

DOCKET NO. 589586

IN RE JOSE ANTONIO RODRIGUEZ	§	BEFORE THE
D/B/A TONY'S RESTAURANT	§	
PERMIT NO. BG-450237	§	
	§	TEXAS ALCOHOLIC
	§	
ZAPATA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2191)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of May, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sharon Cloninger. The hearing convened on April 3, 2001, 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 April 23, 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. 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.

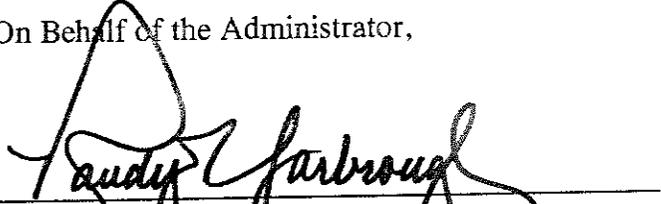
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. BG-450237 are hereby **CANCELED FOR CAUSE**.

This Order will become final and enforceable on June 11, 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 22nd day of May, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Julio A. Garcia, Jr.
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Administrative Law Judge
State Office of Administrative Hearings
Corpus Christi, Texas
VIA FACSIMILE: (361) 884-5427

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

McAllen District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

JOSE ANTONIO RODRIGUEZ d/b/a
TONY'S RESTAURANT
Permit No. BG-450237
(TABC CASE NO. 589586)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff, TABC) brought this action against Jose Antonio Rodriguez d/b/a Tony's Restaurant (Respondent), seeking cancellation of his wine and beer retailer's permit. TABC alleged that Respondent possessed, or permitted others to possess, marihuana on the licensed premises. The Administrative Law Judge (ALJ) recommends that the permit be cancelled.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

ALJ Sharon Cloninger convened the hearing April 3, 2001, in the District Engineers Conference Room at the Texas Department of Transportation office, 1817 Bob Bullock Loop, Laredo, Texas. Staff attorney Dewey Brackin appeared on behalf of TABC, and attorney Julio A. Garcia appeared for Respondent, who was also present. The record closed the same day.

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

II. EVIDENCE

A. Undisputed facts

Respondent, whose business is located at the intersection of Highway 83 and 22nd Street in Zapata, Texas, holds Wine and Beer Retailer's Permit No. BG-450237 issued by TABC. On March 23, 2000, TABC agent Tim Shipton inspected the restaurant, Respondent's living quarters, and a storeroom all located at the address of the licensed premises, and found approximately 150 pounds of marihuana in the storeroom. Agent Shipton made the inspection after receiving a complaint that a shipment of marihuana was on Respondent's licensed premises. He had also received a complaint that Respondent was buying beer from another retailer. Mario Garcia, an investigator with the Zapata County District Attorney's Office, accompanied Agent Shipton on the inspection visit, as did three other law enforcement officers. Agent Shipton did not have a search warrant.

When Agent Shipton's team arrived at Tony's Restaurant, Respondent was there. Agent Shipton asked Respondent to provide beer receipts. Respondent indicated the receipts were in his living quarters, located on the property. Respondent walked out the restaurant's kitchen door and into an apartment located about three feet from the door. Agent Shipton and the other officers followed Respondent into the apartment. Respondent produced the receipts. Agent Shipton continued his inspection, and noticed a stack of beer cartons outside a door next to the living quarters. He believed the door to be the entrance to a room where Respondent stored beer. He opened the unlocked door to the storeroom and saw bundles of gunny sacks and smelled marihuana. Investigator Garcia found a green leafy substance, that he knew to be marihuana, in the bags in the storeroom, as well as three firearms, and \$10,000 in cash. The officers arrested Respondent.

B. TABC's evidence

TABC presented testimony from two witnesses, and offered seven documents and photographs into evidence, all of which were admitted.

1. Tim Shipton's testimony

Agent Shipton, a commissioned Texas peace officer, testified he believed the storeroom to be part of Respondent's licensed premises, because Respondent did not submit a diagram with his wine and beer retailer's permit application requesting that the storeroom be excluded from the licensed premises. Under the Texas Alcoholic Beverage Code, permit applicants may submit such a diagram if they want certain parts of a premises excluded from the licensed area, but they are not required to do so.

Agent Shipton testified that TABC agents are not required to obtain search warrants before inspecting licensed premises. When he saw stacks of beer cartons outside the storeroom, he assumed beer was stored inside. He asked Respondent if he could look in the storeroom, and Respondent did not answer. The door was unlocked, and Agent Shipton, as part of his inspection, looked inside and discovered the marihuana.

2. Mario Garcia's testimony

Investigator Garcia said prior to the inspection, he had received a tip that marihuana was being stored at Respondent's premises. He assisted Agent Shipton with the inspection, and was present when the marihuana was discovered. Respondent claimed he had rented the storeroom out to a man from Mexico, but Investigator Garcia described the storeroom as being too small for a renter to sleep in. He said there was no cot, no sink, and no bathroom. He also said the storeroom was filled with tools and the marihuana.

C. Respondent's evidence

Respondent testified, and offered no documentary evidence.

Respondent contends that his living quarters and the storeroom are not part of the licensed premises, so Agent Shipton could not legally inspect those areas without a search warrant. When

Agent Shipton asked him for the beer receipts, Respondent went to his living quarters to get them, and Agent Shipton, Investigator Garcia, and the other officers followed him inside, uninvited. He does not invite customers from his restaurant into his living quarters, and he does not serve customers beer or wine in the living quarters.

While Respondent admitted the storeroom is on his property and under his control, he does not consider it to be part of the licensed premises. The storeroom is at the same physical address as the restaurant, but it is in a different building, about twelve to fifteen feet from the restaurant's kitchen door.

About two months prior to Agent Shipton's inspection, Respondent had rented the storeroom to a man from Monterrey, Mexico, but he does not know where the man is now. Respondent did not know there was marihuana in the storeroom until Agent Shipton discovered it, and he never saw illegal drugs being moved into the storeroom. The marihuana was not his.

III. STATUTORY AUTHORITY

The applicable statutory provisions are as follow:

A license or permit issued under this code is a purely personal privilege and is subject to revocation or suspension if the holder is found to have violated a provision of this code or a rule of the commission. TEX. ALCO. BEV. CODE ANN. § 6.01(b).

The commission or administrator may . . . cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee: (1) violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled TEX. ALCO. BEV. CODE ANN. § 61.71(a)(1).

The provisions of this code applicable to the cancellation and suspension of a retail dealer's on-premise license also apply to the cancellation and suspension of a wine and beer retailer's permit. TEX. ALCO. BEV. CODE ANN. § 25.04(b).

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: possession of a narcotic or any equipment used or designed for administering a narcotic or permitting a person on the licensed premises to do so. TEX. ALCO. BEV. CODE ANN. § 104.01(9)

Under TABC administrative rules, "narcotic" is defined as "any substance defined in the Texas Controlled Substance Act. . . ." 16 TEX. ADMIN. CODE § 35.41(2). "Marihuana" is one of the controlled substances defined in the Texas Controlled Substance Act. HEALTH & SAFETY CODE § 481.002 (26).

In this code, "premises" means 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. TEX. ALCO. BEV. CODE ANN. § 11.49(a)

Subject to the approval of the commission or the administrator . . . an applicant for a permit or license may designate a portion of the grounds, buildings, vehicles, and appurtenances to be excluded from the licensed premises. TEX. ALCO. BEV. CODE ANN. § 11.49(b)(1).

By accepting a license or permit, the holder consents that the commission, an authorized representative of the commission, or a peace officer may enter the licensed premises at any time to conduct an investigation or inspect the premises, for the purpose of performing any duty imposed by this code. TEX. ALCO. BEV. CODE ANN. § 101.04.

IV. ANALYSIS

In its Notice of Hearing, TABC alleges that on March 23, 2000, Respondent possessed or permitted others to possess a narcotic on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. §104.01(9) and 16 TEX. ADMIN. CODE (TAC) § 35.41 (2).

Respondent contends that the storeroom in which the marihuana was found was not part of his licensed premises, and not subject to TABC inspection. But when Respondent applied for his wine and beer retailer's permit, he did not submit a diagram of his property indicating that the storeroom should not be included in the licensed premises. Because Respondent did not submit a diagram excluding the storeroom from the licensed premises, the storeroom is part of the licensed premises. TABC agents may inspect the licensed premises of a permit holder without first obtaining a search warrant. Agent Shipton conducted a legal inspection of Respondent's storeroom.

It was reasonable for Agent Shipton to inspect the storeroom. He believed that Respondent stored beer there, because of the stack of beer cartons outside the storeroom door. He needed to inspect stored beer, because he had received a complaint that Respondent was buying beer from another retailer.

The storeroom in which the marihuana was found is on Respondent's property and under his control. It does not matter whether or not the marihuana belonged to Respondent, or to someone else. It was illegal for the marihuana to be on his licensed premises.

Staff proved the matter alleged in the notice of hearing. The disciplinary provisions in TEX. ALCO. BEV. CODE ANN. §§ 25.04, 61.71 and 104.01(9) permit TABC to cancel a retail dealer's license for the violation.

V. RECOMMENDATION

Respondent's wine and beer retailer's permit is subject to cancellation for possessing or permitting others to possess marihuana on his licensed premises. The ALJ recommends cancellation of the permit.

VI. FINDINGS OF FACT

1. On July 5, 2000, the Texas Alcoholic Beverage Commission (TABC) sent proper and timely notice of the intent to take disciplinary action against Jose Antonio Rodriguez d/b/a Tony's Restaurant (Respondent).
2. On March 8, 2001, TABC sent Notice of Hearing to Respondent.
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. Respondent is located at the intersection of Highway 83 and 22nd Street in Zapata, Texas.
5. Respondent holds Wine and Beer Retailer's Permit No. BG-450237 issued by TABC.
6. Respondent's licensed premises include Tony's Restaurant, a detached apartment occupied by Respondent, and a storeroom detached from the restaurant and apartment.
7. On March 23, 2000, TABC agent Tim Shipton inspected Respondent's licensed premises:
 - a. The licensed premises included a storeroom about twelve to fifteen feet from the kitchen door of Tony's Restaurant.
 - b. When Agent Shipton inspected the storeroom, he discovered approximately 150 pounds of marihuana, which he recognized by its smell.
 - c. Mario Garcia, an investigator with the Laredo County District Attorney's office, accompanied Agent Shipton on the inspection.
 - d. Investigator Garcia identified the green, leafy substance in the storeroom as marihuana.
 - e. Investigator Garcia also found three firearms and \$10,000 in cash in the storeroom.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE §§ 6.01, 25.04 and 61.71.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over 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. Ch. 2003.

3. As referenced in Findings of Fact Nos. 1 and 2, Respondent received proper and timely notice of the intent to take disciplinary action, and of the hearing, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051, 2001.052.
4. TABC does not need a search warrant to inspect licensed premises pursuant to TEX. ALCO. BEV. CODE ANN. § 101.04.
5. Based on Finding of Fact No. 7, Respondent violated TEX. ALCO. BEV. CODE ANN. § 104.01(9) by possessing marihuana on the licensed premises, as prohibited by TEX. ALCO. BEV. CODE ANN. §61.71(a)(1).
6. Based on the foregoing Findings of Fact and Conclusions of Law, TABC should cancel the wine and beer retailer's permit held by Respondent.

SIGNED this 23rd day of April, 2001.



SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS