

DOCKET NO. 584939

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	
	§	OF
R & R ENTERTAINMENT, INC.	§	
D/B/A MOMENTS CABARET	§	
PERMIT NO. MB-224277 & LB-224278	§	
HARRIS COUNTY, TEXAS	§	
(SOAH Docket No. 458-00-0433)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 4th day of June, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Caliph Johnson. The hearing convened on September 14, 2000, and was closed October 16, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 23, 2001. This 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. Exceptions have been filed by the Respondent.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which 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 Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB-224277 & LB-224278 are hereby **SUSPENDED**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$30,000.00** on or before the **30th** day of **July, 2001**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **thirty (30) days, beginning at 12:01 A.M. on the 6th day of August, 2001.**

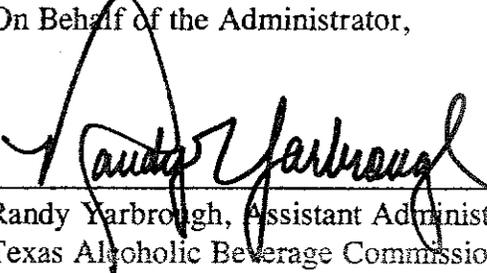
This Order will become final and enforceable on June 25, 2001. unless a Motion for

Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 4th day of June, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE (713) 812-1001

Paul Decuir, Jr.
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Houston, Texas 77213
CERTIFIED MAIL NO. 7000 1530 0003 1927 3234

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission

Houston District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 584939

REGISTER NUMBER:

NAME: R & R Entertainment, Inc.

TRADENAME: Moment Cabaret

ADDRESS: 9003 North Freeway, Houston, Texas 77037-2115

DATE DUE: July 30, 2001

PERMITS OR LICENSES: MB-224277 & LB-224278

AMOUNT OF PENALTY: \$30,000.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 30TH DAY OF JULY, 2001, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.
MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

DOCKET NO. 458-00-0433

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
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VS.	§	
	§	OF
R & R ENTERTAINMENT, INC.	§	
D/B/A MOMENT CABARET	§	
PERMIT NO. MB-224277 & LB-224278	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 584939)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against R & R Entertainment, Inc. d.b.a. Moments Cabaret (Moments), a men's club in Houston. Staff alleges that on four occasions, Moments, or one of its employees, agents, or servants engaged in or permitted conduct on the premises which was lewd, immoral, or offensive to public decency, by engaging in acts of sexual contact with the genitals of another person with intent to arouse or gratify the sexual desire of the other person. Staff further alleges the following: on one occasion, one of Moment's employees, agents, or servants, on the licensed premises, solicited a customer to buy drinks for consumption by the employee, agent, or servant; on one occasion, one of Moment's employees, agents, or servants, was intoxicated on the licensed premises; on one occasion, one of Moment's employees, agents, or servants, on the licensed premises, solicited or permitted solicitations, for sexual purposes. Staff recommends Moments' mixed beverage permit and mixed beverage late hour permit, which are issued by the Texas Alcoholic Beverage Commission (TABC), be suspended or canceled.

Moments denies the alleged acts of sexual contact, solicitation of a customer to buy drinks for consumption, solicitation for sexual purposes, or intoxication on the premises were committed. Moments further contends that TABC has failed to establish an employment relationship between Moments and the dancers who are alleged to have committed the acts complained of. Also, Moments alleges that TABS and the Houston Police Department (HPD) Vice Division has committed official Oppression against Moments. The Administrative Law Judge finds that Moments committed the alleged violations of Section 104.01(6) of the TEX. ALCO. BEV. CODE by engaging in acts of sexual contact with intent to arouse or gratify sexual desires of another person. The ALJ also finds that Moments committed the alleged violation of Section 104.01(7) of the TEX. ALCO. BEV. CODE, by solicitation for sexual purposes, which was done under mitigating circumstances. The ALJ recommends suspending Moments' Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for 30 days and that Moments be given the option of paying a civil penalty in the amount of \$30,000.

I. PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are set out in the findings of facts and conclusions of law without further discussion here.

A hearing in this case was held before Caliph Johnson, Administrative Law Judge (ALJ), on September 14, 2000, at 10:00 a.m. in the Houston office of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. Staff Appeared and was represented by Mr. Dewey A. Brackin, Legal Division, TABC. Moments appeared and was represented by Mr. Paul Decuir, Jr., Attorney at Law. Following the presentation of evidence, the hearing remained open until October 16, 2000, for the submission of post-hearing briefs.

II. EMPLOYMENT STATUS OF DANCERS WHO WORK AT MOMENTS

At the hearing, Staff contended and offered evidence to support the contention that dancers who dance at Moments are "employees" or "Servants" of Moments, under Texas case law and provisions of the Texas Alcoholic Beverage Code. Moments, on the other hand, contends: that it does not employ the dancers; that, it does not pay the dancers, and in fact, the dancers pay Moments to use its facilities; that, the only control or direction Moments has over the dancers is to control the use of the facilities due to limited space and; that, Moments does not require any of the dancers to attend work and does not have any expectation of control, except the prevention of unlawful acts committed at its facilities. Both parties submitted post-hearing briefs on the issue.

A. Evidence and Argument

1. Evidence

a. Staff Evidence

Staff witnesses, TABC agents and HPD officers (including Agent Brian Williams, Agent Michael Lockhart, Officer Brian Surginer, Officer John Ogelsby and Officer David Nieto), testified about their observations regarding the manner in which Moments' dancers went about performing their duties while working at Moments. According to these witnesses, the Disc Jockey (DJ) would call each dancer's name as she began her performance. She danced on the main stage first. Then, she moved to a secondary stage. After dancing on the secondary stage, she moved onto the floor and mingled with the customers, offering to perform table dances.

One of Moments' witnesses, Pamela Rodriguez (a dancer), initially stated that she filled out an application before she began dancing for Moments. Subsequently, upon questions from Moments' attorney, she stated that she did not know whether or not she filled out an application before beginning work for Moments. She also stated that Moments required her to show an identification card and a Social Security card before beginning to work. She stated that she considered herself working for Moments.

Mr. Ray, the Club owner and manager, stated that if a dancer was convicted of a violation of a TABC Code provision, while working at Moments, he would ask that she not come back to the club.

b. Moments' Evidence

Moments presented very little evidence on the subject. Primarily, it has contended that Staff has failed to support its position that the dancers are employees of Moments. The dancer, Pamela Rodriguez, testified that dancers could come to work whenever they wanted to, at whatever time they chose. She testified that Moments did not pay the dancers. They earned money from performing table dances for

customers. Usually, customers paid \$20.00 per dance. She stated that dancers were required to pay Moments \$21.00. Further, she stated that dancers were expected to dance on the main and secondary stages when the DJ called them up, although she believed they were not required to do so.

2. Argument on the Evidence

a. Staff's Argument

In support of its position that all of Moments' dancers are "employees" or "servants" under Texas case law, Staff cited several code provisions and court decisions. Staff urges that under *Casey v. Sandborn's Inc. of Texas*, 478 S.W. 2d 234, 239 (Tex. Civ. App.--Hous [1st Dist.] 1972, no writ, the fact that an alleged servant was performing services particular to a principal's business or affairs established *prima facie* that the relationship of servant and master exists between them. More specifically, Staff relies on the case of *Bruce v. State*, 743 S.W. 2d 313, 315-316 (Tex. App.-- Hous. [14th Dist.] 1987, writ refused, in which the Court held that evidence was sufficient to demonstrate that a dancer was an "employee" of a club for purposes of the drink solicitation statute (also Code Section 104.010), where the club owner testified that dancers at the club must initially fill out an application form, receive permission before they perform and were called to the stage by a disc jockey. Staff also cites a U.S. Fifth Circuit Court of Appeals case, *Reich v. Circle C Investments*, 998 F.2d 324 (5th Cir.), which held that topless dancers are employees of topless clubs, with regard to Social Security employment benefits.

Staff argues that, like the dancers in *Bruce v. State*, Moments' dancers must fill out an application, receive permission before they may perform, and are called to the stage by the disc jockey. And that, additionally, the very act of topless dancing, itself, is the performance of a service particular to Moments' business as a "gentlemen's entertainment" club.

b. Moment's Argument

Moments argues that it does not employ the dancers, and compares itself to a race track owner to whom racers pay a fee to race their vehicles on the track, but are not employees of the track.

Moments further argues that Staff's reliance on *Bruce v. State*, 743 S.W.2d 313 is improper, because the facts in *Bruce v. State* are different from the facts in the case at hand. Moments points out that in *Bruce v. State*, the dancers received remuneration from the club in the form of commission from drinks sold at the club. And, that Moments does not remunerate the dancers in any form or fashion. Further, Moments notes that, in this case, the opposite occurs, dancers pay Moments for using the facility.

Moments attempts to distinguish this case from *Bruce v. State*, in several other ways: that TABC failed to prove that dancers fill out an employment application before dancing at Moments and; that TABC failed to prove that the dancers receive permission before they perform, contending that these are all essential elements in proving that an employment relationship exists in accordance with *Bruce v. State*.

3. Analysis

The cases relied on to support Staff's positions ask first, whether the alleged employees perform services that are particular to the principal's business or affairs. If so, that establishes *prima facie* that

the relationship between them is one of master and servant. *Casey v. Sandborn's Inc. of Texas*. Since Staff has shown that the main attraction of a men's adult club is the entertainment by the dancers (on stage and at tables), a prima facie case of employer-employee is established. Additionally, all facets of the dancers' relationships with Moments considered together show that they were engaged in an employer-employee relationship. One witness, Ms. Pamela Rodriguez (a dancer), initially admitted that she filled out an application before she began dancing for Moments. The ALJ is persuaded by this statement, as opposed to her retraction when questioned by Moments' attorney. Ms. Rodriguez also testified that dancers are required to show Identification Cards and Social Security Cards to the Club management, before they are allowed to dance there. Further, Ms. Rodriguez stated that she considered that she worked for Moments. Ms Rodriguez and several TABC agents and HPD officers agreed in their testimony that Moments' DJ calls each dancer to the stage, and that usually the dancer follows the routine of dancing on the main stage first, then moving to the secondary stage before dancing at tables for customers, for which they are paid. Also, Ms. Rodriguez stated that dancers pay a \$21.00 "Tipout" fee to dance there. The \$21.00 go to pay the house DJ, and to contribute to a fund for getting dancers out of jail, if they are arrested. Finally, Mr. Ray, the club's owner, testified that he reserves the right to tell a dancer to not come back to work there if, for example, a dancer is convicted of a violation of a TABC Code provision. Therefore, the ALJ is persuaded that, in accordance with *Bruce v. State*, Moments retains and exercises sufficient control over the dancers to justify a conclusion that the dancers are employees of Moments. This conclusion is also consistent with the U.S. Fifth Circuit's decision in *Reich v. Circle C Investments*.

III. UNFAIR TREATMENT OF MOMENTS BY TABC AND THE HPD VICE DIVISION

Respondent contends that the HPD Vice Division, with the assistance of TABC agents, conspired, under the direction of Houston City Council Member Martha J. Wong, to mistreat Moments. Specifically, the Vice Division and TABC unduly targeted Moments by conducting excessive investigations not consistent with the normal course of activities of these agencies. Respondent alleges that the Vice Division and TABC conducted forty (40) investigations of Moments in a 24-month period, and that, during that time there were only two (2) complaints made against Moments. Respondent further alleges that, upon investigation, those two complaints were determined to be unfounded.

Petitioner, on the other hand, contends that in order to establish discriminatory enforcement (an equal protection claim), a defendant must first show that he or she has been singled out for prosecution, while others similarly situated and committing the same acts have not. Then, the defendant must show that the discrimination was based on race, creed or other membership in a protected class, or the exercise of First Amendment rights. And, there must be a discriminatory intent. Petitioner urges a conclusion that Respondent failed to show that TABC had a discriminatory intent; failed to show that Moments is a member of a protected class; and failed to show that Moments was exercising a constitutionally protected right.

A. Evidence

Moments' attorney attempted to prove multiple investigations and harassment by the Houston Police Department's Vice Division, primarily through a video tape of a televised investigative report given by investigative reporter, Wayne Dolcefino, on television station KTRK, Channel 13, in Houston. Although the ALJ permitted Moments to play the video tape in the hearing, neither the tape nor its contents were admitted into evidence. Moments also attempted to introduce into evidence an alleged letter from Councilwoman Martha Wong. Although Agent Williams, Officer Ogelsby and Officer Nieto testified

that the August 18, 1999 investigation was in response to a City Council complaint, the alleged letter from Councilwoman Wong was not admitted, because it was not properly authenticated. The owner of Moments, Mr. Ray, testified that HPD officers investigated Moments many times, from day-one, when he opened the club.

B. Analysis

The ALJ concludes that Moments failed to prove that the investigations that gave rise to the charges in this case were based on an impermissibly discriminatory enforcement practice. Moments failed to prove, first, that it had been singled out for prosecution, while others similarly situated and committing the same acts have not, and further, Moments failed to show that any singling out or discrimination was based on the race, creed or membership in other protected classes, or the exercise of First Amendment rights. Additionally, there was no showing of a discriminatory intent on the part of TABC.

IV. DISCUSSION

A. Background

R.& R. Entertainment, Inc., d.b.a. Moments Cabaret is a men's club, located in Houston. It is the holder of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit. TABC and the HPD Vice Division conducted several undercover investigations at Moments, on January 9, 1999, April 19, 1999, July 15, 1999, and August 18, 1999. Staff alleges that on four occasions, Moments, or one of its employees, agents, or servants engaged in acts of sexual contact with the clothed genitals of another person with intent to arouse or gratify the sexual desire of the other person; one of Moment's employees, agents, or servants, solicited a customer to buy drinks for consumption by the employee, agent, or servant; one employee, agent, or servant, was intoxicated on the licensed premises; one of Moment's employees, agents, or servants solicited or permitted solicitations, for sexual purposes. Based on these allegations, TABC Staff instituted this disciplinary proceeding and sought to have Moments' mixed beverage permit and mixed beverage late hour permit, suspended or canceled.

B. Sexual Contact with Another's Genital with intent to arouse or gratify sexual desire

Attorney for Petitioner dismissed Charge number 1, the charge that on January 7, 1999, an employee or servant of the Respondent, on the licensed premises knowingly engaged in acts of sexual contact with the intent to arouse or gratify sexual desires of a customer. The dismissal is due to the unavailability of a witness, HPD Officer Rushing.

July 15, 1999 Investigation

From the July 15, 1999 investigation, based on the testimony of TABC Agent Brian Williams, Staff introduced evidence that Krista Chavez, a.k.a. Goddess, a dancer at Moments, performed a table dance for Agent Williams, and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing body slides (which involved standing or straddling the customer and touching his face with her clothed genitals. That she made full contact while sliding down his body. She put her face and head on his clothed genitals, simulating oral sex). Agent Williams also testified that she performed body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).

Agent Lockhart testified that, on July 15, 1999, a dancer named Elia Alvarez Ambrose, a.k.a. Melissa, performed a table dance for him and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing body slides and, body grinds.

August 18, 1999 Investigation

From the August 18, 1999 investigation, Agent Brian Williams testified that a dancer named Crystal Phears, a.k.a. Victoria, performed a table dance for him and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body slides and body grinds.

Also, from the August 18, 1999 investigation, HPD Officer John Ogelsby testified that a dancer named Pamela Sue Rodriguez, a.k.a. Pamela, performed a table dance for him and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body slides (including putting her mouth on his clothed genitals, and body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion). Further, that another dancer named Erin Faver, a.k.a. Morgan, performed a table dance for him and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).

Moments introduced evidence through the testimony of Pamela Sue Rodriguez, who testified that she complied with the Club's rules and stayed at least three feet away from Officer Ogelsby while performing a table dance. She also explained that she pleaded guilty to the criminal charges of public lewdness because she thought she had to. She stated that she was late in appearing at her trial. The Judge gave her a choice of pleading guilty or going to jail immediately. Because she has small children, she chose to plead guilty.

Finally, from the August 18, 1999 investigation, HPD Officer David Nieto testified that a dancer named Katherine Lynn Frederick, a.k.a. Melody, performed a table dance for him and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body slides (including putting her head between his legs and messaging his clothed genitals with her head), and body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).

1. Applicable Law

This violation is defined by the Texas Alcoholic Beverage Code Ann. (V.T.C.A. 2000) TEX. ALCO. BEV. CODE § 104.01(6), which provides that “[n]o 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: . . . (6) permitting lewd or vulgar entertainment or acts”; and further by Texas Alcoholic Beverage Commission Rules, 16 TAC § 35.41(1), which prohibits conduct that is lewd, immoral, or offensive to public decency, by engaging in acts of sexual contact with the genitals of another person with intent to arouse or gratify the sexual desire of the other person. Also, Texas Penal Code, Section 21.01(2) provides that: “Sexual Contact” means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of another person. Texas Penal Code, Section 21.07 further provides that: “A person commits an offense if he knowingly engages in any of the following acts in a public place, or if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his: . . . (3) act of sexual contact . . .”

2. Issues

The first issue raised in conjunction with these charges is whether the dancers were employees of Moments. The ALJ has already concluded that they were employees for purposes of resolving these charges.

The second issue is whether the dancers committed the alleged acts.

3. Analysis

The evidence supports a finding that, on July 15, 1999, dancers Krista Chavez, a.k.a. Goddess, and Elia Alvarez Ambrose, a.k.a. Melissa, knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, as alleged by Staff.

Further, the evidence supports a finding that, on August 18, 1999, dancers Crystal Phears, a.k.a. Victoria, Pamela Sue Rodriguez, a.k.a. Pamela, Erin Faver, a.k.a. Morgan, and Katherine Lynn Frederick, a.k.a. Melody, knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, as alleged by Staff.

C. Solicitation of a Moments Customer to buy Drinks for Consumption by an Employee

Attorney for Petitioner dismissed Charge number II, which alleged that on January 7, 1999 Moments' employees or servants solicited a customer to buy drinks for consumption by an employee or servant on the licensed premises. The dismissal is due to the unavailability of a witness, HPD Officer Rushing.

D. An Employee or Servant of Moments Intoxicated on Licensed Premises

From the August 18, 1999 investigation, Agent Brian Williams testified that a dancer named Leigh Ann Taylor, while on the licensed premises, admitted to another dancer that she was intoxicated. He further testified that he heard her state that she had too many drinks. Also, stated that she needed another drink. He stated that he observed that her speech was slurred, she staggered and she talked loud.

Agent Michael Lockhart also stated that he observed dancer Leigh Ann Taylor approach another dancer, stated that she had too much to drink and she needed another drink. He further testified that he observed her speech was slurred and she staggered. Also, he stated that he subsequently observed her pour herself an alcoholic drink.

Moments introduced evidence through the testimony of Leigh Ann Taylor. She testified that she was not intoxicated. Further, she stated that she had not drank alcoholic beverages at all that evening because she was taking antibiotics as medication. She denied saying that she had drank too much, or that she needed another drink. She also denied pouring herself an alcoholic drink.

Ms. Taylor further testified that she was arrested for intoxication and when she appeared for trial the case was dismissed because the officers stated that she was the wrong person. Moments also introduced Respondent's Exhibit 1, which was a motion to dismiss the criminal charge of liquor violation, and an

order signed by the Court which dismissed the charge, because TABC officer said she was not the person who committed the crime.

1. Applicable Law

Section 104.01(5) of the TEX. ALCO. BEV. CODE prohibits a person authorized to sell beer at retail, his agent or employee, from being intoxicated on the licensed premises.

3. Analysis

The evidence fails to support a finding that Leigh Ann Taylor, or any other employee of Moments, was intoxicated on the licensed premises, on August 18, 1999. Agent Brian Williams, Agent Michael Lockhart and the prosecutors seemed confused on the facts of this charge.

E. Solicitation by an Employee or Servant of Moments on Licensed Premises, for Sexual Purposes

From the August 18, 1999 investigations, HPD Officer Brian Surginer testified that a dancer named Michelle Morones, a.k.a. Merissa, performed a table dance for him. Further, he testified that he told her he was looking for something more. She stated that she could give him a blow job in the corner. He further stated that she said that she could turn a chair around and do it for \$40.00. Also, he testified that he then told her he had to take a friend home and would get with her when he got back.

1. Applicable Law

Section 104.01(7) of the TEX. ALCO. BEV. CODE prohibits a person authorized to sell beer at retail, his agent or employee, from solicitations of persons for immoral or sexual purposes.

2. Analysis

The testimony of Officer supports a finding of solicitation, by Michelle Morones, a.k.a. Merissa, on licensed premises, for sexual purposes, on August 18, 1999. His testimony also establishes that she offered to give him a blow job only after he insisted that he was looking for something more than a table dance.

F. Parties' Exhibits

3. Petitioner's Exhibits

P Ex. 1 - History of Moments Cabaret's Permits and Violations

P Ex. 2 - Photograph of Crystal Phears, a.k.a. Victoria

P Ex. 3 - Photograph of Leigh Ann Taylor and Moments Manager, Torres

P Ex. 4 - Photograph of Michelle Morones, a.k.a. Merissa

P Ex. 5 - Photograph of Pamela Sue Rodriguez, a.k.a. Pamela

P Ex. 6 - Photograph of Erin Faver, a.k.a. Morgan

P Ex. 8 - Photograph of Elia Alvarez Ambrose, a.k.a. Melissa

P Ex. 9 - Photograph of Katherine Lynn Frederick, a.k.a. Melody

4. Respondent's Exhibits

R Ex. 1 - Motion and Order to Dismiss

V. FINDINGS OF FACT

1. On February 24, 2000, Staff of the Texas Alcoholic Beverage Commission (Staff) mailed to R & R Entertainment, Inc. d.b.a. Moments Cabaret (Moments) a notice of hearing informing Moments of the nature of the hearing, the legal authority and jurisdiction under which it was to be held, the particular sections and rules involved, and the matters asserted by Staff. The notice of hearing was received by Moments.
2. A hearing in this case was held before Caliph Johnson, Administrative Law Judge, on September 14, 2000, in the Houston office of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. Staff Appeared and was represented by Mr. Dewey A. Brackin, Legal Division, TABC. Moments appeared and was represented by Mr. Paul Decuir, Jr., Attorney at Law. Following the presentation of evidence, the hearing remained open until October 16, 2000, for the submission of post-hearing briefs.
3. R.& R. Entertainment, Inc., d.b.a. Moments Cabaret is a men's club, located in Houston. It is the holder of a Mixed Beverage Permit (NO. MB-224277), and a Mixed Beverage Late Hours Permit (LB-224278).
4. TABC and the HPD Vice Division conducted an undercover investigation at Moments, on July 15, 1999.
5. During the July 15, 1999 undercover investigation, Krista Chavez, a.k.a. Goddess, a dancer, and employee of Moments, performed a table dance for Agent Williams, and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing body slides (which involved standing or straddling the customer and touching his face with her clothed genitals, making full contact while sliding down his body, and putting her face and head on his clothed genitals, simulating oral sex). She also performed body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).
6. During the July 15, 1999 undercover investigation conducted by the TABC and the HPD Vice Division, a dancer, and employee of Moments, named Elia Alvarez Ambrose, a.k.a. Melissa, performed a table dance for Agent Lockhart, and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing body slides and, body grinds.
7. TABC and the HPD Vice Division conducted undercover investigation at Moments, on August 18, 1999.

8. During the August 18, 1999 undercover investigation, a dancer, and employee of Moments, named Crystal Phears, a.k.a. Victoria, performed a table dance for Agent Brian Williams, and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body slides and body grinds.
9. During the August 18, 1999 undercover investigation, a dancer, and employee of Moments, named Pamela Sue Rodriguez, a.k.a. Pamela, performed a table dance for HPD Officer John Ogelby, and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body slides (including putting her mouth on his clothed genitals, and body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).
10. During the August 18, 1999 undercover investigation, a dancer, and employee of Moments, named Erin Faver, a.k.a. Morgan, performed a table dance for HPD Officer John Ogelsby and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).
11. During the August 18, 1999 undercover investigation, a dancer, and employee of Moments, named Katherine Lynn Frederick, a.k.a. Melody, performed a table dance for HPD Officer David Nieto, and knowingly engaged in acts of sexual contact with intent to arouse or gratify sexual desires, by performing several body slides (including putting her head between his legs and messaging his clothed genitals with her head), and body grinds (which involved placing her buttock against his clothed genital area and simulating sexual intercourse, in a grinding motion).
12. The evidence fails to support a finding that Leigh Ann Taylor, or any other employee of Moments, was intoxicated on the licensed premises, on August 18, 1999, as alleged by Staff.
13. During the August 18, 1999 undercover investigation, a dancer, and employee of Moments, named Michelle Morones, a.k.a. Merissa, solicited HPD Officer Brian Surginer, on the licensed premises, for sexual purposes. This was done only in response to Officer Brian Surginer's insistence that he was looking for something more than a table dance.
14. Moments failed to prove that the January 9, 1999, April 19, 1999, July 15, 1999, August 18, 1999, and other undercover investigations by TABC agents and HPD Vice Division officers amounted to impermissible discriminatory enforcement by TABC.
15. Moments failed to prove, that it had been singled out for prosecution, while others similarly situated and committing the same acts have not.
16. Moments failed to prove that any singling out or discrimination committed by TABC was based on Moments' race, creed or other membership in a protected class, or the exercise of First Amendment rights.
17. Moments failed to prove any discriminatory intent on the part of TABC.
18. Staff proved that the main attraction of a men's adult club is the entertainment by the dancers on stage and at tables), and thereby established a prima facie case of employer-employee relationship between Moments and the dancers.

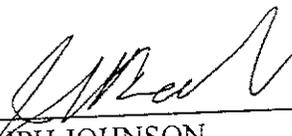
19. All facets of the dancers' relationships with Moments considered together show that they were engaged in an employer-employee relationship.
20. Moments required dancers to fill out an application before they began dancing for Moments.
21. Moments required dancers to show Identification Cards and Social Security Cards to Club management, before they were allowed to dance there.
22. One dancer, Ms. Pamela Rodriguez, believed that she worked for Moments.
23. Moments' DJ called each dancer to the stage, and usually, each dancer followed the routine of dancing on the main stage first, then moving to the secondary stage before dancing at tables for customers, for which they are paid.
24. Dancers paid a \$21.00 "Tipout" fee to Moments to dance there. The \$21.00 went to pay the house DJ, and to contribute to a fund for getting dancers out of jail, if they were arrested.
25. Mr. Ray, the club's owner, reserved the right to tell a dancer to not come back to work there.
26. Therefore, the dancers are employees of Moments.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Section 106.13 of the Texas Alcoholic Beverage Code, TEX CODE ANN. § 1.01 2t seq. Vernon Supp.1998).
2. The State Office of Administrative Hearings 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 (Vernon 1998).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. § § 2001.051 and 2001.052 (Vernon 1998).
4. Based on Findings number 13-17, the investigations of Moments by TABC did not amount to an impermissibly discriminatory enforcement of the Texas Alcoholic Beverage Code against Moments.
5. Based on Findings number 18-26, Moments' dancers are employees of Moments.
6. Based on Findings number 5, 6, 8, 9, 10 and 11, employees of Moments violated Section 104.01(6) of the TEX. ALCO. BEV. CODE by knowingly engaging in acts of sexual contact with intent to arouse or gratify sexual desires of another person.
7. Based on Findings number 13, an employee of Moment violated Section 104.01(7) of the TEX. ALCO. BEV. CODE by solicitation for sexual purposes. This was done only in response to Officer Brian Surginer's insistence that he was looking for something more than a table dance.

8. Based on Conclusion number 6 and 7, Moments violated a provision of the Code pursuant to Section 11.61(b)(2) of the Code.
9. Based on Conclusion number 8, Moments' permits issued by the Commission may be suspended for not more than 60 days or canceled pursuant to Section 11.61 (b) of the Code.
10. Pursuant to Section 11.64(a) of the Code, Moments shall have the opportunity to pay a civil penalty rather than have its permits suspended. Therefore, the provision of Section 11.64(b) should apply.
11. Based on Findings number 13 and Conclusion number 7, Moments' employee violated Section 104.01(7) of the TEX. ALCO. BEV. CODE by solicitation for sexual purposes, only in response to Officer Brian Surginer's insistence that he was looking for something more than a table dance, pursuant to Section 11.64 (c) (2) of the Code.
12. Based on Conclusion number 11, the Commission may relax any administrative assessed against Moments pursuant to based on Conclusion 7, pursuant to Section 11.64(b) of the Code.
13. Based on the foregoing Findings and Conclusions, the Commission should suspend Moments' Mixed Beverage Permit (NO. MB-224277) and a Mixed Beverage Late Hours Permit (LB-224278) for 30 days or in lieu thereof Moments should be given the option of paying a civil penalty in the amount of \$30,000.

SIGNED this 23rd day of April 2001.

For 

CALIPH JOHNSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS