

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 25, 2008

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

VIA MAIL DELIVERY

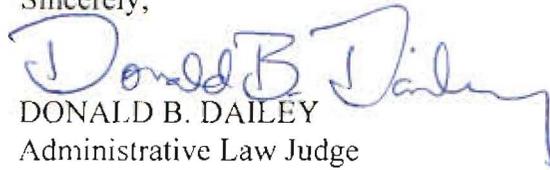
RE: Docket No. 458-08-2076, TABC vs Welste, Inc. d/b/a Red Barron Lounge

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,


DONALD B. DAILEY
Administrative Law Judge

DBD/ilap

Enclosure

xc Susan Stith, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
David Willborn, 9310 Broadway, Ste 201, San Antonio, TX 78217 - **VIA REGULAR MAIL**



**SOAH DOCKET NUMBER 458-08-2076
TABC CASE NUMBER 560373**

| | | |
|---|---|--------------------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner | * | BEFORE THE STATE OFFICE |
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| VERSUS | * | OF |
| | * | |
| WELSTE, INC., D/B/A RED BARRON LOUNGE, PERMIT/LICENSE NUMBER MB612401, BEXAR COUNTY, TEXAS, Respondent | | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Petitioner) through its staff (Staff) requested that the license of Welste, Inc. (Respondent), doing business as the Red Barron Lounge (Lounge), be suspended for twenty days based on allegations that an employee of Respondent allegedly possessed a narcotic on the licensed premises and allegedly was intoxicated on the licensed premises. The Administrative Law Judge (ALJ) finds that Staff proved the foregoing allegations. The ALJ recommends that Respondent's license be suspended for twenty days or that Respondent be assessed a civil penalty of \$150 per day for a total of \$3000.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of jurisdiction or notice. Those issues are addressed in the findings of fact and conclusions of law without further discussions here.

The hearing in this matter convened on May 28, 2008, at the State Office of Administrative Hearings (SOAH), Suite 250, 10300 Heritage Boulevard, San Antonio, Texas 78213, before ALJ Donald B. Dailey. Petitioner was represented by its staff attorney Susan Stith. Respondent was represented by its attorney David Willborn. The hearing was concluded that same day. To allow the submission of briefs, the record was held open until June 5, 2008.

II. ALLEGATIONS AND APPLICABLE LAW

Staff alleges that Respondent committed the following violations as set out in the Notice of Hearing:

A. Count One

1. **Allegation:** Respondent or its agent, servant, or employee, possessed or permitted others to possess a narcotic on the licensed premises on or about February 17, 2007.

2. Applicable Law:

a. 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 permitting a person on the licensed premises to do so. TEX. ALCO. BEV. CODE ANN. § 104.01(9).

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: ... the permittee violated a provision of this code or a rule of the commission. . TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

c. Narcotic—Any substance defined in the TEX. HEALTH & SAFETY CODE ANN. § 481.002(5), (6), (7), or (26). 16 TEX. ADMIN. CODE § 35.41(2).

d. “Marijuana” means the plant *Cannabis sativa* L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the resin. TEX. HEALTH & SAFETY CODE ANN. § 481.002(26).

B. Count Two

1. **Allegation:** Respondent or its agent, servant, or employee, was intoxicated on the licensed premises on or about February 17, 2007.

2. **Applicable Law:**

a. 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: ... being intoxicated on the licensed premises. . TEX. ALCO. BEV. CODE ANN. § 104.01(5).

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: ... the permittee violated a provision of this code or a rule of the commission; TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

III. EVIDENCE PRESENTED

Staff presented the testimony of two witnesses and offered four exhibits. Respondent presented no witnesses and offered no exhibits.

Alan Lanier is an enforcement agent for the Texas Alcoholic Beverage Commission (TABC). He has had three years experience with the TABC and six years total experience in law enforcement. He has a peace officer's state certification and a bachelor's degree in law enforcement.

Agent Lanier said that he was summoned to the Lounge by the San Antonio Police Department. He arrived at about 3:20 a. m. Many persons were in the Lounge even though it was after closing time. Also present were several San Antonio Police Department officers and

TABC Enforcement Agent Hodges. Agent Lanier assisted Agent Hodges, who has since retired.

The police officers had a man in handcuffs. They had arrested him for public intoxication. His name was Kyle Daniel Etrheim. The police officers removed the handcuffs so that Mr. Etrheim could be administered a portable breath test. He reached into his pockets for cigarettes. Agent Hodges searched Mr. Etrheim for officer safety. Agent Hodges found a pill bottle that he handed to Agent Lanier. When he opened the pill bottle, Agent Lanier found a green, leafy substance which was fresh and wet. The substance had the distinctive odor of marijuana. Agent Lanier previously had been in contact with marijuana many times in connection with searching people and vehicles. Mr. Etrheim was again handcuffed and not administered a portable breath test.

The Incident Reports prepared by Agent Lanier and Agent Hodges were admitted as public records without objection. However, Respondent did object to any hearsay statements within the reports. Both reports indicate that Agent Hodges interviewed a person whose name was Charles Kelly Forester and who identified himself as the manager of the Lounge. Mr. Forester said that he had left the Lounge earlier in the evening but then returned after he was advised that the police were at the Lounge. Also, Mr. Forester stated that Mr. Etrheim had been employed at the Lounge for three weeks and was paid by the night in cash.

Marty Laurenz is a detective with the San Antonio Police Department. He has had twelve years experience with the department, ten in patrol and two as a detective.

Officer Laurenz said that he responded to a dispatch to the Lounge regarding a report of a cutting. After he and other police officers arrived at the scene, a woman in the parking lot told him that she had been assaulted inside the Lounge. The officer could hear a number of people laughing, joking, and moving around inside the Lounge. However, the exterior doors were all locked. He identified himself and sought entry. He was initially refused entry. He advised the people inside that he would kick the door down. He was then allowed entry. Due to his lack of familiarity with TABC regulations, he called for assistance by a TABC enforcement agent.

Once inside the Lounge, Officer Laurenz encountered a large man named Kyle Daniel Etrheim, who identified himself as the doorman. He said the reason that he did not open the door to the Lounge was because he could not tell that the officers were policemen. Mr. Etrheim had the odor of an alcoholic beverage on his breath. His eyes were bloodshot, his speech was slurred, he had difficulty maintaining his balance, and he was argumentative and uncooperative.

IV. ANALYSIS

Staff proved by a preponderance of the evidence that Mr. Etrheim was an employee of Respondent. The manager of the Lounge identified Mr. Etrheim as an employee to Agent Hodges. His statement was the statement of Respondent's servant made concerning a matter within the scope of his employment during the existence of his employment, that is, the admission of a party-opponent and not hearsay. Mr. Etrheim identified himself as an employee of the Lounge, said that he was paid, identified his duties as being the doorman, and did on the occasion in question control entry to the Lounge. In weighing the evidence, the ALJ did not consider Mr. Etrheim's statements bearing on the issue of his employment as the admissions of Respondent's servant, since the disputed issue is whether he was, in fact, Respondent's servant. However, while Mr. Etrheim's statements to Officer Lorenz bearing on the issue of his employment may have been hearsay, they were received into evidence without objection both on direct examination and cross-examination and had probative value.

Staff proved that Mr. Etrheim possessed marijuana. Staff offered a business record affidavit containing a drug analysis report from the Texas Department of Public Safety identifying the substance in question as marijuana. The report is dated the day before the hearing and was not furnished to Respondent until minutes before the hearing commenced. Respondent objected to the admission of the report as not timely filed as required by TEX. R. EVID. Rule 902(10)(a). Without regard to the admissibility of the report, Staff's evidence was sufficient. Agent Hodges found a substance in a pill bottle in Mr. Etrheim's pocket. Agent Lanier handled the substance. Based on his law enforcement education, training, and experience, Agent Lanier was qualified to and did identify the substance as marijuana. Agent Lanier's qualifications to identify the substance as marijuana were challenged. However, Agent Lanier's testimony was

credible and sufficient to prove that the substance was marijuana. The evidence that Mr. Etrheim possessed the substance was undisputed.

Also, Respondent argued that no conviction for possession of marijuana was proved. In addition, Respondent argued that the definition of narcotic in the Alcoholic Beverage Commission regulations differs from the definition of narcotics in other state and federal statutes which violates due process. The absence of a criminal conviction does not negate the sufficiency of the evidence presented. The lack of statutory consistency in the definition of narcotic did not deprive Respondent of due process.

Finally, Staff proved that Mr. Etrheim was intoxicated. In addition to having a controlled substance on his person, Mr. Etrheim exhibited signs of consumption of intoxicants and exhibited signs of the loss of the normal use of his mental and physical faculties, such as the odor of alcohol on his breath, his difficulty in maintaining his balance, and his argumentative demeanor. Respondent argued that the evidence was insufficient because Mr. Etrheim offered to take a breath test, but none was administered, and because no conviction for public intoxication was proved. Neither the law enforcement officer's possible failure to follow through with giving Mr. Etrheim a portable breath test nor the absence of a criminal conviction negates the sufficient evidence of Mr. Etrheim's intoxication.

Accordingly, pursuant to the TABC's standard penalty chart, the ALJ recommends imposition of a ten day suspension for each violation for a total of twenty days or a \$150 per day civil penalty for a total of \$3000.

IV. PROPOSED FINDINGS OF FACT

1. On February 17, 2007, Respondent was and still is the holder of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises known as the Red Barron Lounge located at 914 Burr Road, San Antonio, Bexar County, Texas 78209.
2. On February 17, 2007, Kyle Daniel Etrheim was working as a doorman for cash at the Lounge.

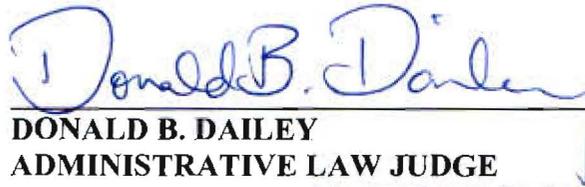
3. On February 17, 2007, Kyle Daniel Etrheim was a paid employee of Respondent, working at the licensed premises.
4. On February 17, 2007, while working at the Lounge, Kyle Daniel Etrheim had a green, leafy substance in his pocket in a pill bottle.
5. The green, leafy substance in Kyle Daniel Etrheim's pocket was marijuana.
6. On February 17, 2007, Kyle Daniel Etrheim was in possession of a narcotic, that is, marijuana, on the licensed premises.
7. On February 17, 2007, while working at the Lounge, Kyle Daniel Etrheim had the odor of an alcoholic beverage on his breath, had bloodshot eyes, had slurred speech, had difficulty maintaining his balance, and was argumentative and uncooperative.
8. On February 17, 2007, while working at the Lounge, Kyle Daniel.
9. On February 17, 2007, Kyle Daniel Etrheim was intoxicated on the licensed premises.
10. On March 5, 2008, Staff sent Respondent a Notice of Hearing.
11. The Notice of Hearing contained a statement of the time, date, location, 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 allegations and relief sought by Petitioner.
12. On May 28, 2008, a public hearing was held at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas, before ALJ Donald B. Dailey. Petitioner was represented by its staff attorney Susan Stith. Respondent was represented by its attorney David Willborn. The hearing was concluded that same day. To allow the attorneys additional time to submit briefs on evidentiary issues, the record was held open until June 5, 2008.

V. PROPOSED CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 11.61.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T. CODE ANN. Ch. 2003.
3. Proper and timely notice of the hearing was provided to the parties. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052, TEX. ALCO. BEV. CODE ANN. § 11.63, and TEX. ADMIN. CODE § 155.55.

4. Based on the above Findings of Fact, Respondent or his agent, servant, or employee possessed or permitted others to possess a narcotic on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 104.01(9) and 11.61(b)(2) and 16 TEX. ADMIN. CODE § 35.41(b).
5. Based on the Findings of Fact, Respondent or his agent, servant, or employee was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 104.01(5) and 11.61(b)13.
6. Based on Conclusion of Law No. 4, a ten day suspension of Respondent's permit pursuant to the Standard Penalty Chart. TEX. ADMIN. CODE § 37.60(a).
7. Based on Conclusion of Law No. 5, a ten day suspension of Respondent's permit pursuant to the Standard Penalty Chart. TEX. ADMIN. CODE. § 37.60(a).
8. Respondent should be allowed to pay a civil penalty of \$150 per day for a total of \$3000 in lieu of suspension of its permit. TEX. ALCO. BEV. CODE ANN. § 11.64(a).

SIGNED June 25, 2008.



DONALD B. DAILEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING