

DOCKET NO. 613097

IN RE I GOTCHA INC.	§	BEFORE THE TEXAS
d/b/a Illusions	§	
PERMIT NO. MB-158142 & LB-158143	§	
	§	ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0758)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27 day of November, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Monica Garza. The hearing convened on March 24, 2006, and the record closed on April 28, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 1, 2006. This Proposal For Decision (**attached hereto as Exhibit "A"**), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. **Exceptions have been filed.**

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 suspension or cancellation of Respondent's permits is not warranted, pursuant to §§ 11.61(b)(2), 11.61(b)(13) and 104.01(5) of the Code.**

This Order will become final and enforceable on Dec 21, 2006, 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.

SIGNED on this 27 day of November, 2009, at Austin, Texas.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Jeannene Fox", written over a horizontal line.

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Monica Garza
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE 817-377-3706

John L. Gamboa
RESPONDENT'S ATTORNEY
VIA FACSIMILE 817-885-8504
Ph.: 817-885-8500

I Gotcha Inc.
d/b/a Illusions
RESPONDENT
7405 Camp Bowie West
Ft. Worth, TX 76116
~~CERTIFIED MAIL NO. _____~~
~~RETURN RECEIPT REQUESTED~~

Jerry McClain
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-819-9676

Licensing Division
Ft. Worth District Office

SOAH Docket No. 458-06-0758
TABC Docket No. 613097

Proposal for Decision

On March 24, 2006, a hearing convened before SOAH ALJ Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Jerry McClain, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Mr. Gamboa. Following presentation of evidence, the parties were given additional time to file written closing arguments. The record closed on April 28, 2006.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.61(b)(13), and 104.01(5), TABC may suspend or cancel a permit if it finds that a permittee, his agent, his servant, or his employee was intoxicated on the licensed premises.

Further, pursuant to TEX. PEN. CODE ANN. § 49.01(2), intoxicated means:

- (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
- (B) having an alcohol concentration of 0.08 or more.

III. EVIDENCE

A. Respondent's Permits

Respondent holds a Mixed Beverage Permit, MB-158142, and a Mixed Beverage Late Hours Permit, LB-158143, issued by TABC, for the premises located at 7405 Camp Bowie West, Fort Worth, Tarrant County, Texas. These permits were originally issued on December 16, 1983, and they have been continuously renewed.

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B. Respondent's Alleged Intoxicated Employee

On September 16, 2004, Patricia King was working as a dancer at Respondent's premises. She began her shift at 7:00 p.m. Between her dancing rotations, Ms. King sat with patrons. At approximately 10:00 p.m., while she was sitting with a patron at the bar, Ms. King was approached by TABC Agent Wesley Brian Miers. Shortly thereafter, Agent Miers arrested Ms. King for Public Intoxication.

C. Patricia King's Alleged Intoxication

1. Agent Miers' Testimony

Agent Miers provided the following testimony regarding his observations of Ms. King. He entered Respondent's premises that evening to conduct an inspection. While on the premises, he observed Ms. King seated at the bar with a gentleman. During a 20-minute time period, he observed her consume a mixed beverage and four shots of liquor. He observed that her speech was unusually loud. He also observed Ms. King display poor balance while on the bar stool, noting that she slid off the bar stool and used the bar to assist with her balance. He also observed her slinging her head in an awkward manner.

Upon contacting Ms. King, Agent Miers observed that she had the odor of an alcoholic beverage on her person; had red, bloodshot, and watery eyes; had slurred speech; and had poor balance. During his attempt to conduct the Horizontal Gaze Nystagmus standardized field sobriety evaluation, she was unable to comply with his instructions. While he was escorting Ms. King to the dancers' dressing room to retrieve identification, Ms. King lost her balance while walking up the stairs, and Agent Miers had to keep her from falling. In reference to whether her shoes might have affected her balance, he could not recall the type of footwear adorning Ms. King's feet.

Agent Miers concluded that Ms. King was a danger to herself and/or others, and he arrested

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her for Public Intoxication. While in the dressing room, Agent Miers suggested that Ms. King should change her clothes since she was going to jail. While he remained in the room while she changed her clothing, Agent Miers maintained that he did not observe Ms. King in a state of nudity.

2. Richard Milan's Testimony

Richard Milan, Respondent's manager on the date of Ms. King's arrest, provided the following testimony regarding the events of that evening. When Agent Miers and his partner entered Respondent's premises, Mr. Milan greeted them at the door. Mr. Milan then toured the premises with Agent Miers as they discussed unrelated TABC concerns. The other TABC agent stood between the bar and the pool tables as Agent Miers conducted his business with Mr. Milan. When he was finished speaking with Mr. Milan, Agent Miers walked over to speak with his partner. After speaking with his partner, Agent Miers re-approached Mr. Milan. He told Mr. Milan that there were two intoxicated people in the bar. When Mr. Milan asked to whom he was referring, Agent Miers did not respond. When Mr. Milan asked again, Agent Miers looked at his partner. The partner then pointed out Ms. King.

Regarding Ms. King's appearance that evening, Mr. Milan testified that she did not have unsteady balance, even though she was wearing six-inch platform heels. He noted that the only balance issue for Ms. King that evening was when she walked up the stairs in her six-inch heels. He indicated that while Agent Miers observed Ms. King on the bar stool, she was in the process of avoiding gropes from the patron seated beside her. Regarding her beverage consumption, he testified that Ms. King was drinking a sunset, which is an alcohol-free fruit drink dancers order when seated with patrons. Although he did observe her consume some liquor shots that evening, these were spread out between 7:00 p.m. and 10:00 p.m.

3. Patricia King's Testimony

Ms. King provided the following testimony regarding the evening of her arrest. She

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consumed one liquor shot at approximately 7:00 p.m. While seated at the bar during the TABC visit, she consumed two liquor shots and nursed the non-alcoholic sunset drink. When the patron wished to buy her another beverage, she suggested that she was too intoxicated to consume additional alcoholic beverages. She testified that making such a comment is a customary way to refuse drinks without insulting the customer. Regarding her appearance while seated at the bar, Ms. King testified that she was wiggling around in an attempt to avoid the constant groping of the patron.

At approximately 10:00 p.m., Agent Miers put his hand on Ms. King's shoulder and asked for her to step back to the kitchen area. She had no balance issues as she walked the 15-feet to the kitchen in her six-inch heels. When Agent Miers asked her to participate in field sobriety testing, she agreed, however, she asked permission to remove her six-inch heels. Agent Miers stated that would not be necessary, as they were not going to make it that far. Agent Miers asked her to follow the pen with her eyes during Horizontal Gaze Nystagmus testing. She stated that she was able to focus on the stimulus and follow it with her eyes, but Agent Miers only made one pass in each direction prior to putting his pen back in his pocket. He then stated that she had failed miserably.

Agent Miers then asked Ms. King for identification, and he followed her to the dressing room to retrieve it. Ms. King had no difficulty walking across the bar to the stairwell, but she lost her balance on one occasion when climbing the stairs. Ms. King indicated that the steps are not long enough to accommodate her shoes, making it most difficult to climb the stairs gracefully in the six-inch platform heels. She also noted that the stairs are concrete, and that they are pitted and rutted, again making them difficult to climb in those shoes. Ms. King indicated she would not wear her heels to climb the stairs under normal circumstances. However, even though she lost her balance on one occasion, she was able to catch her balance without completely falling down. Agent Miers did not have to assist her with her balance.

Once she was alone in the dressing room with Agent Miers, Ms. King retrieved her identification from her locker. Agent Miers then suggested that she change her clothes because she was going to jail. Agent Miers then watched her as she changed from her work clothes into her street

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clothes. When going down the stairs without her heels, Ms. King had no balance problems. Agent Miers then had her stand in a certain area while he conducted other business for approximately five minutes. Ms. King offered to provide a specimen for testing, but no opportunity was provided.

IV. ANALYSIS

Having considered the record in this case, the ALJ finds insufficient credible evidence to demonstrate that Respondent's employee, Patricia King, was intoxicated on the licensed premises on or about September 16, 2004.

Agent Miers initially observed Ms. King seated at the bar. He observed that she displayed unsteady balance and would sling her head in an awkward manner while seated at the bar. Both of these observations are consistent with Ms. King's testimony that she was attempting to avoid the constant groping of a patron seated beside her at the bar.

Regarding the number of alcoholic beverages consumed by Ms. King that evening, there is conflicting testimony. Agent Miers testified that he observed Ms. King consume a mixed beverage and four shots of liquor over a 20-minute time period. However, Ms. King testified that the mixed beverage was actually a non-alcoholic sunset drink, and she consumed two liquor shots during Agent Miers' visit. Because the evidence shows that Agent Miers was attending to other matters during the 20-minute time period, the ALJ is unable to find, by a preponderance of the evidence, that he observed Ms. King consume the number of drinks indicated in his testimony.

Regarding Ms. King's comment to the patron that she was too intoxicated to consume additional alcoholic beverages, she testified that this was a customary way to refuse additional drinks without insulting a patron. The ALJ finds this is a reasonable explanation for the comment. Therefore, the ALJ does not find the comment an admission of intoxication.

Once Agent Miers contacted Ms. King, he testified that he attempted to conduct standardized

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field sobriety testing. He felt that Ms. King was unable to comply with his instructions due to her level of intoxication. However, Ms. King's testimony suggests that Agent Miers had already made up his mind that she was intoxicated. When she asked to remove her six-inch platform heels, Agent Miers stated that would not be necessary, as they were not going to make it that far. When Agent Miers asked her to follow the pen with her eyes during Horizontal Gaze Nystagmus testing, she was able to focus on the stimulus and follow it with her eyes. However, Agent Miers only made one pass in each direction prior to putting his pen back in his pocket. He then stated that she had failed miserably. The ALJ finds Ms. King was able to provide detailed testimony regarding the attempted field sobriety testing and finds her version of events to be the most credible. Based on Ms. King's testimony regarding the field sobriety testing, the ALJ finds insufficient facts to demonstrate her intoxication.

Regarding Ms. King's balance issues while climbing the stairs, the ALJ finds her explanation reasonable that it was difficult to climb the pitted and rutted concrete stairs in six-inch platform heels that barely fit on the steps. Ms. King's loss of balance as she climbed the stairs is not evidence of her intoxication. Further, if Agent Miers truly believed Ms. King was a danger to herself and/or others due to her level of intoxication, it is not logical for him to direct Ms. King to climb the stairs to retrieve her identification.

For all of these reasons, the ALJ finds insufficient credible evidence exists to demonstrate that Respondent's employee, Patricia King, was intoxicated on the licensed premises on or about September 16, 2004. Therefore, suspension or cancellation of Respondent's permits is not warranted.

V. PROPOSED FINDINGS OF FACT

1. I Gotcha, Inc. d.b.a Illusions (Respondent) holds a Mixed Beverage Permit, MB-158142, and a Mixed Beverage Late Hours Permit, LB-158143, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 7405 Camp Bowie West, Fort Worth,

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Tarrant County, Texas. These permits were originally issued on December 16, 1983, and they have been continuously renewed.

2. On September 16, 2004, Patricia King was working as a dancer at Respondent's premises.
3. On that evening, Ms. King began her shift at 7:00 p.m.
4. Shortly before 10:00 p.m., TABC Agent Wesley Brian Miers entered Respondent's premises to conduct an inspection.
5. During Agent Miers' visit, Ms. King was seated with a patron at the bar.
6. While seated with this patron, Ms. King consumed a non-alcoholic mixed beverage and two shots of liquor.
7. While seated at the bar, Ms. King was attempting to avoid the constant groping of her patron.
8. Ms. King's actions in avoiding the patron's groping caused her balance to appear unsteady.
9. When the patron offered to buy Ms. King an additional beverage, she suggested she was too intoxicated.
10. Ms. King made this statement in order to politely decline the patron's offer of an additional beverage.
11. Agent Miers approached Ms. King and asked her to step to the kitchen area for field sobriety testing.
12. Ms. King asked if she could remove her six-inch platform heels prior to this testing.
13. Agent Miers stated that would not be necessary, as they were not going to make it that far.
14. During attempted Horizontal Gaze Nystagmus testing, Ms. King was able to focus on the stimulus and follow it with her eyes.
15. Agent Miers only made one pass in each direction prior to putting his pen back in his pocket.
16. Agent Miers stated she had failed miserably.

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17. Agent Miers asked Ms. King to retrieve her identification.
18. Ms. King climbed a flight of pitted, rutted, concrete stairs in her six-inch heels in order to retrieve her identification from the dressing room.
19. Ms. King lost her balance due to the logistics of climbing those particular stairs in those particular shoes.
20. There is insufficient credible evidence to demonstrate, by a preponderance of the evidence, that Ms. King was intoxicated on the licensed premises on or about September 16, 2004.
21. On December 15, 2005, TABC staff (Petitioner) issued its notice of hearing, directed to Respondent and its attorney, John Gamboa.
22. The notice 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.
23. On March 24, 2006, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas.
24. Petitioner was represented at the hearing by Jerry McClain, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Mr. Gamboa.
25. Following presentation of evidence, the parties were given additional time to file written closing arguments. The record closed on April 28, 2006.

VI. PROPOSED CONCLUSIONS OF LAW

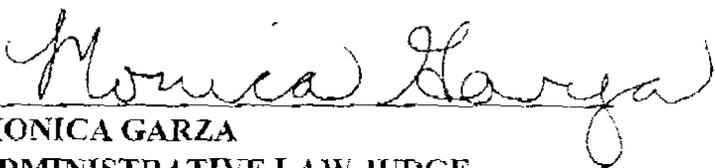
1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61(b)(2), 11.61(b)(13), and 104.01(5).
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.

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3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052
4. Respondent's employee was not intoxicated on the licensed premises. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.61(b)(13), and 104.01(5) and TEX. PEN. CODE ANN. § 49.01(2).
5. Suspension or cancellation of Respondent's permits is not warranted. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.61(b)(13), and 104.01(5).

SIGNED May 1, 2006.



MONICA GARZA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: I Gotcha Inc. d/b/a Illusions

DOCKET NUMBER 458-06-0758

AGENCY CASE NO: 613097

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As of May 1, 2006