

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge  
April 23, 2012

RECEIVED

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TABC HOUSTON  
LEGAL

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

VIA REGULAR MAIL

**RE: Docket No. 458-12-0925, Texas Alcoholic Beverage Commission vs. M.I.S. Enterprises, Inc. d/b/a Moulin Rouge**

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](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "B. Brown", written over a horizontal line.

BENNIE BROWN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

[BB/ell]  
Enclosure

xc Shelia Lindsey, Texas Alcoholic Beverage Commission, 427 West 20<sup>th</sup> Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL (with Certified Evidentiary Record and Hearing CD/s)  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL  
Clyde Burlison, Attorney for Respondent, 1533 West Alabama, Ste. 100, Houston, TX 77006 - VIA REGULAR MAIL  
City of Houston c/o Nirja Aiyer, Senior City Attorney, Protestant, 900 Bagby Street, 3<sup>rd</sup> Floor, Houston, TX 77002- VIA REGULAR MAIL



## I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice, jurisdiction, or venue in this proceeding. Therefore, those matters are set out in the proposed Findings of Fact and Conclusions of Law without further discussion here.

On February 17, 2012, a hearing was convened in this matter in Houston, Texas, before ALJ Bennie Brown. TABC appeared and was represented by Shelia Lindsey, Staff Attorney. Respondent appeared and was represented by attorney Clyde Burleson. Protestant appeared and was represented by attorneys Nirja Aiyer and Yolanda Woods. The hearing concluded on February 17, 2012, and the record was closed on February 29, 2012, after additional evidence was offered and final arguments made.

## II. APPLICABLE LAW

The statutory foundation for the protest to this application is Tex. Alco. Bev. Code § 11.46(a)(8), which provides:

The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exist:

- (8) the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, peace, morals, and safety of the people and on the public sense of decency.

TABC remained neutral on the protest of the application, having determined that Respondent met all of the technical requirements to obtain the permits. In order to deny an alcoholic beverage permit to a fully qualified applicant who proposes to operate a lawful business in an area designated as “wet” for the purpose of alcoholic beverage sales and to operate in compliance with the zoning ordinances of the city, some unusual condition or situation must

be shown so as to justify a finding that the place or manner in which the applicant may conduct its business warrants a refusal of a permit.<sup>1</sup>

### III. EVIDENCE

#### A. TABC

TABC offered into evidence certified copies of TABC records which included Moulin Rouge's administrative history, settlement agreements, and current application for permit renewal. The administrative history indicates that since the last date of renewal in May 2008, Moulin Rouge and TABC have settled all violations administratively with the exception of one alleged violation that occurred on June 3, 2011.<sup>2</sup> The alleged violation is still pending. Violations from August 2009 through March 2010 were disposed of either by dismissal or civil penalty.

#### B. Protestant

The City presented the case for Protestant and offered into evidence 15 Houston Police Department offense reports and related convictions as well as a record of calls for service and various other documents. Protestant alleges that the renewal permit should be denied due to Moulin Rouge's ongoing criminal activity, unlawful operation as a sexually-oriented business ("SOB"), and existence as a common nuisance.<sup>3</sup> Following is a summary of the relevant evidence.

Protestant offered the testimony of Houston Police Officer Matthew Dexter, who is currently in the Vice Division of the Houston Police Department. Officer Dexter testified that he is familiar with Moulin Rouge and has been there approximately four times in the last 7 years. Officer Dexter testified that Moulin Rouge does not hold an SOB permit.

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<sup>1</sup> See *TABC v. Twenty Wings, LTD. et al*, 112 S.W.3d 647, 650 (Tex. App. – Ft. Worth 2003).

<sup>2</sup> TABC Ex. 1 at p.2.

<sup>3</sup> This PFD examines only evidence related to the allegations set forth in the First Amended Notice of Hearing, dated February 1, 2012, the grounds of which form the basis of this protest hearing. Nuisance was not alleged in the First Amended Notice of Hearing and will not be discussed in this PFD.

In November 2011, Officer Dexter received a tip regarding a juvenile runaway. Officer Dexter received information that the juvenile was employed as a topless dancer at Moulin Rouge. Officer Dexter testified that it was unlawful for a minor to be employed by or present in an SOB. During the course of his investigation, Officer Dexter learned that the juvenile was terminated due to Moulin Rouge's discovery that the juvenile was a minor and had used false identification to gain employment. Officer Dexter stated that the juvenile used the identification of a former dancer at Moulin Rouge.

Officer Dexter testified that he confirmed the juvenile had been employed at Moulin Rouge by speaking with the disc jockey and another dancer at the establishment. Officer Dexter did not review any employee files, records, or identifications to confirm the juvenile had been employed by Moulin Rouge. He also stated that while conducting his investigation, he did not observe any minors dancing and did not obtain any proof that minors had been dancing at Moulin Rouge.

Protestant also offered the testimony of Houston Police Officer Kevin Raven. Officer Raven has been assigned to the Vice Division for approximately 5 years. Officer Raven testified that he has participated in three investigations at Moulin Rouge. He described the establishment as having a dark interior with a bar, main stage, and tables surrounding the stage. Officer Raven thinks there is a VIP room and thinks he may have gone inside on a previous occasion. Officer Raven testified that some of the dancers are partially clothed and some are not partially clothed.

Officer Raven's most recent investigation occurred on September 22, 2011. Officer Raven and Officer Smith were working undercover at Moulin Rouge, and Officer Raven observed Officer Smith receive a table dance from a dancer known as "Jazzy."<sup>4</sup> No violations occurred during the dance. At the conclusion of the dance, Officer Raven observed Officer Smith approach another dancer on the main stage. The dancer known as "Jaden" was observed making physical contact with another customer by grinding her buttocks against the

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<sup>4</sup> City of Houston Ex. 2.

customer's clothed genital area. Officer Smith held out a dollar bill, and "Jaden" crawled over to Officer Smith and backed up on all fours until her buttocks were touching Officer Smith's clothed genital area. "Jaden" was wearing a black G-string and began to thrust her buttocks repeatedly against Officer Smith's clothed genitals. At the conclusion of the dance, Officer Smith sat down and sent a "bust" signal to the raid team. "Jaden" was subsequently arrested for an SOB violation. However, Officer Raven noted that the case is still pending and there has not been a final adjudication.

Officer Raven also testified to two other investigations conducted at Moulin Rouge on March 10, 2010, and August 20, 2009. However, these cases have been settled administratively with TABC and will not be considered by the ALJ.<sup>5</sup>

### **C. Respondent**

Respondent offered the testimony of TABC agent Michael Sehon who has been employed with TABC for 8 years. Agent Sehon is familiar with Moulin Rouge and has conducted inspections and investigations at that location over the past 8 years. Agent Sehon testified that he believes Moulin Rouge operates as an SOB, but he could not testify to the legal definition of an SOB.

Agent Sehon testified that he performed a risk assessment for Moulin Rouge in December 2011. The assessment covered a 1-year period from December 2010 to December 2011. Agent Sehon explained that he enters information, such as code violations, police reports, and calls for service, into a computer program which determines whether a particular location is at risk for future violations. Agent Sehon explained that there are three possible outcomes: 1) no action, 2) education, or 3) open complaint. With regard to the risk assessment for Moulin Rouge, Agent Sehon testified that the results were submitted to his supervisor who recommended education and training.

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<sup>5</sup> See TABC Ex. 1 at p.2.

#### IV. ANALYSIS

Protestant bears the burden of proof to establish that Moulin Rouge's business operations create an unusual condition or situation that is contrary to the general welfare, peace, morals, and safety of the people and the public sense of decency. Protestant argues that Moulin Rouge's history of ongoing criminal activity and unlawful operation as an SOB warrant denial of the renewal permits.

Although Protestant offered evidence of investigations and arrests dating from July 2009 through March 2010, these incidents are not considered by the ALJ. The administrative history reveals that these cases have either already been disposed by dismissal or civil penalty or have not been adopted by TABC. TABC is in the best position to know Moulin Rouge's complete administrative and criminal history and how they compare to other permitted businesses throughout the state. If Moulin Rouge's prior permit history has not warranted cancellation or denial of a permit, it does not warrant denial of the renewal permits.

Protestant alleges that Moulin Rouge illegally employs minors as dancers and offered the testimony of Officer Dexter to support this allegation. However, Officer Dexter's testimony did not prove that Moulin Rouge knowingly employed a minor. Officer Dexter's investigation revealed that a minor may have been employed at some point by Moulin Rouge under false pretenses. Officer Dexter never confirmed with management or any other supervisor whether the juvenile had actually been employed by Moulin Rouge and never reviewed any employee records or identifications. Further, Officer Dexter testified that he did not obtain any proof that minors were currently or previously employed by Moulin Rouge.

Protestant also argues that Moulin Rouge is operating illegally as an SOB and offered evidence of an alleged SOB violation that occurred on September 22, 2011. However, the evidence fails to meet the definition of an SOB which requires the offering of services to be intended for the purpose of sexual stimulation or sexual gratification to the customer.<sup>6</sup> Officer Raven testified that he observed dancer "Jaden" thrust her buttocks on the clothed genital

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<sup>6</sup> Tex. Loc. Gov't Code § 243.002; *see also* Code of Ordinances of the City of Houston § 28-121.

area of Officer Smith. Since Officer Raven did not receive the dance, he does not have personal knowledge of the intent and effect of the dancer's movements on Officer Smith. Although "Jaden" was arrested for an SOB violation, the matter is still pending and has not been finally adjudicated. Consequently, Protestant has failed to show that Moulin Rouge operates as an SOB.

As a result, Protestant's evidence is insufficient to establish that the place or manner in which Moulin Rouge conducts business warrants denial of the renewal permits. The ALJ recommends that the renewal permits be issued.

## V. FINDINGS OF FACT

1. M.I.S. Enterprises, Inc. d/b/a Moulin Rouge (Respondent or Moulin Rouge) has filed a renewal application with the Texas Alcoholic Beverage Commission (TABC) for its mixed beverage permit MB471800 and mixed beverage late hours permit LB471801, for a premises located at 8930 Winkler Drive, Houston, Harris County, Texas 77017.
2. Protest to the application was filed by the City of Houston based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency.
3. A First Amended Notice of Hearing dated February 1, 2012, was issued by TABC Staff notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing.
4. On February 17, 2012, a hearing was held before ALJ Bennie Brown in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Shelia Lindsey. Respondent appeared and was represented by attorney Clyde Burlison. Protestant appeared and was represented by attorneys Nirja Aiyer and Yolanda Woods. The record closed on February 29, 2012.
5. All administrative violations from July 2009 to March 2010 have resulted in dismissals or civil penalties.
6. None of the violations resulted in permit revocation.
7. The investigation by Officer Dexter in November 2011 fails to show that Respondent illegally employs minors as dancers.
8. The investigation of September 22, 2011, fails to show that Respondent operates a sexually-oriented business.

9. Applicant has met all TABC requirements for holding the permits requested for the location listed above.
10. No unusual conditions or situations exist that would warrant refusal of the permits.

#### VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Tex. Alco. Bev. Code chs. 5, 11, and 28 and §§ 6.01 and 11.46(a)(8). Tex. Alco. Bev. Code § 1.01 *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 ch. 2003.
3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401.
4. Renewal of the requested permits does not adversely affect the general welfare, health, peace, morals, or safety of the people or violate the public sense of decency. Tex. Alco. Bev. Code § 11.46(a)(8).
5. Respondent's renewal application for a mixed beverage permit MB471800 and mixed beverage late hours permit LB471801 for the premises located at 8930 Winkler Drive, Houston, Harris County, Texas, should be granted.

**SIGNED April 23, 2012.**



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BENNIE BROWN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 602550**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Jurisdictional Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
<b>CITY OF HOUSTON, Protestant</b>	§	
	§	
<b>VS.</b>	§	
	§	
<b>M.I.S. ENTERPRISES, INC. D/B/A MOULIN ROUGE, Respondent/Applicant</b>	§	<b>ALCOHOLIC</b>
	§	
<b>PERMIT NOS. MB471800, LB471801</b>	§	
	§	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-12-0925)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 21st day of December, 2012, 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 (ALJ) Bennie Brown presiding. The hearing convened on February 17, 2012 and the SOAH record closed on February 29, 2012. The ALJ made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on April 23, 2012. The PFD was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. On May 8, 2012, the City of Houston filed exceptions. Respondent's Answers to Exceptions were filed on May 22, 2012. On June 4, 2012, the Administrative Law Judge responded to the exceptions, recommending that no changes be made to the Proposal for Decision.

The ALJ did not consider Protestant's evidence of investigations and arrests dating from July 2009 through March 2010. The evidence was apparently not considered because "these cases have either already been disposed by dismissal or civil penalty or have not been adopted by TABC. TABC is in the best position to know Moulin Rouge's complete administrative and criminal history and how they compare to other permitted businesses throughout the state. If Moulin Rouge's prior permit history has not warranted cancellation or denial of a permit, it does not warrant denial of the renewal permits."

The statement that denial of a renewal permit is not warranted if prior permit history has not warranted previous cancellation or denial of the permit is not an accurate

statement of the law generally. Clearly evidence of prior permit history is relevant to the issue to be decided in cases such as this. As the Court explained in *Wishnow v. Texas Alcoholic Beverage Commission*, 757 SW2d 404, Tex. Ct. Apps. – Houston [14<sup>th</sup>] (1988), “it is illogical to assert that such evidence along with whatever violations subsequently occurred could not be considered in a review of the past history and pattern of operation” of the Appellant. Specifically, this evidence was relevant to allegations that the appellant’s permits should be suspended based on the “place or manner” in which he operated his business. In *Thacker v. Texas Alcoholic Beverage Commission*, 474 SW2d 258, Tex. Ct. Civ. Apps. - San Antonio (1971), the Court stated that “prior suspensions were relevant to his manner of operation”. In *Texas Liquor Control Board v. Pompa*, 298 SW2d 605, Tex. Ct. Civ. Apps. – San Antonio (1957), the Court noted that “the order granting him a beer license did not erase Pompa’s prior record, nor close the door to facts which happened before the date of the grant”.

However, I do not understand the ALJ’s statement to mean that prior permit history should never be taken into account. In the context of the specific circumstances of this case, I understand it to mean that the ALJ is not persuaded that Respondent’s prior permit history *by itself* justifies refusal of a renewal application, at least absent evidence of some “new” previously un-adjudicated violation. Where there is evidence of a new violation, if the ALJ is persuaded that it occurred then the ALJ should *consider* prior permit history as being relevant to the question of whether the application may be denied on the basis that the applicant’s complete permit history indicates that the place and manner in which the premises may be operated does not comport with the general welfare, health, peace, morals and safety of the people and on the public sense of decency. Alcoholic Beverage Code §11.46(a)(8). However, even in that instance, considering such evidence and being persuaded by it are two different matters. And the ALJ, as the trier of facts, is the one who must be persuaded.

As to Protestant’s evidence of investigations and arrests dating from July 2009 through March 2010 (City of Houston Exhibits 1 – 17), these are apparently the cases that the ALJ indicates have “not been adopted by the TABC”. The ALJ as the trier of facts is entitled to decide how much weight to give this evidence.

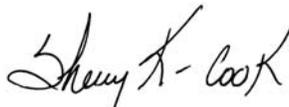
Although I might weigh the evidence differently in any particular case, the effect of Government Code §2001.058(e) is to vest those fact-finding powers in the ALJ and to limit my ability to change proposed findings of fact and conclusions of law. For the reasons stated above, I do not believe that the ALJ committed an error of law in making these findings and conclusions.

After review and due consideration of the Proposal for Decision, exceptions, answers and response, 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 other 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, which are not specifically adopted herein, are denied.

**IT IS THEREFORE ORDERED** that the application of M.I.S. Enterprises, Inc. d/b/a Moulin Rouge for the renewal of its Mixed Beverage Permit and Mixed Beverage Late Night Permit is **GRANTED**.

This Order will become final and enforceable on the 11th day of January, 2013, unless a Motion for Rehearing is filed **on or before** the 10th day of January, 2013.

**SIGNED** this the 21st day of December, 2012, at Austin, Texas.



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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 December, 2012.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Bennie Brown  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
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