

DOCKET NOS. 611874 and 616238

LEONARDO ADEMYRK MENDOZA	§	BEFORE THE TEXAS
D/B/A EL CONQUISTADOR	§	
LICENSE NO(s). BG320519, BL320520	§	
	§	ALCOHOLIC
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1440)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this July 14, 2006, 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 April 7, 2006 and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 1, 2006. The Proposal For Decision, attached 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. 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, with the following changes:

The Assistant Administrator of the Texas Alcoholic Beverage Commission includes and amends Findings of Fact #4 to read as follows:

"On July 30, 2004, Greg Lewis, Kelly Kersh, and Michael Sehon observed consumption of alcoholic beverages on the licensed premises and in a location within view of the bartender **during prohibited hours.**"

The Assistant Administrator of the Texas Alcoholic Beverage Commission includes and amends Findings of Fact #5 to read as follows:

"On April 2, 2005, John Donahoo and Greg Lewis observed consumption of alcoholic beverages on the licensed premises and in a location within view of the bartender **during prohibited hours.**"

All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein, are denied.

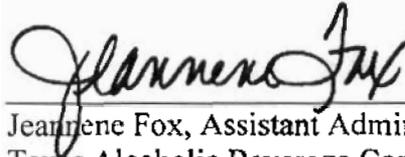
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your license(s) are hereby **CANCELLED FOR CAUSE.**

This Order will become final and enforceable on August 3, 2006, 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 the 14th day of July, 2006 at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Hon. Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
Via Facsimile: (713) 812-1001

Leonardo Ademyrk Mendoza
RESPONDENT
d/b/a EL Conquistador
8121 Barkley St.
Houston, Texas 77002
CERTIFIED MAIL NO. 7005 3110 0000 6409 0925

Edward P. Sillas
ATTORNEY FOR RESPONDENT
8400 Howard Drive
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Via Facsimile: (713) 645-1522

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

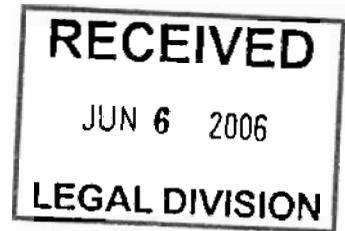
Licensing Division

Houston District Office

State Office of Administrative Hearings *SPT*



Shelia Bailey Taylor
Chief Administrative Law Judge



June 1, 2006

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

VIA REGULAR MAIL

611874

**RE: Docket No. 458-06-1440; Texas Alcoholic Beverage Commission
Ademyrk Mendoza d/b/a El Conquistador**

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 "Rex A. Shaver".

Rex A. Shaver
Administrative Law Judge

RAS/mc
Enclosure

xc: Sandra Patton, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL
Edward P. Sillas, Attorney at Law, 8400 Howard Drive, Houston, Texas 77017 - VIA REGULAR MAIL

On February 17, 2006, Petitioner issued its notice of hearing, directed to Respondent and its attorney, Eduardo P. Sillas. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On April 7, 2006, a hearing convened before SOAH ALJ, Rex Shaver, at the SOAH office located at 2020 N. Loop West, Suite 111, Houston, Texas 77018. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Edward P. Sillas. Following presentation of evidence and argument of counsel the record was closed on the same day.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (18) TABC may suspend or cancel a mixed beverage permit if it finds after notice and hearing:

[T]hat the licensee consumed an alcoholic beverage or permitted one to be consumed on the licensed premise at a time when the consumption of alcoholic beverages is prohibited by this code.

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 105.06 (c):

[A] person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a.m. and 12 noon and on any other day between 2:15 a.m. and 7 a.m.

III. EVIDENCE

A. **Documentary Evidence: TABC Exhibit 1: Respondent's Permit and License History**

Respondent holds a Wine and Beer Retailer's Permit issued by TABC, BG-320519, which includes the Retail Dealer's On-Premise Late Hours License, for the premises located at 3907 ½ Canal, Houston, Harris County. The permit and license were originally issued on the 8th day of August 1996, and have been continuously renewed.

B. **Testimony Regarding the Alleged Violations:**

(1) Greg Lewis testified that on July 30, 2004, he had occasion to visit the premises of El Conquistador located at 3907 ½ Canal in Houston, Harris County, Texas. That visit was in his official capacity as a TABC enforcement agent. He and Agent Miguel Campos were in an undercover capacity, investigating claims that the licensee was selling alcoholic beverages during prohibited hours. They entered the location at 2:15 a.m. At approximately 2:20 a.m. the witness Lewis approached the bar and purchased 2 beers from the bartender who was later identified as Dennis Mendoza. The witness observed 20 or 30 people still on the premises and half of those persons were consuming alcoholic beverages in the seating area directly across from the bar area. The bartender had an unobstructed view of the patrons in that area.

Mr. Lewis also testified that on April 2, 2005, at 2:45 a.m., he had another occasion to enter the premises of El Conquistador. He and several other agents were operating in an open capacity to investigate claims that the licensee was selling alcoholic beverages during prohibited hours. Dennis Mendoza was tending bar was once again tending bar. Agent Lewis observed 20 to 30 patrons on the premises and consuming alcoholic beverages. Eleven of those patrons were cited for consuming alcoholic beverages in a public place during prohibited hours.

(2) Kelly Kersh testified that on July 30, 2004 she had occasion to visit the premises of El Conquistador located at 3907 ½ Canal in Houston, Harris County, Texas. That visit was in her official capacity as a TABC enforcement agent investigating claims that the licensee was selling

alcoholic beverages during prohibited hours. She was working as an open agent and along with other agents entered the premises at approximately 2:35 a.m. after being called in by the undercover team. She entered through the front entrance. The witness observed 25 or 30 people on the premises and 50% to 60% of those persons were drinking beer from bottles. She testified that she served Dennis Mendoza with administrative notice of the violation and other agents cited four of the patrons who were consuming alcoholic beverages during prohibited hours.

(3) Michael Sehon testified that he had occasion to enter the premises of El Conquistador at 3907 ½ Canal in Houston, Harris County, Texas on July 30, 2004 at approximately 2:35 a.m. He was acting in his capacity as an enforcement agent with the TABC and he was a part of the open enforcement team. He observed 10 persons in the bar and 2 of those persons were consuming alcohol on the premises. The witness testified that he wrote citations to those 2 patrons. The witness testified that he had no memory of taking part in an enforcement action on April 2, 2005, regarding El Conquistador.

(4) John Donahoo testified that on April 2, 2005, he took part as a TABC enforcement agent in an enforcement action concerning prohibited hours consumption at El Conquistador. He entered the premises in an open capacity at approximately 2:45 a.m. and he observed 20-30 people on the premises and issued citations to 2 persons he observed consuming alcoholic beverages during prohibited hours. He did not issue a citation to Leonardo Mendoza. He had no recollection of dealing with El Conquistador prior to April 2, 2005.

(5) Bradley Warner testified that in his capacity as a TABC enforcement agent he took part in an enforcement action against El Conquistador on April 2, 2005. He was acting as an open agent when entering El Conquistador with his partner, Agent Lewis, at approximately 3:30 or 4:00 a.m. He observed one patron consuming an alcoholic beverage. Agent Lewis issued a citation to that patron.

IV. ANALYSIS

The testimony of the first four witnesses was consistent, and un-controverted. The final witness, Bradley Warner, testified that his memory of the event was that he entered the premises at 3:30 or 4:00 a.m. rather than 2:15 to 2:45 a.m. testified to by the other witnesses. This difference in the time of observation of consumption of alcoholic beverages is insufficient to cast doubt on the testimony of the other witnesses. It should be noted that whether the time was 2:15 a.m. or 4:00 a.m. it would still be during the prohibited hours of consumption.

Testimony established that the prohibited hours consumption in July of 2004, occurred in the early morning hours of July 30, 2004. The Notice of Hearing in this matter alleged "On or about July 29, 2004" and was sufficient to advise the Respondent of the nature and date of the alleged violations so that he could respond and prepare a defense.

V. PROPOSED FINDINGS OF FACT

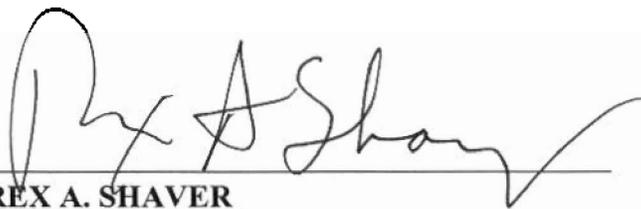
1. Leonardo Ademyrk Mendoza d/b/a El Conquistador (Respondent) holds a Wine and Beer Retailer's Permit , BG-320519, which includes the Retail Dealer's On-Premise Late Hours License issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 3907 ½ Canal, Houston, Harris County, Texas.
2. These permits were originally issued on August 8, 1996, and has been continuously renewed.
3. Respondent has a violation history of five (5) Administrator's Orders, Docket Nos. 602684 (10 day suspension), 601013 (30 day suspension), 596672 (10 day suspension), 592434 (30 day suspension) and 585378 (10 day suspension).
4. On July 30, 2004, Greg Lewis, Kelly Kersh, and Michael Schon observed consumption of alcoholic beverages on the licensed premises and in a location within view of the bartender.
5. On April 2, 2005, John Donahoo and Greg Lewis observed consumption of alcoholic beverages on the licensed premises and in a location within view of the bartender.
6. On February 17, 2005, Petitioner issued its notice of hearing, directed to Respondent and his attorney, Eduardo P. Sillas.

7. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
8. On April 7, 2006, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Rex Shaver at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Harris County, Texas.
9. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared and was represented by his attorney, Eduardo P. Sillas.
10. On April 7, 2006, following presentation of evidence and argument of counsel, the record was closed

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 61.71 (a) (18) and 105.06.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.
4. Respondent, his agent, servant or employee permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours on both July 30, 2004 and on April 2, 2005 in violation of §§ 61.71(a)(18) and 105.06 of the Code.
5. Respondent's permits should be cancelled. TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (18) and 16 TEX. ADMIN. CODE § 37.60.

SIGNED June 1, 2006.



REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS