



**CERTIFICATE OF SERVICE**

I certify that I have served copies of the above Order on the parties shown below in the manner indicated on May 4, 2010.



Cecelia Brooks, Paralegal  
TABC Legal Section  
Texas Alcoholic Beverage Commission

Honorable Judge Richard R. Wilfong  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
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**RESPONDENT**  
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**VIA REGULAR MAIL**

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TABC Legal Section

Licensing Division

Dallas District Office

**SOAH DOCKET NO. 458-10-1162**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION**  
Petitioner

V.

**MELMAT, INC. D/B/A EL CUBO**  
**(TABC Docket Nos. 586223 and**  
**584839)**  
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/Petitioner) requested that the mixed beverage, mixed beverage late hours, and beverage cartage permits, and the food and beverage certificate of Melmat, Inc. d/b/a El Cubo (El Cubo/Respondent), located at 2900 Walnut Hill Lane, Suite 202, in Dallas, Texas, be cancelled based on violations of the Texas Alcoholic Beverage Code (Code) alleged to have occurred during April and May 2009. Respondent denied the allegations. The Administrative Law Judge (ALJ) finds that Staff proved all of the allegations against El Cubo as explained in detail below. Accordingly, the ALJ recommends that Respondent's permits be cancelled.

**I. PROCEDURAL HISTORY AND JURISDICTION**

There are no contested issues of notice or jurisdiction, and those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing in this matter relating to alleged violations of §§ 11.61(b)(2) and (23) and 104.01(4) of the Code (items 1, 2, and 3 below) was held on January 7, 2010, at the State Office of Administrative Hearings, 6333 Forest Park Road, Dallas, Texas 75235. The hearing was before Administrative Law Judge (ALJ) Richard R. Wilfong. TABC Staff was represented by attorney Emily Helm. Respondent appeared by attorney Dan Estrada. Following the hearing the parties submitted written closing statements and legal briefs. The record closed on March 15, 2010.

## II. ALLEGATIONS AND LEGAL STANDARDS

In its Notice of Hearing, Staff made the following allegations:

1. On or about April 3, 2009, or April 4, 2009, Respondent, or Respondent's agent, servant, or employee, solicited or permitted solicitation of a person to buy drinks for consumption by Respondent or any of its employees in violation of §§ 11.61(b)(2) and 104.01(4) of the Code.
2. On or about May 31, 2009, Respondent or Respondent's agent, servant or employee, to wit: Norma Chapan Rodriguez, sold or offered to sell an alcoholic beverage on the licensed premises during prohibited hours in violation of § 11.61(b)(23) of the Code.
3. On or about May 31, 2009, Respondent or Respondent's agent, servant, or employee, to wit: David Contreras, sold, or offered to sell an alcoholic beverage on the licensed premises during prohibited hours in violation of § 11.61(b)(23) of the Code.

## III. SUMMARY OF EVIDENCE PRESENTED AND ANALYSIS

At the hearing on the alleged violations Staff presented the testimony of four witnesses and offered five exhibits that were admitted. Respondent presented the testimony of one witness. The following is a summary of the evidence presented and the ALJ's analysis:

**A. April 3, 2009, or April 4, 2009 – Allegation that Respondent or its Agent, Servant, or Employee, Solicited a Person to Buy Drinks for Consumption by Respondent or Respondent's Employees.**

**1. Evidence**

On April 3 or 4, 2009, TABC enforcement agent David Salazar and Dallas police officer Jose Bedoy, while working undercover, entered El Cubo at approximately 12:40 a.m. and proceeded directly to the bar where they purchased two beers for \$4.00 each and left a \$1.00 tip. Shortly thereafter, Mr. Salazar went to the bathroom and as he was walking back to the bar he was waved over by a male patron sitting at a table near the bar dressed in women's clothing who identified

himself as Yesena.<sup>1</sup> Yesena asked agent Salazar if he would buy him a beer. Agent Salazar said yes and gave Yesena a \$20.00 bill. Yesena gave the bill to a female sitting next to him and she passed the bill to the bartender. The bartender served the beer and gave \$15.00 in change. Yesena kept \$5.00 and gave agent Salazar \$10.00. In the course of conversation, Yesena told agent Salazar that he worked at El Cubo and had no other form of employment.<sup>2</sup> Yesena then asked agent Salazar if he would buy the female a drink and he refused. Agent Salazar and officer Bedoy left El Cubo and notified the “open” members of the team that the solicitation to buy alcoholic beverages had occurred. Agent Salazar also testified that he had been involved in a prior solicitation to buy drinks at El Cubo that occurred on December 12, 2008. The permit holder pled true to that offense and received a 10-day suspension. On cross-examination, agent Salazar demonstrated the complicity of the bartender by explaining that normally when a \$4.00 beer is purchased with a \$20.00 bill the bartender gives the patron \$16.00 in change, including either one or six one dollar bills so the patron can tip the bartender. In the transaction involving Yesena, the bartender, on his own initiative, kept \$5.00 for a \$4.00 beer, indicating that bartender was fully aware of what was going on and by acting as a *fichera*,<sup>3</sup> Yesena was tacitly an agent/employee of El Cubo.

TABC agent Leigh Sosbee testified that she was the lead agent on the “open” team and she identified Yesena as Behamine Nevine Mendez (a/k/a Yesena or Vanessa).<sup>4</sup> Agent Sosbee had seen Yesena previously working at La Pantera where he also solicited drinks.<sup>5</sup> When Yesena was taken to jail, agent Sosbee was informed by another agent that Yesena had a falling out at La Pantera and had moved to El Cubo.

Dexter E. Simpson testified as an expert for Respondent. Regarding the allegation that Yesena was Respondent’s agent, servant or employee, Mr. Simpson testified that TABC stopped

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<sup>1</sup> Tr. 1905, TABC Ex. 3.

<sup>2</sup> Tr. 1907.

<sup>3</sup> “Fichera” is a nickname given to female employees at a Hispanic bar that serve as waitress and accompany or befriend male patrons by dancing with them etc.

<sup>4</sup> Tr. 1925-1926.

<sup>5</sup> Tr. 1927.

short in their investigation by failing to search or ask for employment records showing that Yesena was an employee.<sup>6</sup> In response to the criticism that TABC should have searched for employment records to determine whether Yesena was Respondent's employee, agent Salazar testified that with regard to *ficheras*, the owners of the bars normally do not have any employment records because these individuals are transient workers.<sup>7</sup> He also pointed out that Yesena admitted that he worked at El Cubo when he had no reason to lie.<sup>8</sup>

## 2. Analysis

The ALJ found the testimony of agent Salazar to be credible and persuasive. The (1) admission by Yesena that he was employed at El Cubo, (2) the nature of the bartender's participation in the purchase of the beer for Yesena, and (3) the obvious mutual benefits derived from Yesena's actions as a *fichera*, prove by a preponderance of the evidence that on the occasion in question Yesena was Respondent's agent/employee who in that capacity solicited a person to buy an alcoholic beverage for consumption by Respondent's agent/employee in violation of §§ 11.61(b)(2) and 104.01(4) of the Code.

### B. May 31, 2009 - Allegation that Respondent or its Agents, Servants or Employees, to wit: Norma Chapan Rodriguez and David Contreras, Sold Alcoholic Beverages During Prohibited Hours.

#### 1. Evidence

Dallas Police vice detective Diane Swint testified that on May 31, 2009 at approximately 2:15 a.m. she entered El Cubo while working undercover. She observed approximately 25 patrons still being served alcoholic beverages in styrofoam cups.<sup>9</sup> At approximately 2:20 a.m. detective

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<sup>6</sup> Tr. 1982.

<sup>7</sup> Tr. 1912.

<sup>8</sup> Tr. 1919.

<sup>9</sup> Tr. 1943.

Swint purchased a Corona beer from Norma Rodriguez, one of the bartenders, for \$5.00. Ms. Rodriguez poured the beer into a styrofoam cup and served it to her.<sup>10</sup> She walked around in the bar for several minutes and saw that it was not closing. The bartenders continued to sell and serve beer to the group of patrons. At approximately 2:30 a.m. detective Swint purchased a second beer from the male bartender, David Cantreras. She again paid \$5.00 and Mr. Cantreras opened the bottle of Corona and poured it into a styrofoam cup and served it to her.<sup>11</sup> She observed Ms. Rodriguez and Mr. Cantreras working behind the bar, selling and serving beer, and handling money in the cash register.<sup>12</sup> Detective Swint then left the bar and called for TABC assistance.

TABC enforcement agent Claudio Ramirez testified that on May 31, 2009, he and agent Leigh Sosbee received a call for assistance from TABC at El Cubo. When they arrived they began making arrests for after-hours sales and while doing so observed a car that they recognized as belonging to the owner/permittee of El Cubo. They then saw the owner, Ms. Un Suk Chu, walking with Dallas police officers who had found her hiding in the parking lot.<sup>13</sup> Ms. Chu refused to talk with agent Ramirez. Agent Ramirez identified Mr. Cantreras as the manager of El Cubo based on past inspections at El Cubo.<sup>14</sup> He then arrested Ms. Rodriguez and Mr. Cantreras for selling alcoholic beverages during prohibited hours.

Mr. Simpson testified on behalf of Respondent that TABC should only seek a penalty rather than permit cancellation regarding the sales after hours. Mr. Dexter relied on § 106.14 of the Code in support of his position. However, on cross-examination, Mr. Dexter read § 106.14 of the Code into the record and from this reading it is clear that the mitigation provisions of § 106.14 of the Code only apply to a sale to a minor or an intoxicated person, and not to sales after hours.

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<sup>10</sup> Tr. 1944.

<sup>11</sup> Tr. 1946.

<sup>12</sup> Tr. 1959.

<sup>13</sup> Tr. 1968.

<sup>14</sup> Tr. 1969.

## 2. Analysis

The ALJ found the testimony of detective Swint and agent Ramirez to be credible and persuasive and substantially unchallenged on cross-examination. The urging by Mr. Simpson in reliance on § 106.14 of the Code, that Respondent should only receive a penalty rather than permit cancellation, is without statutory support. Based on the clear preponderance of the evidence, the ALJ finds that TABC proved that Ms. Rodriguez and Mr. Contreras, in their capacity as Respondent's employee, servant or agent, sold or offered to sell alcoholic beverages during prohibited hours in violation of § 11.61(b)(23).

## IV. RECOMMENDED SANCTIONS

The Commission has adopted a Standard Penalty Chart which sets forth suggested sanctions for the Commission's agents, compliance officers, or other designated personnel to use when settling cases prior to a hearing.<sup>15</sup> The suggested sanctions bind neither an ALJ nor the Commission and deviations from the chart are permitted if there are aggravating or mitigating circumstances.

Although the Standard Penalty Chart is not binding, it does provide some guidance in considering a penalty. And based on the Schedule of Sanctions and Penalties for Health, Safety and Welfare Violations, the ALJ agrees with Staff's recommendation for permit cancellation. The ALJ also finds that the mitigation provisions of § 106.14 of the Code do not apply to prohibited sales after hours. Additionally, the ALJ finds that the number of violations and repeat violations committed by Respondent over a relatively short period of time is indeed cause for concern.<sup>16</sup> Moreover, the evidence presented does not inspire any confidence that Respondent is capable or of a mind to adequately oversee the operation of the licensed premises as required by law and in a manner that would prevent violations that threaten public health, safety, and welfare from occurring in the future.

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<sup>15</sup> 16 TEX. ADMIN. CODE (TAC) § 37.60(a).

<sup>16</sup> TABC Ex. 2. TABC permit violation history for El Cubo.

Accordingly, based on the totality of the circumstances and for the reasons stated, the ALJ recommends cancellation of Respondent's permits.

## V. FINDINGS OF FACT

1. Melmat, Inc. d/b/a El Cubo (Respondent) is the holder of Mixed Beverage, Mixed Beverage Late Hours, and Beverage Cartage permits, and a Food and Beverage Certificate issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 2900 Walnut Hill Lane, Suite 202, Dallas, Dallas County, Texas (licensed premises).
2. On November 6, 2009, TABC Staff (Staff) sent a Notice of Hearing to Respondent.
3. The Notice of Hearing contained a statement of the time, date, location, and the 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 allegations and the relief sought by the TABC.
4. On January 7, 2010, a hearing was held at the State Office of Administrative Hearings, 300 Forest Park Road in Dallas, Dallas County, Texas, before Administrative Law Judge Richard R. Wilfong (ALJ). Staff appeared through attorney Emily Helm. Respondent appeared through attorney Dan Estrada. The presentation of evidence concluded on the same day, but the administrative record remained open until March 15, 2010, to allow the parties to submit written closing arguments and legal briefs as ordered by the ALJ.
5. On April 3 or 4, 2009, TABC enforcement agent David Salazar and Dallas police officer Jose Bedoy conducted an undercover operation at El Cubo. They arrived at El Cubo at approximately 12:40 a.m. They went to the bar and purchased two beers for \$4.00 each and left a \$1.00 tip.
6. Behamine Nevine Mendez a/k/a Yesena solicited agent Salazar to buy him a beer. Agent Salazar agreed and gave Yesena a \$20.00 bill. Yesena gave the \$20.00 to the bartender who served the beer and returned \$15.00. Yesena kept \$5.00 and gave agent Salazar \$10.00.
7. Yesena asked agent Salazar if he would buy a beer for a female sitting at the table with Yesena and agent Salazar refused.
8. Yesena was acting as a *fichera*.
9. On April 3 or 4, 2009, Yesena was Respondent's agent, servant, or employee.

10. On May 31, 2009, Dallas vice detective Diane Swint was working undercover and entered El Cubo at approximately 2:15 a.m.. She observed approximately 25 patrons still being served alcoholic beverages and the bar was not closing.
11. At approximately 2:20 a.m., detective Swint purchased a Corona beer from bartender Norma Chapan Rodriguez for \$5.00. Ms. Rodriguez poured the beer into a Styrofoam cup and served it. Detective Swint walked around the bar and saw that it was not closing. The bartenders continued to sell beer to the patrons.
12. At approximately 2:30 a.m., detective Swint purchased another Corona beer from the male bartender, David Cantreras. She again paid \$5.00 and Mr. Cantreras opened the bottle of Corona, poured it into a Styrofoam cup and served it.
13. Detective Swint observed bartenders, Norma Rodriguez and David Cantreras working behind the bar, selling and serving beer, and handling money in the cash register.
14. During this time the owner of El Cubo, Ms. Chu, was present and was found hiding in the parking lot.
15. On May 31, 2009, Norma Chapan Rodriguez and David Cantreras were Respondent's employees, agents or servants.
16. Respondent committed prior violations of solicitation by Respondent's agent, servant, or employee to buy drinks for consumption by Respondent's agent, servant, or employee on September 13, 2008, and on December 12, 2008.
17. Respondent has not taken any significant steps to prevent violations from occurring in the future.

## **VI. CONCLUSIONS OF LAW**

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, and §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE (TAC) § 155.401.

4. Based on the above Findings of Fact, on May 31, 2009, Respondent's employees, agents or servants, sold and served alcoholic beverages during prohibited hours in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(23).
5. Based on the above Findings of Fact, on April 3 or 4, 2009, Respondent's employee, agent or servant, solicited a person to buy drinks for consumption by Respondent's agent, servant, or employee in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 104.01(4).
6. Based on the above Findings of Fact and Conclusions of Law the Respondent's permits should be cancelled pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61.

**SIGNED March 26, 2010.**



**RICHARD R. WILFONG**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**