

DOCKET NO. 572493

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	ALCOHOLIC
HECTOR SOTO CHAVEZ	§	
D/B/A RENE'S BAR	§	
PERMIT/LICENSE NO(s). BG424164	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-08-2618)	§	BEVERAGE COMMISSION

ORDER

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

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on the 25th day of June, 2008 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 28th day of August, 2008. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates **those** Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

I. FINDINGS OF FACT

Hector Soto Chavez d/b/a Rene's Bar, Respondent possessed a narcotic on his person on the licensed premise in violation of Texas Alcoholic Beverage Code §§ 104.01(9), 61.71(17), and 16 Texas Administrative Code § 35.31 (c)(15).

Hector Soto Chavez d/b/a Rene's Bar, Respondent failed to promptly report to the Commission any and all breach of the peace incidents occurring on the licensed premises, in violation of Texas Alcoholic Beverage Code § 61.71((31).

II. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, Respondent's permit and License should be CANCELLED FOR CAUSE.

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 your permit(s) and/or license(s) is/are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on October 17, 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 23rd day of September, 2008 at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

The Honorable Veronica S. Najera
Administrative Law Judge
SOAH - El Paso
VIA FACSIMILE: (915) 834-5657

Ray Velarde
ATTORNEY FOR RESPONDENT
VIA FACSIMILE: (915) 542-2341

HECTOR SOTO CHAVEZ
RESPONDENT
d/b/a RENE'S BAR
1033 Wyoming
El Paso, TX 79902

Emily E. Helm
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
District Office

EH/cj

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 28, 2008

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA FACSIMILE NO. 512-206-3350

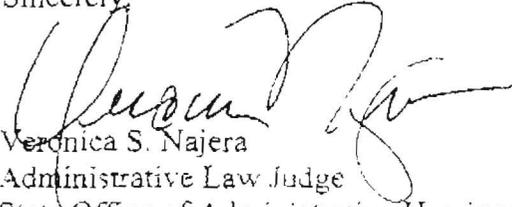
RE: Docket No. 458-08-2618--TABC No. 572493
Texas Alcoholic Beverage Commission v. Hector Soto Chavez d/b/a
Rene's Bar

Dear Ms. Fox:

Please find enclosed the Proposal for Decision on the above referenced case. My recommendation is cancellation.

The exhibits will be directly forwarded to the attorney of record after the exceptions period.

Sincerely,



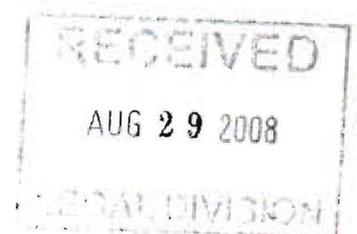
Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN or
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- VIA Docket Change Form

Emily E. Helm, Attorney, TABC Legal Division- VIA Facsimile No. 512-206-3498

Ray Velarde, Attorney at Law, VIA Facsimile No. 915-542-2341



SOAH DOCKET NO. 458-08-2618

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**
Petitioner

BEFORE THE STATE OFFICE

V.

OF

HECTOR SOTO CHAVEZ
d/b/a **RENE'S BAR,**
Respondent

EL PASO COUNTY, TEXAS

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff at the Texas Alcoholic Beverage Commission brought this action against Hector Soto Chavez d/b/a Rene's Bar, alleging that Respondent possessed a narcotic on the licensed premises. The Petitioner seeks the cancellation for cause of the permit and license based on lewd, immoral, indecent conduct,¹ and the general welfare, health, peace, morals and sense of decency of the people.²

After a contested case hearing and review of the applicable law hereto, the Administrative Law Judge (ALJ) recommends cancellation of the of the wine and beer retailer's on premise permit, which includes a retailer's on premise late hours license.

I. NOTICE AND JURISDICTION

A notice of hearing was issued on April 23, 2008, apprising all parties of Petitioner's allegations and of the hearing date. An amended notice of hearing was subsequently issued on June 25, 2008. Notice and jurisdiction were not contested issues and are addressed in the findings of fact and conclusions of law without further discussion here.

¹ TEX. ALCO. BEV. CODE ANN. § 104.01(9)

² *Id.* at § 61.71(17).

II. PROCEDURAL HISTORY

An agreed motion for continuance was granted on May 23, 2008. Prehearing statements were filed by both parties in a timely fashion. A hearing was convened on July 31, 2008, before ALJ Veronica S. Najera at the SOAH El Paso Regional Office. The TABC's staff was represented at the hearing by Emily E. Helm, staff attorney. The Respondent was represented by Ray Velarde, attorney at law. The record closed on July 31, 2008, upon the conclusion of the hearing.

III. DISCUSSION

A. Background

Rene's Bar is a small bar establishment within the City and County of El Paso, Texas.³ Respondent holds a wine and beer retailer's on premise permit, which includes a retailer's on premise late hours license.⁴ Respondent's administrative violation history includes the following:⁵

Violation date	Violation description	Disposition
12-01-07	Possession of drugs by license/permit holder	pending
12-01-07	Sale/delivery of drugs by license/permit holder	pending
12-26-04	Refusing inspection of license premises	Written warning
12-26-04	Place or manner	Written warning
12-04-00	Cash law	5 day suspension or \$750.00 civil penalty
06-08-00	Refusing inspection of license premises	Written warning
06-08-00	Possession/display of indecent graphic material	Written warning
03-16-00	Cash law	Written warning

³ Rene's Bar is located at 1033 Wyoming Street, El Paso, Texas.

⁴ See Petitioner's Exhibit No. 2, permit number BG-424164

⁵ Full administrative violation history

05-27-98	Miscellaneous violation	Written warning
03-04-98	Cash law	Written warning

B. Petitioner's Case

The Petitioner seeks the cancellation of Respondent's permit and license based on a narcotic possession allegation against Respondent. To support its position, the Petitioner relies on the testimony of the TABC agents and officers who conducted an inspection of Rene's Bar on December 1, 2007. The evidence shows, as recounted in the following paragraphs, that cocaine was found on Respondent's person at the establishment. Specifically, the Respondent possessed on his person 12 cocaine diamond folds, with a total gross weight of 11.34 grams.⁶

Three TABC agents conducted an inspection of the licensed premises on December 1, 2007. All three TABC agents testified and recounted the events of that inspection. Agent Oscar Menchaca said that during the inspection, the agents encountered a locked safe in the office. The bartender in charge, Alma Tovar, informed the TABC agents that Respondent was the only person who had access to the safe. She was instructed to telephone Respondent. Respondent arrived and consented to opening the safe. Agent Menchaca inspected the safe and found the following items inside the safe: a charged revolver,⁷ a bottle labeled inositol,⁸ and two money bags.⁹ While in the office, the agents observed the Respondent reach for his left pants pocket and throw a plastic bag to the floor. Agent Anthony Canonizado and Agent Robert Chavez also saw Respondent drop the plastic bag from his pocket.

⁶ Petitioner's Exhibit No. 3, Texas Department of Public Safety laboratory submission form. See also Petitioner's Exhibit No. 4, Texas Department of Public Safety drug analysis laboratory report. There is a difference in weight between the two laboratory reports. The difference is due to one reflecting total gross weight, which includes the packaging, and the other reflecting net weight.

⁷ Petitioner's Exhibit No. 7.

⁸ Petitioner's Exhibit No. 8. Agent Menchaca has eight years of narcotic experience with the El Paso Police Department, with a total of 20 years experience in law enforcement. Agent Menchaca testified that inositol, a white powdery substance, is a component used to cut cocaine. He said that a white powdery substance was inside the bottle. The substance was not tested in a laboratory.

⁹ Petitioner's Exhibit No. 13, search warrant execution video. The recording shows the two money bags found inside the safe and the opening of such by the TABC agents. Video recording was made by Agent Canonizado at the TABC office the night of the inspection.

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The plastic bag thrown to the floor by Respondent contained 11 diamond folds. Respondent's right pants pocket contained another diamond fold. Each diamond fold contained cocaine.¹⁰ Further, a piece of paper with handwritten notations and tally marks referring to "coca" was found on Respondent's person.¹¹ Officer Menchaca testified that "coca" is slang in Spanish for cocaine, which led him to believe that the tally marks indicate sales of cocaine.

The money bags were opened by Agent Wesley Rappe at the TABC El Paso office. One money bag contained \$97,40.00 in \$100.00 bills. The currency was contained in plastic bags inside two men's socks. Agent Menchaca testified that the manner in which the currency was packaged¹² indicates that the money is narcotic related. In addition, the "sniff" test for narcotics on the money bag was positive.¹³ The second money bag also contained some incidental currency and a check book. The agents testified that Respondent told them the money bag with the large amounts of currency belonged to an Azteca gang member. Agent Menchaca said that Respondent told him that the gang had taken over the bar and it was being used as a "tiendita"¹⁴ for the sale of drugs. Subsequently, Respondent told the agents that the money found was derived from the sale of a home in Juarez, Mexico.

In addition, the Staff presented the testimony of Sergeant Glen W. Archer who testified about his involvement in six police responses to the bar involving narcotic activity.¹⁵

Report number	Date of occurrence
07-302019	10-29-07
07-302016	10-29-07

¹⁰ Officer Chavez first tested the diamond folds and they all tested positive for cocaine. The official laboratory report confirmed the narcotic. See Petitioner's Exhibit No. 4.

¹¹ Respondent's Exhibit No. 12.

¹² See Respondent's Exhibit No. 13, search warrant execution video. The video recording shows the packaging of the money bag.

¹³ Officer Alfredo Torres, a canine handler, testified that an "odor of narcotics sniff" was conducted by a trained dog. He said that the dog alerted to an odor of narcotics on the money bank bag.

¹⁴ Agent Menchaca testified that "tiendita" means "small store" in Spanish.

¹⁵ See Petitioner's Exhibit 6(a-f). El Paso Police incident investigation reports

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07-280027	10-07-07
07-238280	08-26-07
07-218019	08-05-07
07-218013	08-06-07 ¹⁶

None of the six incidents were reported to the TABC as a breach of the peace.¹⁷

C. Respondent's Case

Alma Tovar, the bartender in charge on December 1, 2007, testified to the same facts provided by the agents' testimony. She said the Respondent had "just left about 10 minutes before the arrival of the TABC agents." She said she telephoned the Respondent, and he arrived about 20 minutes thereafter. She also spoke about an incident in which she was verbally attacked by a patron which required a police response. She informed the Respondent about it, but no breach of the peace report was filed with the TABC. Her testimony paralleled Sergeant Archer's testimony, confirming that they had spoken regarding the incident calls at the bar.

IV. ANALYSIS

Two grounds are asserted for the cancellation:

- First, cancellation is sought based on lewd, immoral, indecent conduct which specifically defines possession of a narcotic as a prohibited act.¹⁸

¹⁶ See Petitioner's Exhibit 6(a-f), El Paso Police incident/investigation reports.

¹⁷ The permittee has as a duty to promptly report a breach of the peace occurring on the licensed premises. See TEX. ALCO. BEV. CODE ANN. § 61.71(31). "Premises" is defined as the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. *Id.* at § 11.49(a).

¹⁸ TEX. ALCO. BEV. CODE ANN. § 104.01(9) [Regulation of Retailers], states that no person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency including the possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.

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- Second, cancellation is sought based on the general welfare, health, peace, morals, safety, and sense of decency of the people which specifically defines any narcotic offense as an offense against the general welfare.¹⁹ Similarly, the Commission's rules define a narcotics related offense as an offense against the general welfare.²⁰

The administrative rules further define "narcotic" as "any substance defined in the Texas Controlled Substance Act." Cocaine is one of the controlled substances defined in the Texas Controlled Substance Act.²¹

Respondent's argument that, but for the fact that he was called to the premises, he would not have been there with narcotics, is not persuasive. Further, Respondent's own witness testified that the Respondent had just left the premises. There is no dispute that the Respondent possessed the narcotic on his person within the establishment. Whether or not the sale of narcotics was effectuated at the establishment is not detrimental to this action because the Code²³ prohibits *possession*.

Furthermore, the Respondent has failed to comply with the Code by failing to promptly report a breach of the peace occurring on the licensed premises.²⁴ In fact, Respondent has not just failed to *promptly* report the incidents of record; he has not reported them at all. The failure to report is a ground for cancellation pursuant to the Code.²⁵

Moreover, the permittee himself was in possession of a narcotic. The Code places on Respondent the duty to abide by the rules and regulations that are appertained to a TABC permit.

¹⁹ *Id* at § 61.71(17) [Grounds for Cancellation or Suspension - Retail Dealer], states that the commission or administrator may suspend or cancel an original or renewal retail dealer's on or off premise license if it is found, after notice and hearing, that the place and manner in which the permittee conducts his business warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people.

²⁰ 16 TEX. ADMIN. CODE ANN. (TAC) § 35.31(c)(15) [Offenses Against the General Welfare]

²¹ 16 TAC § 35.41(b).

²² TEX. HEALTH & SAFETY CODE ANN. § 481.002.

²³ The Code refers to the Texas Alcoholic Beverage Code.

²⁴ TEX. ALCO. BEV. CODE ANN. § 61.71(31).

²⁵ *Id*

Also Persuasive is the fact that the applicable Code has specifically defined any narcotic related offense as lewd, immoral, indecent conduct, and as a place or manner offense. Furthermore, Respondent's narcotic possession, and his disregard of Code duties, evidences that the manner in which the business has been conducted warrants cancellation of the permit and license.

For the reasons stated in the preceding paragraph, the ALJ recommends cancellation of Respondent's permit and accompanying license.

V. FINDINGS OF FACT

1. Hector Soto Chavez d/b/a Rene's Bar (Respondent) holds a wine and beer retailer's on premise permit, which includes a retailer's on premise late hours license, issued by the Texas Alcoholic Beverage Commission (TABC) under number BG-424164, for the premises located at 1033 Wyoming, El Paso, El Paso County, Texas.
2. A notice of hearing was issued on April 23, 2008, by the TABC, apprising all parties of Petitioner's allegations and of the hearing date. An amended notice of hearing was subsequently issued on June 25, 2008.
3. A hearing was convened on July 31, 2008, before Administrative Law Judge (ALJ) Veronica S. Najera at the SOAH El Paso Regional Office. The TABC's staff was represented at the hearing by Emily E. Helm, staff attorney. The Respondent was represented by Ray Velarde, attorney at law.
4. The record closed on July 31, 2008.
5. Respondent's administrative violation history includes the following:

Violation date	Violation description	Disposition
12-01-07	Possession of drugs by license/permit holder	pending
12-01-07	Sale/delivery of drugs by license/permit holder	pending
12-26-04	Refusing inspection of license premises	Written warning
12-26-04	Place or manner	Written warning
12-04-00	Cash law	5 day suspension or \$750.00 civil penalty

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06-08-00	Refusing inspection of license premises	Written warning
06-08-00	Possession and display of indecent graphic material	Written warning
03-16-00	Cash law	Written warning
05-27-98	Miscellaneous violation	Written warning
03-04-98	Cash law	Written violation

6. On December 1, 2007, three TABC agents conducted an inspection of Rene's Bar.
7. A locked safe in Respondent's licensed premises contained a charged revolver, a bottle labeled inositol, and two money bags.
8. While on the licensed premises, the Respondent reached for his left pants pocket and threw a plastic bag to the floor.
9. The plastic bag thrown to the floor by Respondent contained 11 diamond folds.
10. Respondent possessed another diamond fold in his right pants pocket.
11. All diamond folds tested positive for cocaine.
12. On December 1, 2007, Respondent possessed 12 cocaine diamond folds on his person, while at the licensed premises.
13. One of the two money bags found inside a locked safe in the establishment contained \$97,940.00 in currency.
14. Respondent failed to report a breach of the peace regarding the following:

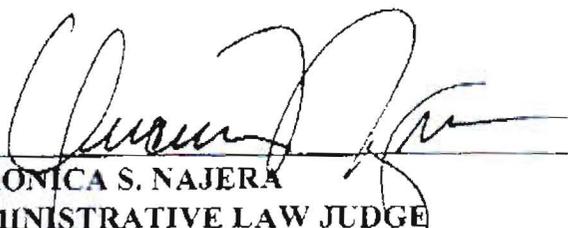
City of El Paso Police Report Number	Date of occurrence
07-302019	10-29-07
07-302016	10-29-07
07-280027	10-07-07
07-238280	08-26-07
07-218019	08-05-07
07-218013	08-06-07 ²⁶

²⁶ See Petitioner's Exhibit 6(a-f). El Paso Police incident/investigation reports

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (Code) §§ 5.31 and 5.35.
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 proposed findings of fact and conclusions of law, pursuant to Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042.
3. Notice of hearing was provided pursuant to 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and Code §11.63.
4. Based upon the Findings of Fact, Respondent possessed a narcotic on his person on the licensed premise in violation of Code §§104.01(9), 61.71(17), and 16 TAC § 35.31(c)(15).
5. Based upon the Findings of Fact, Respondent failed to promptly report to the Commission any and all breach of the peace incidents occurring on the licensed premises, in violation of Code § 61.71(31).
6. Respondent's permit and license should be cancelled for cause.

SIGNED August 29, 2008.


VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS