

DOCKET NO. 594400

IN RE KENNETH OSITA ANAGBOR	§	BEFORE THE
D/B/A HOMEBOY STORE	§	
PERMIT NO. Q-488763	§	
LICENSE NO. BF440767	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-3868)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of January 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 November 2, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 2, 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.

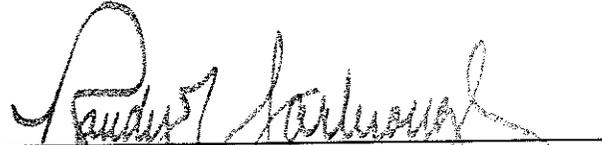
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. Q-488763 and License No. BF440767 are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on February 18, 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 28th day of January 2002.

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

Kenneth Osita Anagbor
d/b/a Homeboy Store
RESPONDENT
5038 E. Rosedale
Fort Worth, Texas 76105
CERTIFIED MAIL NO. 7000 1530 0003 1929 1856

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Fort Worth District Office
Licensing Division

DOCKET NO. 458-01-3868

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
	§	
VS.	§	OF
	§	
KENNETH OSITA ANAGBOR D/B/A	§	
HOMEBOY STORE	§	
TARRANT COUNTY, TEXAS	§	
(TABC CASE NO. 594400)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought cancellation of the wine and beer permits held by Kenneth Osita Anagbor d/b/a Homeboy Store (Respondent) because he permitted a breach of the peace on his 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 May 17, 2001, Staff sent Respondent a complaint alleging that Respondent permitted a breach of the peace on the licensed premises. This matter was referred to the State Office of Administrative Hearings (SOAH). On November 2, 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 closed on November 2, 2001. Because notice and jurisdiction were not contested issues, those matters are addressed in the Findings of Fact and Conclusions of Law.

II. DISCUSSION**A. Applicable Law**

The TABC may cancel a wine only package store permit and a retail beer dealer's off-premise license if it finds that a breach of the peace has occurred on the licensed premises or on premises under the licensee's control and that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 24.11, 61.71(a)(1), & 69.13(Vernon 2002) (the Code).

B. Evidence

Respondent's licensed premises are located at 5038 East Rosedale, Fort Worth, Tarrant County, Texas. Respondent holds wine only package store permit Q488763 and retail beer dealer's off-premise license BF440767. On March 24, 2001, Respondent shot Ledeol Sigler and Terral

Matthews with a shotgun. The shooting occurred just outside of the licensed premises.

1. Mr. Sigler's Testimony

Mr. Sigler and Mr. Matthews had been drinking at a bar in the same general area as Respondent's premises. Mr. Sigler had an argument with another unnamed man at the bar concerning the use of the bar's pool table. Mr. Sigler and Mr. Matthews left the bar and went to Respondent's premises. Mr. Sigler went inside to purchase cigarettes and Mr. Matthews made a call on an outside pay telephone. Mr. Sigler testified that Respondent for no apparent reason pushed him out of the store. Earnestine Wiley, Trenton Parrish, and Akenne Obinak who were present in the store testified that Mr. Sigler was intoxicated, and was profane and abusive to Ms. Wiley. They stated that after Respondent made repeated requests that Mr. Sigler leave, which Mr. Sigler ignored, Respondent physically ejected Mr. Sigler.

Mr. Sigler testified that once he was out of the store a man he did not recognize drove up in a car and put a gun to his head. Mr. Sigler stated he talked the man out of committing any violence, and the man left. It was Mr. Sigler's belief the unknown man was a confederate of Respondent. He claimed that Respondent then appeared in the doorway of the store and began shooting the shotgun at him.

2. Mr. Matthews Testimony

Mr. Matthews testified he heard Respondent tell Mr. Sigler to leave the store, and saw Respondent push Mr. Sigler out of the store. Mr. Matthews stated Mr. Sigler picked up a "stick" sufficiently large to cause an injury and threatened Respondent. Mr. Matthews claimed that the man with whom Mr. Sigler had argued at the bar appeared and began threatening Mr. Sigler and the general area with a handgun. The man discharged the weapon "eight" times. Mr. Matthews said that Respondent then fired his shotgun three times. Mr. Sigler and Mr. Matthews were within 10 to 15 feet of Respondent when he first fired.

3. Officer Salazar's Testimony

Fort Worth Police Officer J. R. Salazar interviewed Mr. Sigler at the hospital. Mr. Sigler identified Respondent as the person who shot him. Mr. Sigler did not tell Officer Salazar about the man who allegedly held a gun to his head, although Mr. Matthews did disclose this to him. No one mentioned the "stick" that Mr. Sigler allegedly waved. Officer Salazar believed that Respondent had no justification to fire the shotgun, and that he used excessive force.

4. Detective Johnson's Testimony

Fort Worth Detective B. C. Johnson appeared at the premises just after the shooting. He detained Respondent after a struggle. Detective Johnson found a .25 caliber pistol in Respondent's back pocket. He found a shotgun behind a counter of the store and expended shotgun shells outside the store. Detective Johnson testified that Respondent did not indicate why he had fired the shotgun.

Respondent did not claim to Detective Johnson that he was reacting to a robbery or a threat.

5. Agent Curry's Testimony

TABC Agent Nathan Curry investigated the shooting scene. He saw three shotgun shells collected. He did not see, and testified that no police report mentioned, either a big stick or expended pistol cartridges. He testified he saw no evidence, such as bullet holes, that a pistol had been discharged. Agent Curry recommended that Respondent's wine only package store permit Q488763 and retail beer dealer's off-premise license BF440767 be canceled for cause.

C. Analysis, Conclusion, and Recommendation

Respondent's permit and license may be suspended if the Staff has proved:

- a breach of the peace occurred;
- on Respondent's the licensed premises or on premises under the control of Respondent;
- the breach of the peace was not beyond the control of the Respondent; and
- the breach of the peace resulted from his improper supervision of persons permitted to be on his licensed premises or on premises under his control.

Did Respondent commit a breach of the peace?

The term breach of the peace to means an act that "disturbs or threatens to disturb the tranquility enjoyed by the citizens." *Ross v. State*, 802 S.W.2d 308, 315 (Tex.App.-Dallas 1990). "Actual or threatened violence is an essential element of a breach of the peace. Either one is sufficient to constitute the offense." *Kunkel v. State*, 46 S.W.3d 328,330 (Tex.App.-Houston [14th Dist.] 2001). Respondent injured two persons by shooting them with a shotgun. Respondent did actual violence to Ledeol Sigler and Terral Matthews. Respondent committed a breach of the peace.

Did the breach of the peace occur on Respondent's licensed premises or on premises under the control of Respondent?

The actions that lead to the shooting of Mr. Sigler and Mr. Matthews began inside the licensed premises. They continued outside the premises onto the parking lot area in front of the premises. The area where Mr. Sigler and Mr. Matthews were shot was one that Respondent asserted control over when he stepped out of the premises and used the shotgun. As near as the evidence can pinpoint Respondent was just outside the front door of his store. He was standing on or had just stepped from the step leading inside his store. No evidence suggested that prior to firing the shotgun Respondent moved any appreciable distance from the front door of the store. The evidence is that Respondent fired the shotgun in the parking area immediately in front of his store. The breach of the peace occurred on Respondent's licensed premises and on premises under the control of

Respondent.

Was the breach of the peace beyond the control of the Respondent?

The choice to fire the shotgun three times was under the exclusive control of Respondent.

Did the breach of the peace result from Respondent's improper supervision of persons permitted to be on his licensed premises?

From the evidence, Respondent's expulsion of Mr. Sigler from the store was appropriate. Mr. Sigler was acting in such a manner that his continued presence in the store might have, itself, constituted a breach of the peace. What happened after Mr. Sigler was expelled from the store is a matter of disagreement and rancor between the participants. Some of the witnesses had been drinking before the shooting. It is possible that some of the witnesses had been drinking before testifying at the hearing.¹ It is unquestioned that Respondent fired his shotgun three times, and struck Mr. Matthews once, injuring him in three places. Mr. Sigler was struck on two separate occasions, the second time in the back as he fled the scene. The person that Respondent did not adequately supervise was Respondent himself. Assuming that the unknown man had left the scene prior to Respondent stepping out of the store with his shotgun, and assuming that Mr. Sigler was brandishing a stick at Respondent (although there is no evidence for it), firing three shots, one of which hits an innocent person, is excessive. Assuming that the unknown man was on the scene when Respondent stepped out of the store with his shotgun, and assuming that the unknown man fired eight times (although there is no evidence for it), Respondent appeared to have shot at Mr. Sigler and Mr. Matthews, hitting them and missing the armed man. Leaving aside Mr. Sigler's culpability, Mr. Matthews was an innocent injured by Respondent's poor marksmanship. In either event, the breach of the peace resulted from Respondent's poor self-control.

The ALJ recommends cancellation of Respondent's wine only package store permit Q488763 and retail beer dealer's off-premise license BF440767.

III. FINDINGS OF FACT

1. On May 17, 2001, the Staff of the Texas Alcoholic Beverage Commission (Staff) sent Respondent a complaint alleging that Respondent had permitted a breach of the peace on Respondent's licensed premises.
2. On August 23, 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.

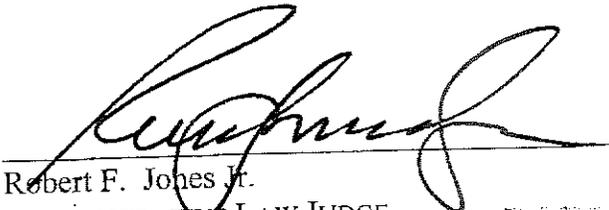
¹ Although not in the record, other persons at the hearing reported to the ALJ that some of the witnesses had the smell of an alcoholic beverage on their breaths. The demeanor of some witnesses was consistent with intoxication.

3. The hearing was held on November 2, 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. Respondent appeared in person. The record closed on November 2, 2001.
4. TABC has issued wine only package store permit Q488763 and retail beer dealer's off-premise license BF440767 to Respondent.
5. Respondent's licensed premises are located at 5038 East Rosedale, Fort Worth, Tarrant County, Texas.
6. On March 24, 2001, Respondent shot Ledeol Sigler and Terral Matthews with a shotgun. The shooting occurred just outside of the licensed premises.
7. Prior to the shooting, Respondent had expelled Mr. Sigler from the licensed premises for good cause.
8. Prior to the shooting, Mr. Matthews had not entered the licensed premises and was using a pay telephone just outside the front door to Respondent's premises.
9. Respondent stepped out of his licensed premises and onto the area immediately in front of his premises debouching onto the parking lot.
10. The reason why Respondent fired the shotgun was not proved.
11. Respondent shot the gun in the direction of Ledeol Sigler and Terral Matthews at a distance of approximately 10 to 15 feet.
12. Respondent shot Mr. Matthews unintentionally.
13. Respondent took no steps to avoid shooting Mr. Matthews.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. 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 2002).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2002).
4. Based on the foregoing findings, Respondent committed a breach of the peace.
5. Based on the foregoing findings, the breach of the peace occurred on Respondent's licensed premises and on premises under the control of Respondent.
6. Based on the foregoing findings, the breach of the peace caused by the firing of the shotgun three times was under the exclusive control of Respondent.
7. Based on the foregoing findings, the breach of the peace resulted from Respondent's improper supervision of himself.
8. Based on the foregoing findings and conclusions, Respondent's wine only package store permit Q488763 and retail beer dealer's off-premise license BF440767 may be canceled. §§ 11.61(b)(2), 24.11, 61.71(a)(1), & 69.13 of the Code.
9. Respondent's wine only package store permit Q488763 and retail beer dealer's off-premise license BF440767 should be canceled.

SIGNED January 2, 2002.


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