

DOCKET NO. 579407, 579650, 580499 & 581427

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	ALCOHOLIC
LAS RAICES GARCIA INC.	§	
D/B/A LA PANTERA, Respondent	§	
PERMIT/LICENSE NO(s). MB638573, LB	§	
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-3845)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 3rd day of February 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Brenda Coleman, presiding. The hearing convened on October 16, 2009, and the record was closed on November 6, 2009. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on January 8, 2010. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

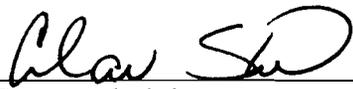
It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent shall pay a civil penalty in the amount of **\$2,100.00** on or before **27th day of April 2010**. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above license or permit by the Code will be **SUSPENDED** beginning at 12:01 A.M. on **7th day of May 2010** and shall remain suspended for **seven (7) days**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on March 1st, 2010, unless a Motion for Rehearing is filed before that date.

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

SIGNED this the 3rd day of February
2010 at Austin, Texas



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

Timothy E. Griffith
ATTORNEY FOR RESPONDENT
6333 Forest Park Road, Suite 150-A
Dallas, Texas 75235
VIA FACSIMILE: (469) 742-9521

Las Raíces Garcia Inc.
RESPONDENT
d/b/a La Pantera
10569 Denton Drive
Dallas, Texas 75220
VIA U. S. FIRST CLASS MAIL

Shelia A. Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SAL/dp

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: _____ **REGISTER NUMBER:** _____

NAME: LAS RAICES GARCIA INC.

TRADENAME: LA PANTERA

ADDRESS: 10569 DENTON DRIVE, DALLAS, TEXAS 75220

DUE DATE: APRIL 27, 2010

PERMITS OR LICENSES: MB638573, LB

AMOUNT OF PENALTY: \$2,100.00

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You **must** pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

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**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

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BEFORE THE STATE OFFICE

OF

V.

**LAS RAICES GARCIA INC.
D/B/A LA PANTERA,
Respondent**

ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION¹

The Texas Alcoholic Beverage Commission (TABC, Commission) Staff (Petitioner) brought this enforcement action against Las Raices Garcia Inc. d/b/a La Pantera (Respondent) based on seven violations of the Texas Alcoholic Beverage Code (Code) alleged to have occurred between May 3, 2008, and November 9, 2008. Petitioner requests cancellation of Respondent's permits, or alternatively, that Respondent's permits be suspended for 60 days with an option to pay a civil penalty of \$300.00 per day in lieu of the suspension. The Administrative Law Judge (ALJ) finds that Petitioner has met its burden of proof to establish only one of the seven alleged violations. Therefore, the ALJ recommends suspension of Respondent's permits for 7 days with the option to pay a civil penalty of \$300.00 per day in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The single disputed issue concerning notice is addressed in the discussion section below. Other notice and jurisdiction matters are set out in the findings of fact and conclusions of law without further discussion here.

On October 16, 2009, a hearing convened before ALJ Brenda Coleman at the State Office of Administrative Hearings, located at 6333 Forest Park Lane, Suite 150A, Dallas, Texas. Petitioner

¹ This Amended Proposal for Decision amends only the ALJ's recommended period of suspension found in the Recommended Sanction section from a "5-day suspension" to a 7-day suspension. This was a clerical error.

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was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared in person and was represented by his attorney, Timothy Griffith. The record closed on November 6, 2009.

II. DISCUSSION AND ANALYSIS

A. Respondent's Permits

The Commission issued Respondent's Mixed Beverage Permit, MB-638573, which includes Respondent's Mixed Beverage Late Hours Permit, on September 6, 2006. Respondent's premises are located at 10569 Denton Drive, Dallas, Dallas County, Texas.

B. Applicable law

The Commission may suspend for not more than 60 days or cancel a permit if it finds the permittee violated a provision of the Code or a rule of the Commission,² or the permittee was intoxicated on the licensed premises.³ "Intoxicated" is defined as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol ... into the body," or having .08 or more alcohol concentration.⁴

A mixed beverage permittee may sell, offer for sale, and possess mixed beverages, wine, beer, ale, and malt liquor, for consumption on the licensed premises.⁵ 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, solicitation of any person to buy drinks for consumption by the retailer or any of his employee;⁶ or

² Code § 11.61(b)(2).

³ *Id.* § 11.61(b)(13).

⁴ TEX. PENAL CODE § 49.01(2).

⁵ *Id.* §§ 28.01(a) and (c).

⁶ *Id.* § 104.01(4).

being intoxicated on the licensed premises.⁷

A mixed beverage late hours permittee may sell mixed beverages on Sunday between the hours of 1:00 a.m. and 2:00 a.m. and on any other day between the hours of 12 midnight and 2:00 a.m. if the premises covered by the permit are in an area where the sale of mixed beverages during those hours is authorized by the code.⁸ All provisions of the code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit.⁹ No person may sell or offer for sale mixed beverages at any time not permitted by the Code.¹⁰ In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place on any day between 2:15 a.m. and 7:00 a.m. Proof that an alcoholic beverage was possessed with intent to consume in violation of the Code requires evidence that the person consumed an alcoholic beverage on that day.¹¹

C. Petitioner's Evidence

Petitioner alleged that between May 3, 2008, and November 9, 2008, Respondent, its agent, servant, or employee has committed various violations of the Code which warrant cancellation or suspension of Respondent's permits. Petitioner presented five exhibits and the testimony of five witnesses at the hearing.

1. Solicitation to buy drinks for consumption on May 3, 2008

On May 3, 2008, at approximately 1:45 a.m., Officer Thomas Peterson of the Dallas Police

⁷ *Id.* § 104.01(5).

⁸ *Id.* § 29.01, 105.03 (c).

⁹ *Id.* § 29.03.

¹⁰ *Id.* § 105.03(a).

¹¹ Code § 105.06(c) - (d).

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Department entered Respondent's premises to conduct an undercover investigation. Officer Peterson approached the bar and ordered a Coors Lite Beer from the unidentified bartender. The officer said he paid \$6.00 for the beer. Officer Peterson testified that while sitting at the bar, a male dressed as a woman, later identified as Alfredo Ponce, asked the officer to buy him a Corona Beer. Officer Peterson agreed. Officer Peterson said the bartender told him that Mr. Ponce's beer cost \$10.00. Officer Peterson observed the waitress hand Mr. Ponce a red ticket. According to Officer Peterson, Mr. Ponce told him that he worked for the club as a waitress, and he made \$10.00 for every beer he helped sell.

Officer Peterson said he has been a Dallas officer for 12 years, and he has worked as a vice-detective for four years. He has done two or three undercover operations for solicitation each month. He said he first looks for an indication that the suspect is employed by the establishment, *i.e.*, delivers drinks, picks up or puts away beer bottles, or enters restricted areas reserved only for employees. Officer Peterson testified that he did not observe Mr. Ponce perform any such duties, but stated that, based on his experience, what occurred was consistent with solicitation-type operations. Officer Peterson added that it his experience that the red ticket is an accounting method for tracking drinks solicited and sold for a cut of the proceeds to club employees.

Officer Peterson stated on cross-examination that he questioned no one about the purpose of the ticket and he never met the owner of the premises. He also admitted that he obtained no employee records, etc. regarding Mr. Ponce from Respondent.

2. Solicitation to buy drinks for consumption on July 18, 2008

Officer Peterson testified that he conducted a second undercover investigation on Respondent's premises on July 18, 2008. Upon entering the premises at approximately 1:45 a.m., he observed a female, later identified as Vanessa Ilias, he believed to be a waitress. The officer first observed Ms. Ilias clear a table by removing beer bottles and putting them in the trash. Officer Peterson sat at the far right side of the bar and ordered a Coors Light Beer. He observed Ms. Ilias

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approach the bar, lift the countertop, go behind the bar to the kitchen, fix a plate of food, then return to the bar. Officer Peterson said Ms. Ilias sat next to him and asked him to buy her a drink. He then asked her if she worked there, to which she replied, "Yes."

Officer Peterson stated that he observed other ladies on the premises, who, he opined, were employees, because he observed them performing duties that only employees would perform, *i.e.*, ordering drinks, taking orders, picking up bottles, and cleaning tables. He said he did not observe Ms. Ilias take drink orders from other patrons. However, he concluded that she was Respondent's employee because he observed her performing some of the same duties, and he observed no one attempt to stop her or remove her from behind the bar when she entered the kitchen area.

On cross-examination, Officer Peterson said Ms. Ilias spoke very little English, and he does not speak Spanish. He also stated that he observed no exchange of red tickets, and he obtained no employee records from Respondent.

3. Solicitation to buy drinks for consumption on October 9, 2008

Officer Jose Bedoy, Dallas Police Department, testified that he participated in an undercover operation on Respondent's premises on October 9, 2008. Upon entering the premises, he went to the bar and ordered a drink. He said two females approached him and identified themselves as Cindy Quintanilla and Carina Edith. According to Officer Bedoy, Ms. Quintanilla and Ms. Edith asked if he would purchase them a Corona Beer. Officer Bedoy said he agreed, and he paid \$15.00 for each beer. Officer Bedoy stated that he asked Ms. Quintanilla if it was okay for her to drink while working, to which she replied, "Yes," and that she had already had five that day. Officer Bedoy said he asked the bartender why the beers cost \$15.00 and why the women were given tickets. According to the officer, Ms. Quintanilla responded that they were paid at the end of the night for the number of drinks they had with customers, and the tickets were used to track the drinks.

Officer Bedoy stated that he purchased a second round of beers for the women. He said he

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did not observe Ms. Quintanilla or Ms. Edith perform any sort of duties. However, he observed the bartender place the beers on the side of the bar for Ms. Quintanilla to pick up instead of placing the beers directly in front of them. Based on this observed interaction between Ms. Quintanilla and the bartender, he believed that Ms. Quintanilla worked there.

Officer Bedoy said Respondent's owner was not present. He also said, pursuant to departmental policy, officers requested employee records. However, there were none for either Ms. Quintanilla or Ms. Edith.

4. Testimony of TABC Agent Leigh Sosebee

TABC Agent Leigh Sosebee testified that she assisted Officer Bedoy with the undercover investigation on the premises on October 9, 2008. Based on the physical descriptions provided by Officer Bedoy, she contacted the two females. The females verbally identified themselves to Agent Sosebee as Cynthia Quintanilla and Carina Edith Alvarez. Agent Sosebee said she identified the bartender that night as Samantha Salas. Agent Sosebee also conducted an inspection of the premises in an attempt to locate employment records for the females.

Agent Sosebee retrieved the following from behind the bar: a copy of a notepad which appeared to have handwritten names and dates, along with the word "tickets" written in Spanish;¹² a document with a list of first names written in the left column along with blank columns for each day of the week;¹³ and seller server certificates with no identifying information. Agent Sosebee said she later obtained a copy of the Seller Server Training class roster maintained by the Commission.¹⁴

Agent Sosebee testified on cross-examination that it is possible the handwritten notepad could refer to tickets issued by the game machines on the premises. Agent Sosebee also agreed that

¹² Ex. P-3. Agent Sosebee testified that she speaks and reads Spanish. She interpreted some of the document.

¹³ Ex. P-6.

¹⁴ Ex. P-5.

mere presence of a person's name the Seller Server Training roster did not mean that the person was Respondent's employee. Finally, she admitted that the document with first names and days of the week contained nothing to indicate that it was a work schedule or employee list.

5. Intoxicated employee on licensed premises, solicitation to buy drinks for consumption, consumption during prohibited hours, and sale of mixed beverage during prohibited hours on November 9, 2008

a. Testimony of TABC Agent Daniel Garcia

On November 9, 2008, at approximately 1:45 a.m., TABC agents, Daniel Garcia and Ruben Suarez conducted an undercover investigation on Respondent's premises for possible violations of the Code. Agent Garcia testified that they sat at a table and ordered two Bud Lite Beers. An unidentified waitress delivered the beers in styrofoam cups shortly before 2:00 a.m.

At 2:00 a.m., the agents observed a different female, later identified as Magdalena Chow, appear to stagger and bump into people as she approached their table. Agent Garcia stated that Ms. Chow tripped over herself and fell into his lap, at which time he smelled the strong odor of alcoholic beverage on her breath, and he noted slurred speech when she talked. Based on his visual observations, he opined that Ms. Chow was intoxicated. He said Ms. Chow asked him to buy her a drink. He agreed to buy her a Bud Lite Beer, gave her a \$20.00 bill, and observed her stagger to the bar. Agent Suarez followed Ms. Chow to the bar. The bartender handed Ms. Chow a beer in a styrofoam cup and she returned to the table with \$5.00 in change for Agent Garcia.

Agent Garcia estimated that approximately 50 to 60 customers were inside the premises, and a great majority of them received drinks in styrofoam cups. He said around 2:00 a.m., he observed the bartender handing out styrofoam cups to five or six people who appeared to be employees because they went around the premises checking beer bottles, pouring the contents of the bottles into styrofoam cups for patrons, and discarding the bottles.¹⁵ According to Agent Garcia, he observed Ms.

¹⁵ The agent stated that he personally observed the brand label on some of the beer bottles.

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Chow take drink orders for patrons, go to the bar, retrieve drinks in bottles and styrofoam cups from the bartender, deliver drinks to patrons at a couple of tables (at the least), make change for patrons, and pour drinks from bottles into styrofoam cups for patrons. Therefore, he concluded that she was an employee.

Agent Garcia said he saw no posted signs on the premises prohibiting the sale of alcoholic beverages after 2:00 a.m. He said he and other patrons continued drinking beer until 2:18 a.m., or later, when officers entered the premises.

Agent Garcia admitted, on cross-examination, that he never obtained any employee records. Respondent's establishment was crowded, the only opportunity he had to hear Ms. Chow's speech was when she asked him to buy her a drink, and he did not know if she performed field sobriety tests or provided a breath or blood sample.

b. Testimony of TABC Agent Ruben Suarez

Agent Suarez testified that he observed Ms. Chow serving alcoholic beverages and clearing empty beer bottles from tables. He said he believed she was intoxicated because she staggered as she approached their table, and almost fell on top of Agent Garcia.

Agent Suarez said he saw employees deliver styrofoam cups to everyone with beer bottles at 2:00 a.m., pour beer into the cups, and remove the empty beer bottles. He also saw patrons drinking from styrofoam cups. According to Agent Suarez, he followed Ms. Chow to the bar because it was after 2:00 a.m. and time for Respondent to stop selling alcoholic beverages. At the bar, he observed the female bartender, later identified by the last name of Alvarez,¹⁶ pour a 12 oz. bottle of Bud Lite Beer into a styrofoam cup and give it to Ms. Chow. He and Ms. Chow then returned to the table.

Agent Suarez testified that he returned to the bar a little after 2:15 a.m. and ordered a 12 oz.

¹⁶ Agent Suarez stated that he could not recall Ms. Alvarez's first name. There was no evidence that the bartender (Ms. Alvarez) mentioned by Agent Suarez is Carina Edith Alvarez, referred to earlier in this Proposal for Decision.

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Corona Beer. He added that Ms. Alvarez never refused to sell him the beer. Instead, she held the Corona Beer below the counter and poured it into the styrofoam.

On cross-examination, the agent admitted that he did not know what the other patrons drank. He also said he never observed any employee records for Ms. Alvarez.

D. Respondent's Evidence

Carlos Garcia, Respondent's owner, testified on behalf of Respondent. He stated that he was not present on the premises when the alleged violations occurred. He added that he arrived at the establishment at around 2:25 a.m. on November 9, 2009. According to Mr. Garcia, when he arrived, the lights were on, the music was off, there were no customers on the premises and TABC agents were present. He observed Ms. Chow sitting at the bar speaking with friends approximately four feet away, but he did not speak with her. Mr. Garcia said Ms. Chow appeared to be sober.

Mr. Garcia denied that Alfredo Ponce, Vanessa Ilias, Cynthia Quintanilla, Edith Alvarez, and Magdalena Chow were his agents, servants, or employees. He added that he does not know who they are. He said the Seller Server class roster for August 2, 2008, included people other than himself and some of his employees in an effort to make a large class. He also stated that his bartenders charge \$4.00 for domestic beer and \$5.00 for imported beer. Therefore, he did not know why the women charged the officers \$15.00 for a beer.

According to Mr. Garcia, the notepad retrieved by Agent Sosebee on October 9, 2008, was used to track tickets for a game machine on October 6 and 7, 2008, and to track Edith Alvarez's bar tab for drinks while she played pool on October 7, 2008. He also stated that the tickets the officers observed the bartender hand to the females were given to all the customers for inventory purposes. He added that the bartender would count the tickets at the beginning of the night to track the number of beers sold at the end of the night in closing the register. According to Mr. Garcia, he has since changed this accounting method.

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Mr. Garcia testified that his employees are not permitted to serve alcoholic beverages during prohibited hours. He stated that he has signs posted in Spanish and English¹⁷ advising customers that Respondent does not sell alcoholic beverages after 2:00 a.m. According to Mr. Garcia, Respondent only serves O'Douls and Coors Non-Alcoholic Beer after 2:00 a.m. He admitted that Respondent uses styrofoam cups at 2:00 a.m. because some customers get upset if their bottles are not empty when the bottles are picked up.

E. Analysis

Respondent is subject to having his permits canceled or suspended if any of the above allegations are proven and any of the individuals involved were his agent, servant, or employee. At the hearing, Agent Sosebee testified regarding documents she seized from Respondent's premises on October 9, 2008. Petitioner argues that the documents suggest an employee-employer relationship between some of the involved individuals and Respondent. The ALJ disagrees. The ALJ finds the content of the documents (Petitioner's exhibits three, five, and six) to be conclusory and unreliable. Therefore, the ALJ gives no weight to the exhibits.

Petitioner argues that the issuance of tickets to some of the involved individuals demonstrates an agent, servant, or employee relationship with Respondent. Based on the evidence presented in this case, the ALJ disagrees. Furthermore, the ALJ finds the explanation presented by Mr. Garcia regarding the tickets to be just as plausible.

For purposes of Code §104, an agent is someone authorized by another to transact business or manage some affair for the other person; a servant is one employed by a master to perform service in his affairs and whose physical conduct in the performance of this service is controlled or is subject to the right of control of the master; and an employee is a person who works for another in return for compensation and is subject to control of the other person. Skruck v. State, 740 S.W.2d 819, 822 (Tex. App. - Houston [1st] 1987, pet. refd), citing Ackley v. State, 592 S.W.2d 606, 608 (Tex. Crim.

¹⁷ Ex. R-2.

App. 1980). The term "employee" includes "servant" and "agent." Ackley, supra.

Petitioner's witnesses testified that no employee records or personnel files were obtained for the involved individuals. Respondent's owner, Mr. Garcia, testified that the involved individuals were not his employees, and he has never paid, supervised, scheduled them for work, or authorized them to handle his business transactions. Where there is no contract of employment, an employer's right to control the employee's work may be established by circumstantial evidence. Hoechst Celanese Corp. v. Compton, 899 S.W.2d 215 (Tex. App. – Houston [14th] 1994, writ den.). The mere fact of hiring or payment of wages is not determinative. Murillo v. Valley Coca-Cola., 895 S.W.2d 758 (Tex. App. – Corpus Christi 1995, no writ); Doe v. Boys Clubs, 868 S.W.2d 942 (Tex. App. – Amarillo 1994), aff., 907 S.W.2d 472. The fact that an alleged servant was performing services particular to the principal's business or affairs establishes prima facie that the relationship of servant and master exists between them. Casey v. Sanborn's Inc. of Texas, 478 S.W.2d 234 (Tex. Civ. App. – Houston [1st Dist.] 1972, no writ).

1. Alleged Solicitations to Buy Drinks for Consumption

Petitioner alleged that on May 3, 2008, Alfredo Ponce, Respondent's agent, servant, or employee, solicited the purchase of an alcoholic beverage for his own consumption from Officer Peterson. Officer Peterson stated that he did not observe Mr. Ponce perform any type of bartending, waiter or waitress duties or services particular to Respondent's business. The ALJ finds the evidence insufficient to show that Mr. Ponce was Respondent's agent, servant, or employee. Therefore, Petitioner failed to meet its burden of proof on this issue.

Petitioner alleged that on July 18, 2008, Vanessa Ilias, Respondent's agent, servant, or employee, solicited the purchase of an alcoholic beverage for her own consumption from Officer Peterson. Officer Peterson stated that he observed Ms. Ilias clean tables and go behind the bar to the kitchen and return with a plate of food. The ALJ finds the evidence sufficient to show that Ms. Ilias performed duties or services particular to Respondent's business for the benefit of Respondent.

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Therefore, she was Respondent's employee.

The ALJ finds, however, Petitioner's evidence insufficient to prove Ms. Ilias solicited a drink for consumption in violation of the Code. Officer Peterson only testified that Ms. Ilias asked him to buy her a drink. Petitioner presented no evidence that the officer purchased an alcoholic beverage for Ms. Ilias, or she possessed an alcoholic beverage. Therefore, Petitioner failed to meet its burden of proof on this issue.

Petitioner alleged that on October 9, 2008, Cynthia Quintanilla and Carina Edith Alvarez, Respondent's agents, servants, or employees, solicited the purchase of alcoholic beverages for their own consumption from Officer Bedoy. The officer testified that he did not observe either perform any type of bartending or waitress duties or services particular to Respondent's business. The ALJ finds the evidence insufficient to show that Ms. Quintanilla or Ms. Alvarez were Respondent's agents, servants, or employees. Therefore, Petitioner failed to meet its burden of proof on this issue.

Lastly, Petitioner alleged that on November 9, 2008, Magdalena Chow, Respondent's agent, servant, or employee, solicited the purchase of an alcoholic beverage for her own consumption from Agent Garcia. The agent testified that he observed Ms. Chow take drink orders, retrieve drinks from the bartender at the bar, deliver drinks to patrons, pour drinks, and make change for patrons. The ALJ finds the evidence sufficient to show that Ms. Chow performed duties or services particular to Respondent's business for the benefit of Respondent. Therefore, she was Respondent's employee. Based on the testimony Agents Garcia and Suarez, the ALJ further finds that Ms. Chow solicited the purchase of an alcoholic beverage for her own consumption from Agent Garcia.

2. Alleged Intoxicated Employee on November 9, 2008

Petitioner also alleged that on November 9, 2008, Ms. Chow was intoxicated on the licensed premises. Agents Garcia and Suarez stated that they observed Ms. Chow to stagger as she approached their table. Agent Garcia further stated that he observed the odor of alcoholic beverage

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on her breath when she tripped and fell into his lap. He also said he detected slurred speech when she asked him to buy her a drink.

On the other hand, Agent Garcia said he observed Ms. Chow take drink orders, retrieve drinks from the bartender at the bar, deliver drinks to patrons, pour drinks, and make change for patrons. Agent Suarez also stated that he observed Ms. Chow serving drinks and cleaning tables. The agents did not note that Ms. Chow had any problems with performing those activities. The ALJ opines that in doing so, Ms. Chow showed she had the normal use of her mental or physical faculties. Additionally, the agents did not have Ms. Chow perform any field sobriety tests or conduct a breath or blood test. While the failure to do such tests does not per se mean that intoxication cannot be found, it is a factor the ALJ may consider. Therefore, Petitioner failed to meet its burden of proof on this issue.

3. Alleged Prohibited Hours Violations on November 9, 2008

Respondent argues that Petitioner has failed to prove a prohibited hours violation. The ALJ agrees with Respondent. Petitioner alleged in Count 6 of its Third Amended Notice of Hearing that Respondent, its agent, servant, or employee, sold or offered to sell mixed beverages during prohibited hours in violation of Code §§ 11.61(b)(2) and 105.03. The ALJ finds that Petitioner failed to meet its burden of proof on this issue. Agents Garcia and Suarez testified regarding only the purchase of beer on November 9, 2008, not mixed beverages. The Code distinguishes beer and mixed beverages.

Petitioner alleged in Count 7 of its Third Amended Notice of Hearing that Respondent violated Code §§ 11.61(b)(2) and 105.06.¹⁸ Code § 11.61(b)(2) provides that a permit may be

¹⁸ Count 7 of Petitioner's Third Amended Notice of Hearing provides the following: "On or about November 9, 2008, Las Raices Inc., or Respondent's agent, servant, employee, consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours. By consuming or permitting others to consume an alcoholic beverage on the licensed premises during prohibited hours, Respondent violated Texas Alcoholic Beverage Code §§ 105.06 and 11.61(b)(2)."

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suspended or canceled if a permittee violates a provision of the Code. "Permittee" means the permit holder, or his agent, servant, or employee.¹⁹ Pursuant to Code § 105.06(c), "... a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverages ... between 2:15 a.m. and 7:00 a.m." Petitioner argues that Respondent permitted Agent Garcia and other unidentified patrons observed by Agent Garcia to consume alcoholic beverages after hours.

Respondent argues that no provision cited by Petitioner provides that a violation occurs if the permittee permitted others to consume an alcoholic beverage during prohibited hours. Respondent further argues that there was no proof that its agent, servant or employee consumed an alcoholic beverage during prohibited hours. The ALJ agrees with Respondent.²⁰ Neither Agent Garcia nor Agent Suarez testified that either observed Respondent's employee, Ms. Chow, consume an alcoholic beverage after 2:15 a.m. The ALJ finds that Petitioner failed to meet its burden of proof on this issue.

F. Recommended Sanction

Based on the seven alleged violations at issue in this proceeding, Petitioner requested cancelation of Respondent's permits, or alternatively, that Respondent's permits be suspended for 60 days with an option to pay a civil penalty of \$300.00 per day in lieu of the suspension. Petitioner proved Respondent's employee engaged in conduct which is lewd, immoral, or offensive to public decency by soliciting another person to purchase an alcoholic beverage for the employee's consumption in violation of Code §§ 11.61(b)(2) and 104.01(4). The recommended penalty for the first offense of public lewdness in violation of Code § 104.01 is a suspension of 5-7 days, 10-14 days for the second offense, and cancellation for the third offense. The first and second offenses include a \$300.00 per day civil penalty in lieu of suspension.²¹

¹⁹ Code § 1.04(11).

²⁰ See TEX. GOV'T CODE ANN. § 2001.052.

Respondent's violation history shows Respondent received five warnings for the following violations: missing or incomplete records on June 18, 2008, failure to report breach on November 10, 2008, failure to properly display permit on December 20, 2008, and place or manner (unsanitary conditions) on December 20, 2008. The Commission also imposed a suspension of five days, or a \$1500.00 civil penalty in lieu of suspension for "Misc. Violations" on February 7, 2009. The ALJ is unable to determine from "Misc. Violations" if Respondent has a previous violation relating to public lewdness. Therefore, the ALJ recommends a 7-day suspension or a \$300.00 civil penalty in lieu of suspension for the solicitation for consumption violation.

III. FINDINGS OF FACT

1. Las Raices Garcia Inc. d/b/a La Pantera (Respondent) is the holder of Mixed Beverage and Mixed Beverage Late Hours permits issued by the Texas Alcoholic Beverage Commission (TABC, Commission) on September 6, 2006.
2. Respondent's premises are located at 10569 Denton Drive, Dallas, Dallas County, Texas.
3. On July 1, 2009, Petitioner issued its third amended notice of hearing to Respondent.
4. The notice contained a statement of the time, place, 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 matters asserted.
5. On October 16, 2009, a hearing convened before Administrative Law Judge (ALJ) Brenda Coleman at the State Office of Administrative Hearings (SOAH), located at 6333 Forest Park Road, Suite 150A, Dallas, Texas. Petitioner was represented by Shelia Lindsey, TABC Staff Attorney. Respondent appeared and was represented by attorney Timothy Griffith. The record closed on November 6, 2009.
6. Alfredo Ponce was not Respondent's agent, servant, or employee on May 3, 2008.
7. On July 18, 2008, Respondent's employee, Vanessa Ilias, asked undercover officer, Thomas Peterson, to buy her a drink.
8. Petitioner failed to establish that Officer Thomas purchased or agreed to purchase a drink for

²¹ 16 TEX. ADMIN. CODE (TAC) § 34.2, Schedule of Sanctions and Penalties.

Ms. Ilias, or that Ms. Ilias possessed an alcoholic beverage.

9. Cynthia Quintanilla and Carina Edith Alvarez were not Respondent's agents, servants, or employees on October 9, 2008.
10. On November 9, 2008, Respondent's employee, Magdalena Chow, asked undercover agent, Daniel Garcia, to buy her a drink.
11. Agent Garcia agreed to purchase Ms. Chow a Bud Lite Beer, handed her a \$20.00 bill, and watched her walk to the bar.
12. Ms. Chow purchased the beer from the bartender, returned to Agent Garcia's table, and handed him \$5.00 in change.
13. Petitioner failed to establish that Ms. Chow consumed an alcoholic beverage after 2:15 a.m.
14. On the same date, Agent Garcia and Agent Ruben Suarez observed Ms. Chow take drink orders, retrieve drinks from the bartender at the bar, deliver drinks to patrons, pour drinks, make change for patrons, and clean tables at the premises without difficulty in performing the tasks.
15. Ms. Chow's ability to perform the tasks referred to in Finding of Fact No. 14 without apparent difficulty demonstrates that she had not lost the normal use of her mental or physical faculties by reason of the introduction of alcohol into her body.
16. On November 9, 2008, Agents Garcia and Suarez purchased and consumed beer at Respondent's premises after 2:00 a.m. The agents also observed other patrons purchase and consume beer after 2:00 a.m.

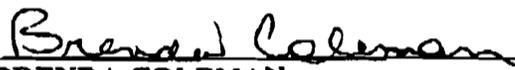
IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) Ch. 5 and §§ 6.01 and 11.61.
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with 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. §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that on May 3, 2008, July 18, 2008, and October 9, 2008, Respondent's agent, servant, or employee, solicited another to buy drinks for consumption in violation of Code

§§ 11.61(b)(2) and 104.01(4).

5. Based on the above Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that on November 9, 2008, Respondent's employee was intoxicated on the licensed premises in violation of Code §§ 11.61(b)(13) and 104.01(5).
6. Based on the above Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that on November 9, 2008, Respondent's employee sold or offered to sell mixed beverages during prohibited hours in violation of Code §§ 11.61(b)(2) and 105.03.
7. Based on the above Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that on November 9, 2008, Respondent's employee consumed an alcoholic beverage on the premises during prohibited hours in violation of Code §§ 11.61(b)(2) and 105.06.
8. Based on the above Findings of Fact, on November 9, 2008, Respondent's employee solicited another to buy drinks for consumption in violation of Code §§ 11.61(b)(2) and 104.01(4).
9. Based on the above Findings of Fact and Conclusion of Law No. 8, Respondent's permits should be suspended for 7 days with an option to pay a civil penalty of \$300.00 per day in lieu of suspension.

SIGNED January 8, 2010.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS