

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

February 11, 1999

Doyme Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

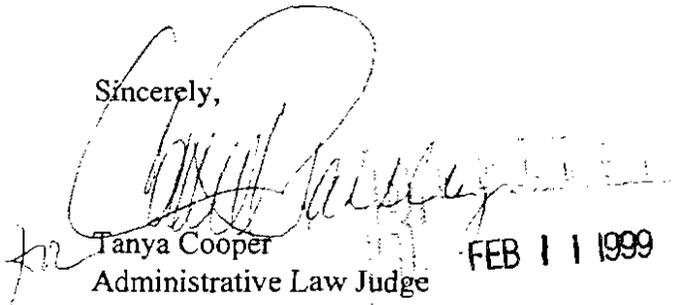
RE: Docket No. 458-98-1335; Texas Alcoholic Beverage Commission vs. Domingo Garcia, Jr., d/b/a The Trestle (TABC Case No. 575042)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Dewey Brackin, attorney for Texas Alcoholic Beverage Commission, and to Constance Fouts, attorney for Respondent Domingo Garcia, Jr., d/b/a The Trestle. For reasons discussed in the proposal, I recommend Respondent's permits be canceled.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,


Tanya Cooper
Administrative Law Judge

FEB 11 1999

TC:et

Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - **HAND DELIVERY**
Dewey Brackin, Staff Attorney, Texas Alcoholic Beverage Commission - **HAND DELIVERY**
Constance A. Fouts, Attorney at Law, 901 North Lancaster at Colorado, Dallas, Texas 75203 - **CERTIFIED MAIL NO. Z 300 865 967, RETURN RECEIPT REQUESTED**

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TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
DOMINGO GARCIA, JR.	§	
D/B/A THE TRESTLE	§	
MB-238940, LB-238941 & PE-238942;	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 575042)	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Domingo Garcia, Jr. d/b/a The Trestle (Respondent), alleging several violations. First, Staff alleges that on four occasions, Respondent, his agents, or employees knew or should have known that multiple acts of public lewdness were occurring on the licensed premises, in violation of the Texas Alcoholic Beverage Code (Code) and of the Texas Alcoholic Beverage Commission rules (Rules). Secondly, Staff asserts that Respondent's agent or employee sold an alcoholic beverage to an intoxicated person in violation of the Code. Staff requested that Respondent's permits be canceled. This proposal finds that Respondent, his agents or employees knew or should have known that acts of public lewdness were occurring on the licensed premises; and further, that on one occasion an alcoholic beverage was sold to an intoxicated person by Respondent's agent or employee. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permits.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01, and §11.61. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. No contested issues of notice or jurisdiction were raised prior to the hearing.

During the hearing Staff offered evidence regarding additional lewd activities occurring at the licensed premises on July 31, 1998, a date subsequent to the dates alleged in the notice of hearing. Respondent's attorney objected to this evidence's presentation based upon a lack of notice regarding the event. Upon a reconsideration of counsels' arguments, the notice provided of this proceeding, and the evidence presented, the ALJ determines that this evidence cannot fairly be used as a basis for any determination of any issues presented in this case or any sanctions sought in the matter due to a lack of notice regarding this additional allegation regarding events occurring on July 31, 1998. The ALJ determines, however, that Staff's notice of this proceeding in relation to events alleged to have occurred on or about October 26, 1996, December 14, 1996, June 13, 1997, and June 23, 1998 was adequate. This Proposal for Decision is based upon the ALJ's consideration of the evidence relating to these events.

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On December 2, 1998, a hearing convened before Tanya Cooper, Administrative Law Judge (ALJ), State Office of Administrative Hearings, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by its attorney, Dewey Brackin. Respondent appeared and was represented by counsel, Constance A. Fouts. Evidence was received from both parties on that date. The record was closed on December 18, 1998, after the parties were allowed to submit additional written materials consisting of proposed findings of fact and conclusions of law.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under TEX. ALCO. BEV. CODE ANN. §11.61(b) (7) (Vernon 1998) to cancel or suspend for not more than 60 days a permit if it is found that the permittee has conducted his business in a manner contrary to the general welfare, health, peace, morals, and safety of the people and the public sense of decency. In establishing that Respondent has conducted his business in this manner, Staff alleged that Respondent, his agents or employees, knew or should have known that acts of public lewdness were occurring on the premises.

Public lewdness is a criminal offense as defined in the Texas Penal Code. TEX. PENAL CODE §21.07 provides:

A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:

...

3. act of sexual contact.

...

Sexual contact means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. TEX. PENAL CODE §21.01(2) (Vernon 1998).

Staff's second allegation in this case is that Respondent, through the actions of his agent or employee, sold or delivered alcoholic beverage to an intoxicated person. TABC is further authorized to cancel or suspend a permit for not more than 60 days, pursuant to §11.61(b)(14) of the Code, if a permittee has sold or delivered an alcoholic beverage to an intoxicated person.

The standard of proof required to establish a violation is that required in a civil case: the preponderance of the evidence. The trier of fact must ask if, weighing all the evidence, the party with the burden of proof has shown by 51% of the evidence that an alleged violation occurred. Staff bears the burden of proof to show the alleged violations occurred.

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Mixed Beverage Permit MB-238940, Mixed Beverage Late Hours Permit LB-238941, and Beverage Cartage Permit PE-238942 issued for his premises, The Trestle, located at 412 S. Haskell Ave., Dallas, Dallas County, Texas. It is an establishment that is open to the public during its hours of operation. Staff alleged that Respondent, his agent or employee knew or should have known that violations of the Texas Penal Code §21.07 (public lewdness) were occurring on the premises on or about October 26, 1996, December 14, 1996, June 13, 1997, and June 23, 1998, constituting a pattern by Respondent of conducting his business in a place or manner contrary to the general welfare, health, peace, morals, and safety of the people or the sense of public decency; and that Respondent, through his agent or employee, sold or delivered an alcoholic beverage to an intoxicated person on June 13, 1997.

Staff presented testimony from several law enforcement officers, along with documentary evidence and photographs. Respondent testified at the hearing on his own behalf, presented testimony from witnesses, Joe Wright and George Zdansky, and offered numerous photographs of the premises that were admitted into evidence. Staff's evidence will be discussed first by each alleged incident's date.

Staff's Evidence

1. October 26, 1996

On October 26, 1996, Officer D. Tremain and C. Reynerson, Dallas Police Department, were at the licensed premises, The Trestle. Tremain stated that prior to this evening, complaints associated with sexual activity occurring at the bar had been received and that numerous arrests had been made at the location over the years. On this evening, however, the officers were on the premises in an undercover capacity for a routine inspection unrelated to any specific complaint.

Officer Tremain, along with Officer Reynerson, were inside the premises for approximately one hour. The interior of the bar was dimly lit, but the lighting was sufficient to identify individuals. There were two employees present, a bartender and a doorman. At approximately midnight, people began congregating in a small, doorless area with a couch and pinball machine. Tremain was inside this area at this time. He observed three men masturbating each others' penises. He was "groped" while inside this area having his genitals touched through his clothing. This activity continued and grew to the degree that Tremain described the activity as a "melee." He estimated that sixteen people were gathered inside this small area engaging in this activity. Tremain, a vice officer of several years experience, characterized the event as the highest level of sexual activity that he had ever witnessed in any type of bar.

Officer C. Reynerson also testified that he observed another group of males knowingly touching each others' genitals for gratification. This encounter lasted for approximately five minutes on the premises' patio area. Reynerson stated that the men's activity was participated in openly without any attempts to hide or conceal their conduct. Throughout the time he was inside the premises on the patio, bar employees were moving in and out of the area.

Both officers made arrests of individuals on that evening. The arrests were made for the acts of public lewdness they had observed occurring on the premises.¹

2. June 13, 1997

Dallas Police Department officer M. Mendez was working in an undercover capacity with other Dallas police officers and Sgt. B. Roberts, TABC, at The Trestle on June 13, 1997. These officers arrived at the bar at approximately 11:00 p.m. Several acts of sexual contact and indecent exposure were observed by the officers on that evening.

While on the patio of the premises, Officer Mendez observed two individuals masturbating. Other officers with Officer Mendez that evening, Officer Guzman and Officer Carrillo, were each grabbed in their crotch area by two other persons. Officer Mendez described observing one customer raise his shorts and reveal that he was not wearing underwear. Another man approached this individual and began to masturbate him. These persons were arrested by Officer Mendez for public lewdness and indecent exposure on June 14, 1997. Each of these individuals pled guilty to criminal charges filed by Mendez relating to this event in criminal court proceedings.

Officer Mendez stated there was one employee present on the premises as these events were occurring, a bartender. Officer Mendez opined that this person, being in charge of the premises, should have known what was occurring. He further went on to testify that he has made approximately eight arrests for these types of violations on the premises in the past. Upon each occurrence he had spoken with the bar employees present. Employees had consistently taken the position with Officer Mendez that they had no control over activities taking place on the patio.

Officer Mendez, upon observing public lewdness and indecency offenses, requested uniformed-officer assistance before completing arrests of any individuals inside the premises. While waiting for this assistance, he returned to the inside of the bar. He, along with Sgt. Roberts, observed an individual who appeared very intoxicated inside the bar drinking a bottle of Coors Light beer. The person was barely able to stand, used the walls for support, his eyes were bloodshot, and his speech was slurred. After finishing this beer, he approached the bartender and ordered another beer. According to Officer Mendez, the bartender served this alcoholic beverage to the patron while the patron was in an obviously intoxicated condition.

3. June 23, 1998

On June 23, 1998, Officer M. Tarver was working undercover at The Trestle. He was observing activity in the bar's patio area. During the time Tarver was on the premises, the number of bar patrons ranged from five to twenty people. He watched as two individuals engaged in sexual contact. One person had placed his mouth on the penis of the other person. This activity was intentional and not accidental, continuing for approximately five minutes. Other bar patrons were present and able to observe this conduct. No efforts were made to conceal this activity, and it appeared to Tarver that the conduct was meant to be observed by others.

¹During the hearing, several law enforcement officers appeared and identified persons arrested for acts of public lewdness, indecent exposure, or other criminal offenses on the licensed premises. Although a part of the record of this proceeding, the ALJ elects to not identify any of these arrested individuals by name in the discussion of the evidence received in this proceeding.

Other Staff Evidence.

Respondent's permit history, as maintained by Staff, was admitted into evidence. In 1994, Respondent signed a waiver of hearing and accepted a suspension of his permit due to numerous public lewdness violations occurring on his premises.

Agent Roberts testified that he first became aware of Respondent's bar in 1996 when he was assigned to the Dallas TABC office. In the course of his duties at this office, he received Dallas Police Department reports regarding criminal acts of public lewdness occurring on the premises. Roberts' first contact with Respondent or his agents or employees occurred in June 1997, while working undercover with Officer Mendez.

Agent Roberts spoke with Respondent's bartender, Joe Wright, on the evening of June 13-14, 1997, concerning the specific violations he observed that night. Wright stated to Roberts that he was responsible for working at the bar and could not be accountable for activities occurring on the patio. Agent Roberts continued his investigation contacting Respondent. Respondent was aware of the previous permit suspension for public lewdness violations. Agent Roberts and Respondent discussed various means of deter this type of activity, such additional lighting or increased employee presence on the patio. Roberts testified that he was not aware that any of these suggestions had been implemented and that the pattern of violations had continued with public lewdness arrests being made, most recently in June 1998.

Agent Roberts further attempted to determine whether Respondent's personnel were seller-server certified in relationship to the violation of serving alcoholic beverage to an intoxicated person. He determined from his investigation that Respondent's personnel had not received this training.

Respondent's Evidence

Joe Wright works at The Trestle for Respondent. He was present tending bar on June 13, 1997. On that date, he was cited by Officer Mendez for serving an intoxicated person. Mr. Wright recalled serving this customer four drinks (2 mixed drinks and 2 beers), but did not recall any unusual behavior by this person suggesting he was intoxicated.

Mr. Wright has worked at The Trestle for a considerable period of time and considers himself Respondent's friend. He stated that he was aware of Respondent's previous permit suspension due to lewd conduct occurring on the premises. Mr. Wright discussed steps that Respondent took over a period of time attempting to discourage this type of behavior by the bar's patrons. Respondent had instructed Mr. Wright and other personnel to watch for incidents of public lewdness, installed more lighting inside the bar and on the patio, and posted written notices prohibiting lewd conduct. Mr. Wright testified that he had removed customers from the premises for engaging in lewd activities.

George Zdansky works at The Trestle as a bar back, bartender, and bookkeeper for Respondent. He testified that he does not receive monetary compensation, but provides help as needed due to his friendship with Respondent. Mr. Zdansky was also present on June 13, 1997, and observed the customer arrested by Officer Mendez for public intoxication. Zdansky stated this person was not a regular patron at the bar, but it was his opinion that this individual was not intoxicated.

Mr. Zdansky also discussed the remedial steps that Respondent had taken to stop lewd conduct from occurring on the premises. He stated that he realized it was his responsibility to control the premises. In order to carry out this task, he had ejected or banned persons in the past that he observed participating in lewd conduct, but stated that any conduct of this type was likely to stop if any patrons observed him as he walked through the bar.

Respondent testified that he was not at the bar during the events described by the law enforcement officers at the hearing, but he was aware that arrests for public lewdness had been made in 1994 that resulted in the suspension of his permit for a period of time. He also stated he was aware that arrests for public lewdness, indecent exposure, or other criminal acts were made on his premises in October 1996, December 1996, June 1997, and June 1998.

Respondent did not dispute that the events had occurred as described and agreed that he had known problems had persisted with the business' operation. He pointed out that he had taken numerous steps to stop the conduct over the years, but the activity continued. Respondent stated that he increased lighting, removed doors from bathrooms, posted notices prohibiting certain conduct, and fired employees for failing to stop lewd conduct. However, Respondent conceded that his attempts to stop his patrons from participating in this type of conduct had been unsuccessful.

Respondent testified that his business is a small one, netting approximately \$600 per month, but it was his desire to maintain his permit due to it being his livelihood. He stated that a "change in format" for the bar would eliminate problems he had suffered in the past associated with his clientele, although he could not insure that the illicit conduct his customers participated in the past would stop in the future.

ANALYSIS

1. Operation of Business Contrary to General Welfare and Public Decency Violation.

TABC's evidence shows that Respondent has operated his business over the course of several years knowing that persons on the premises were engaging in lewd activities contrary to public decency. Respondent's evidence only further illustrates that he and his employees or agents were aware that the conduct of some individuals on the premises was criminal despite whether or not the conduct was actually witnessed by Respondent or his personnel as the activities were occurring.

Beginning with Respondent's permit suspension in 1994 for public lewdness violations on the premises, he was aware problems existed in the operation of his establishment. Although Respondent points to steps that he took to prevent illegal activity on the premises, these measures were obviously ineffective and insufficient. Arrests for public lewdness, indecent exposure, and other criminal acts have continued to occur on the premises over the years 1996, 1997, and 1998.

Although a permittee cannot insure that criminal conduct will never ever occur upon a licensed premises, it is the responsibility of any permittee to take effective measures to prevent illegal conduct on a licensed premises. This is especially true once a pattern of criminal conduct is known by the permittee to be an ongoing situation. The permittee must take steps to stop criminal activity from continuing to take place. Based upon the scope, degree, and duration of the criminal conduct occurring on this premises, as established by the testimony of several experienced law enforcement officials, Respondent has not fulfilled this responsibility.

2. Sale to Intoxicated Person Violation.

Staff's evidence supports that a sale of alcoholic beverage to an intoxicated person occurred on the licensed premises on June 13, 1997. It is undisputed that Respondent's employee, Joe Wright, sold an alcoholic beverage, a beer, to the person that was observed by law enforcement officers. At issue is whether the person was intoxicated when Mr. Wright sold the beverage to him.

Two law enforcement officers, trained and experienced in detecting alcohol-related violations, both believed that the patron was intoxicated. This person was described by the officers as exhibiting common indicators of intoxication: bloodshot eyes, slurred speech, and poor balance.

Respondent's personnel, Mr. Wright and Mr. Zdansky, had not attended any type of alcohol seller-server training that could have provided them with more information to assess whether any patron was impaired to the level of intoxication. At a minimum, this patron was served four alcoholic beverages (beer and mixed drinks) according to the testimony of Mr. Wright. This person was not a regular customer at The Trestle, making assessment of his normal mental or physical faculties more difficult particularly for any person untrained in looking for the signs of impairment in individuals.

In weighing the evidence on this point, more credibility must be provided to persons trained and familiar with detection of impaired individuals. In the opinion of the trained law enforcement personnel, this person at the bar presented a danger to himself or others due to his consumption of alcoholic beverages. His signs of intoxication were readily apparent and were a common indicia of intoxication; they should have also been apparent to any bartender exercising a reasonable degree of care and trying to avoid sales to intoxicated persons.

Staff requested a cancellation of Respondent permits for these violations. TABC's rules establish a range of sanctions from permit suspension for a designated time period or civil fine in lieu of suspension, to permit cancellation based upon the type of violation committed by the permittee and the permittee's prior violation history. See Rule §37.60. Although this standard penalty chart is not binding in contested, non-settlement cases, it provides guidance for the ALJ's recommendation in this case. The first violation of operating an establishment in such a manner as to be contrary to the general welfare, health, peace, morals, and safety of the people and contrary to the public sense of decency may result in a penalty ranging from a 15-day suspension to permit cancellation, depending on the details of the offenses committed on the premises.

The ALJ agrees with Staff and recommends that Respondent's permit be cancelled. In reaching this recommendation the ALJ considered the following as relevant factors:

1. Respondent's previous violation history including a prior permit suspension for the same activities established in this instance;
2. The scope and duration of the events established by Staff showed a pattern of conducting business by Respondent that allowed numerous criminal acts of public lewdness to be committed on the licensed premises;

3. Another Code violation, sale of alcoholic beverage to an intoxicated person, was observed on the premises; and

4. Respondent's past failure to adequately address prevention of this illegal conduct, although obviously aware that the conduct was taking place, creates a reasonable expectation or likelihood that violations of these type will continue to occur in the future at the premises.

RECOMMENDATION

The ALJ recommends that Respondent's permits be canceled.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, are denied.

FINDINGS OF FACT

1. Domingo Garcia, Jr. (Respondent) holds Mixed Beverage Permit MB-238940, Mixed Beverage Late Hours Permit LB-238941, and Beverage Cartage Permit PE-238942 for the premises known as The Trestle, located at 312 S. Haskell Ave., Dallas, Dallas County, Texas.
2. On August 7, 1998, Staff of the Texas Alcoholic Beverage Commission (TABC) gave Respondent notice of the hearing by certified mail, return receipt requested. A hearing was scheduled by the State Office of Administrative Hearings (SOAH) and convened on December 2, 1998. Both parties appeared at the hearing. Evidence was received and the record closed on December 18, 1998.
3. On October 26, 1996, one or more acts of public lewdness occurred on the licensed premises and were observed by law enforcement officers.
4. Dallas police officers made arrests for these offenses described in Finding of Fact 3.
5. Respondent, his agents, servants or employees, knew or should have known that persons on the premises were engaging in the acts of public lewdness described in Finding of Fact 3, based on previous violations of the same nature and the openness of the activities.
6. Respondent was aware arrests for public lewdness had occurred on the licensed premises in December 1996.
7. On June 13, 1997, one or more acts of public lewdness occurred on the licensed premises and were observed by law enforcement officers.
8. Arrests were made for the offenses described in Finding of Fact 7 on June 14, 1997, by Dallas police officers.

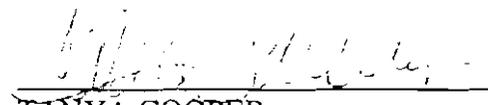
9. Respondent, his agents, servants or employees, knew or should have known that persons on the premises were engaging in the acts of public lewdness described in Finding of Fact 7, based on previous violations of the same nature and the openness of the activities.
10. On June 13, 1997, Respondent's employee or agent, Joe Wright, sold an alcoholic beverage, beer, to an intoxicated person on the licensed premises.
11. This person exhibited obvious signs of intoxication such as slurred speech, bloodshot eyes, and poor balance.
12. This person was a danger to himself or others, having lost the use of normal mental or physical faculties, due to his consumption of alcoholic beverages.
13. On June 23, 1998, one or more acts of public lewdness occurred on the licensed premises and were observed by law enforcement officers.
14. Dallas police officers made arrests for the offenses described in Finding of Fact 13.
15. Respondent, his agents, servants or employees, knew or should have known that persons on the premises were engaging in the acts of public lewdness described in Finding of Fact 13, based on previous violations of the same nature and the openness of the activities.
16. Respondent's violation history as maintained by the TABC shows that his permits were suspended in 1994 for acts of public lewdness occurring on the licensed premises.

CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01 and §11.61.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting 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.
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3 - 9 and 13 - 16, Respondent operated his business in a manner contrary to the public's general welfare and public sense of decency, contrary to TEX. ALCO. BEV. CODE ANN. §11.61(b)(7).
5. Based on Findings of Fact Nos. 10, 11, and 12, Respondent's employee sold alcoholic beverage to an intoxicated person on the licensed premises, contrary to TEX. ALCO. BEV. CODE ANN §11.61(b)(14).

6. Based on Findings of Fact Nos. 3 - 16, Conclusion of Law No. 5, and Conclusion of Law No. 6, Respondent's Mixed Beverage Permit MB-238940, Mixed Beverage Late Hours Permit LB-238940, and Beverage Cartage Permit PE-238942 should be cancelled.

SIGNED this 14th day of February, 1999.



TANYA COOPER

Administrative Law Judge

State Office of Administrative Hearings