

DOCKET NO. 592483

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
KELBERG ASSOCIATES, INC. D/B/A BIG SHOT'S SPORTS CAFE, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. MB711084, LB, PE, CB	§	
	§	
TARRANT COUNTY, TEXAS (SOAH DOCKET NO. 458-10-5846)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of July, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Tanya Cooper presiding. The hearing convened on October 18, 2010 and the SOAH record closed on October 29, 2010. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 4, 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, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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 motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent pay a civil penalty in the amount of **\$1,500.00** on or before **July 26th**, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permits by the Code will

be **SUSPENDED** beginning at 12:01 A.M. on **August 3rd**, 2011, and shall remain suspended for **FIVE (5)** consecutive days.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$1,500.00** on or before the **TENTH (10th)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **EIGHTEENTH (18th)** day following the date the judgment is signed and shall remain suspended for **FIVE (5)** consecutive days

This Order will become final and enforceable on the 25th day of July, 2011, unless a Motion for Rehearing is filed **before** that date.

SIGNED this the 1st day of July, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 1st day of July, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Tanya Cooper
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6777 Camp Bowie Blvd. Suite 400

Fort Worth, Texas 76116
VIA FACSIMILE: 512.322.0473

Kelberg Associates, Inc.
d/b/a Big Shot's Sports Cafe
RESPONDENT
1833 Airport Freeway
Bedford, Texas 76021
VIA REGULAR MAIL

David C. Hill
ATTORNEY FOR RESPONDENT
8117 Preston Road, Suite 300
Dallas, Texas 75225
VIA REGULAR MAIL
AND VIA FACSIMILE: (214) 706-9023

John Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Division

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: REGISTER NUMBER:

NAME: KELBERG ASSOCIATES, INC.

TRADENAME: BIG SHOT'S SPORTS CAFE

ADDRESS: 1833 AIRPORT FREEWAY, BEDFORD, TEXAS 76021

DUE DATE: 7/26/2011

PERMITS OR LICENSES: MB711084, LB, PE, CB

AMOUNT OF PENALTY: \$1, 500

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.

DOCKET NO. 458-10-5846

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION, Petitioner	§	
	§	
V.	§	OF
	§	
	§	
KELBERG ASSOCIATES, INC. D/B/A	§	
BIG SHOT'S SPORTS CAFÉ	§	
TARRANT COUNTY, TEXAS	§	
(TABC CASE NO. 592483)	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Kelberg Associates, Inc. d/b/a Big Shot's Sports Cafe (Respondent), alleging a violation of the Texas Alcoholic Beverage Code (the Code). In TABC Staff's notice of hearing, it alleged that Respondent allowed a breach of the peace on the licensed premises on October 21, 2009, that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises when an employee became involved in a physical altercation with a patron while at the licensed premises. TABC Staff requested that Respondent's permits be suspended¹ for 35 days in relation to this violation, or in lieu of permit suspension, Respondent pay a civil penalty in the amount of \$10,500.

¹ The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found after notice and hearing, that any the permittee/retail dealer violated a provision of this Code or rule of the Commission. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2).

* * * *

All provisions of the Texas Alcoholic Beverage Code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit and beverage cartage permit. TEX. ALCO. BEV. CODE ANN. §§ 29.03 and 44.03.

* * * *

Permittee means a person who is the holder of a permit provided for in the Texas Alcoholic Beverage Code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

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The Administrative Law Judge (ALJ) finds the evidence was sufficient to establish that a breach of the peace occurred on the licensed premises that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises. Accordingly, the ALJ agrees with TABC Staff that a suspension of Respondent's permits is appropriate; however, due to the nature of the violation, the small number of other Code violations, and Respondent's quick response to this incident, the ALJ recommends that Respondent's permits be suspended for a period of five days, or that Respondent pay a civil penalty in the amount of \$1,500.00 in lieu of any permit suspension.²

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice or jurisdiction in this proceeding. Therefore, those issues are addressed only in the Findings of Facts and Conclusions of Law.

On October 18, 2010, a hearing convened before ALJ Tanya Cooper, at the SOAH offices located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by John Sedberry, TABC Staff Attorney. Respondent appeared in person and was represented David C. Hill, Attorney at Law. The record closed on October 29, 2010.

II. EVIDENCE

A. Permits Held and Violation History

Respondent holds a Mixed Beverage Permit, MB-711084, which includes a Beverage Cartage Permit, Caterer's Permit, and Mixed Beverage Late Hours Permit, issued by TABC for Respondent's premises located at 1833 Airport Freeway, Bedford, Texas. Respondent's permits were initially issued on December 23, 2008, and have been continuously renewed since that date. TABC's Exhibit 1, the violation history for Respondent's permits, reveals three warnings have been

² TEX. ALCO. BEV. CODE ANN. §§ 11.64 and 11.641 and 16 TEX. ADMIN. CODE § 34.2.

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given to Respondent for other Code violations.

B. Hearing Testimony

Mark Kelcher, Matthew Schulze, Edgar Lopez, and Joshua Handy testified at the hearing. Mr. Kelcher is the Vice-President of Kelberg Association, Inc. At the time of this incident, Mr. Schulze was employed by Respondent as a bartender; Mr. Lopez was also employed by Respondent as a bar-back. Mr. Handy was a patron at the licensed premises on October 21, 2009; he had been previously terminated from employment at the licensed premises.

1. Mark Kelcher

Mr. Kelcher stated that he was working at the licensed premises, Big Shots, on October 21, 2009. He was in the back of the licensed premises after closing when he was told there was an altercation between Matthew Schulze and Joshua Handy. Mr. Kelcher said he escorted Mr. Handy out of the premises. According to Mr. Kelcher, he did not see that Mr. Handy had sustained any injuries as a result of the altercation. Consequently, he did not call the police or report this incident to TABC Staff.

Mr. Kelcher testified that he had never seen either Mr. Schulze or Mr. Handy engage in violence but acknowledged that he had fired Mr. Handy for making threats of violence toward others. However, he characterized Mr. Handy as more of a "big talker" than a violent person. Mr. Kelcher said he did not know if Mr. Handy had been served any alcoholic beverages while at the licensed premises that night.

According to Mr. Kelcher, he terminated Mr. Schulze the day after this incident. Mr. Kelcher said that Mr. Schulze had always handled past problem patrons in an acceptable manner by diffusing confrontations. He opined that Mr. Schulze had reacted differently to Mr. Handy in this situation because Mr. Handy had been harassing Mr. Schulze's girlfriend, who was at the licensed premises, and made an offensive comment toward her.

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When asked about the impact TABC Staff's requested penalty in this situation would have upon Respondent's business, Mr. Kelcher said it would likely put Respondent out of business. A 35-day suspension would leave Respondent's 30 employees without any income for that period unless they found other jobs. Mr. Kelcher stated that Respondent did not have the financial resources to pay the civil penalty requested in lieu of permit suspension.

2. Matthew Schulze

Mr. Schulze testified that, in his opinion, Mr. Handy was intoxicated when he arrived at the licensed premises. Consequently, Mr. Schulze said that he did not serve Mr. Handy any alcohol, but it was possible that a waitress could have served Mr. Handy without his knowledge. According to Mr. Schulze, Mr. Handy seemed to be looking for trouble and was belligerent from the start. Mr. Schulze was familiar with Mr. Handy, having worked with him prior to Mr. Handy being fired for making threats about shooting people. Mr. Schulze testified that on the date of the altercation, Mr. Handy kept "hitting on" Mr. Schulze's girlfriend, and when she expressed no interest in Mr. Handy, Mr. Handy referred to her as a prostitute.

At closing time, Mr. Handy would not leave with the other patrons. Mr. Schulze said that Mr. Handy smarted-off to him, continued to bait him, and then took a swing at him. At that point, Mr. Schulze wrapped Mr. Handy up in a "bearhug" hold, and they both went to the floor. As the two of them got up, Mr. Schulze testified that Mr. Handy took another swing at him and hit his chest. At that point, Mr. Schulze struck Mr. Handy in the face, and Mr. Handy fell backwards. Mr. Schulze said he went to the back of the licensed premises to get Mr. Kelberg. Mr. Schulze said he did not see Mr. Handy bleeding, nor did he see any blood on the floor.

Mr. Schulze said he did not report this incident to the police, but he was ultimately charged with assaulting Mr. Handy. He accepted an arranged plea and was given a deferred adjudication in the case.

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3. Edgar Lopez

Mr. Lopez said he overheard Mr. Handy making offensive comments to Mr. Schulze's girlfriend. Mr. Handy was drinking at the bar and was told several times to leave by Mr. Schulze. According to Mr. Lopez, he tried to get Mr. Handy to apologize to avoid any confrontation, but Mr. Schulze was really mad by that point. Mr. Lopez stated that Mr. Schulze grabbed Mr. Handy in a headlock and took him to the ground. Mr. Lopez stated that Mr. Handy was bleeding when he got up off the floor, but he did not see Mr. Schulze ever punch Mr. Handy. Mr. Lopez said that Mr. Handy sat down in a chair and said that his ankle was hurting.

Mr. Lopez testified that Mr. Kelcher came out to where Mr. Handy was seated and told him to leave the premises. Mr. Kelcher was pushing Mr. Handy toward the door when Mr. Handy said, "you'll be hearing from my lawyer."

Mr. Lopez said he no longer works at the licensed premises. He had not seen Mr. Handy since this incident.

4. Joshua Handy

Mr. Handy testified that he had gone to Big Shots to pick up some money for a friend. He had consumed some alcoholic beverage prior to his arrival there and said Mr. Schulze served him three beers. He admitted his recollection of all the events were somewhat hazy. He denied having said that a girl seated at the bar was a "prostitute," but conceded he may have commented that her attire looked like a prostitute's. He said he was not aware the girl was Mr. Schulze's girlfriend.

According to Mr. Handy, everything happened quickly. He had no idea anything was wrong until Mr. Schulze hit him, and Mr. Handy denied having ever taken a swing at Mr. Schulze. After he got up, Mr. Kelcher came over to where he was seated, grabbed him, and pushed him out of the licensed premises' door because he was unable to move as fast as Mr. Kelcher wanted him to move. Another Big Shot's patron helped him to his car, and he went to a friend's house. After arriving at

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his friend's home, his friend drove him to the hospital where he learned he had a fractured nose, fractured left patella, and fractured left distal fibula. Although his injuries were painful, he did not require any surgery.

Mr. Handy said he was never asked to leave the licensed premises until Mr. Kelcher did so after the altercation with Mr. Schulze. He realized that some bar patrons were leaving before the altercation, but he did not hear "last call" being given. He further denied having ever threatened anyone with violence.

III. ANALYSIS

The issues to be determined concerning this alleged violation are:

1. Whether a breach of the peace occurred on Respondent's licensed premises; and
2. If so, whether the breach of the peace was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises or on a premises under its control. TEX. ALCO. BEV. CODE ANN. § 28.11.

"Breach of the peace," is not defined by the Code or TABC Rules. However, it has been judicially defined in case law as an act that disturbs or threatens to disturb "the tranquility enjoyed by the citizens" and includes actual or threatened violence as an essential element. Woods v. State, 213 S.W.2d 685 (Tex.Crim.App. 1948). It is clear from the evidence presented that, on October 21, 2009, Respondent's employee and a former employee engaged in a physical altercation on the licensed premises. As a result of that altercation, the former employee was injured and required medical treatment.

This breach of the peace was not beyond the control of Respondent because Mr. Kelcher was aware of Mr. Handy's propensity to threaten violence toward others. It appears Mr. Handy's violent threats were well known to others, including Mr. Schulze. Mr. Handy's conduct was sufficiently serious that it resulted in Mr. Kelcher terminating Mr. Handy's employment; however,

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Mr. Kelcher failed to take sufficient steps to protect Respondent's other employees and patrons by banning Mr. Handy from the license premises. As a result of that failure, Mr. Handy was allowed on the licensed premises while he was likely intoxicated and engaged in inappropriate conduct toward persons on the licensed premises, namely Mr. Schulze's girlfriend.

Based upon the factors discussed above, the ALJ finds that a breach of the peace occurred on this licensed premises; said breach of the peace was not beyond the control of Respondent; and said breach resulted from Respondent failure to properly supervise persons on the licensed premises. However, the ALJ does not agree with the recommended penalty requested by TABC Staff. TABC Staff seeks the maximum suspension of Respondent's permits for an aggravated breach of the peace, 35 days, and a civil penalty of \$10,500 (35 days x \$300/day). An aggravated breach of the peace includes a serious bodily injury, death, or involves a deadly weapon.

In this instance, there was no death or deadly weapon involved. While there were injuries sustained by Mr. Handy, the ALJ also finds Mr. Handy's own conduct exacerbated the incident and was a factor in him sustaining injuries, which were undoubtedly painful, yet did not require extensive treatment, such as surgery, to correct. The ALJ also deems the following factors important in her recommended penalty: Respondent's relatively few previous violations; Mr. Kelberg's immediate action in terminating Mr. Schulze; and economic hardship that TABC Staff's requested penalty would have not only on Respondent, but Respondent's employees. Consequently, the ALJ believes Respondent's permits should be suspended for five days, or in lieu of any suspension, Respondent should pay of a civil penalty in the amount of \$300 per day for the permit suspension length. This recommendation is the maximum suspension, or civil penalty in lieu of suspension, for a first simple breach of the peace violation.³

³ 16 TEX. ADMIN. CODE § 34.2.

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IV. RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for a period of five days, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of \$1,500.00 for allowing a breach of the peace on the licensed premises.

V. PROPOSED FINDINGS OF FACT

1. Respondent holds a Mixed Beverage Permit, MB-711084, which includes a Beverage Cartage Permit, Caterer's Permit, and Mixed Beverage Late Hours Permit, issued by TABC for Respondent's premises located at 1833 Airport Freeway, Bedford, Texas. Respondent's permits were initially issued on December 23, 2008, and have been continuously renewed since that date.
2. On October 21, 2009, Respondent's employee, Matthew Schulze, and a former employee, Joshua Handy, engaged in a physical altercation on the licensed premises described in Finding of Fact No. 1.
3. This altercation occurred after Mr. Handy had consumed alcoholic beverages, made offensive comments to Mr. Schulze's girlfriend, and refused to leave the licensed premises at closing.
4. Mr. Handy sustained a fractured nose, fractured left patella, and fractured left distal fibula; and although his injuries were painful, he did not require any surgery to correct his injuries.
5. Mr. Handy's employment with Respondent had previously been terminated by Respondent's Vice President, Mark Kelcher, due Mr. Handy making threats of violence against Respondent's employees. However, Mr. Kelcher failed to ban Mr. Handy from being present at the licensed premises.
6. Respondent's permit history shows only a few minor prior violations, for which warnings were received; Respondent employs several people whose jobs will be in jeopardy if a lengthy suspension were ordered; and its representative, Mr. Kelcher has taken swift actions in dealing with persons engaging in inappropriate conduct on the licensed premises.
7. On October 18, 2010, a hearing convened before ALJ Tanya Cooper, at the SOAH offices located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by John Sedberry, TABC Staff Attorney. Respondent appeared in person and was represented David C. Hill, Attorney at Law. The record closed on October

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29, 2010.

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 1, 5, 6, 11, 28, 29, 31, and, 44, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.*
2. The State Office of Administrative Hearings has jurisdiction over all matters related 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. chs. 2001 and 2003.
3. Respondent received adequate notice of the proceedings and hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Proposed Findings of Fact Nos. 1 - 5, a breach of the peace occurred on the licensed premises that was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons on the premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 28.11.
5. Based on the foregoing Findings of Fact Nos. 1 - 6 and Conclusion of Law No. 4, Respondent's Mixed Beverage Permit, MB-711084, which includes a Beverage Cartage Permit, a Caterer's Permit, and a Mixed Beverage Late Hours Permit issued by TABC should be suspended for a period of five days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of \$1,500.00 pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.64, 11.641, and 28.11, and 16 TEX. ADMIN. CODE § 34.2.

SIGNED November 4, 2010.


TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS