

DOCKET NO. 458-99-0390

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
§
§
VS. § OF
§
MARGARITA AGUILAR §
D/B/A EL FARAYON NIGHT CLUB §
(TABC CASE NO. 581845) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Margarita Aguilar d/b/a El Farayon Night Club (Respondent), alleging (1) that Respondent's employees were intoxicated on the licensed premises, and (2) that one of Respondent's employees was in possession of cocaine on the licensed premises, both violations of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permit and license be canceled. This proposal finds that Respondent's employees were intoxicated on the licensed premises, and one of Respondent's employees was in possession of cocaine on the licensed premises. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permit and license.

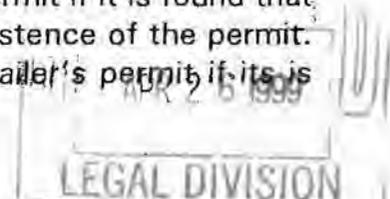
JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61(b)(2), (7), & (13), 25.04, 61.71(a)(1), and 104.01(5) & (9). The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

On April 8, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared in person, and with the assistance of Francisca Arzola. Evidence was received from the Staff on that date. The record was closed on April 8, 1999.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under §§61.71 and 25.04 of the Code to cancel or suspend for not more than 60 days, a wine and beer retailer's permit if it is found that the permittee has violated a provision of the Code during the existence of the permit. § 11.61(b)(13) authorizes cancellation of a wine and beer retailer's permit if its is



found that the permittee was intoxicated on the licensed premises. Under § 1.04(11), "permittee" means "an agent, servant, or employee" of the permittee. § 104.01(5) & (9) prohibit a permittee, or her agent, servant, or employee, from being intoxicated on the licensed premises, or being in possession of a narcotic. Under TABC Rule, 16 T.A.C. § 35.41(b), a narcotic is any substance defined in §§ 481.002(5) and 481.102, TEX. HEALTH & SAFETY CODE. That definition includes cocaine.

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Wine and Beer Retailer's Permit BG-408971, and Retail Dealer's On Premise Late Hours License BL-408972 issued to Respondent doing business as El Farayon Night Club (the Club). The Club is located at 2506 Knight Street, Dallas, Dallas County, Texas. Staff alleged that Respondent's employees were intoxicated on the licensed premises, and that one of Respondent's employees was in possession of cocaine on the licensed premises.

Petitioner, on March 15, 1999, served upon Respondent certain requests for admissions, contained in Petitioner's Requests for Admission and Interrogatories, admitted into evidence as Petitioner's Exhibit #3. Under SOAH procedural rule, 1 T.A.C. § 155.31(d)(2) & (g), the following facts have been conclusively established as to Respondent:

- (1) Respondent, Margarita Aguilar, operates under the trade name of El Farayon Night Club and the licensed premises is located at 2506 Knight Street, Dallas, Dallas County, Texas.
- (2) Respondent operates under the authority of permits numbers BG-408971 and BL-408972, both of which are currently in effect and issued by the Petitioner.
- (3) On June 1, 1998, Adelaido Nunez was an employee of the Respondent.
- (4) On June 1, 1998, Alfonso Quintero was an employee of the Respondent.
- (5) On June 1, 1998, Adelaido Nunez was intoxicated on the licensed premises.
- (6) On June 1, 1998, Alfonso Quintero was intoxicated on the licensed premises.
- (7) On June 1, 1998, Adelaido Nunez possessed approximately 24 tenths of a gram of cocaine wrapped in a dollar bill on the licensed premises.

On June 1, 1998, Dallas Police Officer Eddie Lopez, Badge Number 7021, observed El Farayon Night Club. The time was approximately 4:45 a.m.¹ The Club's door was open, the lights were on, and Lopez observed persons entering and leaving

¹ Under § 105.05(c), beer may not be sold or offered for sale after 2:00 a.m. by the holder of an on-premise late hours license, such as Respondent. Under § 105.06(c), beer may not be consumed, or possessed with the intent to consume, in a public place after 2:15 a.m. and before 7:00 a.m.

the establishment. Lopez, assisted by Dallas Police Officers Schoelen, Castro, and Winkie, entered the licensed premises. Approximately twenty-one persons, aside from Respondent's employees, were present in the Club, most in possession of and consuming beer. Lopez encountered Adelaido Nunez, an employee of Respondent. Nunez was working as a waitress. Lopez observed that Nunez had the odor of an alcoholic beverage on her breath, had slurred speech, and bloodshot eyes. Nunez was unsteady in her balance, swayed while walking and standing. Lopez is an officer of about four years experience, and has had training in the detection and investigation of intoxication offenses. Lopez did not have Nunez perform any field sobriety tests. Lopez formed the opinion that Nunez was intoxicated. Lopez's opinion was not contradicted. Lopez then encountered Alfonso Quintero, an employee of Respondent. Alfonso Quintero was the manager of the Club. Lopez observed that Quintero had the odor of an alcoholic beverage on his breath, had slurred speech, and bloodshot eyes. Quintero was unsteady in his balance, and exhibited sway both walking and standing. Lopez did not have Quintero perform any field sobriety tests. Lopez formed the opinion that Quintero was intoxicated. This opinion was not contradicted. The patrons of the Club were all determined to be intoxicated. Nunez, Quintero, and the patrons of the Club were all arrested for public intoxication.

As an incident to her arrest, Nunez was searched by Dallas Police Officer Gloria Doll, Badge Number 7544. Doll searched Nunez about 5:00 a.m. Nunez was found to be in possession of about \$ 1,300.00 in cash, and a tightly folded one dollar bill. Doll testified that her experience as a police officer lead her to believe the folded bill was a receptacle for drugs. Doll opened the bill and found a quantity of a "white, powdery substance," which was seized. Doll testified the substance was subsequently analyzed, and determined to be cocaine.

Officer Lopez gave further testimony concerning police experience with El Farayon Night Club. Lopez testified he had patrolled the area around El Farayon Night Club for two years. The Club was , during Lopez's tour, consistently open after 2:00 a.m. The police made numerous public intoxication arrests both inside the club, and in its parking lot. The Club was a focus of drug use.

Respondent did not testify or offer any other evidence. While making an unsworn statement, Respondent offered the explanation that she worked at the Club from its opening until midnight, and was not present after midnight to supervise her employees.

ANALYSIS

1. Intoxicated Employees on the Premises

TABC's evidence shows that Adelaido Nunez and Alfonso Quintero, employees of the Respondent, were intoxicated while on the licensed premises. These facts were established procedurally, by way of deemed admissions, and by the uncontradicted testimony of Officer Lopez.

2. Possession of a Narcotic on the Premises

TABC's evidence shows that Adelaido Nunez, an employee of the Respondent, was in possession of cocaine, a narcotic, while on the licensed premises. These facts were established procedurally, by way of deemed admissions, and by the uncontradicted testimony of Officer Doll.

Staff requested the cancellation of Respondent's permit and license for the violation. Petitioner's rules establish a range of enforcement penalties. See TEX. ALCO. BEV. CODE ANN., § 11.64(a); see e.g. **Standard Penalty Chart**, 16 T.A.C. § 37.60. A first violation for an employee being intoxicated on the licensed premises has a recommended sanction of a minimum 7-day permit suspension to a maximum of cancellation of the permit or license. A first violation for possession of a narcotic by an employee on the licensed premises has a recommended sanction of a minimum 10- to-21-day permit suspension to a maximum of cancellation of the permit or license. In arriving at the recommendation below, the ALJ considered the following factors:

Respondent's history, as established by Officer Lopez's testimony, shows a consistent pattern of operating the premises after hours. Respondent's Club has been the location of a number of public intoxication arrests, and drug use. On the night in question, at least twenty-one intoxicated persons were being served beer almost three hours after the statutory time the Club should have been closed. These patrons were being served by intoxicated bar workers. One server was in possession of cocaine, and a large amount of cash. Respondent failed to offer evidence of mitigating circumstances or of any remedial actions taken on Respondent's part to ensure violations of these type do not continue to occur.

RECOMMENDATION

The ALJ recommends that Respondent's Wine and Beer Retailer's Permit BG-408971, and Retail Dealer's On Premise Late Hours License BL-408972, be canceled.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be denied.

FINDINGS OF FACT

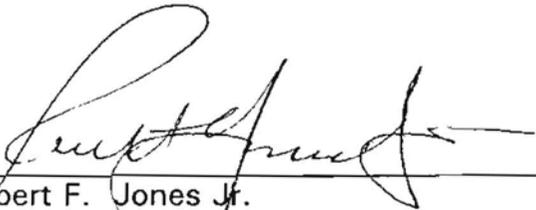
1. Margarita Aguilar d/b/a El Farayon Night Club (Respondent), holds Wine and Beer Retailer's Permit BG-408971, and Retail Dealer's On Premise Late Hours License BL-408972.
2. On March 15, 1999, Staff of the Texas Alcoholic Beverage Commission (Staff) gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing in person.
3. Respondent does business as El Farayon Night Club. Respondent's licensed premises is located at 2506 Knight Street, Dallas, Dallas County, Texas.
4. On June 1, 1998, Adelaido Nunez and Alfonso Quintero were employees of the Respondent.
5. On June 1, 1998, Adelaido Nunez and Alfonso Quintero were intoxicated on the licensed premises.
6. On June 1, 1998, Adelaido Nunez was in possession of cocaine on the licensed premises.
7. El Farayon Night Club has a history of a consistent pattern of operating the premises after hours, public intoxication arrests, and drug use.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. §§6.01, 11.61(b)(2), (7), & (13), 25.04, 61.71(a)(1), and 104.01(5) & (9).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003.

3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 1, 3, 4, and 5, Respondent violated TEX. ALCO. BEV. CODE ANN §§ 11.61(b)(13) and 104.01(5).
5. Based on Findings of Fact Nos. 1, 3, 4, and 6, Respondent violated TEX. ALCO. BEV. CODE ANN § 104.01(9).
6. Based on Findings of Fact No. 7 and Conclusions of Law No. 4 and 5, Respondent's Wine and Beer Retailer's Permit BG-408971, and Retail Dealer's on Premise Late Hours License BL-408972 should be canceled.

SIGNED this 23rd day of April, 1999.



Robert F. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS