problems with Ms. Tucker either soliciting drinks or soliciting for sexual purposes while employed by Respondent.

Frank Smith, the owner of Respondent premises since 1983, testified that there was no history of Nancy Tucker soliciting drinks or soliciting for sexual purposes while employed there.

IV. ANALYSIS

There are two issues to be decided: whether the events as alleged by Staff actually occurred, and, if so, whether Respondent permitted the conduct to occur.

A. Credibility of the Witnesses

The testimony presented by the parties is contradictory and mutually exclusive. The decision must therefore turn on the credibility of the witnesses. The ALJ finds Petitioner's evidence is more credible. Petitioner's witnesses are not interested parties and have no personal or financial stake in the outcome of the case.

B. Term "Permitted" Defined

The controlling case on the meaning of "permitting" certain conduct in a civil proceeding involving a permittee is Wishnow v. Texas Alcoholic Beverage Commission, 757 S.W.2d 404, 409-

410 (Tex.App.--Houston, 14th Dist., 1988, writ den.). The court stated that one permits certain conduct if one "knew or should have known" that the conduct was occurring. The court cited the permittee's responsibility for supervising a premises and its being "charged with notice of the potential for the type of ... activity which was found by the TABC to have occurred."

Respondent in the instant matter had the responsibility of supervising its premises and was charged with being aware of conduct occurring in the public area of the premises. In addition, Respondent's 14 day permit suspension in 1996 for drink solicitation and sexual contact offenses, as well as the history of administrative action taken against Respondent's permits since 1990, shows Respondent was aware this problem existed. Although a permittee cannot insure that such conduct will never occur on the licensed premises, it is nevertheless the permittee's responsibility to take effective measures to prevent its occurrence. Respondent in the instant matter failed to fulfill that responsibility.

V. RECOMMENDATION

Accordingly, the ALJ agrees with Staff and recommends that Respondent's permits be suspended for 60 days or that Respondent pay a civil penalty of $108,492.60 in lieu of this suspension.[5]

FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.

2. Respondent, Sheer Dlite, holds Private Club Registration Permit No. N-162596, Private Club Late Hours Permit No. NL-162957, and Beverage Cartage Permit No. PE-162958.

3. Respondent's licensed premises is located at 8951 East R.L. Thornton, Dallas, Dallas County, Texas.

4. On May 12, 1998, Nancy Tucker, an employee of Respondent, solicited officer Terry Vice and officer Joe Thompson to buy alcoholic drinks for her consumption while she was working as an employee of Respondent on Respondent's premises and during Respondent's hours of operation.

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[5]**TEX. ALCO. BEV. CODE ANN., Sec. 11.64. ALTERNATIVES TO SUSPENSION, CANCELLATION.** (a) ... In cases in which a civil penalty is assessed, the commission or administrator shall determine the amount of the penalty and in doing so shall consider the economic impact a suspension would have on the permittee or licensee. The amount of the civil penalty may not be less than $150 or more than $25,000 for each day the permit or license was to have been suspended.

Petitioner calculated the total civil penalty using Respondent's average daily alcoholic beverage sales for the previous year of $1,808.21 per day. $1,808.21 x 60 days = $108,492.60.

5. On May 12, 1998, Nancy Tucker, an employee of Respondent, grabbed and rubbed the clothed genital areas of officer Vice and officer Thompson while working as an employee of Respondent on Respondent's premises and during Respondent's hours of operation.

6. On May 12, 1998, Nancy Tucker, an employee of Respondent, solicited officer Vice for sexual purposes while she was working as an employee of Respondent on Respondent's premises and during Respondent's hours of operation, offering to have sex with him and officer Thompson for $400.

7. The conduct of Nancy Tucker in Findings of Fact Nos. 4, 5, & 6 all occurred in a public place and open area of Respondent's premises, visible to Respondent's management and employees. No corrective action was taken by Respondent's management or employees either during or after the events set forth in Findings of Fact Nos. 4, 5, & 6.

8. A criminal complaint was filed against Nancy Tucker based on the above-cited allegations.

9. Since 1990, TABC has disciplined Respondent as follows: Respondent was given a five day suspension or $750.00 civil penalty on August 3, 1990, for three drink solicitation offenses and a sexual contact offense; a 15 day suspension or $2,250.00 civil penalty on August 26, 1991, for a breach of the peace offense; a seven day suspension or $1,050.00 civil penalty on May 8, 1996, for serving an intoxicated person; and a 14 day suspension or $2,100.00 civil penalty on September 26, 1996, for drink solicitation, sexual contact, and operating an open saloon.

10. Respondent's annual permit application shows that Respondent had $660,000.00 in alcoholic beverage sales for the year prior to the year in which these violations occurred.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §§1.03, 5.31, 5.36, 6.01, and 11.61. The State Office of Administrative Hearings has jurisdiction over all matters related 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.

2. Respondent received adequate notice of the proceedings and hearing.

3. Based on Findings of Fact Nos. 4 & 7, Respondent permitted an employee on its premises to solicit persons to buy drinks for consumption by the employee, contrary to TEX. ALCO. BEV. CODE ANN. §§11.61(b)(2) and 104.01(4).

4. Based on Findings of Fact Nos. 5 & 7, Respondent permitted an employee to engage in lewd acts on its premises, contrary to TEX. ALCO. BEV. CODE ANN §§11.61(b)(2) and 104.01(6).

5. Based on Findings of Fact Nos. 6 & 7, Respondent permitted an employee to solicit persons for immoral or sexual purposes on its premises, contrary to TEX. ALCO. BEV. CODE ANN §§11.61(b)(2) and 104.01(7).

6. Based on Findings of Fact No. 10 and Conclusion of Law Nos. 3-5, Respondent's Private Club Registration Permit No. N-162596, Private Club Late Hours Permit No. NL-162957, and Beverage Cartage Permit No. PE-162958 should be suspended for 60 days or Respondent should pay a civil penalty of $108,492.60.

SIGNED this 2 day of February, 2000.

JERRY VAN HAMME
Administrative Law Judge
State Office of Administrative Hearings