

DOCKET NO. 591211

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
MI YONG STEPHENS	§	
D/B/A THE DOLL HOUSE	§	
PERMIT NOS. BG-402932 & BL-402933	§	
EL PASO COUNTY, TEXAS	§	
(SOAH Docket no. 458-01-1579)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 20th day of June, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Louis Lopez. The hearing convened on April 9, 2001, and the record closed on April 25, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 17, 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.

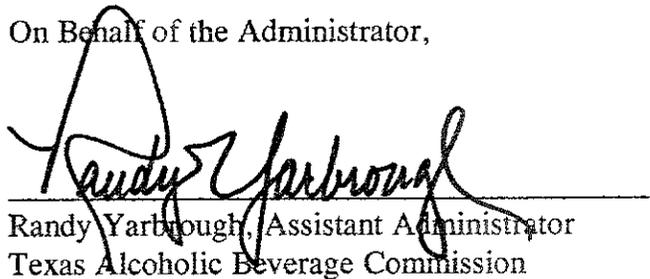
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that unless the Respondent pays a civil penalty in the amount of **\$9,000.00** on or before the **22nd** day of **August, 2001**, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of **thirty, (30)** days, beginning at **12:01 A.M. on the 29th day of August, 2001.**

This Order will become final and enforceable on July 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 20th day of June, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

G. Daniel Mena
ATTORNEY FOR RESPONDENT
3233 N. Piedras
El Paso, Texas 79930
CERTIFIED MAIL NO. 7000 1530 0003 1927 3302

Administrative Law Judge
State Office of Administrative Hearings
El Paso, Texas
VIA FACSIMILE: (915) 834-5657

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

El Paso District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 591211

REGISTER NUMBER:

NAME: Mi Yong Stephens

TRADENAME: The Doll House

ADDRESS: 5715 Trowbridge, El Paso, El Paso County, Texas 79925-3342

DATE DUE: August 22, 2001

PERMITS OR LICENSES: BG-402932 & BL-402933

AMOUNT OF PENALTY: \$9,000.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 22ND DAY OF JUNE, 2001, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.
MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

.....

16 TEXAS ADMINISTRATIVE CODE (TAC) §37.61 (West 2000).
Suspensions.

.....

(b) In determining whether to deny a licensee or permittee the right to pay a civil penalty in lieu of a suspension, the administrator shall consider:

- (1) the type of permit or license held by the violating licensee or permittee and whether the sale of alcoholic beverages constitutes the primary or partial source of the licensee or permittee's business;
- (2) the type of violation or violations charged;
- (3) the licensee's or permittee's record of past violations; and
- (4) any aggravating or ameliorating circumstances.

(c) Aggravating or ameliorating circumstances may include but are not limited to:

- (1) whether the violation was caused by intentional or reckless conduct by the licensee or permittee;
- (2) the number, kind and frequency of violations of the Alcoholic Beverage Code and rules of the commission committed by the licensee or permittee;
- (3) whether the violation caused the serious bodily injury or death of another; and/or
- (4) whether the character and nature of the licensee's or permittee's operation are reasonably calculated to avoid violations of the Alcoholic Beverage Code and rules of the commission.

II. EVIDENCE

The only exhibit introduced into evidence was a set of documents presented by the Staff related to Respondent's permits. The exhibit was admitted without objection. The Staff called two witnesses: El Paso Police Officers Ruben Cardenas and Luis Martinez. Respondent called two witnesses: Gunnar Philipp and herself.

On early Thursday, August 10, 2000, right after midnight, Officers Cardenas and Martinez were conducting surveillance of the Doll House from the parking lot. Officer Cardenas testified he saw a white male between the age of 40 and 50 staggering, almost falling, as he approached the door of the Doll House from the parking lot. The man had to brace himself against the door frame when he reached it. He then entered, and the officers immediately followed.

When Officer Cardenas entered, he saw the same man sitting at a stool at the bar, swaying so much that he could hardly stay on it. A woman bartender then served the man

a bottle of beer. The man was speaking loudly, but his speech was too slurred and incoherent to understand what he was saying. Officer Cardenas testified that Sergeant Martinez asked the man to step outside. The man had difficulty maintaining his balance and difficulty understanding what the sergeant was trying to tell him. Officer Cardenas testified that both he and his sergeant were wearing necklaces with readily visible police badges during the entire time.

Sergeant Martinez' testimony was consistent with that of Officer Cardenas. He noticed the bartender serve the man either a Budweiser or Bud Light beer. When Sergeant Martinez asked the man to step outside, he had to help him get off the stool. Outside, Sergeant Martinez administered the Horizontal Gaze Nystagmus test to the man, who had difficulty following instructions. The sergeant found the maximum of six clues in the man's eyes. When Sergeant Martinez asked the man to stand straight with his hands by his side, the man was unable to do so. The man was identified as Alan Robinette, and the bartender who served him was identified as Andrea Parra. Sergeant Martinez testified that the signs of the intoxication of Mr. Robinette should have been plain to the bartender, mostly due to Mr. Robinette's loud and incoherent talking.

Gunnar Philipp and Respondent both testified that they observed Mr. Robinette come into the Doll House that night. They both thought that he walked straight and that his speech was coherent and at a regular level of volume. They both stated they had observed many drunken persons in their lives, and in their opinions, Mr. Robinette was not intoxicated. Mr. Philipp also testified he had seen other intoxicated people at the Doll House before that night.

Mr. Philipp was sitting at the end of the bar near the door and so had a clear view of Mr. Robinette, who said "hello" to him as he approached the bar to order a drink. He saw Ms. Parra serve Mr. Robinette a long neck bottle of beer. He admitted he was Respondent's ex-boyfriend and that they used to live together. They were still friends.

Respondent testified she saw Mr. Robinette come into the bar, but soon after that she was approached by peace officers--other than Officers Cardenas and Martinez--who asked her to step outside to talk to them. She went outside and was soon placed under arrest on an unrelated charge. When Respondent was asked if she was aware of any animosity the police might bear toward her or her business, she responded she knew of none. Mr. Philipp gave the same answer to the same question.

III. DISCUSSION

Violation

With the distraction surrounding Respondent's talking to police, it is not clear how she was able to make more than a cursory observation of Mr. Robinette after he entered the bar. It is also likely that Mr. Philipp would have been distracted by peace officers escorting his girlfriend, the Respondent, outside.

Possibly, Officers Cardenas and Martinez could have had an exaggerated recall of the signs of intoxication exhibited by Mr. Robinette, but they were more credible than Respondent and her ex-boyfriend, partly because they were paying better attention to Mr. Robinette. Respondent and Mr. Philipp also had a much greater motive to lie about what happened. There was no evidence that the officers had any motive to lie or exaggerate based on any special animosity toward Respondent or her business.

At the hearing, Respondent claimed that no bartender would have served a clearly intoxicated person while police officers were in the bar with their badges clearly visible on their person. This does create pause for thought. The explanation could be that Ms. Parra was distracted by peace officers in the bar talking to Respondent. On the other hand, if Ms. Parra had been properly instructed, even a significant distraction would not have affected her attention.

Sanction

Under the Code, a permittee who commits the violation of serving an intoxicated person can be denied the right to pay a civil penalty in lieu of suspension. The TABC rules delineate the considerations to be reviewed in allowing the payment of a civil penalty, 16 TAC §37.61 (b) and (c), *supra*. The considerations that apply to this case will now be discussed.

Respondent holds a Wine and Beer Retailer's Permit as well as a Retail Dealer's On-Premise Late Hours License. It would appear important that Respondent be careful to avoid aiding persons in becoming intoxicated in view of her being open for business at late hours. The Doll House is the sole source of Respondent's business. The type of violation found here is one that clearly aids and abets a customer in violating a law: public intoxication. It could further involve a customer in committing other crimes such as driving while intoxicated. Respondent has several violations, with most of them occurring since April 1998. There was a document in the Staff's exhibit called Agreement and Waiver Hearing. In it, Respondent agreed that a violation involving an intoxicated employee occurred at the Doll House in April 1998. The name of the employee written down as being intoxicated was Andrea Parra. At the hearing, Respondent insisted the intoxicated employee had not been Ms. Parra but had been one of her other bartenders, a man. It is hard to believe, however, that the TABC agent who wrote the violation would have confused a man for a woman and written down Ms. Parra.

Respondent's conduct in serving intoxicated people was not intentional or reckless. The situation in the bar at the time could help explain why neither Ms. Parra nor Respondent were as attentive as they might have been. The violation did not cause serious bodily injury or death, but it is one that would tend to increase the probability of such an event.

At the hearing, when Respondent was asked how the employees were instructed to avoid serving intoxicated persons, she answered that she told employees to look for

various common signs of intoxication. She testified there were no written instructions for employees to follow, and she did not state whether servers were subject to dismissal for serving intoxicated persons. Ms. Parra continued to work for several months after the incident and resigned only due to back problems. In Respondent's favor, she has not been charged by peace officers for any violations since that night, including serving an intoxicated person. She testified that the Doll House was only a small bar, which will be considered in assessing the monetary amount of her penalty.

IV. CONCLUSION

Based on a preponderance of the evidence, Respondent committed one violation of the Code. As a consequence, it is proposed that Respondent's permits be suspended for 30 days, with a civil penalty, in lieu of suspension, of \$300 per day for a total of \$9,000.

FINDINGS OF FACT

1. My Yong Stephens (Respondent), doing business as the Doll House, is the holder of Wine and Beer Retailer's Permit No. BG-402932 and Retail Dealer's On Premise Late Hours License No. BL-402933, issued by the Texas Alcoholic Beverage Commission (TABC) on October 25, 1996. The permits have been continuously renewed.
3. On October 19, 2000, the staff of TABC (the Staff) sent a notice to Respondent that TABC was seeking to cancel or suspend Respondent's permits based on one Code violation: serving an alcoholic beverage to an intoxicated person.
4. On January 26, 2001, the Staff sent a Notice of Hearing by certified mail to Respondent. The hearing notice specified the time, place, and nature of the hearing; the legal authority for the hearing; and the matter to be determined. The State Office of Administrative Hearings notified Respondent of the hearing in an Order Setting Prehearing Conference on February 1, 2001.

Violation

5. On Thursday, August 10, 2000, right after midnight, a man between the age of 40 and 50 staggered into the Doll House from the parking lot. The man had to brace himself against the door frame when he reached it.
6. The same man sat at a stool at the bar and swayed so noticeably that he could hardly stay on it. He was speaking loudly, but it was hard to understand what he was saying due to his slurred, incoherent speech.
7. The man asked the bartender for a drink, and the bartender served him a Budweiser-brand long neck bottle of beer.

8. The man had difficulty maintaining his balance while standing and difficulty understanding what El Paso Police Sergeant Luis Martinez tried to tell him. On the Horizontal Gaze Nystagmus test, he had difficulty following instructions. His eyes showed the maximum six clues. When the man was asked to stand straight with his hands by his side, he was unable to do so.
9. The man was identified as Alan Robinette, and the bartender who served him was identified as Andrea Parra.
10. Mr. Robinette was intoxicated at the time Ms. Parra served him an alcoholic beverage.

Criteria in 16 TAC §37.61

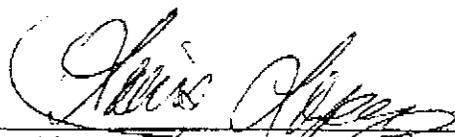
11. Respondent has a license that allows the sale of alcoholic beverages at late hours.
12. The sale of alcoholic beverages is the primary source of Respondent's business.
13. Serving an intoxicated person is a violation that can have serious consequences, including the violation of other laws by the intoxicated person.
14. Respondent's record shows several past violations of the TEX. ALCO. BEV. CODE.
15. A violation in April 1998 was that of having an intoxicated employee--the same Andrea Parra--on the licensed premises.
16. The serving of Mr. Robinette was neither intentional nor reckless.
17. There was no serious bodily injury or death, but the potential for it was there.
18. Respondent has only the minimal procedures in the operation of the Doll House reasonably calculated to avoid violations of the Code and rules.
19. The Doll House is a small bar.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. [CODE] §§5.31–5.44 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to CODE §5.43(a) and TEX. GOV'T. CODE ANN. §§2003.021 and 2003.042 (Vernon 2000).

3. Service of proper notice of the hearing was made on Respondent pursuant to CODE §11.63 and the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. On August 10, 2000, Respondent violated CODE §61.71(a)(6) by serving an intoxicated person.
5. Under the criteria in CODE §11.64(a) and 16 TEXAS ADMINISTRATIVE CODE §37.61 (West 2000), Respondent is entitled to pay a civil penalty in lieu of a suspension.
6. Based on the foregoing Findings of Fact and Conclusions of Law, it is proposed that Respondent's permit and license both be suspended for a period of 30 days with a civil penalty, in lieu of a suspension, of \$300 per day for a total of \$9,000.

SIGNED this 17th day of May 2001.



LOUIS LOPEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS