

DOCKET NO. 597466

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
TRINIDAD ORTEGA TORRES D/B/A EL PADRINO NIGHT CLUB, Respondent	§	ALCOHOLIC
	§	
PERMITS NO. MB659599, LB & PE	§	
	§	
EL PASO COUNTY, TEXAS (SOAH DOCKET NO. 458-12-6372)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 21st day of March, 2013, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Veronica S. Najera presiding. The hearing convened on September 14, 2012 and the SOAH record closed on September 28, 2012. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 16, 2012. 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.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

THEREFORE, IT IS ORDERED that Respondent's Mixed Beverage Permit No. 659599 and the associated Mixed Beverage Late Hours Permit and Beverage Cartage Permit are hereby **CANCELLED**.

This Order will become final and enforceable on the 14th day of April, 2013, unless a Motion for Rehearing is filed on or before the 13th day of April, 2013.

SIGNED this the 21st day of March, 2013, at Austin, Texas.



Sherry K-Cook, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 21st day of March, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Veronica S. Najera
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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John Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Division

II. DISCUSSION AND EVIDENCE

A. Staff's Allegations

The Padrino Night Club is situated in El Paso County and operates under alcoholic beverage permit number MB659599, which includes a beverage cartage permit and a mixed beverage late hours permit. The permit was issued in May 2007.¹ The Notice of Hearing alleges that on or about August 6, 2010, Respondent knowingly possessed alcoholic beverages not covered by invoice, an act which is specifically prohibited by the Texas Alcoholic Beverage Code (Code).² Further, the Code calls for cancellation of a permit if it is found, after notice and hearing, permittee knowingly possessed alcoholic beverages not covered by invoice.³

B. Petitioner's Direct Case

At approximately 4 p.m. on August 6, 2010, Agent Menchaca surveyed Lowe's supermarket located at 3518 Montana.⁴ The licensed premises is two blocks away from the supermarket. At around 5:15 p.m., he saw permittee Trinidad Ortega Torres and a female loading cases of beer into a white Hyundai vehicle. The agent followed the vehicle to the licensed premises.⁵ Agent Menchaca observed Mr. Torres unload and carry the cases of beer into the establishment.⁶ The female with Mr. Torres was identified as Mr. Torres' girlfriend.⁷

Before approaching Mr. Torres, Agent Menchaca requested assistance from another agent. Agent Menchaca said Mr. Torres told him he purchased twelve cases of beer at the store.⁸

¹ Petitioner's Exhibit No. 1.

² Code at § 28.06 (c) [Possession of Alcoholic Beverage Not Covered by Invoice].

³ Code at § 28.06 (d).

⁴ Tr. at 11.

⁵ *Id.*

⁶ Tr. at 12.

⁷ Tr. at 54.

⁸ *Id.*

Mr. Torres explained that he was in a hurry because he was going out of town.⁹ Agent Menchaca observed six beer cartons were emptied into a large container or barrel, four cases were at the door entrance, and two cases remained in the vehicle.¹⁰

On redirect examination, Agent Menchaca stated he previously observed the unloading of alcohol from a parked vehicle into the licensed premises. He explained that he was driving by the establishment on July 3, 2010, and observed a vehicle back-up to the door of the bar, and this movement got his attention.¹¹ He was off-duty so he did not approach, but he saw a female take cases of beer from the vehicle into the bar. The female then drove to Lowe's supermarket at 3518 Montana.¹² The agent remained in the parking lot and saw the female exit the store with cases of beer. He followed her back to the establishment and observed her unload the cases of beer into the Padrino Night Club.¹³ The female drove a red Nissan with a New Mexico State University tag on the front plate.¹⁴ Agent Menchaca said the female in the July 3, 2010, incident appeared younger than the girlfriend that accompanied Mr. Torres on August 6, 2010.¹⁵

C. Respondent's Direct case

Mr. Torres said he had a family emergency and was in a hurry to leave for Mexico on August 6, 2010.¹⁶ He said he did not buy the beer from a distributor because it closed at 4:00 p.m. on August 6, 2010.¹⁷ He testified he had never bought beer for resale at Lowe's before.¹⁸ He also said that none of his employees, or anyone else, has ever purchased alcohol for the bar

⁹ Tr. at 12-13.

¹⁰ Tr. at 13-14.

¹¹ Tr. at 45.

¹² Tr. at 46.

¹³ Tr. at 46-47, 54.

¹⁴ Tr. at 46, 53.

¹⁵ Tr. at 53-55.

¹⁶ Tr. at 24-25.

¹⁷ Tr. at 24, 44-45.

¹⁸ Tr. at 24.

and that he is the only one in charge of purchasing the alcohol.¹⁹

III. ANALYSIS

A preponderance of the evidence establishes that Mr. Torres purchased cases of beer at Lowe's supermarket on August 6, 2010, and emptied the cases into containers at Padrino Night Club for resale. Lowe's supermarket is not a licensed distributor or wholesaler which means it cannot sell for resale as a supplier.²⁰ Mr. Torres knew he could lose his license for this type of action.²¹ The reason given for the violation of the Code is unpersuasive. Mr. Torres had various options to avoid purchasing beer in contradiction of the Code. First, Mr. Torres is not bound to purchase from a particular distributor. Respondent can purchase from any entity that is properly licensed. There are numerous properly licensed entities that sell after 4:00 p.m.²² Second, any employee or agent can purchase in Respondent's absence.²³ Third, the ALJ does not find Mr. Torres' testimony credible. He specifically stated he is the only one that purchases alcohol and that alcohol has never been bought at Lowe's prior to August 6, 2010. Agent Menchaca's observations on July 3, 2010, impeach Mr. Torres' statement.

Having reviewed all the evidence, the ALJ finds that the evidence proves Respondent knowingly possessed alcoholic beverages not covered by invoice and recommends cancellation of Respondent's permit.

IV. FINDINGS OF FACT

1. Trinidad Ortega Torres d/b/a Padrino Night Club (Respondent) is situated in El Paso County and operates under alcoholic beverage permit number MB659599, which includes a beverage cartage permit and a mixed beverage late hours permit. The permit was issued by the Texas Alcoholic Beverage Commission (Petitioner) in May 2007.

¹⁹ Tr. at 32-33, 42.

²⁰ Tr. at 13, 14.

²¹ Tr. at 29.

²² Tr. at 42.

²³ Tr. at 42-43.

2. Respondent received proper and timely notice of the hearing. The Notice of Hearing was issued on June 29, 2012.
3. On September 14, 2012, the hearing convened before Administrative Law Judge (ALJ) Veronica S. Najera, at the State Office of Administrative Hearings (SOAH), El Paso regional office. Petitioner was represented by Staff Attorney John W. Sedberry. Respondent was represented by Mark T. Davis, attorney.
4. The record closed on September 28, 2012, after receipt of the transcript.
5. At approximately 4 p.m. on August 6, 2010, Agent Oscar Menchaca surveyed Lowe's supermarket located at 3518 Montana, El Paso, Texas.
6. The Padrino Night Club is approximately two blocks away from Lowe's supermarket.
7. At around 5:15 p.m., permittee Trinidad Ortega Torres and a female loaded cases of beer into a white Hyundai vehicle at the Lowe's supermarket parking lot.
8. Agent Menchaca followed the vehicle to the licensed premises.
9. Agent Menchaca observed Mr. Torres unload and carry the cases of beer into the establishment.
10. Mr. Torres purchased twelve cases of beer at the store.
11. On August 6, 2010, six beer cases purchased at Lowe's supermarket were emptied by Mr. Torres into a large container or barrel, four cases were at the door entrance, and two cases remained in the vehicle.
12. Lowe's supermarket is not a licensed distributor or wholesaler which means it cannot sell for resale as a supplier.
13. Mr. Torres did not have invoices from a properly-licensed wholesaler, distributor, or supplier for the beer purchased on August 6, 2010.
14. On July 3, 2010, Agent Menchaca saw a female drive from Padrino Night Club to Lowe's supermarket. The agent remained in the parking lot and saw the female exit the store with cases of beer. He followed her back to the establishment and observed her unload the cases of beer into the Padrino Night Club.

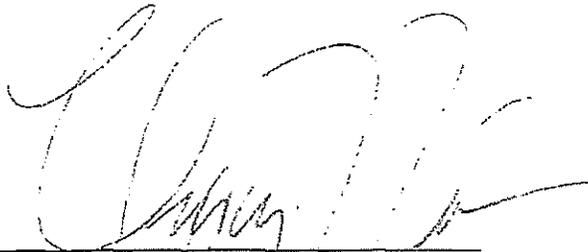
V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to

Tex. Alco. Bev. Code (Code) §§ 5.31 and 5.35.

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code §§ 2003.021(b) and 2001.042.
3. Notice of the hearing was provided as required by 1 Tex. Admin Code § 155.401 and Code § 11.63.
4. Based on the Findings of Fact, Respondent knowingly possessed alcoholic beverages not covered by invoice on August 6, 2010, in violation of Code § 28.06 (c).
5. The ALJ recommends cancellation of Respondent's permit pursuant to Code § 28.06 (d).

Signed November 16, 2012.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS