

DOCKET NO. 581618 & 579787

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
LETICIA NORMA MUNOZ	§	ALCOHOLIC
D/B/A EL PALACIO NIGHT CLUB,	§	
Respondent	§	
PERMIT/LICENSE NO(s). BG540625, BL	§	
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-5344)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 22nd day of January 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Brenda Coleman, presiding. The hearing convened on October 8, 2009 and the record was closed on the same day. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on December 7, 2009. Exceptions were filed to which the Administrative law Judge replied and recommended that no changes be made to the Proposal for Decision.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

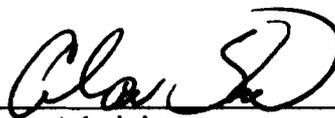
It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent's permits and licenses be **CANCELED FOR CAUSE**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on February 13, 2010, unless a Motion for Rehearing is filed before that date.

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

SIGNED this the 2nd day of January
2010 at Austin, Texas



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

Hon. Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
6333 Forest Park Road, Suite 105-A
Dallas, Texas, 75235
VIA FACSIMILE: (214) 956-8611

Larry Finstrom
ATTORNEY FOR RESPONDENT
1401 Elm Street, Suite 4770
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VIA FACSIMILE: (214) 748-8379

Leticia Norma Munoz
RESPONDENT
d/b/a El Palacio Night Club
4430 Maple Avenue
Dallas, Texas 75219
VIA U. S. FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SKP/dp

SOAH DOCKET NO. 458-09-5344

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
 Petitioner	§	
	§	
V.	§	OF
	§	
LETICIA NORMA MUNOZ D/B/A	§	
EL PALACIO NIGHT CLUB,	§	
 Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC, Commission) Staff (Petitioner) brought this enforcement action against Leticia Norma Munoz d/b/a El Palacio Night Club (Respondent) alleging that Respondent has engaged in conduct prohibited by the Texas Alcoholic Beverage Code (the Code) and/or Commission's rules (the Rules). The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law.

On October 8, 2009, a hearing convened before ALJ Brenda Coleman at the State Office of Administrative Hearings, located at 6333 Forest Park Lane, Suite 150A, Dallas, Texas. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared in person and was represented by her attorney, Timothy Griffith. The record closed on the same date.

II. DISCUSSION AND ANALYSIS

A. Applicable law

The Commission may cancel or suspend a retail dealer's on-premises license if it finds the holder violated a provision of the Code or a rule of the Commission.¹ The provisions of the Code applicable to the cancellation and suspension of a retail dealer's on-premises license also apply to the cancellation and suspension of a wine and beer retailer's permit.²

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, possession of a narcotic or permitting a person on the licensed premises to do so.³ "Narcotic" is defined as "any substance defined in the Texas Controlled Substance Act."⁴ Cocaine is a controlled substance defined in the Texas Controlled Substance Act.⁵ Possession means "actual care, custody, control, or management."⁶

The Commission may also cancel or suspend such a license if the licensee conducted her "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 sense of decency of the people."⁷ To cancel or suspend a license for a "place or manner" violation, Petitioner must prove an offense was committed

¹ Code § 61.71(a)(1).

² *Id.* § 25.04.

³ *Id.* § 104.01(9).

⁴ 16 TEX. ADMIN. CODE (TAC) § 35.41(2).

⁵ TEX. HEALTH & SAFETY CODE ANN. § 481.002(29).

⁶ *Id.* § 481.002(38).

⁷ Code § 61.71(a)(17).

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by the licensee in the course of the licensed business, or by any person on the licensed premises if the licensee "knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense."⁸ A narcotics offense is a "place or manner" violation.⁹

B. Respondent's Permit and License

The Commission issued Respondent's Wine and Beer Retailer's On-Premise permit BG-540625, which includes Respondent's Late Hours Retailer's On-Premise License, on July 25, 2003. Respondent's premises are located at 4430 Maple Avenue, Dallas, Dallas County, Texas.

C. Petitioner's Evidence

Petitioner alleged that on April 28, 2008, June 21, 2008, and August 20, 2008, Respondent, its agent, servant, or employee, sold or possessed, or permitted others to sell or possess a narcotic on the licensed premises. Petitioner also alleged that between April 28, 2008, and August 20, 2008, Respondent, its agent, servant, or employee conducted business at the licensed premises in a "place or manner" which warrants cancellation or suspension of Respondent's license based upon the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Therefore, Petitioner requests cancellation of Respondent's permit and license.

Petitioner presented seven exhibits and the testimony of four witnesses at the hearing.

⁸ 16 TAC § 35.31(a) and (b).

⁹ *Id.* § 35.31(c)(15).

1. Allegations of Narcotics on the Licensed Premises on April 28, 2008

On April 28, 2008, at approximately 6:45 p.m., Officers Edgar Perez and T. Castleberg, Dallas Police Department narcotics detectives, entered Respondent's premises to conduct an undercover investigation due to a complaint alleging drug activity on the premises. Officer Perez testified that he sat at the bar, and the female behind the bar, later identified as Olga Rodriguez, took his order and served him.

Officer Perez said he observed Officer Castleberg purchase drugs from Ms. Rodriguez. According to Officer Perez, Officer Castleberg handed \$100 to Ms. Rodriguez. She then went to a storage closet located 10 to 12 feet from the bar, walked back to the bar, handed the drugs to Officer Castleberg, and placed the money in the cash register. Officer Perez said he did not see anyone else access the closet, and the drugs were packaged for resale in individual packages. The substance in the bags tested positive for cocaine in a field test conducted by Officer Perez.

Officer Perez stated on cross-examination that, although Ms. Rodriguez left the closet door slightly open, he was unable to see her hands, and it was possible that she retrieved the drugs from her person.

Officer Perez also testified that, on the same date, he observed an unidentified male enter the premises through the back door and purchase what he believed to be drugs from Ms. Rodriguez. According to Officer Perez, after the male approached Ms. Rodriguez, she walked to the storage closet, came back, and handed the male something. He, in return, handed her \$100, which she placed in the register. Officer Castleberg later informed Officer Perez that he personally observed the male in the restroom sniffing a white substance believed to be cocaine.

Ms. Rodriguez was placed under arrest. Officer Perez retrieved 100 clear bags containing

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what was believed to be cocaine from the storage closet. The substance was confirmed to be cocaine through chemical analysis conducted by the Southwestern Institute of Forensic Sciences of Dallas.

On January 22, 2009, Ms. Rodriguez pled guilty to the second-degree felony offense of "unlawful possession with intent to deliver a controlled substance to wit: cocaine 1G."¹⁰ She was placed on community supervision for a period of five years and fined \$500. April 28, 2008, was the date of the offense for which the deferred adjudication was imposed.

2. Allegation of Narcotics on the Licensed Premises on June 21, 2008

On June 21, 2008, at approximately 4:45 p.m., Officer Noel Carrasco, a Dallas Police Department narcotics detective, entered Respondent's premises to conduct an undercover investigation due to a complaint alleging drug activity on the premises. Officer Perez testified that he entered the premises and observed a female waitress and a male, later identified as Rafael Estrada, standing behind the bar. Officer Carrasco approached the male. According to Officer Carrasco, "I asked him if I could get some powder cocaine from him." Mr. Estrada replied, "Let me see if I have that much."

Mr. Estrada then entered an interior door while the officer remained at the bar. Mr. Estrada returned with nine clear bags of what the officer believed to be cocaine. Officer Carrasco handed Mr. Estrada two \$100 bills in return for the bags of white powder. The substance in the bags tested positive for cocaine in a field test conducted by Officer Carrasco. Mr. Estrada was placed under arrest. The substance was confirmed to be cocaine through chemical analysis conducted by the Southwestern Institute of Forensic Sciences of Dallas.

On August 20, 2008, Mr. Estrada pled guilty to the first-degree felony offense of "unlawful

¹⁰ Ex. P-7.

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delivery of a controlled substance to wit: cocaine 4G."¹¹ He was sentenced to eight years in the penitentiary and fined \$2,500. The conviction was imposed for the offense that occurred on June 21, 2008.

Officer Carrasco testified on cross-examination that Mr. Estrada removed money from his pocket to make change for the two \$100 bills, and he kept the money on his person. The officer also stated that he was unable to actually see where Mr. Estrada retrieved the drugs. Finally, Officer Carrasco stated that he did not see Respondent's owner on the premises.

3. Allegation of Narcotics on the Licensed Premises on August 20, 2008

Officer Perez testified that he conducted a second undercover drug investigation on Respondent's premises on August 20, 2008, at approximately 7:30 p.m. Upon entering the premises, the officer observed a male behind the bar selling drinks and, in Officer Perez's opinion, working as the bartender. The male was later identified as Ramiro Lara. Officer Perez approached Mr. Lara at the bar and requested \$60 of cocaine. Mr. Lara stepped away from the bar and walked to the storage closet. He returned to the bar with what Officer Perez believed to be powder cocaine individually packaged in baggies for street sale. The officer handed Mr. Lara the \$60 in exchange for the drugs. The substance in the baggies tested positive for cocaine in a field test conducted by Officer Perez. The substance was confirmed to be cocaine through chemical analysis conducted by the Southwestern Institute of Forensic Sciences of Dallas.

Officer Perez testified that he observed no other employees working on the premises, and he saw no one else access the closet. He added that Mr. Lara, an undocumented immigrant, was later arrested that night and deported by Immigration and Naturalization Services (INS) the next day. On cross-examination, Officer Perez stated that he did not observe Mr. Lara place the money for the cocaine in the register, and he did not see Respondent's owner present on the premises.

¹¹ Ex. P-6.

Officer Tung Nguyen, Dallas Police Department, testified that he was present on the premises to assist undercover Officer Perez with the arrest of the subject involved in the drug sale to Officer Perez. Officer Perez informed him that he had bought a small quantity of cocaine from the suspect, Mr. Lara, and the drugs were kept inside the closet. Officer Nguyen said when he entered the premises, he observed one customer at the bar and several women around the bar. Mr. Lara was standing behind the bar putting away beers. Officer Nguyen said he placed Mr. Lara under arrest based on the information and description provided to him by Officer Perez.

According to Officer Nguyen, he did not locate any drugs on Mr. Lara's person. The officer then searched the closet and found a brown paper sack next to some paint cans, which seemed out of place. The paper sack contained more than 100 individual packages of white powdery substance, which, in Officer Nguyen's opinion, were packaged for distribution. Officer Nguyen also stated that, as they were leaving the premises, a female entered the premises and said she was coming to work. Finally, Officer Nguyen said he gave the drugs seized from the closet to Officer Perez.

4. Testimony of TABC Agent Kenneth Sherman

TABC Agent Kenneth Sherman testified regarding his opinion, based on his experience as a certified peace officer and TABC agent, of how the sale of drugs affects the community in general. The agent stated, on cross examination, that the Commission requested no records from Respondent for either Mr. Estrada or Mr. Lara.

C. Respondent's Evidence

Respondent argued that only one of the three people arrested on the premises between April 28, 2008, and August 20, 2008, was employed by Respondent; Respondent's owner was not present and had no knowledge of the violations; and Respondent has taken steps to rectify the conditions on

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the premises and prevent further incidents. Therefore, as provided under Code § 11.64(c), Respondent requests a lesser sanction of suspension or civil penalty.¹²

Respondent's owner, Leticia Norma Munoz, testified on behalf of Respondent. Ms. Munoz stated that she was not present on the premises on the dates of the alleged violations, and only became aware of each of the incidents after they occurred. Ms. Munoz said she had no knowledge of drugs on the premises, and she did not allow drugs on the premises.

Ms. Munoz said she has an office on the premises, but patrons do not have access to her office. She does not allow drugs to be stored in the office. She also said there is a room in the back used for storage, but only the morning cleaning person has access to it. She added, however, that the door is kept closed, but it is not locked.

Ms. Munoz admitted that Ms. Rodriguez worked for her on April 28, 2008, but added that she fired Ms. Rodriguez after she learned of the incident. She said another former employee, Sylvia,¹³ was the bartender working on June 21, 2008, and August 20, 2008, and was the person in charge of the premises. She also fired Sylvia after she learned of the incident on August 20, 2008.

According to Ms. Munoz, she has never employed a male bartender. Neither Mr. Estrada nor Mr. Lara has ever worked for her. She stated that she does not know them; nor has she ever supervised or paid them.

Finally, Ms. Munoz testified that, in an effort to prevent similar problems on the premises, she is present more often and constantly calls. She said she has had cameras installed, which made

¹² Code §§ 11.64(b) and (c). The Commission is authorized to relax a requirement that a license be canceled and impose a lesser sanction of suspension or a civil penalty. To justify a lesser sanction, issues of due diligence, entrapment, the licensee's knowledge, and good faith have to be resolved.

¹³ Ms. Munoz stated that Sylvia worked for her for approximately a year; however, Ms. Munoz said she did not remember Sylvia's last name.

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her aware of the fact that her employees were stealing from her. In addition, she is more careful of who she hires as employees.

D. Analysis and Recommendation

Petitioner has established by a preponderance of the evidence that cocaine was sold and possessed on the premises on April 28, 2008, June 21, 2008, and August 20, 2008. The remaining issue is whether Respondent permitted the possession of the narcotic. After considering the arguments and evidence, the ALJ finds that Petitioner, in the exercise of reasonable care, should have known her employees or others had 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 them. The ALJ concludes that Petitioner has shown that the place or manner in which Respondent's establishment has been operated is not consistent with the general welfare, health, peace, morals, safety, and sense of decency of the people.

It appears from the testimony of Ms. Munoz that she was seldom present on the premises, and she had little communication with the employees. According to her testimony, she delegated the operation of the premises to Sylvia on June 21, 2008, and August 20, 2008. Ms. Munoz testified that the two men behind the bar and trafficking cocaine on the premises on those two dates were not her employees, and she was unfamiliar with the two men. The ALJ does not know whether or not Ms. Munoz was familiar with the men. However, the ALJ finds her testimony that the men were not her employees, along with her statement that she has never employed a male bartender to be credible. Therefore, the ALJ opines that the appearance of employment created by the presence and actions of Mr. Estrada and Mr. Lara behind the bar were not attributable to any express or implied working relationship between the two men and Ms. Munoz. The ALJ also finds, however, that, although Sylvia was left in charge, Ms. Munoz, as the permittee, had a duty to know what was happening on the premises. Ms. Munoz clearly was not in control of the premises.

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Respondent's argument that she had no knowledge that the narcotics were sold or possessed on the premises is not persuasive. The applicable legal standard does not require actual knowledge or involvement by Respondent. A license can be cancelled if the sale or possession of drugs occurs on the premises by "any person."¹⁴ Respondent stated that she fired Ms. Rodriguez and Sylvia after the incidents occurred. However, Respondent presented no specific evidence as to measures implemented to prevent the sale or possession of narcotics at the time the offenses occurred. Respondent had a duty to maintain control of the licensed premises and ensure that the establishment was operated in accordance with Commission regulations.

Respondent had the burden to show any mitigating factors applied to her. Respondent failed to meet her burden. In this case, Petitioner has proven three incidents over a period of four months where narcotics were sold or possessed on Respondent's premises. Based on the evidence, the ALJ recommends that Respondent's permit and license be canceled.

III. FINDINGS OF FACT

1. Leticia Norma Munoz d/b/a El Palacio Night Club (Respondent) holds Wine and Beer Retailer's On-Premise Permit BG-540625, which includes the Retailer's On-Premise Late Hours License, issued by the Texas Alcoholic Beverage Commission (TABC, Commission) on July 25, 2003.
2. Respondent's premises are located at 4430 Maple Avenue, Dallas, Dallas County, Texas.
3. On August 12, 2009, Petitioner issued its notice of hearing to Respondent.
4. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. On October 8, 2009, a hearing convened before Administrative Law Judge (ALJ) Brenda Coleman at the State Office of Administrative Hearings (SOAH), located at 6333 Forest Park Road, Suite 150A, Dallas, Texas. Petitioner was represented by Sandra Patton, TABC Staff

¹⁴ 16 TAC § 35.41.

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Attorney. Respondent appeared and was represented by attorney Timothy Griffith. The record closed on the same day.

6. On April 28, 2008, Dallas police officers Edgar Perez and T. Castleberg conducted an undercover drug investigation on Respondent's premises.
7. Officer Castleberg purchased cocaine from Respondent's employee, Olga Rodriguez, on the premises.
8. Ms. Rodriguez pled guilty to a second-degree felony narcotics offense for the crime she committed on the premises on April 28, 2008.
9. On June 21, 2008, Respondent's employee, Sylvia, was left in charge of managing the premises.
10. On that date, Dallas police officer Noel Carrasco conducted an undercover drug investigation on Respondent's premises.
11. Officer Carrasco observed a male and female behind the bar. Officer Carrasco purchased cocaine from the male, identified as Rafael Estrada.
12. Mr. Estrada pled guilty to a first-degree felony narcotics offense for the crime he committed on the premises on June 21, 2008.
13. On August 20, 2008, Respondent left her employee, Sylvia, in charge of managing the premises.
14. On that date, Dallas police officers Edgar Perez and Tung Nguyen conducted an undercover drug investigation on Respondent's premises.
15. Officers Perez and Nguyen observed a male, identified as Ramiro Lara, behind the bar.
16. Officer Perez purchased cocaine from Mr. Lara on the premises.
17. Mr. Lara, an undocumented immigrant, was arrested and deported.
18. On April 28, 2008, June 21, 2008, and August 20, 2008, Respondent or its employee possessed a narcotic on the licensed premises, or permitted another to sell or possess a narcotic on the premises.
19. On April 28, 2008, June 21, 2008, and August 20, 2008, Respondent or its employee engaged in conduct on the premises, which was lewd, immoral, or offensive to public decency, or

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permitted another person to engage in conduct on the premises, which was lewd, immoral, or offensive to public decency.

20. On April 28, 2008, June 21, 2008, and August 20, 2008, Respondent either knew or should have known that illegal drug trafficking and possession were occurring on the premises.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) Ch. 5 and §§ 61.71 and 104.01.
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 ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. On April 28, 2008, June 21, 2008, and August 20, 2008, Respondent, or its agent, servant, or employee, possessed or permitted others to possess a narcotic on Respondent's licensed premises in violation of CODE § 104.01(9).
5. On April 28, 2008, June 21, 2008, and August 20, 2008, Respondent conducted her business in a place or manner which warrants the cancellation or suspension of the permit and license based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Code §§ 61.71(a)(1) and (17).
6. Based on the foregoing findings and conclusions, the Administrative Law Judge recommends cancellation of Respondent's permit and license.

SIGNED December 7, 2009.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 7, 2009

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

VIA FACSIMILE 512/206-3203

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
LETICIA NORMA MUNOZ d/b/a EL PALACIO NIGHT CLUB
SOAH DOCKET NO. 458-09-5344**

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,

Brenda Coleman
Brenda Coleman
Administrative Law Judge

BC/sp
Enclosure

Xc: Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**
Timothy Griffith, Attorney for Respondent, **VIA FACSIMILE 469/742-9521**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**

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