

DOCKET NO. 588278

IN RE PABLO LOMELI HERNANDEZ
D/B/A CLUB LATINO
PERMIT NOS. MB402011, LB402012,

TRAVIS COUNTY, TEXAS
(SOAH DOCKET NO. 458-00-2354)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 4th day of June 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened and adjourned February 2, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 16, 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 on April 18, 2001 by Petitioner and by Respondent on May 4, 2001.

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. MB402011 and LB402012 shall be **RENEWED**.

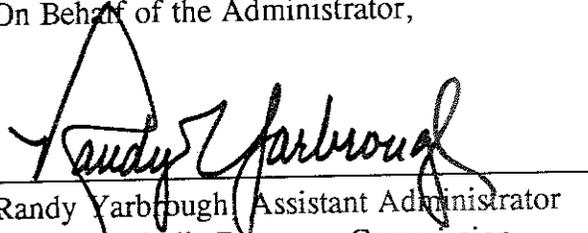
IT IS FURTHER ORDERED that Respondent receive a **WARNING** that continued criminal activity on his licensed premises or around it may cause denial of his permits in the future and that he should continue to cooperate with the Texas Alcoholic Beverage Commission and the Austin Police Department to solve these problems.

This Order will become final and enforceable on June 25, 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 4th day of June 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE (512) 475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
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Christopher Burnett
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TABC Legal Section

Licensing Division
Austin District Office

SOAH DOCKET NO. 458-00-2354

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,

Petitioner

VS.

PABLO LAMELI HERNANDEZ
D/B/ACLUB LATINO
PERMIT NOS. MB402011 & LB402012
TRAVIS COUNTY, TEXAS

Respondent

(TABC CASE NO. 588278)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this action against Pablo Lameli Hernandez d/b/a Club Latino (Respondent) seeking to deny the renewal of Respondent's permits. TABC alleged Respondent has conducted his business against the public's general welfare, health, peace, morals, safety, and sense of decency. Respondent appeared, was represented by counsel, and contested the allegations. This Proposal for Decision finds the permits should be renewed.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter convened February 2, 2001. Attorney Christopher Burnett represented TABC. Respondent was represented by attorney Don Walden. Administrative Law Judge John H. Beeler (ALJ) presided. The hearing was concluded that same day but the record was left open until February 16, 2001, to allow the parties to file closing arguments.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

II. EVIDENCE

A. TABC'S Case:

The staff of TABC (Staff) offered the testimony of two witnesses and documentary evidence in the form of 64 police reports concerning the licensed premises. The reports were admitted; however, the citizens' statements found in the reports were admitted only to prove that the statements were made to the officers, not for the truth of the matters asserted.

1. Testimony of David Farrero:

Lieutenant David Farrero has been employed by TABC for 16 years and is familiar with Club Latino. From October 18, 1998, the date Respondent's permits were issued, through October of 1999, there have been five administrative filings against the location, five criminal filings, and more problems with the location than with other licensed premises in the area. Lieutenant Farrero's knowledge was obtained from former TABC agent Kirk Delcheu and the police reports admitted in this hearing.

2. Testimony of Stephen Oswald:

Stephen Oswald is employed as a detective with the Austin Police Department (APD) and has worked for APD for 19 years. He has never been inside the licensed premises but is familiar with the police reports admitted in this hearing. Detective Oswald feels that the problems referenced in the police reports would disappear if Respondent's permits are not renewed.

3. The 64 police reports.

The police reports contain information in reference to the following alleged occurrences:

1. 5 auto thefts
2. 1 deadly conduct
3. 7 possession of illegal drugs
4. 17 public intoxications
5. 9 fights
6. 2 robberies
7. 2 minors in possession of alcohol
8. 4 trespasses
9. 2 DWIs
10. 1 consuming alcohol in parking lot
11. 1 fire
12. 2 burglaries of a motor vehicle
13. 6 missing cell phones
14. 1 missing Wallet
15. 1 curfew violation
16. 1 driving without a license
17. 2 amplified music from vehicles
18. 2 leaving the scene of accidents
19. 1 disturbance
20. 1 auto accident
21. 1 attempted assault

- 22. 3 assaults
- 23. 1 Class C assault
- 24. 1 criminal mischief

B. Respondent's Case:

Respondent presented the testimony of Jo Garcia, Jose Lazano, Mario Rodriguez, and Pablo Hernandez. In addition, two documents were offered and admitted. The first is TABC's response to discovery and the second is a diagram of the premises and surrounding area.

1. Testimony of Jo Garcia

Mr. Garcia is a counselor with the Austin Independent School district and has held events at the club for the benefit of students. The facility has always been cooperative and has provided a safe environment for the events.

2. Testimony of Jose Lazano

Mr. Lazano is the manager of the licensed premises. Situations involving illegal drugs at the club usually involve an employee of the club discovering that a customer has drugs and the employee reporting this to the police. This occurs about once per month or so. The club institutes security measures as suggested by TABC.

3. Testimony of Maria Rodriguez

Ms. Rodriguez is a customer of the club and regularly takes her teenage daughters with her to the club. The club is a safe place and she has never had any problem there.

4. Testimony of Pablo Hernandez

Mr. Hernandez owns the club and tries to run a lawful and safe business. His employees are trained and certified by TABC. He has increased security at the recommendation of TABC. He is willing to meet with APD and TABC to address their concerns and follow their suggestions as he has done this in the past.

Other businesses share the same parking lot with Respondent that are open late, such as a restaurant, a taco trailer, and a music shop.

5. TABC response to discovery

The pertinent part of the document is as follows:

INTERROGATORY NO. 5: Please explain in detail why you believe that Pablo Hernandez, on November 22, 1999, conducted [his] business against the public's general welfare, health, peace, morals, safety, and sense of decency, as alleged in the Notice of Hearing.

RESPONSE: Respondent's business has been the site of voluminous number of criminal acts, including aggravated assault, robbery, public intoxication, possession of controlled substance, burglary, theft, and other offenses that are against the public's general welfare, health, place [sic], morals, safety and sense of decency.

6. Diagram of premises

The diagram shows the licensed premises, the parking lot, and the other businesses in the area.

III. STATUTORY AUTHORITY

The applicable statutory provisions at TEX. ALCO. BEV. CODE ANN. §§11.46(a)(8) state:

(a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

(8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

IV. ANALYSIS

TABC's witnesses gave little information based upon their personal knowledge, possibly because the TABC agent who actually investigated Club Latino is no longer employed by TABC and did not testify. The only evidence of activity at the licensed premises presented by TABC was the information contained in the police reports, which indicate that there were approximately 75 occurrences documented over a one year time period. While this number seems high for one location for one year, a closer assessment reveals that the number of reports relating to how Respondent operated his business is much lower. For example, all of the reports concerning possession of illegal

drugs were the result of Respondent's employees discovering persons in possession of the drugs and notifying the police. Most of the other reports concerned incidents that occurred in the parking lot which was shared by Respondent and other businesses. Further, the reports, because of their hearsay nature, cannot be considered to prove that the criminal acts occurred, but only that the police were notified and made a report. The exceptions to this are the public intoxication (PI) and minor in possession of alcohol (MIP) occurrences. Of the 17 PI situations, several of the violators were outside the club when observed by the officers. Also, neither of the reports concerning MIP indicated that the minors purchased alcohol from the club.

The evidence presented at the hearing did not prove, by a preponderance, that Respondent conducted his business against the public's general welfare, health, peace, morals, safety, and sense of decency.

III. RECOMMENDATION

Because the evidence admitted at the hearing did not prove, by a preponderance, that Respondent conducted his business against the public's general welfare, health, peace, morals, safety, and sense of decency, the renewal of Respondent's license should not be denied

IV. FINDINGS OF FACT

1. Pablo Lameli Hernandez d/b/a Club Latino (Respondent) is the holder of Permit Nos. MB402011 and LB402012, issued by the Texas Alcoholic Beverage Commission (TABC) on October 18, 1998.
2. On March 24, 2000, the staff of TABC (Staff) sent a Notice of Hearing by certified mail, return receipt requested, to Respondent asserting that TABC was seeking to deny the renewal of Respondent's permits.
3. The hearing on the merits was held on February 2, 2001. TABC attorney Christopher Burnett appeared and represented Staff. Respondent appeared and was represented by attorney Don Walden. John H. Beeler, Administrative Law Judge (ALJ), presided. Evidence was received and the hearing concluded that day, but the record was left open until February 16, 2001, for the filing of briefs.
4. Approximately 75 police reports were made concerning criminal activity at or near the licensed premises from October 18, 1998, through October 1999.
5. Many of the reports referenced in Finding of Fact No. 4 occurred in a parking lot shared by Respondent and other businesses in the area.

6. The reports referenced in Finding of Fact No. 4 that concerned possession of illegal drugs were the result of Respondent's employees discovering that customers possessed the drugs and called the police.
7. Most of the reports referenced in finding of Fact No. 4 were not the result of the manner in which Respondent conducted his business.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.46.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's permits should be renewed.

SIGNED this 16th day of April, 2001.



JOHN H. BEELER

**ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**