

DOCKET NO. 606182

IN RE B & J INVESTMENTS INC.	§	BEFORE THE
D/B/A J. J.'S BAR	§	
PERMIT NO. MB-485370 & LB-485371	§	
	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
<i>(SOAH DOCKET NO. 458-04-8195)</i>	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 17th day of March, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on October 29, 2004 , and the record was left open until November 8, 2004 . The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 19, 2005. 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 April 7, 2005, 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 17th day of March, 2005.

On Behalf of the Administrator,

A handwritten signature in cursive script, appearing to read "Jeannene Fox", written over a horizontal line.

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/yt

The Honorable Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings,
VIA FACSIMILE: (713) 812-1001

John Trueheart, Jr.
ATTORNEY FOR RESPONDENT
5100 Westheimer, Suite 131
Houston, Texas 77056
REGULAR MAIL

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

DOCKET NO. 458-04-8195

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**B & J INVESTMENTS INC.
D/B/A J. J.'S BAR
Harris County, Texas
(TABC DOCKET 606182)**

§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this disciplinary action against B & J Investments Inc. d/b/a J. J.'s Bar (Respondent), alleging that Respondent's agent, servant or employee, was intoxicated on the licensed premises, in violation of the Texas Alcoholic Beverage Code § 11.61 (b)(13). No allegation of serving an intoxicated person was made by Petitioner. Petitioner requested that Respondent's permit and license be suspended or canceled. Having found that Kenneth Kellough was intoxicated but was not an employee of the Respondent, the Administrative Law Judge recommends that no action be taken against the permit and that no suspension be imposed

I. PROCEDURAL HISTORY

On October 29, 2004, Rex A. Shaver, Administrative Law Judge for the State Office of Administrative Hearings (SOAH), convened a public hearing at the Hearing Facility of the State Office of Administrative Hearings, Houston, Texas. Respondent appeared and was represented by attorney John H. Trueheart, Jr. Staff attorney Dewey Bracken represented TABC. Evidence and argument were heard, and the record remained open through November 8, 2004 for the filing of briefs and written argument.

II. JURISDICTION AND NOTICE

The Commission has jurisdiction over this matter pursuant to §§ 6.01 and 11.61 of the Code. 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. Chap. 2003.

The Respondent is the holder of Mixed Beverage Permit MB485370 and Mixed Beverage Late Hours permit LB-485371 and held that permit and license on the date of the alleged violation. On September 9, 2004, the Notice of Hearing was mailed to the Respondent at 14634 Honeycomb Ln., Cypress, Texas 77429-2235. Respondent received the notice pursuant to TEX. GOV'T CODE ANN. Chap. 2001.

III. EVIDENCE

Documentary Evidence:

TABC Exhibit 1: *Seller Server Training Confirmation for Kenneth Kellough.*

TABC Exhibit 2: *Permit and Violation History Affidavit.*

TABC Exhibit 3: *Seller Server Training Confirmation for Loretta Dicky.*

Testimony:

1. **Michael Lockhart:**

On July 11 2003, Mr. Lockhart was an agent of the TABC and in that capacity he entered the premises of Respondent, J. J.'s Bar as part of a routine "sale to intoxicated person sting." Because of the

undercover nature of the “sting” Mr. Lockhart was in plain clothes and did not identify himself as an agent of the TABC. The premises were located at 4505 Hwy. 6N, Suite 950 in Houston, Harris County, Texas. Upon entering the premises Mr. Lockhart was greeted by a person later identified to him as Kenneth Kellough. Mr. Lockhart observed Mr. Kellough to appear unsteady on his feet, and to have trouble expressing himself. Mr. Kellough attempted to shake hands with Mr. Lockhart but lost his balance and grabbed Mr. Lockhart’s arm to keep from falling. These observations led Mr. Lockhart to form the opinion that Mr. Kellough was intoxicated.

Mr. Lockhart made additional observations that led him to believe that Mr. Kellough was acting as an agent, servant or employee of the Respondent. He observed Mr. Kellough as he took empty boxes off of the bar and begin folding them and placing them in a trash can. He then observed Mr. Kellough push and drag the trash can out of the door and into the parking lot. Having formed the opinion that Mr. Kellough was intoxicated and might be an employee of J. J.’s Bar he then contacted the open agents, waiting outside of the premises, by cell phone and conveyed his observations and opinions to them.

Mr. Lockhart remained in the premises and continued his observations while the open agents entered the premises. During this time he observed the bartender, later identified as Loretta Dickey, exit through the same door as Mr. Kellough and then return to the bar. Mr. Lockhart maintained his undercover status and remained in the bar for a period before returning to the other agents.

On cross examination Mr. Lockhart testified that he was inside the premises for 20 minutes. He further testified that he did not see anyone give Mr. Kellough instruction as to when to fold boxes or take out the trash can. He did not observe anyone giving instructions to Mr. Kellough. He did not observe any compensation being paid or given to Mr. Kellough for these actions.

2. Deborah Kersh:

On July 11, 2003, Ms. Kersh was an agent of the Texas Alcoholic Beverage Commission and in that capacity she was at the premises of Respondent, J. J.'s Bar as part of a routine "sale to intoxicated person sting." In her role as an open agent she remained outside of the bar while Agent Lockhart entered the premises in an undercover capacity. When violations are reported by the undercover agent, she and other open agents would enter the premises and confront the alleged violators.

At 1:25 a.m. on July 11, 2003, Agent Lockhart contacted the open team and reported possible violations and an intoxicated person in the parking lot with a trash bag. She observed an individual later identified as Kenneth Kellough in the parking lot with a trash bag picking up cans. She approached Mr. Kellough and identified herself as a law enforcement officer. She observed Mr. Kellough to have a strong odor of an alcoholic beverage on his breath, bloodshot eyes, slurred speech, unstable balance, a stumble when walking and used a vehicle for support when standing. Mr. Kellough admitted to drinking six or seven alcoholic beverages that night. No sobriety tasks were requested because she thought that Mr. Kellough might injure himself.

She also testified that Mr. Kellough told her that for several years he had worked at J. J.'s Bar as a bar back. He told her that he was not paid in cash but received free drinks.

Ms. Kersh also had contact with Loretta Dickey who identified herself as the manager of J. J.'s Bar.

The witness testified that Ms Dickey told her that Mr. Kellough had "hung around" the bar for a few years but was not paid. Ms. Kersh then issued Mr. Kellough a class C citation for public intoxication.

During this investigation Ms. Kersh observed no one exercising any direction or control over Mr. Kellough. She did not observe Mr. Kellough receive any compensation or drinks from J. J.'s Bar.

3. Kenneth Kellough:

Mr. Kellough testified that he was born on October 10, 1940, and retired in 1992. He related that he takes medication for high blood pressure and his thyroid. He has suffered three strokes. A stroke in 2002 affected his speech on July 11, 2003, and continued to give him a slight speech impediment at the time of his testimony.

The witness testified that he was present at J. J.'s Bar on July 11, 2003. Mr. Kellough testified that he took a garbage can full of empty beer bottles to the trash cans behind the premise. He denied going behind the bar to reach the trash can. Mr. Kellough testified that Loretta Dickey dragged the can to an entry way from behind the bar and he then rolled the can outside through the front door. The can contained several bags. He could not have lifted the entire can. He testified that several patrons would help take out heavy trash as a courtesy to the bartender and were not compensated for that service.

Mr. Kellough denied telling any law enforcement officers that he had consumed 6 or 7 drinks. He stated that he had arrived at the bar at around 11:00 p.m. He did have three or four scotch and water mixed drinks. He denied telling any agent that he was intoxicated. He told a female agent that he had not stumbled but had tripped by the trash can on rollers he was taking to the trash cans.

Mr. Kellough stated that he was a regular patron at J. J.'s Bar, having gone there since 1990. He would on occasion help clean up after a friend's party at the bar and would remove decorations and remove bottles from the tables. He also stated that on one or two occasions he had coffee in the morning at J. J.'s Bar and would go behind the bar to help put up clean glasses. He stated he did this just to help

a friend. He denied ever receiving a drink in compensation for his help. He testified that he did receive free drinks when the bar manager provided a complimentary round of drinks to a group of which he was a member.

4. Loretta Dickey:

Ms. Dickey testified that on July 11, 2003, she was at J. J.'s Bar working as the bartender and was the only employee present. Mr. Kellough was also present. On that night, he helped her empty the trash. He did not help her every night but "maybe couple of times a week." Ms. Dickey testified that Mr. Kellough did not come into the bar every night. Ms. Dickey testified that Mr. Kellough did help clean up after parties as did many regular patrons. This would include clearing tables of glasses and bottles. Ms. Dickey stated that Mr. Kellough had never worked as a bar back for her and that she cleaned glasses and did her own work. She has five trash cans she has to take out. Many customers offer to help her carry out the heavy cans. Mr. Kellough never received any instructions from her on how or when to empty the trash. She testified that she occasionally buys good customers drinks. She has done this for Mr. Kellough. That complimentary drink is not placed on his tab. He runs a tab which he pays at the end of the night. On the night in question, Mr. Kellough came in late and she recalled serving him two or three drinks. She did not know if he had any other drinks earlier in the day. She did not know if Mr. Kellough was intoxicated.

Ms. Dickey denied saying that "He said he works here." She stated that she told the TABC agents that he did not work at the bar. She did not ask Mr. Kellough to attend the Seller/Server class, but it was given at J. J.'s Bar and was open to anyone who was there.

IV. DISCUSSION

The testimony of Agent Lockhart and Agent Kersh was clear and convincing. They observed Kenneth Kellough to have an odor of an alcoholic beverage on his breath, bloodshot eyes, slurred speech and unstable balance. Mr. Kellough admitted drinking. The testimony was sufficient to show by a preponderance of the evidence that Mr. Kellough was intoxicated on the licensed premises.

While the evidence established that Mr. Kellough was intoxicated, there was no showing that a *quid pro quo* existed with payment of money or drinks for this help. Mr. Kellough did not go to J. J.'s bar every night. The bartender gave him no instructions as to when or how to accomplish any tasks. Many other customers did the same things that Mr. Kellough did around the bar. The testimony of Ms. Dickey and Mr. Kellough was reasonable and provided believable proof that Mr. Kellough was not an agent, servant or employee of B & J Investments, Inc. but was rather a regular customer who on occasion helped the female bartender with clearing tables and carrying heavy trash. The evidence presented at this hearing taken as a whole was insufficient to establish that Kenneth Kellough was an agent, servant or employee of B&J Investments, Inc. d/b/a J. J.'s Bar. It is, therefore, recommended that no action be taken against the permit and that no suspension be imposed.

V. PROPOSED FINDINGS OF FACT

1. On July 11, 2003, Kenneth Kellough was not an agent, servant or employee of B & J Investments, Inc. d/b/a J. J.'s Bar.
2. On July 11, 2003, Kenneth Kellough was intoxicated on the licensed premises of B & J Investments, Inc. d/b/a J. J.'s Bar.
3. On July 11, 2003, Kenneth Kellough folded and placed boxes into a trash can

4. On July 11, 2003, Kenneth Kellough took a trash can full of empty beer cans from the bar and to the trash area in the parking lot.
5. These actions by Kenneth Kellough were done as a personal favor for the bartender, Loretta Dickey, and not for B & J Investments, Inc. d/b/a J. J.'s Bar.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Section and 11.61(b)(2) of the TEX. ALCO. BEV. CODE ANN (Vernon's 1999).
2. The State Office of Administrative Hearings has jurisdiction in 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 (Vernon's 2005)
3. Service of proper and timely notice of the hearing was given to the Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. Chapter 2001, and 1 TEX. ADMIN. CODE Chapter 155.
4. No violation of §11.61(b) (13), TEX. ALCO. BEV. CODE ANN. was proven by a preponderance of the evidence.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that no action be taken against the permit and that no suspension be imposed.

SIGNED January 19, 2005.

R. Shaver - by S. Burger, ALJ -
with permission
REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS