

DOCKET NO. 592218

IN RE TERESA GILL ORTIZ	§	BEFORE THE
D/B/A GAVINOS	§	
PERMIT NO. BG235295	§	
LICENSE NO. BL235296	§	TEXAS ALCOHOLIC
	§	
NUECES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2254)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 7th day of September, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle J. Groves. The hearing convened and adjourned on May 25, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 13, 2001. 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.

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.

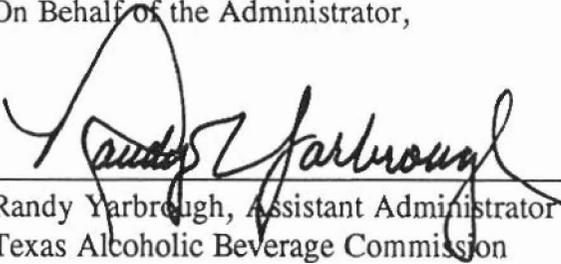
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on September 28, 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 7th day of September 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings,
VIA FACSIMILE: (361) 884-5427

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TABC Legal Section

Licensing Division
Corpus Christi District Office

DOCKET NO. 458-01-2254

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
vs.	§	
	§	OF
TERESA GILL ORTIZ D/B/A GAVINOS PERMIT NO. BG-235295 LICENSE NO. BL-235296 NUECES COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks cancellation of Permit No. BG-235295 and License No. BL-235296 held by Teresa Gill Ortiz, d/b/a Gavinos (Respondent or Licensee) for allegedly permitting the use or display of the license in the conduct of business for the benefit of a person not authorized by law to have an interest in the license. The Administrative Law Judge recommends that the petition be denied.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

The hearing in this case was convened on May 25, 2001, at the State Office of Administrative Hearings in Corpus Christi, Texas before Administrative Law Judge Kyle J. Groves. Christopher Burnett, staff attorney, represented Petitioner. Respondent was represented by Attorney Celso Rodriguez. The record remained open until June 22, 2001, so the parties could file closing arguments. There are no contested issues of jurisdiction or notice. Therefore, these matters are addressed as findings of fact and conclusions of law without further discussion here.

II. DISCUSSION

Petitioner called three witnesses: TABC Agent Arthur Munsell, Gilbert Hinojosa, and Julian Flores. Petitioner offered seven exhibits and all were admitted.

Respondent testified for herself. Respondent offered four exhibits and all were admitted.

A. Petitioner's Witnesses

1. Arthur Munsell

Arthur Munsell is a TABC enforcement officer. Munsell was contacted by Gilbert Hinojosa in the fall of 2000. Hinojosa told Munsell that he had loaned money to Julian Flores to assist Flores in renewing the license for Gavinos. Hinojosa said Flores was controlling Gavinos. Hinojosa requested that Munsell assist him in getting his money back from Flores.

Munsell contacted Julian Flores. Flores said he had entered into an agreement with Respondent and Michael Gurleski in which Flores contributed money in return for part ownership in Gavinos. Flores told Munsell that he was in control of Gavinos and, according to his agreement with Respondent, she would be paid a sum of money for allowing Flores and Gurleski to use her license.

Munsell testified that the license is solely in Respondent's name. Respondent is prohibited from having a partner in the operation of the business.

Petitioner then offered seven exhibits and all were admitted. Petitioner's exhibit one is a certified copy of Respondent's license, permit and administrative history (Petitioner's Ex. 1). Petitioner's exhibit two is an affidavit signed by Gilbert Hinojosa (Petitioner's Ex. 2). This affidavit states that Hinojosa met with Flores on August 3, 2000, at Gavinos. During this meeting, Hinojosa loaned Flores \$950.00 so Flores could renew "his" beer license. Hinojosa states in the affidavit that Respondent arrived later, and Flores handed the money to her. Respondent stated she needed to get to the courthouse before it closed so she would not be late in renewing her beer license.

Petitioner's exhibit three is a receipt stating that Julian Flores paid Respondent \$950.00 to renew her beer license (Petitioner's Ex. 3). This receipt is signed by Respondent.

Petitioner's exhibit four is a lease signed by Respondent and Michael Gurleski for Gavinos (Petitioner's Ex. 4). This lease is dated July 14, 2000, and it provides that Michael Gurleski will pay Respondent \$1,000.000 per month. Gurleski was responsible for the maintenance of the interior of Gavinos and Respondent was responsible for the exterior. The lease states that it went into effect July 1, 2000 and expired in two years.

Petitioner's exhibit five is a receipt signed by Respondent for \$1,500.00 for money given to Respondent by Michael Gurleski (Petitioner's Ex. 5). The receipt states that Gurleski paid Respondent \$1,500.00 on July 14, 2000, for rent and deposit. It also states that Respondent shall leave her beer license at Gavinos for 90 days from the date of the receipt.

Petitioner's exhibit six is a partnership agreement, dated July 14, 2000, between Michael Gurleski and Julian Flores for Gavinos (Petitioner's Ex. 6). This agreement was to start July 14, 2000 and end on July 1, 2002.

Petitioner's exhibit seven is a letter of authority to operate under a permit or license granted by the Texas Alcoholic Beverage Commission to Respondent (Petitioner's Ex. 7). This letter was issued on June 2, 2000, and it says that Respondent's license and permit would expire on August 3, 2000.

On cross examination, Respondent offered a temporary receipt dated August 2, 2000, showing payment for the renewal of Respondent's late hours permit in the amount of \$418.00 (Respondent's Ex. 1) and a temporary receipt dated August 2, 2000, showing payment for the renewal of Respondent's wine and beer retailers permit in the amount of \$305.50 (Respondent's Ex. 2). When asked to explain how Respondent could have received these receipts one day prior to the date she was given money by Flores to pay for her license and permit, Munsell theorized that it was possible that the receipts were backdated by the clerk so Respondent would not be assessed a penalty for failing to renew the license and permit before they expired.

2. Gilbert Hinojosa

Gilbert Hinojosa is a self-employed accountant and consultant. Hinojosa stated that he loaned \$950.00 to Julian Flores because he thought Flores was the owner of Gavinos. The money was to be used to renew the license and permit. Hinojosa later found out that Flores had entered into a partnership agreement with Michael Gurleski that gave Flores an ownership interest in Gavinos (Petitioner's Ex. 6).

3. Julian Flores

Julian Flores testified that he had a business interest in Gavinos. He stated that he paid Respondent \$4,700.00 to gain part ownership, and in May 2000, he completed renovation on the Club and opened it for business. He said he routinely signed off on invoices from beer distributors.

Flores also testified that he borrowed \$950.00 from Gilbert Hinojosa so Respondent could renew the license and permit for Gavinos. This is evidenced by the receipt dated August 3, 2000 (Petitioner's Ex. 3).

Flores said that he was convicted of possession of cocaine with intent to distribute in 1987. He also was arrested for failure to pay child support in 2000.

B. Respondent's Witness

1. Teresa Ortiz

Teresa Ortiz is the Respondent and the license and permit holder of Gavinos. She testified that Julian Flores was merely the boyfriend of one of her employees. She denied entering into a partnership agreement with Flores.

Respondent offered four exhibits and all were admitted. Respondent's exhibit one is a temporary receipt dated August 2, 2000, showing payment for the renewal of Respondent's late hours permit in the amount of \$418.00 (Respondent's Ex. 1). Respondent's exhibit two is a temporary receipt dated August 2, 2000, showing payment for the renewal of Respondent's wine and beer retailer permit in the amount of \$305.50 (Respondent's Ex. 2).

Respondent's exhibit three is a notarized copy of a receipt for \$1,500.00 for money given to Respondent by Michael Gurleski (Respondent's Ex. 3). This contains the same wording as Petitioner's Ex. 4. However, Respondent's Ex. 3 has been voided by a handwritten paragraph signed by Respondent and Michael Gurleski dated July 12, 2000. The exhibit has been notarized and sworn to on July 12, 2000.

Respondent's exhibit four is a notarized copy of the lease agreement between Respondent and Michael Gurleski (Respondent's Ex.3). This contains the same wording as Petitioner's Ex. 5. However, Respondent's Ex. 4 contains the date of July 14, 2000 in the upper right-hand corner. In addition, Respondent's Ex. 4 has been voided by a handwritten paragraph signed by Respondent and dated July 12, 2000. The exhibit has been notarized and sworn to on July 12, 2000.

Respondent testified that Respondent's Exs. 3 and 4 were voided prior to the date they went into effect. Respondent said that Michael Gurleski told her that he could not enter into a partnership agreement to run Gavinos because the license and permit were not in his name. According to Respondent, she and Gurleski then voided the agreements and had them notarized.

III. APPLICABLE LAW

1. Section 61.71(a)(1) of the Texas Alcoholic Beverage Code states: "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: (15) permitted the use or display of his license in the conduct of business for the benefit of a person not authorized by law to have an interest in the license;" Tex. Alco. Bev. Code Ann. §61.71 (Vernon 1995).

2. Section 2003.021(b) of the Texas Government Code states in pertinent part: "The office (1) shall conduct all administrative hearings in contested cases under Chapter 2001 that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency; (2) shall conduct administrative hearings in matters for which the office is required to conduct the hearing under other law . . ." Tex. Gov't. Code Ann. §2003.021 (Vernon 1998).

3. Section 2001.051 of the Texas Government Code states: "In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case." Tex. Gov't.

Code Ann. §2001.051 (Vernon 1998).

IV. DISCUSSION

The testimony of Respondent and Julian Flores are contradictory. The ALJ must decide who is the more credible witness.

Petitioner has the burden of proof to show Respondent violated the Texas Alcoholic and Beverage Code. Petitioner called three witnesses. Agent Munsell testified that he was informed by Julian Flores that Respondent sold an ownership interest to Flores in Gavinos. However, Petitioner did not offer any written agreements between Respondent and Flores showing this relationship.

Petitioner did produce an agreement between Flores and Michael Gurleski in which they were to become partners in Gavinos. But there was no evidence presented showing Respondent was a party to this agreement.

Petitioner provided testimony from Flores and Gilbert Hinojosa that Hinojosa loaned money to Flores so Flores could renew Respondent's license and permit. Petitioner provided the court with a copy of a receipt stating that Flores paid Respondent \$950.00 so Respondent could renew her beer license (Petitioner's Ex. 3). Respondent denied receiving this money and denied that the signature on the exhibit was hers.

Respondent countered Flores testimony with receipts showing the license and permit were paid one day prior to this loan (Respondent's Exs. 1 and 2). Petitioner then recalled Agent Munsell who said that it was possible that the receipts were backdated by the clerk so Respondent would not be assessed a penalty for failing to renew the license and permit before they expired. While this may be possible, it does not overcome the evidence that the license and permit were renewed before the loan was made.

It must be said that the ALJ finds it highly unusual that on July 12, 2000, Respondent and Michael Gurleski entered into and then voided a lease agreement that was to begin on July 1, 2000. It is also very unusual to have the voided agreement notarized while the original agreement was not notarized.

Nevertheless, the Court must base its decision on the evidence presented. Agent Munsell only knows what he was told by Flores and Hinojosa. Hinojosa only knows that he loaned money to Flores because Flores said he needed to renew his beer license. Hinojosa learned that the license was Respondent's at a later date. Hinojosa does not have personal knowledge of the relationship between Flores and Respondent.

While the Court has reservations about the testimony of Respondent and the method she used to void Respondent's Exs. 3 and 4, the court has greater reservations with the testimony of

Julian Flores. Flores is a convicted felon. Flores did not produce documentation proving that he entered into a partnership agreement with Respondent. Flores only showed that he entered into a partnership agreement with Gurleski and that he gave money to Respondent. It was not proven that Gurleski had an ownership interest in Gavinos. In addition, it was not proven that the money Flores gave to Respondent was used to renew her license and permit. Accordingly, the ALJ cannot conclude that Respondent violated Texas Alcoholic Beverage Code Section 61.71 (a) and recommends that the petition be denied.

V. PROPOSED FINDINGS OF FACT

1. The hearing in Docket No. 458-01-2254 was convened on May 24, 2001, before Administrative Law Judge Kyle J. Groves at the State Office of Administrative Hearings in Corpus Christi, Texas. Christopher Burnett, staff attorney, appeared on behalf of the Texas Alcoholic Beverage Commission (Petitioner). Attorney Celso Rodriguez appeared for Respondent.

2. Respondent was notified of the factual allegations against Respondent in the Notice of Hearing issued by Petitioner on March 14, 2001.

2. Respondent was notified of the date, time, and location of the scheduled hearing by the Notice of Hearing issued by Petitioner on March 14, 2001.

3. Respondent holds Wine and Beer Retailer's Permit No. BG-235295 and Retail Dealer's On-Premise Late Hours License No. BL-235396.

4. Respondent did not permit the use or display of her license in the conduct of business for the benefit of a person not authorized by law to have an interest in the license in violation of Tex. Alco. Bev. Code Ann. §61.71.

IV. PROPOSED CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Tex. Alco. Bev. Code Ann. §11.61 (Vernon 1998).

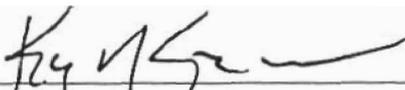
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including issuing this Proposal for Decision with findings of fact and conclusions of law, pursuant to Tex. Gov't. Code Ann. §2003.021 (Vernon 1998).

3. Respondent received proper and timely notice of the hearing in this case.

4. Respondent did not permit the use or display of her license in the conduct of business for the benefit of a person not authorized by law to have an interest in the license.

5. Based upon the Findings of Fact and Conclusion of Law No. 4, Petitioner's adverse action of canceling Respondent's Permit No. BG-235295 and License No. BL-235296 is denied.

SIGNED on this 13th day of August, 2001.


KYLE J. GROVES
Administrative Law Judge
State Office of Administrative Hearings