

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

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TABC HOUSTON
LEGAL

July 5, 2012

Sherry Cook
Acting Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

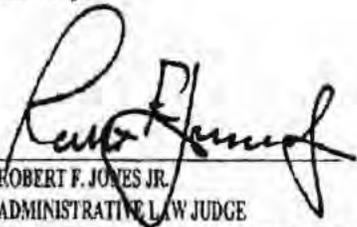
**RE: Docket No. 458-12-3820; TABC Docket No. 607247
Texas Alcoholic Beverage Commission vs Justino Valdez, D/B/A
Esquina Alegre**

Dear Ms. Cook:

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,


ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

RJ/L

Enclosure

cc - Lisa Crissman, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008
- VIA REGULAR MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
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Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
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Timothy Griffith, Attorney for Respondent, 101 E. Park Blvd., Suite 600, Plano, TX 75074 - VIA
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DOCKET NO. 458-12-3820

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
JUSTINO VALDEZ D/B/A ESQUINA ALEGRE, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Justino Valdez d/b/a Esquina Alegre (Respondent) alleging that Respondent or his agent, servant, or employee, violated the Texas Alcoholic Beverage Code (the Code) and the Commission's regulations. Staff sought cancellation of Respondent's permits. The Administrative Law Judge (ALJ) recommends that Respondent's permits be canceled.

I. PROCEDURAL HISTORY

The hearing in this matter convened before ALJ Robert F. Jones Jr. on May 10, 2012, at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas, and concluded the same day. Licensing Attorney Lisa Crissman appeared and represented TABC. Respondent appeared through his attorney of record, Timothy E. Griffith. Evidence was received that day, but the record remained open until May 31, 2012, to allow the parties to file final written arguments.

returned. When Det. Guerra indicated he could not, Respondent sold Det. Guerra a small bag containing white powder. The powder in the bag purchased by Det. Guerra contained 0.470 grams of cocaine.¹⁰

On August 31, 2011, the detectives returned to the premises. Det. Cabrera made a purchase from Mr. Morales Gallegos. The powder in the bag purchased by Det. Cabrera contained 0.440 grams of cocaine.¹¹ On September 8, 2011, the detectives returned to the premises. Det. Cabrera made a purchase from Mr. Morales Gallegos. The powder in the bag purchased by Det. Cabrera contained 0.360 grams of cocaine.¹² The detectives obtained an arrest warrant for Mr. Morales Gallegos which was executed on September 9, 2011. Mr. Morales Gallegos was subsequently convicted of making deliveries of cocaine to Det. Cabrera and Det. Guerra, each delivery being a state jail felony.¹³

The detectives made a series of relevant observations during their investigation. First, they observed Mr. Morales Gallegos working behind the premise's bar, filling drink orders and making change for drink purchases. They observed Mr. Morales Gallegos make drug sales to other persons in the men's room. On one occasion, Det. Cabrera observed some black males enter the bar and proceed directly to the men's room followed by Mr. Morales Gallegos. Det. Cabrera thought this was unusual all other patrons were Hispanic. On several occasions, the detectives observed Mr. Morales Gallegos and, on the occasion of the sale by Respondent to Det. Guerra, Respondent enter the disc-jockey's booth prior to making a drug sale. Det. Cabrera, on July 7, 2011, asked Mr. Morales Gallegos if he sold drugs anywhere aside from the premises. Mr. Morales Gallegos replied that he did but only if the licensed premises were not open. On several occasions, the detectives observed Respondent open the premises and noted that he carried an opaque plastic bag into the premises with him. After Mr. Morales Gallegos's arrest, Mr. Morales Gallegos told the detectives that Respondent occasionally sold drugs in the premises for Mr. Morales Gallegos and received a commission on the sale.

¹⁰ TABC Exhibit #11.

¹¹ TABC Exhibit #12.

¹² TABC Exhibit #13.

¹³ See TABC Exhibits #15 to 23.

Respondent would commit a “place or manner” violation if a predicate offense was committed by Respondent in the course of conducting his alcoholic beverage business or by any person on the premises, and Respondent 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.¹⁹ One such predicate offense would be “any narcotics related offense described in Chapters 481 and 483 of the Texas Health and Safety Code.”²⁰ Cocaine is a narcotic.²¹ Possession, sale or delivery of cocaine in the amount of less than one ounce is a state jail felony.²² The TABC’s penalty matrix recommends a penalty of suspension from 25 to 35 days or a \$300 a day civil penalty for a first violation of § 104.01(9) of the Code, and cancellation for a second offense.²³

B. Objections to Evidence

The ALJ has reviewed Respondent’s written argument with respect to the admissibility of the Staff’s exhibits. The Respondent has not offered any new objections to the exhibits beyond those made earlier when the Staff’s exhibits were first offered into evidence in February 2012, and has not addressed the bases for the admissibility of the exhibits stated in Prehearing Order No.4. Consequently, those objections raised in Respondent’s final written argument are overruled.

C. Analysis

The evidence demonstrates that Det. Cabrera and Det. Guerra made a series of cocaine purchases in the licensed premises. On August 10, 2011, Respondent sold Det. Cabrera 0.470 grams of cocaine. As noted above, Respondent habitually carried an opaque plastic bag into the licensed premises when he opened for business, as Respondent did on September 9, 2011.

¹⁹ 16 TEX. ADMIN. CODE § 35.31(a)&(b).

²⁰ 16 TEX. ADMIN. CODE § 35.31(c)(15).

²¹ TEXAS HEALTH & SAFETY CODE § 481.002(29)(D).

²² TEXAS HEALTH & SAFETY CODE §§ 481.102(3)(D); 481.115(a)&(b).

²³ 16 TEX. ADMIN. CODE § 34.2 (matrix). The rule makes reference to § 35.41(27). There is no subsection 27 to the cited rule. There is a definition of “narcotic” in § 35.41(2), namely as defined in TEXAS HEALTH & SAFETY CODE § 481.002(5). That statute defines a “narcotic” as a “controlled substance” which is “a substance . . . listed in . . . Penalty Group I.” Cocaine is a Penalty Group I substance. *See* footnotes 21 & 22, above.

Sergeant Robinson and Agent Feick found Respondent standing next to a pistol, cash, and 53 plastic bags of cocaine in plain view, the opaque plastic bag tucked a few feet away. The ALJ infers that Respondent carried the pistol, cash, and 53 plastic bags of cocaine into the premises with him. Respondent was in possession of the pistol, cash, and 53 plastic bags of cocaine. An additional cache of 3.50 grams of cocaine was located in the club's disc-jockey's booth, an area over which Respondent had control and which Respondent had visited to prior to making drug sales. Respondent was in possession of the 3.50 grams of cocaine that was located in the club's disc-jockey's booth.

A preponderance of the evidence shows that Respondent violated § 104.01(9) of the Code. Further, Respondent personally committed a narcotics related offense on the licensed premises on August 10, 2011, and again on September 9, 2011.²⁴ The offenses were conducted in the course of Respondent operating his alcoholic beverage business. Therefore, the place or manner in which Respondent conducts his business warrants the cancellation or suspension of his permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.²⁵

The detectives purchased the bulk of the drugs from Jose Luis Mr. Morales Gallegos. Respondent asserted that Staff failed to prove that Mr. Morales Gallegos was an employee or agent of Respondent because Staff did not prove that Respondent controlled or paid Mr. Morales Gallegos. The Staff responded that the term "employee" as used in the Code should be construed liberally, and means "any person who works for Respondent in return for financial *or other consideration* and who is subject to Respondent's control."²⁶ Staff argued that Respondent is required to maintain control over the licensed premises. Respondent allowed Mr. Morales Gallegos to sell drugs on the premises from which sales Respondent was compensated. The preponderance of the evidence shows that Respondent directed drug sales to Mr. Morales Gallegos, and sold drugs in Mr. Morales Gallegos's absence. This arrangement between Respondent and Mr. Morales Gallegos is a more than adequate "*other consideration*" to fulfill the definition. Mr. Morales Gallegos worked behind the bar, taking drink orders, dispensing

²⁴ TEXAS HEALTH & SAFETY CODE §§ 481.102(3)(D); 481.115(a)&(b).

²⁵ § 11.61(b)(7) of the Code.

²⁶ *Ackley v. State*, 592 S.W.2d 606, 608 (Tex.Crim.App. 1980)(*emphasis supplied*)

alcoholic beverages, and accepting payment for the drinks. Mr. Morales Gallegos had access to areas of the premises usually accessible to employees only. Respondent as the permit holder had the authority to control to Mr. Morales Gallegos's activities to the extent that Mr. Morales Gallegos tended bar. The preponderance of the evidence shows that Mr. Morales Gallegos was Respondent's employee, Mr. Morales Gallegos possessed narcotics on the licensed premises, and Respondent permitted and encouraged him to do so.²⁷ Mr. Morales Gallegos committed narcotics related offenses on the licensed premises.²⁸ The offenses were conducted in the course of Respondent operating his alcoholic beverage business. This is further evidence that the place or manner in which Respondent conducts his business warrants the cancellation or suspension of his permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.²⁹ Respondent knew of the offenses, failed to take reasonable steps to prevent the offenses, and actively participated in them.³⁰ Again, Respondent committed a "place or manner" violation of the Code.³¹

Respondent has a prior violation for possession of drugs by the Respondent on the licensed premises. The ALJ recommends that Respondent's Mixed Beverage Permit, MB-740695, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit, issued by the TABC on January 21, 2010, be cancelled.³²

IV. FINDINGS OF FACT

1. Respondent Justino Valdez d/b/a Esquina Alegre holds Mixed Beverage Permit, MB-740695, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC) on January 21, 2010.
2. The premises are located at 2601 West Jefferson Street, Grand Prairie, Texas.
3. Jose Luis Morales Gallegos was employed by Respondent as a bartender.

²⁷ § 104.01(9) of the Code.

²⁸ TEXAS HEALTH & SAFETY CODE §§ 481.102(3)(D); 481.115(a)&(b).

²⁹ § 11.61(b)(7) of the Code.

³⁰ 16 TEX. ADMIN. CODE § 35.31(a)&(b).

³¹ § 11.61(b)(7) of the Code.

³² 16 TEX. ADMIN. CODE § 34.2 (matrix).

4. On June 1, 2011, Mr. Morales Gallegos sold undercover Grand Prairie Detective Luis Cabrera 0.430 grams of cocaine on the licensed premises.
5. On June 1, 2011, Mr. Morales Gallegos sold undercover Grand Prairie Cesar Guerra 0.584 grams of cocaine on the licensed premises.
6. On June 3, 2011, Mr. Morales Gallegos sold Det. Cabrera 0.340 grams of cocaine and sold Det. Guerra 0.400 grams of cocaine on the licensed premises.
7. On June 17, 2011, Mr. Morales Gallegos sold Det. Cabrera 0.420 grams of cocaine and sold Det. Guerra 0.410 grams of cocaine on the licensed premises.
8. On July 7, 2011, Mr. Morales Gallegos sold Det. Cabrera 0.420 grams of cocaine on the licensed premises.
9. On August 31, 2011, Mr. Morales Gallegos sold Det. Cabrera 0.440 grams of cocaine on the licensed premises.
10. On September 8, 2011, Mr. Morales Gallegos sold Det. Cabrera 0.360 grams of cocaine on the licensed premises.
11. The detectives obtained an arrest warrant for Mr. Morales Gallegos which was executed on September 9, 2011.
12. Mr. Morales Gallegos was convicted of making deliveries of cocaine to Det. Cabrera and Det. Guerra, each delivery being a state jail felony.
13. August 10, 2011, Respondent sold Det. Guerra 0.470 grams of cocaine on the licensed premises.
14. Det. Cabrera and Det. Guerra observed:
 - a) Respondent direct drug sales to Mr. Morales Gallegos;
 - b) Mr. Morales Gallegos working behind the premise's bar, filling drink orders and making change for drink purchases;
 - c) Mr. Morales Gallegos make drug sales to other persons in the men's room;
 - d) Mr. Morales Gallegos and Respondent enter the disc-jockey's booth prior to making a drug sale; and
 - e) Respondent open the premises carrying an opaque plastic bag into the premises with him.
15. Mr. Morales Gallegos told Det. Cabrera that he made drug sales at other locations than the licensed premises but only if the licensed premises were closed.
16. Mr. Morales Gallegos told the detectives that Respondent would occasionally sell drugs in the premises for Mr. Morales Gallegos and receive a commission on the sale.

17. Grand Prairie Sergeant Scott Robinson and TABC Agent William Feick executed an arrest warrant on Respondent and a search warrant of the licensed premises on September 9, 2011,
18. On September 9, 2011, Respondent was followed from his home to the licensed premises and did not make any stops.
19. Respondent entered the licensed premises carrying an opaque plastic bag.
20. When Sgt. Robinson and Agent Feick entered the licensed premises. Respondent was behind the bar standing by the cash register.
21. The opaque plastic bag carried into the licensed premises by Respondent was tucked under the bar on top of a beer cooler.
22. Sgt. Robinson and Agent Feick located a pistol, cash, and a ball formed of aluminum foil in plain view next to the cash register. The foil contained 53 plastic bags cocaine.
23. The pistol, cash, and 53 plastic bags cocaine were in Respondent's possession.
24. The disc-jockey's booth was searched and an additional 3.50 grams of cocaine was located.
25. The club's disc-jockey's booth was an area over which Respondent had control and which Respondent had visited to prior to making drug sales.
26. The 3.50 grams of cocaine located in the club's disc-jockey's booth was in Respondent's possession.
27. On October 20, 2008, Respondent paid a civil penalty of \$3,150 for possession of drugs by the Respondent on the licensed premises.
28. Cocaine is a narcotic.
29. Respondent and his employee, Jose Luis Morales Gallegos, possessed a narcotic on the licensed premises.
30. Respondent in the course of conducting his alcoholic beverage business possessed, sold, or delivered a narcotic on the licensed premises.
31. Jose Luis Morales Gallegos possessed, sold, or delivered narcotics on the licensed premises.
32. Respondent in the course of conducting his alcoholic beverage business knew that Jose Luis Morales Gallegos possessed, sold, or delivered narcotics on the licensed premises and failed to take reasonable steps to prevent the offense.

33. On February 9, 2012, Staff issued its Amended Notice of Hearing, which contained information regarding the date, time, and place of the hearing; the matters asserted; the statutes and rules involved; and the legal authorities under which the hearing would be held.
34. The hearing in this matter convened before ALJ Robert F. Jones Jr. on May 10, 2012, at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas, and concluded the same day. Licensing Attorney Lisa Crissman appeared and represented TABC. Respondent appeared through his attorney of record, Timothy E. Griffith. Evidence was received that day, but the record remained open until May 31, 2012.

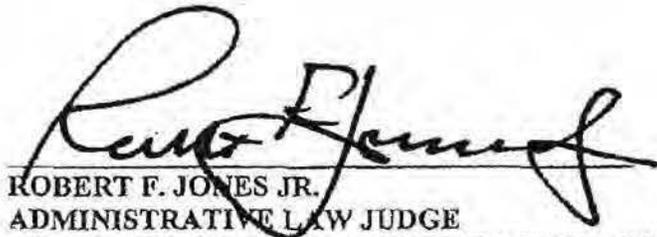
III. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, subch. B.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051.
4. Respondent violated the Code by possessing a narcotic on the licensed premises. § 104.01(9) of the Code.
5. Respondent violated the Code by allowing his employee, Jose Luis Morales Gallegos, to possess a narcotic on the licensed premises. § 104.01(9) of the Code.
6. Respondent violated the Code in the course of conducting his alcoholic beverage business by possessing, selling, or delivering a narcotic on the licensed premises. 16 TEX. ADMIN. CODE § 35.31(c)(15); TEX. HEALTH & SAFETY CODE § 481.002(29)(D); TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D); 481.115(a)&(b).
7. Respondent violated the Code in the course of conducting his alcoholic beverage business by allowing his employee, Jose Luis Morales Gallegos, to possess, sell, or deliver a narcotic on the licensed premises. Respondent knew of the offenses and failed to take reasonable steps to prevent the offenses. 16 TEX. ADMIN. CODE § 35.31(c)(15); TEX. HEALTH & SAFETY CODE § 481.002(29)(D); TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D); 481.115(a)&(b).
8. The place or manner in which Respondent conducts his business warrants the cancellation or suspension of Mixed Beverage Permit, MB-740695, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit issued by the TABC on January 21, 2010,

based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. § 11.61(b)(7) of the Code.

9. Respondent's Mixed Beverage Permit, MB-740695, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit, issued by the TABC on January 21, 2010, should be cancelled. 16 TEX. ADMIN. CODE § 34.2.

Signed July 5, 2012.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Alcoholic Beverage Commission, Texas (TABC)
STYLE/CASE: JUSTINO VALDEZ dba ESQUINA ALEGRE
SOAH DOCKET NUMBER: 458-12-3820
REFERRING AGENCY CASE:

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ ROBERT JONES

REPRESENTATIVE / ADDRESS

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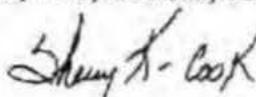
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TEXAS ALCOHOLIC BEVERAGE COMMISSION

xc: Docket Clerk, State Office of Administrative Hearings
Emily Helm GENERAL COUNSEL, TABC, Fax No. 512-206-3498

SIGNED this the 5th day of November, 2012, 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 5th day of November, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Robert F. Jones, Jr.
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TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

service ★ courtesy ★ integrity ★ accountability

José Cuevas, Jr.
Presiding Officer-Midland

Steven M. Weinberg, MD, JD
Member-Colleyville

Melinda S. Fredricks
Member-Conroe

Sherry Cook
Administrator

FACSIMILE TRANSMITTAL COVERLETTER SHEET

Date: November 5, 2012

Pages: 3
(Including Cover Page)

From: Martin Wilson, Assistant General Counsel
Offices of the General Counsel
D: 512.206.3489 | F: 512.206.3280

RE: Texas Alcoholic Beverage Commission v. JUSTINO VALDEZ d/b/a ESQUINA ALEGRE, TABC Docket No.607247; SOAH Docket No. 458-12-3820

ORDER ON PFD

To All in the Manner as Indicated:

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