

State Office of Administrative Hearings



575462

Cathleen Parsley
Chief Administrative Law Judge

September 10, 2008

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

VIA HAND DELIVERY

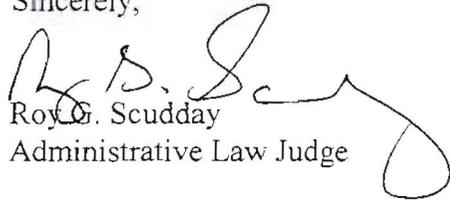
RE: Docket No. 458-08-3321; Texas Alcoholic Beverage Commission v. VASMAYO, LLC d/b/a The Southside Saloon

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.

Sincerely,


Roy G. Scudday
Administrative Law Judge

RGS/sb
Enclosure

xc Emily E. Helm, Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA HAND DELIVERY

Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA HAND DELIVERY

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA HAND DELIVERY

Larry J. Dowling, Attorney, 1602 E. 7th Street, Austin, TX 78702 -VIA REGULAR MAIL

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SOAH DOCKET NO. 458-08-3321

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

v.

VASMAYO LLC
D/B/A THE SOUTHSIDE SALOON
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff/TABC) brought this disciplinary action against Vasmayo LLC, dba The Southside Saloon (Respondent), seeking suspension of Respondent's Wine & Beer Retailer's On Premise Permit and Retailer's On Premise Late Hours License, or the assessment of an administrative fine. This Proposal for Decision recommends that the permit and license not be suspended and that no fine be assessed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice, jurisdiction, or venue in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing convened August 27, 2008, before Administrative Law Judge (ALJ) Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Emily E. Helm, attorney. Respondent was represented by attorney, Larry J. Dowling. The record closed on the date of the hearing.

II. REASONS FOR DECISION

A. Background and Applicable Law

The basic facts are not in dispute. On March 1, 2008, Austin Police Officer Dustin James Lowe responded to an excessive noise complaint at the Southside Saloon. While at the location, Officer Lowe entered into a discussion with Jose Hernandez, a managing partner of Respondent. Officer Lowe proceeded to issue a citation to the establishment for amplified noise without a permit. Officer Lowe also had his dispatcher contact TABC personnel because of his opinion that Mr. Hernandez was intoxicated.

Shortly thereafter, Agent John Altum with the TABC arrived on the scene and began questioning Mr. Hernandez. Agent Altum formed the opinion that Mr. Hernandez was intoxicated and proceeded to issue him a notice of violation, after which he released Mr. Hernandez to the custody of his wife.

On May 15, 2008, Staff issued a Notice of Violation to Respondent, alleging that Respondent's agent was intoxicated on the licensed premises. Respondent's request for hearing regarding that notice resulted in the docketing of this contested case.

The TABC has authority to seek the cancellation or suspension of a permit pursuant to TEX. ALCO. BEV. CODE (Code) § 11.61 and of a license pursuant to Code § 61.71. (Although Staff initially alleged a violation of Code § 11.61(b)(2), its amended Notice of Hearing changed the allegation to a violation of Code § 61.71(a)(1), effectively abandoning its action against Respondent's Wine & Beer Retailer's On Premise Permit.) One of the grounds for suspension of a license is if the licensee violated a provision of the Code or a rule of the TABC.¹ Being

¹ Code § 61.71(a)(1).

intoxicated on the premises is an act that is considered to be lewd, immoral, or offensive to public decency when engaged in on the premises by an agent of a person authorized to sell beer at retail²

Pursuant to 16 TEX. ADMIN. CODE (TAC) § 34.2, the TABC adopted a Schedule of Sanctions and Penalties for Health, Safety, and Welfare Violations (Schedule) to determine the proper penalty for violations. The penalty for the first violation of an agent of a licensee being intoxicated on premises is suspension for 17-25 days and/or a fine of \$300 per day.

B. Evidence

Officer Lowe testified that when he answered the noise complaint on March 1, 2008, he initially talked to one of the club employees before Mr. Hernandez came outside the club. Officer Lowe observed that Mr. Hernandez' speech was slurred, he had bloodshot eyes, he had the odor of alcohol on his breath, and his balance was unsteady in that he had to lean against the building or a vehicle to maintain his balance, all of which are indicators of intoxication. However, Officer Lowe did not ask Mr. Hernandez to perform any field sobriety tests, but, rather, formed the opinion, based on his experience, that Mr. Hernandez was intoxicated because, in his opinion, Mr. Hernandez did not have the proper use of his mental or physical faculties. Notwithstanding, Officer Lowe did not cite Mr. Hernandez for public intoxication because Officer Lowe did not think Mr. Hernandez was a danger to himself or others, and it was the police department's policy to contact TABC personnel regarding what appeared to be an intoxicated agent on the premises.

Agent Altum testified that when he arrived at the club, Officer Lowe told him that Mr. Hernandez was intoxicated. Agent Altum observed that Mr. Hernandez had slurred speech, the odor of alcohol on his breath, and unsteady balance in that he was using a parked car for support. However, as did Officer Lowe, Agent Altum did not ask Mr. Hernandez to perform any field sobriety tests, but, rather, formed the opinion based on his experience that Mr. Hernandez was

² Code § 104.1(5).

intoxicated because, in his opinion, Mr. Hernandez did not have the proper use of his mental or physical faculties. Notwithstanding, again like Officer Lowe, Agent Altum did not cite Mr. Hernandez for public intoxication because Agent Altum did not think Mr. Hernandez was a danger to himself or others. When given the option of either signing the violation notice or going to jail, Agent Altum testified that Mr. Hernandez signed the notice and was then released to the custody of his wife.

Both Mr. and Mrs. Hernandez testified that they had been at their restaurant from 9:00 A.M. on February 29, 2008, until approximately 1:00 A.M. on March 1, 2008. Mr. Hernandez admitted to having drunken two to three beers while the staff was cleaning up after the restaurant closed around midnight. Mr. and Mrs. Hernandez then proceeded to Respondent's location, where Mr. Hernandez was a managing partner, in order to handle the closing procedures of the club for that night. Mr. Hernandez testified that he had nothing to drink at the club, but that he was very tired after a long day and may have sat on a car hood to rest. Both Mr. and Mrs. Hernandez testified that he was not intoxicated.

C. Analysis and Recommendation

The main issue in this case is the definition of "intoxication" to be used when applying §§ 61.71(1)(1) and 104.01(5) of the Code. The Code does not define intoxication; however the Texas Penal Code (Penal Code) provides definitions for both "intoxication" and "public intoxication".

The Penal Code § 49.01(2) defines "intoxication" as

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 in to the body; or (B) having an alcohol concentration of 0.08 or more.

The Penal Code § 49.02(a) provides that

A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another.

Based on the testimony, only the first definition would be applicable in this case. That definition implies that there may be levels of alcohol in a person's system that do not amount to intoxication. The degree of intoxication set out in Penal Code § 49.01(2) means a level of alcohol in the system sufficient to make observable the effect on the mental and physical faculties of the person being observed. This definition of intoxication is commonly used in connection with intoxication offenses other than public intoxication.

The evidence presented in this case is insufficient to prove that Jose Hernandez was intoxicated under this definition. While the observations of Officer Lowe and Agent Altum indicate that there was some level of alcohol in Mr. Hernandez' system, they fail to prove that he no longer had the normal use of his mental or physical faculties due to the introduction of alcohol as opposed to other factors, including being tired after working for over fifteen hours. While their observations led to their both forming the opinion that he was intoxicated, with no field sobriety tests or breath or blood tests to support those opinions, Staff has not shown by a preponderance of the evidence that Mr. Hernandez' actions were due to the introduction of alcohol to the point of intoxication. Therefore, the ALJ recommends that there be no suspension of Respondent's permit and no assessment of an administrative fine.

III. FINDINGS OF FACT

1. Vasmayo LLC, dba The Southside Saloon (Respondent) is the holder of a Wine & Beer Retailer's On Premise Permit and a Retailer's On Premise Late Hours License, both issued by the Texas Alcoholic Beverage Commission (TABC).
2. On May 15, 2008, Staff of the TABC (Staff) issued to Respondent a Notice of Violation stating Staff's intent to cancel or suspend Respondent's permit or license.
3. Respondent notified Staff of its request for an administrative hearing regarding the notification.

4. On June 9, 2008, Staff issued a notice of hearing to Respondent advising it of the date, time, and place of the hearing; the matters alleged; and the statutes and rules involved.
5. The hearing on the merits was held on August 27, 2008, before Administrative Law Judge (ALJ) Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. All parties appeared and participated in the hearing.
6. On March 1, 2008, Austin Police Officer Dustin James Lowe responded to an excessive noise complaint at the Southside Saloon.
7. Officer Lowe observed that Jose Hernandez, a managing partner of Respondent, had slurred speech, bloodshot eyes, the odor of alcohol on his breath, and that his balance was unsteady.
8. When TABC Agent Altum arrived at the club, Officer Lowe told him that Mr. Hernandez was intoxicated. Agent Altum observed that Mr. Hernandez had slurred speech, the odor of alcohol on his breath, and unsteady balance.
9. Both Officer Lowe and Agent Altum formed the opinion that Mr. Hernandez was intoxicated because, in their respective opinions, Mr. Hernandez did not have the proper use of his mental or physical faculties, but neither of them asked Mr. Hernandez to perform any field sobriety tests or give samples of breath or blood to support their opinions.
10. Neither Officer Lowe nor Agent Altum cited Mr. Hernandez for public intoxication because neither thought that he was a danger to himself or others.
11. Mr. Hernandez had been at a restaurant he owned from 9:00 A.M. on February 29, 2008, until approximately 1:00 A.M. on March 1, 2008. Mr. Hernandez drank two to three beers while the staff was cleaning up after the restaurant closed around midnight.
12. After closing the restaurant, Mr. Hernandez proceeded to Respondent's location in order to handle the closing procedures of the club for that night.
13. Mr. Hernandez had nothing to drink at the club, but he was very tired after a long day, and may have sat on a car hood to rest while being questioned by Officer Lowe.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic and Beverage Commission has jurisdiction and authority to take disciplinary action against Respondent. TEX. ALCO. BEV. CODE (Code) chs. 11 and 61.

2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the complaint and of the hearing on the merits was provided as required by Code § 1305.253 and by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. TABC had the burden of proving the case by a preponderance of the evidence.
5. Based on Findings of Facts Nos. 6-13, TABC did not prove by a preponderance of the evidence that Jose Hernandez was intoxicated on the premises of Respondent on March 1, 2008.
6. Based on Findings of Fact Nos. 6-13 and Conclusion of Law No. 5, the TABC should not suspend Respondent's license or assess an administrative penalty against Respondent.

SIGNED September 10, 2008.



ROY C. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS