

DOCKET NO. 588472

IN RE MARSELINO LOPEZ RODRIGUEZ §
D/B/A THE NEW TUSAS NITE CLUB §
PERMIT NOS. BG-439367 & BL-439368 §
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BEFORE THE

TEXAS ALCOHOLIC

NUECES COUNTY, TEXAS
(SOAH DOCKET NO. 458-01-1016)

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of May, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle J. Groves. The hearing convened on April 5, 2001, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 9, 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. 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. BG-439367 and BL-439368 are herein **SUSPENDED**.

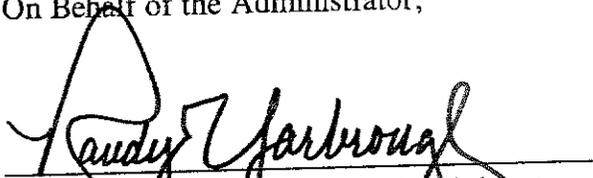
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,500.00** on or before the **25th day of July, 2001**, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of ten (10) days, beginning at **12:01 A.M. on the 1st day of August, 2001**.

This Order will become final and enforceable on **June 11, 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 22nd day of May, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Marselino Lopez Rodriguez
RESPONDENT
d/b/a The New Tusas Nite Club
623 Old Robstown Road
Corpus Christi, Texas 78408
CERTIFIED MAIL NO. 7000 1530 0003 1927 3104

The Honorable Kyle J. Groves, Administrative Law Judge
State Office of Administrative Hearings
Corpus Christi, Texas
VIA FACSIMILE: (361) 884-5427

Corpus Christi District Office
Licensing Division

DOCKET NO. 458-01-1016

TEXAS ALCOHOLIC
BEVERAGE COMMISSION

vs.

MARSELINO LOPEZ RODRIGUEZ
D/B/A THE NEW TUSAS NITE CLUB
PERMIT NOS. BG-439367 & BL-439368
NUECES COUNTY, TEXAS
(TABC CASE NO. 588472)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks suspension of Permit Nos. BG-439367 and BL-439368 held by Marselino Lopez Rodriguez, d/b/a The New Tusas Nite Club (Respondent) for allegedly giving checks or drafts for the purchase of beer that were dishonored when presented for payment. Petitioner seeks to suspend Respondent's permits for 10 days or, in lieu of suspension, to assess a civil penalty against Respondent in the amount of \$150.00 per day of violation for a total of \$1,500.00. The Administrative Law Judge recommends that Petitioner's action be sustained.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

The hearing in this case was convened on April 5, 2001, at the State Office of Administrative Hearings in Corpus Christi, Texas before Administrative Law Judge Kyle J. Groves. Dewey Brackin, staff attorney, represented Petitioner. Respondent did not attend the hearing. Petitioner presented evidence relating to notice and jurisdiction, then moved that a proposal for decision be issued on a default basis pursuant to 1 Tex. Admin. Code §155.55 (1998). There are no contested issues of jurisdiction or notice, and the allegations against Respondent are deemed admitted. Therefore, these matters are addressed as findings of fact and conclusions of law without further discussion here.

II. APPLICABLE LAW

1. Section 11.61(b)(2) of the Texas Alcoholic Beverage Code states: "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 . . . Tex. Alco. Bev. Code Ann. §11.61 (Vernon 1998).

2. Section 11.64(a) of the Texas Alcoholic Beverage Code states, in pertinent part: "When the commission or administrator is authorized to suspend a permit or license under this code, the commission or administrator shall give the permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended . . ." Tex. Alco. Bev. Code Ann. §11.64 (Vernon 1998).

3. Section 11.71 (a)(1) of the Texas Alcoholic Beverage Code states: "The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee: (1) violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period . . ." Tex. Alco. Bev. Code Ann. §11.71 (Vernon 1998).

4. Section 2003.021(b) of the Texas Government Code states in pertinent part: "The office (1) shall conduct all administrative hearings in contested cases under Chapter 2001 that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency; (2) shall conduct administrative hearings in matters for which the office is required to conduct the hearing under other law . . ." Tex. Gov't. Code Ann. §2003.021 (Vernon 1998).

5. Section 2001.051 of the Texas Government Code states: "In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case." Tex. Gov't. Code Ann. §2001.051 (Vernon 1998).

6. Section 61.73 (b) of the Texas Alcoholic Beverage Code states: "The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premises license if it is found, after notice and hearing, that the licensee gave a check, as maker or endorser, or a draft, as drawer or endorser, as full or partial payment for beer or the containers or packages in which it is contained or packaged, which is dishonored when presented for payment." Tex. Alco. Bev. Code Ann. §61.73 (Vernon 1995).

7. Section 155.55 (a) of Title 1 of the Texas Administrative Code states, in pertinent part: "If, after receiving notice of a hearing, a party fails to appear in person or by representative on the

day and time set for hearing or fails to appear by telephone in accordance with this chapter, the ALJ may proceed in that party's absence and, as authorized by applicable law, may enter a default judgment against the defaulting party." 1 Tex. Admin. Code §155.55 (1998).

8. Section 155.55 (b) of Title 1 of the Texas Administrative Code states, in pertinent part: "For purposes of this section, entry of a default judgment means the issuance of a proposal for decision or order, where provided by law, against the defaulting party in which the factual allegations against that party in the notice of hearing are deemed admitted as true without the requirement of submitting additional proof." 1 Tex. Admin. Code §155.55 (1998).

III. FINDINGS OF FACT

1. The hearing in Docket No. 458-01-1016 was convened on April 5, 2001 before Administrative Law Judge Kyle J. Groves at the State Office of Administrative Hearings in Corpus Christi, Texas. Dewey Brackin, staff attorney, appeared on behalf of the Texas Alcoholic Beverage Commission (Petitioner). Marselino Lopez Rodriguez, d/b/a The New Tusas Nite Club, (Respondent) did not appear.

2. Respondent was notified of the factual allegations against Respondent and of the date, time, and location of the scheduled hearing in the Notice of Hearing issued by Petitioner on February 16, 2001.

3. Respondent holds Wine and Beer Retailer's Permit No. BG-439367 and Retail Dealer's On-Premise Late Hours License No. BL-439368.

4. On October 29, 1999, Respondent gave a check or draft in the amount of \$188.50 for the purchase of beer that was dishonored when presented for payment.

5. On December 3, 1999, Respondent gave a check or draft in the amount of \$312.20 for the purchase of beer that was dishonored when presented for payment.

6. On December 10, 1999, Respondent gave a check or draft in the amount of \$841.40 for the purchase of beer that was dishonored when presented for payment.

7. On December 3, 1999, Respondent gave a check or draft in the amount of \$887.20 for the purchase of beer that was dishonored when presented for payment.

8. On December 17, 1999, Respondent gave a check or draft in the amount of \$891.20 for the purchase of beer that was dishonored when presented for payment.

IV. CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Tex. Alco. Bev. Code Ann. §11.61 (Vernon 1998).

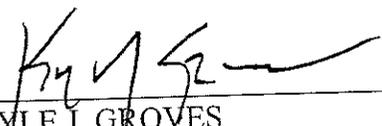
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including issuing this Proposal for Decision with findings of fact and conclusions of law, pursuant to Tex. Gov't. Code Ann. §2003.021 (Vernon 1998).

3. Respondent received proper and timely notice of the hearing in this case.

4. Respondent violated Tex. Alco. Bev. Code §61.73 (b) (Vernon 1995) by giving five checks or drafts for the purchase of beer that were dishonored when presented for payment.

5. Based upon the Findings of Fact and Conclusion of Law No. 4, Petitioner's adverse action of suspending Respondent's Permit No. BG-439367 and License No. BL-439368 for 10 days or, in lieu of suspension, assessing a civil penalty against Respondent in the amount of \$150.00 per day of violation for a total of \$1,500.00, is proper.

SIGNED on this 9 day of April, 2001.



KYLE J. GROVES
Administrative Law Judge
State Office of Administrative Hearings