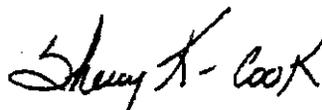


SIGNED this the 5th day of October 2011,
at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 5th day of October 2011.



Sandra K. Patton
Attorney for the Commission

Hon. Veronica Najera
Administrative Law Judge
State Office of Administrative Hearings
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Rogelio Simiano Garces
D/B/A Charanda Lounge
RESPONDENT
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VIA U.S. REGULAR MAIL

David T. Duncan Jr.
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Lt. Salvador Morales
El Paso Enforcement District Office

SOAH DOCKET NO. 458-11-0251

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
	§	
Petitioner	§	
V.	§	
	§	
ROGELIO SIMIANO GARCES	§	OF
d/b/a CHARANDA LOUNGE,	§	
	§	
Respondent	§	
	§	ADMINISTRATIVE HEARINGS
EL PASO COUNTY, TEXAS	§	
(TABC CASE NO. 590441)	§	

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Petitioner) is seeking ~~cancellation of the retail establishment permit issued to Rogelio Simiano Garces d/b/a Charanda Lounge (Respondent).~~ Petitioner alleges that Respondent conducts his business in a manner which is against the public's general welfare, health, peace, morals, safety, and sense of decency.

After a review of the evidence of record and applicable law, the Administrative Law Judge (ALJ) finds Staff's evidence sufficient to establish all of the elements of the alleged violations and recommends cancellation.

I. NOTICE, JURISDICTION, PROCEDURAL HISTORY

There are no contested issues of jurisdiction. The hearing was held before ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office. Staff was represented by David T. Duncan, staff attorney. Respondent was represented by Jesse A. Herrera, attorney. A certified language interpreter was provided at the Respondent's request.

The hearing was scheduled to convene on March 17-18, 2011. On the first day of hearing, Respondent stated he was not prepared to respond to the allegations stating he was only

aware of the one violation date in the notice of hearing. Respondent did not file a written application for a more definite and detailed statement regarding the contents of the notice of hearing pursuant to the Government Code, Chapter 2001, § 2001.052(4) and discovery was not exchanged.¹ Respondent asked for an extension of time to reconvene.² The ALJ granted the request. The hearing reconvened on April 4, 2011. Respondent did not call any witnesses and no evidence was offered. The record closed that day.

II. BACKGROUND AND EVIDENCE

The listed permittee is Rogelio Simiano Garces. The establishment is located in the city of El Paso, County of El Paso, Texas. The TABC issued Respondent a wine and beer retailer's on premise permit, which includes a retailer's on premise late hours license, in December 1994.³ Respondent's administrative history includes nine written warnings for various alleged ~~TEX. ALCO. BEV. CODE ANN. (Code)~~ violations and two permit suspensions for sale to minor and possession of uninvoiced alcoholic beverages.⁴

A. Petitioner's direct case

Narcotic related offenses⁵ on the bar's premises are the basis for the alleged general welfare violations. The delivery of a controlled substance (cocaine) on the premises is the primary allegation.

El Paso Police officer Maria de Los Angeles Robles testified at hearing. On August 20, 2005, she observed narcotic-filled balloons in the proximity of the pool table in the bar.

¹ Tr. at pp. 83-85.

² Tr. at pp. 140-142.

³ Petitioner's Exhibit No. 1, custodian of records affidavit for permit BG-302315.

⁴ *Id.* at p. 3, administrative history.

⁵ TABC Rule § 35.31 (b)(15) [Offenses Against the General Welfare].

Detective Jeremiah Poust also testified. On the same date, he observed a clear plastic bag with narcotics located in a chalk bowl used for pool cues.⁶

On September 6, 2007, a search warrant was executed at the bar by Detective Richard Rodriguez. The detective testified at hearing that he conducted surveillance of the bar due to the information given by a confidential informant.⁷ He observed a lot of foot-traffic indicative of narcotic transactions. A surveillance investigation revealed cocaine sales being made at the bar by two employees. The cocaine was kept in a locked storage area. Officers observed one employee directing customers wanting to purchase narcotics to the other employee. Both were inside the bar area. All narcotics were seized field-tested, and the tests showed positive for cocaine.⁸

On December 16, 2008, undercover officers openly bought cocaine from a man at the bar known as "Cabano." The bartender was aware of the man and pointed to him. The substance purchased field tested positive for cocaine.⁹

On January 6, 2009, another undercover purchase was made by the same officer and from the same person involved with the December 16th transaction. The bindle¹⁰ field-tested positive for cocaine.¹¹

Sergeant Raul Apodaca with the El Paso Sheriff's Office testified he was at the bar in January 2009 in an undercover capacity. He purchased bindles of cocaine on January 9, 13 and 15, 2009, from a bar's employee.¹² The employee was a maintenance staff worker named

⁶ Tr. at p. 23; Petitioner's Exhibit No. 13, incident report.

