

DOCKET NO. 591750

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
WHITNEY CROWNE CORPORATION LTD D/B/A MIDNIGHT RODEO/PIRANHA, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT NOS. MB426492, LB426493	§	
	§	
RANDALL COUNTY, TEXAS (SOAH DOCKET NO. 458-11-1123)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of August, 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 B.L. Phillips presiding. The hearing convened on February 22, 2011 and the SOAH record closed March 8, 2011. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on March 21, 2011. 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, with the following exception only. Finding of Fact No. 10 is amended to read as follows (to correct a typographical error):

Finding of Fact No. 10. Mr. Cox was placed on the floor because he was still belligerent and was then placed in a chair and had the handcuffs removed.

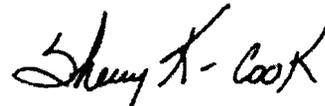
With this amendment to Finding of Fact No. 10, I incorporate the Findings of Fact and Conclusions of Law contained in the Proposal for Decision into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

I do not agree with all of the Analysis in the Proposal for Decision. Nonetheless, this Order rests on the specific facts of this case (as stated in the Findings of Fact), and on my judgment that the alleged violations were not proven by a preponderance of the evidence (as stated in Conclusions of Law Nos. 4 and 5).

IT IS THEREFORE ORDERED that **NO ACTION** be taken against Respondent's permits in connection with this proceeding.

This Order will become final and enforceable on the 5th day of September, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

SIGNED this the 10th day of August, 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 10th day of August, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

B.L. Phillips
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
8212 Ithaca, Suite W3
Lubbock, Texas 79423
VIA FACSIMILE: (806) 792-0149

Whitney Crowne Corporation Ltd.
d/b/a Midnight Rodeo/Piranha
RESPONDENT
4400 S Georgia
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VIA REGULAR MAIL

Tracey McCormick
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12260 Nacogdoches Road, Suite 102
San Antonio, Texas 78217
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Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL: sandra.patton@tabc.state.tx.us

State Office of Administrative Hearings

591 950



Cathleen Parsley
Chief Administrative Law Judge
March 21, 2011

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

VIA REGULAR MAIL

RE: Docket No. 458-11-1123; Re: Whitney Crowne Corp. Ltd. d/b/a Midnight Rodeo/Piranha

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,

A handwritten signature in black ink that reads "B.L. Phillips".

B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

BLP/vu

Enclosure

xc ✓ Sandra Patton, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008-

VIA REGULAR MAIL

Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-

VIA REGULAR MAIL

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -

VIA REGULAR MAIL (with Certified Evidentiary Record and 1 Hearing CD/s)

Tracey McCormick, Attorney, 12260 Nacogdoches Road, Ste. 102, San Antonio, TX 78217 -**VIA REGULAR MAIL**

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
WHITNEY CROWNE CORP. LTD D/B/A MIDNIGHT RODEO Respondent	§	ADMINISTRATIVE HEARINGS
	§	

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission’s Staff (Petitioner) brought this disciplinary action against Whitney Crowne Corporation Ltd. d/b/a Midnight Rodeo/Piranha (Respondent) alleging that: (1) on or about July 24, 2009, Respondent or their servant, agent or employee conducted business in a manner as to allow a breach of the peace on the licensed premises which was not beyond Respondent’s control and resulted from Respondent’s improper supervision of persons permitted to be on the licensed premises, in violation of Texas Alcoholic Beverage Code (the Code) §§ 28.11, and 11.61(b)(2); and (2) on or about July 24, 2009, Respondent, or his servant, agent, or employee, failed to promptly report a breach of the peace on the licensed premises to the Commission, in violation of the Code §§ 11.61(b)(2) and (21). Based on the evidence, the Administrative Law Judge (ALJ) finds that the Petitioner failed to prove the allegations by a preponderance of the evidence and recommends that no action be taken in regards to Respondent’s permit.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

On February 22, 2011, a hearing convened before the State Office of Administrative Hearings (SOAH), B. L. Phillips presiding ALJ. Petitioner appeared at the hearing and was represented by Sandra K. Patton, attorney. Respondent appeared at the hearing represented by Tracey McCormick, attorney. After presentation of evidence and argument, the hearing concluded. The record was closed on March 8, 2011, after receipt of written closing arguments for the parties.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 28.11, the TABC commission or administrator may suspend or cancel a mixed beverage permit after giving the permittee notice and the opportunity to show compliance with all requirements of law for the retention of the permit if it finds that a breach of the peace has occurred on the licensed premises or on premises under the control of the permittee and that the breach of the peace 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.

Pursuant to the Code § 61.71(a)(1) and (17), the Commission may suspend or cancel a retail dealer's on- or off-premise license if it is found that the licensee: violated a provision of the Code or rule of the Commission during the existence of the license sought to be cancelled, or conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and public sense of decency of the people.

Pursuant to the Code § 11.61(b)(2), the Commission may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of this code or a rule of the commission.

Pursuant to the Code § 11.61(b)(21), the Commission may suspend for not more than 60 days or cancel an original or renewal permit if it is found that the permittee failed to promptly report to the commission a breach of the peace occurring on the permittee's licensed premises.

III. DISCUSSION AND ANALYSIS

A. Background

The following facts were not disputed at the hearing. Respondent's licensed premises, known as Midnight Rodeo/Piranha, are located at 4400 S. Georgia, Amarillo, Randall County, Texas. Respondent holds a Mixed Beverage permit and a Mixed Beverage Late Hours Permit, issued by the TABC. On or about July 24, 2009, a fight broke out between patrons on the licensed premises, and one patron was confronted and removed from the premises by the staff of the licensed premises. Officers from the Amarillo Police Department investigated the fight, entered the licensed premises, but no arrests resulted from their investigation.

B. Petitioner's Evidence and Contentions

Petitioner presented the testimony of several witnesses and extensive documentary evidence. Officer Drew Cox of the Randall County Sheriff's Office testified that he arrived at the licensed premises on July 24, 2009, accompanied by friends and was dancing in the Piranha room of the licensed premises when the incident occurred. He was dancing when bumped by another patron who grabbed him and would not let him go, and was grabbed by an unknown person from behind. Mr. Cox took that person to the ground, and he testified that multiple unknown persons punched, kicked, and poked him in the eyes. He stated that he was tased multiple times before he was handcuffed by persons later identified as employees of the licensed premises. Mr. Cox testified that the employees picked him up by the handcuffs and his neck, used his head to open swinging doors to a back room, slammed him to the floor, hit his thighs with their knees, and used the taser on him again. He stated that he was bleeding from his lip and nose with his blood pooling on the floor and that an employee named Steve Daffern stated that he was an EMT and checked out his injuries. The police were called to the licensed premises, and Mr. Cox was asked to sign a trespass warning and allowed to leave.

Ms. Shasta Winn testified that she was the person dancing with Mr. Cox when the incident began. She observed another patron pushing Mr. Cox across the dance floor and her brother Trenton Winn breaking up the fight. She and Trenton left the Piranha room and waited

in the Midnight Rodeo area of the licensed premises while a security guard grabbed Mr. Cox. She testified that Mr. Cox was escorted from the room by several security guards wearing shirts with the word "STAFF" on the back. Ms. Winn recalled that Mr. Cox was not injured when she and Trenton left the Piranha room but that his face was swelling and bloody when he was escorted from the room by security. When she was able to see Mr. Cox in the back room where he was taken, he was very angry at the security guards and asking for their names.

Mr. Steven Daffern II was employed as a security guard for the licensed premises on the date of the incident. He testified that he responded to a fight in the Piranha room and observed Mr. Cox and security guard Chris Cortez on the ground. Mr. Cortez was trying to restrain Mr. Cox and identified himself as security when another security staff member named Tony Cardona arrived to assist. Mr. Daffern observed that Mr. Cox was flailing about and very aggressive but did not observe any injuries to Mr. Cox. He did recall hearing a stun gun go off behind him and testified that it was used in the air to clear the crowd. Mr. Daffern escorted Mr. Cox to the back room of the licensed premises and put on rubber gloves to clean the blood off of his face. He did not notice anything wrong with Mr. Cox's eyes at that time. He recalled that Mr. Cox was alternating between very agitated and calm before the decision was made to call the police. He denied that Mr. Cox was punched, poked in the eye, slammed to the floor, or that his head was used to open a swinging door by any of the staff of the licensed premises.

Sgt. Harold Dempsey of the Amarillo Police Department testified that he was assigned to the unit of the APD that would investigate charges such as those made by Mr. Cox against the staff of the licensed premises. Sgt. Dempsey interviewed witnesses and determined that there was enough evidence to submit the incident to the grand jury. He testified that the grand jury did not issue any indictments in the case.

Agent Carla Thompson of the TABC testified and recommended that the breach of the peace and failure to report the breach of the peace complaints be upheld. She reviewed the evidence gathered by APD and determined that the security staff of the license premises had assaulted Mr. Cox on the night in question and that Chris Cortez, Tony Cardona, and Steve Daffern were the involved staff members. She testified that staff escalated the problem which

could have been handled in another manner. She also testified that the licensed premises failed to report the breach of the peace to the TABC, but did report it to the local police.

C. Respondent's Evidence and Contentions

Respondent presented the testimony of two members of their security staff who helped control the fight on the licensed premises as well as the testimony of the manager of the club. Mr. Christopher Cortez testified that he was working on the licensed premises on the night in question and was wearing a shirt that identified him as a staff member. He was in the DJ booth when he observed a fight occur in the Piranha room in which people were hitting and pushing each other. When Mr. Cortez went to the dance floor, he grabbed one person to separate the fight participants and then was grabbed from behind by Mr. Cox. He took Mr. Cox to the floor to subdue him and attempted to handcuff him while Mr. Cox continued fighting with another person. Mr. Cox continued to struggle and fight with Mr. Cortez, and another unidentified person was hitting them before he ran off into the crowd. Mr. Cortez and other staff members took Mr. Cox to the back room where he was still very aggressive, angry, cussing, and bucking off the chair that they placed him in. Mr. Cortez denied that he or any other member of the staff of the licensed premises punched, slammed into a door or onto the floor, used a stun gun on, or poked Mr. Cox in the eyes. Mr. Cortez testified that he observed that Mr. Cox had a busted lip but did not notice any redness in his eyes.

Mr. Tony Cardona was also working as a security officer for the licensed premises on the night in question and was wearing the same type of shirt that identified him as a staff member. He heard the fight call, came onto the dance floor, and observed Mr. Cortez and Mr. Cox on the floor. Mr. Cardona testified that he used a stun gun by discharging it into the air to disperse the crowd. He assisted in taking Mr. Cox to the back room, and placed him on the ground because he was still belligerent. He denied punching, poking, slamming his head into a door or slamming Mr. Cox on the ground, nor did he observe any other staff member to do the same.

Mr. Duane Thompson was the operations manager for the licensed premises on the night of the incident and responsible for reporting any breaches of the peace to the TABC. The

procedure at the time of the incident for this licensed premise was to fax a report of any breaches of the peace to their corporate office, and he was later told by TABC agents that they preferred that the report go directly from the affected licensed premises to the local TABC office. He testified that some TABC offices allow a report to the police of a breach of the peace to suffice for the report to TABC. Mr. Thompson reported the incident to the Amarillo Police Department, who arrived at the license premises to conduct an investigation, and he was aware that APD reported the incident to TABC.

Mr. Thompson did not observe the fight but he did observe Mr. Cox and the staff members in the back room of the licensed premises. He testified that Mr. Cox was on the floor and then put into a chair, that he was yelling and then approached Mr. Cortez in a loud threatening manner when his handcuffs were removed. Mr. Thompson advised the staff to place the handcuffs back on Mr. Cox and the APD was called to investigate the incident. He thought that Mr. Cox was out of control that night, but he never complained to Mr. Thompson that he was assaulted by security personnel that night.

D. Analysis

After considering the evidence, the ALJ concludes that Petitioner did not prove that Respondent violated the Code by permitting a breach of the peace to occur on the licensed premises, or by failing to report a breach of the peace to the Commission. Respondent, to the contrary, demonstrated that it had fulfilled in its obligation to provide responsible operation of its establishment. The evidence demonstrates that a fight occurred on the licensed premises on the night in question involving Mr. Cox and unknown other persons who fled the scene before they could be apprehended. Security personnel for the licensed premises, who were identified by shirts they were wearing with the word "STAFF" on the back, responded to the fight, subdued Mr. Cox who was involved and attempted to apprehend any other participants. Unfortunately, the likely other participant ran off into the crowd before he could be apprehended. The conflicting evidence simply does not rise to the level to prove that Mr. Cox was assaulted by security staff of the licensed premises that night. Mr. Cox was clearly agitated and upset due to the fight which it appears that he did not initiate. However, in the ensuing mayhem, he ended up

fighting with the security personnel who he may have thought were other patrons continuing the fight with him. After a difficult time, security personnel were able to subdue Mr. Cox and remove him from the dance floor. He was understandably very upset and no doubt confused by what had just occurred. The security personnel denied that they ever assaulted Mr. Cox that night, and the police who arrived at the licensed premises to investigate the incident did not arrest anyone due to the incident. Mr. Cox was asked to sign a trespass warning requiring him to leave the licensed premises and allowed to leave.

The evidence demonstrates that a breach of the peace occurred on the licensed premises that was beyond Respondent's control and did not result from Respondent's improper supervision of persons permitted to be on the licensed premises. Respondent's employees responded to a fight in progress and did the best that they could under the circumstances to break up the fight. Unfortunately Mr. Cox appears to have been injured in the fight and was properly upset and confused by the events of that evening. The bar manager stated that Mr. Cox appeared out of control, which is why the handcuffs were placed back on him after they had been removed and why the Amarillo Police Department was called to the licensed premises to investigate the incident. The response of Respondent's employees to use a stun gun on to disperse the crowd was questionable in that such a technique in the hands of a civilian could possibly escalate the violence. The bar manager testified that he has instructed employees to discontinue such a practice.

The bar manager did promptly report the breach of the peace to law enforcement officers who arrived on the licensed premises to investigate and who reported the incident to TABC. Mr. Thompson testified that, in his experience as an operations manager, there were various means for reporting such incidents to the TABC. The rule does not make clear the means by which the Commission would receive reports of alleged breaches of the peace, and the practice in the industry appears to leave some leeway for TABC offices and license holders to comply with the rule. It appears that in this instance Respondent did comply with the rule by reporting the incident to the Amarillo Police Department, who in turn reported it to the TABC. Due to the reporting, TABC was able to complete an investigation of the incident under the spirit of the rule.

IV. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence was insufficient to prove that: (1) on or about July 24, 2009, Respondent, their servant, agent or employee conducted business in a manner as to allow a breach of the peace on the licensed premises which was not beyond Respondent's control and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises, or (2) on or about July 24, 2009, Respondent, their servant, agent, or employee, failed to promptly report a breach of the peace on the licensed premises to the Commission. The ALJ recommends that no action be taken against Respondent's permit.

V. FINDINGS OF FACT

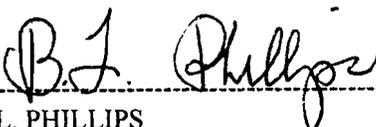
1. Whitney Crowne Corporation Ltd d/b/a Midnight Rodeo/Piranha holds a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit, issued by TABC for the premises located at 4400 S. Georgia, Amarillo, Randall County, Texas.
2. Respondent received proper and timely notice of the hearing from TABC in a notice of hearing dated November 5, 2010 and an Amended Notice of Hearing dated February 18, 2011.
3. The hearing on the merits convened February 22, 2011, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Texas. The TABC was represented by attorney Sandra K. Patton. Respondent was represented by attorney Tracey McCormick. The record closed on March 8, 2011, after receipt of written closing arguments for the parties.
4. On or about July 24, 2009, a fight occurred on the licensed premises involving Mr. Drew Cox and other unidentified persons.
5. Respondent's employee Mr. Christopher Cortez, who was wearing a STAFF shirt, observed the fight occur in the Piranha room of the licensed premises and that people were hitting and pushing each other.
6. Mr. Cortez entered the dance floor, grabbed one person to separate the fighters and was grabbed from behind by Mr. Cox.

7. Mr. Cortez took Mr. Cox to the floor to subdue him and attempted to handcuff him while Mr. Cox continued fighting with an unidentified person who then ran off into the crowd.
8. Mr. Tony Cardona, another security person wearing a STAFF shirt, discharged a stun gun into the air to disperse the crowd on the dance floor during the fight.
9. Mr. Cortez placed handcuffs on Mr. Cox, and along with Cardona and staff member Mr. Steven Daffern removed Mr. Cox from the dance floor and took him to a back room of the licensed premises.
10. Mr. Cox was placed on the floor because he was still belligerent and was then placed in a chair and had the handcuffs removed.
11. Mr. Daffern put on rubber gloves to clean blood off of Mr. Cox's face but did not notice anything wrong with his eyes at that time.
12. Mr. Cox continued to be very aggressive and angry, so the handcuffs were placed back on him and the Amarillo Police Department was called to the licensed premises to investigate the incident.
13. Amarillo Police Department members arrived at the licensed premises but no arrests occurred due to the incident.
14. Mr. Cox was asked to sign a trespass warning and asked to leave the licensed premises, which he did.
15. The Amarillo Police Department notified the Texas Alcoholic Beverage Commission of the incident, and TABC investigated the incident and Mr. Cox's subsequent allegations that he was assaulted by staff members of the licensed premises.
16. Respondent's manager of the licensed premises was aware that TABC allowed various means for reporting alleged breaches of the peace, including reporting such incidents to local police.
17. The TABC investigation concluded that a breach of the peace occurred on the licensed premises that was not beyond Respondent's control and that Respondent failed to report the breach of the peace to TABC.
18. A grand jury investigated the allegations of assault and did not return any indictments for the incident.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH has jurisdiction over all matters relating to the conduct of 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 TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Findings of Fact Nos. 4-14, Petitioner failed to prove by a preponderance of the evidence that Respondent violated the Code by allowing a breach of the peace to occur on the licensed premises that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises.
5. Based upon Findings of Fact Nos. 15-18, Petitioner failed to prove by a preponderance of the evidence that Respondent violated the Code by failing to promptly report a breach of the peace on the licensed premises to the Commission.
6. The ALJ recommends that no action be taken with regards to Respondent's permit.

Signed: MARCH 21, 2011



B.L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS