

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
JOSE TOBIAS AGUERO	§	
D/B/A LIGHT BAR	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB572969, LB &	§	
PE	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-1487)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3rd day of May, 2010, 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 14th day of January, 2010 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 4th day of March, 2010. 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 Assistant 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.

IT IS THEREFORE ORDERED, by the Assistant 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 and/or license is hereby **SUSPENDED**.

IT IS THEREFORE ORDERED, that unless Respondent pays a civil penalty in the amount of **\$2,100.00** on or before the **25th** day of **May, 2010**, all rights and privileges granted by the Commission under the above described permit and/or license will be **SUSPENDED** for **seven (7) days** starting at **12:01 A.M.** on the **2nd** day of **June, 2010**,

This Order will become **final and enforceable** on the 3rd day of May, 2010, 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 3rd day of May, 2010, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

MW/cb

Honorable Judge Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso, Texas
VIA FACSIMILE: (915) 834-5657

Mark T. Davis
Attorney for Respondent
1515 Lomaland
El Paso, TX 79935
VIA FACSIMILE: (915) 629-9691

Jose Tobias Agüero
Respondent
d/b/a Light Bar
1700 N Zaragosa, Ste., 113
El Paso, TX 79936
VIA REGULAR MAIL

Martin Wilson
Attorney for Petitioner
TABC Legal Section

Licensing Division

El Paso District Office

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 4, 2010

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

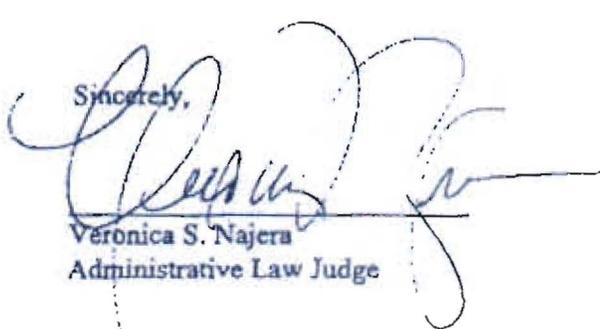
VIA FACSIMILE NO. 512-206-3203

RE: Docket No. 458-10-1487
TABC v. Jose Tobias Aguero d/b/a Light Bar

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Sincerely,



Veronica S. Najera
Administrative Law Judge

Enclosure

xc Mr. Martin Wilson, Attorney, Texas Alcoholic Beverage Commission - VIA Facsimile No. 512-206-3498.
Mr. Mark T. Davis, Attorney for Respondent- VIA Facsimile No. 915-629-9691.

staff attorney. Respondent was represented by Mark T. Davis, attorney. The record closed at the conclusion of the hearing that day.

II. DISCUSSION AND ANALYSIS

The listed owner of the Light Bar is Jose Tobias Agüero. The establishment encompasses a small bar, described as a "neighborhood" bar, which operates under one permit within the City and County of El Paso, Texas. The TABC issued Respondent a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, in December 2005.¹ The bar is managed by the permittee's two sons. The bar is situated in a shopping complex. The administrative history reveals two prior warnings for failure to report and one place or manner violation.²

A. Breach of the peace allegation

A female patron of the Light Bar was assaulted on January 4, 2009, on the sidewalk area outside the bar establishment. Veronica Rojas testified that she was assaulted by a group of patrons that verbally molested her inside the bar. Specifically, one female patron verbally insulted, or "threw words at her," each time she went to the restroom. Ms. Rojas claims the same group of persons who bothered her inside the bar assaulted her outside the bar. Ms. Rojas did not go to the hospital that night. She went home. Ruben Rodriguez, Ms. Rojas' husband, testified that words were exchanged on the sidewalk with persons he is unable to identify.

The bar manager's account is quite different. Michael Agüero, manager of the bar, testified that he noticed that Ms. Rojas "got loud" and he asked his bartender to inform Ms. Rojas that "she could not be served anymore." She became upset. He said that Ms. Rojas was attempting to stand on the stools and dance. Mr. Agüero noticed that Ms. Rojas was having a verbal exchange with other patrons at the center of the bar. They were yelling or "throwing

¹ Petitioner's Exhibit No. 2, custodian of records affidavit for permit MB-572969.

words” at each other. He told them to either calm down, or leave, more than once. After the verbal warning, Ms. Rojas exposed her buttocks. Mr. Aguero then “told her to leave.” Mr. Aguero escorted Ms. Rojas and her party to the door. He did not perceive any danger. He said, “They walked out the door and in my mind the incident was over. Minutes passed—I noticed people running and movement outside. I noticed a fight going on. The group involved in the verbal altercation was still sitting inside the bar. I called the police. I stopped everyone from exiting by standing in front of the door. When the police arrived, the persons involved in the assault were gone.”

B. Analysis for breach of the peace allegation

Petitioner’s burden of proof regarding the breach of the peace requires the following elements:

- That the breach occurred on the licensed premises, or
- On premises under the control of the permittee, and
- The breach was not beyond the control of the permittee, and
- Resulted from his improper supervision of persons permitted to be on the licensed premises, or
- On premises under his control.³

The ALJ finds that a breach occurred on the licensed premises.⁴ The ALJ concludes the sidewalk immediately outside of the bar’s entrance is indirectly under the control of the permittee.

Nonetheless, there are various issues with the facts of record which lead the ALJ to conclude that the burden of proof was not met with regard to all of the elements of Code § 28.11. In this case, Petitioner’s principal witness is not credible. By her own admission, she has a criminal history of engaging in fights at bars. Her version of the events blames everyone else

² *Id.* at p. 3, administrative violations document.

³ TEX. ALCO. BEV. CODE ANN. (Code) § 28.11 [Breach of the Peace].

⁴ Code §11.49 [Premises Defined]. The Code defines ‘premises’ 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.

and she does not accept any responsibility for the occurrences. Petitioner's other witness was Ms. Rojas' husband. There are no documents or testimony of record regarding the police investigation of the alleged assault, no medical information, or TABC testimony about its own investigation of the incident. But there is testimony which reveals the manager took affirmative steps to diffuse the situation inside the bar:

- He noticed that groups of people were verbally harassing one another. He asked all to refrain from insulting.
- He warned the groups that they would have to leave if they did not stop.
- He noticed Ms. Rojas was dancing on stools and yelling obscenities.
- He stopped serving Ms. Rojas.
- He saw Ms. Rojas expose her buttocks to the patrons.
- He told Ms. Rojas to leave.
- He escorted Ms. Rojas and her group to the door.
- He noticed movement outside the bar.
- He checked and discovered a fight going on.
- He called the police.
- He stood at the door to prevent a further escalation.

The ALJ finds the bar manager was credible and his version of events consistent. Based on the evidence of record, the ALJ finds no evidence to indicate improper supervision of the persons involved or evidence to support the fight was not beyond the permittee's control. The ALJ does not sustain this allegation.

C. Failure to report breach of the peace allegation

TABC Agent David Ianni testified that Respondent did not file a report on this incident. Respondent does not contest the fact that a report was not filed. Respondent testified he believed it was not his duty to file a report since the breach occurred outside the bar. Argument was made

that Respondent did not have control over the premises outside the front door because they are considered a common area pursuant to the establishment's lease.

D. Analysis of failure to report breach

The licensed premises are 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 person." Respondent's responsibilities as a lessee are different in genre and application from his responsibilities as a permittee. The ALJ concludes the sidewalk immediately outside of the bar's entrance is indirectly under the control of the permittee for purposes of his permit responsibilities under the Code. In this case, the bar manager witnessed the fight and called the police; but failed to report the breach to the TABC. Key to this analysis is the fact that Respondent had first hand knowledge of the fight. Even though the facts do not support a conclusion that the fight was not beyond his control, he had a duty to report the fight under the Code once he became aware of it.

Respondent has had two prior written warnings for failure to report a breach. The ALJ recommends a 7-day suspension for failing to report a breach of the peace. In lieu of suspension, the Respondent should pay a \$2,100.00 civil penalty.

III. FINDINGS OF FACT

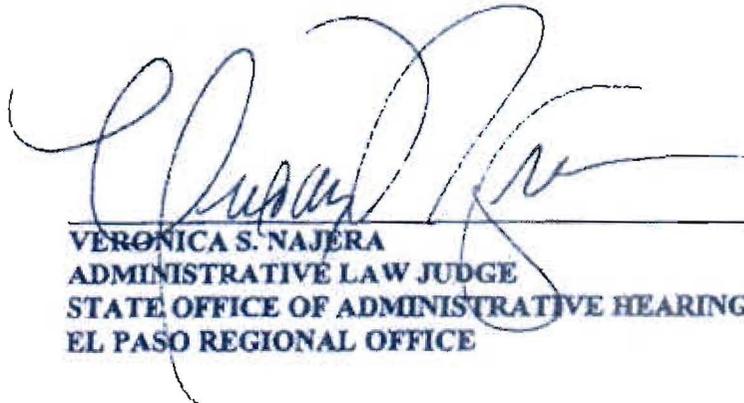
1. A hearing convened on January 14, 2010, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus Jose Tobias Agüero d/b/a Light Bar (Respondent).
2. The hearing was held before Administrative Law Judge (ALJ) Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas.
3. Staff was represented by Martin Wilson, staff attorney. Respondent was represented by Mark T. Davis, attorney.
4. The record closed on January 14, 2010.

5. The Light Bar operates under the authority of a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit number MB-572969 issued in December 2005.
6. The bar is situated within the City and County of El Paso, Texas.
7. Respondent has one place or manner violation in 2006 in its administrative history.
8. A female patron, Veronica Rojas, was assaulted on January 4, 2009, on the sidewalk area outside the bar's entrance.
9. Ms. Rojas had been inside the bar before the physical assault.
10. Ms. Rojas was involved in verbal confrontations with other patrons inside the bar.
11. The manager, Michael Aguero, was aware of the verbal exchanges going on inside the bar.
12. Mr. Aguero warned the patrons involved in the verbal exchanges to stop or leave.
13. The bar stopped serving alcohol to Ms. Rojas at the manager's directive.
14. Ms. Rojas exposed her buttocks to the patrons, at which point she was escorted out the bar by the manager.
15. The persons who assaulted Ms. Rojas have not been identified.
16. The persons involved in the verbal exchange were inside the bar when the assault occurred.
17. The manager called the police when he noticed the fight outside.
18. The manager stopped everyone from exiting by standing in front of the door.
19. The manager properly supervised the patrons inside the bar and took steps to diffuse the verbal exchanges between Ms. Rojas and other patrons.
20. The fight was beyond the control of the permittee.
21. Respondent had knowledge of the fight which occurred on January 4, 2009.
22. Respondent did not file a breach of the peace report on the January 4, 2009 incident.

V. 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) § 155.401 and Code § 11.63.
4. Based upon the Findings of Fact, the breach of the peace which occurred on January 4, 2009, was beyond Respondent's control and did not result from Respondent's improper supervision.
5. Based upon the Findings of Fact, Respondent failed to report a breach of the peace incident which occurred on January 4, 2009.
6. The ALJ recommends a 7-day suspension for failing to report a breach of the peace. In lieu of suspension, the Respondent should pay a \$2,100.00 civil penalty.

SIGNED March 4, 2010.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE