

DOCKET NO. 588424

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
MC/VC, INC.	§	ALCOHOLIC
D/B/A PARTY PLACE CABARET	§	
PERMIT NOS. MB-243299, LB-243300	§	
& PE-243301	§	
NUECES COUNTY, TEXAS	§	
(SOAH Docket No. 458-01-1020)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 29th day of May, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle J. Groves. The hearing convened on March 12, 2001, and the record was closed March 30, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 15, 2001. 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. A Motion to Amend PFD's Recommendation was filed by the Respondent.

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.

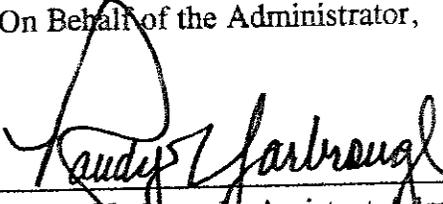
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB-243299, LB-243300 and PE-243301 are hereby **CANCELED FOR CAUSE**.

This Order will become final and enforceable on June 19, 2001, 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 29th day of May, 2001.

On Behalf of the Administrator,



Randy Karabrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

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Corpus Christi District Office
Licensing Division

SOAH DOCKET NO. 458-01-1020

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
Petitioner	§	
vs.	§	
	§	
MC/VC, INC.	§	OF
D/B/A PARTY PLACE CABARET	§	
PERMIT NOS. MB-243299, LB-243300,	§	
PE-243301	§	
NUECES COUNTY, TEXAS	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against a permittee of the Commission alleging: (1) the permittee, it's agent, servant or employee possessed or permitted others to possess a narcotic on the permittee's premises, and (2) the permittee, its's agent, servant or employee permitted others to sell a narcotic on the licensed premises. The Staff recommended that the subject permits be canceled. This Administrative Law Judge (ALJ) agrees and recommends cancellation.

I. Procedural History

On May 15, 2000, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified MC/VC, Inc., doing business as Party Place Cabaret (Respondent) that the Staff would seek disciplinary action against Respondent's permits because Respondent, it's agent, servant or employee, possessed or permitted others to possess a narcotic on the permittee's premises, and the Respondent, its's agent, servant or employee, permitted others to sell a narcotic on the licensed premises.

The hearing commenced on March 12, 2001, in the offices of the State Office of Administrative Hearings, 1225 Agnes Street, Corpus Christi, Texas before the undersigned Administrative Law Judge (ALJ). After the taking of evidence, the hearing was concluded. The record was left open until 5:00 p.m. on March 30, 2001, for the filing of closing arguments. Staff was represented by Dewey A. Brackin, Assistant Attorney General of Texas. Respondent was represented by Attorney James R. Lawrence.

II. Jurisdiction and Notice

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

III. Discussion

Petitioner called one witness, Corpus Christi Police Officer Ira Herrero. Petitioner offered two exhibits, a Department of Public Safety lab test result (Petitioner's Ex. 1) and a certified copy of Respondent's permits and administrative history (Petitioner's Ex. 2). Respondent called one witness, Larry Stessman, the general manager of Party Place Cabaret at the time of the alleged offense.

A. Petitioner's Witness

1. Ira Herrero

Ira Herrero is an officer for the Corpus Christi Police Department. On August 19, 1999 he was working undercover with his partner Officer Felix Gonzalez. Herrero and Gonzalez went to Respondent's place of business and observed a woman dancing on stage who went by the name Siren. Siren had been called on stage to dance by the disc jockey. Later, Herrero spoke with Siren. Siren told him that her real name was Leah Alvarez.

Officer Herrero asked Ms. Alvarez if she could obtain cocaine for him. Ms. Alvarez said that she could obtain the cocaine if Herrero returned the next night.

Officers Herrero and Gonzalez returned to Respondent's the next night. Ms. Alvarez approached Officer Herrero and asked if he was still looking for cocaine. Herrero said he was and he wanted to purchase \$20.00 worth.

Ms. Alvarez left and returned a short time later and handed Officer Herrero a small baggy containing a powdery substance. Officer Herrero then gave Ms. Alvarez \$20.00.

Officer Herrero took the baggy containing the powdery substance to the police station. There he field tested it, and it tested positive for cocaine. Herrero then tagged the substance as evidence and sent it to the Texas Department of Public Safety laboratory for analysis. The analysis came back positive for cocaine (Petitioner's Ex. 1).

B. Respondent's Witness

1. Larry Stessman

Larry Stessman worked as Respondent's general manager in August 1999. He recalls a dancer named Leah Alvarez that went by the stage name Siren. Stessman said that Ms. Alvarez was an independent contractor. The dancers that work at Respondent's come and go at will and they are not paid with payroll checks.

Dancer applicants must complete a form required by the City of Corpus Christi. This is used by Respondent to verify the applicant is of age and has proper identification. Upon their arrival for work, dancers sign in at the bar. This list is then used by the disc jockey to call the dancers to the stage.

IV. Statutory Criteria

1. TEX. ALCO. BEV. CODE ANN § 11.61 (Vernon 1995 and Supp. 2000)

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(7) the place or 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;

2. TEX. ALCO. BEV. CODE ANN § 104.01 (Vernon 1995 and Supp. 2000)

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, but not limited to, any of the following acts:

(9) 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.

V. Discussion

Officer Herrero's testimony regarding his purchase of cocaine from Ms. Alvarez was not disputed. The only issue before the court is whether Ms. Alvarez was an agent, servant or employee of the Respondent.

Officer Herrero testified that Ms. Alvarez was working as a dancer at Respondent's place of business. He also said that Respondent's disc jockey called Ms. Alvarez to the stage where she danced.

Mr. Stessman testified that Ms. Alvarez did work for Respondent, but she was an independent contractor. He said the dancers that work at Respondent's come and go at will, and they are not paid with payroll checks. Mr. Stessman testified that Dancer applicants must complete a form required by the City of Corpus Christi. This is used by Respondent to verify the applicant is of age and has proper identification. Upon their arrival for work, dancers sign in at the bar. This list is then used by the disc jockey to call the dancers to the stage.

The Alcoholic Beverage Code does not define the term employee. When a definition is not provided, words should be read in context and construed according to the rules of grammar and common usage. Generally speaking, an employee is simply a person who works for another in return for financial or other compensation. The test to determine whether one person is another's employee is whether or not he is subject to the control of the other person. *Herndon v. Halliburton Oil Well Cementing Co.*, 154 S.W.2d 163 (Tex.Civ.App. El Paso 1941, writ ref'd w.o.m.)

This ALJ finds that Ms. Alvarez's employment with Respondent does not meet the criteria of an independent contractor. Rather than being in business for herself, she was dependent upon the employment provided by Respondent. Ms. Alvarez was under the direction and control of Respondent, and she was performing duties particular to Respondent's business.

PROPOSED FINDINGS OF FACT

1. MC/VC, Inc., doing business as Party Place Cabaret, (Respondent) is the holder of Mixed Beverage Permit No. MB-243299, Mixed Beverage Late Hours Permit No. LB-243300, and Beverage Cartage Permit No. PE-243301.
2. The Texas Alcoholic Beverage Commission sent a notice of hearing to Respondent dated November 27, 2000.
3. The notice of hearing 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.
4. The hearing was convened on March 12, 2001, in the offices of the State Office of Administrative Hearings, 1225 Agnes Street, Corpus Christi, Texas. After the taking of evidence, the hearing was concluded. The record was left open until 5:00 p.m. on March 30, 2001 for the filing of closing arguments. Staff was represented by Dewey Brackin, Assistant Attorney General of Texas. Respondent was represented by Attorney James R. Lawrence.

5. On August 20, 1999, Leah Alvarez was an employee of Respondent.
6. On August 20, 1999, Leah Alvarez possessed a narcotic on the licensed premises.
7. On August 20, 1999, Leah Alvarez sold a narcotic to Officer Herrero on the licensed premises.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) (Vernon 1995 and Supp. 2000).
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. § 2001 (Vernon 1998).
3. The Texas Alcoholic Beverage Commission provided adequate notice of the hearing pursuant to TEX. ALCO. BEV. CODE ANN. §11.63 and TEX. GOV'T CODE ANN. §2001.
4. Based upon Findings of Fact Nos. 5, 6 and 7, Respondent's employee possessed and sold a narcotic on Respondent's premises in violation of TEX. ALCO. BEV. CODE ANN §§ 104.01, and 11.61 (b)(7) (Vernon 1995 and Supp. 2000).

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that the Respondent's Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit should be canceled.

Signed this 15th day of May, 2001.



KYLE J. GROVES
Administrative Law Judge
State Office of Administrative Hearings