

DOCKET NO. 591661

IN RE ANABEL MADRID HERNANDEZ
D/B/A THE DERRICK CLUB
PERMIT NO. BG462492

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§

BEFORE THE

TEXAS ALCOHOLIC

GRAY COUNTY, TEXAS
(SOAH DOCKET NO. 458-01-1431)

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of May, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brian Lee Phillips. The hearing convened and adjourned February 27, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 20, 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 No. BG462492 be **SUSPENDED**.

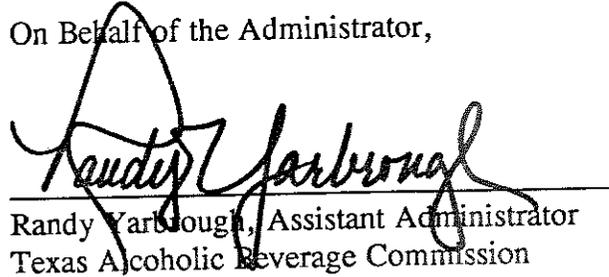
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,500.00** on or before the **15th day of August, 2001**, all rights and privileges under the above described permit will be **SUSPENDED** for a period of ten (10) days, beginning at **12:01 A.M.** on the **22nd day of August, 2001**.

This Order will become final and enforceable on **June 1, 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 11th day of May, May, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Brian Lee Phillips
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (806) 792-0149

Anabel Madrid Hernandez
d/b/a The Derrick Club
RESPONDENT
1124 Crane Road
Pampa, Texas 79065-5765
CERTIFIED MAIL NO. 7000 1530 0003 1927 4361

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Amarillo District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 591661

REGISTER NUMBER:

NAME: ANABEL MADRID HERNANDEZ

TRADENAME: THE DERRICK CLUB

ADDRESS: 2401 W. Alcock, Pampa, Gray County, Texas 79065-5765

DATE DUE: August 15, 2001

PERMITS OR LICENSES: BG462493

AMOUNT OF PENALTY: \$1,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 15TH DAY OF AUGUST 2001, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711**

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

DOCKET NO. 458-01-1431

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
	§	
VS.	§	OF
	§	
ANABEL MADRID HERNANDEZ	§	
D/B/A THE DERRICK CLUB	§	
PERMIT NO. BG-462492	§	
POTTER COUNTY, TEXAS	§	
(TABC CASE NO. 591661)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff or Commission) initiated this action against Anabel Madrid Hernandez dba The Derrick Club (Respondent) for allegedly engaging in or permitting an act of sexual contact intended to arouse or gratify sexual desires. Staff recommended Respondent's permits be suspended for thirty days or that a civil penalty of one hundred and fifty dollars per day be assessed against Petitioner. The Administrative Law Judge (ALJ) finds that Petitioner did prove by a preponderance of the evidence that Respondent engaged in or permitted an act of sexual contact intended to arouse or gratify sexual desires, that Respondent's employees engaged in conduct on the retail premises which is lewd, immoral, or offensive to public decency by engaging in lewd or vulgar entertainment or acts, and that Respondent conducted her business in a manner which warrants the suspension of her permit based on the general welfare, health, safety, peace, morals, safety, and sense of decency of the people. Respondent's permits should be suspended accordingly or the civil penalty be paid.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

The hearing on this matter convened on February 27, 2001, before ALJ B. L. Phillips, at the Justice of the Peace Courtroom, Amarillo, Potter County, Texas. Staff was represented by Christopher Burnett, Assistant Attorney General. Respondent appeared and represented herself. The record closed on February 27, 2001.

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notices of intention to institute enforcement action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. DISCUSSION

A. Testimony.

Beverly Chase, Gray County Sheriff's Department. Deputy Chase, accompanied by Deputy Dallas Hardin, initiated a standard inspection of the licensed premises on August 26, 2000 and observed one of the dancers leaving the stage area and going to the office with a male subject. She contacted the dancer, whom she identified as a Miss McDaniel, and then returned to the stage area where she had an unobstructed view of the stage. She then observed another dancer, later identified as Calinda Riley, as she got on stage and proceeded to dance and remove her clothing until she only was wearing shoes, hose and a thong. Riley then was joined on stage by a female who lay across the stage while Riley laid on top of her so that her face was on the female's crotch area and the female's face was on Riley's crotch area. Chase observed that Riley's face was on the female's crotch. Chase then observed that Miss McDaniel returned to the stage and that she assumed the same position with Riley with her face on McDaniel's crotch. Chase also observed male patrons coming up to Riley, rubbing up against her and putting money in the thong.

Dallas Hardin, Investigator for the District Attorney. On August 26, 2000, Mr. Hardin was working as a deputy for the Gray County Sheriff's Department. He and Deputy Chase initiated a standard inspection of the licensed premises on that date and he observed dancers on the licensed premises touching each other's genitals. He specifically observed a dancer named Miss McDaniel getting on stage with another dancer named Riley and assuming a "69" position where their faces were in each other's crotches. He then observed Riley assumed a "69" position with a female from the audience and with a male from the audience. He observed Riley to rub her face in the crotch of the male patron. It was his belief that the behavior he saw that night was sexual contact as defined by the Texas Penal Code.

Calinda Riley, a dancer at The Derrick Club. Riley testified that she never touched the crotch of anyone that night nor did they touch her crotch. She stated that she observed the "six inch" rule so that it only looked as if she was touching someone's crotch when in fact she was at least six inches apart from them.

B. Analysis.

Staff notified Respondent by letter dated January 12, 2001 of its contention that Respondent, her agent, servant or employee engaged in or permitted an act of sexual contact intended to arouse or gratify sexual desires and that this was a violation of TEX. ALCO. BEV. CODE §§ 61.71(a)(1) and 104.01(6) and 16 TEX. ADMIN. CODE § 35.31 (b). Pursuant to TEX. ALCO. BEV. CODE § 61.71(a)(1), the Commission may suspend or cancel a retail dealer's permit if it is found that the permittee violated a

provision of the Code during the existence of the permit sought to be suspended. Section 1.04(11) defines a "Permittee" as a person who is the holder of the permit or an agent, servant, or employee of that person. Section 104.01(6) states that 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 permitting lewd or vulgar entertainment or acts. 16 TEX. ADMIN. CODE § 35.31 (b) states that the permittee violates the place or manner provisions of the Code if the permittee commits a violation of any sexual offense described in Chapter 21 of the Penal Code. This rule relates to § 61.71(a)(17) of the Code which states that the Commission may suspend or cancel a retail dealer's permit if it is found that the permittee conducted the business in a place or manner which warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. PEN. CODE ANN. § 21.07 states that a person commits an offense if he knowingly engages in an act of sexual contact 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 act of sexual contact. "Sexual contact" is defined in § 21.01(2) as 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.

In this case, there is no dispute that Riley and McDaniel were the employees or agents of Respondent. Riley testified that she was one of the dancers on the licensed premises who was observed by Deputies Chase and Hardin on the night in question. The only evidence that Respondent presented to the Court was the testimony of Riley and no attempt was made to disclaim that she or McDaniel were agents, servants or employees of Respondent. The issue is whether the acts that the dancers engaged in that night were lewd, immoral or offensive to public decency and whether this constituted sexual contact. The only defense offered to prove that the acts observed by the Deputies were not lewd, immoral or offensive to public decency or that sexual contact did not occur was Riley's testimony that she observed a "six inch" rule by maintaining at least six inches between her body and the bodies of the others engaged in these acts and that it only appeared that contact was made.

The ALJ concludes that the acts described in the evidence were lewd, immoral or offensive to public decency and that sexual contact occurred between the person engaged in these acts. Miss Riley admitted that it may have appeared that she had physical contact with the other persons engaged in the described behavior since her hair could have partially covered her face and the other persons' crotches. It seems clear that she was at the very least attempting to simulate sexual contact by this behavior. The only purpose for simulating sexual contact, or actually engaging in sexual contact which the Court believes occurred, is to entertain the patrons in the licensed premises and causing them to be sexually aroused and titillated by the "show." This in itself is lewd, immoral or offensive to public decency. Deputy Hardin testified that he observed sexual contact occurring that night as it is defined in the Texas Penal

Code. Therefore Riley engaged in public lewdness as set forth in the Penal Code by engaging in sexual contact in a public place or by being reckless about whether another is present who will be offended or alarmed by such acts. Because of this finding, the ALJ finds Respondent violated TEX. ALCO. BEV. CODE § 61.71(a)(1) and (17) by conducting the business in a place or manner which warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. The ALJ further concludes that Respondent violated section 104.01 by permitting conduct on the premises of the retailer with is lewd, immoral, or offensive to public decency.

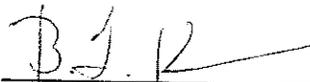
III. FINDINGS OF FACT

1. On November 22, 1999, the Texas Alcoholic Beverage Commission (the Commission) issued a Wine and Beer Retailer's Permit BG-462492 to Respondent for the premises known as The Derrick Club, 2401 W. Alcock, Pampa, Gray 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 January 12, 2001.
3. The hearing was convened on February 27, 2001, at Justice of the Peace Courtroom, 500 S. Fillmore, Amarillo, Potter County, Texas. Respondent appeared *pro se*. Christopher Burnett, Assistant Attorney General, represented Staff.
4. On August 26, 2000, Calinda Riley and Miss McDaniel were employed by Respondent as a dancers at the licensed premises.
5. On that date, Riley was on stage on the licensed premises when she removed her clothing until she was wearing only shoes, hose and a thong.
6. Riley was joined on stage by a female patron who lay across the stage while Riley lay on top of her so that Riley's face was on the patron's crotch and the patron's face was on Riley's crotch.
7. McDaniel got onto the stage and assumed the same position with Riley with Riley's face on McDaniel's crotch.
8. Riley later assumed the same position with a male patron and rubbed her face in his crotch.
9. These acts were intended to arouse the sexual desire of the patrons on the licensed premises.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 11.61 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this proceeding and to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 (Vernon 2000) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Service of proper and timely notice of hearing was effected upon Respondent pursuant to TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000).
4. Based upon Finding of Facts Nos. 4-9, Respondent's employees engaged in conduct on the retail premises which is lewd, immoral, or offensive to public decency by engaging in lewd or vulgar entertainment or acts.
5. Based on Finding of Facts Nos. 4-9, Respondent conducted her business in a manner which warrants the suspension of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people.
6. Based on Finding of Facts Nos. 4-9, Respondent's agent, servant, or employee engaged in sexual contact while on the licensed premises.
5. Based on the foregoing, suspension of Respondent's Wine and Beer Retailer's Permit BG-462492 for a period of thirty days is warranted.
7. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, Respondent should be permitted to pay a civil penalty of one hundred and fifty dollars for each day that the permits would be suspended.

SIGNED this 20th day of April, 2001.



B.L. PHILLIPS

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS