

IT IS THEREFORE ORDERED that Wine and Beer Retailer's Permit No. BG156159 and the associated Retail Dealer's On-Premise Late Hours License No. BL289534 are hereby **CANCELLED**.

This Order will become **final and enforceable** on the 12th day of December, 2012, unless a Motion for Rehearing is filed by the 11th day of December, 2012.

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

Veronica S. Najera
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
401 East Franklin Avenue, Suite 580
El Paso, Texas 79901
VIA FACSIMILE: 512.322.0472

Thomas Nunley Warren, Senior
d/b/a Goodtime Lounge
RESPONDENT
P.O. Box 609
Fort Stockton, Texas 79735
VIA REGULAR MAIL

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 29, 2012

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

VIA REGULAR MAIL

RE: Docket No. 458-11-2195
Thomas Nunley Warren, Senior d/b/a Goodtime Lounge

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica S. Najera", written over a horizontal line.

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

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TABC HOUSTON
LEGAL

Enclosure

xc Shelia Lindsey, 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 78731 - **VIA REGULAR MAIL**
James D. Jepson, P.O. Box 1052, McCamey, Texas 79752 - **VIA REGULAR MAIL**

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SOAH DOCKET NO. 458-12-2195

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
	§	
Petitioner	§	
V.	§	OF
	§	
THOMAS NUNLEY WARREN, SR. d/b/a GOODTIME LOUNGE,	§	
	§	
Respondent	§	ADMINISTRATIVE HEARINGS
(TABC CASE NOS. 598568, 598576, 598572 & 598569)	§	
	§	

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks the cancellation of the alcoholic beverage permit issued to Thomas Nunley Warren, Sr. d/b/a Goodtime Lounge (Respondent) based on the allegation that narcotics were sold on the licensed premises. Staff alleges business was conducted by Respondent in a manner which was against the public's general welfare, health, peace, morals, safety, and sense of decency. After a review of the evidence of record and applicable law, the Administrative Law Judge (ALJ) recommends cancellation of the permit.

I. NOTICE, JURISDICTION, PROCEDURAL HISTORY

There are no contested issues of notice and jurisdiction. Petitioner issued the Notice of Hearing on November 14, 2011. The hearing convened on April 2, 2012. ALJ Veronica S. Najera presided over the hearing at the State Office of Administrative Hearings, El Paso Regional Office. Staff was represented by Shelia A. Lindsey, staff attorney. Respondent was represented by James D. Jepson, attorney. The record closed on April 2, 2012.

II. DISCUSSION

A. Background

Goodtime Lounge is located in Fort Stockton, Pecos County, Texas. The TABC issued Respondent a wine and beer retailer's on premise permit number BG-156159, which includes a retailer's on premise late hour license, in July 1982. During the investigation at issue, Respondent operated another establishment in Fort Stockton, which was licensed under a different permit.

B. Petitioner's Allegations

TABC agents conducted an undercover operation in 2009, which resulted in the purchase of narcotics at the Goodtime Lounge. Staff alleges the bartenders were in charge of the licensed premises and facilitated the purchase of narcotics on the premises. Staff further alleges the drug sales, attempted drug sales, and criminal convictions illustrate a place or manner violation, and plead the following:

- Petitioner alleged Respondent engaged in conduct that was lewd, immoral, or offensive to the public decency by possessing narcotics or permitting a person on the licensed premises to do so, in violation of Tex. Alco. Bev. Code § 104.01(9).
- Petitioner alleged that Respondent conducted his business in a place or manner which warrants the cancellation of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people, in violation of Tex. Alco. Bev. Code § 61.71(a)(1) and § 61.71(a)(17).

C. Petitioner's Direct Case

TABC agent Ronald James Swenson testified he was the agent in charge of an extensive undercover operation involving both establishments owned by Respondent which began in May 2009. He said gambling complaints at the Goodtime Lounge prompted the initial investigation which ultimately led the TABC to Respondent's other bar. In the span of one year, numerous undercover visits were conducted at various bars in Fort Stockton, including the Goodtime Lounge. The evidence of record indicates Respondent was seen briefly only once, on June 12, 2009, at the licensed premises. Respondent's bars shared employees, so the agents became familiar with the bartenders at both establishments. The allegations of facilitation and actual drug purchases are based on occurrences on three dates: May 22, 2009; June 12, 2009; and July 25, 2009:

1. On May 22, 2009, Agent Swenson and his partner Agent Ernesto Prieto were in an undercover capacity at the Goodtime Lounge. Agent Swenson asked the bartender Billy Jean Harvey whether he could be "hooked-up." Agent Prieto asked, "Can you get us a blow?" The bartender told them to "hold on a second" and approached a man, later identified as Rene Valdez, inside the establishment and engaged in a conversation with him. Upon returning, she told the agents to follow the man to the restroom. Agent Prieto testified he purchased a baggie with white powdery substance for \$20.00 from the man inside the restroom. The substance tested positive for cocaine. Agent Prieto purchased 0.08 grams of cocaine.¹ Agent Swenson

¹ Petitioner's Exhibit No. 5, photograph; Petitioner's Exhibit No. 6, seized property report; and Petitioner's Exhibit No. 7, drug analysis laboratory report.

testified the bartender and the man who sold the cocaine were subsequently convicted in federal court.²

2. On June 12, 2009, Ms. Harvey was the bartender and only employee at the establishment. The bartender was speaking with two men, later identified as Kenneth W. May and Michael W. Dodson. The bartender, without a direct question, asked agent Swenson if he was “looking to score some more.” The agent nodded. She replied that “the person that has some just left, but he will be back.” The agents waited. About 30 minutes later, Mr. May returned. The bartender spoke with him at the door and he looked at the agents as if he were checking them out. The bartender asked the agents if they wanted a “50 or a 20.” Mr. May approached the agent and said, “I hear you guys are looking for a hook-up.” The man put a baggie with white powdery substance on the barstool at the bar, and Agent Swenson gave him \$60.00 for it. The agents purchased 0.56 grams of cocaine on June 12, 2009.³ Both Agent Swenson and Agent Prieto testified the bartender stood behind the bar when the purchase occurred.

3. On July 25, 2009, Nora Alfaro was the bartender. Agent Prieto testified he asked her for a “blow of cocaine.” The bartender asked Agent Swenson whether Agent Prieto was serious about a purchase. Subsequently, the bartender told the agents she had sent a text message to her brother and asked him to bring cocaine. The agents waited 30 minutes, but the bartender’s brother did not show.

² Petitioner’s Exhibit Nos. 8 and 9, judgments in criminal case.

Agent Swenson said eight federal criminal convictions resulted from the undercover investigation under a federal conspiracy case. Four persons convicted were Respondent's employees.

D. Respondent's case

Respondent presented two witnesses. Pablo Carrillo Carrasco denied being an employee, but yet said he performed maintenance at the bar for about 10 years. Respondent paid him in cash. As a maintenance staff, he arrived at the bar before it opened at noon and stayed until closing almost every night. He said Respondent was present at the bar once in a while, mostly for 15 minutes to an hour in the morning prior to opening for business. Mr. Carrasco said Respondent met with him about problems at the bar and asked him to throw people out for drug dealing. He said the same people were removed from the bar on a recurring basis. Mr. Carrasco said that when he found empty or full cocaine "baggies" he informed Respondent, but the findings were not reported to law enforcement.

Debbie Rios, a bartender and current bar manager at the Goodtime Lounge, testified she has worked for Respondent a total of four years. As the current manager, she supervises the bartenders and the daily operations. She said she calls the police for any illicit activity.

III. DISCUSSION AND RECOMMENDATION

³ Petitioner's Exhibit No. 10, seized property report; Petitioner's Exhibit No. 11, drug analysis laboratory report; and Petitioner's Exhibit No. 12, photographs.

Respondent argued that Mr. Warren did not have actual knowledge of the narcotic sales. Staff, however, is not alleging that Respondent had actual knowledge or that he sold narcotics. Staff is alleging Respondent engaged in conduct that is lewd, immoral, or which is offensive to the public decency by permitting a person on the licensed premises to possess narcotics. The persons permitted to possess narcotics were Respondent's employees and patrons. Specifically, Staff asserts the bartenders were in charge of the establishment and they assisted and/or facilitated the purchase of narcotics on the premises.

Contrary to Respondent's argument, under the Texas Alcoholic Beverage Code (Code), Respondent is responsible for his employees and the management of the licensed premises. The Code at § 1.04 (11) defines "permittee" as a person who is the holder of a permit or an agent, servant, or employee of that person. Actual knowledge of the criminal activity is not required. Therefore, Respondent's argument is not persuasive. The ALJ concludes that the drug sales which took place and the attempted drug sales constitute a place or manner violation.

Furthermore, the evidence of record reveals Respondent was not at the licensed premises routinely. In a one-year span, he was observed once at the Goodtime Lounge. The lack of presence poses an issue because the facts in evidence indicate Respondent did not maintain exclusive control or manage the daily operations of the establishment. There is no evidence to the contrary, aside from the testimony indicating changes in management were made after the fact. But, there are not any details in evidence regarding the daily management of the licensed premises during the relevant time.

The ALJ recommends cancellation based on the gravity and extent of the violations; on the fact the sale of cocaine is a narcotics-related offense defined as an offense against the general welfare under 16 Tex. Admin. Code § 35.31; and because Respondent failed to control and manage the licensed premises permitting a person on the licensed premises to engage in conduct that was lewd, immoral, or offensive to the public decency.

IV. FINDINGS OF FACT

1. The Notice of Hearing was issued on November 14, 2011. The notice of hearing 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 statement of the matters asserted. The Notice of Hearing also contained the required 12-point, bold-face type default language.
2. A hearing convened on April 2, 2012, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus Thomas Nunley Warren, Sr. d/b/a Goodtime Lounge (Respondent).
3. The hearing was held before Administrative Law Judge (ALJ) Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas.
4. Staff was represented by Shelia A. Lindsey, staff attorney. Respondent was represented by James D. Jepson, attorney.
5. The record closed on April 2, 2012.
6. The Goodtime Lounge operates under the authority of a wine and beer retailer's on premise permit number BG-156159, which includes a retailer's on premise late hour license, issued in July 1982 by the Texas Alcoholic Beverage Commission (TABC).
7. The Goodtime Lounge is located in Fort Stockton, Pecos County, Texas.
8. TABC agents conducted an undercover operation in 2009 in Fort Stockton, which resulted in the purchase of narcotics at the Goodtime Lounge.

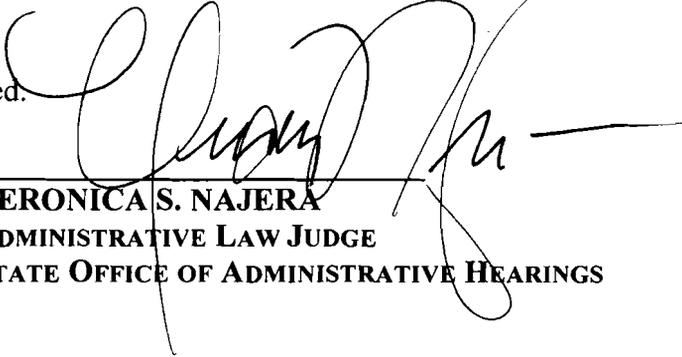
9. On May 22, 2009, Agent Swenson and his partner Agent Ernesto Prieto were in an undercover capacity at the Goodtime Lounge.
10. On May 22, 2009, Agent Swenson asked the bartender Billy Jean Harvey whether he could be "hooked-up" and Agent Prieto asked, "Can you get us a blow?" The bartender told him to "hold on a second" and approached a man, identified as Rene Valdez, inside the establishment and engaged in a conversation with him.
11. On May 22, 2009, the bartender told the agents to follow Rene Valdez to the restroom.
12. On May 22, 2009, Agent Prieto purchased 0.08 grams of cocaine for \$20.00 from Rene Valdez inside the restroom at the Goodtime Lounge.
13. On June 12, 2009, Billy Jean Harvey was the bartender and only employee at the Goodtime Lounge.
14. On June 12, 2009, the bartender was speaking with two men, identified as Kenneth W. May and Michael W. Dodson.
15. On June 12, 2009, the bartender, without a direct question, asked Agent Swenson if he was "looking to score some more." The agent nodded. She replied that "the person that has some just left, but he will be back."
16. On June 12, 2009, when Mr. May returned, the bartender spoke with him at the door and he looked at the agents as if he were checking them out.
17. On June 12, 2009, the bartender asked the agents if they wanted a "50 or a 20."
18. On June 12, 2009, Mr. May approached the agent and said, "I hear you guys are looking for a hook-up." The man put a baggie with white powdery substance on the barstool at the bar, and the agent Swenson gave him \$60.00 for it.
19. On June 12, 2009, the agents purchased 0.56 grams of cocaine at the Goodtime Lounge.
20. The bartender stood behind the bar when the drug purchase occurred on June 12, 2009.
21. On July 25, 2009, Nora Alfaro was the bartender at the Goodtime Lounge.
22. On July 25, 2009, Agent Prieto asked the bartender for a "blow of cocaine."
23. On July 25, 2009, the bartender asked Agent Swenson whether Agent Prieto was serious about a drug purchase.

24. On July 25, 2009, the bartender told the agents she sent a text message to her brother and asked him to bring cocaine to the Goodtime Lounge.
25. The agents waited 30 minutes, but the bartender's brother did not show.
26. Respondent was observed only once at Goodtime Lounge during the one year investigation.
27. Respondent was present at the Goodtime Lounge once in a while, for about 15 minutes to an hour, prior to opening for business.
28. Maintenance staff informed Respondent that empty or full cocaine "baggies" were found at the licensed premises, but the findings were not reported to law enforcement.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Tex. Alco. Bev. Code (Code) §§ 5.31 and 5.35.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Code § 5.43 and Tex. Gov't Code §§ 2003.021(b) and 2003.042.
3. Notice of hearing was provided pursuant to 1 Tex. Admin. Code (TAC) § 155.401 and Code § 11.63.
4. Based upon the Findings of Fact, Respondent engaged in conduct that was lewd, immoral, or offensive to the public decency by permitting a person on the licensed premises to possess narcotics, in violation of Code § 104.01(9).
5. Based upon the Findings of Fact, Respondent conducted his business in a place or manner which warrants the cancellation of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people, in violation of Code § 61.71(a)(1) and § 61.71(a)(17).
6. Respondent's permit should be cancelled.

SIGNED May 29, 2012.


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