

**DOCKET NO. 590601**

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
EMMA TOUCET	§	ALCOHOLIC
D/B/A EMMA'S MEXICAN FOOD	§	
AND CANTINA	§	
PERMIT NOS. MB-201475, PE-457019,	§	
CB-457020	§	
LUBBOCK COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-0501)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 22nd day of February, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on December 10, 2001, and the record was closed on December 21, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 23, 2002. 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.

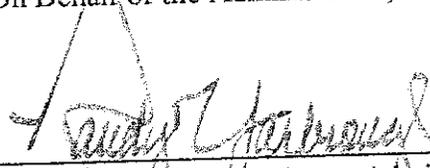
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB-201475, PE-457019 & CB-457020 are hereby **CANCELED FOR CAUSE**.

**This Order will become final and enforceable on March 15, 2002**, 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 22<sup>nd</sup> day of February, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

Administrative Law Judge  
State Office of Administrative Hearings  
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Lubbock District Office  
Licensing Division

DOCKET NO. 458-01-0501

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
	§	
VS.	§	OF
	§	
EMMA TOUCET	§	
D/B/A EMMA'S MEXICAN FOOD	§	
AND CANTINA	§	
PERMIT NOS. MB201475, PE457019	§	
& CB457020	§	
LUBBOCK COUNTY, TEXAS	§	
(TABC CASE NO. 590601)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Emma Toucet D/B/A Emma's Mexican Food and Cantina (Respondent) for allegedly possessing or permitting others to possess a narcotic on the licensed premises, refusing to permit or interfering with an inspection of the licensed premises by an authorized Commission representative or peace officer, and possessing or permitting others to possess equipment used or designed for administering a narcotic on the licensed premises. The Staff recommended that Respondent's permits be canceled. Based on the evidence, the Administrative Law Judge finds that Petitioner proved the allegations and recommends that Respondent's permits be canceled.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

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

The hearing convened on December 10, 2001, at the Offices of the State Office of Administrative Hearings in Lubbock, Lubbock County, Texas. Petitioner appeared and was represented by Dewey Brackin, its counsel. Respondent appeared and was represented by Jesse Mendez, attorney. The parties were permitted to submit written closing arguments, and the record was closed on December 21, 2001.

II. DISCUSSION

A. Testimony.

**Sgt. Dennis Kelly, Lubbock Police Department.** On July 1, 2000, Sgt. Kelly was investigating a possible fight in progress at a location near the licensed premises when he observed some individuals on the stairs leading up to the top floor of the licensed

premises. When these individuals apparently observed him, they abruptly went up the stairs and closed the door behind them. Kelly and another officer attempted to get the occupants to answer the door to no avail and called for TABC Agent Doyce Vandivere, who got the same response from the occupants. Finally, Respondent showed up and was able to get the occupants to open the door. Kelly observed that there was a strong smell of marijuana coming from the location. A search of the premises yielded marijuana, rolling papers, drug paraphernalia and bongs. Guadalupe Guillermo Mejia, who stated that he worked at the licensed premises as a cook, was arrested. Kelly also observed that there was a TV monitor connected to a surveillance camera in the room where the occupants could see that police were on the stairs and the landing.

**Agent Doyce Vandivere, Texas Alcoholic Beverage Commission.** Agent Vandivere assisted Sgt. Kelly and Officer Pennington in their attempts to gain entry to the upstairs portion of the licensed premises, but he was unsuccessful until Respondent arrived and got the occupants to open the door. He observed that there was a strong marijuana smell and that there was a TV monitor which showed the landing area outside the premises. Marijuana and four pipes were found when the premises were searched. Also, ten bottles of alcoholic beverages which did not have local distributor's stamps as required by the Code were located in the apartment.

Vandivere explained that the permittee can exclude from TABC supervision and inspection portions of a building where the licensed premises are located by "red-lining" the excluded portion and filing with TABC a premises diagram showing the red-lined portion. Vandivere testified that he had a conversation with Respondent before the July 1 incident in which she stated that the upstairs apartment was not part of the licensed premises and her son lived there. He told her the upstairs apartment was not red-lined and therefore was considered part of the licensed premises until she went to the local TABC office to file a diagram showing the red-lined portions of the building. However, an examination of Respondent's permit history file showed that no such diagram had been submitted to TABC. Furthermore, Respondent's permit application specifically asks if the entire building in which the licensed premises is located will be included in the permit and Respondent answered in the affirmative.

**Officer Chris Hensley, Lubbock Police Department.** On August 22, 2001, Officer Hensley observed an individual looking into a vehicle in the parking lot of the licensed premises which was parked in a no parking zone. Because he had been called to the licensed premises in reference to a possible auto burglary several days earlier, he decided to contact the individual who was identified as Javier Toucet. Hensley recalled that Toucet made several trips between the vehicle and the upstairs apartment of the licensed premises before he was contacted. The vehicle was registered to Toucet, who stated that the licensed premises was his mother's restaurant and he was a dishwasher at the restaurant. Hensley believed Toucet was under the influence of narcotics at the time he contacted him and determined that he was wanted for outstanding warrants. A canine unit arrived at the scene and alerted police that there were possible drugs in the vehicle. The search of the vehicle revealed that it contained a mobile methamphetamine lab, which was confirmed by Drug Enforcement Agency

Officer Steven Thompson. Toucet was arrested for outstanding warrants and possession of methamphetamine equipment.

**Agent Steven Thomas, Drug Enforcement Agency.** Agent Thomas arrived at the licensed premise on August 22, 2001 in response to a call from the Lubbock Police Department. He examined the items located in the vehicle and determined they were chemicals and glassware used in the manufacture of methamphetamine.

**Emma Toucet, Respondent.** Respondent is the owner of Emma's Mexican Food and Cantina. She testified that Guadalupe Guillermo Mejia is her nephew and Javier Toucet is her son and both had helped out around the restaurant in the past. Javier Toucet was on the payroll as an employee for the restaurant but she was not sure when she put him on the payroll. As for the apartment above the restaurant, Respondent testified it was sometimes used by both her nephew and son but that she was not aware that they would use it for illegal activity. On July 1, 2000, the apartment was not red-lined, but she stated that two agents for TABC told her that they would red-line the apartment for her. She has a diagram of the premises next to her permits for public display which shows that the apartment is not part of the licensed premises, but she admits she never brought a diagram to TABC for approval.

**B. Analysis.** Staff alleged that on July 1, 2000, Respondent violated the Texas Alcoholic Beverage Code (the Code) because Guadalupe Guillermo Mejia, who was her agent, servant, or employee, possessed marijuana and drug paraphernalia while on the licensed premises. Pursuant to TEX. ALCO. BEV. CODE § 104.01 (9), 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 possessing a narcotic or any equipment used or designed for the administering of a narcotic (emphasis added).

Respondent never denied that Mejia possessed marijuana or drug paraphernalia, and the other testimony demonstrates that marijuana, rolling papers and bongs were found in the apartment. She denied that Mejia was her employee; however, she admitted that he did help out around the licensed premises. She also denied that the apartment, where the marijuana or drug paraphernalia were found, was part of the license premises.

The Code is silent on the definition of agent or servant, but the dictionary defines agent as "one who acts for or in the place of another by authority from him" and servant as "one who serves others." Respondent's testimony that Mejia helped out at her restaurant, which was the licensed premises, clearly shows that he was her agent at least for the limited purpose of helping her and her husband conduct the business of the restaurant. Also, Sgt. Dennis Kelly testified that Mejia stated that he worked at the restaurant as a cook.

Regarding the defense that the apartment was not part of the license premises, the evidence preponderates against this proposition. Agent Vandivere testified that he told Respondent the apartment was not red-lined to remove it from the licensed

premises and she would have to have TABC approval of any red-lined portion of the premises. Respondent stated that she has a diagram posted next to her permits showing that the apartment is not part of the licensed premises but she did not get TABC approval for the red-lined portion. This is insufficient to show that a portion of the building is not part of the licensed premises without the same being approved by TABC. Further, Respondent's permit application on file with TABC demonstrates her intention to include the entire building in the licensed premises. On that application, she answered "Yes" to the question of whether the licensed premises included the entire building in which it was located.

Staff furthered alleged that on July 1, 2000, Respondent violated the Code when Mejia, as an agent, servant, or employee of Respondent, refused to permit a peace officer and an authorized representative of the Commission to enter the licensed premises. Pursuant to TEX. ALCO. BEV. CODE § 101.04, by accepting a license or permit, the holder consents that the Commission, an authorized representative of the Commission, or a peace officer may enter the licensed premises at any time to conduct an investigation or inspect the premises for the purpose of performing any duty imposed under the Code. The evidence discussed above demonstrates that Mejia was Respondent's agent, servant or employee and that the apartment which he refused to allow the officers to enter was part of the licensed premises. Sgt. Kelly and Agent Vandivere both testified that Mejia refused to open the door to the apartment when they knocked on the door. They both also noted that there was a surveillance monitor in the apartment showing the stairs and landing where the peace officers were standing when they were knocking at the door. Respondent testified that she arrived at the apartment when the officers could not gain admittance and that Mejia opened the door for her, whereupon the officers inspected the apartment.

Finally, Staff alleged that on August 22, 2001, Respondent violated the Texas the Code because Javier Toucet IV, her employee, possessed equipment used or designed for administering a narcotic on the licensed premises, a violation of TEX. ALCO. BEV. CODE § 104.01 (9). Pursuant to 16 TEX. ADMIN. CODE § 35.31(b), a permittee is in violation of the Code if they commit any narcotics related offense described in Chapters 481 and 483 of the Texas Health and Safety Code, which would include the above violation. According to § 1.04(11) of the Code, the definition of "permittee" includes the agent, servant, or employee of a permit holder.

Respondent argued that Toucet had never been indicted for the offense of possession of such equipment. She admitted that the vehicle in which the equipment was found was his vehicle and it was in the parking lot of the licensed premises. She also admitted that Toucet was an employee, although she was unsure of when he was put on the payroll. Her testimony clearly demonstrates that Toucet was employed by Respondent. Officer Hennisley also testified that Toucet told him he was employed as a dishwasher at the restaurant owned by his mother. The testimony of Agent Steven Davis of the Drug Enforcement Agency is conclusive that the equipment found in Toucet's vehicle was a small box lab for the manufacture of methamphetamine.

The evidence is sufficient under the preponderance of the evidence standard to prove that Mejia was an employee, agent, or servant of Respondent while possessing a narcotic on the licensed premises and he refused to permit a peace officer and an authorized representative of the Commission to enter the licensed premises. The evidence is also sufficient to prove that Toucet was Respondent's employee and that he possessed equipment used or designed for administering a narcotic on the licensed premises. As a result, Staff's recommendation to cancel Respondent's permits is affirmed.

### III. FINDINGS OF FACT

1. On July 15, 1988, the Texas Alcoholic Beverage Commission (Commission) issued Mixed Beverage Permit MB-201475, and on August 20, 1999 issued Beverage Cartage Permit PE-457019 and Caterer's Permit CB-457020, which have been continuously renewed, to Respondent for the premises known as Emma's Mexican Food and Cantina, 620 19<sup>th</sup> Street, Lubbock, Lubbock County, Texas.
2. Respondent received proper and timely notice of the hearing from the Staff for the Commission (Staff) in a notice of hearing, dated November 27, 2001.
3. The hearing was convened on December 10, 2001, at the offices of the State Office of Administrative Hearings in Lubbock, Lubbock County, Texas. Respondent appeared and was represented by Jesse Mendez, attorney. Dewey Brackin, Assistant Attorney General, represented the Staff. The record closed on December 21, 2001.
4. In the Application For A Retailer's Permit Or License filed by Respondent with TABC, she stated that the permit would embrace the entire building, grounds and appurtenances at the address shown as the location for the licensed premises, which was 620 19<sup>th</sup> Street, Lubbock, Lubbock County, Texas.
5. On July 1, 2000, Respondent Emma Toucet had not requested TABC approval to red-line the upstairs apartment located in the building which housed the licensed premises to exclude it from TABC supervision and inspection.
6. On that date, Guadalupe Guillermo Mejia refused to permit Sgt. Dennis Kelly and Officer Chris Hennsley of the Lubbock Police Department as well as Agent Doyce Vandivere of the TABC to enter the upstairs apartment by failing to respond to their repeated requests to open the door to the apartment.
7. On that date, Respondent arrived at the apartment and persuaded Mejia to open the door to her and the peace officers.
8. On that date, Mejia was present in the upstairs apartment while possessing a narcotic in the form of marijuana as well as rolling papers and bongs.

9. On that date, Mejia stated that he was a cook at the licensed premises.
10. Respondent admitted that Mejia was her nephew and helped out around the licensed premises.
11. Mejia was the agent, servant or employee of Respondent on July 1, 2000.
12. On August 22, 2001, Javier Toucet, IV was present in the parking lot of the licensed premises where his vehicle was found to contain equipment for a mobile methamphetamine lab.
13. Toucet stated that the licensed premises was his mother's restaurant and he was a dishwasher at the restaurant.
14. Respondent admitted that Toucet was her son and he was on the payroll of the restaurant.
15. Toucet was the agent, servant, or employee of Respondent on August 22, 2001.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over this matter, including the authority to issue a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. § 2003.
3. Proper and timely notice of the hearing was provided as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. On July 1, 2000, the upstairs apartment in the building where the licensed premises is located was subject to TABC inspection and approval in accordance with Respondent's permit application.
5. Based on Findings of Fact Nos. 4-7 and Conclusion of Law No. 4, Staff proved that Respondent's agent, servant, or employee on July 1, 2000 refused to permit or interfered with an inspection of the licensed premises by an authorized representative of the Commission or peace officer in violation of TEX. ALCO. BEV. CODE §§ 11.61(b)(2) and 101.04.
6. Based on Findings of Fact Nos. 8-11 and Conclusion of Law No. 4, Staff proved that Respondent on July 1, 2000 possessed or permitted others to possess a narcotic on the licensed premises in violation of TEX. ALCO. BEV. CODE §§ 11.61(b)(7) and 104.01(9).

7. Based on Findings of Fact Nos. 12-15, Staff proved that Respondent on August 22, 2001 possessed or permitted others to possess equipment used or designed for administering a narcotic on the licensed premises in violation of TEX. ALCO. BEV. CODE §§ 11.61(b)(7) and 104.01(9).
8. Based on the foregoing, cancellation of Respondent's Mixed Beverage Permit MB-201475, Beverage Cartage Permit PE-457019 and Caterer's Permit CB-457020 is warranted.

Signed this 23<sup>rd</sup> day of January, 2002.



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B.L. PHILLIPS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS