

**DOCKET NO. 557874**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
STEVEN L MARTINEZ	§	
d/b/a 25 BAR & GRILL	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BE567662	§	
	§	
MCLENNAN COUNTY, TEXAS	§	
<b>(SOAH DOCKET NO. 458-08-0140)</b>	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 19<sup>th</sup> day of August, 2008, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Steven M. Rivas. The hearing convened on April 2, 2008 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 26<sup>th</sup> day of June, 2008. The Proposal For Decision (PFD) was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record. Petitioner filed Exceptions on June 13, 2008. Respondent did not file a response. On July 3, 2008, the Administrative Law Judge agreed with Petitioner's Exceptions and made three (3) additional Findings of Fact for the PFD.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal For Decision, Exceptions and Administrative Law Judge's additional Findings of Fact, the Commission adopts the Findings of Fact and Conclusions of Law as stated below.

All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**I. FINDINGS OF FACT**

1. Steven L. Martinez d/b/a MC's 25 Bar & Grill (Respondent) holds a Beer Retailer's On Premise License and a Retail Dealer's On-Premise Late Hours License, BE-567662, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 928 North Street, Waco, McLennan County, Texas.

2. Respondent authorized Anthony Lopez to perform managerial duties for the licensed premise referred to in Finding of Fact No.1.

3. In Respondent's absence, Mr. Lopez was in charge of operating the licensed premise.

4. Mr. Lopez performed activities, such as ordering supplies, writing checks to pay bills and taxes, and making deposits into the bar's bank account.

5. Mr. Lopez also negotiated a security guard contract for the bar, and assisted Respondent in obtaining membership with the Cen-Tex Hispanic Chamber of Commerce.

6. On September 12, 2007, TABC issued a Notice of Violation to Respondent alleging he permitted an unauthorized person to use or display a permit or license in the conduct of business.

7. A Notice of Hearing dated September 14, 2007, was issued by Commission Staff notifying the parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.

8. April 2, 2008, a public hearing was held before Administrative Law Judge Steven M. Rivas in Waco, Texas. Staff appeared at the hearing, and was represented by Judith L. Kennison, attorney. Respondent appeared and was represented by E. Eugene Palmer, attorney. Evidence was received and the record closed the same day.

9. Mr. Lopez was authorized to write checks from the bar's bank account. Signing checks to pay vendors or tax authorities did not indicate Mr. Lopez owned the bar.

10. Mr. Lopez performed duties that were akin to a general manager and not necessarily an owner.

11. No evidence was presented to establish that Respondent displayed a loss of control of the licensed premise.

12. Sufficient facts existed for Petitioner to properly pursue this case.

13. Petitioner did not bring this case for purposes of harassment against Respondent.

14. Respondent is not entitled to attorney's fees under § II TEX. GOV'T. CODE § 2006.13.

## II. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Chapters. 5, 6, 11, 25, 70, and 109.

2. 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 pursuant to TEX. GOV'T CODE ANN. Chapters 2001 and 2003.

3. Respondent received adequate notice of the hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Based upon Findings of Fact Nos. 2 -5, and 9 -11, Respondent did not permit the use or display of this TABC issued permit and license in the conduct of a business by a person not authorized by law to have an interest in the permit.

5. Based upon Findings of Fact Nos. 2 -5, and 9 -11, and Conclusion of Law No.4, no enforcement action should be taken against Respondent's Beer Retailer's On-Premise License and a Retail Dealer's On-Premise Late Hours License, BE-567662 issued by TABC for the violation alleged in this proceeding.

6. Respondent is not entitled to attorney's fees under § II TEX. GOV'T. CODE § 2006. 13.

**IT IS THEREFORE ORDERED**, by the 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 no enforcement action is taken against the Respondent.

This Order will become final and enforceable on September 12, 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 the 19<sup>th</sup> day of August, 2008 at Austin, Texas.

  
\_\_\_\_\_  
Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

The Honorable Steven M. Rivas  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FAX (512) 475-4994**

E. Eugene Palmer  
**ATTORNEY FOR RESPONDENT**  
**VIA FAX (512) 750-9380**

Steven L. Martinez  
**RESPONDENT**  
d/b/a MC's 25 BAR & GRILL  
2918 Wenz  
Waco, TX 76708  
**VIA REGULAR MAIL**

Judith Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

District Office

JK/cj

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

June 2, 2008

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

**VIA HAND DELIVERY**

**RE: Docket No. 458-08-0140; Texas Alcoholic Beverage Commission v. Steven L. Martinez d/b/a MC's 25 Bar & Grill, TABC Docket No. 557874**

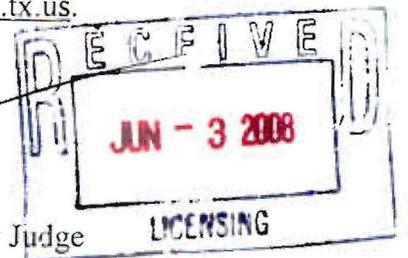
Dear Mr. Steen:

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](http://www.soah.state.tx.us).

Sincerely,

  
Steven M. Rivas  
Administrative Law Judge



SMR/Ls]  
Enclosure

cc Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA HAND DELIVERY**  
E. Eugene Palmer, P. O. Box 1057, Austin, TX 78767-1057 - **VIA REGULAR MAIL**

**DOCKET NO. 458-08-0140**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>STEVEN L. MARTINEZ</b>	§	
<b>d/b/a MC's 25 BAR &amp; GRILL,</b>	§	
<b>(TABC DOCKET NO. 557874)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Steven L. Martinez d/b/a MC's 25 Bar & Grill (Respondent), alleging that Respondent committed a violation<sup>1</sup> of the Texas Alcoholic Beverage Code (the Code) by permitting the use or display of the Respondent's TABC-issued permit and license in the conduct of a business by a person not authorized by law to have an interest in the permit. The TABC Staff seeks to revoke Respondent's permit and license. The Administrative Law Judge (ALJ) finds TABC Staff's evidence insufficient to establish the above-listed violation. The ALJ recommends that no enforcement action be taken against Respondent.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 6, 11, 25, 70, and 109. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related 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. ch. 2001. There were no contested issues concerning notice or jurisdiction in this proceeding. Accordingly, those matters will be addressed in the Findings of Fact and Conclusions of Law sections of this Proposal for Decision.

---

<sup>1</sup> The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found after notice and hearing, that any permittee violated a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

On April 2, 2008, a hearing was convened before ALJ Steven M. Rivas at the SOAH facility in Waco, Texas. TABC Staff was represented by Judith L. Kennison, Staff Attorney. Respondent appeared and was represented by E. Eugene Palmer, attorney. The record closed the same day.

## II. DISCUSSION

### A. Background Facts

Respondent holds a Beer Retailer's On-Premise License and a Retail Dealer's On-Premise Late Hours License, BE-567662, issued by TABC to Steven L. Martinez d/b/a MC's 25 Bar & Grill, located at 928 North 25<sup>th</sup> Street, Waco, McLennan County, Texas. TABC Staff asserts that Respondent participated in a subterfuge operation of the above-listed premise because he permitted the use or display of the permit and license in the conduct of a business by a person not authorized by law to have an interest in the permit.

Staff alleged that Respondent gave control of the bar to another person, Anthony Lopez, by allowing Mr. Lopez to write checks on the bar's account and by allowing Mr. Lopez to hold himself out as owner or co-owner of the bar to patrons and other business associates. Staff also contended that Mr. Lopez did not qualify as a permit-holder because he was delinquent in child support payments.

### B. Issues

#### 1. Did the official investigation reveal any findings of subterfuge?

TABC Agent, Ruben Suarez, testified that he was assigned a complaint over subterfuge and first examined Respondent's application and compared the information to other data like bank records. According to Agent Suarez, Respondent's bank records showed that Mr. Lopez had written

more than 90% of all the checks on the bar's account to pay vendor charges, taxes, license fees, and utilities.

Agent Suarez also noted that on a bank record, Respondent designated Mr. Lopez as a person authorized to make bank deposits on the bar's account at Compass Bank. Staff pointed out that Respondent initially set up the bar as a new account and designated Respondent as the owner and as the only person authorized to make deposits.<sup>2</sup> However, on the same date, August 4, 2004, Respondent changed the authorized signers to include both Respondent and Mr. Lopez.<sup>3</sup> On the change form, Respondent was still listed as the owner and Mr. Lopez was identified as a co-owner. However, on October 24, 2007, Respondent made another change to the form by designating Mr. Lopez as an employee.<sup>4</sup>

Respondent testified he was confused when he filed the two bank records in 2004 and did not intend to designate Mr. Lopez as a co-owner. Respondent argued that a bank employee typed the word "co-owner" next to Mr. Lopez's name, and that Respondent only wanted to authorize Mr. Lopez to make deposits and sign checks. According to Respondent, the amended bank record in 2007 came about after Respondent learned that TABC had alleged Mr. Lopez was acting as a co-owner of the bar.

Agent Suarez testified that after examining Respondent's bank records he found no evidence that Mr. Lopez had skimmed or taken any funds to which he was not entitled. Furthermore, Agent Suarez admitted he did not research the owner of the premises where the bar was located, but he did confirm with the Texas Workforce Commission that Respondent was the owner of the bar, and that the bar's water bill was in Respondent's name. Agent Suarez also confirmed that Mr. Lopez was

---

<sup>2</sup> TABC Exhibit No. 4, page 1.

<sup>3</sup> *Id* at page 2

<sup>4</sup> Respondent's Exhibit No. 4.

delinquent in his child support payments.<sup>5</sup>

**2. Did Respondent's tax returns reflect any indication of subterfuge?**

Mark Bowman, an accountant of 22 years, testified he prepared tax returns for both Respondent and Mr. Lopez in 2006 for tax year 2005.<sup>6</sup> Mr. Bowman pointed out that Respondent, as owner of a business, was required to attach a Schedule C to his tax return, which he did, to reflect the bar's profit/loss statement. Mr. Bowman also asserted that Respondent's tax records show that he is the sole owner of the business.<sup>7</sup>

Staff pointed out that Mr. Lopez's 2005 tax return reflected an amount of \$1,061 in wages and asked Mr. Bowman if that amount was typical for bar manager. Mr. Bowman asserted the amount of \$1,061 was listed on Mr. Lopez's W2 form as earned salary, and that if he was being paid cash, it may not be reflected on his W2 form or tax returns. Respondent testified that Mr. Lopez's salary appeared low because the bar had only opened in late 2005.

In addition to preparing Respondent's tax returns, Mr. Bowman also assists Respondent with his monthly payroll and sales taxes. Mr. Bowman stated he has seen no evidence that Mr. Lopez has skimmed any cash from the bar's finances. As to the checks signed by Mr. Lopez, Mr. Bowman

---

<sup>5</sup> TABC's Exhibit No. 8, a Financial Activity Report showing Mr. Lopez owed \$4,175.58 in back due child support.

<sup>6</sup> Respondent's Exhibit Nos. 1 and 2; form 1040 tax returns for 2005. Mr. Bowman has prepared Respondent's tax returns since 2005.

<sup>7</sup> Mr. Bowman stated that if the bar was owned by a partnership consisting of Respondent and Mr. Lopez, they would have to file a form 1065 tax return.

testified he understood Mr. Lopez was a manager with the authority to sign checks and that signing checks in and of itself is not indicative of ownership.

### 3. How did Respondent's business dealings reveal elements of subterfuge?

In August 2005, Respondent sought to be listed with the Cen-Tex Hispanic Chamber of Commerce in Waco, Texas. Executive Director, Joe Rodriguez, testified that although he was not personally involved in the application process, it appears that both Respondent and Mr. Lopez were listed as co-owners of the bar on their application.<sup>8</sup> This application was filled out and signed by Mr. Lopez because Respondent admitted he never saw the application. Respondent also testified that although he knew Mr. Lopez had sought membership with the Hispanic Chamber of Commerce and paid the dues, he never bothered to look at the listing.<sup>9</sup> Furthermore, Respondent knew the membership had to be renewed yearly, and he never intended on renewing.

In 2005, Denise Nicholson, president of Pro Security Group, a security guard company, met with Mr. Lopez to negotiate a security contract for the bar. Ms. Nicholson stated no written contract was written up, but she did agree to provide security for the bar. She also stated that she met Respondent and was under the impression that Respondent and Mr. Lopez were co-owners of the bar by the way they acted. However, Ms. Nicholson admitted she did not verify ownership.

In 2005, Ester Ramon, staff appraiser for the McClennan County Appraisal District (MCAD), performed an inspection of the bar to verify ownership. According to Ms. Ramon, when she arrived at the bar, neither Respondent nor Mr. Lopez was present. Ms. Ramon testified that she inspected the property and briefly spoke to a female bartender. Ms. Ramon also testified that she informed the bartender on duty to have Respondent contact her. When Respondent contacted Ms. Ramon about the purpose of her inspection, Ms. Ramon explained that as a new business, the MCAD had to verify

---

<sup>8</sup> TABC's Exhibit No. 7 at page 3, application for membership dated August 9, 2005.

<sup>9</sup> *Id* at page 8. The listing reads "Anthony Lopez & Stevie Martinez" under the bar's name.

ownership and collect phone numbers and addresses. Ms. Ramon testified that during a conversation with Respondent in 2002, he told her that Mr. Lopez was co-owner of the bar. However, the bar opened in 2005, and the ALJ is unclear if Respondent made that comment in 2002 or shortly after Ms. Ramon visited the bar. Respondent testified he does not remember telling Ms. Ramon that Mr. Lopez was co-owner of the bar.

Joseph Carter, an enforcement officer with the State's Comptroller Tax Division, performed another inspection of the bar in 2005 to verify sales tax permits. Mr. Carter testified that neither Respondent nor Mr. Lopez was at the bar when he arrived, but he found Respondent's permits were current and observed documents that indicated Respondent was sole owner of the bar. While at the bar, Mr. Carter also observed checks written by Mr. Lopez, but stated it was not unusual for other people to be authorized to write checks.

**4. Did the assault incident on October 23, 2005, support TABC's subterfuge claim?**

Detective Robert Grissom of the Waco Police Department Assault Division investigated an alleged assault that occurred at the bar on October 23, 2005. Detective Grissom testified the alleged victim (Francheska Juarbe) claimed Mr. Lopez choked her and removed her from the bar on the night in question.

According to Detective Grissom, Ms. Juarbe was removed from the bar after an alleged disturbance between Ms. Juarbe and her ex-boyfriend, an unidentified male who was at the bar when Ms. Juarbe arrived. During the investigation, Detective Grissom recalls Mr. Lopez told him that he was a "co-owner" of the bar and was "in charge" the night he removed Ms. Juarbe from the bar.<sup>10</sup> Respondent stated he was at the bar on that night but claims he did not see Mr. Lopez remove Ms. Juarbe from the bar.

---

<sup>10</sup> According to Detective Grissom, Mr. Lopez was not formally charged with assault.

Tara Oliver accompanied Ms. Juarbe to the bar that night and remembers Mr. Lopez kicking them out soon after they arrived. Ms. Oliver also stated she did not see Respondent that night and that Mr. Lopez appeared to be “running the bar.”

Staff argued Mr. Lopez made statements to Detective Grissom that he was co-owner and was in charge of the bar in order to misrepresent himself during the investigation and Respondent did nothing to correct Mr. Lopez’s misleading statements. Staff argued Respondent’s inaction illustrated his loss of control over the bar.

**5. Did the testimony of Respondent’s current and former employees reflect any elements of subterfuge?**

Sandra White worked at the bar and asserted she knew Respondent was the owner and considered Mr. Lopez to be a manager. She also stated Mr. Lopez never told her he was a co-owner of the bar and never discussed ownership with her. Ms. White further recalled talking to Agent Suarez and telling him that Mr. Lopez was “the boss,” but not the owner. According to Ms. White, Respondent and Mr. Lopez shared an evenly divided office that contained two desks, personal items, and photographs. Staff argued that an evenly divided office demonstrated equal control of the bar.

Griselda Lopez (no relation to Mr. Lopez) also testified that she sometimes works at the bar as a photographer and bartender. Ms. Lopez stated that although she works infrequently and for relatively short hours, she knew Respondent was the bar’s owner and Mr. Lopez was the manager.

Tommy Burns, who sometimes works at the bar as a bouncer and doorman, also acknowledged Respondent was the owner and Mr. Lopez the manager. Mr. Burns stated he was not present on the night of the alleged assault.

**6. Did Respondent's testimony reveal any evidence of subterfuge?**

Respondent strongly asserted Mr. Lopez does not own any part of Respondent's business. Respondent testified that he and Mr. Lopez have been friends for many years and he hired Mr. Lopez as a bar manager and authorized him to sign checks. Additionally, Respondent testified he had no reason to believe Mr. Lopez skimmed from the business profits.

Respondent stated Mr. Lopez was authorized to write checks to any entity for any amount so long as it was related to the bar. Respondent also noted that he would review the monthly bank statements to make sure Mr. Lopez was not paying too much for services like security guards or electricians. On cross-examination, Respondent testified he was not present at the bar during the day when most vendors would make deliveries, and that it would be Mr. Lopez's responsibility to deal with the vendors at that time.

Respondent further stated that he authorized Mr. Lopez to handle the day-to-day operations of the bar, and when Respondent was not at the bar, everyone understood that Mr. Lopez was in charge. Although Respondent never heard Mr. Lopez call himself a co-owner, he acknowledged that he knew Mr. Lopez told girls at the bar that he was a co-owner. Additionally, Respondent admitted that Mr. Lopez may have told people that he was the actual owner of the bar. However, the record is silent as to whom Mr. Lopez may have identified himself as the owner.

**7. Is Respondent's counsel entitled to attorney fees?**

Respondent's counsel argued he is entitled to attorneys fees under TEX GOV'T CODE § 2006.13, because TABC improperly pursued this case against Respondent based on the lack of evidence that supported TABC's claim of subterfuge.<sup>11</sup> Additionally, Respondent's counsel asserted

---

<sup>11</sup> Tex. Gov't. Code § 2006.13 Requirements of recovery (a) In an administrative adjudicatory proceeding...the small business may be awarded reasonable attorney fees and court costs if: (1) it is a small business at the time it becomes a party to the proceeding or action; (2) it prevails in the proceeding or action; and (3) the proceeding or action was groundless and brought: (A) in bad faith; or (B) for purposes of harassment.

that TABC sought to harass Respondent by bringing this action. Staff argued counsel was not entitled to attorney's fees because sufficient evidence of subterfuge existed to bring this case and that no evidence of harassment exists.

The ALJ believes sufficient evidence exists to bring this case against Respondent based on the fact that Mr. Lopez wrote more than 100 checks on the bar's account and that Mr. Lopez identified himself as co-owner to the Hispanic Chamber of Commerce and other bar patrons.

Respondent's counsel also argued that this case resembles the facts of another case outlined in SOAH docket number 458-07-0146; *TABC v. Araceli Cadena d/b/a Club Los Dos Laredos*, a case in which ALJ Tanya Cooper found that TABC failed to prove its claim of subterfuge against the permit-holder. Respondent's counsel argued the facts of the *Cadena* case were so similar to the facts in this case, that TABC should have known it would not be able to prove subterfuge, and that TABC's continued pursuit of this case was to merely harass the Respondent.

The ALJ is not convinced that the *Cadena* case placed TABC on notice that it could not prevail on this matter and therefore should not have pursued this matter, even though some of the facts of the *Cadena* case are similar to the present case. The similarities of alleged subterfuge include: (1) a person other than the permit-holder was handling the day-to-day operations of the bar, (2) a person other than the permit-holder attempted to pay taxes owed for the bar, (3) the person alleged to have been acting in the permit-holder's place was not qualified to hold a TABC permit, and (4) Agent Suarez was one of the TABC's investigating officers. In the *Cadena* case, the permit-holder's brother was found to be operating the bar while his sister, the permit-holder, was away attending family business in Mexico. The TABC investigators in the *Cadena* case were unable to speak with the permit-holder during their investigation. In the present case, both actors (Respondent and Mr. Lopez) were present during the investigation.

The ALJ believes even though the similarity between this case and the *Cadena* case is noteworthy, it does not amount to harassment on the part of TABC in bringing the present case against

Respondent. The ALJ noted, as did Staff, that the *Cadena* decision does not represent the Agency's Final Order, nor does it set out any legal guidelines or criteria that must be considered in every subterfuge case that follows. Agent Suarez testified that he was aware of the *Cadena* decision, but asserted that all subterfuge cases have similar characteristics and that findings of subterfuge are dependent on each investigation.

Because the evidence reflects some elements of purported subterfuge, the ALJ believes TABC did not improperly pursue this case. Since bringing this case against Respondent was not improper, the ALJ can find no evidence of harassment on the part of TABC. Therefore, Respondent's counsel failed to prove he was entitled to attorney's fees under TEX GOV'T CODE § 2006.13.

### **C. Analysis**

#### **1. What must be shown to prove a case of subterfuge?**

Staff alleged in its Notice of Hearing that Respondent allowed an unauthorized person to use or display a permit or license in the conduct of business in violation of Section 109.53 of the Code. The ALJ adopts ALJ Cooper's analysis of Section 109.53 as stated in the *Cadena* case:

The Code provides for several activities that are prohibited in the operation of a licensed premise. Collectively, these violations are referred to as subterfuge. And while the term "subterfuge" is not specifically defined within the provisions of the Code, its common meaning is defined as a deception in order to... escape, or evade; or a deceptive device or stratagem. (See Webster's Collegiate Dictionary, Tenth Edition).

ALJ Cooper found in favor of the bar in the *Cadena* case because TABC failed to prove that the non permit-holder, Ramon Cadena, conducted business at the bar for the benefit of himself. Staff argued that in this case, as opposed to the *Cadena* case, TABC need not prove Mr. Lopez derived

any benefit from conducting business at the bar. According to Staff, it only needs to prove that Respondent allowed Mr. Lopez to use the permit in the conduct of business.

**2. Did Respondent allow Mr. Lopez to use his permit in the conduct of business?**

Respondent, without question, allowed, authorized and consented to Mr. Lopez to conduct a great deal of business for the bar. This is evident by the employer/employee relationship between Respondent and Mr. Lopez. The record reflects Respondent was clearly the owner of the business, and Mr. Lopez was the manager, who oversaw the daily activities of the bar and wrote checks to vendors and other entities like taxing authorities. However, none of Staff's witness testified they ever saw any documentation (utility bill or permit) that reflected Mr. Lopez was the owner or co-owner of the bar.

The record is very clear that Mr. Lopez wrote over 100 checks to vendors and other entities and in doing so, represented the bar and arguably conducted business for the bar. Respondent stated that Mr. Lopez primarily wrote checks to vendors including Ben E. Keith, and Glazer's, that made deliveries while Respondent was away from the bar. However, Respondent gave no explanation why he could not write checks to such entities like the City of Waco (water bill), Texas Comptroller of Accounts (sales tax), Mark Bowman (accountant), McClennan County Appraisal District (property taxes), Pro Security Group, Spark Energy (electric bill), Atmos Energy (gas bill), the IRS, and Texas Workforce Commission (unemployment taxes), among other non-vendor entities.

Staff argued it was improper for Respondent to "abdicate" all responsibilities to Mr. Lopez, a person unqualified to hold a permit. However, apart from the Hispanic Chamber of Commerce application that indicated Respondent and Mr. Lopez were co-owners, actions such as opening and closing the business, purchasing supplies, and making deposits into the bar's bank account, appear to be akin to the activities of a bar's general manager. Furthermore, none of Staff's witnesses testified that the act of writing checks for a business indicates ownership of the business because it is common for non-business owners to write checks for the business in which they are employed.

### C. Conclusion

The ALJ finds Staff failed to prove its case against Respondent because all of the activities performed by Mr. Lopez were in line with activities commonly performed by a general manager. The ALJ recommends that no enforcement action be taken against Respondent in connection to this matter.

### III. FINDINGS OF FACT

1. Steven L. Martinez d/b/a MC's 25 Bar & Grill (Respondent) holds a Beer Retailer's On-Premise License and a Retail Dealer's On-Premise Late Hours License, BE-567662, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 928 North 25<sup>th</sup> Street, Waco, McClennan County, Texas.
2. Respondent authorized Anthony Lopez to perform managerial duties for the licensed premise referred to in Finding of Fact No. 1.
3. In Respondent's absence, Mr. Lopez was in charge of operating the licensed premise.
4. Mr. Lopez performed activities, such as ordering supplies, writing checks to pay bills and taxes, and making deposits into the bar's bank account.
5. Mr. Lopez also negotiated a security guard contract for the bar, and assisted Respondent in obtaining membership with the Ccn-Tex Hispanic Chamber of Commerce.
6. On September 12, 2007, TABC issued a Notice of Violation to Respondent alleging he permitted an unauthorized person to use or display a permit or license in the conduct of business.
7. A Notice of Hearing dated September 14, 2007, was issued by Commission Staff notifying the parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
8. On April 2, 2008, a public hearing was held before Administrative Law Judge Steven M. Rivas in Waco, Texas. Staff appeared at the hearing, and was represented by Judith L. Kennison, attorney. Respondent appeared and was represented by E. Eugene Palmer, attorney. Evidence was received and the record closed the same day.

9. Mr. Lopez was authorized to write checks from the bar's bank account. Signing checks to pay vendors or tax authorities did not indicate Mr. Lopez owned the bar.
10. Mr. Lopez performed duties that were akin to a general manager and not necessarily an owner.
11. No evidence was presented to establish that Respondent displayed a loss of control of the licensed premise.

#### IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. chs. 5, 6, 11, 25, 70, and 109.
2. 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, pursuant to TEX. GOV'T CODE ANN. chs. 2001 and 2003.
3. Respondent received adequate notice of the hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Findings of Fact Nos. 2 - 5, and 9 - 11, Respondent did not permit the use or display of his TABC-issued permit and license in the conduct of a business by a person not authorized by law to have an interest in the permit.
5. Based upon Findings of Fact Nos. 2 - 5, and 9 - 11, and Conclusion of Law No. 4, no enforcement action should be taken against Respondent's Beer Retailer's On-Premise License and a Retail Dealer's On-Premise Late Hours License, BE-567662 issued by TABC for the violation alleged in this proceeding.

**SIGNED ON June 2, 2008.**



---

**STEVEN M. RIVAS,  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

SOAH DOCKET NO. 458-08-0140

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
STEVEN L MARTINEZ	§	OF
d/b/a MC'S 25 BAR & GRILL, Respondent	§	
	§	
PERMIT/LICENSE NO(s).	§	
BE567662, BL	§	
MCLENNAN COUNTY, TEXAS	§	
(TABC CASE NO. 557874)	§	ADMINISTRATIVE HEARINGS

**PETITIONER'S EXCEPTION TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE RIVAS:

COMES NOW, Petitioner, through its attorney of record, Judith Kennison with this its Exceptions to the Proposal for Decision (PFD) issued June 2, 2008 and in support shows the following:

I.

The Administrative Law Judge (ALJ) issued a PFD recommending that no enforcement be taken against Respondent. Although Petitioner does not support this determination, it does not challenge said conclusion.

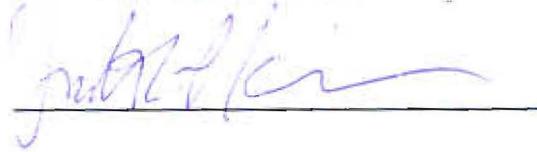
However, the ALJ indicated within the body of the PFD that the Respondent was not entitled to attorney's fees pursuant to 11 Tex. Gov't Code § 2006.13.<sup>1</sup> Specifically, the ALJ decided that the Petitioner did not bring its case against Respondent improperly or for purposes of harassment. Unfortunately, the ALJ failed to include this determination within the Findings of Fact and Conclusions of Law. Such an omission renders the PFD incomplete as written.

WHEREFORE, Petitioner requests that its Exceptions be considered and that the PFD be appropriately corrected to include the requested finding.

---

<sup>1</sup> PFD, p. 8-10

Respectfully submitted by,



Judith L. Kennison  
ATTORNEY FOR PETITIONER  
State Bar No. 11313030  
TABC Legal Services  
5806 Mesa Drive, Ste. 230  
Austin, Texas 78731  
Telephone: (512) 206-3490  
Fax (512) 206-3498

**CERTIFICATE OF SERVICE**

I, Judith L. Kennison, certify that I have served true copies of this Petitioner's Exceptions to the Proposal for Decision on all parties, on June 13, 2008, in the manner indicated below.



Judith L. Kennison  
**ATTORNEY FOR THE PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Services Division

Administrative Law Judge Rivas  
State Office of Administrative Hearings  
**VIA FAX (512) 475-4994**

E. Eugene Palmer  
ATTORNEY FOR RESPONDENT  
**VIA FAX (512) 750-9380**

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge  
July 3, 2008

LE -

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

VIA FACSIMILE: 512/206-3217

**RE: Docket No. 458-08-0140; Texas Alcoholic Beverage Commission v. Steven L. Martinez d/b/a MC's 25 Bar & Grill, TABC Docket No. 557874**

Dear Mr. Steen:

On June 13, 2008, Judith Kennison, counsel for Petitioner, Texas Alcoholic Beverage Commission (Staff/TABC), filed its Exceptions to the Proposal for Decision that was issued on June 2, 2008. Counsel for Respondent, Steven L. Martinez, did not file a response to Staff's exceptions.

In its Exceptions, Staff asserted the undersigned Administrative Law Judge (ALJ) erred because he failed to include a finding of fact stating Respondent's attorney was not entitled to attorney's fees under § 11 TEX. GOV'T. CODE § 2006.13.

After careful review of Staff's exceptions, the ALJ makes the following additions to the PFD:

1. Finding of Fact No. 12: Sufficient facts existed for Petitioner to properly pursue this case.
2. Finding of Fact No. 13: Petitioner did not bring this case for purposes of harassment against Respondent.
3. Finding of Fact No. 14: Respondent is not entitled to attorney's fees under § 11 TEX. GOV'T. CODE § 2006.13.

The ALJ recommends no further changes to the PFD that are not stated herein.

Sincerely,

  
Steven M. Rivas  
Administrative Law Judge

SMR/Ls

xc Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA FACSIMILE: 512/206-3490  
E. Eugene Palmer, P. O. Box 1057, Austin, TX 78767-1057 - VIA FACSIMILE: 512/750-9380

William P. Clements Building  
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025  
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994  
<http://www.soah.state.tx.us>