

DOCKET NO. 587855

IN RE LONE STAR BAR, INC.	§	BEFORE THE
D/B/A LONE STAR BAR	§	
PERMIT NOS. BG-277248 & BL-277249	§	
	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2190)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of May, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ruth Casarez. The hearing convened on December 14, 2000, and adjourned January 3, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 6, 2001. 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. Exceptions were filed by Petitioner on March 27, 2001. No replies were filed by Respondent.

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.

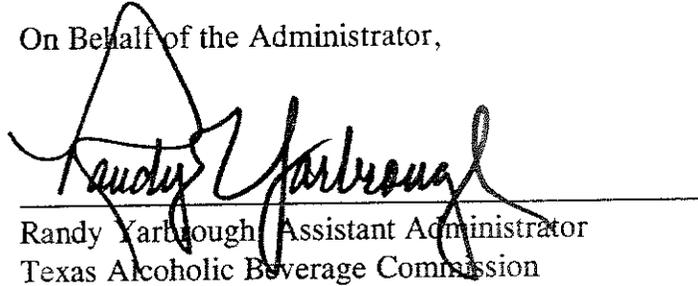
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on May 29, 2001, 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 9th day of May, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Ruth Casarez
Administrative Law Judge
State Office of Administrative Hearings,
VIA FACSIMILE: 475-4994

Rip Collins
ATTORNEY FOR RESPONDENT
1100 Guadalupe
Austin, Texas 78701
CERTIFIED MAIL NO. 7000 1530 0003 1927 3043

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Austin District Office

DOCKET NO. 458-00-2190
(TABC NO. 587855)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	
	§	OF
LONE STAR BAR INC.,	§	
D/B/A LONE STAR BAR	§	
PERMIT NO. BG-277248;	§	
LICENSE NO. BL 277249	§	
TRAVIS COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This is a disciplinary action brought against Lone Star Bar Inc., d/b/a Lone Star Bar (Respondent) for two alleged violations: a breach of the peace on the premises that was not beyond the control of Respondent, and allowing its agent, servant or employee to be intoxicated on the licensed premises. Instead of suspension or cancellation of Respondent's beer and wine Retailer's permits, as recommended by Staff, the Administrative Law Judge recommends that no action be taken against Respondent as the violations were not proven by a preponderance of the evidence.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

The hearing convened on December 14, 2000, at 1:30 p.m. before Ruth Casarez, Administrative Law Judge (ALJ), at the State Office of Administrative Hearings (SOAH) hearings facility located at the Stephen F. Austin Office Building, 1700 North Congress Avenue, Ste. 1100, Austin, Texas 78701. Staff was represented by Mr. Dewey Brackin, Attorney with the Commission. Respondent was represented by Mr. Rip Collins. After several witnesses were called, Mr. Brackin asked that the hearing be continued to allow him an opportunity to enforce a subpoena for a witness who had not appeared. The hearing was recessed. As agreed by the parties, the hearing was reconvened on January 3, 2001 at 9:00 a.m. at the same location; the record of the hearing closed on that date. The parties stipulated as to notice and jurisdiction, and those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

II. REASONS FOR DECISION

Staff introduced a certified public record showing that on July 7, 1992, Respondent had been issued Wine and Beer Retailer's Permit BG-277249 and retail Dealers's On-Premises Late Hours License, BL-277249; the permit and license had been continuously renewed. The critical facts that gave rise to this case are not in dispute. The parties presented five witnesses: Staff presented Travis County Deputy Donna Fuller, Ms. Welshire and Ms. Ewing, two of Respondent's bartenders.

Respondent presented Mr. Kirksey, a bar customer who was present when the incident occurred and Mr. Ainsworth, the bar owner, who was not present, but knew about the circumstances. Deputy Fuller testified as to her observations and the interviews she conducted on the evening in question. She interviewed the two bartenders, one or two customers in the bar, and Mrs. Ainsworth. Although the witnesses' statements varied slightly as to certain details, for the most part, all of them agreed as to the facts that led to the breach and how it occurred. The facts outlined below are a reasonable synthesis of the statements, reviewed in light of the additional information given by Mr. Ainsworth.

A. The Violations.

1. Breach of the Peace.

(a) Legal Standard. §69.13 of the TEX. ALCO. BEV. CODE ANN. provides for permit suspension or cancellation for a finding 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 licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.

A review of three cases applying this statute leads to the conclusion that foreseeability and the licensee's ability to control the situation determine whether liability will be found. No violation was found in Texas Liquor Control Board v. Luke, 340 S.W.2d 504 (Tex. Civ. App. - Beaumont 1960, no writ), an action concerning an assault with a gun on an individual, because: (1) the shooting took place outside the cafe, while appellee was inside the building and in no position to control any participant; and (2) the licensee did not know "trouble was brewing" and had no reason to anticipate any. The court found insufficient evidence reasonably showing that the acts of the employee were the result of improper supervision by appellee, the licensee. Two cases that sustain cancellation of liquor licenses found the events that occurred resulted from improper supervision by the licensee. Texas Liquor Control Board v. Rodriguez, 364 S.W.2d 459 (Tex. Civ. App. - San Antonio 1963, no writ) [The inexperienced 19 year-old barmaid in charge of the premises where fatal incident occurred had seen a fight between the two individuals ten minutes before the shooting, but did nothing to avoid further trouble, which was foreseeable.]; McFarland v. Texas Liquor Control Board, 434 S.W.2d 924 (Tex. Civ. App. - Waco 1968, no writ) [Barmaid and bartender knew the victim was drunk; had taken a knife from him earlier; knew he and the assailant had been fighting verbally for 30 minutes; told the victim to leave and then knew he had returned to make trouble. Their failure to call police or at least warn the manager resulted in the fatal stabbing of the victim.]

(b) The Breach. Mr. and Mrs. Ainsworth were involved in a nasty divorce action. Mrs. Ainsworth had obtained a protective order against Mr. Ainsworth keeping him from coming within a certain distance of her. Mr. Ainsworth had obtained a restraining order prohibiting Mrs. Ainsworth from coming to the bar. It was not clear whether the restraining order had been served on Mrs. Ainsworth as of October 11, 1999, but Mr. Ainsworth testified she knew about it and he had posted

a copy of it on the mirror in the bar. He had instructed his employees to call the police if Mrs. Ainsworth appeared at the bar.

Between 7:30 and 8:00 p.m. on October 11, 1999, Mrs. Ainsworth drove to the bar. Although Ms. Welshire, the day shift bartender, had been relieved by Ms. Ewing, who worked the evening shift, she was still at the bar doing some paper work. When Mrs. Ainsworth entered the bar and walked toward the cash register, Ms. Ewing locked the register and took the key out. She told Mrs. Ainsworth that she was not supposed to be there, pointing to the posted order, and pleaded with her saying, "Please, don't do this." Mrs. Ainsworth paid no attention and moved toward the register, with her own key in hand. Ms. Welshire, who had dialed the police, went to the register, handed the telephone to Ms. Ewing and told her to call the police. At that point, she either grabbed Mrs. Ainsworth's arm or placed her hands on the register trying to stop her from taking money from the register. Mrs. Ainsworth pushed Ms. Welshire away from the register, took the register tape and cash and then attempted to leave. When pushed aside, Ms. Welshire had hit her head against something and had fallen to the floor, but she had gotten up and may have tried to hold or block Mrs. Ainsworth, because when Deputy Fuller arrived she saw the two women behind the bar and had to separate them. Ms. Welshire had suffered a cut, which was bleeding, on her forehead and was very upset. According to Deputy Fuller, Mrs. Ainsworth had red marks or bruises on her arms. The entire incident took only a matter of minutes. After interviewing the bartenders, Mrs. Ainsworth, and several customers, Deputy Fuller arrested Mrs. Ainsworth and Ms. Welshire for disorderly conduct; she also determined that Ms. Welshire had been intoxicated on the premises.

The testimony of Messrs. Kirksey and Ainsworth will be summarized because their knowledge of the facts or observations is worth noting separately. Mr. Kirksey, a customer unaffiliated with either Mr. or Mrs. Ainsworth, had been at the bar since about 6:30 p.m. He was seated directly across from the cash register and saw what happened. He stated everything was fine until Mrs. Ainsworth entered the bar and headed directly to the cash register. After Ms. Ewing pleaded with her "not to do this," Ms. Welshire went to the register and placed her hands on it trying to keep Mrs. Ainsworth from the cash. Mr. Kirksey was quite certain that Ms. Welshire had not grabbed or struck Mrs. Ainsworth. He stated Mrs. Ainsworth pushed Ms. Welshire away from the register, opened the register and then took the cash and put it in her purse.

Mr. Ainsworth was across the street from the bar and had seen the police at a convenience store not far from his bar. As soon as he saw his wife drive up to the bar, he called them because he did not want her on the premises. The police told him not to go to the bar because he would be arrested if he did. He followed their advice and stayed out.

2. Intoxicated employee on the premises.

(a) Legal Standard. §104.01(5) of the Code provides for cancellation or suspension of a retail dealer's license, if the licensee, permit holder or any employee is intoxicated on the licensed premises. § 49.01 of the TEX. PENAL CODE ANN. defines "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 .08 or more.”

(b) Intoxicated on the premises. Deputy Fuller testified she observed certain signs that led her to believe Ms. Welshire was intoxicated. She had an odor of alcohol about her, her speech was slurred, her balance was unsteady, and she did not seem to understand. Deputy Fuller had to repeat her instructions to Ms. Welshire several times. Deputy Fuller did not ask Ms. Welshire to perform any field sobriety tests or to provide a breath or blood specimen; she stated her intoxication seemed obvious, and she did not believe it was necessary to conduct any tests. Deputy Fuller also did not ask Ms. Welshire or Mrs. Ainsworth if either had been drinking. She did not ask Ms. Welshire if she had taken any medication, or if she was hurt or dazed due to the injury. She had offered to call EMS, but Ms. Welshire had declined emergency treatment. Deputy Fuller arrested Ms. Welshire only for disorderly conduct.

Deputy Fuller was familiar with the Lone Star Bar prior to the incident. She had seen Mrs. Ainsworth managing the bar in the past and thought Mrs. Ainsworth was a co-owner. She knew the Ainsworths were having problems and knew about the protective order Mrs. Ainsworth had against Mr. Ainsworth. She did not know if the restraining order against Mrs. Ainsworth had been served prior to the evening of the fight.

Mr. Kirksey testified that while he was at the bar, he had not seen Ms. Welshire drinking. From his observations, she appeared to be fine, and did not appear to be intoxicated.

B. Analysis

Were the allegations set out above proven by a preponderance of the evidence.

1. The Breach of the Peace: There is no question that a breach of the peace, “[a] violation or disturbance of the public tranquility and order (citation omitted),” as defined in *Black’s Law Dictionary*, occurred on the licensed premises in the early evening of October 11, 1999. The issues presented are whether the breach was within Respondent’s control and whether it resulted from his improper supervision of persons permitted to be on the licensed premises.

Prior to Mrs. Ainsworth’s arrival, everything was fine at the bar. When she entered the bar, everything changed. The bartenders, who knew she was not supposed to be there, directed her to the restraining order on the mirror and told her she was not allowed on the premises. They also called the police, as they had been instructed to do. Mrs. Ainsworth did not heed their requests to leave; instead, she proceeded with her plan, to take money from the cash register. When Ms. Welshire tried to keep her from opening the register, Mrs. Ainsworth pushed her aside, knocking her to the floor and injuring her.

Was this breach foreseeable? Mr. Ainsworth had foreseen that Mrs. Ainsworth would go to the bar and try to take money from the register. If she did that while he was at the bar, he would try

to stop her from taking the money, which would very likely result in an altercation or a breach of the peace. To prevent this from happening, he had obtained a judicial order prohibiting Mrs. Ainsworth from entering the premises. And while it was not completely clear that Mrs. Ainsworth had been served with the restraining order as of that evening, the evidence was clear that when she entered, she was told about and was shown the restraining order that prohibited her from being there. She chose to disregard the order. Respondent's employees called the police, as they had been instructed to do. There was no evidence that the employees had been instructed to stop Mrs. Ainsworth from taking money from the register, and it is doubtful Mr. Ainsworth could have foreseen that Ms. Welshire, who was no longer on duty, would try to stop Mrs. Ainsworth. The ALJ finds that Ms. Welshire's action that evening could not have been foreseen by Mr. Ainsworth. But even if her action could have been anticipated, the ALJ finds that it was Mrs. Ainsworth, and not Ms. Welshire, who caused the breach of the peace by disobeying the restraining order.

Staff argued that if Ms. Welshire had not moved to the cash register, there would have been no breach, and that no one knew for sure that Mrs. Ainsworth did not have a right to take money from the register. The evidence presented belies this argument. Every witness who testified knew about the bitter divorce action that existed between Mr. and Mrs. Ainsworth. The bartenders knew that, by court order, Mrs. Ainsworth was not permitted on the premises and presumably was not allowed to take money from the register. They did as they had been instructed to do, but Mrs. Ainsworth was determined to carry out her intent. Mrs. Ainsworth's actions that evening were not under Respondent's control. Indeed, she was not a person permitted on the licensed premises on that evening. On the evening of October 11, 1999, Mrs. Ainsworth was on a very specific mission; she was under no one's supervision or control, and other than having police at the bar entrance, it is difficult to imagine what could have kept her out of the bar that evening. The facts in this case are distinguishable from those in the *Rodriguez* and *McFarland* cases in that the permit holder in this case had taken preemptive action to legally exclude a person who would very likely create a breach of the peace if allowed on the premises. The permit holder had foreseen the trouble and had acted to prevent it. He had given appropriate instructions to his employees to call the police if the person entered the bar. The employees told the person she was not permitted in the bar and called the police. But the person against whom the restraining order was issued disregarded the order, entered the premises and created a disturbance. The ALJ finds Mrs. Ainsworth, a person who was not permitted in the bar on October 11, 1999, was the sole cause of the breach of the peace that evening.

2. Intoxicated Employee on the Premises: The primary evidence in support of this allegation came from Deputy Fuller. However, the signs described by Deputy Fuller could have been a result of the fall and injury to the head that Ms. Welshire had sustained immediately prior to being interviewed, instead of the result of intoxication. Ms. Welshire was very upset, perhaps hysterical, about what had happened. She was undoubtedly shocked when she was pushed from the register, knocked to the floor and began bleeding from the cut on her forehead. It is a distinct possibility that Ms. Welshire was dazed due to her injury and had trouble understanding what was being said by Deputy Fuller. Additionally, since she had been bartending most of the day, it was not unusual for her to have the odor of alcohol about her person. Basic sobriety tests could have been conducted to determine if Ms. Welshire was intoxicated, but no tests were given. She was not even asked if she

had been drinking. On the other hand, Mr. Kirksey, who had been in the bar for an hour or two prior to the incident, indicated he had not seen Ms. Welshire drinking, and that she was fine and did not appear to be intoxicated. Considering the contradictory statements presented on the question of intoxication, the ALJ finds the Staff did not prove by a preponderance of the evidence that Ms. Welshire was intoxicated, as defined in the Texas Penal Code, while on the licensed premises.

Because the allegations were not proved by a preponderance of the evidence, the ALJ recommends that no adverse action be taken against Respondent.

III. FINDINGS OF FACT

1. On July 7, 1992, the Texas Alcoholic Beverage Commission (the Commission) issued Wine and Beer Retailer's Permit BG-277248 and Retail Dealer's On-Premise Late Hours License 277249 to Lone Star Bar, Inc. d/b/a Lone Star Bar. The permit and license have been continuously renewed since that date.
2. The parties received proper and timely notice of the hearing which was begun on December 14, 2000, recessed and concluded on January 3, 2001 in the hearings facility of the State Office of Administrative Hearings in Austin, Texas.
3. Mr. Dewey Brackin, Attorney with the Commission, represented the Staff, and Mr. Rip Collins represented the Respondent at the hearing referenced in Finding No. 2. The record closed at the conclusion of the hearing on January 3, 2001.
4. Mr. Ainsworth is the owner of the Lone Star Bar.
5. As of October 1999, Mr. and Mrs. Ainsworth were involved in an unpleasant divorce action.
6. Mrs. Ainsworth had obtained a protective order prohibiting Mr. Ainsworth from coming within a certain distance of Mrs. Ainsworth.
7. Mr. Ainsworth had obtained a restraining order prohibiting Mrs. Ainsworth from entering the Lone Star Bar. The order was in effect on October 11, 1999.
8. Mr. Ainsworth had posted a copy of the restraining order on the mirror inside the bar and had instructed his employees to call the police if Mrs. Ainsworth came into the premises.
9. Ms. Welshire and Ms. Ewing were the day shift and night shift bartenders, respectively, at the Lone Star Bar on October 11, 1999. Ms. Welshire was off duty as of 7:30 p.m., but had remained in the bar to complete some paper work.
10. Prior to 7:30 p.m., Ms. Ewing, Ms. Welshire, and several customers were in the bar; everything was fine at that time.

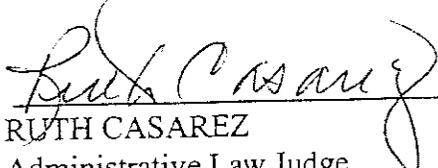
11. At or about 7:30 p.m. on October 11, 1999, Mrs. Ainsworth arrived at the bar. After entering, she went directly to the cash register behind the bar.
12. Ms. Ewing told Mrs. Ainsworth that there was a restraining order prohibiting her from coming into the bar; she locked the cash register and pointed to the order posted on the mirror, and said to Mrs. Ainsworth, "please don't do this."
13. Mrs. Ainsworth disregarded Ms. Ewing's statements and proceeded to open the register with her own key.
14. Ms. Welshire, who had dialed the number handed the phone to Ms. Ewing and asked she to call the police, stepped to the register and placed her hands on it trying to keep Mrs. Ainsworth from taking cash from it.
15. Mrs. Ainsworth pushed Ms. Welshire away from the register, knocking her to the floor; Ms. Welshire suffered a cut to her forehead, which began bleeding.
16. Ms. Welshire was very upset by the events that had occurred; her speech and balance were likely affected by the fall and injury to her head, and she may have appeared disoriented.
17. On the evening of October 11, 1999, at or about 7:30 p.m., Mrs. Ainsworth knew that she was not permitted to be in the Lone Star Bar.
18. Mrs. Ainsworth's action in pushing or shoving Ms. Welshire away from the cash register created a disturbance on the evening of October 11, 1999, in the Lone Star Bar. Mrs. Ainsworth was not under Mr. Ainsworth's control or supervision at that time.
19. Although off duty at or about 7:30 p.m. on October 11, 1999, Ms. Welshire was an employee under Mr. Ainsworth's control and supervision. She had been instructed to call the police if Mrs. Ainsworth entered the bar, but had not been instructed to keep Mrs. Ainsworth from taking money from the register.
20. Mr. Ainsworth had instructed his employees to call the police if his wife entered the bar; he had no way of knowing that Ms. Welshire, while off duty, would try to keep Mrs. Ainsworth from taking money from the register.
21. While Ms. Welshire placed her hands on the register to keep Mrs. Ainsworth from taking money from the register, she did not grab or strike Mrs. Ainsworth.
22. Mr. Kirksey, who had been at the bar since 6:30 p.m. on October 11, 1999, had not seen Ms. Welshire drinking alcoholic beverages, and she did not appear to be intoxicated to him.

23. Having observed signs in Ms. Welshire that could have indicated intoxication, Deputy Fuller did not perform any tests to check for intoxication, nor did she ask Ms. Welshire if she had been drinking alcoholic beverages.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (the Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 61.71 (Vernon 1998).
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(6) (Vernon 2000).
3. Based on Finding No. 2, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T. CODE ANN. § 2001.051 (Vernon 2000).
4. On October 11, 1999, Mrs. Ainsworth entered the licensed premises and breached the peace. On that date, she was not permitted on the premises and was not under Respondent's control or supervision. Respondent had acted responsibly to prevent her from entering the premises. (Findings Nos. 7, 10-15, and 17-21.)
5. Based on Conclusion of Law No. 4, Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 69.13.
6. The preponderant evidence did not establish that Respondent's employee was intoxicated on the licensed premises on October 11, 1999. (Findings Nos. 15-16 and 22-23.)
7. Based on Conclusion No. 6, Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 104.01(5).
8. Based on the foregoing findings and conclusions, the Commission should take no adverse action against Respondent.

SIGNED this 6th day of March 2001.



RUTH CASAREZ
Administrative Law Judge
State Office of Administrative Hearings