

DOCKET NO. 589141

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE TEXAS

VS.

JUNE GLORIA MISHLER
D/B/A CARIBBEAN COWBOY BAR & GRILL
PERMIT/LICENSE NO(s). MB629083, PE &
LB
TARRANT COUNTY, TEXAS
(SOAH DOCKET NO. 458-10-2951)

ALCOHOLIC

BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

The above-styled and numbered cause is before the Assistant Administrator, Texas Alcoholic Beverage Commission for consideration and entry of the agency order.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on the 15th day of April, 2010 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 28th day of April, 2010. 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, acting on behalf of the Administrator of the Texas Alcoholic Beverage Commission, after review and consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law made by the Administrative Law Judge as those of the Texas Alcoholic Beverage Commission.

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 your permit(s) and/or license (s) is hereby **SUSPENDED**.

IT IS THEREFORE ORDERED, that unless Respondent pays a civil penalty in the amount of \$900.00 on or before the 15th day of June, 2010, all rights and privileges granted by the Commission under the above described permit and/or license will be **SUSPENDED** for **three (3) days** starting at 12:01 A.M. on the 23rd day of June, 2010.

This Order will become final and enforceable on the 31st day of June, 2010, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED this the 26th day of May 2010, at Austin, Texas.



Sherry K- Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK/cb

CERTIFICATE OF SERVICE

I certify that I have served copies of the above Order on the parties shown below in the manner indicated on the 27th day of May, 2010.



Cecelia Brooks, Paralegal
TABC Legal Section
Texas Alcoholic Beverage Commission

Honorable Judge Tanya Cooper
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
Fort Worth, TX
VIA FACSIMILE: (817) 377-3706

June Gloria Mishler
d/b/a Caribbean Cowboy Bar & Grill
RESPONDENT
12450 S. Fwy.
Fort Worth, TX 76028
VIA REGULAR MAIL

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Arlington District Office

DOCKET NO. 458-10-2951

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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BEFORE THE STATE OFFICE

v.

OF

JUNE GLORIA MISHLER D/B/A
CARIBBEAN COWBOY BAR & GRILL
TARRANT COUNTY, TEXAS
(TABC CASE NO. 589141)

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against June Gloria Mishler d/b/a Caribbean Cowboy Bar & Grill (Respondent), alleging a violation of the Texas Alcoholic Beverage Code (the Code). In TABC Staff's notice of hearing, it alleged that Respondent allowed a breach of the peace on the licensed premises on August 20, 2009, that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises when she became involved in a confrontation with an employee while at the licensed premises. TABC Staff requested that Respondent's permits be suspended¹ for seven days in relation to this violation.

¹ 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 any the permittee/retail dealer violated a provision of this Code or rule of the Commission. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2).

* * * *

All provisions of this Code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit and beverage cartage permit. TEX. ALCO. BEV. CODE ANN. §§ 29.03 and 44.03.

* * * *

Permittee means a person who is the holder of a permit provided for in this Code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

The Administrative Law Judge (ALJ) finds the evidence was sufficient to establish that a breach of the peace occurred on the licensed premises that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises. Accordingly, the ALJ agrees with TABC Staff that a suspension of Respondent's permits is appropriate; however, due to the nature of the violation, Respondent's lack of prior Code violations, and dismissal of the criminal charge filed against Respondent, the ALJ recommends that Respondent's permits be suspended for a period of three days, or that Respondent pay a civil penalty in the amount of \$900.00 in lieu of any permit suspension.²

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice or jurisdiction in this proceeding. Therefore, those issues are addressed only in the Findings of Facts and Conclusions of Law.

On April 15, 2010, a hearing convened before ALJ Tanya Cooper, at the SOAH offices located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by Judith Kennison, TABC Staff Attorney. Respondent appeared in person and represented herself.

II. EVIDENCE

Respondent holds a Mixed Beverage Permit, MB-629083, which includes a Beverage Cartage Permit, and Mixed Beverage Late Hours Permit, issued by TABC for Respondent's premises located at 12450 S. Freeway, Fort Worth, Texas. Respondent's permits were initially issued on May 25, 2006, and have been continuously renewed since that date. TABC's Exhibit 2, the violation history for Respondent's permits, reveals no other Code violations other than a warning Respondent received for failing to report this incident to TABC Staff. Officer S. Pelton, Christopher Gause, Christin Gause, David Whiting, Agent William Feick, Damon Bullock, and Respondent

² TEX. ALCO. BEV. CODE ANN. §§ 11.64 and 11.641.

testified at the hearing.

A. TABC Staff's Evidence.

Officer S. Pelton, Fort Worth Police Department, testified that he was dispatched to Respondent's licensed premises on August 20, 2009. When he arrived, he met with Christopher Gause and David Whiting. Mr. Gause reported that after the bar closed, he and Respondent had a dispute over payment for his DJ services that evening and that Respondent kicked him in the back of legs as he was walking out of the licensed premises. Mr. Whiting also reported he saw Respondent kick Mr. Gause. Officer Pelton said he tried to contact Respondent after taking Mr. Gause and Mr. Whiting's statements, but was unable to do so.

Mr. Gause said that Respondent was very intoxicated that evening. During the course of the argument over his compensation after closing time, Mr. Gause testified that Respondent had pushed him in the chest and threatened to confiscate his DJ equipment. Mr. Gause stated that Respondent threw \$34 at him despite the fact that his usual DJ fee was \$125. According to Mr. Gause, he picked up the money and was exiting from the bar when Respondent kicked him from behind. The blow struck him in the lower-calf area of one of his legs.

Christin Gause, Mr. Gause's wife, was also present at the licensed premises during this incident. She also said Respondent appeared intoxicated. According to Ms. Gause, Respondent was yelling that she wanted Mr. Gause out of the bar because she had received complaints about his work. She said that Mr. Gause tried to calm Respondent, but Respondent pushed him in his chest. Ms. Gause said that she left the bar to stay with Mr. Gause's DJ equipment and never observed Mr. Gause be aggressive toward Respondent. When asked about the level of alcohol she and Mr. Gause had consumed that evening, she thought Mr. Gause might have had a couple of beers, and she had three mixed drinks, consisting of vanilla vodka and Dr. Pepper. She did not recall having any unpaid bar tab.

Mr. Whiting testified that he was at Respondent's licensed premises for several hours prior to

the incident between Respondent and Mr. Gause. He was reluctant to provide his testimony because he did not want to cause problems for either Mr. Gause or Respondent, but said he saw at least a portion of the confrontation between them. While he did not hear any of the conversation between the two, he saw that it appeared Respondent kicked at Mr. Gause's knee after she unlocked the door for Mr. Gause to leave the bar. Mr. Whiting admitted he was probably intoxicated at the time of this incident. Although he believed what he reported to Officer Pelton at the time, he opined that his level of intoxication could have impacted his observations.

Agent Feick stated that he learned about this incident while investigating a drug-related complaint at Respondent's premises, which he later determined was unfounded. He testified that he interviewed Respondent about this incident. Respondent told Agent Feick that Mr. Gause was a problem employee and that she had fired him. According to Respondent, Mr. Gause had thrown a bar towel at her, but she denied being physical toward Mr. Gause. When asked to define "breach of the peace," Agent Feick said that it is a situation that usually includes any assault by contact with another person.

B. Respondent's Evidence.

Damon Bullock testified he was at the licensed premises during this incident. He said that the bar was very busy that night. According to Mr. Bullock, Respondent had not consumed any alcoholic beverage that evening, but he thought Mr. and Ms. Gause were intoxicated because they had consumed numerous drinks. Mr. Bullock stated that Mr. Gause became upset when Respondent told him to turn off the music at closing time. Mr. Bullock said that Mr. Gause cursed at Respondent and threw a bar rag at Respondent, but was allowed to gather his DJ equipment up before being escorted from the licensed premises. Mr. Bullock denied ever seeing Respondent push or kick Mr. Gause. When asked about why the police were not summoned to assist Respondent if Mr. Gause's conduct was threatening, Mr. Bullock said he did not believe the incident warranted police involvement. He said that although the bar rag was nasty, he would not have called the police over it. In his opinion, Respondent had acted appropriately.

Respondent stated Mr. Gause was creating problems in the bar. Customers were complaining because he was late in starting karaoke that evening. Respondent said that she was also concerned that Mr. Gause and his wife were running up high bar tabs. On the evening of this incident, Respondent said the bar was exceptionally busy for a weeknight and she could not leave from behind the bar. It was her intention to take up Mr. Gause's performance with him after closing. As closing time approached, she repeatedly told Mr. Gause to announce "last call," but he kept playing music. After telling him several times to turn off the music, she told Mr. Gause she was going to pull the electrical plugs to Mr. Gause's equipment. Mr. Gause cursed at her and said he was quitting. He wanted to be paid for the evening's work. When Respondent brought up that he owed Respondent money on this bar tab,³ Mr. Gause threw a wet bar rag in her face. After Mr. Gause collected his equipment, she and another employee escorted him from the licensed premises. Respondent denied having been intoxicated during this incident and testified she never kicked or pushed Mr. Gause.

Respondent said she did not consider calling the police concerning Mr. Gause's behavior toward her because she was focused on getting customers out of the bar and working through her closing procedures. She was unaware that Mr. Gause had called the police or that Officer Pelton had attempted to contact her. She testified that she received a court citation through the mail about the complaint Mr. Gause filed, but stated that the charge filed against her had been dismissed.

III. ANALYSIS

The issues to be determined concerning this alleged violation are:

1. Whether a breach of the peace occurred on Respondent's licensed premises; and
2. If so, whether the breach of the peace was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises or on a premises under its control. TEX. ALCO. BEV. CODE

³ Respondent produced two bar tab receipts bearing Mr. Gause's name showing that a number of drinks (including beer and vanilla vodka/Dr. Pepper), were served and the amount owed as \$185.00.

ANN. § 28.11.

“Breach of the peace,” is not defined by the Code or TABC Rules. However, it has been judicially defined in case law as an act that disturbs or threatens to disturb “the tranquility enjoyed by the citizens” and includes actual or threatened violence as an essential element. Woods v. State, 213 S.W.2d 685 (Tex.Crim.App.1948). It is clear from the evidence presented that on August 20, 2009, Respondent and Mr. Gause, a person providing DJ services at the licensed premises, engaged in a verbal confrontation concerning Mr. Gause’s work performance, compensation, and bar tab. This confrontation, which was loud and included cursing, was witnessed by several persons, including employees and patrons at the licensed premises. Witness accounts provided to law enforcement officers and at the hearing vary concerning who was the aggressor in escalating the verbal confrontation into physical contact.⁴ Nevertheless, the ALJ is convinced that the actions of both Respondent and Mr. Gause were contrary to maintaining the peace and tranquility of the environment at the licensed premises during this incident.

Further, this breach was within the control of Respondent and resulted from her failure to properly supervise Mr. Gause’s activities. Respondent became involved in a confrontation with Mr. Gause in front of others at the licensed premises. This confrontation was volatile and could have led to a more serious physical altercation. In the ALJ’s assessment of the situation, much of this confrontation could have been avoided had Respondent not allowed Mr. Gause to run a bar tab and established a policy that no person working at the licensed premise be allowed to consume alcoholic beverages while performing work tasks.

Based upon the factors discussed above, the ALJ finds that a breach of the peace occurred on this licensed premises; said breach of the peace was not beyond the control of Respondent; and said

⁴ Respondent stated that Mr. Gause threw a wet bar rag in her face, and her account of this was confirmed by Mr. Bullock. Mr. Gause contends that Respondent pushed him in his chest; and Ms. Gause said she saw Respondent push Mr. Gause. Mr. Gause also reported that Respondent kicked him as he was walking away leaving the licensed premises. Mr. Gause’s account of Respondent’s conduct was confirmed at the time of the incident by Mr. Whiting. However, Mr. Whiting was intoxicated at the time he provided this information to Officer Pelton, and in his hearing testimony, Mr. Whiting waived on whether he accurately observed this incident.

breach resulted from Respondent failure to properly supervise persons on the licensed premises. However, the ALJ does not agree with the recommended penalty requested by TABC Staff. The standard penalty assessment for any TABC permittee found to have violated the Code by conducting its business in a manner as to allow a simple breach of the peace with no serious bodily injury or involving a deadly weapon is a permit suspension of three to five days, or in lieu of any suspension, payment of a civil penalty in the amount of \$300 per day for the permit suspension length.⁵ The ALJ recommends a lesser suspension of three days because this is Respondent's first Code violation of any type other than the warning received for failing to report this incident to TABC Staff; the breach of the peace was not between patrons of the licensed premises and Respondent or any of Respondent's staff; and the criminal complaint made against Respondent was dismissed.

IV. RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for a period of three days, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of \$900.00 for allowing a breach of the peace on the licensed premises.

V. PROPOSED FINDINGS OF FACT

1. June Gloria Mishler d/b/a Caribbean Cowboy Bar & Grill (Respondent) holds a Mixed Beverage Permit, MB-629083, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 12450 S. Freeway, Fort Worth, Tarrant County, Texas.
2. On August 20, 2009, Christopher Gause worked at Respondent's licensed premises described in Finding of Fact No. 1 as a DJ.
3. At or shortly after the licensed premises' closing time, a confrontation occurred between Mr.

⁵ 16 TEX. ADMIN. CODE § 34.2.

- Gause and Respondent concerning Mr. Gause's work performance, his bar tab, and payment of Mr. Gause's services for that night.
4. There was a heated verbal exchange between Mr. Gause and Respondent that was observed by patrons and employees at the licensed premises.
 5. Although it is unclear who escalated the confrontation from a verbal argument to a physical exchange, the situation devolved to the point of Mr. Gause throwing an object, a wet bar towel, in Respondent's face, and Respondent pushing Mr. Gause.
 6. The incident was reported to the Fort Worth Police Department. Officer S. Pelton came to the licensed premises and took statements from Mr. Gause and a bar patron, David Whiting.
 7. Officer Pelton was unable to interview Respondent at the time of this incident.
 8. The breach of the peace described in Findings of Fact Nos. 3 - 5 was reported to TABC Staff.
 9. A hearing in this matter was conducted on April 15, 2010, at the State Office of Administrative Hearings, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. Administrative Law Judge Tanya Cooper presided over the hearing. TABC Staff was represented by TABC Staff Attorney, Judith Kennisen. Respondent represented herself at the hearing. The hearing concluded and the record closed on April 15, 2010.

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 1, 5, 6, 11, 28, 29, and, 44, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.*
2. The State Office of Administrative Hearings has jurisdiction over all matters related 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 ANN. chs. 2001 and 2003.
3. Respondent received adequate notice of the proceedings and hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Proposed Findings of Fact Nos. 1 - 7, a breach of the peace occurred on the licensed premises that was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons on the premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 28.11.

5. Based on the foregoing Findings of Fact Nos. 1 - 9 and Conclusion of Law No. 4, Respondent's Mixed Beverage Permit, MB-629083, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit, issued by TABC should be suspended for a period of three days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of \$900.00 pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.64, 11.641, and 28.11, and 16 TEX. ADMIN. CODE § 34.2.

SIGNED April 28, 2010.



TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS