

**DOCKET NO. 584931**

IN RE HESAM ADIN MESBAH	§	BEFORE THE TEXAS
D/B/A SPLACH	§	
	§	
PERMIT NOS. BG-402659 & BL-402660	§	ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH Docket No. 458-99-2764)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 4th day of May, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge James Kuvet. The hearing convened on January 18, 2000 and adjourned January 18, 2000. James W. Norman, Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 28, 2000. 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. 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 the allegation in this cause be **DISMISSED**.

**This Order will become final and enforceable on May 25, 2000**, 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 4th day of May, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

State Office of Administrative Hearings  
Castle Hills Executive Center  
1015 Jackson Keller, Suite 102B  
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Roland Caballero and Manuel Rodriguez  
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San Antonio District Office  
Licensing Division



# TEXAS ALCOHOLIC BEVERAGE COMMISSION

Post Office Box 13127, Austin, Texas 78711-3127 (512) 206-3333  
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Doyle Bailey, Administrator

May 1, 2000

Mr. Randy Yarbrough  
Assistant Administrator  
Texas Alcoholic Beverage Commission  
P. O. Box 13127  
Austin, Texas 78711-3127

Re: Docket No.: 584931  
TABC v. Hesam Adin Mesbah, d/b/a Splach

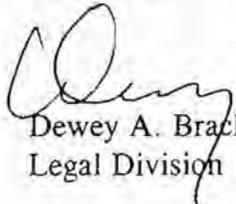
Dear Mr. Yarbrough:

Please find enclosed a Proposal for Decision and exhibits in the above-referenced cause. No exceptions to the Proposal have been filed.

After your review, please inform this office of your decision. We will then draft an Order conforming with your judgment.

Thank you for your attention to this matter.

Yours truly,

  
Dewey A. Brackin  
Legal Division

*Adopt Prop for Decision  
Decision for insufficient evidence  
R/...  
5/1/2000*

DAB/yt

DOCKET NO. 458-99-2764  
(TABC CASE NO. 584931)

TEXAS ALCOHOLIC  
BEVERAGE COMMISSION

VS.

HESAM ADIN MESBAH, d/b/a  
SPLACH, PERMIT NO. BG-402659,  
LICENSE NO. 402660,  
BEXAR COUNTY, TEXAS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

### PROPOSAL FOR DECISION

In this case, the Texas Alcoholic Beverage Commission (Commission) staff (Staff) alleged that an agent, servant, or employee of Hesam Adin Mesbah, d/b/a Splach (Splach) was intoxicated on the licensed premises and that another agent, servant, or employee refused to let a Commission representative inspect the premises. Splach denied the allegations. This proposal recommends that no action be taken because the allegations were not shown by a preponderance of the evidence.

#### I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Because there are no disputed issues of notice or jurisdiction, those matters are stated in the findings of fact and conclusions of law without further discussion in the proposal.

The hearing convened on January 18, 2000, before James Kuvet, Administrative Law Judge, at the State Office of Administrative Hearings offices in San Antonio, Texas. Splach appeared through Hesam Mesbah and was represented by Roland Cabellero and Manuel Rodriguez, Attorneys. The Commission was represented by Dewey Brackin, Attorney. The evidentiary portion of the hearing closed on January 18, 2000, but the record was left open until February 17, 2000, for the submission of proposed findings of fact. None of the parties submitted proposed findings by that date; however, Splach submitted a filing on March 8, 2000. After the hearing was held on January 18, 2000, the case was reassigned to James W. Norman, Administrative Law Judge, because of the resignation of Judge Kuvet. Judge Norman has listened to the tapes of the hearing and has read all of the exhibits.

#### II. DISCUSSION

##### A. Refusal to Permit Inspection—Officer Not Present to Testify

###### 1. Commission Staff

San Antonio Police Department Detective Daniel Petrokolonzo (phonetic spelling) testified he went to the Splach premises on January 24, 1999, based on information that illegal narcotics were being sold there. He arrested one of the patrons for possession of cocaine. He stated that he and his partner, Detective Lloyd Lopez, began an inspection of the premises. He testified he heard the owner, Hesam Mesbah, complain because the police had inspected the establishment earlier that week. He maintained Hesam Mesbah was standing at the entry way to an area behind the bar counter. Detective Petrokolonzo testified Detective Lopez told him Hesam Mesbah refused to let him inspect the area behind the counter.<sup>1</sup> Detective Petrokolonzo did not personally hear that conversation.

Testimony from Detective Petrokolonzo indicated he called San Antonio Police Department Detective Troy Merritt to the scene. Detective Merritt advised him to arrest Hesam Mesbah for preventing an inspection of the premises and he did so.

The Commission Staff argued the case comes down to a swearing match. It maintained the police officers were more credible because the witnesses for Splach had a motive to fabricate.

## 2. Splach

Hesam Mesbah testified he was at Splach on January 24, 1999. He maintained he did not attempt to prevent an inspection and was not standing close to the bar counter when he talked to Detective Lopez. He asserted when he asked why he was being arrested, the officer told him he would find something to charge him with.

Hesam Mesbah's daughter, Sonya Mesbah, testified she was on the premises on the night of January 24. She said she was employed there, but was not working that night. She maintained she was close enough to her father to hear what he was saying, and she did not hear him attempt to prevent the officers from inspecting the bar premises or see him standing close to the bar counter.

Hesam Mesbah's wife, Guadalupe Mesbah, was at Splach on the night of January 24. She testified she did not observe her husband attempt to prevent an inspection of the premises.

Leticia Ramos was the bartender on the night of January 24. She testified she did not see Hesam Mesbah attempt to keep the officers from inspecting the establishment.

The attorneys for Splach contended the Commission did not prove its case because the officer with personal knowledge of the alleged incident did not testify.

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<sup>1</sup>Splach lodged a hearsay objection to Detective Petrokolonzo's testimony concerning Detective Lopez's conversation with him. However, the objection was not stated until some time after the matters described above came into evidence and was therefore not timely for that testimony.

### 3. Analysis

The charge was not proved by a preponderance of the evidence. The only Commission witness with personal knowledge of the alleged conduct, Detective Lopez, did not appear and testify under oath—testimony can often be impeached through cross examination. Why Detective Petrokolonzo was able to hear Hesam Mesbah complain about being inspected twice in one week, but not hear him refuse the inspection was not apparent.

In contrast to Detective Lopez, Hesam Mesbah appeared and testified that the refusal did not occur. His story was supported by testimony from Sonya Mesbah, Guadalupe Mesbah, and Leticia Ramos who were at the bar in a position to see what happened.

#### B. Evidence Insufficient that Guadalupe Mesbah was an Agent, Servant, or Employee of Splach

##### 1. Commission Staff

Detective Merritt testified Ms. Ramos directed him to Guadalupe Mesbah after the arrest of Hesam Mesbah and Sonya Mesbah; he asserted she told him Guadalupe Mesbah was in charge of the premises. He maintained Ms. Mesbah walked behind the bar counter and presented herself as being in charge. He asserted he asked her if she worked there and she said "yes". He contended she had trouble standing and slurred speech. She admitted she had been drinking, but stated she was not working that night. He contended she was intoxicated and a danger to herself and others.

As in the refusal to permit inspection allegation, the Commission Staff argued this matter comes down to a swearing match and that the police officers were more credible because they did not have a motive to fabricate.

##### 2. Splach

Guadalupe Mesbah testified she was at Splach on the night of January 24, 1999. She maintained, however, she had never been employed or worked there in any capacity. She acknowledged an officer asked her for tax receipts, but said she told him she did not know where they were.

Hesam Mesbah testified his wife does not work at Splach, and is not authorized to sign checks, order beer, sign documents, or represent the business in any way. He maintained he and his daughter operate the establishment.

Leticia Ramos testified she asked Guadalupe Mesbah to respond to the officer's questions because Sonya Mesbah and Hesam Mesbah had been arrested. She said she was trying to find out where the tax receipts were. She maintained Guadalupe Mesbah never went behind bar counter. She asserted Guadalupe Mesbah has not worked at Splach and has nothing to do with its operation.

Sonya Mesbah testified Guadalupe Mesbah has never been involved in operating Splach or been an employee there.

The attorneys for Splach cited the testimony of several witnesses indicating that Guadalupe Mesbah did not work for Splach.

### 3. Analysis

The preponderant evidence does not support a conclusion that Guadalupe Mesbah was an agent, servant, or employee of Splach (although it did show she was intoxicated on the licensed premises on the night of January 24, 1999).

The evidence showed clearly that Guadalupe Mesbah was not an agent, servant, or employee of Splach on a routine basis. The primary issue was whether she somehow assumed that status on the night of January 24, 1999. However, there was no evidence that anyone with authority to do so appointed her an agent or employee. Hesam Mesbah and Sonya Mesbah were already under arrest.

Even if Detective Merrit's testimony that Guadalupe Mesbah told him she was an employee of Splach is taken as accurate, her statement alone does not make it true. It is at least as plausible that she misrepresented the truth on the night of the inspection rather than at the hearing in an attempt to assist her husband's business in a time of crisis.

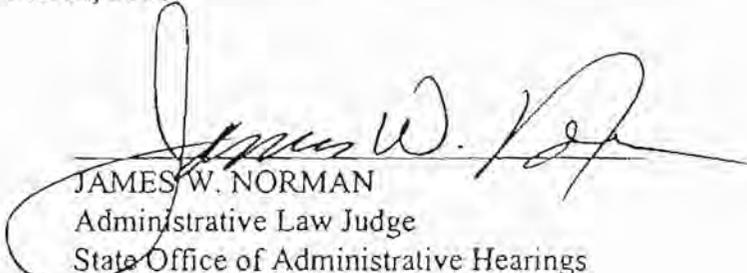
## III. FINDINGS OF FACT

1. Hesam Adin Mesbah, d/b/a Splach (Splach) holds Wine and Beer Retailer's Permit No. BG-402659 and Retail Dealer's On-Premise Late Hours License No. BI-402660 issued on October 21, 1996.
2. A notice of hearing was issued on November 24, 1999, containing 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.
3. The notice of hearing alleged that: on or about January 24, 1999, a servant, agent, or employee of Splach was intoxicated on the licensed premises; and on the same date, that a servant, agent, or employee of Splach refused inspection of the premises by an authorized representative of the Texas Alcoholic Beverage Commission.
4. The preponderant evidence did not prove the matters stated in Finding of Fact No. 3.

#### IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding. TEX. ALCO. BEV. CODE §§ 25.04 and 61.71(a).
2. The State Office of Administrative Hearings has jurisdiction to conduct a hearing in this proceeding, and to prepare a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Based on Finding of Fact No. 4, no action should be taken against Splach in this case.

SIGNED this 28<sup>th</sup> day of March, 2000.

  
JAMES W. NORMAN  
Administrative Law Judge  
State Office of Administrative Hearings