

DOCKET NO. 518314

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
DENNIS MICHAEL ROOP	§	
D/B/A BOOFIE'S	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BE262880	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO.518314)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Craig R. Bennett. The hearing convened on January 12, 2007 and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 29, 2007. 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.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

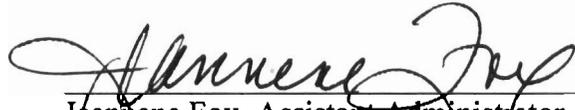
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permit(s) and license(s) is hereby **Cancelled for Cause**.

This Order will become final and enforceable on April 4, 2007, unless a Motion for Rehearing is filed before that date.

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

SIGNED this March 8, 2007.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC\bc

The Honorable Craig R. Bennett
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (254) 750-9380

DENNISL MICHAEL ROOP
RESPONDENT
d/b/a BOOFIE'S
702 E CENTRAL
TEMPLE, TX 765014546

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

January 29, 2007

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

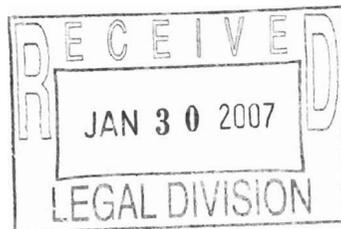
HAND DELIVERY

RE: Docket No. 458-07-0809; Texas Alcoholic Beverage Commission v. Dennis Michael Roop d/b/a Boofie's (TABC Docket No. 518314)

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 § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.



Sincerely,

A handwritten signature in black ink, appearing to read "Craig R. Bennett".

Craig R. Bennett
Administrative Law Judge

CRB/Is
Enclosure

xc: **Docket Clerk, State Office of Administrative Hearings - VIA HAND DELIVERY**
W. Michael Cady, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -
VIA HAND DELIVERY
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -
VIA HAND DELIVERY
Dennis Michael Roop, d/b/a Boofie's, 702 E. Central, Temple, TX 76501-4546 - **VIA REGULAR MAIL**

DOCKET NO. 458-07-0809

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	
	§	OF
DENNIS MICHAEL ROOP	§	
d/b/a BOOFIE'S	§	
(TABC DOCKET NO. 518314)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this enforcement action against Dennis Michael Roop d/b/a Boofie's (Respondent), alleging that Respondent (1) violated the Texas Alcoholic Beverage Code by allowing its agent, servant, or employee to be in possession of a narcotic on the licensed premises, and (2) conducted business at the licensed premises in a place or manner which warranted 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. TABC requests that Respondent's license be canceled. Alternately, TABC requests that Respondent's license be suspended for 60 days for each offense, without the option of paying a civil penalty in lieu of suspension. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) recommends that Respondent's license be canceled.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

Respondent operates a bar ("the bar" or "Boofie's") located at 702 E. Central Avenue in Temple, Texas. The bar is operated under the authority of Beer Retail Dealer's On Premise License No. BE262880 issued by the TABC. On January 4, 2006, TABC Agent Daniel Garcia conducted an inspection of Respondent's licensed premises and found a marijuana cigarette in plain view and directly beside a bar employee. After this incident, and because of a history of other allegedly improper activity at the bar,¹ TABC brought this action seeking to cancel Respondent's license.

¹ At the hearing, TABC presented evidence showing that, since 1987, there have been over 251 incident reports opened by the Temple Police Department in relation to the premises where the bar is located. Although not all of these incident reports represent arrests or involved any substantiated criminal conduct, most of them involved allegations of criminal conduct or disturbances.

On January 12, 2007, a hearing convened before ALJ Craig R. Bennett, in SOAH's Waco office. TABC was represented at the hearing by W. Michael Cady, staff attorney. Respondent appeared and represented himself. The hearing concluded and the record closed that same day.

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 11 and §§ 61.71 and 104.01(9). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

II. DISCUSSION

A. Applicable Law

State law allows TABC to revoke a license for numerous reasons. TABC relies on two separate grounds in this case. Specifically, TEX. ALCO. BEV. CODE § 61.71 provides, in pertinent part:

- (a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:
 - (1) violated a provision of this code or a rule of the commission during the existence of the license sought to be cancelled or suspended or during the immediately preceding license period;
- * * *
- (17) conducted his 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;

TABC rules further address what types of situations warrant suspension or cancellation of a license “based on the general welfare, health, peace, morals, safety, and sense of decency of the people.” Specifically, in relevant part, 16 TEX. ADMIN. CODE § 35.31 provides that certain drug-related offenses (including possession of narcotics) will justify cancellation of a license if they are committed “by any person on the licensee or permittee’s licensed premises” and “the licensee or permittee 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.”

Finally, Texas law clearly prohibits employees of licensees from engaging in or permitting lewd conduct, which includes “possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.”²

Relying upon these provisions, TABC brings this enforcement action against Respondent, arguing that its license should be cancelled because (1) its employee possessed a narcotic while on the premises, thus violating the Code, and (2) the possession of a narcotic by the Respondent’s employee and by others on Respondent’s licensed premises, along with the sale of such narcotics on the premises, shows the bar is being operated in a 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. The relevant factual and legal issues are addressed below.

B. TABC’s Evidence and Arguments

TABC presented the testimony of numerous witnesses. Peace officer David Hess of the Temple Police Department testified that he had received many citizen complaints of drug trafficking at Respondent’s bar. In fact, he was aware that since 1987 there have been at least 251 incidents at the premises where the bar is located, although not all of these involved complaints of drug activity. In his opinion, it was unsafe to have the bar in that location, right next to a residential area. Officer

² TEX. ALCO. BEV. CODE ANN. § 104.01(9).

Hess also testified regarding police surveillance of the bar on January 4, 2006. On that date, Temple police stopped numerous people leaving the bar and found drugs in their possession.³ Since that day, Officer Hess has spoken to known drug traffickers in the Temple area who have told him they bought or sold drugs at the bar.

At the hearing, Officer Hess offered a written statement he obtained from a convicted drug dealer, Jamaica McDade, who indicated the bartenders at the bar knew he was selling drugs there and would warn him if the police were coming. Specifically, the sworn statement of Mr. McDade indicates:

I have sold drugs at Boofies bar at 14th and Central in Temple on and off since 1999. I have sold crack cocaine and PCP. While I was selling drugs at Boofies each bartender on each shift knew what I was doing. As long as I bought beer, the bartenders didn't care what we were doing. Bartenders like Mildred, Pricilla, Pat, Kathy, (W/F with glasses) would warn me if the police was coming. If the police would come I would leave with my drugs, because I was barred from Boofies. Sometimes, people would come in to buy drugs that I would not recognise [sic]. They would go to the Bar Tender [sic], and the bartender would send them to me. I sent them to the bathroom and I would go in after them and make a deal.⁴

Peace officer Marlon Reed of the Temple Police Department also testified at the hearing.⁵ He was involved in the surveillance of the bar on January 4, 2006. On that date, he observed Joseph Graham leave the bar. He detained him later and found him in possession of narcotics. Mr. Graham told Officer Reed that he had purchased \$4 worth of crack cocaine at the bar. On January 21, 2006, Officer Reed stopped Larus Franklin after he had left the bar. Mr. Franklin was found with cocaine in his possession and admitted to being at the bar.

³ Jerry Alexander and Jamaica McDade are two people who were found in possession of drugs after leaving Boofie's on January 4, 2006. Both were charged with criminal conduct and convicted of drug charges for their conduct that day. See TABC Exs. 5 and 8.

⁴ TABC Ex. 6.

⁵ His testimony is also supported by incident reports prepared by him and introduced into evidence at the hearing. See TABC Ex. 12.

Peace officer Robert Mallett of the Temple Police Department testified, and indicated he was involved in the surveillance of the bar on January 4, 2006. On that date, Officer Mallett also spoke with Joseph Graham, who told him that he (Mr. Graham) goes to the bar to buy drugs. Moreover, officer Mallett was involved in the arrest of Larus Franklin on January 21, 2006, and corroborated the testimony of Officer Reed.⁶ In Officer Mallett's opinion, the bar was a frequent location of drug dealing, was unsafe for the area, and should have its license canceled.

Finally, TABC presented the testimony of TABC Agent Daniel Garcia. Agent Garcia testified that he went into the bar on January 4, 2006, and found a 2½-inch marijuana cigarette on top of a beer cooler within arm's length of a sitting bartender.⁷ The marijuana cigarette was slightly burnt and was within arms length of Maria Coppage (also known as Della May Coppage), the sole bar employee on duty at the time. There were no other persons in close proximity to the marijuana cigarette at the time of the inspection. Ms. Coppage told Agent Garcia the cigarette was not hers. Agent Garcia turned the cigarette over to Temple police officers, who tested it and confirmed that it contained marijuana.⁸

Based upon the testimony and documentation offered, TABC asserts there is ample evidence to show that the bar has been operated in a place or manner that is not consistent with the general welfare, health, peace, morals, safety, and sense of decency of the people. TABC notes that there are homes with children adjacent to the bar and argues there is a substantial risk that children could be harmed by the drug activities that are expected to occur at the bar if it is allowed to continue to operate.

⁶ See TABC Ex. 14 (Officer Mallett's incident report) for additional details regarding the incident.

⁷ The witnesses and written evidence also refer to the marijuana cigarette as a "marijuana cigar blunt." However, at the hearing, the witnesses clarified that the references to "marijuana cigarette" and "marijuana cigar blunt" actually were referring to the same item.

⁸ See also TABC Ex. 17 (the case report prepared by Agent Garcia) for additional details.

C. Respondent's Evidence and Arguments

Respondent presented the testimony of Lynda Wolf, who has worked as a bartender for Respondent for the last few years. Ms. Wolf testified that she works as a floater at Respondent's different bars. She has worked at Boofie's on numerous occasions over the last three years. She worked on January 4, 2006—the day the marijuana cigarette was found at the bar. She got off work shortly before Agent Garcia inspected the bar. She was relieved of her duties by Ms. Coppage, the employee on duty at the time of the TABC inspection.

Ms. Wolf testified that, during her time at the bar that day, she did not see any drug use or dealing. She further testified that Respondent has instructed her and other bar employees to not allow drug use or dealing on the premises. Moreover, employees are instructed to not allow patrons to loiter on the premises or more than one person to go into the restroom at a time. These precautions are designed to limit drug use and trafficking on the premises. Ms. Wolf also testified that she did not believe the bar was a problem for the area, and that police have only been to the bar two times while she was working. In her opinion, there have been no major problems at the bar in the time she has worked there.

In his closing argument, Respondent asserted that he has always attempted to cooperate with law enforcement. As evidence of this, he notes that he has put up "no trespassing" signs and signs indicating the bar will not allow drugs on the premises. He has instructed all of his bartenders to not tolerate the use or sale of drugs on the premises. Further, he has executed criminal trespass affidavits allowing the police to arrest certain known drug dealers if they are located at the bar. He noted that no one at the bar has been found to have engaged in drug use or dealing, and none of the incidents cited by TABC in this case have involved the confirmed sale or use of drugs at the bar. He acknowledged there is a drug problem in the area where the bar is located, but argues there is nothing more he can do about it. Accordingly, he contends it is unfair to punish him for the fact that some of his patrons were found to have drugs in their possession or for the lone marijuana cigarette found at the bar.

D. The ALJ's Analysis

After considering the totality of the evidence, the ALJ concludes that TABC has shown that the place or manner in which the bar has been operated is not consistent with the general welfare, health, peace, morals, safety, and sense of decency of the people. Therefore, the ALJ recommends that Respondent's license be canceled.

This is a difficult case. Most of the wrongful conduct cited by TABC (primarily, the possession of drugs by various individuals) is not attributable to Respondent. The individuals involved were not employees of Respondent and there is no evidence that Respondent was clearly aware of their conduct. This is not a case where an undercover agent observed any illegal activity occurring at the bar, other than the presence of a marijuana cigarette on the premises. Even the marijuana cigarette found at the bar was not clearly shown to be in the possession of a bar employee. On initial consideration, it seems harsh to cancel Respondent's license for the wrongdoing of others when Respondent has not been shown to be directly involved in such conduct.

However, the applicable legal standard does not require actual knowledge or involvement by Respondent. Rather, a license can be canceled if the use, sale or possession of drugs occurs on the licensed premises "by *any person*" if "the licensee or permittee . . . 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."⁹ Moreover, the statute that allows a license to be canceled if the licensee "conducted his 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" does not require an element of actual criminal wrongdoing by the licensee.¹⁰ Rather, it is sufficient if the manner or place in which the business is conducted is not consistent with the general welfare, peace, and safety of the community.

⁹ 16 TEX. ADMIN. CODE § 35.31 (emphasis added).

¹⁰ TEX. ALCO. BEV. CODE § 61.71(a)(17).

In this case, any of the individual instances alleged would probably not, standing alone, be sufficient to warrant cancellation of Respondent's license. However, when taken as a whole, the ALJ is persuaded they show that the place or manner in which the bar is operated presents a danger to the general welfare, peace, and safety of the community.

There have been more than 250 incidents at the location of the licensed premises since 1987.¹¹ On average, police have been called to the location more than once per month. Numerous times police have stopped individuals leaving the bar with illegal drugs in their possession. At least two individuals have made statements that they purchased drugs at the bar, and one of those individuals indicated bar employees were aware of such drug sales.¹²

Although the ALJ recognizes that the statement of Mr. McDade—a convicted drug dealer—may be of questionable reliability, his statement is corroborated by other evidence in the record. In particular, the oral statement of Joseph Graham indicating he bought drugs at Boofies; numerous citizen complaints of drug activity at the bar; the numerous individuals found in possession of drugs after leaving the bar; the frequent instances observed by peace officers of individuals going into the bar for just a few minutes and then leaving; and the presence of marijuana during the January inspection are all consistent with Mr. McDade's assertion of drug dealing on the licensed premises.

The physical dimensions of the bar are not large. It is designed as a single open area that can be observed directly by the bartender. It does not have many different rooms or other areas that might be hidden from sight. Respondent admitted at the hearing that he knew that drug dealing and use was a problem in the area. During the raid on January 4, 2006, marijuana was found in the bar in a place where, even if it was not in the possession of the bar employee on duty, it was clearly within her view and was observable by her.

¹¹ TABC Ex. 11.

¹² TABC Ex. 6.

Although Respondent put up signs prohibiting loitering and indicating the bar had a zero tolerance drug policy, it does not appear such signs have been effective. The ALJ does not necessarily fault Respondent himself for this. Rather, it is quite possible the employees that Respondent has hired to work at the bar have been lax in enforcing the signs and ensuring that illegal conduct does not occur on the premises. But, in regard to license actions, the acts of Respondent's employees are attributable to Respondent.¹³

Moreover, the only witness presented by Respondent was a bar employee (Ms. Wolf) who worked at Boofie's only sporadically.¹⁴ As such, her knowledge of the regular activities at the bar is limited. Therefore, the ALJ is not persuaded that Ms. Wolf's testimony shows that Respondent took reasonable steps to actually prevent illegal drug dealing and possession from occurring on the premises.

In light of all of the evidence discussed above, the ALJ concludes that Respondent either knew or should have known that illegal drug trafficking and possession were occurring on the licensed premises. At a minimum, Respondent knew or should have known of the likelihood of its occurrence and failed to take reasonable steps to prevent it. That, coupled with the actual existence of illegal drugs on the property during the inspection on January 4, 2006, persuade the ALJ that the place or manner in which the bar has been operated warrants cancellation of Respondent's license based on the general welfare, health, peace, morals, safety, and sense of decency of the people. Accordingly, the ALJ recommends that Respondent's license be canceled. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

¹³ For purposes of the Alcoholic Beverage Code, "licensee" means a person who is the holder of a license provided in this code, *or any agent, servant, or employee of that person.* TEX. ALCO. BEV. CODE § 1.04(16). (Emphasis added)

¹⁴ In fact, Officer Mallett testified that he has patrolled the area around the bar for the last three years and has been in the bar weekly, if not daily throughout much of that time, and has never seen Ms. Wolf working there.

III. FINDINGS OF FACT

1. Respondent operates a bar ("the bar" or "Boofie's") located at 702 E. Central Avenue in Temple, Texas. The bar is operated under the authority of Beer Retail Dealer's On Premise License No. BE262880 issued by the TABC.
2. On January 4, 2006, TABC Agent Daniel Garcia conducted an inspection of Respondent's licensed premises and found a marijuana cigarette in plain view and directly beside a bar employee. The marijuana cigarette was slightly burnt and was sitting on top of a beer cooler within arms length of Maria Coppage (also known as Della May Coppage), the sole bar employee on duty at the time. There were no other persons in close proximity to the marijuana cigarette at the time of the inspection.
3. On January 4, 2006, officers with the Temple Police Department stopped numerous people leaving the bar and found drugs in their possession.
4. Jerry Alexander and Jamaica McDade are two people who were found in possession of drugs after leaving Boofie's on January 4, 2006. Both were charged with criminal conduct and convicted of drug charges for their conduct that day.
5. Since 1999, Jamaica McDade has regularly sold drugs at Boofie's.
6. On January 4, 2006, Joseph Graham purchased crack cocaine from others while on the licensed premises of Boofie's.
7. On January 21, 2006, Larus Franklin was in possession of cocaine while on the licensed premises of Boofie's.
8. The employees of Boofie's have known or should have known of the illegal sale and possession of drugs on the licensed premises of Boofie's.
9. The employees of Boofie's have failed to take reasonable steps to prevent the illegal sale and possession of drugs from occurring on the licensed premises of Boofie's.
10. Police are called to the licensed premises of Boofie's, on average, more than once a month for disturbances or alleged criminal conduct.
11. On February 23, 2006, TABC notified Respondent of its intent to cancel or suspend Respondent's license.
12. Respondent requested a hearing regarding TABC's intended action.

13. On November 14, 2006, the TABC sent its Notice of Hearing to Respondent. This Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and included a short plain statement of the allegations and the relief sought by TABC.
14. On January 12, 2007, an evidentiary hearing in this matter convened in Waco, Texas, before Administrative Law Judge (ALJ) Craig R. Bennett. TABC was represented at the hearing by W. Michael Cady, staff attorney. Respondent appeared and represented himself. The hearing concluded and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 11 and §§ 61.71 and 104.01(9).
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.021.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.55.
4. Respondent conducted his 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. TEX. ALCO. BEV. CODE ANN. § 61.71(a)(17).
5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Beer Retail Dealer's On Premise License No. BE262880 should be canceled.

SIGNED on January 29, 2007.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS