DOCKET NO. 592440

IN RE FELIBERTO ALEGRIA	§	BEFORE THE
D/B/A TITO'S	§	
PERMIT NO. BG297126	§	
LICENSE NO. BL297127	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2072)	§	BEVERAGE COMMISSION

ORDER

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

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened and adjourned on April 20, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 13, 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. BG297126 and License No. BL297127 are hereby **CANCELED FOR CAUSE.**

This Order will become final and enforceable on August 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 July, 2001.

On Behalf of the Administrator,

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Feliberto Alegria
d/b/a Tito's
RESPONDENT
1645 Corrin
Fort Worth, Texas 76131
CERTIFIED MAIL NO. 7000 1530 0002 0152 7322

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Fort Worth District Office

DOCKET NO. 458-01-2072

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
VS.	§	OF
	§	
FELIBERTO ALEGRIA D/B/A TITO'S	§	
TARRANT COUNTY, TEXAS	§	
(TABC CASE NO. 592440)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought cancellation of the wine and beer permits held by Feliberto Alegria d/b/a Tito's (Respondent) because Respondent permitted others to possess drug paraphernalia on the licensed premises. This proposal finds that the Staff's allegation is true. The Administrative Law Judge (ALJ) recommends the permits be canceled.

I. PROCEDURAL HISTORY & JURISDICTION

On January 11, 2001, Staff sent Respondent a complaint alleging that Respondent permitted others to possess drug paraphernalia on the licensed premises. This matter was referred to the State Office of Administrative Hearings (SOAH). On April 20, 2001, a public hearing was convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission's (TABC) Legal Division. Respondent appeared in person. The record was closed on April 20, 2001. Because notice and jurisdiction were not contested issues, those matters are addressed only in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Applicable Law

A beer permittee (including his employees) may not possess or allow another to possess narcotics or "any equipment used or designed for the administering of a narcotic" on the licensed premises. TEX. ALCO. BEV. CODE ANN. § 104.01(9)(Vernon 2001) (the Code). The TABC may cancel or suspend a permit if "the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency." § 11.67(b)(7) of the Code. A permittee violates § 11.67(b)(7) of the Code if "any narcotics related offense described in Chapters 481 and 483 of the Texas Health and Safety Code" is committed by "any person" on the licensed premises, and "when the permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense." 16 TEX. ADMIN. CODE § 35.31(a), (b)(2)&(3), & (c)(15).

Under the Health and Safety Code,

> A person commits an offense if the person knowingly or intentionally uses or possesses with intent to use drug paraphernalia to . . . test, analyze, pack, repack, store, contain, or conceal a controlled substance. . . .

TEX. HEALTH & SAFETY CODE ANN. §481.125(a)(Vernon 2001). "Drug paraphernalia" means

> equipment, a product, or material that is used or intended for use in . . . testing, analyzing, packaging, repackaging, storing, containing, or concealing a controlled substance. . . . The term includes . . . a scale or balance used or intended for use in weighing or measuring a controlled substance; [and] . . . a capsule, balloon, envelope, or other container used or intended for use in packaging small quantities of a controlled substance.

Id. §481.002(17)(E)&(I). "Possession" means actual care, custody, control, or management. *Id.* §481.002(38).

B. Evidence

Tito's is located at 2137 Jacksboro Highway, Fort Worth, Tarrant County, Texas. The premises are in one large room. Patrons enter through the front door. The horseshoe-shaped bar is to the right of the front door. Table seating is provided between the front door and the bar. Pool tables are located to the right of the seating area. The horseshoe bar is entered near the pool tables to the right. On September 6, 2000, Fort Worth Police Officer James Reynolds and Officers Martinez and Roedke made a routine bar check at Tito's. The three officers entered Tito's through the front door. Roedke blocked the front door. Officer Martinez went immediately to and inspected the restrooms and then inspected the permit board. Officer Reynolds went directly to and entered the bar area.

Officer Reynolds confronted the bartender, later identified as Ramon Vasquez Jr. Officer Reynolds requested Mr. Vasquez to produce identification and a health card. Officer Reynolds searched around the closed end of the bar while Mr. Vasquez obtained the items he had requested. Mr. Vasquez was between him and the open end of the bar near a trash can. Officer Reynolds and Mr. Vasquez then left the bar and stood by the front door. Three people were playing pool at a table near the open end of the bar. Their drinks and possessions were on the bar. Respondent was in the premises sitting at a table. Officer Reynolds did not see anyone approach the bar after he entered the premises. Officer Martinez happened to look in the trash can behind the bar. He saw and retrieved a 20-dollar bill from the trash can.

Officer Reynolds went behind the bar and examined the trash can. He found a plastic scale and a 4 by 6 inch plastic bag on top of the garbage in the can. Officer Reynolds recognized the scale as one commonly sold in "head shops." This type of scale is used by a drug purchaser to check the weight of narcotics like crack cocaine, cocaine or methamphetamine being purchased. The scale had a useable amount of what Officer Reynolds believed was cocaine adhering to it. The 4 by 6 inch bag

contained a number of ½ by ¾ inch plastic baggies. Officer Reynolds identified the small baggies as commonly used to package narcotics for sale.

Officer Reynolds testified the trash can was not accessible to anyone outside of the horseshoe bar, unless the person stood and leaned over the bar. The trash can was accessible to Mr. Vasquez. While Officer Reynolds was behind the bar with Mr. Vasquez, Mr. Vasquez was between him and the trash can and had the best access to the can. Mr. Vasquez did not claim that someone else had put the scale and baggie in the trash can. Respondent was sitting in the bar with an unobstructed view of the bar. Respondent did not testify or claim to have observed any person, such as a customer, place anything in the trash can. Officer Reynolds did not see Mr. Vasquez place the items in the trash can and consequently did not believe he had probable cause to arrest Mr. Vasquez. Officer Reynolds asserted that it was his strong belief that Mr. Vasquez had placed the items in the can.

TABC Agent Marvin G. Montero testified concerning an incident at Tito's in November of 1999. Agent Montero entered Tito's and proceeded to the men's room. He observed a man "laying out a line of cocaine" preparatory to its use. Agent Montero arrested the man for possession of narcotics. Agent Montero testified that on November 26, 2000, Respondent served a seven-day suspension of his permit for an unrelated drug incident. On September 15, 2000, TABC Agents King and O'Cayce made an investigative visit to Tito's. They found additional ½ by ¾ inch plastic baggies in the premises, as well as gambling paraphernalia. Mr. Vasquez was working as the bartender on September 15, 2000.[1] Agent Montero testified that Respondent had a currently issued beer and wine permit and a beer and wine late hours permit which were in effect on September 6, 2000. Agent Montero added that permittees must control the licensed premises and actively monitor their employees.

C. Analysis, Conclusion, and Recommendation

The scale and the ½ by ¾ inch plastic baggies found by Officer Reynolds in the trash can behind the bar at Tito's were drug paraphernalia. Officer Reynolds, an officer of nine years experience, unequivocally described the items as "used or intended for use in . . . processing, preparing, packaging, repackaging, storing, or containing" narcotics. TEX. HEALTH & SAFETY CODE ANN.§481.002(17). In particular, "a scale or balance used or intended for use in weighing or measuring a controlled substance," and "a capsule, balloon, envelope, or other container used or intended for use in packaging small quantities of a controlled substance" are specifically included in the statutory definition of drug paraphernalia. *Id.* §481.002(17)(E)&(I).

Mr. Vasquez was in possession of the drug paraphernalia on the licensed premises. "Possession" means actual care, custody, control, or management. *Id.* §481.002(38). He was the only person behind the bar when the police entered Tito's. After the police entered Tito's no other person aside from Mr. Vasquez had access to the trash can. Any other person leaning over the bar to reach

[1] Agent Montero's testimony concerning the November of 1999 incident, the November of 2000 suspension, and the King and O'Cayce discovery were offered by the Staff and admitted by the ALJ for a limited purpose. The incidents were offered as aggravating circumstances to be weighed in deciding whether Respondent's permits should be canceled, suspended, or a monetary penalty imposed.

the trash can or approaching the rear of the bar would have been observed by the police officers. Mr. Vasquez had access to the trash can when Officer Reynolds was searching the bar. There was no reason for the paraphernalia to be placed into the trash can before the officers entered the bar and very good reasons for the paraphernalia to be dumped after they did. Mr. Vasquez had actual control and management of the paraphernalia. Mr. Vasquez committed a narcotics related offense described in Chapters 481 and 483 of the Texas Health and Safety Code *Id.* §481.125(a)(Vernon 2001); 16 TEX. ADMIN. CODE § 35.31(b)(2) & (c)(15).

Respondent "knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense." 16 TEX. ADMIN. CODE § 35.31(b)(3). Respondent is the permittee. Respondent did deny, but did not testify, that he knew Mr. Vasquez was in possession of the paraphernalia. Respondent was present at the premises and had Mr. Vasquez within his sight when the paraphernalia had to have been placed in the trash can. The ALJ infers from the state of the record that the paraphernalia was swept into the trash can from the top of the bar. The ALJ infers that the paraphernalia was swept into the trash can because of the 20-dollar bill found in the trash can by Officer Martinez. The presence of the 20-dollar bill indicates the bill and the paraphernalia were swept into the trash can hastily because they were in plain view on the bar. The ALJ infers from the state of the record that Respondent was aware that Mr. Vasquez was in possession of drug paraphernalia and took no steps to prevent the offense. The "place or manner in which the [Respondent conducted] his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency." § 11.67(b)(7) of the Code; 16 TEX. ADMIN. CODE § 35.31(a). Mr. Vasquez possessed narcotics and "equipment used or designed for the administering of a narcotic" on the licensed premises. Respondent allowed Mr. Vasquez to possess them on the licensed premises. § 104.01(9) of the Code.

If the TABC is authorized to suspend a license under the Code, it is required to give the permittee an opportunity to pay a civil penalty instead. § 11.64(a) of the Code. The TABC has adopted rules to determine when a suspension may be imposed without affording the permittee a chance to pay a civil penalty. *See* 16 TEX. ADMIN. CODE § 37.61. The TABC must determine what type of permit is in question and whether the sale of alcoholic beverages "constitutes the primary or partial source" of the permittee's business. § 37.61(b)(1) of the Code. The type of violation must be considered, § 37.61(b)(2)of the Code, and the permittee's past record. § 37.61(b)(3) of the Code. The TABC must also consider "aggravating or ameliorating circumstances" such as whether the permittee acted intentionally or recklessly, the "number, kind and frequency" of the permittee's violations, whether any person was killed or injured as a result of the violation, and whether the "character and nature" of the permittee's operation "are reasonably calculated to avoid violations." § 37.61(c) of the Code.

Under certain circumstances, the TABC may relax a provision of the Code "relating to the suspension or cancellation of the permit" and assess a sanction that the TABC finds is just under the circumstances. § 11.64(b) of the Code. The TABC has to find "that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence."§ 11.64(c) of the Code.

Under the TABC's "standard penalty chart" a violation of § 104.01 involving the permittee or an employee calls for a suspension of 10 to 15 days for a first offense, a suspension of 20 to 25 days for a second offense, and a minimum suspension of 30 days or cancellation for a third offense. *See* 16 TEX. ADMIN. CODE § 37.60. The standard penalty chart is not binding. The facts developed in the record are the determining factors "as to the sufficiency of the penalty assessed." 16 TEX. ADMIN. CODE § 37.60(g).

At the hearing, Agent Moreno and the Staff recommended cancellation of Respondent's permits. The TABC is not required to afford Respondent an opportunity to pay a civil penalty rather than suspending Respondent's permit. Respondent had a currently issued beer and wine permit and a beer and wine late hours permit. The sale of alcoholic beverages is the primary source of Respondent's business. Respondent allowed one of his employees to possess a narcotic and drug paraphernalia in the bar. In the past, Agent Montero found and had to use physical force upon a customer preparing to use drugs in the men's room, and Respondent has already served a seven-day suspension for a drug related violation. Respondent has at best acted with a reckless disregard of what happens in his establishment. These drug violations are frequent. The risk of death or injury relating to the sale or use of drugs is generally recognized. Respondent does not appear to have taken steps to avoid such violations, as is witnessed by the violations found by TABC Agents King and O'Cayce on September 15, 2000. Respondent does not exercise due diligence in controlling his premises or employees. The ALJ recommends cancellation of Respondent's permits.

IV. FINDINGS OF FACT

1. On January 11, 2001, the Staff of the Texas Alcoholic Beverage Commission (Staff) sent Respondent a complaint alleging that Respondent permitted others to possess drug paraphernalia on the licensed premises.

2. On March 13, 2001, Staff issued a notice of hearing notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.

3. The hearing was held on April 20, 2001, in Fort Worth, Tarrant County, Texas, before Robert F. Jones Jr., an administrative law judge with the State Office of Administrative Hearings (SOAH). Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission's (TABC) Legal Division. Division. Respondent appeared in person. The record was closed on April 20, 2001.

4. Respondent has a currently issued beer and wine permit and a beer and wine late hours permit. The permits were in effect on September 6, 2000.

5. Respondent's licensed premises are located at 2137 Jacksboro Highway, Fort Worth, Tarrant County, Texas.

6. Ramon Vasquez Jr. was working for Respondent as a bartender in the licensed premises on September 6, 2000.

7. Respondent was present in the licensed premises on September 6, 2000.

8. Mr. Vasquez was in possession of a plastic scale and a 4 by 6 inch plastic bag containing a number of ½ by ¾ inch plastic baggies.

9. The scale was one commonly used to measure amounts of crack cocaine, cocaine or methamphetamine by a purchaser to check the weight of the narcotics being purchased.

10. The scale had a useable amount of cocaine adhering to it.

11. The ½ by ¾ inch plastic baggies are commonly used to contain narcotics.

12. The scale and plastic baggies were drug paraphernalia.

13. Respondent was aware that Mr. Vasquez was in possession of drug paraphernalia in the licensed premises.

14. Respondent took no steps to prevent Mr. Vasquez from being in possession of drug paraphernalia in the licensed premises.

15. The sale of alcoholic beverages is the primary source of Respondent's business.

16. Respondent has had drug related violations both before and after September 6, 2000.

17. Respondent does not exercise due diligence in controlling his premises or employees.

V. CONCLUSIONS OF LAW

4. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).

5. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).

6. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).

7. Based on the foregoing findings, Mr. Vasquez committed a narcotics related offense described in Chapters 481 and 483 of the Texas Health and Safety Code. TEX. HEALTH &

SAFETY CODE ANN. §481.125(a)(Vernon 2001); 16 TEX. ADMIN. CODE § 35.31(b)(2) & (c)(15).

8. Based on the foregoing findings, Respondent "knew or, in the exercise of reasonable care, should have known of [Mr. Vasquez's] offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense." 16 TEX. ADMIN. CODE § 35.31(b)(3).

9. Based on the foregoing findings and conclusions, the "place or manner in which the [Respondent conducted] his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency." § 11.67(b)(7) of the Code; 16 TEX. ADMIN. CODE § 35.31(a).

10. Based on the foregoing findings and conclusions, Mr. Vasquez possessed narcotics and "equipment used or designed for the administering of a narcotic" on the licensed premises. Respondent allowed Mr. Vasquez to possess them on the licensed premises. § 104.01(9) of the Code.

11. Respondent's beer and wine permit and a beer and wine late hours permit should be canceled.

SIGNED June 13, 2001.

Robert F. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS