

DOCKET NO. 582078

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

PETITIONER

VS.

LSD INVESTMENTS INC.
D/B/A BILLARES PUEBLA

RESPONDENT

PERMIT/LICENSE NO(s). MB653953, LB
DALLAS COUNTY, TEXAS
(SOAH DOCKET NO. 458-09-2198)

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BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 9th day of April, 2010, the above-styled and numbered cause.

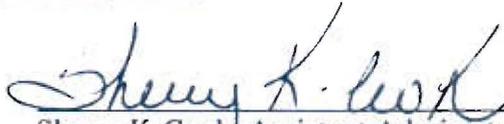
After proper notice and hearing before Administrative Law Judge Richard R. Wilfong, the Administrative Law Judge made and filed a Proposal For Decision (PFD) containing Findings of Fact and Conclusions of Law on the 9th day of February, 2010. The On February 19, 2010, Staff filed exceptions to the PFD. On March 2, 2010, the Respondent's Attorney filed exceptions to the PFD. The Administrative Law Judge made corrections to the Proposal for Decision as a result of the exceptions filed.

The Proposal for Decision containing Findings of Fact and Conclusions of Law, made and filed on February 9, 2010, as amended by corrections made by the Administrative Law Judge on March 8, 2010 as a result of the timely filed exceptions, is adopted as the agency decision of the Texas Alcoholic Beverage Commission.

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 Respondent's Mixed Beverage Permit MB653953, and Late Hours Permit are **CANCELLED FOR CAUSE**.

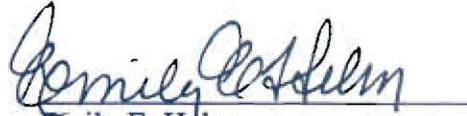
This is a final order of the Texas Alcoholic Beverage Commission and it will be enforced without further notice to the Respondent on May 3, 2010, unless a Motion for Rehearing is filed **before** that date.

SIGNED on April 9th, 2010 at Austin, Texas.


Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I, Emily E. Helm, do hereby certify that true and correct copies of the foregoing Order Adopting Proposal for Decisions has been served upon the parties listed below, in the manner indicated, on this the 13th day of April, 2010.



Emily E. Helm
Attorney for Petitioner

Honorable Judge Richard R. Wilfong
Administrative Law Judge
State Office of Administrative Hearings – Dallas Texas
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LSD Investments, Inc.
RESPONDENT
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Dallas, TX 75234-7945
VIA REGULAR MAIL

Emily E. Helm
Attorney For Petitioner
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-09-2198
TABC NO. 582078

TEXAS ALCOHOLIC BEVERAGE COMMISSION Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
V.		OF
LSD INVESTMENTS, INC. D/B/A BILLARES PUEBLA, Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff/TABC/Petitioner) requested that the mixed beverage and mixed beverage late hours permits of LSD Investments, Inc. d/b/a Billares Puebla (Billares Puebla/Respondent), located at 2900 Walnut Hill Lane, Suite 306, in Dallas, Texas, be canceled based on several violations of the Texas Alcoholic Beverage Code (Code) alleged to have occurred between March 9, 2007, and April 3, 2009. Respondent denied the allegations. The Administrative Law Judge (ALJ) finds that Staff proved all of the contested allegations specific to Respondent as explained in detail below. Accordingly, the ALJ recommends that Respondent's permits be cancelled.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing in this matter relating to alleged violations of §§ 11.61(b)(7) and 81.005 of the Texas Alcoholic Beverage Code (Code) (items 6 and 7 below) was jointly held with several other dockets involving common issues of fact concerning the alleged violations referred to generally as "place or manner" and common nuisance allegations. The joint hearing on place or manner and common nuisance allegations convened at the J. Eric Jonson Central Library, 1515 Young Street, Dallas, Texas 75201, on April 27, 28 and 29, 2009, and August 17, 18, and 19, 2009. Additional

alleged violations specific to the Respondent (items 1 through 6 and 8 below) were heard on October 28, 2009 at the State Office of Administrative Hearings, 6333 Forest Park Road, Dallas, Texas 75235. All of the hearings were before Administrative Law Judge (ALJ) Richard R. Wilfong. TABC Staff was represented by attorneys Emily Helm and Judith Kennison. Respondent appeared by attorney Timothy Griffith. Following the hearings the parties submitted written closing arguments and reply briefs. The record closed on December 30, 2009.

II. ALLEGATIONS AND LEGAL STANDARDS

In its Notice of Hearing, Staff made the following allegations:

1. On or about April 3, 2009, Respondent, or Respondent's agent, servant, or employee solicited or permitted solicitation of a person to buy drinks for consumption by Respondent or any of Respondent's employees in violation of §§ 11.61(b)(2) and 104.01(4) of the Code.
2. On or about March 9, 2007, through December 15, 2008, the place or manner in which Respondent, or Respondent's agent, servant, or employee conducted its business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of § 11.61(b)(7) of the Code.
3. On or about March 9, 2007, through December 15, 2008, Respondent or Respondent's agent, servant, or employee used or allowed others to use the permitted premises in a manner that constitutes a common nuisance as defined in § 81.001 of the Code and in violation of § 81.005 of the Code.

III. SUMMARY OF EVIDENCE PRESENTED AND ANALYSIS

At the joint hearings on place or manner and common nuisance allegations Staff presented the testimony of 13 witnesses: nine members of the Dallas Police Department and four TABC employees. Staff offered 12 exhibits, 9 of which were admitted. Respondents collectively presented eight witnesses and offered seven exhibits that were admitted.

At the hearing on the alleged violation specific to Billares Puebla, Staff presented the testimony of one witness and three exhibits that were admitted. Respondent presented the testimony of one witness.

The following is a summary of the evidence presented concerning the alleged violations and the ALJ's analysis:

A. April 3, 2009 - Allegation that Respondent or its Agent, Servant or Employee, solicited or permitted solicitation of a person to buy drinks for consumption by Respondent or any of Respondent's employees.

1. Evidence:

On April 3, 2009, TABC enforcement agent David Salazar, accompanied by a Dallas police officer, conducted an undercover operation at Billares Puebla at approximately 11:01 p.m. Mr. Salazar and the Dallas police officer went to the bar and purchased a Miller Light beer and a Crown Royal on the rocks from the bartender for \$8.00 plus a \$1.00 tip.¹ They then moved to the pool table and played pool for about 30 minutes. During this time they observed Nancy Lozano Zavala serving other patrons.² Ms. Zavala then approached Mr. Salazar and the Dallas police officer and asked if they wanted another round of drinks. They ordered another Miller Light and Crown Royal on the rocks. Ms. Zavala then asked if they would purchase a drink for her and they agreed. Ms. Zavala went to the bar and returned with two Miller Light beers and a Crown Royal on the rocks. When asked how much the drinks cost she said \$25.00. Mr. Salazar gave her \$25.00 and she walked back to the "waitress area" at the bar³ and gave the money to the bartender and did not receive any

¹ Tr. 1546

² Tr. 1548

³ Tr. 1552

change.⁴ Mr. Salazar testified that based on his experience, the bartender gives part of the extra money charged for the drinks to the waitress. In this case, to Ms. Zavaia.⁵

According to Leo Sanchez, the president of Billares Puebla, the price for the Miller Light beer was \$4.00 each and \$5.00 for the Crown Royal. He adamantly claimed the bartender would not have kept the difference between the cost of the drinks and the \$25.00 that Mr. Salazar claimed Ms. Zavala received from him and gave to the bartender.⁶ Mr. Sanchez did not dispute that the bartender was Respondent's agent, servant or employee. However, Mr. Sanchez claimed that he did not know Ms. Zavala, he never supervised or directed her to perform any task, and he never paid her. Further, he never received an accounting from her and he never authorized her to transact any business for him.⁷ He said he was not at Billares Puebla when these events occurred on April 3, 2009.⁸ Mr. Sanchez acknowledged settling a violation in September 2008 for allowing consumption of alcoholic beverages during prohibited hours. He also acknowledged a violation for sale to a minor on November 20, 2008, and two violations involving possession of drugs and intoxicated permit holder on November 30, 2008. He recalled paying a penalty for those violations.⁹

2. Analysis

The testimony of Mr. Salazar concerning the conduct of Ms. Zavala and the bartender on April 3, 2009, was credible and persuasive. In contrast, the testimony of Mr. Sanchez concerning what occurred at Billares Puebla on April 3, 2009, *when he was not there* lacks probative value. Respondent's only evidence that Ms. Zavala was not Respondent's agent, servant or employee, was Mr. Sanchez's testimony that he did not pay, supervise, authorize, or obtain an accounting from Ms. Zavala.

⁴ Tr. 1549

⁵ Tr. 1557-1558

⁶ Tr. 1563

⁷ *Id.*

⁸ Tr. 1565

⁹ Tr. 1567-1569; TABC Ex. 2-A Admitted without objection. See Tr. 11.

The Code does not define the term "employee." In *Ackley v. State*, 592 S.W. 2d 606, 608 (Tex. Crim. App. 1980), the Texas Court of Criminal Appeals defined "employee" as "a person who works for another in return for financial or other consideration." The court stated that the test for determining whether one person is another person's employee is whether the person is subject to the control of the other person.

The ALJ finds it significant that Respondent failed to present any credible testimony to dispute or rebut the testimony of Mr. Salazar concerning the activities and actions of Ms. Zavala. In view of Mr. Salazar's undisputed testimony that Ms. Zavala performed customary waitress duties, including taking orders from patrons, handling the exchange of money for drinks at the bar, and serving the drinks to the patrons at their tables, it is clear to the ALJ that Ms. Zavala was openly performing the work of a waitress that was beneficial to Bellares Puebla. As to whether Ms. Zavala was working in return for financial or other consideration, the ALJ finds the testimony of Mr. Salazar credible and persuasive that it is customary for part of the extra money that Ms. Zavala charged for the drinks and gave to the bartender to later be paid back to her by the bartender. Moreover, the ALJ is aware of the universal custom and practice for patrons of bars and restaurants to tip waiters and waitresses. The amount of the tip is generally 15 to 20 percent of the cost of the food or beverage purchased. As to being "subject to the control of the other person" the bartender as the person in charge could have simply required Ms. Zavala to stop what she was doing. Notwithstanding the apparent absence of hiring formality, by openly performing waitress services with the acquiescence of the Respondent, an agent, servant, or employee relationship was tacitly created. Thus, the ALJ finds that the Petitioner proved that Respondent's employee, agent or servant solicited a person to buy drinks for consumption by Respondent's employee, agent or servant in violation of §§ 11.61(b)(2) and 104.01(4) of the Code. The ALJ also finds that Respondent committed four additional Code violations in 2008: (1) allowing consumption of alcohol during prohibited hours; (2) sale to a minor; (3) possession of drugs; and (4) intoxicated permit holder.

B. March 9, 2007 through December 15, 2008 – Allegations 2 and 3 that the Place or Manner Respondent Conducted Business Offended the General Welfare, Health, Peace, Morals and Safety of the People and the Public Sense of Decency, and/or Constitutes a Common Nuisance.

1. Evidence

The evidence was extensive concerning the allegations that Respondent, *et al*, conducted business in a place or manner that offended the general welfare, health, peace, morals and safety of the people and the public sense of decency, and/or constitutes a common nuisance.

Billares Puebla is among a cluster of bars and other businesses located in close proximity to each other in a “U” shaped strip center located at 2900 Walnut Hill Lane in Dallas, Texas. The bars are not assigned designated parking for use by their patrons; rather, they share a large common parking area.¹⁰ The common parking area is exclusively controlled and maintained by the owner of the property rather than the individual bar owners who lease their bar locations from the owner of the property.

The bar owners, including Respondent, did not dispute the criminal activity, but claimed they were not responsible for it since it occurred in the common parking area exclusively controlled and maintained by the property owner. Moreover, they adamantly argue that they can not be held legally responsible for criminal activity in the common parking area outside their bars because that is not part of their “licensed premises.”

2. Analysis

In view of the ALJ’s findings and conclusions regarding the specific allegations against Billares Puebla as discussed above, and the recommendation below that Respondent’s permits be

¹⁰ Due to the uniqueness of the configuration and proximity of the bars, a photo (Exhibit 10) showing the layout is attached.

cancelled, the ALJ concludes that it is unnecessary to address the place or manner and common nuisance allegations.

IV. RECOMMENDED SANCTIONS

The Commission has adopted a Standard Penalty Chart which sets forth suggested sanctions for the Commission's agents, compliance officers, or other designated personnel to use when settling cases prior to a hearing.¹¹ The suggested sanctions bind neither an ALJ nor the Commission and deviations from the chart are permitted if there are aggravating or mitigating circumstances.

Although the Standard Penalty Chart is not binding, it does provide some guidance in considering a penalty. Based on the Schedule of Sanctions and Penalties for Health, Safety and Welfare Violations, the ALJ agrees with Staff's recommendation for permit cancellation. The ALJ finds that the frequency and gravity of Respondent's violations, and the repetition of the same types of violations over a relatively short period of time, is indeed cause for concern and justification for aggressive action.¹² The pattern exhibits careless indifference to violations of the law and a lack of diligence to prevent the violations. Additionally, the evidence does not inspire any confidence that Respondent is capable or of a mind to adequately oversee the operation of the licensed premises as required by law and in a manner that would prevent violations that threaten public health, safety, and welfare from occurring in the future. Accordingly, based on the totality of the evidence and for the reasons stated, the ALJ recommends cancellation of Respondent's permits.

V. FINDINGS OF FACT

1. LSD Investments, Inc. d/b/a Billares Puebla (Respondent) is the holder of Mixed Beverage and Mixed Beverage Late Hours permits issued by the Texas Alcoholic Beverage

¹¹ 16 Tex. Admin. Code (TAC) § 37.60(a).

¹² TABC Ex. 2-E. This exhibit was admitted without object on April 27, 2009, the first day of the joint hearing. See Tr. 13.

Commission (TABC) for the premises located at 2900 Walnut Hill Lane, Dallas, Dallas County, Texas (licensed premises).

2. On April 7, 2009, TABC Staff (Staff) sent an Amended Notice of Hearing to Respondent.
3. The Amended Notice of Hearing contained a statement of the time, date, location, and the 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 the relief sought by the TABC.
4. On April 17, 28, and 29, August 17, 18, and 19, and October 28, 2009, public hearings were held at the J. Eric Jonson Central Library and the State Office of Administrative Hearings in Dallas, Dallas County, Texas, before Administrative Law Judge Richard R. Wilfong (ALJ). Staff appeared through attorneys Emily Helm and Judith Kennison. Respondent appeared through attorney Timothy Griffith. The presentation of evidence concluded on October 28, 2009, but the administrative record remained open until December 30, 2009, to allow the parties to submit closing arguments and reply briefs as ordered by the ALJ.
5. On April 3, 2009, TABC enforcement agent David Salazar and a Dallas police officer participated in an undercover operation at the licensed premises.
6. On April 3, 2009, enforcement agent Salazar observed Nancy Lozano Zavala for more than 30 minutes performing waitress duties, including taking drink orders from patrons, obtaining drinks at the bar and serving drinks to patrons at the licensed premises.
7. On April 3, 2009, Ms. Zavala took an order from Mr. Salazar for a Miller Light and a Crown Royal then asked if Mr. Salazar would buy her a drink. When he agreed to do so she obtained two Miller Light beers (one for herself) and a Crown Royal from the bartender and charged Mr. Salazar \$25.00 for the three drinks. She then gave the \$25.00 to the bartender and received no change.
8. On April 3, 2009, Ms. Zavala was the Respondent's employee, agent or servant.
9. On April 3, 2009, Ms. Zavala solicited TABC enforcement agent Salazar to buy her a drink for her consumption.
10. On April 3, 2009, the bartender that dealt with Ms. Zavala was the Respondent's employee.
11. Respondent committed four other violations of the Texas Alcoholic Beverage Code (Code) in 2008 and has not taken any significant steps to prevent violations from occurring in the future.
12. Respondent failed to use due diligence to prevent violations of the Code.

13. Respondent condoned violations of the Code by Respondent's agents, servants, or employees.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, and §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
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 (TAC) § 155.401.
4. Respondent indirectly encouraged its employees to violate the law. 16 TAC § 50.10(d).
5. Based on the above Findings of Fact, on April 3, 2009, Respondent or Respondent's employee, agent or servant, solicited a person to buy drinks for consumption by Respondent or Respondent's employee, agent or servant in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 104.01(4).
6. Based on the above Findings of Fact, the Respondent failed to exercise due diligence to prevent the violations. TEX. ALCO. BEV. CODE ANN. § 106.13(c)(1).
7. Based on the above Findings of Fact and Conclusions of Law the Respondent's permits should be cancelled pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61 and 106.13.

SIGNED February 10, 2010.


RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Texas
Liquor
Package
Store-Off
premises

El Jardin

Venus

Tacos
Poncho

Guerrero Bar
El Cubo
Exclusivo

Billares
Puebla

El Rey De
Todos

Tippler's

AREA

EXHIBIT
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