

DOCKET NO. 553805

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE TEXAS

VS.

ALICIA GUERRA VELASQUEZ
D/B/A ALICIA'S PLACE
PERMIT/LICENSE NO(s). BG292300, BL
VICTORIA COUNTY, TEXAS
(SOAH DOCKET NO. 458-07-3589)

ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 7 th day of January 2008, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on the 10th day of October 2007 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 5th day of December 2007. The 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.

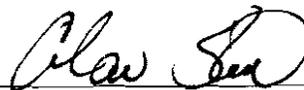
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those 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 your renewal application for Permit No. BG292300 is hereby DENIED.

This Order will become final and enforceable on February 5, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this January 8, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

The Honorable John H. Beeler
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (512) 475-4994

Lee Hernandez
ATTORNEY FOR RESPONDENT
4100 N.W. Loop 410, Suite 100
San Antonio, Texas 78229-4252
VIA FAX (210) 735-4231

ALICIA GUERRA VELASQUEZ
RESPONDENT
d/b/a ALICIA'S PLACE
3504 MORALES
VICTORIA, TX 77901

JUDITH L. KENNISON
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Enforcement Division

DOCKET NO. 458-07-3589

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
ALICIA GUERRA VALASQUEZ. d/b/a ALICIA'S PLACE (TABC CASE NOS. 553805)	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff/TABC) brings this action against Alicia Guerra Valasquez d/b/a Alicia's Place (Respondent), seeking to cancel an existing permit and license and to deny the renewal of the permit and license. TABC alleges that Respondent's spouse was placed on deferred adjudication for the felony offense of theft. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) recommends that Respondent's existing permit and license not be cancelled but, that the requested permit and license renewals be denied.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 11. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015, and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

The hearing in this matter convened on October 10, 2007, before ALJ John H. Becler, in San Antonio, Texas. TABC was represented at the hearing by Christopher G. Gee, staff attorney. Respondent appeared and was represented by attorney Lee Hernandez. The hearing concluded and the record closed that same day.

II. AGREED FACTS

Respondent holds a Wine and Beer Retailer's Permit and a Retailer's On Premise Late Hours License for the premises located at 805 Del Mar Drive, Victoria, Victoria County Texas, and has applied to renew both. On March 26, 2006, Respondent's spouse received Deferred Adjudication and was placed on community supervision for three years for the felony offense of theft.

III. APPLICABLE LAW

In the Notice of Hearing, Staff noted that, if the allegations in the notice were found true, it would seek cancellation or suspension of the permit and license, and/or denial of the renewal application. In support, Staff cited TEX. ALCO. BEV. CODE ANN. §§ 11.46 (a)(2), 25.06 (c)(2), 61.42 (a)(6), 61.43 (a)(2), and 109.532. Several of the referenced statutes do not concern a felony act by a spouse of a licensee, permittee, or applicant.

A felony committed by the actual applicant is addressed in §§ 11.46 (a)(2) and 61.42 (a)(2), with no reference to a spouse. An applicant's spouse is referenced in §61.43 (a)(2), but the subject of that section concerns prior cancellation or revocations of a permit or license, with no mention of criminal activity. The requirement, as well as process, for criminal background checks makes up § 109.532.

TEX. ALCO. BEV. CODE ANN. § 25.06 (c) (2) concerns permits and provides:

(c) The commission shall refuse to issue a renewal of a wine or beer retailer's permit if it finds:

(2) that five years have not elapsed since the termination of a sentence, parole, or probation served by the applicant, or the applicant's spouse, of a felony conviction or conviction of any of the offenses described in Subsection (a) of this section.

TEX. ALCO. BEV. CODE ANN. § 69.06 (c) (2) addresses licenses and provides:

(c) The commission shall refuse to issue a renewal of a retail dealer's on-premise license if it finds:

(2) that five years has not elapsed since the termination of a sentence, parole, or probation served by the applicant or the applicant's spouse because of a felony prosecution or prosecution for any of the offenses described in Subsection (a) of this section.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 70.03, [a]ll provisions of this code which apply to a retail dealer's on-premise license also apply to a retail dealer's on-premise late hours license.

The ALJ found no other provisions of the Code addressing a felony committed by the spouse of a license or permit holder. Specifically, no provision of the Code authorizes suspension or revocation of a license or permit if the holder's spouse commits a felony or is placed on felony probation.

IV. DISCUSSION

Staff seeks cancellation of the permit and license and denial of the renewal applications, arguing that those are the only sanctions allowed under the Code. Respondent argues that the Code allows a lesser penalty, such as suspension or the payment of a civil penalty. Specifically, Respondent relies on TEX. ALCO. BEV. CODE ANN. § 11.64 (b) and (c), which states:

(b) In the case of a violation of this code by a permittee or a licensee, the commission or administrator may relax any provision of the code relating to the suspension or cancellation of the permit or license and assess a sanction the commission or administrator finds just under the circumstances, and the commission or administrator may reinstate the license or permit at any time during the period of suspension on payment by the permittee or licensee of a fee of not less than \$75 nor more than \$500, if the commission or administrator finds that any of the circumstances described in Subsection (c) exists.

(c) The following circumstances justify the application of Subsection (b):

(1) that the violation could not reasonably have been prevented by the permittee or

- licensee by the exercise of due diligence;
- (2) that the permittee or licensee was entrapped;
 - (3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee;
 - (4) that the permittee or licensee did not knowingly violate this code;
 - (5) that the permittee or licensee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations; or
 - (6) that the violation was a technical one.

Although both parties appeared to make their arguments assuming that cancellation of the permit and license was a possible outcome in this matter, as discussed above, no authority could be found in the Code for that position. Therefore, the ALJ does not recommend any action be taken against the existing permit or license.

Respondent argues that several mitigating circumstances set out above apply. Specifically, the violation could not have been prevented by Respondent, the violation was committed without the knowledge of Respondent, Respondent did not knowingly violate the code, and the violation is a technical one. However, these arguments assume that the commission of the felony by Respondent's husband was a violation of the Code. In fact, the spouse's act did not violate the Code, but the fact that he is on probation causes Respondent to be prohibited from renewing her license and permit.

The two sections of the Code that relate to felony convictions by a spouse of an applicant state that the "commission shall refuse to issue" permits or licenses if five years have not passed since the spouse was terminated from probation. The issues addressed in § 11.64 are relevant in situations of suspension or cancellation of permits or licenses. They are not to be considered when determining eligibility for renewal. Therefore, the ALJ only recommends denial of the renewal applications.

V. FINDINGS OF FACT

1. Alicia Guerra Valasquez d/b/a Alicia's Place (Respondent) holds a Wine and Beer Retailer's Permit and a Retailer's On Premise Late Hours License for the premises located at 805 Del Mar Drive, Victoria, Victoria County Texas, and has applied to renew both.
2. On March 26, 2006, Respondent's spouse received Deferred Adjudication and was placed on community supervision for three years for the felony offense of theft.
3. On July 24, 2007, TABC sent its Notice of Hearing to Respondent. This Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and included a short plain statement of the allegations and the relief sought by TABC.
4. On October 10, 2007, an evidentiary hearing in this matter convened in San Antonio, Texas, before Administrative Law Judge (ALJ) John H. Beeler. TABC was represented at the hearing by Christopher G. Gee, staff attorney. Respondent appeared and was represented by attorney Lee Hernandez. The hearing concluded and the record closed that same day.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 11.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and 11.015, and TEX. GOV'T CODE ANN. § 2003.021.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.55.
4. Based on Finding of Fact No. 2 and TEX. ALCO. BEV. CODE ANN. § 25.06 (c) (2), Respondent's license and permit should not be renewed.

SIGNED on December 5, 2007.



JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 5 2007

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

HAND DELIVERY

RE: Docket No. 458-07-3589; Texas Alcoholic Beverage Commission vs. Alicia Guerra Valasquez d/b/a Alicia's Place (TABC Case No. 553805)

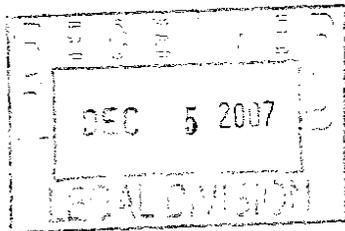
Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

John H. Beeler
Administrative Law Judge



JHB/sb(pp)
Enclosure

- xc Christopher G. Gee, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA HAND DELIVERY
- Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA HAND DELIVERY
- Lee Hernandez, Attorney at Law, 4100 N. W. Loop 410, Suite 100, San Antonio, TX 78229-4252 -**VIA REGULAR MAIL**