

DOCKET NO. 565805

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| TEXAS ALCOHOLIC BEVERAGE COMMISSION | § | BEFORE THE TEXAS |
| | § | |
| | § | |
| VS. | § | |
| | § | |
| JMNI INC. | § | |
| D/B/A JAKE'S SPORTS CAFE | § | ALCOHOLIC |
| PERMIT/LICENSE NO(s). MB533746 | § | |
| LUBBOCK COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-07-4060) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge B. L. Phillips. The hearing convened on 23rd day of October 2007 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 30th day of November 2007. The 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 were filed by Respondent. The Administrative Law Judge denied Respondent's Exceptions.

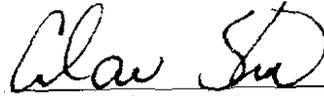
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those 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 your permit(s) and/or license(s) are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on February 13, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this January 18, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

JLK\bc

The Honorable B. L. Phillips
Administrative Law Judge
State Office of Administrative Hearings
8212 Ithaca, Suite W3
Lubbock, TX 79423
VIA FAX (806) 792-0149

Scott Stephenson
JMNI INC.
RESPONDENT
d/b/a JAKE'S SPORTS CAFE
5025 50th St 'A'
Lubbock, TX 79414

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

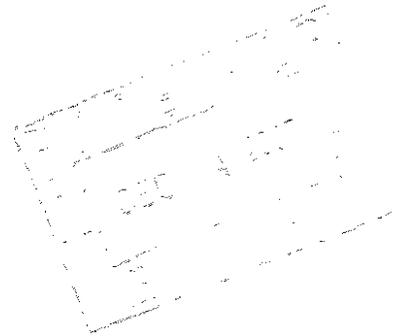
State Office of Administrative Hearings

12-21-07



Shelia Bailey Taylor
Chief Administrative Law Judge

November 30, 2007



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

VIA REGULAR MAIL

RE: Docket No. 458-07-4060, JMNI INC. D/B/A Jake's Sport's Cafe'

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,

A handwritten signature in cursive script that reads "B.L. Phillips".

B.L. Phillips
Administrative Law Judge

BLP/vu

Enclosure

xc W. Michael Cady, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-**VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-**VIA REGULAR MAIL**
Scott Stephenson, JMNI INC., 5025 50th St. 'A', Lubbock, TX 79414-**VIA REGULAR MAIL**

SOAH DOCKET NO. 458-07-4060

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

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BEFORE THE STATE OFFICE

V.

JMNI, INC.
D/B/A JAKE'S SPORTS CAFÉ,
LUBBOCK COUNTY, TEXAS
(TABC CASE NO. 565805)
Respondent

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Petitioner) brought this disciplinary action against JMNI, Inc. d/b/a Jake's Sports Café, (Respondent), alleging that, on or about June 8, 2007, Respondent, his agent, servant or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person, in violation of Texas Alcoholic Beverage Code (the Code) § 11.61(b)(14); with criminal negligence, allowed a minor to consume an alcoholic beverage on the licensed premises, in violation of §106.13; and operated the establishment in a place or manner which 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, pursuant to Code § 11.61(b)(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 Respondent's permit should be cancelled.

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 October 23, 2007, 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 W. Michael Cady, attorney. Respondent was represented by Scott Stephenson, President of JMNI, Inc. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code §§ 11.61(b)(14), TABC may cancel or suspend a permit if it is found that the permittee sold, served, or delivered an alcoholic beverage to an intoxicated person.

Pursuant to the Code § 106.13(a), TABC may cancel or suspend a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises. A person acts with criminal negligence under Code § 1.08 if the person acts with a mental state that would constitute criminal negligence under chapter 6 of the Penal Code, which states:

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Section 106.14 states that the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if : (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law. However, under TABC Rule 50.10 (c), proof by the Commission that an employee or agent of the licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, or allowed consumption of same by a minor or intoxicated person, more than twice in a 12-month period, shall constitute prima facie evidence that the licensee/permittee has directly or indirectly encouraged violation of the relevant laws.

Pursuant to the Code § 11.46 (b)(7) , the Commission may suspend a permit if it finds that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

IV. EVIDENCE

A. Documentary Evidence

Petitioner offered into evidence ten exhibits, including the Notice of Hearing issued in the case, Respondent's permit history, copies of police and TABC reports made pursuant to the investigation of this case, medical records of the minor involved in the case, statements taken from parties with knowledge of the case and a drawing of the licensed premises. All offered exhibits were admitted into evidence. Exhibit number two is Respondent's permit history. It shows a recently restrained administrative violation for sale of an alcoholic beverage to a minor on March 24, 2007.

B. Michelle Ann Bautista

Ms. Bautista testified that, on June 9, 2007, she was on duty at the licensed premises as the manager when she was summoned from the office by a security guard who said that there was an unconscious and unresponsive patron in the club and an ambulance was needed. She located the victim, later identified as Katie Roper, outside of the club and determined that she was not marked at all as a patron of the club. Minors were marked with a large black X and an armband, which the victim did not have, leading Ms. Bautista to conclude that she had not been in the club that night. However, during her investigation of the incident, she learned that the victim had entered the club, possibly as crew member of a band called Black Obsidian, which had played at the club that night. It was the club's policy to allow minors into the concert area so long as they were accompanied by an adult.

During her investigation, Ms. Bautista was told that Ms. Roper was the girlfriend of one of the members of the Black Obsidian band, later identified as David Rodriguez, and that he may have been providing alcohol to her that night. Mr. Rodriguez was involved in a fight that same night after Ms. Roper was taken away by ambulance. Ms. Bautista observed Mr. Rodriguez in the parking lot of the club; he was upset and hit a security guard before running away. She chased him down an alley but did not have any contact with him. She testified that the night was frantic at the club, and they did not know how to handle the situation.

C. David Rodriguez, Jr.

Mr. Rodriguez testified that, on the night of June 8-9, 2007, he played at the licensed premises with a band called Black Obsidian. He met Ms. Roper outside of the club before the band entered and observed that she did not have a wrist band on. She followed the band into the club through a door that only band members were supposed to use. However, the doors were used by

many people besides band members, according to his testimony. Mr. Rodriguez recalled that before Ms. Roper entered the club, she was not close to drunk, and later she looked fine and not "plastered" later when he observed her while the band was playing. At some point, another member of the band pointed her out to Mr. Rodriguez when she was passed out at a table and stated that they needed to do something with her. They took her outside of the club and asked for help from security for the club. Mr. Rodriguez testified that he observed Ms. Roper that night at the licensed premises from approximately 7:00 p.m. to 11:30 p.m.

Mr. Rodriguez admitted that he had been drinking while on the licensed premises that night and was intoxicated at approximately 11:15 p.m., when he hit another person and then ran away. In fact, he characterized himself as "pretty wasted" when the incident with the security guards occurred. He testified that he consumed alcohol on the licensed premises to the point that he faded into oblivion and was a danger to himself and others. He purchased some of the alcohol that he consumed that night himself, and some was brought to him by friends or fans. In his written statement dated June 21, 2007, Mr. Rodriguez stated that he ordered two drinks from the bar.

D. Jasper Collins-Koenig, Lubbock Police Department

Officer Collins-Koenig testified that he was on duty with the Lubbock Police Department on the night of June 8-9, 2007, when he was dispatched to the licensed premises regarding a civil disturbance. He determined that Mr. Rodriguez had punched a bouncer from the club in the face and then run off. Officer Collins-Koenig made contact with Mr. Rodriguez after he was brought back to the parking lot of the licensed premises by another officer. He concluded that Mr. Rodriguez should be arrested for public intoxication after determining that he had a strong odor of an alcoholic beverage on his breath, was unable to provide an information regarding the incident, and kept bringing up accusations against him for serving an alcoholic beverage to a minor.

E. Chris Drake

Mr. Drake is a bartender and occasional manager for the licensed premises. On the night of the incident involving Mr. Rodriguez, he observed Mr. Rodriguez appearing intoxicated and arguing with a waitress. Mr. Drake told a bouncer for the licensed premises that Mr. Rodriguez needed to leave, and later he observed that same bouncer come back into the licensed premises with a bloody nose.

F. Anthony Bates, Texas Alcoholic Beverage Commission

Agent Bates is an Enforcement Agent with TABC and a certified peace officer in the State of Texas. He was contacted by Lubbock Police Department on the night of the incident regarding a service call to the licensed premises and determined that a seventeen-year-old patron of the club had been taken to the emergency room (ER), intoxicated and unresponsive. He contacted a nurse at the ER who identified the victim as Katie Roper and stated that she had a .3 blood alcohol concentration and had been placed on a ventilator because she stopped breathing due to intoxication.

Agent Bates conducted an investigation of the incident and contacted Michelle Bautista, the club's manager that night. Ms. Bautista told him that Mr. Rodriguez had been providing alcoholic beverages to Ms. Roper all night. She also stated to him that, apparently, no one from the club was watching the back door into the club that night. Agent Bates also testified that Petitioner seeks cancellation of Respondent's permit, based on Respondent's four restrained cases in the violation history, the place and manner violation resulting from the current incident, and the consumption of alcohol on the licensed premises by Ms. Roper.

G. Katie Roper

Ms. Roper is a young-appearing woman, whose date of birth is August 11, 1989. She entered the licensed premises on the night in question through the back door to the club, where she did not observe any security personnel. During the evening, she was given a few drinks by an unknown man, but she did not personally purchase any alcoholic beverages at the licensed premises that night. She testified that she does not remember much of what happened on the night in question. Ms. Roper did not have a wrist band on while on the licensed premises.

V. ANALYSIS

The evidence is sufficient to prove that Respondent sold, served, or delivered an alcoholic beverage to an intoxicated person, in violation of the Code. Mr. Rodriguez testified that he was "pretty wasted" after playing in a band and drinking on the licensed premises on the night in question. He admitted that he consumed alcohol on the licensed premises to the point that he faded into oblivion and was a danger to himself and other. The evidence shows that he got into a verbal fight with a waitress and a physical altercation with security personnel from the licensed premises, and he fled the scene after assaulting at least one of the security personnel. Police were called to the scene to locate Mr. Rodriguez, and they placed him under arrest. The evidence, while inconclusive, indicates that he may also have been providing alcoholic beverages to a minor on the licensed premises that night. There is no dispute in the evidence that Mr. Rodriguez purchased at least some of his drinks from the licensed premises during that tumultuous night. There was no evidence to support any finding other than that he was intoxicated, and Respondent's employees knew or should have known that fact and stopped serving alcoholic beverages to him.

The evidence also proves that Respondent, with criminal negligence, allowed a minor to consume an alcoholic beverage on the licensed premises in violation of the Code. Respondent's

actions on that night rise to the level of criminal negligence in that he ought to have been aware that Ms. Roper was a minor and taken steps to prevent her from consuming alcoholic beverages on the licensed premise. Ms. Roper was able to enter the licensed premises through a back entrance that was designated for members of the bands playing at the club; however, this entrance was used by many persons besides band members. Had Ms. Roper not had this avenue of access to the licensed premises, she would have still been allowed into the club because minors were allowed to enter to watch the bands but not permitted to drink; yet, she might have been marked as a minor to ensure that she was not given access to alcoholic beverages. However, since she was not marked as a minor and her access was not controlled, she was able to enter the club and remain there for several hours while unknown persons provided her with alcoholic beverages. There is no evidence that anyone from the licensed premises observed this very young-looking girl drinking or even that she eventually passed out while on the licensed premises. The only notice that she merited occurred when she was taken outside of the licensed premises by Mr. Rodriguez and others and was unconscious. Security was then called to assist her, and she was taken by ambulance to the hospital where she stopped breathing and had to be intubated to assist her breathing. The evidence shows that Ms. Roper had a severe reaction to the level of alcohol in her system that night. Respondent, through his employees, acted with criminal negligence by failing to prevent a minor from drinking to the point that her life was threatened while on the licensed premises and by failing to even observe her compromised state until she was taken outside of the club by others where security was alerted to her condition.

Finally, the evidence is sufficient to prove that the place or manner in which Respondent conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. On the night in question, the licensed premises were, in the words of its manager, frantic and out of control. The manager and security personnel were not even aware that a member of a band playing in the club was intoxicated while purchasing alcoholic beverages or that a minor was potentially drinking herself to death on the licensed premises. Their only awareness of the danger occurred when the minor was removed from the club unconscious by others and when the band member assaulted someone and ran away. The

club's personnel testified that minors were allowed into the club when bands were playing, but it is obvious that there was no control of their entrance into the club to ensure that they were properly identified as minors. More disturbing is the fact that Ms. Roper was able to drink herself almost to death, and a band member was able to drink himself into oblivion to the point that he committed an assault and was, in his own words, a danger to himself and others. The manner in which Respondent conducts his business constitutes a danger to the general welfare, peace, morals, and safety of both patrons and the general public and is a violation of the public sense of decency.

The evidence was sufficient to prove that Respondent violated the Code and his permit should be cancelled.

VI. PROPOSED FINDINGS OF FACT

1. JMNI, Inc. d/b/a Jake's Sports Café, Lubbock County, Texas, holds Permit No. MB-533746, issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 5025 50th Street "A", Lubbock, Lubbock County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated September 6, 2007.
3. The hearing on the merits convened October 23, 2007, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney W. Michael Cady. The Respondent was represented by Scott Stephenson, President of JMNI, Inc. The record closed on the same day.
4. On or about June 8, 2007, David Rodriguez, Jr. was on the licensed premises playing in a band when he became intoxicated after purchasing alcoholic beverages and also being provided drinks from the audience.
5. Mr. Rodriguez became so intoxicated that he faded into oblivion, was a danger to himself and others, and committed an assault on security personnel from the licensed premises.

6. On that same date, Katie Roper, whose date of birth is August 11, 1989, entered the licensed premises through a back door and was not identified or marked by security personnel as a minor.
7. Ms. Roper remained on the licensed premises for approximately three and a half hours and was provided alcoholic beverages by unknown persons.
8. Ms. Roper drank alcoholic beverages to the point that she became unconscious and was removed from the licensed premises by Mr. Rodriguez and others.
9. Respondent, his agent, servant or employees failed to asked for any identification from Ms. Roper that night or to ascertain whether she was a minor, and they did not observe her drinking herself unconscious until alerted by others.
10. Ms. Roper was taken by ambulance to the hospital, where she stopped breathing and had to be intubated for breathing support.
11. The cause of Ms. Roper's physical distress was her level of intoxication due to drinking on the licensed premises.
12. Respondent failed to prevent Ms. Roper from drinking until her life was threatened.
13. On the night in question, the licensed premises were *frantic and out of control* with employees unaware that Ms. Roper was in danger or that Mr. Rodriguez was a danger to himself or others.
14. Adequate measures were not employed that night to ensure that minors were properly marked so they could be identified as minors.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 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 No. 4-5, Respondent violated the Code by having an agent, servant, or employee who sold, served, or delivered an alcoholic beverage to an intoxicated person on June 8, 2007.
5. Based upon Findings of Fact No. 6-12, Respondent violated the Code by having an agent, servant, or employee who, with criminal negligence, permitted a minor to possess and consume an alcoholic beverage on June 8, 2007.
6. Based upon Findings of Fact No. 4-14, Respondent violated the Code by conducting his business in a manner which warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.
7. Based on the foregoing, cancellation of Respondent's permit is warranted.

SIGNED: November 30th, 2007



B. L. Phillips

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS