

DOCKET NO. 596266

IN RE DICITIE, INC.	§	BEFORE THE
D/B/A PALLADIUM	§	
PERMIT NO. MB-422378 & LB-422379	§	
	§	TEXAS ALCOHOLIC
	§	
JEFFERSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1782)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 30th day of July, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on April 11, 2002, 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 June 11, 2002. 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 Nos. MB-422378 & LB-422379 are hereby **SUSPENDED**.

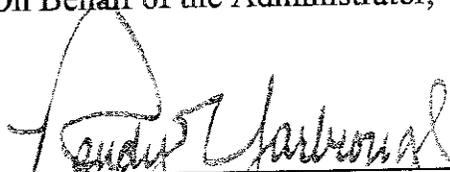
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,050.00 on or before the 25th day of September, 2002, all rights and privileges under the above described permits will be **SUSPENDED** for a period of seven (7) days, beginning at 12:01 A.M. on the 2nd day of October, 2002.

This Order will become final and enforceable on August 19, 2002, 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 30th day of July, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Don Smith
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (713) 812-1001

Dicitie, Inc.
d/b/a Palladium
RESPONDENT
P. O. Box 59
Nederland, Texas 77627-0059
CERTIFIED MAIL NO. 7001 2510 0000 7276 6419
RETURN RECEIPT REQUESTED

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

Beaumont District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 596266 REGISTER NUMBER:

NAME: Dicitie, Inc. TRADENAME: Palladium

ADDRESS: 528 Forsythe, Beaumont, Texas 77701

DATE DUE: September 25, 2002

PERMITS OR LICENSES: MB-422378 & LB-422379

AMOUNT OF PENALTY: \$\$1,050.00

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 25TH DAY OF SEPTEMBER, 2002, 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

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

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.

DOCKET NO. 458-02-1782

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**DICITIE INC.
D/B/A PALLADIUM**

§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Dicitie Inc. d/b/a Palladium (Respondent), a drinking establishment in Jefferson County, Texas. Staff alleged that on July 6, 2001, a breach of the peace occurred on the licensed premises, which was not beyond the control of the Respondent, and which resulted from the improper supervision of persons on the premises.

A hearing in this case was held before Don Smith, Administrative Law Judge, on April 11, 2002, at the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. Staff appeared and was represented by their attorney, Dewey Brackin. Dicitie Inc. appeared and was represented by one of its principal owners, Roy Etie.

After announcements, each party made an opening statement. Both parties agreed the breach of the peace was caused by an ex-girlfriend and an off-duty bouncer from the club having a domestic dispute in Respondent's parking lot. Staff alleged several bouncers assaulted the ex-girlfriend. Respondent argued that it was the ex-girlfriend who assaulted the off-duty bouncer and that the bouncers had to restrain the girl.

There was no issue whether the parking lot is part of the licensed premises or whether Respondent is responsible for all acts of its agents, servants, and employees. Basically, the issue boils down to whether Respondent should be held liable for a domestic dispute that occurred in the public parking lot of the licensed premises.

EVIDENCE

On July 6, 2001, Jacquelyn Sterling got off work at 10:00 p.m. from Target. She walked out into the parking lot and became angry because she felt someone had "messed" with her car. She testified that it appeared that someone had gotten into her car and tried to take the inspection sticker. Her ex-boyfriend, Joe Mayon had the second set of keys to her car. She had not seen Mr. Mayon since March 23, 2001, when he had ask her to leave his apartment. At the time he had ask her to leave, she was pregnant with his baby. Ms. Sterling testified that thereafter, Child Protective Services (CPS) ordered her not to see Mr. Mayon, and that the baby was in the care of CPS. She testified that she had not had any problems with Mr. Mayon after they separated, but she suspected Joe Mayon of "messing" with her car that night.

Ms. Sterling wanted her car keys back. Ms. Sterling testified she went home to her mother's house and called 911. The police arrived at the house and informed her the best way to get her keys was to ask for them peacefully. She and a girlfriend went to Palladium to confront Joe Mayon, who worked there as a bouncer. Mr. Mayon was not there. They waited for him.

When Mr. Mayon arrived, Ms. Sterling confronted him at the front door of the club. He had worked at the club earlier in the evening, gotten off work, gone home, and changed clothes so that he could come back to the club as a patron.

At the front door of the club, they began arguing because he did not have the keys on him, and she was three or four car payments behind and wanted him to make the payments. There were some welding items (hood and gloves) in the trunk of the car he wanted. She said he could not have the items in the trunk until he made a car payment or gave her his set of keys. He told her his keys were at his apartment in Port Arthur. She told him that she was going to show up the next day with the constable to get the keys. The argument was in front of the on-duty bouncers at the front door, who ask her to leave the premises as she was extremely agitated and making a scene. Ms. Sterling and the girl with her walked out of the building. The alleged Code violations are based on what happened next.

Jacquelyn Sterling did not leave Respondent's premises. She walked about fifteen feet to the corner of the building and started talking to a boy named, Chad. The bouncers saw that Ms. Sterling was in the parking lot. When Chad walked off, Ms. Sterling saw that the bouncers were looking at her. The girl with her got into Ms. Sterling's Ford Escort vehicle. Ms. Sterling walked over to the Ford Escort and told the girl to turn on the car's music, and play it loud, while Ms. Sterling sat defiantly on the car. When Joe Mayon saw that she had not left, he confronted her. Three bouncers followed Mr. Mayon into the parking lot (B.J., Chris, and an unknown named bouncer). Mr. Mayon told one of the bouncers, B.J., to go call the police. B.J. went back inside and called the manager to the front door. The police were not called until after the incident was over. B.J. told the manager that there was a problem with Joe Mayon's ex-girlfriend in the parking lot.

In the parking lot, Ms. Sterling testified that Joe Mayon grabbed her arm, twisted it, and took her keys. Ms. Sterling testified that Mr. Mayon held the keys up in the air, dangling them before her. Robert Straszewski, the manager, came outside with B.J., and observed that Mr. Mayon had his arms up in the air with Ms. Sterling yelling, punching, and kicking Mr. Mayon. Ms. Sterling testified that when she kicked Mr. Mayon in the genitals, the bouncer named Chris restrained her.

Chris was a bouncer she knew. Chris pulled her off Mr. Mayon and said "Calm down." When he let go of her, she immediately went back at Mr. Mayon. The bouncers attempted to restrain her as she fought back. During the two minutes that elapsed, at one point, she fell to the ground.

Ms. Sterling testified that the bouncers did not hit her, did not throw her to the ground, but did restrain her as she became more and more agitated. She also said that Mr. Mayon got his things out of the trunk and threw her keys on the ground (Mr. Straszewski testified that he never saw Mr.

Mayon get anything out of the trunk). Ms. Sterling testified that when she got her keys, Joe Mayon walked off and that the bouncers followed Mr. Mayon. Ms. Sterling said she was still screaming at Chris when she got into her car and drove off.

The next day Joe Mayon and Jacquelyn Sterling both filed assault charges against each other, which were later dismissed. She never got the extra set of keys from him, and the car was repossessed.

Robert Straszewski, the manager, testified that he attended a recent Texas Alcoholic Beverage Commission (TABC) class on domestic violence at clubs. They were taught that the fighting individuals first needed to be restrained from injuring each other. Then, they were to advise the individuals to take separate transportation away from the club. If the violence continued, they were told that they should make a citizen's arrest and hold the violent person for the police.

DISCUSSION

A breach of the peace occurred on the licensed premises. Was it beyond the control of Respondent? The breach was first caused by Jacquelyn Sterling in the club. She left the club, but not the premises. Staff's argument is that Respondent is liable because the bouncers took it upon themselves to confront Jacquelyn Sterling in the parking lot, instead of calling the police. In order to agree with the argument, there would have to be a finding that it was the bouncers who confronted Ms. Sterling in the parking lot.

Jacquelyn Sterling was making a scene in the parking lot, just as she had made a scene in the club. She told her friend to turn the car music up as she sat defiantly on the vehicle. When the bouncers approached the vehicle, she made it clear that she was not going to leave. Although off-duty, Joe Mayon asserted control over the bouncers, and told B.J. to go call the police. Ms. Sterling asserts that Mr. Mayon grabbed her car keys. But if he did, it is unclear how her friend was able to turn up the car's radio and play the music so loud. Whether or not Mr. Mayon grabbed the car keys, it was Mr. Mayon who confronted Ms. Sterling, with the bouncers watching.

The manager argued that the incident was under control, because he observed the bouncers using reasonable restraint on an out-of-control ex-girlfriend. He never saw Mr. Mayon attack the girl by grabbing the keys. He saw the girl doing all the attacking. The bouncers restrained her from trying to cause injury to her ex-boyfriend, who should not have been in the parking lot.

It is this ALJ's opinion that the bouncers should have tried to keep Mr. Mayon from going into the parking lot. There was some evidence that it was the bouncers who told Mr. Mayon that Ms. Sterling had not left the premises. It is the bouncers' job to keep agitated people separated. According to Jacquelyn Sterling, her problem with Joe Mayon started long before she got to the club. Her agitation only grew when she confronted Mr. Mayon in the club. Proper supervision would demand that Joe Mayon not be allowed to go out into the parking lot. The manager testified that the

TABC class he attended taught that the fighting individuals needed to be restrained away from each other. If the bouncers had asked Joe Mayon to stay inside, then when they approached Jacquelyn Sterling, she would have either left the parking lot or have been arrested when the police arrived. Instead, the bouncers let the situation intensify by allowing Mr. Mayon to confront Ms. Sterling in the parking lot.

In conclusion, it is this ALJ's opinion that a breach of the peace occurred on the licensed premises, which was not beyond the control of the Respondent and which resulted from the improper supervision of persons on the premises.

RECOMMENDATION

TABC business records admitted at the hearing show that in a previous breach of the peace violation by Respondent, TABC and Respondent agreed to a ten-day suspension or \$1,500.00 fine. This ALJ believes the previous breach of the peace violation to be a more serious matter because it involved an assault, while this matter was a domestic dispute between two patrons of the club caused almost entirely by Ms. Sterling. This ALJ does not find that Respondent's employees' actions amounted to an assault on Ms. Sterling as the Staff attorney contends, but does find that Respondent's employees did not use good sense in allowing Mr. Mayon to confront Ms. Sterling in the parking lot. Therefore, this ALJ can not follow the penalty recommendation that the Staff's attorney suggested, but does agree with the Staff's attorney that Respondent should be penalized for improper supervision.

In a previous "failure to report" violation, TABC and Respondent agreed to a five-day suspension or \$750.00 fine. This matter is a more serious violation than just a "failure to report" violation. Therefore, the penalty in this matter should be between the two previous violations. This ALJ finds that a violation occurred and recommends a seven-day suspension or \$1,050.00 fine.

FINDINGS OF FACT

1. Dicitie, Inc. doing business as Palladium, 528 Forsythe, Beaumont, Jefferson County, Texas, holds Mixed Beverage Permit (MB-422378) and Mixed Beverage Late Hours Permit (LB-422379) issued by the Texas Alcoholic Beverage Commission (TABC).
2. On October 2, 2001, Petitioner sent Respondent written notice that on July 6, 2001, a breach of the peace occurred on the licensed premises, which was not beyond the Permittee's control, and resulted from the Permittee's improper supervision of the persons on the premises in violation of Texas Alcoholic Beverage Code Section 28.11 and 16 Texas Administrative Code Section 35.31 (b).
3. Respondent requested a hearing.

4. Notice of the hearing was sent to Respondent on February 15, 2002.
5. On April 11, 2002, a hearing convened before Administrative Law Judge Don Smith, State Office of Administrative Hearings, at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by TABC Staff Attorney Dewey Brackin. Respondent was represented at the hearing by one of its principal owners, Roy Etie.
6. On July 6, 2001, Joe Mayon was employed by Respondent as a bouncer on the licensed premises.
7. On July 6, 2001, Jacquelyn Sterling went to Palladium to confront Joe Mayon about matters unrelated to his employment at Palladium.
8. When Jacquelyn Sterling confronted Joe Mayon on the license premises, Mr. Mayon was not on-duty as a bouncer for Respondent.
9. Respondent's employees requested Ms. Sterling to leave the licensed premises.
10. On July 6, 2001, the on-duty bouncers knew that Ms. Sterling was agitated, as they had just witnessed an argument between Mr. Mayon and Ms. Sterling at the front of the club.
11. Ms. Sterling walked out the club but did not leave the licensed premises.
12. The parking lot where Ms. Sterling's Ford Escort was parked was part of the licensed premises.
13. Ms. Sterling started causing a scene in the parking lot of the licensed premises when she told the girl that was with her to turn up the car radio and play the music loud as Ms. Sterling sat on the hood of the car.
14. Mr. Mayon went into the parking lot and confronted Ms. Sterling.
15. Respondent's employees followed Mr. Mayon into the parking lot and did not restrain him.
16. Respondent's employees should not have let Joe Mayon go out into the parking lot of the licensed premises.
17. A struggle between Joe Mayon and Jacquelyn Sterling ensued.
18. At the time of the incident, Joe Mayon was off-duty and was outside his course and scope of employment with Respondent.

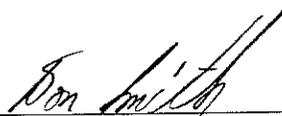
19. The incident was not beyond the control of the Respondent because the bouncers should have told Joe Mayon to stay inside while they confronted his ex-girlfriend.
20. The incident resulted from the improper supervision of persons on the premises because the bouncers should not have let Mr. Mayon confront his agitated ex-girlfriend in the parking lot.
21. Respondent employees should have either called the police or should have made a citizen's arrest on Ms. Sterling when she refused to leave the premises.
22. On July 6, 2001, Ms. Sterling was a danger to herself and to others in her agitated state of mind.
23. During the incident in the parking lot, Ms. Sterling used excessive force on Mr. Mayon, kicking him in the groin.
24. In the parking lot Respondent's employees properly restrained Ms. Sterling asking that she calm down.
25. Respondent's employees did not hit Ms. Sterling, did not push her, and did not fling her to the ground.
26. Ms. Sterling fell to the ground because she resisted being restrained by the bouncers whom she knew and who had been her friends in the past.
27. Respondent's employees did not assault Ms. Sterling.

CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Section 28.11.
2. SOAH has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. Sections 2001.051 and 2001.052.
4. Venue was proper in Houston, Texas, pursuant to 1 TEX. ADMIN. CODE Section 155.13.

5. A breach of the peace occurred on the licensed premises that was not beyond the control of the permittee and that resulted from improper supervision of persons permitted to be on the licensed premises. TEX. ALCO. BEV. CODE ANN. Section 28.11.
6. Based on the Findings of Fact and the above Conclusions of Law, the Respondent's permits should be suspended for seven days, or in the alternative, Respondent should be required to pay a civil penalty of \$1,050.00 in lieu of suspension.

SIGNED this 11th day of June, 2002.



Don Smith
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS