



After the hearing, the parties were requested to submit legal authority concerning the meaning of "employing, requesting, or authorizing" in TEXAS PENAL CODE § 43.251. The record was closed on January 7, 1998, following receipt of the parties' briefs.

### III. DISCUSSION

#### A. Description of Mary's Place

Mary's Place, owned by Donald Lee Sonnier, is located in Palacios, Texas, and holds Beer and Wine Retailer's Permit No. 232670 and Retail Dealer's On-Premise License No. 232671 issued by the Commission.

#### B. Summary of Allegations

The Commission Staff alleged that on December 8, 1995, Mary's Place permitted two underage persons to dance topless.

#### C. Alleged Violations of §61.71 (a) (17)

Section 11.61(b)(17) of the Code authorizes suspension if the permittee conducted business in a manner contrary to the "general welfare, health, peace, morals, and safety of the people" or offensive to "the public sense of decency." Under TEXAS PENAL CODE §43.251, it is a misdemeanor to employ, induce, or authorize a child (seventeen or under) to work while nude or topless. The necessary implication of §43.251 is that such conduct of a business is offensive to the public sense of decency as well as harmful to the child.

The uncontroverted facts are as follows: Mary's Place was at all material times a bar owned by Donald Lee Sonnier and doing business under license in Palacios, Texas. On or about December 8, 1995, Ina Joyce Sonnier, the daughter of Mary's Place owner, Mr. Sonnier, authorized or permitted Charlotte Ellery Hebert<sup>1</sup> and Brandy Corrine Kersner<sup>2</sup> to dance while topless in Mary's Place. Ms. Hebert and Ms. Kersner danced on the premises while clothed in a manner that left uncovered, portions of the breast of each below the top of the areola.

Mary's Place contends (a) that the Staff's evidence that Ms. Hebert and Ms. Kersner were seventeen years of age on December 8, 1995, was insufficient to meet its burden, (b) that the owner, Mr. Sonnier, neither employed, requested, nor authorized Ms. Hebert and Ms. Kersner to dance topless on the licensed premises, and (c) that Mary's Place was advised by a Palacios police officer that girls could dance topless at age seventeen.

The Staff met its burden in all respects. Ms. Hebert and Ms. Kersner were clearly permitted to dance topless in Mary's Place. The evidence was convincing that both Ms. Hebert and Ms. Kersner were seventeen on December 8, 1995. The owner did not abdicate his responsibility to require that dancers performing in his establishment be of age by delegating selection of dancers to

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<sup>1</sup> Spelled phonically.

<sup>2</sup> Spelled phonically.

another. And, whether Mary's Place was misinformed by a Palacios police officer concerning the legality of seventeen year olds dancing topless is not significant, since a minimum suspension or fine in lieu thereof is recommended.

Ms. Hebert and Ms. Kersner were seventeen years of age while dancing topless in Mary's Place on December 7 and 8, 1995. There was no evidence that either Ms. Hebert or Ms. Kersner was not seventeen on that date. Palacios Police Officer Raymond Longoria on the evening of December 7, 1995, received a telephone call placed to the Palacios Police Department from Ms. Hebert and Ms. Kersner asking if it would be legal for them to dance topless since they were only seventeen. Officer Longoria was unsure and passed the call off to Officer Goodman. Neither officer answered their question. Officer Goodman paged Agent William A. Parker, a staff member assigned to Matagorda County. In the mean time, the young ladies began dancing. Officers Longoria and Goodman went to the bar. Officer Longoria was well acquainted with the young ladies. He observed Ms. Hebert dancing uncovered from the waist up. He observed Ms. Kersner topless, also. Ms. Kersner in apparent embarrassment said to the officers, "Are ya'll gonna leave? I wished ya'll would leave, 'cause I'm up next." Officer Longoria left before Ms. Kersner began dancing at about 11:45pm when he went off duty.

When Agent Parker entered Mary's Place shortly after midnight on December 8th, 1995, he observed Ms. Kersner dancing bare from the waist up before four fishermen at a table. Police officers pointed out Ms. Hebert, who was wearing a see-through top with her breasts below the areola clearly visible. Agent Parker questioned both teenage women. Both Ms. Hebert and Ms. Kersner identified themselves and told Agent Parker they were seventeen. Both admitted dancing topless. Ms. Hebert gave Agent Parker a Department of Public Safety "ID" card with her picture and birth date on it. Mr. Sonnier also observed that Ms. Kersner and Ms. Hebert danced topless. Mr. Sonnier knew both young women. He figured the young women to be "about eighteen or nineteen, something like that." Mr. Sonnier did not attempt to determine the teenagers' ages. He assumed his daughter had since "that was her job to do that." Ms. Ina Sonnier admitted to Agent Parker that she knew the dancers were seventeen, but she claimed that someone at the Commission had said it was okay.

Ina Sonnier was an agent, servant, or employee of Mary's Place. She was the daughter of the owner, authorized by the owner to permit topless dancing on the premises. Her father and the owner of Mary's Place, testified that it was Ina's "job" to "ID" prospective dancers to see if they were of age. According to the owner, their arrangement was that his daughter could collect and keep any cover charges less any sum she chose to share with dancers whom she permitted to work topless on the dance floor, that the dancers could keep tips paid by to them by customers, and the owner, by logical inference, could keep any increase in alcoholic beverages sold as a result of business drawn by the topless entertainment. Mr. Sonnier testified that Ms. Ina Sonnier watched the door, collected cover charges, and selected the dancers. The dancers worked by dancing. Mr. Sonnier provided the bar. Ms. Sonnier admitted paying part of the total cover charges for admission to the bar to each of the two child dancers on December 8, 1995.

The public policy announced in §1.03 of the Code is to promote the public health, welfare and safety and to construe the other provisions of the Code liberally to those ends. In §1.04(11) of the Code, the legislature defined the term permittee inclusively as "a person who is the holder of the permit provided for in this code, or an agent, servant, or employee of that person." The Code prohibits not only the retailer but also anyone who is "his agent, servant or employee" from engaging

in or even permitting lewd, immoral, or indecent conduct on the licensed premises. The Code must be construed to protect the public -- rather than the permittee -- from the improper activities of the permittee's agents, servants, and employees.

Mary's Place asserted as a defense that on a prior occasion a member of the Palacios Police Department had informed its owner, Mr. Sonnier, that it was lawful for a seventeen-year-old person to dance topless in a bar. The evidence was controverted as to whether such ill-founded advice was ever given. There is no requirement of criminal intent in TEXAS PENAL CODE §43.251 nor of willful wrong doing in Section 11.61(b)(17) of the Code. A finding that Mary's Place had unintentionally violated §43.251 might mitigate any penalty imposed but would not be a defense to the violation.

D. Penalty

In determining the recommended penalty for the violation, the ALJ has considered the standard penalty guidelines set out in the Commission's Rule, 16 TAC §37.60. The ALJ has also considered the policies and practices that led to the violations, and the absence of evidence on the economic impact a suspension or fine would have on Mary's Place.

Mary's Place has been operated with a retail beer and wine permit by Mr. Sonnier for over eight years without previous violations. About one and one half years ago, Mary's Place stopped having a regular weekly topless night and over three months ago, ceased occasional topless dancing on the premises. The Staff presented no evidence concerning the amount of suspension or fine in lieu thereof which might be sufficient to accomplish the manifest purpose of the Code, other than the evidence of the circumstances of the violation.

The Penal Code provision which Mary's Place violated is not the least serious infraction upon which a suspension might be founded. Yet, the local police did not have a ready response to whether seventeen year old girls could dance topless. Apparently, Ms. Hebert and Ms. Kersner waited for a response from their police department that in turn waited to hear from the Staff. Such delays belied the seriousness of the violation.

While this is a first infraction, it occurred and a suspension or fine in lieu thereof is required. The suggestion of 16 TAC §37.60 is for a minimum suspension of fifteen days for a violation harmful to a minor. In the absence of evidence of the economic consequence of a suspension or fine to Mary's Place, the ALJ did not adjust the recommended minimum suspension upwards. Because of the seriousness of the violation, the ALJ will not consider factors in mitigation below the recommended minimum. Hence, it is unnecessary to decide whether a Palacios police officer ever mislead Mary's Place concerning the legality of seventeen year olds dancing topless. The Code in § 11.64 provides that the minimum fine in lieu of suspension be one hundred and fifty dollars per day of suspension. The ALJ recommends the minimum suspension or minimum fine, 15 days or \$2250.00.

#### IV. FINDINGS OF FACT

1. The request for hearing in this case, with the complaint attached, was properly and timely filed with the State Office of Administrative Hearings on August 28, 1998.

2. Notice of the hearing was mailed to Donald Lee Sonnier d/b/a Mary's Place by certified mail, return receipt requested (No. 419584497), on October 12, 1998.
3. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The hearing was convened November 23, 1998, at the Offices of the Texas Department of Human Services, Conference Room, 1502 Airline, Suite 39, Victoria, Texas. Administrative Law Judge Joe R. Gilbreath, presided. Dewey Bracken, Assistant Attorney General, with Agent William A. Parker, represented the Commission's Staff. Richard L. Manske, Attorney at Law, with owner Donald Lee Sonnier, represented Mary's Place. The hearing was adjourned November 23, 1998.
5. The hearing was closed January 7, 1998, with the filing of legal authority on the issue of what constitutes "employing, requesting, or authorizing" in § 43.251 of the Texas Penal Code.
6. Mary's Place holds Permit No. BG-232670 and License BL-232671 from the Commission.
7. Donald Lee Sonnier is and was at all material times the sole proprietor of Mary's Place.
8. Mr. Sonnier authorized or permitted Charlotte Ellery Hebert, and Brandy Coreen Kersner to dance topless (i.e. with breasts exposed below the top of the areola) on or about December 8, 1995.
9. On or about December 8, 1995, Ms. Hebert and Ms. Kersner appeared youthful, but Mr. Sonnier did not check their ages because he assumed his daughter, Ina Joyce Sonnier, had done so.
10. Ina Sonnier was at all material times an employee, agent, or servant of Mary's Place with authority from its owner, her father, to permit persons to dance topless on the dance floor of the premises.
11. On or about December 8, 1995, the employees, agents, and servants of Donald Lee Sonnier d/b/a Mary's Place authorized or permitted Ms. Hebert and Ms. Kersner to dance topless in front of paying gentlemen customers on the dance floor of the licensed premises.
12. On or about December 8, 1995, Ms. Hebert and Ms. Kersner were each seventeen years of age.
13. On or about December 8, 1995, Ms. Hebert and Ms. Kersner were each known by agents, servants and employees of Mary's Place to be seventeen years of age.

14. On or about December 8, 1995, Ms. Hebert and Ms. Kersner, each worked in Mary's Place while the other danced with breasts exposed below the top of the areola.
15. Mary's Place has maintained a retail beer and wine permit for roughly eight years and has had no prior violations.

### V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to §§2.02, 5.35, 6.01, 11.61, and 32.17 of the TEX. ALCO. BEV. CODE ANN. (Code).
2. The State Office Administrative Hearing (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 finding of fact and conclusions of law, pursuant to TEX. GOVT. CODE ANN. Ch. 2003.
3. Mary's Place received notice in accordance with TEX. GOVT. CODE ANN. §2001.052.
4. Mary's Place violated § 43.251 of the TEXAS PENAL CODE on December 8, 1995, by employing, authorizing, or inducing two children to work in Mary's Place and permitting them to dance topless on the licensed premises.
5. Mary's Place's license and permits became subject to suspension under §61.71(a)(17) of the Code and 16 TAC §35.31, because of the violation of §43.251 of the Texas Penal Code.
6. Based on the foregoing findings of fact and conclusions of law, together and separately, Mary's Place violated §11.61(b)(7) of the Code, because it conducted its business in a manner that was contrary to the general welfare, health, peace, morals, and safety of the people and offensive to the public sense of decency.
7. Mary's Place permit and license should be suspended for 15 days for the Code violation set forth in Conclusion of Law No. 6.
8. Pursuant to Code §11.64, Mary's Place should have the opportunity to pay a civil penalty of \$2,250.00 in lieu of the suspension set forth in Conclusion of Law No. 7.

SIGNED this 21<sup>st</sup> day of January, 1999.

  
JOE R. GILBREATH  
Administrative Law Judge  
State Office of Administrative Hearings