

DOCKET NO. 596509

IN RE JOSE LUIS ALCARAZ
D/B/A EL TENAMPA NIGHT CLUB
PERMIT NO. BG-442489 & BL-442490

HARRIS COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-1786)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of August, 2002 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on April 4, 2002, and adjourned the same day and the record was left open through April 25, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 24, 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. Exceptions to the Proposal were filed by the Respondent. No reply was filed by the Petitioner.

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.

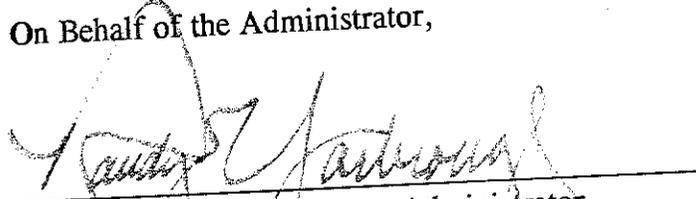
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit and License Nos. BG-442489 & BL-442490 are hereby **CANCELLED**.

This Order will become final and enforceable on September 2, 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 12th day of August, 2002.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator,
Texas Alcoholic Beverage Commission

DAB/yt

James G. Glass
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Jose Luis Alcaraz
d/b/a El Tenampa Night Club
RESPONDENT
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Administrative Law Judge Rex Shaver
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Houston District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

V.S.

JOSE LUIS ALCARAZ
D/B/A EL TENAMPA NIGHT CLUB
PERMIT NOS. BG-442489 & BL-442490
HARRIS COUNTY, TEXAS
(TABC CASE NO. 596509)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (TABC) brought this action against Jose Luis Alcaraz d/b/a El Tenampa Night Club (Respondent), a licensee of the Commission, alleging that on or about August 3, 2001, the Respondent, his agent, servant or employee, delivered or permitted others to deliver a narcotic on the licensed premises and by doing so violated TEX. ALCO. BEV. CODE § 61.7 (a)(17) and on the same date Respondent, his agent, servant or employee, possessed or permitted others to possess a narcotic on the licensed premises and by doing so violated TEX. ALCO. BEV. CODE § 104.01 (9). The Staff requested that all of Respondent's permits be canceled. The ALJ finds sufficient evidence that the Respondent violated TEX. ALCO. BEV. CODE §§ 61.7 (a)(17), and 104.01 (9) and recommends that the Respondent's permits be suspended.

I. PROCEDURAL HISTORY

By Notice of Hearing dated February 19, 2002 and Second Amended Notice of Hearing dated March 25, 2002 the Staff notified Respondent that a hearing would be held to determine whether disciplinary action should be taken against the Respondent's permit based on an allegation that on or about August 3, 2001, the Respondent, his agent, servant or employee delivered or permitted others to deliver a narcotic and permitted others to possess a narcotic on the licensed premises. The Staff asserted that such acts constituted grounds for suspension or cancellation of both the Wine and Beer Retailer's Permit and On-Premises Late Hours License held by the Respondent.

On April 4, 2002, the hearing commenced, pursuant to the Notice of Hearing, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Mr. Dewey Brackin, of the TABC Legal Section. The Respondent, was represented by his attorney Mr. James G. Glass. The hearing was concluded on April 4, 2002 and the record was left open through April 25, 2002 for the filing of briefs and proposed findings of facts.

II. JURISDICTION AND NOTICE

The Commission has jurisdiction over this matter pursuant to §§ 6.01 and 11.61 of the Code. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Chapter 2003.

The Respondent is the holder of Wine and Beer Retailer's Permit BG-442489 and Retail Dealer's On-Premise Late Hours License BL-442489 and held that permit and license on the date of the alleged violation. On February 19, 2002 the Notice of Hearing in this matter was mailed to the Respondent at 7808 Keller Street, Houston, Texas 77012-3635. Respondent received the notice pursuant to TEX. GOV'T CODE ANN. Chapter 2001.

III. REASONS FOR DECISION

A. Legal Standard

The Commission may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Code or a rule adopted by the Commission. TEX. ALCO. BEV.CODE ANN. §§ 6.01(b), 11.61(b)(2), and 61.71(a)(17)

Sec. 6.01 (b) of the Texas Alcoholic Beverage Code: "*A license or permit issued under this code is a purely personal privilege and is subject to revocation or suspension if the holder is found to have violated a provision of this code or a rule of the commission.*"

Sec. 11.61(b) of the Texas Alcoholic Beverage Code: "*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 are true. . . .(2) the permittee violated a provision of this code or rule of the commission.*"

Sec. 61.71(a) of the Texas Alcoholic Beverage Code. "*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: . . .(17) conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people.*"

Sec. 104.01 (9) of the Texas Alcoholic Beverage Code. "*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, but not limited to, any of the following acts: . . .(9) possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.*"

B. Evidence

1. TABC's Evidence

TABC Exhibit 1: Affidavit from Licensing Department Director for the TABC.

TABC Exhibit 2: Certification of Records Re: J. Luis Alcaraz, Lab Number L01-11048.

TABC Exhibit 3: Certification of Records Re: Juan Cuellar, Felipe Escobar, Lab Number L01-11045.

Witness - Antonio Gracia

Antonio Gracia testified that he was a Texas peace officer employed by the Houston Police Department Narcotics squad on the night of August 3, 2001. In that capacity he and his partner Steven Kwiatowski were undertaking an undercover "buy/bust" operation in Houston, Texas. The witness said he was wearing a t-shirt and shorts along with a ball cap, because this operation required him to attempt to purchase narcotics and when successful cause the sellers to be arrested. At approximately 10:00 p.m. on the night of August 3, 2001 he and his partner went to the parking lot of the El Tenampa Night Club located at 12534 Market Street in the northeast part of Houston. At that location they exited their vehicle and approached the suspect Juan Cuellar. The witness asked Juan Escobar if he knew the whereabouts of an individual who had helped him buy "soda" or cocaine in the past. Mr. Cuellar stated that he had a friend inside so they went with him inside the club. Mr. Cuellar went to Felipe Escobar who was working behind the bar along with Luis Alcaraz. The witness and his partner observed Mr. Cuellar speaking with Mr. Escobar. Mr. Cuellar motioned for the witness and his partner to follow him to the men's restroom. In the restroom the witnesses partner Mr. Kwiatowski gave Mr. Cuellar two (2) marked twenty-dollar bills. To this amount Mr. Cuellar added his own twenty-dollar bill explaining that he also wished to buy some cocaine.

The witness and his partner left the restroom and watched from 5 to 10 feet away as Mr. Cuellar gave Mr. Escobar the three (3) twenty-dollar bills and received from Mr. Escobar three (3) bottle caps. The witness and his partner went outside to the parking lot and again met with Mr. Cuellar who gave them two (2) of the bottle caps. Mr. Cuellar opened one of the crushed bottle caps and showed the witness and Mr. Kwiatowski that it contained a bag containing a white powder that the witness believed to be cocaine. Mr. Cuellar then re-closed the bottle cap and went to his car and left the parking lot. The witness went to his car and used his radio to broadcast a description of Mr. Cuellar, his vehicle and his direction of travel. The marked units stopped Mr. Cuellar at 1000 Federal Road in Houston. The witness and his partner then arranged that they would return to the inside of La Tenampa Night Club and watch Mr. Escobar to see if he tried to dispose of any thing and confirm he was present when the uniformed officers arrived. The witness and his partner were seated at the bar southwest corner of the bar so they could observe Mr. Escobar. The witness then used a cell phone to call for the marked units to enter the club.

The marked units entered the club and proceeded to the bar. The witness continued to watch Mr. Escobar while uniformed officers went behind the bar, passed by Mr. Alcaraz, and grabbed Mr. Escobar. At that time the witness saw Mr. Alcaraz put his hand into his right front pants pocket and produce two (2) bottle caps which were crimped over in a manner consistent with the bottle caps provided by Mr. Escobar. He was standing about 5 feet from Mr. Alcaraz when he made these observations. The witness then broke cover and told a uniformed officer to handcuff Mr. Alcaraz and arrest him for possession of contraband. On cross examination the witness demonstrated that Mr. Alcaraz pulled his hand out of his pocket and looked at his hand to see what he was holding. The witness stated that he saw only bottle caps and no powder. Prior to this observation he assumed that Mr. Alcaraz was a back-up bartender and had no reason to target him as a suspect in any drug transaction. The witness then left the club and returned to his office.

Witness - Steven Kwiatowski

Steven Kwiatowski testified that he was a Texas peace officer employed by the Houston Police Department Narcotics squad on the night of August 3, 2001. In that capacity he and his partner Antonio Gracia were undertaking an undercover "buy/bust" operation in Houston, Texas. This witness's testimony agreed and confirmed the testimony of the witness Antonio Gracia. However, the witness stated that he did not see Mr. Alcaraz pull any bottle caps from his pockets. This witness gave the additional information that he prepared the "marked bills" given to Mr. Cuellar by copying down the serial numbers and giving that information to a supervisor. The witness stated that he was given possession of all the drugs seized as evidence. He took this evidence to the Houston Police Department Crime Lab and submitted the drugs from both the Cuellar/Escobar arrest and the drugs from the Alcaraz arrest under Incident # 105356801.

Witness - Thomas Chapman

Thomas Chapman testified that he is a Texas peace officer employed by the Houston Police Department Narcotics squad. In that capacity he went to the El Tenampa Night Club on the night of August 3, 2001. His part in the "buy/bust" was to take part in the arrest after the sale of drugs was confirmed by Gracia and Kwiatowski. He arrested the subject Cuellar. He was then called into the club to arrest one of the bartenders pointed out by Gracia and Kwiatowski. He went into the club and behind the bar were both Mr. Escobar and Mr. Alcaraz. His attention was on Mr. Escobar because he had been pointed out as having taken part in the sale of drugs. Mr. Alcaraz was standing away from Mr. Escobar. Officer Gracia told the witness to arrest Mr. Alcaraz and retrieve the narcotics from his pants pocket. The witness did not see Mr. Alcaraz remove anything from his pocket. He handcuffed Mr. Alcaraz and removed two (2) bottle caps from Mr. Alcaraz's front right pants pocket. These bottle caps were folded in half and contained two (2) small packets of powder cocaine.

The witness further testified that he recovered money from Mr. Escobar which included the two (2) twenty-dollar bills with serial numbers matching the numbers recorded by Officer Kwiatowski prior to the purchase from Mr. Escobar. Mr. Alcaraz told the officers at the scene that he did have a vehicle in the parking lot. He was asked if there were any narcotic related items in the vehicle and he said there was not. Mr. Alcaraz gave them permission to look inside his vehicle. This

conversation with Mr. Alcaraz was conducted in English. No written consent to search was requested by the officers. A K-9 unit narcotics dog alerted to the center console area of the vehicle. During the search of that area approximately thirty (30) folded bottle caps were discovered. These bottle caps appeared to contain powder cocaine. The bottle caps were given to Officer Kwiatowski as evidence.

2. Respondent's Evidence

The Respondent tendered no documents as evidence.

Witness - Jose Luis Alcaraz

Jose Luis Alcaraz testified in Spanish with translation by a non-court certified interpreter, Ms. Rosura Trejo. The use of this interpreter was agreed to by both parties. The witness was cautioned as to his right against self incrimination. Mr. Alcaraz stated that he was at the El Tenampa Night Club when the police officers entered the club. He was behind the bar when Mr. Escobar was arrested. He then heard someone say "Take him too". The witness denied pulling two (2) folded bottle caps out of his pants pocket. He confirmed that his truck was parked in the parking lot at the club. The witness asserted his right against self incrimination when asked if drugs were found in his truck.

The witness stated that he completed two (2) years of school in Mexico. He has taken no English classes during the 20 years he has been in this country. He denied the ability to carry on a conversation with a native English speaker. Some of the conversation that evening was in Spanish with one of the officers. That officer was not one of the officers who testified at this hearing. Mr. Alcaraz denied being asked to give consent to search his truck in either English or Spanish. Mr. Alcaraz denied that he gave the police permission to search his truck.

C. DISCUSSION

After considering all the testimony and other evidence there is sufficient evidence to believe that the Respondent was in possession of powder cocaine both on his person inside his licensed premises and inside of his truck parked in the parking lot which is also the licensed premises per Section 11.49 (a) "In this code, "premises" means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person". That a sale of narcotics by the Respondent, his agent, servant or employee took place in the premises was undisputed.

The Respondent denied giving permission to the police to search his truck and that the police had no warrant to search the premises. It is the Respondent's position that the evidence of cocaine should be excluded because it is the result of a nonconsensual, warrant less search. However, the Texas Alcoholic Beverage Code (T.A.B.C.) Section 101.04 states that "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 by this code" The search in this case

was executed as a part of the investigation by the police in furtherance of a duty imposed by the T.A.B.C.; that is, to detect whether a licensee was possessed a narcotic on the premises or was allowing the sale of a narcotic on the premises.

The Respondent himself has been shown to have been in possession of over 25 grams of powder cocaine on the licensed premises. It was also shown that his employee sold a narcotic across the bar while the Respondent stood by with two containers of cocaine in his front pocket. The Staff recommendation that the Respondent's license and permit be canceled is well taken.

D. RECOMMENDATION

The ALJ recommends that all of the Respondent's permits and licenses be canceled

IV. PROPOSED FINDINGS OF FACT

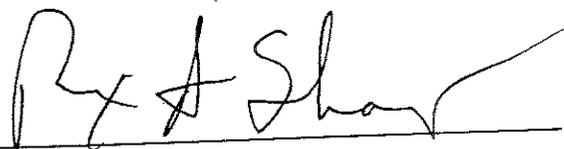
1. Jose Luis Alcaraz, Respondent, is the holder of a Wine and Beer Retailer's Permit, BG - 442489 and Retail Dealer's On-Premise Late Hours License, BL-442490, issued by the Texas Alcoholic Beverage Commission.
2. On August 3, 2001, Felipe Escobar was an employee of Respondent Jose Luis Alcaraz.
3. Felipe Escobar, on August 3, 2001, sold cocaine to Juan Cuellar on the licensed premises of Jose Luis Alcaraz, the El Tenampa Night Club located at 12534 Market Street, in Houston,
4. On August 3, 2001, the Respondent, Jose Luis Alcaraz, while on his licensed premises had 1.4 grams of cocaine, in 2 containers on his person.
5. On August 3, 2001, the Respondent, Jose Luis Alcaraz, had in his locked vehicle on the licensed premises, 24.3 grams of cocaine in 31 containers.
6. The possession and sale of cocaine on these licensed premises is a conduct of business which warrants cancellation or suspension of the retail dealer's on- or off - premise license based on the general welfare, health, peace and morals, safety, and sense of decency of the people.
7. The Respondent or its agent received the notice of hearing.
8. The Staff of the Texas Alcoholic Beverage Commission made a recommendation that Respondent's permits and licenses be canceled.
9. Pursuant to the Second Amended Notice of Hearing the hearing to consider the allegations convened on April 11, 2002, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented

by Mr. Dewey Brackin, of the TABC Legal Section. The Respondent was represented by its attorney, Mr. James G. Glass.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV CODE ANN. §§6.01(b), 11.61(b)(2).and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Findings of Fact Nos. 1-3, the Respondent, his agent, servant or employee delivered or permitted others to deliver a narcotic on the licensed premises in violation of Texas Alcoholic Beverage Code § 61.71 (a) (17).
5. Based on Findings of Fact Nos. 1, 4 and 5, the Respondent, his agent, servant or employee possessed a narcotic on the licensed premises in violation of Texas Alcoholic Beverage Code § 104.01 (9).
6. Based on the foregoing Findings of Fact and the Conclusions of Law, TABC is warranted in canceling Respondent's permits or licences.

SIGNED this 24th day of June, 2002.


Rex A. Shaver
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS