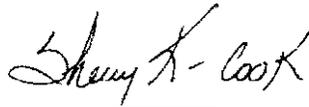




If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$7,500.00** on or before the **tenth (10<sup>th</sup>)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18<sup>th</sup>)** day following the date the judgment is signed and shall remain suspended for **twenty five (25)** consecutive days.

This Order will become final and enforceable on the 9<sup>th</sup> day of February, 2011, unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 9<sup>th</sup> day of February, 2011, at Austin, Texas.



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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 9<sup>th</sup> day of February, 2011.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Veronica S. Najera  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
401 East Franklin Avenue, Suite 580  
El Paso, Texas 79901  
**VIA FACSIMILE: (512) 322-0472**

F.W., Inc.  
d/b/a Tequila Sunrise  
**RESPONDENT**  
11701 Gateway Blvd West  
El Paso, Texas 79936  
**VIA REGULAR MAIL**

Paul F. Grajeda  
**ATTORNEY FOR RESPONDENT**  
1601 N. Kansas St.  
El Paso, Texas 79902  
***VIA REGULAR MAIL***  
***AND VIA FACSIMILE (915) 534-7287***

John Sedberry  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

TABC Licensing Division

Lt. Salvador Moralez  
TABC El Paso District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 589421      REGISTER NUMBER:**

**NAME: F.W. Inc.**

**TRADENAME: Tequila Sunrise**

**ADDRESS: 11701 W Gateway El Paso, TX 79936-3411**

**DUE DATE: March 15, 2011**

**PERMITS OR LICENSES: MB483895, LB**

**AMOUNT OF PENALTY: \$7,500.00**

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

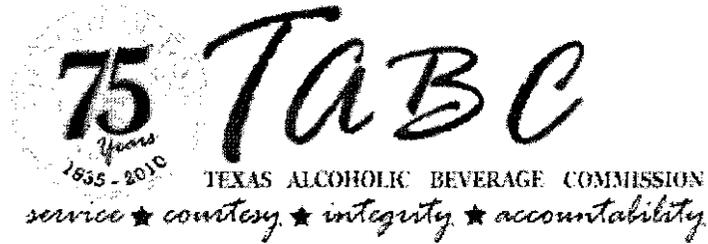
\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No.



José Cuevas, Jr.  
*Presiding Officer-Midland*

Steven M. Weinberg, MD, JD  
*Member-Colleyville*

Melinda S. Fredricks  
*Member-Conroe*

**Alan Steen**  
*Administrator*

February 9, 2011

On the signature lines for Sherry K-Cook, Assistant Administrator, and Martin Wilson, Assistant General Counsel, please note that the date is incorrect due to clerical error. Although the dates on those lines indicate that the order was signed and certified on February 9, 2011, it was indeed both signed by Ms. K-Cook and certified by Mr. Wilson on January 14, 2011, the same day that the order came in for consideration.

If any verification of those dates is needed, please contact the Office of the General Counsel at (512) 206-3223.

**SOAH DOCKET NO. 458-10-4112**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,**

**Petitioner**

**V.**

**F.W. INC.,  
d/b/a TEQUILA SUNRISE,**

**Respondent**

**EL PASO COUNTY, TEXAS  
(TABC CASE NO. 589421)**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Petitioner) is alleging that, on two occasions, F.W. Inc. d/b/a Tequila Sunrise (Respondent) allowed breaches of the peace to occur on the licensed premises which were not beyond its control. Further, Petitioner alleges that Respondent failed to promptly report each breach of the peace. After a review of the evidence of record, the Administrative Law Judge (ALJ) finds Staff's evidence insufficient to establish all of the elements of a breach of the peace pursuant to TEX. ALCO. BEV. CODE ANN. § 28.11. The ALJ sustains the second allegation, and recommends a 10-day suspension for failing to report the breach of the peace which occurred on May 26, 2009; and a 15-day suspension for failing to report the breach of the peace which occurred on June 2, 2010. In lieu of suspension, the Respondent should pay a \$7,500.00 civil penalty.

**I. NOTICE, JURISDICTION, PROCEDURAL HISTORY**

There are no contested issues of notice and jurisdiction. The hearing convened on July 29, 2010. The hearing was held before ALJ Veronica S. Najera, at the State Office of

SOAH DOCKET NO. 458-10-4112

PROPOSAL FOR DECISION

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Administrative Hearings, El Paso Regional Office. Staff was represented by John W. Sedberry, staff attorney. Respondent was represented by Paul F. Grajeda, attorney at law. The record closed on August 23, 2010, upon receipt of the official transcript.

## II. DISCUSSION AND ANALYSIS

Tequila Sunrise is a sexually oriented business which was permitted by the TABC on November 30, 2000. It holds a mixed beverage permit, which includes a mixed beverage late hours permit, number MB-483895. The owner and manager of the corporate entity is Jose Fong. The administrative history reveals three prior adjudicated suspensions.<sup>1</sup>

### A. Breach of the peace allegations.

#### 1. May 26, 2009 incident.

An assault against an employee on the premises is the basis for the first breach of the peace. Testimony of record reveals that Ismael Calleros was employed at Tequila Sunrise on the date of the breach. His duties varied depending on the establishment's needs. On May 26, 2009, he was performing the duties of security/bouncer. Mr. Calleros is the only witness with first hand knowledge of the events who testified. He testified as follows:

- He was situated in the front of the establishment.<sup>2</sup>
- He saw the back and forth arguing between two patrons known as the Fultz brothers and the bartender.<sup>3</sup>
- The bartender "cut-them off." He said the patrons became aggressive after they were refused further alcohol.<sup>4</sup>

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<sup>1</sup> Petitioner's Exhibit No. 2, administrative violations document.

<sup>2</sup> Tr. at p. 151.

<sup>3</sup> Tr. at p. 152.

<sup>4</sup> *Id.*

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PROPOSAL FOR DECISION

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- He did not hear the argument because of the loud ambience, but observed the patrons' behavior and body language which indicated to him they needed to be escorted out.<sup>5</sup>
- He approached the patrons and asked them to leave.<sup>6</sup>
- When they were walking out, the patrons stopped. He "made light body contact" to try to persuade them to go outside of the premises.<sup>7</sup>
- While escorting them out, Mr. Calleros instructed a dancer named Daphne to call the police.<sup>8</sup>
- Once outside, the patrons refused a cab. The patrons were very upset that they were denied access to the establishment.<sup>9</sup>
- The patrons came back into the atrium. The patrons attempted to fight with Mr. Calleros. Mr. Calleros was punched in the face. Mr. Calleros held one patron to the ground. The other bouncer helped. One of the patrons had a knife and in Mr. Calleros' attempt to disarm him, his hand was cut.<sup>10</sup>
- During the scuffle, Mr. Calleros called out twice for somebody to "call the cops."<sup>11</sup>
- Calleros called 911 after he was cut.
- The police arrived. Daniel Fultz was arrested for an aggravated assault with a deadly weapon.

The officers who responded to the calls testified at the hearing. They confirmed that they responded to a call regarding a stabbing. The officers observed a one-inch laceration to Mr. Calleros left hand. The officers' account is consistent with Mr. Calleros' version of the event. At the hearing, they admitted to not having any first hand knowledge to the facts which led to the breach of the peace.<sup>12</sup>

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<sup>5</sup> Tr. at p. 153.

<sup>6</sup> Tr. at p. 154.

<sup>7</sup> *Id.*

<sup>8</sup> Tr. at p. 156.

<sup>9</sup> Tr. at p. 155.

<sup>10</sup> Tr. at pp. 159-160.

<sup>11</sup> *Id.*

<sup>12</sup> Tr. at p. 40.

**2. June 2, 2009 incident.**

Mr. Calleros was working as the doorman on June 2, 2009. He testified as follows:

- Two patrons paid to enter.
- Within 40 seconds of their admittance, Mr. Calleros heard a commotion. He ran toward the commotion.
- He saw broken glass on the floor, and one woman patron and a dancer were fighting.
- He said "the girls had each other by the hair."<sup>13</sup>
- The dancer was hit on the face with a beer bottle.
- The female patron was escorted out.
- Mr. Calleros said he continued to monitor the female patron via the outside cameras.
- He went outside when the female patron was beyond camera range.
- He saw the female patron scratching the dancer's vehicle. The female patron tried to run him over.<sup>14</sup>

Officer Robert Paredes confirmed he responded to a call regarding an aggravated assault. He recounted the events which were communicated to him by the victim and Calleros. He also testified he does not have personal knowledge of the events prior to his arrival. He did observe the female victim to have a cut lip.

**B. Analysis for breach of the peace allegations.**

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.<sup>15</sup>

<sup>13</sup> Tr. at p. 188.

<sup>14</sup> Tr. at pp. 188-191.

<sup>15</sup> TEX. ALCO. BEV. CODE ANN. (Code) § 28.11 [Breach of the Peace].

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PROPOSAL FOR DECISION

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The ALJ finds that both violations of public peace occurred on the licensed premises.<sup>16</sup> Nonetheless, the burden of proof was not met with regard to all of the elements of Code § 28.11.

With regard to the May 26<sup>th</sup> incident, the bouncer was cognizant of the events inside the establishment; he was paying attention and doing his job. The facts articulated in Section A above reveal Mr. Calleros took affirmative steps to diffuse the situation inside the establishment. He did so by approaching the men, asking them to leave, and escorting them out. Agent Ianni testified that escorting them out was the right thing to do.<sup>17</sup> Petitioner's argument that the police should have been called earlier, does not address the statutory elements for Code § 28.11.

Further, the ALJ is unable to conclude the patron's acts on June 2<sup>nd</sup> were a result of the permittee's improper supervision of the patrons on the premises. Mr. Calleros testified the fight ensued within 40 seconds of the patron's admittance. He responded by breaking up the fight and escorting the female patron out. Then he observed her via the security cameras.

The ALJ finds the testimony from Mr. Calleros was credible. The officers who responded to the calls merely confirmed the occurrence of the incidents, but they did not have any knowledge regarding the required statutory elements of control and supervision. Petitioner argued that the police should have been called earlier on both incidents, but there is neither any direct or circumstantial evidence to support the conclusion that either breach was not beyond the control of the permittee and resulted from permittee's improper supervision of persons permitted to be on the licensed premises. Based on the evidence of record, the ALJ does not sustain these allegations.

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<sup>16</sup> 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.

**C. Failure to report breach of the peace allegations**

TABC Agent David Ianni testified that Respondent did not file a report on either the May 26, 2009, or the June 2, 2009, incidents.<sup>18</sup> Respondent does not contest the fact that a report was not filed for each breach. Owner Jose Fong said he did not notify TABC regarding both incidents.<sup>19</sup> In fact, Mr. Fong specifically said he did not know about the incidents until months after their occurrence.<sup>20</sup>

**D. Analysis of failure to report breach.**

It is a fact that permittee did not file the required reports. Mr. Fong claims lack of knowledge as a defense, but that is not a valid defense. Respondent's responsibilities as permittee are very specific. The fact that Respondent was unaware of the events could raise an issue regarding the management of the establishment; but, that particular issue was not pled and not tried by consent.

Respondent is an experienced permittee. He manages other similar businesses and has held the TABC license for a decade. His defense is not persuasive. It appears that the Respondent disregarded his responsibility to report the breach; and the testimony further reveals that Respondent did not instruct his employees regarding the reporting duty until after the incidents discussed herein. Therefore, the ALJ recommends a 10-day suspension for failing to report the May 27, 2009, breach of the peace; and a 15-day suspension for failing to report the breach of the peace which occurred on June 2, 2010. In lieu of suspensions, the Respondent should pay \$7,500.00 civil penalty.<sup>21</sup>

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<sup>17</sup> Tr. at p. 74.

<sup>18</sup> Tr. at pp. 57-59.

<sup>19</sup> Tr. at p. 118.

<sup>20</sup> Tr. at p. 109 and p. 117.

<sup>21</sup> The penalty is at \$300.00 per suspended day.

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PROPOSAL FOR DECISION

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### III. FINDINGS OF FACT

1. A hearing convened on July 29, 2010, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus F.W. Inc. d/b/a Tequila Sunrise (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 John W. Sedberry, staff attorney. Respondent was represented by Paul F. Grajeda, attorney at law.
4. The record closed on August 23, 2010, upon receipt of the official transcript.
5. Tequila Sunrise is a sexually oriented business which operates under the authority of a mixed beverage permit, which includes a mixed beverage late hours permit number MB-483895, issued in November 2000.
6. The business is situated within the City and County of El Paso, Texas.
7. Respondent's administrative history shows the following adjudicated violations: one possession of drugs on premises violation in 2005; a public lewdness/sexual contact violation in 2003; and a sale/delivery of drugs violation in 2001.
8. On May 26, 2009, Respondent's employee, Ismael Calleros, was assaulted on the licensed premises.
9. Mr. Calleros was performing the duties of security/bouncer when the following occurred on May 26, 2009:
  - Mr. Calleros was situated in the front of the establishment.
  - Mr. Calleros saw the back and forth arguing between two patrons known as the Fultz brothers and the bartender.
  - The bartender "cut-them off." The patrons became aggressive after they were refused further alcohol.
  - Mr. Calleros did not hear the argument because of the loud ambience; but observed the patrons' behavior and body language, which indicated to him they needed to be escorted out.
  - Mr. Calleros approached the patrons and asked them to leave.

- When they were walking out the patrons stopped. Mr. Calleros "made light body contact" to try to persuade them to step outside of the premises.
  - While escorting them out, Mr. Calleros instructed a dancer named Daphne to call the police.
  - Once outside, the patrons refused a cab. The patrons were very upset that they were denied access to the establishment.
  - The patrons came back into the atrium. The patrons attempted to fight with Mr. Calleros. Mr. Calleros was punched in the face. Mr. Calleros held one patron to the ground. The other bouncer helped. One of the patrons had a knife and in Mr. Calleros' attempt to disarm him, his hand was cut.
  - During the scuffle, Mr. Calleros called out twice for somebody to "call the cops."
  - Mr. Calleros called 911 after he was cut.
  - The police arrived. Daniel Fultz was arrested for an aggravated assault with a deadly weapon.
10. The fight detailed in number 9 above was beyond the control of the permittee and did not result from permittee's improper supervision of persons permitted to be on the licensed premises. Mr. Calleros acted within a reasonable time to control the patrons. Mr. Calleros was cognizant of the events inside the establishment and took affirmative steps to diffuse the situation inside the establishment by approaching the patrons, asking them to leave, and escorting them out.
11. Mr. Calleros was working as the doorman on June 2, 2009, when the following occurred:
- Two patrons paid to enter.
  - Within 40 seconds of their admittance, Mr. Calleros heard a commotion. He ran toward the commotion.
  - He saw broken glass on the floor, and one woman patron and a dancer were fighting.
  - He said at hearing, "the girls had each other by the hair."
  - The dancer was hit on the face with a beer bottle.
  - The female patron was escorted out.
  - Mr. Calleros continued to monitor the female patron via the outside cameras.
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SOAH DOCKET NO. 458-10-4112

PROPOSAL FOR DECISION

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- Mr. Calleros went outside when the female patron was beyond camera range.
  - Mr. Calleros saw the female patron scratching the dancer's vehicle. Then she tried to run Mr. Calleros over with her vehicle.
12. The fight detailed in number 11 above was beyond the control of the permittee and did not result from permittee's improper supervision of persons permitted to be on the licensed premises. The fight occurred almost immediately upon the patron's entrance; it happened too quickly to take other action, and the actions taken were reasonable. Mr. Calleros responded by breaking up the fight and escorting the female patron out. Then he observed her via the security cameras.
  13. Respondent did not file a breach of the peace report for the May 26, 2009 incident.
  14. Respondent did not file a breach of the peace report for the June 2, 2009.

#### IV. 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 May 26, 2009, was beyond Respondent's control and did not result from Respondent's improper supervision.
5. Based upon the Findings of Fact, the breach of the peace which occurred on June 2, 2009, was beyond Respondent's control and did not result from Respondent's improper supervision.
6. Based upon the Findings of Fact, Respondent failed to report a breach of the peace incident which occurred on May 26, 2009, in violation of Code § 11.61(b)(21).
7. Based upon the Findings of Fact, Respondent failed to report a breach of the peace incident which occurred on June 2, 2009, in violation of Code § 11.61(b)(21).

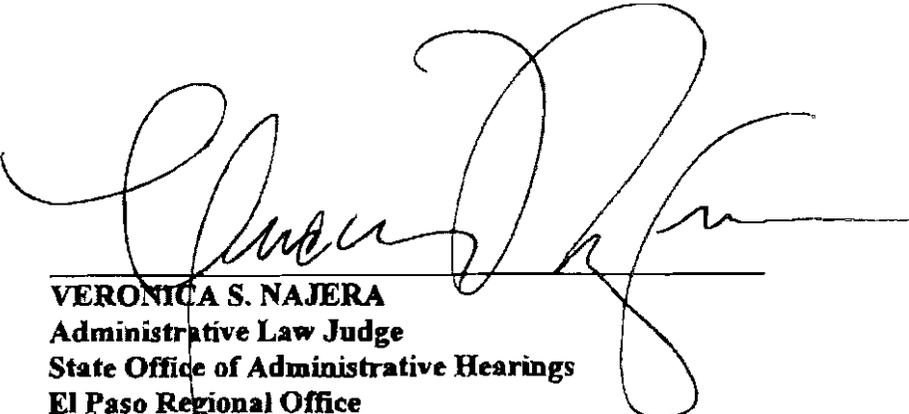
SOAH DOCKET NO. 458-10-4112

PROPOSAL FOR DECISION

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8. The ALJ recommends a 10-day suspension for failing to report the May 26, 2009, breach of the peace; and a 15-day suspension for failing to report the breach of the peace which occurred on June 2, 2010.
9. In lieu of suspensions, the Respondent should pay a \$7,500.00 civil penalty.

SIGNED October 12, 2010.



VERONICA S. NAJERA  
Administrative Law Judge  
State Office of Administrative Hearings  
El Paso Regional Office