

DOCKET NO. 585075

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|--|---|---------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner | § | BEFORE THE |
| | § | |
| | § | |
| VS. | § | |
| | § | TEXAS ALCOHOLIC |
| ANGEL BURGOS MARTINEZ | § | |
| D/B/A EL PENASCO, Respondent | § | |
| | § | |
| PERMIT/LICENSE NO(s). BE628791, BL | § | |
| | § | |
| DALLAS COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-10-0365) | § | BEVERAGE COMMISSION |

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 17th day of June 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Brenda Coleman, presiding. The hearing convened on January 8, 2010 and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on March 9, 2010. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator, Texas Alcoholic Beverage Commission, for review, consideration, and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

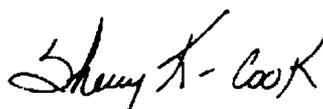
IT IS THEREFORE ORDERED that Respondent’s above-referenced license and/or permit shall be **SUSPENDED** for **twelve (12) days**. In lieu of suspension, the Assistant Administrator is providing Respondent has the opportunity to pay a civil penalty in the amount of **\$3,600.00** on or before the **13th day of July, 2010**. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above-referenced license and/or permit shall be **SUSPENDED** beginning at 12:01 A.M. on **July 21st, 2010** and shall remain suspended for **twelve (12) days**.

This ORDER relates to Respondent’s operation of a beer retailer’s on-premises license and/or a wine and beer retailer’s permit in a county with a population of 1.4 million or more pursuant to Tex.Alco.Bev.Code §§ 11.61 (b-1) and/or 61.71 (j).

IT IS FOUND that the above-referenced license and/or permit is suspended under Section 61.71 of the Texas Alcoholic Beverage Code for a third time. **IT IS ORDERED** that Respondent's performance surety bond in the amount of **\$6,000.00 shall be FORFEITED AND THE ABOVE-REFERENCED LICENSE AND/OR PERMIT SHALL BE CANCELLED EFFECTIVE 12:01 A.M. on the 3rd of August, 2010.**

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent.

SIGNED this the 17 day of June
2010 at Austin, Texas



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

The above Order was served upon each interested party in the manner indicated below on June 18, 2010. by Alexandra Argueta

Hon. Brenda Coleman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150-A
Dallas, Texas 75235
VIA FACSIMILE: (214) 956-8611

Timothy Griffith
ATTORNEY FOR RESPONDENT
101 East Park., Suite 600
Plano, Texas 75074
VIA FACSIMILE: (469) 742-9521

Angel Burgos Martinez
RESPONDENT
d/b/a El Penasco
4601 Maple Avenue
Dallas, Texas 75207
VIA U.S. FIRST CLASS MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Services Division

Licensing Division
Dallas District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 585075

REGISTER NUMBER:

NAME: ANGEL BURGOS MARTINEZ

TRADENAME: EL PENASCO

ADDRESS: 4601 MAPLE AVENUE, DALLAS, TEXAS 75207

DUE DATE: JULY 13TH, 2010

PERMITS OR LICENSES: BE628791, BL

AMOUNT OF PENALTY: \$3,600.00

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You **must** pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

DALLAS OFFICE
6333 Forest Park Road Suite 150a
Dallas, Texas 75235
Phone: (214) 956-8616
Fax: (214) 956-8611

DATE: **03/09/2010**
NUMBER OF PAGES INCLUDING THIS COVER SHEET: **12**
REGARDING: **PROPOSAL FOR DECISION**
DOCKET NUMBER: **458-10-0365**

JUDGE BRENDA S COLEMAN

FAX TO:

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RAMONA PERRY (TEXAS ALCOHOLIC BEVERAGE
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LOU BRIGHT GENERAL COUNSEL (Alcoholic Beverage
Commission, Texas)

(512) 206-3498

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT LEIGH NOLAN(lda) (214) 956-8616

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SOAH DOCKET NO. 458-10-0365

| | | |
|---|---|--------------------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner | § § § § § § § § § | BEFORE THE STATE OFFICE |
| V. | | OF |
| ANGEL BURGOS MARTINEZ D/B/A EL PENASCO, Respondent | | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC, Commission) Staff (Petitioner) brought this enforcement action against Angel Burgos Martinez d/b/a El Penasco (Respondent) alleging that Respondent has engaged in conduct prohibited by the Texas Alcoholic Beverage Code (the Code) and/or Commission's rules (the Rules). The Administrative Law Judge (ALJ) recommends suspension of Respondent's licenses for 12 days with the option to pay a civil penalty of \$3,600.00 in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law.

On January 8, 2010, a hearing convened before ALJ Brenda Coleman at the State Office of Administrative Hearings, located at 6333 Forest Park Lane, Suite 150A, Dallas, Texas. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared in person and was represented by his attorney, Timothy Griffith. The record closed on the same date.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

The Commission may cancel or suspend a retail dealer's on-premise license for not more than 60 days if it finds the holder violated a provision of the Code or a rule of the Commission.¹ "Licensee" means a person who is the holder of a license or an agent, servant, or employee of that person.² The licensee violates the Code if he consumes or permits others to consume an alcoholic beverage on the licensed premises at a time when consumption is prohibited.³ In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place on Sunday between 2:15 a.m. and 12 noon and on any other day between 2:15 a.m. and 7:00 a.m. Proof that an alcoholic beverage was possessed with intent to consume in violation of the Code requires evidence that the person consumed an alcoholic beverage on that day.⁴

No container, packaging material, or dispensing equipment may bear a label or imprint that is untrue in any respect, or by ambiguity, omission, or inference tends to create a misleading impression or causes or is calculated to cause deception of the consumer with respect to the product.⁵ A product is misbranded if it is so labeled as to purport to be a product different from that in the container.⁶

¹ Code § 61.71(a)(1).

² *Id.* § 1.04(16).

³ *Id.* § 61.71(a)(18).

⁴ *Id.* § 105.06(c) - (d).

⁵ *Id.* § 101.41(d)(3) and (4); 16 TEX. ADMIN. CODE (TAC) § 45.82(a)(1).

⁶ *Id.* § 101.43(b)(4); 16 TAC § 45.74(2).

B. Respondent's Licenses

The Commission issued Respondent's Beer Retailer's On-Premise License BE-628791, which includes the Retailer's On-Premise Late Hours License, on May 22, 2006. Respondent's premises are located at 4601 Maple Avenue, Dallas, Dallas County, Texas.

C. Petitioner's Evidence

Petitioner alleged that on March 22, 2009, Respondent, its agent, servant, or employee, permitted others to consume alcoholic beverages on the licensed premises during prohibited hours. Petitioner also alleged that on that same date, Respondent, its agent, servant, or employee misbranded a beer container or dispensing equipment bearing a label or imprint that was untrue, and this caused deception in respect to the beer sold by Respondent and consumed by patrons on the licensed premises. Therefore, Petitioner requests suspension of Respondent's licenses. Petitioner presented eleven exhibits and the testimony of two witnesses at the hearing.

1. Testimony of Dallas Police Officer Megan Gilby

On March 22, 2009, at approximately 3:00 a.m., Officers Megan Gilby and Bill Rios, Dallas Police Department, entered Respondent's premises to conduct an undercover investigation due to a complaint alleging drug activity on the premises. Officer Gilby testified that they observed approximately 80 patrons inside the establishment, and numerous patrons seated at the tables and bar were drinking from red, plastic cups. Upon speaking with some of the patrons and personally examining the red cups, Officer Gilby determined that the liquid inside the cups was beer.

Officer Gilby observed the female bartender, later identified as Maribel Rodriguez Palencia, behind the bar pouring beer from the Bud Light Beer Keg tap handle into a clear plastic pitcher.

Officer Gilby said she also observed Ms. Palencia pouring beer from the pitcher into the plastic cups possessed by patrons. Ms. Palencia admitted that she was the only employee on the premises.

2. Testimony of TABC Agent Victor Bulos

TABC Agent Bulos testified that he and other agents responded to Respondent's premises after 3:00 a.m. on March 22, 2009, to conduct an inspection after Dallas police officers notified the Commission of possible alcoholic beverage violations committed by Respondent. Officer Gilby informed Agent Bulos of her observations and pointed out Ms. Palencia working behind the bar. The agents observed many of the patrons in possession of red plastic cups which appeared to contain beer. Agent Bulos personally contacted two patrons at the bar, Miguel Flores Lopez and Jose Castillo, and inquired what they were drinking. Both replied that they were drinking Bud Light Beer.

On the countertop behind the bar, Agent Bulos observed a Bud Light Beer tap handle and an O'Doul's Non-Alcoholic Beer (O'Doul's) tap handle. Upon closer inspection of the beer keg storage area beneath the countertop behind the bar, he discovered two Bud Light Beer kegs. One keg was tapped to the Bud Light Beer tap. The other keg was tapped to the O'Doul's Beer tap. Agent Bulos subsequently searched the premises for O'Doul's Beer containers in the form of cans, bottles, or kegs, but found none. Agent Bulos asked Ms. Palencia why the Bud Light Beer keg was tapped to the O'Doul's Beer tap handle. Ms. Palencia replied that Respondent's owner did that to conceal that Bud Light Beer was poured after 2:00 a.m. She also stated that she knew that it was against the law to sell, serve or deliver alcoholic beverages during prohibited hours, but she added that Respondent's owner made her sell the beer. Finally, she said Respondent's owner would fire her and hire someone else to do it if she did not sell the beer.

Agent Bulos determined that Ms. Palencia, while bartending, was in full view of patrons inside the licensed premises and around the bar area consuming Bud Light Beer after 2:15 a.m. She was also observed pouring Bud Light Beer from the keg into a pitcher to sell or serve to patrons in

red plastic cups after 2:00 a.m. Agent Bulos placed Ms. Palencia under arrest for permitting the consumption of alcoholic beverages during prohibited hours. The agent issued a citation to Respondent for said Code violation. Respondent was also cited for having misbranded a container of Bud Light Beer as being O'Doul's Beer in violation of the Code by having the O'Doul's Beer tap handle tapped into the Bud Light Beer keg.

D. Respondent's Evidence

Respondent did not dispute that its employee permitted patrons to consume alcoholic beverages during prohibited hours on March 22, 2009. Respondent argued that its owner was not present and had no knowledge of the violation committed by Ms. Palencia. Therefore, Respondent requested a lesser suspension or civil penalty. Respondent also argued that the misbranding violation cited by Petitioner does not apply to retailers, but only to manufacturers or distributors. Therefore, Respondent argued, it is inapplicable in this case. Respondent presented the testimony of two witnesses.

1. Testimony of Angel Burgos Martinez, Respondent's Owner

Mr. Martinez testified on behalf of Respondent. He stated that he was not present on the premises on the date of the alleged violations and only became aware of the allegations approximately two days later when he spoke with Ms. Palencia. According to Mr. Martinez, it is not his practice to sell alcoholic beverages or have his employees sell alcoholic beverages during prohibited hours. He said Ms. Palencia admitted to him that she served Bud Light Beer (not O'Doul's Beer) after hours on March 22, 2009, because she made the mistake of ordering two kegs of Bud Light Beer instead of one keg of each beer. Mr. Martinez stated that he normally orders one keg of Bud Light Beer and four kegs of O'Doul's Beer each month because Respondent uses more O'Doul's Beer. He also stated that he serves O'Doul's Beer in the cups because it is only distributed in kegs, not bottles. Mr. Martinez added that he fired Ms. Palencia after he learned of the incident.

Mr. Martinez described Respondent's general method of operation. He said Respondent stops selling alcoholic beverages around 2:00 a.m. and announces to patrons that they must finish their beers by 2:15 a.m. At that time, Respondent serves only O'Doul's Beer and switches to the red plastic cups for safety reasons. Security personnel help clear the tables and remove all bottles. Mr. Martinez testified that Respondent has not received another citation for permitting consumption of alcoholic beverages during prohibited hours since the incident at issue in this case.

On cross-examination, Mr. Martinez never specifically responded to Petitioner's inquiry regarding Ms. Palencia's statement to Agent Bulos on March 22, 2009, that he tapped the O'Doul's Beer tap handle into the Bud Light Beer keg to conceal that Bud Light Beer was poured after 2 :00 a.m.

2. Testimony of Nora Espinoca, Patron

Ms. Espinoca testified that she has known Mr. Martinez for some time, and she has been customer of Respondent's for a number of years. Ms. Espinoca stated that she was present on the premises on March 22, 2009, when officers entered the premises. According to Ms. Espinoca, Ms. Palencia appeared to be very nervous and frightened at the time.

Ms. Espinoca initially stated that Respondent does not allow the sale or consumption of alcoholic beverages during prohibited hours. She said she has been inside Respondent's premises at 2:00 a.m. when Respondent stopped selling alcoholic beverages and observed the following routine: red plastic cups were placed on the bar counter at 2:00 a.m.; Respondent's waitresses and security guards provided a cup to all the patrons to pour any remaining beer from beer bottles into the red cups; and they told patrons to drink up. Patrons continued to drink from the cups. According to Ms. Espinoca, some patrons, after finishing any beer inside the red cups, went to the bar after 2:15 a.m., asked for "beer," and continued drinking. The bartender dispensed beer from the beer tap handle and served it to patrons. Ms. Espinoca later stated that she did not know what, specifically, the patrons

may have consumed.

E. Analysis and Recommendation

Petitioner has established by a preponderance of the evidence that Respondent or its employee, Ms. Palencia, misbranded beer containers or dispensing equipment and permitted patrons to consume alcoholic beverages on the premises on March 22, 2009. Respondent's argument that he had no knowledge that patrons consumed alcoholic beverages during prohibited hours on the licensed premises is not persuasive. Mr. Martinez's longtime friend and customer, Ms. Espinoca, testified that patrons are permitted to continue consuming alcoholic beverages during prohibited hours. Respondent stated that he fired Ms. Palencia after the incidents occurred. However, Respondent had a duty to maintain control of the licensed premises and ensure that the establishment was operated in accordance with Commission regulations at all times. Thus, his firing of Ms. Palencia after the violation was not relevant as to the issue of whether Respondent committed the violation. The ALJ disagrees with Respondent's argument that the misbranding violation cited by Petitioner is inapplicable to Respondent.

Based on the alleged violations at issue in this proceeding, Petitioner requested that Respondent's licenses be suspended for 12 days with an option to pay a civil penalty of \$3,600.00 in lieu of the suspension. Under the Commission's standard penalty chart, permitted consumption of an alcoholic beverage during prohibited hours on a licensed premises in violation of Code §§ 61.71(a)(18) or 105.06 calls for a 5 to 7 day suspension for a first violation, a 10 to 14 day suspension for a second violation, and cancellation for a third violation. The first and second offenses include a \$300.00 per day civil penalty. *See* 16 TAC § 34.2. The standard penalty chart is not binding, and it is referenced as a tool for guidance. The list of violations included in the penalty chart is not intended to be an exhaustive list of possible violations of the Code or Commission rules.⁷

⁷ 16 TAC 34.1(h).

The amount of the civil penalty may not be less than \$150.00 nor more than \$25,000.00 for each day the permit or license was to have been suspended.⁸

Respondent's violation history was admitted into evidence. Respondent received two written warnings for the following violations: possession of uninvoiced/unauthorized alcoholic beverage on August 31, 2007, and failure to report breach of the peace on November 19, 2008. The Commission imposed a suspension of seven days, or a \$1,050.00 civil penalty in lieu of suspension for the purchase of an alcoholic beverage from an unauthorized source on September 24, 2008. The Commission also imposed a suspension of 13 days, or a \$3,900.00 civil penalty in lieu of suspension, and required a replacement performance bond for "sale while under suspension" on February 18, 2009.

Although the misbranding violation for Code § 101.41(d)(3) and (4) is not specifically included in the penalty chart, the sanction recommended by Petitioner is reasonable and appropriate for the nature and seriousness of the violations and within the authority of the Commission. Therefore, the ALJ recommends that Respondent's licenses be suspended for 12 days, or in the alternative, that Respondent be required to pay a penalty of \$3,600.00.

III. FINDINGS OF FACT

1. Angel Burgos Martinez d/b/a El Penasco (Respondent) holds Beer Retailer's On-Premise License BG-540625, which includes the Retailer's On-Premise Late Hours License, issued by the Texas Alcoholic Beverage Commission (TABC, Commission) on May 22, 2006.
2. Respondent's premises are located at 4601 Maple Avenue, Dallas, Dallas County, Texas.
3. On September 24, 2009, Petitioner issued its notice of hearing to Respondent.
4. 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

⁸ Code § 11.64(a).

the matters asserted.

5. On January 8, 2010, a hearing convened before Administrative Law Judge (ALJ) Brenda Coleman at the State Office of Administrative Hearings (SOAH), located at 6333 Forest Park Road, Suite 150A, Dallas, Texas. Petitioner was represented by Ramona Perry, TABC Staff Attorney. Respondent appeared and was represented by attorney Timothy Griffith. The record closed on the same day.
6. On March 22, 2009, at approximately 3:00 a.m., at Respondent's licensed premises, approximately 80 patrons were drinking beer from red, plastic cups.
7. Respondent's bartender and employee, Maribel Rodriguez Palencia, was behind the bar in full view of the patrons drinking beer.
8. Ms. Palencia poured beer from the Bud Light Beer tap handle into a clear plastic pitcher. Ms. Palencia also poured beer from the pitcher into plastic cups possessed by the patrons.
9. The patrons were drinking Bud Light Beer.
10. A Bud Light Beer tap handle and an O'Doul's Non-Alcoholic Beer (O'Doul's) tap handle were on the countertop behind the bar.
11. Beneath the countertop behind the bar, there were two Bud Light Beer kegs.
12. One keg was tapped to the Bud Light Beer tap handle. The other keg was tapped to the O'Doul's Beer tap handle.
13. No O'Doul's Beer containers were on the premises.
14. Respondent's owner tapped the Bud Light Beer keg to the O'Doul's Beer tap handle to conceal the fact that Bud Light Beer was served to patrons during prohibited hours.
15. On March 22, 2009, Respondent or its employee permitted consumption of alcoholic beverages during prohibited hours on the premises.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) Ch. 5 and §§ 61.71 and 101.41.
2. SOAH 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. Ch. 2003.

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. On March 22, 2009, Respondent, or its agent, servant, or employee, permitted others to consume alcoholic beverages on Respondent's licensed premises in violation of Code §§ 61.71(a)(18) and 105.06.
5. On that same date, Respondent, or its agent, servant, or employee misbranded a container of an alcoholic beverage in violation of Code § 101.41(d)(3) and (4).
6. Based on the foregoing findings and conclusions, Respondent's licenses should be suspended for 12 days, or in the alternative, Respondent should be allowed to pay a civil penalty of \$3,600.00.

SIGNED March 9, 2010.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 9, 2010

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

VIA FACSIMILE 512/206-3203

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
ANGEL BURGOS MARTINEZ D/B/A EL PENASCO
SOAH DOCKET NO. 458-10-0365**

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Brenda Coleman
Brenda Coleman
Administrative Law Judge

BC/lan
Enclosure

Xc: Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**
Timothy Griffith, Attorney for Respondent, **VIA FACSIMILE 469/742-9521**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**

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