

DOCKET NO. 582095

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
OTTO BRUCE JENKINS	§	
D/B/A TEXAS BAR	§	
PERMIT NOS. BG-317789 & BL-405831	§	
NUECES COUNTY, TEXAS	§	
(SOAH Docket NO.458-99-3381)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 14th day of December, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl A. Corbitt. The hearing convened on March 2, 2000, and the record was closed April 3, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 1, 2000. This 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, Transcripts, 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.

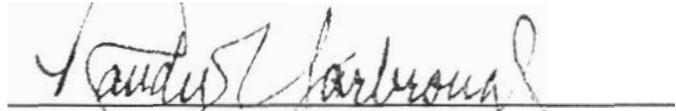
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that the allegations are hereby **DISMISSED**.

This Order will become final and enforceable on January 4, 2001, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 14th day of December, 2000.

On Behalf of the Administrator,

A handwritten signature in cursive script, appearing to read "Randy Yarbrough", is written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Earl A. Corbitt
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

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Corpus Christi District Office

DOCKET NO. 458-99-3381

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PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the wine and beer retailer's permit and the retail dealer's on premises late hours license held by Otto Bruce Jenkins d/b/a Texas Bar (the Respondent) for allegedly allowing a servant, agent, or employee of the Respondent to be intoxicated on the premises. This proposal finds TABC did not sustain its burden of proof and recommends no action be taken against Respondent's license and permit.

PROCEDURAL HISTORY, NOTICE & JURISDICTION

On January 13, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent's attorney at 4525 Gollihar, Suite 100, Corpus Christi, Texas 78411. The Respondent's attorney received the notice. The hearing convened on March 2, 2000, before Administrative Law Judge (ALJ) Edel P. Ruiseco at the offices of the State Office of Administrative hearings (SOAH) at 1225 North Agnes, Suite 102, Corpus Christi, Texas. Staff attorney Dewey Brackin represented TABC, and attorney Jose Longoria represented the Respondent. After receipt of the evidence, the record was left open to allow the parties to file post hearing briefs. No such briefs were filed. The record closed on April 3, 2000.

On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt for preparation of the proposal for decision. The undersigned ALJ has reviewed the record in the case including the audio tape of the hearing and the admitted exhibits.

REASONS FOR DECISION

A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 61.71(a)(1). Section 25.04 of the Code makes §61.71 applicable to a wine and beer retailer's permit issued by TABC. It is a violation of the Code for any person authorized to sell beer at retail, or his agent, servant, or employee to be intoxicated on the licensed premises. TEX. ALCO. BEV. CODE ANN. §104.01(5).

B. Evidence

Three exhibits were admitted into evidence. They included: (1) the notice of hearing; (2) an Order issued in Cause No. 99-0163-3, The State of Texas vs. Delia Jenkins in the County Court No. 1 of Nueces County, Texas, dismissing that cause; and (3) a sketch of the floor plan of the Texas Bar. Four witnesses testified at the hearing.

1. TABC Agent Arthur Munsell

Agent Munsell has worked as a TABC agent for eighteen years, fourteen of which he has worked in the Corpus Christi office. On December 5, 1998, at approximately 2:30 a.m., he noted an unusual number of cars outside the Texas Bar. The Texas Bar has a license to serve until 2:00 a.m. According to Agent Munsell, the Texas Bar operates under permit number BG-317789. His testimony did not reflect any other license or permit number for the Texas Bar.

Agent Munsell testified he heard voices inside the Texas Bar when he arrived there on December 5, 1998. He knocked on the door to the establishment and was granted entry. After entering the establishment he inspected the interior including going to a back room where he observed that Audelia Jenkins, who Agent Munsell knew to be the wife of the owner, appeared to be intoxicated. Agent Munsell testified that Ms. Jenkins was flushed, had blood-shot eyes, and slurred speech, was staggering and swaying, and smelled strongly of alcohol.

Agent Munsell testified he asked Ms. Jenkins to take a group of sobriety tests and she first refused then changed her mind when he announced his intention to arrest her based on his observations. He first administered the horizontal gaze nystagmus test which Ms. Jenkins failed. He next asked that she walk nine steps heel-to-toe then turn around and walk back in the same manner. He halted the test after several steps when he concluded she could not safely perform the test. He then asked her to stand on one leg for 30 seconds and she could not do it. According to Agent Munsell, he concluded Ms. Jenkins was intoxicated. He arrested her and transported her to the county jail.

Agent Munsell testified that on a previous visit to the bar, he had seen Ms. Jenkins working behind the bar at the Texas Bar. He testified that on that visit, she told him she is in charge when her husband is not there.

2. Donna Jo Martinez

Ms. Martinez testified she is the bartender at the Respondent's premises. Ms. Martinez has worked for the Respondent for about three and one-half years. She testified she was present at the time of the inspection by Agent Munsell on December 5, 1998. She was stocking the beer cooler after closing the bar. Ms. Martinez was the person who let Agent Munsell into the establishment. She testified Agent Munsell did not take time to look at the establishment's posted license but rather went directly to the kitchen where Ms. Jenkins was preparing for a benefit meal to be served the next day.

Ms. Martinez testified Ms. Jenkins drank only coffee that night at the Texas Bar. She also testified she had served Ms. Jenkins three beers. She testified Ms. Jenkins was taken outside the bar for the sobriety tests. She testified she observed Ms. Jenkins successfully complete three or four steps of the heel-to-toe test. She also testified she did not pay much attention to the sobriety tests.

Ms. Martinez testified Ms. Jenkins is not employed at the Texas Bar and that Ms. Jenkins was not intoxicated at the time she was arrested by Agent Munsell.

3. Suzanne Contreras

Ms. Contreras testified she is a frequent customer at the Texas Bar. She testified she was present at the time of the inspection by Agent Munsell on December 5, 1998. She was in the kitchen assisting Ms. Jenkins who was cutting up brisket to be served at a benefit meal the next day.

She testified she was at the bar washing her hands when Agent Munsell entered. Agent Munsell first checked the posted license behind the bar. Then he followed Ms. Contreras into the kitchen. According to Ms. Contreras, Agent Munsell walked up to Ms. Jenkins, asked if she was "Delia," then upon receiving an affirmative answer, arrested her immediately. She testified there was no conversation between the two. Agent Munsell then took Ms. Jenkins out of the kitchen.

Ms. Contreras testified she did not come out of the kitchen immediately. She heard Agent Munsell try to get Ms. Jenkins to perform a sobriety test and heard Ms. Jenkins respond she was too nervous and could not do it. Ms. Contreras did not see Ms. Jenkins attempt to perform any sobriety tests.

According to Ms. Contreras, Ms. Jenkins drank three beers at the Texas Bar that night. She did not see Ms. Jenkins drink anything but the three beers. Ms. Contreras testified she has known Ms. Jenkins for ten years and has seen her intoxicated in the past. She testified she was not intoxicated on the night Agent Munsell inspected the bar and arrested her.

Ms. Contreras testified she has never seen Ms. Jenkins work at the Texas Bar.

4. Audelia Jenkins

Ms. Jenkins testified she arrived at the Texas Bar approximately 10 p.m on the night of December 4, 1998. She had work to do in the kitchen to prepare for a benefit meal for her grandson. While working in the kitchen cutting brisket, she was arrested by Agent Munsell.

Ms. Jenkins denied drinking more than three beers before being arrested by Agent Munsell. She denied being an employee of the Texas Bar and denied working there. She denied any ownership interest in the bar. She denied being asked to do any sobriety test other than walking heel-to-toe. She testified she was unable to walk heel-to-toe because she was too nervous.

Ms. Jenkins testified she had prepared food and coffee at home and brought it to the Texas Bar for the benefit of the patrons. She testified the food is given to the patrons without charge.

In regard to her arrest, Ms. Jenkins testified she went to trial but the arresting officers failed to appear. On her second appearance the arresting officers again did not appear and the case against her was dismissed.

C. Analysis and Recommendation

TABC had originally charged that on or about November 26, 1998, a servant, agent, or employee of Otto Bruce Jenkins d/b/a Texas Bar was intoxicated on the licensed premises. When the testimony showed the date of the event to be December 5, 1998, the attorney representing the Respondent moved for a dismissal. Subsequently, the record indicates the Respondent waived any defect in the pleading. TABC had the burden of proving by a preponderance of the evidence that Audelia Jenkins, **at the time of the inspection on December 5, 1998**, was an employee, agent, or servant of the Respondent **and** that she was intoxicated on the Respondent's premises.

The evidence demonstrated that in the early morning hours on December 5, 1998, Audelia Jenkins was in the kitchen of the Texas Bar cutting brisket to be served at a meal the next day which was being held for the benefit of Ms. Jenkins' grandson. The location of the benefit meal was not disclosed. There was no evidence that she was laboring on behalf of the Texas Bar at the time.

Ms. Jenkins testified she is not an employee of the Texas Bar. Her testimony was corroborated by Donna Jo Martinez, the bartender of the Texas Bar, and Suzanne Contreras, a frequent customer of the Texas Bar. Ms. Jenkins testified the bar is owned by her husband, who, save for the notice of hearing which was admitted as an exhibit, was otherwise unidentified throughout the proceeding.

Agent Munsell testified that on a previous inspection of the Texas Bar, Ms. Jenkins had identified herself as the person in charge when her husband was not there. Unfortunately, Agent Munsell did not pin down the time when that previous inspection occurred. He has been an agent of TABC in the Corpus Christi area for some 14 years. Neither the license or permit under which the Texas Bar operates was offered into evidence, so the undersigned ALJ is ignorant of how long the establishment has been in operation. It is possible the conversation between Agent Munsell and Ms. Jenkins occurred 14 years ago. There is no evidence to the contrary.

Ms. Jenkins did testify that she has cooked food and fixed coffee at home and brought it to the Texas Bar where it was given to patrons free of charge. Again, the time frame was not established. The undersigned ALJ does know whether the service was provided yesterday, last week, or years ago.

Based on the evidence presented in this hearing, TABC did not prove by a preponderance of the evidence an essential element of its case. TABC did not prove Audelia Jenkins was an employee, agent, or servant of the Respondent on December 5, 1998.

In regard to the issue of intoxication, the testimony of Agent Munsell established that Audelia Jenkins demonstrated the physical characteristics of intoxication and she failed a series of sobriety tests. Neither Ms. Martinez nor Ms. Contreras observed the full battery of tests. Therefore, TABC did show by a preponderance of the evidence that Ms. Jenkins was intoxicated on the Respondent's premises on December 5, 1998.

Based on the foregoing, the undersigned ALJ finds that TABC failed to prove its allegation by a preponderance of the evidence. No disciplinary action against the Respondent is warranted in this case.

PROPOSED FINDINGS OF FACT

1. Otto Bruce Jenkins d/b/a Texas Bar (the Respondent) holds a wine and beer retailer's permit and a retail dealer's on premises late hours license issued by the Texas Alcoholic Beverage Commission (TABC).
2. On December 5, 1998, at about 2:30 a.m., Audelia Jenkins was arrested at the Texas Bar for being intoxicated.
3. Audelia Jenkins is the wife of the owner of the Texas Bar.
4. At the time she was arrested, Audelia Jenkins was slicing brisket to be served at a benefit meal to be served at an undisclosed location on December 5, 1998.
5. The meal described in Finding of Fact No. 4, was for the benefit of the grandson of Audelia Jenkins.
6. TABC charged the Respondent with having an employee, agent, or servant intoxicated on the licensed premises.
7. On an unspecified date, prior to December 5, 1998, Audelia Jenkins told TABC Agent Arthur Munsell that she was in charge of the Texas Bar when her husband is not there.
8. On January 13, 2000, notice of the hearing to consider sanctions against the Respondent was sent by certified mail, return receipt requested, to the Respondent's attorney at his address, 4525 Gollihar, Suite 100, Corpus Christi, Texas 78411.
9. The Respondent or his agent received timely notice of the hearing.
10. The hearing to consider the allegations convened on March 2, 2000, before Administrative Law Judge Edel P. Ruiseco with the State Office of Administrative Hearings (SOAH) in SOAH offices at 1225 North Agnes, Suite 102, Corpus Christi, Texas. Staff attorney Dewey Brackin represented TABC, and attorney Jose Longoria represented the Respondent.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 61.71.
2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(5).
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T. CODE ANN. §2001.051.
4. There was insufficient evidence to prove Audelia Jenkins was the Respondent's employee, agent or servant on December 5, 1998. TEX. ALCO. BEV. CODE ANN. §104.01(5).
5. There was insufficient evidence to prove the Respondent violated a provision of the Texas Alcoholic Beverage Code or a rule adopted by TABC on December 5, 1998. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 61.71(a)(1).

SIGNED this 15 day of September, 2000.



EARL A. CORBITT
Administrative Law Judge
State Office of Administrative Hearings