

IT IS THEREFORE ORDERED that Respondent's Wine and Beer Retailer's Permit No. BG793028, and the associated Retail Dealer's On-Premise Late Hours License, are hereby **CANCELLED**.

This Order will become final and enforceable on the 23rd day of May, 2014, unless a Motion for Rehearing is filed by the 22nd day of May, 2014.

SIGNED this the 29th day of April, 2014, at Austin, Texas.



Sherry K-Cook, Executive Director
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 29th day of April, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Melissa M. Ricard
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, Texas 78701
VIA FACSIMILE: (512) 322-2061

Alfredo Deleon
d/b/a La Oficina Bar
RESPONDENT
17009 Grapefruit Dr.
Edinburg, Texas 78541
VIA FIRST CLASS MAIL, CMRRR # 70120470000133008309

John W. Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL:
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II. DISCUSSION

A. Applicable Law

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including but not limited to, any of the following acts: possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so. Code § 104.01(9). A narcotic is any substance defined in the Texas Controlled Substances Act. 16 Tex. Admin. Code § 35.41. Tex. Health & Safety Code 481.002(5).

Further, 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 the permittee violated a provision of the Code or a rule of the Commission. Code § 11.61(b)(2).

Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees or business to persons other than the permittee is unlawful. Code § 109.53.

B. Evidence

Respondent is the holder of a Wine and Beer Retailer's On Premise Permit and Retailer's On Premise Late Hours License BG793028, BL (License), for Respondent's premises located at 7106 N. Bentsen Palm Drive, Mission, Hidalgo County, Texas. Respondent owns and operates the La Oficina Bar (Premises) at this location.

On September 28, 2013, TABC Agent Neva Saenz conducted an undercover investigation at the Premises with another agent. Agent Saenz and her companion entered the

Premises and sat a table. Agent Saenz was approached by an individual who took her order for a beer. Agent Saenz stated that the individual appeared to be a waitress or server. The individual returned to the bar, obtained a beer from Respondent, who was working behind the bar, and brought the beer to Agent Saenz. The individual also waited on other tables, took drink orders and made change for other patrons. Agent Saenz observed the individual pass what appeared to be narcotics in an envelope to other people at other tables.

Agent Saenz asked the individual for cocaine and placed a \$20 bill on the table. The individual took the \$20 bill and walked back to the bar. The individual brought a white powdery substance back to Agent Saenz and placed it on the table with \$10 change. Agent Saenz called in other TABC agents to make the arrest so that she could remain in her undercover capacity. The substance was field tested which showed positive for cocaine. The substance was submitted to the Texas Department of Public Safety which also confirmed the substance as cocaine.

Agent Saenz also reviewed the Respondent's permit history which shows a previous suspension of the TABC license for possessing or permitting drugs on the Premises within the last year. Agent Saenz testified that the TABC penalty chart specifies cancellation of license upon a second violation of possessing or permitting drugs in a licensed premises.

Agent Saenz purchased three drinks from the server and observed him¹ cleaning tables, waiting on at least two other tables, making change and obtaining drinks from Respondent who was working behind the bar the entire time.

Respondent testified that he was working behind the bar as the bartender that evening. Respondent testified that he was told by the TABC agents that the individual who waited upon Agents Saenz told the agents he was an employee of Respondent. Respondent stated that this individual was not an employee, only a patron of the restaurant who frequented the establishment every week or two. Respondents stated that the individual never worked for him.

¹ The individual who brought drinks and the drugs to Agents Saenz appeared that evening to be a woman. It was later discovered that this individual was actually a man.

Respondent admitted that he does not know much about the business of running an establishment with a liquor license and did not realize he was responsible for everyone in his establishment. Respondent stated that he did not notice this individual serving several tables, obtaining multiple drinks from him, making change or cleaning off tables. He also said the bar was busy that evening and he does not usually check up on his customers.

Respondent further stated that the previous violation concerned his bartender using drugs. He took full responsibility for that incident but does not think that he should be responsible for someone who was not his employee.

C. Discussion and Recommendation

Respondent argued that the person who served Agent Saenz inside his bar, and later sold illegal drugs to her, did not work for him. However, the record clearly establishes that this individual had apparent authority. Respondent admitted that he did not check up on his customers. Notably, he did not deny that this individual waited on tables, made change and cleaned up; rather, he stated that he did not notice it and did not realize he would be responsible for this behavior. The person held himself out as a servant or agent of Respondent and Respondent allowed it to happen. Therefore, the man legally could be deemed Respondent's agent in this circumstance. The evidence clearly establishes that Respondent or Respondent's agent, servant, or employee possessed or permitted to possess narcotics on the licensed Premises in violation of the Code. Respondent did not offer any evidence to rebut the occurrence of the alleged violation.

Furthermore, under the Code, Respondent is not only responsible for his agents and employees, but also for permitting anyone to possess narcotics on the Premises. Nothing in the record suggests Respondent did anything to prevent a person from possessing narcotics on the Premises. In fact, Respondent admitted that he did not check up on his customers and lacked awareness of what was going on.

After considering the arguments and evidence, the ALJ finds that Respondent should have known about the narcotics on the Premises. At a minimum, Respondent knew or should have known of the likelihood of these facts and failed to take reasonable steps to prevent narcotics on Premises. Respondent did not exercise due diligence in controlling his Premises. Based upon the evidence presented, Respondent's License should be cancelled.

III. FINDINGS OF FACT

1. Alfredo Deleon d/b/a La Oficina Bar (Respondent) holds a Wine Only Package Store Permit Q-653229 (Permit), which includes the Wine and Beer Retailer's On Premise Permit and Retailer's On Premise Late Hours License BG793028, BL (License) issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Premises) located at located at 7106 N. Bentsen Palm Drive, Mission, Hidalgo County, Texas.
2. The permit was originally issued on December 20, 2011.
3. On September 28, 2013, TABC Agent Neva Saenz conducted a drug investigation at Respondent's Premises.
4. A Texas Alcoholic Beverage (TABC) agent was approached by an individual who took her order for a beer. The individual returned to the bar, obtained a beer from Respondent, who was working behind the bar, and brought the beer to the agent.
5. The individual also waited on other tables, took drink orders and made change.
6. The individual passed what appeared to be narcotics to people at other tables.
7. The agent asked the individual for cocaine. The individual took a \$20 bill from the Agent and walked back to the bar. The individual brought a white powdery substance back to Agent and placed it on the table with \$10 change.
8. The Texas Department of Public Safety Crime Laboratory confirmed that the substance was cocaine.
9. On September 28, 2013, Respondent or Respondent's agent, servant, or employee, possessed a narcotic on the licensed premises.
10. Respondent had a prior Code violation for possession of drugs. Respondent served a suspension for this violation.
11. On December 5, 2013, TABC's Staff issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice to the parties contained the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing

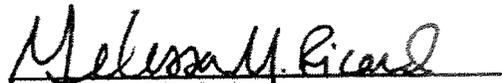
was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.

12. The hearing in this matter convened on December 16, 2013, before State Office of Administrative Hearings (SOAH) ALJ Melissa M. Ricard. John Sedberry, staff attorney, represented Staff at the hearing. Respondent appeared and represented himself. The hearing concluded and the record closed the same day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Texas Alcoholic Beverage Code (Code) ch. 5 and §§ 11.61(b)(2), 24.06, 61.71, and 104.01(9).
2. SOAH has jurisdiction over all matters relating 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 ch. 2003.
3. Respondent received notice of the hearing, pursuant to Tex. Gov't Code §§ 2001.051 and 2001.052 and 1 Tex. Admin. Code ch. 155.
4. Respondent or Respondent's agent, servant, or employee possessed or permitted others to possess a narcotic on the licensed premise and violated Code §§ 104.01(9), 25.04 and 16 Tex. Admin. Code § 35.41.
5. Respondent's permit and license should be cancelled. Code §§ 61.71(a)(1), 11.61(b)(2), and 24.06.

SIGNED February, 12, 2014.


MELISSA M. RICARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Docket No. 458-14-1185E

I hereby affirm that the exhibits referenced on the attached exhibit list identify all the exhibits admitted in this proceeding. Any exhibits not admitted but included in an offer of proof are also listed and identified as such. The referenced exhibits are being placed under seal and returned to the referring agency in the condition in which they were received into evidence.


ADMINISTRATIVE LAW JUDGE

Date Signed: Feb. 12, 2014