

**DOCKET NO. 560373**

IN RE WELSTE INC. § BEFORE THE TEXAS  
D/B/A RED BARON LOUNGE §  
PERMIT/LICENSE NO(s). MB612401, LB § ALCOHOLIC  
§  
BEXAR COUNTY, TEXAS §  
(SOAH DOCKET NO. 458-08-2076) § BEVERAGE COMMISSION

**ORDER DENYING MOTION FOR REHEARING**

**ON THIS DAY** the above numbered and styled cause came on for consideration. On August 5, 2008, an Order was issued which **SUSPENDED** Respondent's permits. Respondent filed a Motion for Rehearing on August 27, 2008.

**IT IS THEREFORE ORDERED** that the Motion For Rehearing is **DENIED**.

By copy of this Order service shall be made upon David Willborn, Attorney for WELSTE INC., Respondent in this manner, as indicated below, on the date signed.

**SIGNED** this the 24th day of September, 2008.

  
\_\_\_\_\_  
Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

Hon. Donald B. Dailey, ALJ  
State Office of Administrative Hearings  
**VIA FACSIMILE: (210) 308-6854**

David Willborn  
**ATTORNEY FOR RESPONDENT**  
9310 Broadway Street, Ste 201  
San Antonio, TX 78217  
**VIA FACSIMILE: (210) 930-9075**

WELSTE INC.  
**RESPONDENT**  
d/b/a RED BARON LOUNGE  
914 Burr Rd.  
San Antonio, TX 78209  
**VIA REGULAR MAIL**

Susan M. Stith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Enforcement District Office

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

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

**ORDER DENYING MOTION FOR REHEARING**

On this date the Defendant's Motion for Rehearing was considered. The Administrative Law Judge finds that the motion should be denied.

It is, therefore, ORDERED that the Defendant's Motion for Rehearing is denied.

**SIGNED** on September 2, 2008.

  
**DONALD B. DAILEY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

SAN ANTONIO OFFICE

10300 Heritage Suite 250  
San Antonio, Texas 78216  
Phone: (210) 308-6681  
Fax: (210) 308-6854

DATE: 09/08/2008

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 2

REGARDING: ORDER - MOTION DENYING MOTION FOR REHEARING

DOCKET NUMBER: 458-08-2076

JUDGE DONALD DAILEY

FAX TO:

FAX TO:

SUSAN SMITH (TEXAS ALCOHOLIC BEVERAGE  
COMMISSION)

(512) 206-3498

DAVID WILLBORN

(210) 930-9075

Lou Bright Director of Legal Services (Alcoholic Beverage  
Commission, Texas)

(512) 206-3498

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT IRENE LAPASNICK(ila) (210) 308-6681

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address via the U.S. Postal Service. Thank you.

**DOCKET NO. 560373**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§ § §	BEFORE THE TEXAS
VS.	§ §	
WELSTE INC. D/B/A RED BARON LOUNGE	§ § §	ALCOHOLIC
BEXAR COUNTY, TEXAS (SOAH DOCKET NO. 458-08-2076)	§ §	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 5<sup>th</sup> day of August, 2008, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Donald B. Dailey. The hearing convened on 28<sup>th</sup> day of May, 2008 and adjourned the same day. The Administrative Law Judge Donald B. Daily, made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 25<sup>th</sup> day of June, 2008. 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 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.

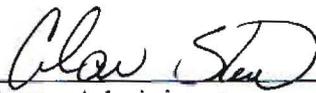
**IT IS THEREFORE ORDERED**, by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's Mixed Beverage Permit MB612401, be hereby **SUSPENDED** for **twenty (20) days** and be assessed a civil penalty of **\$150.00 per day** for a total of **\$3,000.00**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$3,000.00** on or before the **7<sup>th</sup> day of September, 2008**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **twenty (20) days** beginning at 12:01 A.M. on the **14<sup>th</sup> day of September, 2008**.

This Order will become final and enforceable on the 29<sup>th</sup> day of August, 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** on this the 5<sup>th</sup> day of August, 2008, at Austin, Texas.

  
\_\_\_\_\_  
Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

David Willborn  
**ATTORNEY FOR RESPONDENT**  
9310 Broadway Street, Ste. 201  
San Antonio, TX 78217  
**VIA FAX: (210) 930-9075**

WELSTE INC.  
**RESPONDENT**  
d/b/a RED BARON LOUNGE  
914 Burr Rd.  
San Antonio, TX 78209  
**VIA REGULAR MAIL**

Sustan Stith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

District Office

**SOAH DOCKET NO. 458-08-2076**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
WELSTE INC. d/b/a RED BARON LOUNGE	§	OF
	§	
	§	
PERMIT/LICENSE NO(s). MB612401 BEXAR COUNTY, TEXAS <i>(TABC CASE NO. 560373)</i>	§	ADMINISTRATIVE HEARINGS

**PETITIONER’S REPLY TO RESPONDENT’S MOTION FOR REHEARING**

TO THE HONORABLE ADMINISTRATOR FOR THE TEXAS ALCOHOLIC  
BEVEAGE COMMISSION:

Comes now, the Texas Alcoholic Beverage Commission (TABC), Petitioner, by and through its attorney, and files this Reply to Respondent’s Motion for Rehearing. In support thereof Petitioner would show the following:

**I.**

The above-styled cause of action was heard before Administrative Law Judge (ALJ) Donald B. Dailey, at the State Office of Administrative Hearings (SOAH) for San Antonio, Texas. After considering the testimony and evidence offered, the ALJ recommended that the Respondent’s permits be suspended for a period of twenty (20) days, or, in the alternative, pay a civil penalty of \$3,000.00.

A proposal for decision recommending this penalty was filed on June 25, 2008. Neither party filed exceptions to the proposal for decision. On August 5, 2008, the Order adopting the Proposal for Decision was signed, showing the penalty would be final and

enforceable unless a Motion for Rehearing was filed before August 29, 2008. Respondent filed his Motion for Rehearing on August 27, 2008.

## II.

Respondent argues in his Motion for Rehearing that he was unable to produce eyewitnesses to the events that made the basis of the violations, but can now produce witnesses to rebut the allegations. Respondent further argues that he was surprised by additional evidence from Respondent which was never served upon him despite discovery requests. These arguments are insufficient to grant a Motion for Rehearing of this matter.

Respondent has already been provided the opportunity to present any witnesses he deemed necessary to present his case. As shown in the Texas Administrative Code, the applicable rules of procedure are construed to ensure the just and *expeditious* determination of every matter referred to SOAH. *See TAC §155.3, emphasis added.* However, Respondent is not entitled to a rehearing in a matter simply because he has failed to produce a witness. This would be contrary to the construction of the rules of procedure as it would unnecessarily delay the hearing process.

Respondent's attorney failed to request any additional time to locate witnesses for this case. It has been over a year since the violations at issue occurred, giving Respondent and his attorney ample time to locate all witnesses. Moreover, this case was initially scheduled to be heard on April 22, 2008 (approximately one year and two months after the violations date), but was continued by agreement of the parties to May 28, 2008. Respondent's attorney did not indicate he needed to locate any witnesses prior to the final setting of the case, nor did he detail in his Motion for Rehearing what witnesses he has located, why they were previously unavailable or the substance of their

testimony. For these reasons, Respondent's request for a rehearing of this matter should be denied.

Respondent further argues that he was unfairly surprised by evidence which was not sent in response to his discovery request. Although Respondent fails to specifically state what evidence he is referring to in his motion, it is presumably the drug analysis report from the Texas Department of Public Safety. Respondent objected to its admission at not being timely filed by the TABC. Petitioner responded at trial that the report had not been previously provided to Respondent because it was received by TABC immediately prior to the hearing.

As the record of the proceedings and the Proposal for Decision show, the ALJ determined there was sufficient evidence regarding the alleged violation "without regard to the admissibility of the report." *See Proposal for Decision pg 5 ¶3.* The report was not admitted into evidence despite Petitioner's post hearing brief urging its admissibility and the ALJ relied upon the testimony of Agent Lanier in identifying the marijuana in this matter. Thus, the submission of this evidence did not prejudice Respondent as it was not relied upon by the ALJ, nor is it suitable grounds for a rehearing of this matter.

In summary, Respondent's Motion for Rehearing should be denied for the following reasons. Respondent failed to locate witnesses or request any time to do so prior to the second setting of the hearing. The drug analysis report was not relied upon by the ALJ in this matter. Respondent failed to specifically brief what the additional witnesses will offer or what evidence he is complaining he was unfairly surprised by and Respondent failed to file exceptions to the Proposal for Decision regarding any of these issues.

**WHEREFORE PREMISES CONSIDERED**, the Texas Alcoholic Beverage Commission, respectfully requests Respondent's Motion for Rehearing be DENIED.

By:   
\_\_\_\_\_  
SUSAN M. STITH  
State Bar No. 24014269  
TABC Legal Services  
Texas Alcoholic Beverage Commission  
5806 Mesa Dr  
Austin, TX 78731  
Telephone: (512) 206-3493  
Fax (512) 206-3498

**CERTIFICATE OF SERVICE**

I, Susan M. Stith, certify that I have served true copies of this Petitioner's Reply to Respondent's Motion for Rehearing on all parties, on September 8, 2008, in the manner indicated below.

  
\_\_\_\_\_  
Susan M. Stith  
**ATTORNEY FOR THE PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Services Division

David Willborn  
**ATTORNEY FOR RESPONDENT**  
9310 Broadway Street, Ste. 201  
San Antonio, Texas 78217  
**VIA FACSIMILE: (210) 930-9075**

Administrative Law Judge  
State Office of Administrative Hearings  
San Antonio, Texas  
**VIA FACSIMILE: (210) 308-6854**

Mr. Alan Steen  
**Administrator**  
**Texas Alcoholic Beverage Commission**

## NO. 560373

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
vs.	§	
	§	
WELSTE, INC., D/B/A RED BARRON	§	OF
LOUNGE	§	
PERMIT/LICENSE NUMBER	§	
MB612401, BEXAR COUNTY,	§	
TEXAS	§	ADMINISTRATIVE HEARINGS

MOTION FOR REHEARING**TO THE HONORABLE JUDGE OF SAID COURT:**

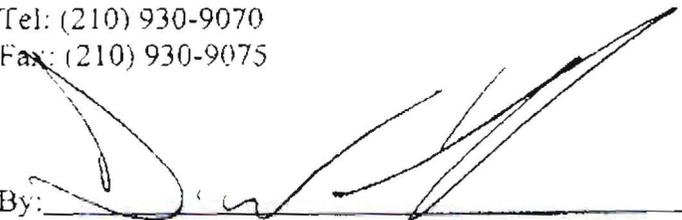
Now comes Welste, Inc., Respondent in the above-entitled and numbered cause, by and through undersigned Attorney, and moves the Court to rehear the above styled case. In support thereof Welste, Inc. would show the Court the following:

1. That Welste, Inc.'s Mixed Beverage Permit was ordered suspended for twenty (20) days and was ordered to alternatively pay a civil penalty of \$3,000.00.
2. That the day of the hearing, Respondent was unable to produce eyewitnesses to the events which led to the complaint filed by Petitioner. Further that Petitioner surprised Respondent with additional evidence at the hearing which was never served on Respondent despite discovery requests.
3. That Welste, Inc. has now located the eyewitnesses to the events and can effectively rebut the allegations made by Petitioner.

**WHEREFORE, PREMISES CONSIDERED,** Welste, Inc. prays the Court grant this Motion for Rehearing.

Respectfully submitted,

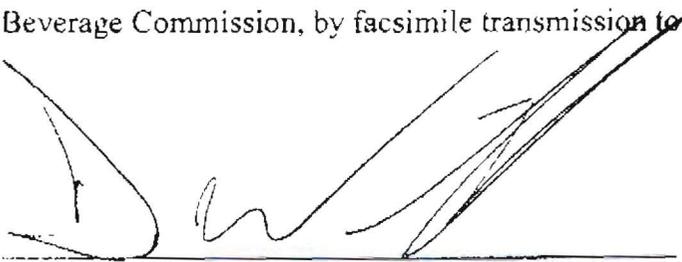
The Law Office of David L. Willborn  
9310 Broadway  
Building II, Suite 201  
San Antonio, TX 78217  
Tel: (210) 930-9070  
Fax: (210) 930-9075

By: 

David L. Willborn  
State Bar No. 24033458  
Attorney for Welste, Inc.

**CERTIFICATE OF SERVICE**

This is to certify that on August 27, 2008, a true and correct copy of the above and foregoing document was served on the Texas Alcoholic Beverage Commission, by facsimile transmission to 512-206-3498.

  
David L. Willborn

DAVID L. WILLBORN  
ATTORNEY AT LAW



PATTON L. ZARATE  
ATTORNEY AT LAW  
(OF COUNSEL)

THE LAW OFFICE OF DAVID L. WILLBORN

9310 BROADWAY  
BUILDING II, SUITE 201  
SAN ANTONIO, TEXAS 78217  
OFFICE: (210) 930-9070  
FAX: (210) 930-9075

FAX COVER SHEET

TO: TABC

FROM: Greg Tatum/Legal Asst.

COMPANY: Legal Division

DATE: August 27, 2008

RE: Docket#: 560373

NO. OF PAGES (including cover sheet): 3

FAX: 512-206-3498

COMMENTS: Please see attached correspondence in the above-referenced matter.  
Thank you

CONFIDENTIALITY NOTICE

The information contained in this facsimile document may include legally privileged and confidential information intended only for the person to whom this transmittal is expressly directed as indicated above. If you are the recipient of this document and you are not the person to whom this transmittal is expressly directed, you are requested to notify us immediately of your receipt of this message and to mail the document to us at 9310 Broadway, Bldg. II Ste. 201, San Antonio, Texas 78217. You are also hereby notified that any dissemination, distribution or copying of this document is strictly prohibited. Thank you for your cooperation.

# State Office of Administrative Hearings



Shehia 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**

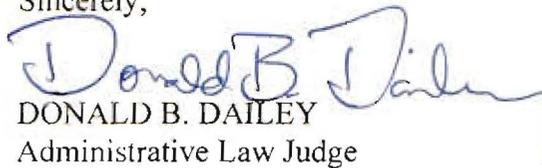
**RE: Docket No. 458-08-2076, TABC vs Welste, Inc. d/b/a Red Barron Lounge**

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](http://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**

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

**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.

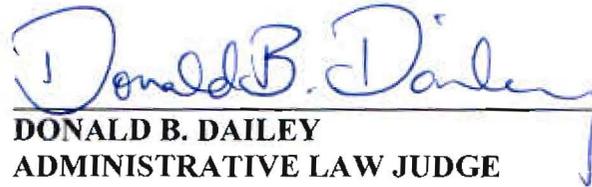
3. On February 17, 2007, Kyle Daniel Etrheim was a paid employee of Respondent, working at the licensed premises.
4. On February 17, 2007, while working at the Lounge, Kyle Daniel Etrheim had a green, leafy substance in his pocket in a pill bottle.
5. The green, leafy substance in Kyle Daniel Etrheim's 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**