

DOCKET NO. 615053

IN RE MARIO DE SANTIAGO	§	BEFORE THE
D/B/A STAGE COACH LOUNGE	§	
PERMIT/LICENSE NOS. BG125136	§	
	§	TEXAS ALCOHOLIC
	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1083)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 19th day of May 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on March 1, 2006 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 26, 2006. 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. 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 Respondent's permits and licenses be CANCELLED FOR CAUSE.

This Order will become final and enforceable on June 9, 2006 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.

SIGNED this 19th day of May, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC/bc

The Honorable Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (915) 834-5657

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Mario De Santiago
d/b/a Stage Coach Lounge
RESPONDENT
4200 Alameda Ave.
El Paso, Texas 79905
VIA CM/RRR NO. 7001 2510 0000 7274 1577

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
V.	§	
	§	
MARIO de SANTIAGO	§	OF
d/b/a STAGE COACH LOUNGE	§	
Respondent	§	
	§	
EL PASO COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS
(TABC CASE NO. 615053)	§	

PROPOSAL FOR DECISION

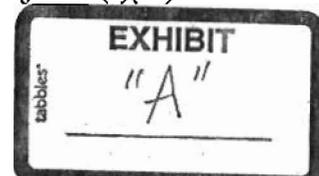
The staff at the Texas Alcoholic Beverage Commission (“Petitioner”) brought this enforcement action against Mario de Santiago d/b/a Stage Coach Lounge (“Respondent”), alleging two counts: possession of drugs, and that Respondent has been convicted of a felony while holding an original or renewal license. The Petitioner seeks the cancellation of the permit and license based on lewd, immoral, indecent conduct,¹ the general welfare, health, peace morals and safety of the people,² and based on Respondent’s alleged felony conviction.³ The cancellation of the permit and license would prevent the club from selling alcoholic beverages.

After a contested case hearing and review of the applicable law hereto, this proposal for decision recommends cancellation of the Wine and Beer Retailer’s Permit and cancellation of the Retail Dealer’s On-Premise Late Hour License.

¹ TEX.ALCO.BEV.CODE ANN. § 104.01(9).

² TEX.ALCO.BEV.CODE ANN. §§ 11.61(b)(7), 61.71(a)(17) and 16 TEX.ADMIN.CODE § 35.31(c)(15).

³ TEX.ALCO.BEV.CODE ANN. §§ 61.71(a)(3) and 11.61(b)(3).



I. NOTICE AND JURISDICTION

A notice of hearing was issued on January 18, 2006, by the Texas Alcoholic Beverage Commission. Petitioner issued an amended notice of hearing on February 15, 2006, apprising all parties of Petitioner's allegations and of the hearing date. Notice and jurisdiction were not contested issues and are addressed in the findings of fact and conclusions of law without further discussion here.

II. PROCEDURAL HISTORY

On March 1, 2006, a contested case hearing was convened in this matter in El Paso, Texas, before the State Office of Administrative Hearings. Petitioner was represented by Mr. W. Michael Cady, staff attorney. The Applicant was represented by Mr. Eduardo N. Lerma, Sr., attorney at law. Administrative Law Judge (ALJ) Veronica S. Najera presided. The record closed that same date.

III. DISCUSSION

A. Background

Respondent operates a bar establishment within the City and County of El Paso, Texas.⁴ Respondent holds a Wine and Beer Retailer's Permit⁵ and a Retail Dealer's On-Premise Late Hour

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The Stage Coach Lounge is located at 4200 Alameda Avenue, El Paso, El Paso County, Texas.

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See Petitioner's Exhibit No. 3, Wine and Beer Retailer's Permit BG-125136. The permit will expire on May 26, 2006.

License.⁶ The permit and license were originally issued on May 27, 1980, and have been continuously renewed.

B. Evidence

Petitioner proffered six exhibits: the laboratory report from the Texas Department of Public Safety dated June 14, 2005 (Exhibit No.1); the amended notice of hearing (Exhibit No. 2); Respondent's administrative record (Exhibit No. 3); El Paso Police Department supplemental report (Exhibit No. 4); a certified copy of Judgment of Plea of Guilty before the 120th District Court and Waiver of Jury Trial (Exhibit No. 5); and TABC's request for hearing document with prior violations (Exhibit No. 6). All were admitted into evidence. TABC Enforcement Agent Wesley Rappe, El Paso Police Officer Chris Johnson, El Paso Police Officer Martin Ramirez and El Paso Police Officer Gabriel Corral testified for Petitioner.

Respondent was called as an adverse witness but invoked his 5th amendment right. Respondent did not proffer any evidence or testimony.

IV. EVIDENCE AND ARGUMENT

A. Petitioner's case

The Petitioner seeks the cancellation of Respondent's permit and license based on the fact that the owner of the bar, Mr. de Santiago, was found to be in possession of narcotics inside the bar establishment on January 7, 2005. To support its position, the Petitioner relies on police reports and on the testimony of the police officers who conducted the bar check. The evidence shows, as

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See Petitioner's Exhibit No. 3, Retail Dealer's On-Premise Late Hour License BL-125137. The license will expire on May 26, 2006.

recounted in the following paragraphs, that cocaine was found in the establishment. Specifically, a diamond fold was found on Respondent's desk, two diamond folds were found in a magnetic key holder under the same desk, and a plastic bag with powdery substance was found inside the wall. The desk was in Respondent's office at the bar establishment. The powdery substance found inside the wall weighed 27.80 grams. The three diamond folds weighed a total of 0.57 grams. All evidence tested positive for cocaine.

First, El Paso Police Officer Johnson, testified that the police department conducted a bar check at the Stage Coach Lounge on January 7, 2005. He said that six or seven officers participated. He explained that they entered the bar via the front door, except for Officer Corral, who went in the back door to prevent anyone from leaving the establishment. Officer Johnson said that he spoke with Respondent and informed him that they were conducting a bar check with a narcotics dog. Officer Johnson said that the dog alerted them to the desk facing the wall. On the desk, the officer found a diamond fold with white powdery substance. A magnetic key holder filled with two diamond folds of cocaine was found under the desk. The dog also alerted them to the corner of the desk. The officer explained that the desk was pushed against the wall corner, and upon moving the desk away from the wall, they found a piece of wood nailed to the wall. Inside the wall was a powdery substance later identified as 27 grams of cocaine.

The officer testified that the diamond folds were folded for street sale, and that all tested positive for cocaine. The officer further stated that Respondent told him that "they belonged to him." Respondent also admitted to him that the substance found was cocaine.

Officer Johnson further testified that Respondent stated that he purchased some of the cocaine for his personal use, and "to make rent because he could not make rent alone with the sale of alcohol." An unregistered gun was also found in Respondent's office.

Next, Officer Ramirez testified that he assisted with the bar check. His testimony was consistent with Officer Johnson's testimony. He said that after the dog alerted them to the wall, Officer Corral found a plastic bag/wrap with cocaine inside the wall cavity. He also said that the

diamond wraps were found on and under Respondent's desk.

Officer Corral testified. His testimony was also consistent with the prior testimony of Officer Johnson and Officer Ramirez. Officer Corral was the dog handler at the bar check. Officer Corral entered the bar via the back door which led him into Respondent's office. Officer Corral said that he found Respondent sitting at his desk which was situated in a small room at the rear entrance of the bar. The small room is Respondent's office. He also testified that the dog alerted them to the desk. He said a diamond fold was found on the center of the desk, two diamond folds were found in a magnetic key holder under the desk, and a plastic bag with powdery substance was found inside the wall.

B. Respondent's case

Respondent did not proffer any evidence or testimony.

V. LEGAL STANDARD

The Texas Alcoholic Beverage Commission asserts three grounds for the cancellation:

- First, it seeks cancellation based on lewd, immoral, indecent conduct which specifically defines the possession of a narcotic as a prohibited conduct.⁷
- Second, it seeks cancellation based on the general welfare, health, peace morals and safety of the people which specifically defines any narcotic offense as an offense

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TEX.ALCO.BEV.CODE ANN. § 104.01(9) [Regulation of Retailers], states that no person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency including the possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.

against the general welfare.⁸

- Third, based on Respondent's alleged felony conviction.⁹

Under TABC administrative rules, "narcotic" is defined as "any substance defined in the Texas Controlled Substance Act."¹⁰ Cocaine is one of the controlled substances defined in the Texas Controlled Substance Act.¹¹

Furthermore, "premises" is defined as the grounds and all buildings, vehicles and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.¹²

VI. ANALYSIS

Respondent did not offer any evidence to rebut the occurrence of the alleged violations. There was a brief argument made about the fact that the narcotic was found in the office, and not the

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TEX.ALCO.BEV.CODE ANN. § 11.61(b)(7) [Cancellation and Suspension of Permits], which states that the commission or administrator may cancel an original or renewal permit if it is found, after notice and hearing, that the place and manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Section 61.71(a)(17) [Cancellation and Suspension of Licenses: Retail Dealers] has the exact general welfare/place and manner language as contained in § 11.61(b)(7) applicable to permits. Any narcotics related offense has been defined as an offense against the general welfare in 16 T.A.C. § 35.31(c)(15).

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Both TEX.ALCO.BEV.CODE ANN. § 61.71(a)(3) [Grounds for Cancellation or Suspension of Licenses: Retail Dealer] and § 11.61(b)(3) [Cancellation or Suspension of Permits] provide for cancellation if the licensee was convicted of a felony while holding an original or renewal license or permit.

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16 TEX.ADMIN.CODE § 35.41(b).

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TEX. HEALTH & SAFETY CODE ANN. § 481.002.

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TEX.ALCO.BEV.CODE ANN. §11.49.

bar. This point is not persuasive since the narcotic was found in Respondent's office which is located within the bar and falls within the definition of "premises" as defined as the grounds and all buildings, vehicles and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.¹³ The office was under Respondent's control.

Persuasive is the fact that the applicable Code¹⁴ has specifically defined any narcotic related offense as lewd, immoral, indecent conduct and as a place or manner offense against the general welfare. Possession of a narcotic is a *per se* violation of the Code. There is no dispute that cocaine was found within the bar establishment. There is also no dispute that the narcotic belonged to the permit holder, the Respondent. In fact, Respondent placed himself in the category of drug dealer by telling the officer that he planned to sell the cocaine to make rent.

With regard to cancellation based on Respondent's alleged felony conviction, the evidence shows that Respondent pled guilty to the charge of possession of a controlled substance and waived his trial rights, but that Respondent was given deferred adjudication, without entering a judgment of guilt.¹⁵ Thus, Respondent was not convicted of a felony while holding an original or renewal license or permit. Thus, the ALJ does not consider this allegation as a basis for cancellation, but finds that the evidence suffices to prove Respondent possessed narcotics on the permitted premises.

Therefore, the possession of the narcotic by the owner of the licensed establishment is a situation which justifies a finding that Respondent engaged in lewd, immoral and indecent conduct. Furthermore, the possession of the narcotic evidences that the manner in which the business has been conducted warrants cancellation of the permit and license based on the general welfare.

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Id.

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The "Code" is the Texas Alcoholic Beverage Code.

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See Exhibit No. 5, a certified copy of Judgment of Plea of Guilty before the 120th District Court and Waiver of Jury Trial.

C. Recommendation

For the reasons stated in the preceding section, the ALJ recommends cancellation of the Wine and Beer Retailer's Permit and cancellation of the Retail Dealer's On-Premise Late Hour License.

VII. FINDINGS OF FACT

1. Respondent holds a Wine and Beer Retailer's Permit BG-125136 and a Retail Dealer's On-Premise Late Hour License BL-125137 issued by the Texas Alcoholic Beverage Commission for the premises located at 4200 Alameda Avenue in El Paso, El Paso County, Texas.
2. On January 18, 2006, the staff Texas Alcoholic Beverage Commission sent notice informing Respondent of the hearing time, date and location; of the allegation(s) it intended to prove, the legal grounds for the action; and of the right to be represented by counsel, as well as a short statement of the matters asserted.
3. Petitioner issued an amended notice of hearing on February 15, 2006, apprising all parties of Petitioner's allegations and of the hearing date.
4. On March 1, 2006, a contested case hearing was convened in this matter before the State Office of Administrative Hearings in El Paso, Texas.
5. The record closed on March 1, 2006.
6. Three El Paso Police Officer's testified and they had first hand knowledge of the bar check.
7. The police officer's testimony was consistent.
8. The police officers were credible.
9. On January 7, 2005, three El Paso Police Officers found diamond fold on Respondent's desk, two diamond folds of cocaine in a magnetic key holder under the same desk, and a plastic bag with powdery substance inside the wall in Respondent's office.
10. The desk was in Respondent's office at the bar establishment.
11. Respondent was sitting at his desk when the officer first made contact with him.

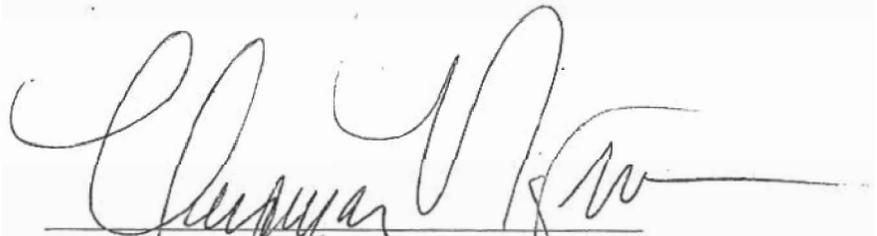
12. All evidence seized as a result of the bar check on January 7, 2005 tested positive for cocaine.
13. The three diamond folds of cocaine weighed a total of 0.57 grams.
14. The cocaine found inside the wall weighed 27.8 grams.
15. Respondent admitted that the cocaine found by the officers belonged to him.
16. Respondent sold cocaine out of the licensed premises.
17. Respondent's prior violations include sale to an intoxicated person in 2001, for which Respondent entered into an Agreement and Waiver of Hearing with Petitioner on April, 18, 2002, and for which he agreed to six days suspension or a penalty of \$900.00.
18. Respondent's additional violations include a place or manner violation in November 2002 and miscellaneous violations in 1999.

VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 6.01 and 61.13.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE §§ 2001.051 and 2001.052.
4. Based on the Findings of Fact, Respondent possessed a narcotic on the licensed premise in violation of Texas Alcoholic Beverage Code §§ 104.01(9), 11.61(b)(7), 61.71(a)(17), 16 Texas Administrative Code § 35.31(c)(15) and Texas Health and Safety Code §§ 481.115 and 481.125.
5. Based on the Findings of Fact, Respondent did not have a criminal conviction for the January 7, 2005, cocaine possession and did not violate the Texas Alcoholic Beverage Code §§ 61.71(a)(3) and 11.61(b)(3).

6. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner should cancel Respondent's Wine and Beer Retailer's Permit No. BG-125136 and Retail Dealer's On-Premise Late Hour License No. BL-125137.

SIGNED April 26, 2006.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 26, 2006



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA FACSIMILE NO. 512-206-3350
AND REGULAR MAIL

RE: Docket No. 458-06-1083
Texas Alcoholic Beverage Commission v. Mario de Santiago d/b/a Stage Coach Lounge

Dear Ms. Fox:

Please find enclosed the Proposal for Decision on the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica S. Najera".

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN/cr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA Docket Change Form**

Michael Cady, Attorney, TABC Legal Division, 5806 Mesa, Suite 160, Austin, Texas - 79912-**VIA FACSIMILE NO. 512-206-3498**

Mr. Eduardo Lerma, Attorney, 1417 Montana Avenue, El Paso, Texas 79902 - **VIA FACSIMILE NO. 915-533-7236**