

TABC DOCKET NO. 585191

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
WHISKEY DICKS INC. D/B/A WHISKEY DICKS PERMIT/LICENSE NO(s). MB668476, LB & PE	§	ALCOHOLIC
	§	
	§	
EL PASO COUNTY, TEXAS (SOAH DOCKET NO. 458-10-1488)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 18th day of October 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 Veronica Najera, presiding. The hearing convened on April 26, 2010 and the record was closed on May 21, 2010. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on July 15, 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 THEREFORE ORDERED that NO ACTION be taken by the Texas Alcoholic Beverage Commission against the Respondent's Permits.

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

By copy of this Order, service shall be made upon all the parties by in the manner indicated below.

SIGNED this the 18th day of October, 2010. at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that each party or person with an interest in the above matter has been notified of the agency order in the manner indicated below on October 18th, 2010.



Sandra Patton, Attorney
Texas Alcoholic Beverage Commission
Legal Division

Hon. Veronica S. Najera
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
401 East Franklin Ave., Suite 580
El Paso, Texas 79901
VIA FACSIMILE: (915) 834-5657

Jim Darnell
ATTORNEY FOR RESPONDENT
310 N. Mesa Street, Ste. 212
El Paso, TX 79901
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Whiskey Dicks Inc.
d/b/a Whiskey Dicks
RESPONDENT
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El Paso, TX 79928
VIA U.S. REGULAR MAIL

Martin Wilson
TABC ATTORNEY
TABC Legal Section
VIA ELECTRONIC MAIL

Sandy Higdon
Licensing Division
VIA PERSONAL DELIVERY

Lt. Salvador Moralez
El Paso Enforcement District Office
VIA ELECTRONIC MAIL

SKP/aa

State Office of Administrative Hearings



Carhleen Parsley
Chief Administrative Law Judge

July 15, 2010

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

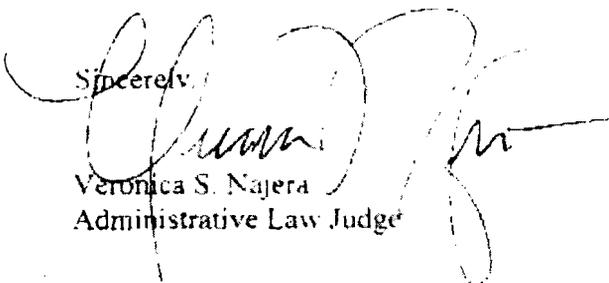
VIA FACSIMILE NO. 512-206-3203

RE: Docket No. 458-10-1488
TABC v. Whiskey Dicks Inc. d/b/a Whiskey Dicks

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

x. Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, **VIA FACSIMILE NO. 512-206-3226**
Martin Wilson, Assistant General Counsel, TABC **VIA FACSIMILE NO. 512-206-3226**
Tim Danell, attorney for Respondent, **VIA FACSIMILE NO. 915-532-4549**
SOAH Auson-Docketing **VIA DOCKET CHANGE FORM**

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II. DISCUSSION AND ANALYSIS

Whiskey Dicks 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 August 2007.¹ The administrative history reveals one prior warning for a cash law violation.²

A. Breach of the peace allegation

Staff alleges that a male patron was assaulted by employees of the bar on January 18, 2009, on the licensed premises. The TABC became involved after the alleged victim, David Jimenez, telephoned the TABC local office and spoke with TABC agent David Ianni. The alleged victim is an officer with the El Paso Police Department. Agent Ianni testified that he took the call from Mr. Jimenez and began the enforcement proceedings. His actions were based on the facts communicated to him by Mr. Jimenez and the police report.³ The written statements from the employees which were submitted to the TABC in response to this action are in evidence.⁴

Mr. Jimenez testified that he, his spouse, and some friends had dinner and drinks at other establishments before arriving at Whiskey Dicks around 9:00 p.m. The alleged incident occurred around 12:30 a.m. Mr. Jimenez said that he overheard two other patrons being told that they were no longer going to be served and that he did not agree with how they were being treated by the bar's employee and a "colored guy" security person named Jefferson. He said that the employee told him "If you have a problem with Jefferson – then leave." Mr. Jimenez responded "No, I have a problem with Jefferson's attitude." He said he walked away from the scene but was asked to leave the premises anyway. Mr. Jimenez stated that he wanted to close his tab and

¹ Petitioner's Exhibit No. 1, custodian of records affidavit for permit MB-668476.

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

³ The police report is not in evidence.

⁴ Respondent's Exhibits Nos. 1-4.

retrieve his credit card before exiting the bar. As he was escorted out, he alleges that a security staff "head-locked" him.

Yvette Valliere, the alleged victims' spouse, testified that she is unaware of what started the incident. She stated that a white male had her husband by the neck. Upon being asked regarding the 10 complaints filed with the police department against her husband, she stated she did not have any knowledge of the accusations. Two friends of Mr. Jimenez, Robert Barrueta and Mark Miller, testified they saw the group walking out the bar. The bar employees and Mr. Jimenez were yelling back and forth. They saw Mr. Jimenez being restrained. They saw Mr. Jimenez struggle to free himself. They said that Mr. Jimenez was grabbed by the neck and was pushed back with a hold. Mr. Barrueta stated Mr. Jimenez was not hurt.

The employees of the bar recount a quite different version of the facts. All four employees involved in the incident testified. Carlos Rivera was the employee who was "cutting another patron off" when Mr. Jimenez became involved. Mr. Jimenez inquired about a patron named Dwight Jefferson. Mr. Jefferson is a retired sheriff who acts as a consultant on security issues. Mr. Rivera said that Mr. Jimenez was belligerent and made repeated racial slurs against Mr. Jefferson. Specifically, he said "That nigger better watch it before I kick his ass." Mr. Rivera said that he used the "N" word repeatedly. At that point, Mr. Rivera determined Mr. Jimenez was very intoxicated and he asked him to leave. Mr. Jimenez was very aggressive and refused to leave.

Thereafter, Mr. Jimenez was escorted to the door by employees Hector Santana, Ulysses Colon and Carlos Rivera. Mr. Jimenez was physical and forceful throughout the incident. He continued his verbal attacks and threatened them by stating that he was going bring his friends to shoot them. All witnesses stated that Mr. Jimenez was posturing, screaming, waving his arms, and challenging them continuously. They all testified that he counted them several times and stated, "It took seven of you mother (***** to get me out of there!" Further, all employee witnesses stated that Mr. Jimenez was restrained against the wall by Filomeno Fackrell, the general manager. Mr. Fackrell testified that "Mr. Jimenez kept fighting so I restrained his left

arm and used my right arm to restrain him around his chest. I proceeded to ask him to calm down and relax but he kept fighting. Carlos restrained his right arm so he could not hit me or anyone else. He would not calm down so I told Carlos that we were going to push him away from us so he could not run and hit us." He further stated he did not hold him for more than one minute and that Mr. Jimenez kept yelling during and after the restraint. The police were called by the bar.

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.

Various issues with the facts lead the ALJ to conclude that the burden of proof was not met with regard to all of the elements of Code § 28.11, as follows:

1. Petitioner's principal witness was not credible. He blamed everyone else and did not accept any responsibility for the occurrences. In contrast, the testimony from Respondent's witnesses was specific, detailed, and consistent regarding the events, Mr. Jimenez's demeanor, and verbal assaults. They detailed the development of the facts which led to the contact with Mr. Jimenez and did not negate the hold, but stated it was necessary to control Mr. Jimenez.

2. There are no documents or testimony of record regarding the police investigation of the alleged assault, no medical information, and no evidence Mr. Jimenez was injured as

alleged Mr. Jimenez testified that he almost "passed out." There is no evidence to support such allegation.

3. The TABC agent testified no one was interviewed aside from the initial telephone call from Mr. Jimenez. Mr. Jimenez's version of the events was taken at face value. Furthermore, the video recording of the events which was testified about during the hearing was given to the police department, who in turn, according to agent Ianni, told the TABC that "the video was not helpful." Agent Ianni was also told there were viewing problems with the recording. Staff did not review the recording.⁶

4. In contrast, Respondent's testimony reveals that affirmative steps to diffuse Mr. Jimenez's verbal and physical actions were taken:

- Due to Mr. Jimenez's verbal and racial attacks, he was asked to leave;
- Mr. Jimenez was escorted out by three employees;
- Mr. Jimenez was verbally and physically aggressive toward the bar's employees;
- The bar manager responded to the commotion and became involved;
- Mr. Jimenez was briefly restrained against the wall;
- The bar staff called the police; and
- A breach of the peace report was filed.

The ALJ finds the bar employees were credible and their version of events consistent. Based on the evidence of record, the ALJ does not find any evidence to indicate improper supervision of the persons involved or any evidence to show the incident was not beyond the permittee's control. In fact, it took a lot of man power to control Mr. Jimenez without further escalation. The ALJ does not sustain this allegation.

⁶ The recording is not in evidence. The record remained opened for submission of the recording, but it appears to have been lost. Both parties submitted conflicting affidavits as to the whereabouts of the video. These were admitted into evidence on May 21, 2010, as Petitioner's Exhibit No. 3 and Respondent's Exhibit No. 3.

III. FINDINGS OF FACT

1. A hearing convened on April 26, 2010, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus Whiskey Dicks, Inc. d/b/a Whiskey Dicks (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 Jim Darnell, attorney.
4. The record closed on May 21, 2010.
5. The Texas Alcoholic Beverage Commission (TABC) issued Respondent a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, in August 2007.
6. Respondent's administrative history reveals one prior warning for a cash law violation.
7. The bar is situated within the City and County of El Paso, Texas.
8. A breach of the peace incident occurred on the licensed premises on January 18, 2009, between patron David Jimenez and bar employees.
9. Mr. Jimenez, his spouse, and some friends had dinner and drinks at other establishments before arriving at Whiskey Dicks around 9:00 p.m. The alleged incident occurred around 12:30 a.m.
10. Employee Carlos Rivera was "cutting another patron off" when Mr. Jimenez inquired about patron Dwight Jefferson. Mr. Jefferson is a retired sheriff who acts as a consultant on security issues.
11. Mr. Jimenez was belligerent and made repeated racial slurs against Mr. Jefferson. Specifically, he said "That nigger better watch it before I kick his ass." Mr. Jimenez used the "N" word repeatedly.
12. Mr. Rivera determined Mr. Jimenez was very intoxicated and he asked him to leave. Mr. Jimenez was very aggressive and refused to leave.
13. Mr. Jimenez was escorted to the door by employees Hector Santana, Ulysses Colon and Carlos Rivera.

14. Mr. Jimenez:

- was physical and forceful throughout the incident;
- verbally attacked and threatened the employees by stating he was going to bring his friends to shoot them;
- postured, screamed, waived his arms, and challenged them continuously;
- counted them several times and stated "It took seven of you mother f***** to get me out of there!"

15. Mr. Jimenez was restrained against the wall by Filomeno Fackrell, the general manager, for less than one minute.

16. Respondent took affirmative steps to diffuse Mr. Jimenez's verbal and physical actions:

- Due to Mr. Jimenez's verbal and racial attacks, he was asked to leave;
- Mr. Jimenez was escorted out by three employees;
- The bar manager responded to the commotion and became involved;
- Mr. Jimenez was briefly restrained against the wall by the bar manager;
- The bar staff called the police; and
- A breach of the peace report was filed.

V. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this proceeding pursuant to 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 (IAC) § 155.401 and Code § 11.63.

4. Based upon the Findings of Fact, the breach of the peace which occurred on January 18, 2009, was beyond Respondent's control and did not result from Respondent's improper supervision, pursuant to Code § 28 11.
5. The ALJ recommends that no sanction should be imposed against Respondent as a result of this proceeding.

SIGNED July 15, 2010.



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