

DOCKET NO. 606018

IN RE WEST HOUSTON NIGHT LIFE INC.	§	BEFORE THE
D/B/A ELECTRIC COWBOY	§	
PERMIT NOS. MB253720, LB253721	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-4308)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of November 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. A prehearing conference was conducted on September 15, 2003 via telephone conference. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 10, 2003. This Proposal For Decision (**attached hereto as Exhibit "A"**), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. 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 regarding Permit Nos. MB253720 and LB253721 are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on November 26, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 5th day of November, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
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TABC Legal Section

Licensing Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
WEST HOUSTON NIGHT LIFE, INC. D/B/A ELECTRIC COWBOY, Respondent (TABC No. 606018)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR SUMMARY DISPOSITION DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this enforcement action against West Houston Night Life, Inc., d/b/a Electric Cowboy, (Respondent) alleging that Respondent, its agent, employee, or servant failed to promptly report a breach of the peace occurring on the licensed premises¹ in which an assault victim, Michele Johnson, was attacked with a knife or other sharp object on May 23, 2003. The Administrative Law Judge (ALJ) finds, upon a review of the pleadings filed in this cause, that the evidence in this matter shows there is no genuine issue of material facts, and that Respondent is entitled to a decision in its favor as a matter of law. Accordingly, the ALJ recommends that this case be dismissed.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Accordingly, these matters are set out in the proposed findings of fact and conclusions of law without further discussion.

The Respondent filed a Motion to Dismiss in this matter on September 15, 2003, and a prehearing conference was conducted on that day by ALJ Tanya Cooper via telephone conference call. Both parties appeared through counsel. Timothy Griffith, TABC Staff Attorney, appeared on behalf of TABC Staff. Gerald A. Para, Attorney at Law, represented Respondent. The Motion for Dismissal filed by Respondent incorporates a Fort Worth Police Department Offense/Incident Report (Identified as Respondent's Exhibit A). Mr. Griffith confirmed to the ALJ that this document was the same evidence which TABC Staff would also rely upon in the presentation of its evidence in support of the alleged violation. As a result, the ALJ will consider this proceeding under provisions

¹The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit or license in the event a permittee or licensee fails to promptly report a breach of the peace occurring on the licensed premises. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(21) and 61.71(a)(31).



of 1 TEX. ADMIN. CODE § 155.57, for summary disposition.²

II. DISCUSSION

TABC Staff alleges that Respondent failed to promptly report a breach of the peace on the licensed premises on or about May 23, 2003. The alleged incident involved a patron, Michelle Johnson, who claimed to have been assaulted with a knife or other sharp object by another. A "breach of the peace" is not defined in the Texas Alcoholic Beverage Code, (the Code), or other regulations associated with the operation of any TABC-licensed premises (the Rules). However, it has been judicially defined in case law as an act that disturbs or threatens to disturb "the tranquility enjoyed by the citizens" and includes actual or threatened violence as an essential element. Woods v. State, 213 S.W.2nd 685 (Tex.Crim.App. 1948).

The parties in this case have represented that both rely on the same document for proof in this case. The narrative portion of the Fort Worth Police Department Offense/Incident Report is set out in its entirety in the Appendix section of this Proposal.

On May 23, 2003, Sergeant M. Weber, Fort Worth Police Department, was working at the Electric Cowboy, located at 8740 Camp Bowie West, providing security for the licensed premises. Another employee of the licensed premises pointed out Michele Johnson to Sergeant Weber, and advised that Ms. Johnson had been in an argument with other females inside the premises. Sergeant Weber walked to the area of the premises pointed out, but none of the parties were located there.

Later Sergeant Weber was outside the premises and observed Ms. Johnson. She was upset. When Sergeant Weber contacted her, Ms. Johnson reported that she was cut by another female. She was, however, reluctant to provide Sergeant Weber with any details concerning the incident and declined to file any charges at that time. Two small superficial cuts were observed on Ms. Johnson's ring and pinkie fingers, but their location seemed inconsistent to Sergeant Weber with how she had reported that the confrontation occurred. Additionally, Ms. Johnson provided conflicting information to Sergeant Weber concerning the incident.

TABC permittees and licensees are required to promptly report a breach of the peace occurring on their licensed premises. However, before the duty to report can exist, it must be preceded by activity amounting to a breach of the peace. In this instance, much of the evidence contained in the Fort Worth Police Department report, which is relied upon by both parties, is inadmissible hearsay. In the ALJ's opinion, the evidence, as discussed below, would not support TABC Staff's burden of proof in this matter.

Initially, there was a report to Sergeant Weber of an argument between Ms. Johnson and

²Summary Disposition. In response to a party's motion...the judge may issue a proposal for decision... resolving a contested case without evidentiary hearing if the pleadings, affidavits, materials obtained by discovery, admissions, matters officially noticed, stipulations, or evidence of record show there is no genuine issue as to any material fact and that a party is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE ANN § 155.57.

other females. Sergeant Weber went to the area of the reported argument, and found no one

An argument is generally thought of as a quarrel; a discussion in which disagreement is expressed about some point. (*See The American Heritage Dictionary, Second Edition*). While it is true that an argument can escalate into violence, or the threat of violence, generally arguments do not rise to that level of acrimony, and thus, are not a breach of the peace.

Later, Sergeant Weber came into contact with Ms. Johnson, who was upset and claimed someone cut her hand with a knife while she was inside the licensed premises. As set out in the Appendix, Sergeant Weber believed Ms. Johnson's account of the events and the small superficial cuts were not consistent with an individual who has been subjected to a violent assault. Without evidence from a credible, first-hand observer, the ALJ is not persuaded that Ms. Johnson was a victim of an assault arising to the level of a breach of the peace that occurred on Respondent's licensed premises. In the absence of that evidence, no duty arose for Respondent to report a breach of the peace on its licensed premises as a matter of law.

Based on a review of the pleadings in this matter and the ALJ's analysis of the evidence submitted at this point, the ALJ believes that summary disposition dismissal of this case is appropriate for the following reasons. There is no genuine issue as to any material fact in the case; and further, the evidence in this matter is insufficient to support any enforcement action being taken against Respondent as a matter of law.

III. PROPOSED FINDINGS OF FACT

1. West Houston Night Life, Inc. d/b/a Electric Cowboy (Respondent) holds a Mixed Beverage Permit, MB 253720, and a Mixed Beverage Late Hours Permit, LB 253721, issued by the Texas Alcoholic Beverage Commission (TABC) for a premises located at 8740 West Camp Bowie, Fort Worth, Tarrant County, Texas.
2. On August 29, 2003, TABC Staff issued notice of hearing concerning an alleged violation of the Texas Alcoholic Beverage Code (the Code) by Respondent. Respondent filed a Motion to Dismiss in this matter on September 15, 2003. A prehearing conference was requested by the parties and convened by ALJ Tanya Cooper on that same day. Both parties appeared via a telephone conference call through counsel. Timothy Griffith, TABC Staff Attorney, represented TABC Staff and Gerald A. Pare, Attorney at Law, represented Respondent. The parties agreed that the Fort Worth Police Department Offense/Incident Report, attached and incorporated into Respondent's Motion to Dismiss, would be relied upon by both parties for the evidence concerning the issues presented in this case.
3. On May 23, 2003, Sergeant M. Weber, Fort Worth Police Department, was employed by Respondent and providing security for the licensed premises described in Proposed Finding of Fact 1.
4. Sergeant Weber was informed by another of Respondent's employees that Michelle Johnson and other females were engaged in an argument inside the licensed premises.

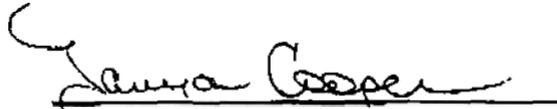
5. Sergeant Weber went to the area of the licensed premises where the argument was supposed to have occurred and saw no one.
6. Sergeant Weber saw Ms. Johnson later in the evening outside the premises in the parking lot as she was leaving; she appeared to be upset.
7. Sergeant Weber approached and spoke to Ms. Johnson, who initially related that she had been cut by a knife inside the licensed premises by an unknown female. Two small superficial cuts were observed on Ms. Johnson's fingers.
8. At the time, Sergeant Weber did not find Ms. Johnson's report credible due to inconsistencies within the account and the improbability of the injuries observed occurring in the manner as described by Ms. Johnson.
9. Based on Proposed Findings of Fact Nos. 2 and 4 - 8, a breach of the peace cannot be established by credible, legally-sufficient evidence as having occurred on Respondent's licensed premises on May 23, 2003.
10. Based on Proposed Findings of Fact No. 9, Respondent had no legal duty to report these events to TABC Staff, and did not fail to promptly report a breach of the peace on the licensed premises.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE. ANN. Chapter 5 and §§ 6.01, 11.61, and 61.71.
2. The State Office of Administrative Hearings 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. Chapter 2003.
3. Notice of the hearing was provided as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.520.
4. Based on the foregoing Proposed Findings of Fact and Conclusions of Law, summary disposition of this contested case is proper because there is no genuine issue as to any material fact in the case and Respondent is entitled to a decision as a matter of law. 1 TEX. ADMIN. CODE §155.57(a).
5. Based on the foregoing Proposed Findings of Fact and Conclusions of Law, Respondent did not violate TEX. ALCO. BEV. CODE §§ 11.61(b)(21) or 61.71(a)(31).
6. Based on the foregoing Proposed Findings of Fact and Conclusions of Law, no enforcement action should be taken against Respondent and the matter should be dismissed based upon

insufficient evidence.

SIGNED this 10th day of October 2003.

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

**TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

APPENDIX

On 052303, Sgt. M.R. Weber 2505 was working an approved offduty job located at 8740 Camp Bowie West, the Electric Cowboy. Earlier in the evening, one of the floor walkers/employee at the Electric Cowboy pointed out the comp. and stated that the comp. was involved in an argument with several other females inside the club. Sgt. Weber went to where the argument was; however, the argument had broke up and the parties had gone their separate ways.

At approx. 0130 hrs., Sgt. Weber was standing outside the club when he observed the comp. very upset. The comp. stated that she was cut by another female in the club. Sgt. Weber asked for information as far as the cutting and the comp. was very reluctant to provide any information. The comp. stated numerous times that she did not want to file any charges, that she just wanted to go home.

Sgt. Weber asked if the susp. was in the club and the comp. stated that no the susp. had run away. The comp. originally stated that the susp. was brandishing a knife and made some type of verbal threat to her and then cut the comp. However, a little later the comp. stated that she did not get a good look at the susp. and would not be able to recognize the susp. Comp. stated that she held up her hands because she was worried about getting cut in the face when she saw the knife from this unknown female that she stated she never saw before, however could not recognize. The cuts to the comp. to the left hand consisted of 2 small cuts, 1 to each finger, her ring finger and pinkie finger. However, this Ofcr. found it strange that a defensive wound would have cuts to the top of the hand and not the bottom or the palm area or the underneath of the fingers. The comp's wounds were to the top of the finger just below the fingernails.

The comp. later, after being questioned about the incident, stated that "If I knew who the bitch was, I would file charges." At that point, the comp. changed her mind and stated that she did want a police report made. It should be noted that the comp. was talking about suing the club.

Sgt. Weber gave the comp. a copy of the SN and advised her that a report would be filed. The comp. refused any medical treatment. The cuts to the comp.'s hands were superficial.