State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

June 6, 2008

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-08-1463, Johnny Alberto Gaytan d/b/a Hitchin Rail

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

B.L. Phillips
Administrative Law Judge

RECEIVED
JUN 9 2008
LEGAL DIVISION

BLP/vu

Enclosure

xc Susan Stith , Attorney,Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-**VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 – **VIA REGULAR MAIL**
Timothy E. Griffith, Attorney, 101 East Park Blvd., Ste. 600, Plano, TX 75074 -**VIA REGULAR MAIL**

Megaron Building
8212 Ithaca, Suite W3 ◆ Lubbock, Texas 79423
(806) 792-0007 Fax (806) 792-0149
http://www.soah.state.tx.us

SOAH DOCKET NO. 458-08-1463

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
	§	
V.	§	
	§	
JOHNNY ALBERTO GAYTAN	§	**OF**
D/B/A HITCHIN RAIL,	§	
HUTCHINSON COUNTY, TEXAS	§	
(TABC CASE NO. 552472)	§	**ADMINISTRATIVE HEARINGS**
Respondent		

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC or the Commission) brought this disciplinary action against Johnny Alberto Gaytan d/b/a Hitchin Rail (Respondent) alleging that, on or about September 30, 2006, Respondent, his agent, servant, or employee permitted the consumption of alcoholic beverages during prohibited hours, in violation of Texas Alcoholic Beverage Code (the Code) §§ 105.06, 11.61(b)(2), 61.71(a)(1), and/or 32.17(a)(7). Based on the evidence, the Administrative Law Judge (Judge) finds the Petitioner proved the allegations by a preponderance of the evidence and recommends that Respondents permit should be suspended for twenty days or a civil penalty paid.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute disciplinary 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. HEARING AND EVIDENCE

On April 23, 2008, a hearing was convened before Judge B. L. Phillips at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Susan M. Stith, attorney. Respondent was represented Timothy E. Griffith, attorney. The record closed on May 9, 2008, after receipt of written closing arguments and briefs for the parties.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 11.61(b)(2), the TABC may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or a rule of the Commission. Pursuant to the Code § 61.71(a) (18), the TABC may suspend or cancel a retail dealer's license if it is found that the licensee consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited. Pursuant to the Code § 105.06(2)(b), in a standard hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a.m. and 12 noon or on any other day between 12:15 a.m. and 7 a.m. Section 105.06(2) defines a "Standard hours area" as an area which is not an extended hours area. Section 105.06 (a-1) states that, for the purposes of this section, a licensed or permitted premises is a public place.

IV. DISCUSSION AND ANALYIS

A. Background

It is undisputed that on September 30, 2006, Respondent, bartender Cindy George and her boyfriend Johnny Dial were on the licensed premises after closing hours with the exterior and most of the interior lights extinguished. Officer Brandon Strope of the Borger Police Department and Trooper Oscar Esqueda of the Texas Department of Public Safety entered the licensed premises

through the rear door and made contact with the three individuals. The officers did not observe anyone take a drink from a bottle containing an alcoholic beverage, but there were beer bottles present in the area. It is also undisputed that the licensed premises are located in a standard hours area subject to those provisions of the Code.

B. Petitioner's Evidence and Contentions

Petitioner offered into evidence three exhibits, the Notice of Hearing issued in the case, Respondent's permit history, and the TABC incident report regarding this case. Respondent offered into evidence copies of the Code and court and administrative decisions relating to the issues herein. All offered exhibits were admitted into evidence.

Agent McCarthy testified that TABC adopted this case after the report of the alleged offense was sent to TABC and he was assigned to investigate. He contacted Officer Strope, took a report from him and determined that there was evidence of consumption after hours on the licensed premises. Agent McCarthy stated that TABC considers the licensed premises to be a public place even after hours and that they are subject to inspection by law enforcement twenty-four hours a day. He indicated that the aggravating factor in the recommendation of a twenty day suspension was the previous administrative case filed against Respondent for consumption after hours.

Trooper Esqueda testified that he and Officer Strope went to the licensed premises on the date in question, observed vehicles parked outside, a light on inside, the front door closed but the rear door propped open. He entered through the rear door and observed Respondent and a male and female at a table appearing to be drinking beer. He observed that there were several beer bottles on the table and that there was still beer in the bottles. Officer Strope checked the beer bottles and told Trooper Esqueda that they were still cold with condensation on the bottle. However, Trooper Esqueda did not observe anyone drinking from the bottles and only observed them handling the bottles when told to pour the beer out.

According to the TABC incident report, on September 30, 2006, at approximately 1:58 a.m., Officer Strope went to the Hitchin Rail accompanied by Trooper Esqueda and observed vehicles parked outside with the front door closed but the back door open. Officer Strope entered the licensed premises and observed three individuals at a table: a woman later identified as Cindy George, who was a bartender at the licensed premises, a man named John Dial and Respondent. All three had open beer bottles at the table where they were seated with the bottles within reach of and directly in front of each person. The bottles still contained liquid and had condensation on them indicating that they were still cold. When Mr. Dial stood up, he also removed a beer bottle, which had not been visible when he was seated, from between his legs. Respondent told Officer Strope that he knew he should not be drinking at that hour; however, he and Ms. George were closing up the bar and Mr. Dial was waiting for a ride, so they had a beer.

According to the permit history, Respondent entered a Waiver Order accepting a suspension or payment of a civil penalty on a charge of consumption during prohibited hours by an employee. The Agreement and Waiver of Hearing was signed by Respondent on September 29, 2006, the day before the alleged incident herein occurred.

C. Respondent's Evidence and Contentions

Respondent testified that, on the night in question, the licensed premises were closed, that all lights except for one interior light were off and that the bar was not a public place at that time because entrance was restricted. Mr. Dial was not an employee but was helping Respondent fix a table while waiting for Ms. George, who was his girlfriend. The bar had not been cleaned at the time so there were beer bottles all over the tables, including the table at which he was sitting with Mr. Dial and Ms. George. Respondent testified that he has taken action since the incident in question to ensure that such an incident would not occur again by cleaning up all remaining bottles at closing, instead of the next day, which was his practice at the time. He denied that Mr. Dial had a beer between his legs or that they were drinking after hours. Finally, Respondent argued that the Agreement and Waiver of Hearing signed by Respondent on September 29, 2006, did not constitute

an admission that the incident occurred because of the express language therein stating that he neither admitted nor denied that the violations occurred.

Respondent also argued that the designation of licensed or permitted premises as a public place found in Code section 105.06(a-1) did not apply in this case. He pointed out that this particular section of the Code was added to the Code by amendment and was only applicable to an offense committed on or after September 1, 2007. Since the alleged offense occurred on September 30, 2006, the licensed or permitted premises should not be considered a public place for the purposes of the Code.

D. Analysis

The evidence is sufficient to prove that Respondent and Mr. Dial were consuming an alcoholic beverage on the licensed premises at a time when the consumption of alcoholic beverages is prohibited. Officer Strope and Trooper Esqueda entered the licensed premises at approximately two o'clock a. m. and observed Respondent, Mr. Dial, and Ms. George sitting together at a table. There were beer bottles with liquid in them and condensation on the bottles indicating that they were cold on the table. When Mr. Dial got up to pour the beer out, he removed a beer bottle from between his legs which was previously not visible. Respondent admitted to Officer Dial that he knew he should not be drinking at that hour; however, he and Ms. George were closing up the bar and Mr. Dial was waiting for a ride, so they had a beer.

Regarding Respondent's argument that the licensed or permitted premises were not a public place and therefore not subject to the Code section dealing with hours of consumption, such a reading of the Code misconstrues the plain meaning of the Code considered as a whole. Section 11.61(b)(2) allows TABC to suspend or cancel a permit if the permittee violated a provision of the Code or a rule of the Commission, including the prohibition found in section 61.71(a)(18) against the consumption of an alcoholic beverage on the licensed premises at a time when consumption is prohibited by the Code. The parties agreed that the standard hours provisions apply, prohibiting

consumption of an alcoholic beverage after 1:15 a.m. on Sunday or 12:15 a.m. on any other day, and that this incident occurred at approximately 2:00 a.m. Even without the provision defining a licensed or permitted premises as a public place, the Code clearly intended in section 61.71(a)(18) to prohibit the consumption of alcoholic beverages on the premises after certain hours. Also, Agent McCarthy testified that TABC considers the licensed premises to be a public place even after hours subject to inspection by law enforcement twenty-four hours a day.

V. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence was sufficient to prove that, on or about September 30, 2006, Respondent, his agent, servant, or employee permitted the consumption of alcoholic beverages during prohibited hours and recommends that Respondent's permits should be suspended or a civil fine paid.

VI. PROPOSED FINDINGS OF FACT

1. Johnny Albert Gaytan d/b/a Hitchin Rail, Hutchinson County, Texas, holds Permit No. BG-565652, issued by the TABC for the premises located at 1608 N. Main, Borger, Hutchinson County, Texas.

2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated February 6, 2008.

3. The hearing on the merits convened April 23, 2008, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by Susan M. Stith, attorney . The Respondent was represented by Timothy E. Griffith, attorney. The record closed on May 9, 2008.

4. On or about September 30, 2006, Respondent employed Cindy George as a bartender at the licensed premises and they both stayed after regular business hours that day.

5. On that same date, John Dial, Ms. George's boyfriend, was also on the licensed premises after regular business hours helping Respondent fix a table while waiting for Ms. George.

6. Officer Strope of the Borger Police Department and Trooper Esqueda of the Texas Department of Public Safety approached the licensed premises on that date at approximately 1:58 a.m. and observed vehicles in the parking lot with the premises back door open.

7. Officer Strope and Trooper Esqueda observed Respondent, Ms. George and Mr. Dial sitting at a table with beer bottles on the table which were still cold with condensation on the bottles.

8. Officer Strope observed Mr. Dial remove a beer bottle from between his legs when he stood up.

9. Respondent told Officer Stope that he knew he should not be drinking at that hour, and admitted that they were having a beer while he and Ms. George were closing up.

10. Respondent signed an Agreement and Waiver of Hearing on September 29, 2006, the day before the incident herein occurred, accepting a penalty for a charge of consumption during prohibited hours by an employee.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.

2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Based upon Findings of Fact Nos. 4-10, the Commission proved that Respondent violated the Code when, on September 30, 2006, he consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited.

5. Based on the foregoing, suspension of Respondent's permit for a period of twenty days or payment of a civil penalty of one hundred and fifty dollars per day of the proposed suspension is warranted.

SIGNED: June 6th, 2008

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