⁷ Tr. at p. 32-33.

⁸ Petitioner's Exhibit No. 13, incident report.

⁹ Petitioner's Exhibit No. 12, Supplement report.

¹⁰ A bindle is about .3 of a gram of cocaine. The cocaine is wrapped in a little plastic wrapper. Tr. at p. 40.

¹¹ *Id.*

¹² See Exhibits Nos. 7, 8, and 9, drug analysis laboratory reports.

Antonio Gomez. Upon being asked, Mr. Gomez retrieved the cocaine from a locked storage area.¹³

Officer Joseph Williamson with the El Paso Sheriff's Office executed a search warrant on January 16, 2009. He testified law enforcement entered the premises via the back entrance and arrested Mr. Gomez who was in the proximity of the stairs and storage area. Thirteen bindles of cocaine were found inside a plastic bin with magnetic strip attached to a beverage metal cart located in the storage area.¹⁴ The canine unit further alerted the officers to a money bag on a desk in the storage area. The bag contained over \$2,000.00 cash. Officer Francisco Chavez testified he arrested Mr. Gomez and, after doing so, discovered a large bundle of 20 dollar bills totaling \$2,293.00 on his person.¹⁵

On March 5, 2009, Detective Jeffrey Lee Harvel conducted a routine bar check and found a small baggie with liquid white substance in a toilet in the janitorial closet. The seized property field tested positive for cocaine.¹⁶ Detective Harvel said there was a bartender named Ms. Trejo and a customs agent named Figueroa working behind the bar. The customs agent denied he was working.¹⁷

Detective Harvel testified that on July 4, 2009, a canine unit alerted to an unmarked, locked door and window situated to the left of the front door. This area is described as a small compartment behind the bar's wall, "a secret room." Numerous items were located in the small room: 80 baggies of cocaine consistent with street-level sales, two ledgers with names and paid amounts, \$4,000.00 cash, a small scale, a taser, and surveillance cameras giving images of the bar's entrance and the entire bar area.¹⁸ The surveillance camera was giving a live feed of the bar when found.¹⁹ All items seized tested positive for cocaine. A tile had been removed from

¹³ Tr. at pp. 36-46. and pp. 57-60.

¹⁴ Tr. at pp. 63-68.

¹⁵ Tr. pp. 69-70.

¹⁶ Tr. at p. 86.

¹⁷ Tr. at pp. 106-108.

¹⁸ Tr. at pp. 88-89 and p. 99-100.

¹⁹ Tr. at p. 101.

the ceiling. Detective Harvel said a person can fit through the tile opening and the crawl space is a conduit to the ceiling above the bar.²⁰ The bar was closed when law enforcement entered the bar.²¹

Officer José Casarez testified two torn cocaine baggies and one diamond fold were located in the bar's restrooms on June 20, 2009.²² Two employees were present. Carolina Gomez and Maria del Carmen Benavidez identified themselves as owners or managers of the bar to the officer.²³

On September 11, 2009, Detective Harvel testified that he found 19 cocaine bindles inside the towel dispenser in the women's bathroom. All seized bindles field tested positive for cocaine.²⁴ The only employee present was a bartender named Carolina Gomez.²⁵

~~TABC agent Robert E. Chavez testified he was at the bar establishment on January 16, 2009, when the warrant was executed. He had been at the bar before conducting routine inspections about six times and noticed the "secret room." Agent Chavez said he observed the "secret room" as part of the premises during an inspection and remembered walking into the room from the bar, before January 16, 2009.²⁶ He described it as an abandoned kitchen. Entrance to the "secret room" was via a door from the establishment.²⁷ Agent Chavez said it is part of the licensed premises.²⁸ Agent Chavez also disclosed that he conducted a "knock-and-talk," meaning he and other law enforcement went to the permittee's address of record after the search warrant was executed. No one was at the house.²⁹~~

²⁰ Tr. at pp.110-11.

²¹ Tr. at p. 109

²² Tr. at p. 126.

²³ Tr. at p. 131.

²⁴ Tr. at pp.144-45.and pp. 147-48.

²⁵ Tr. at p. 148.

²⁶ Tr. at p. 170.

²⁷ Tr. at p. 158.

²⁸ Tr. at pp. 158-59, lines 24-25 and lines 1-3.

B. Respondent's case

Respondent did not present any evidence or call any witnesses.

III. DISCUSSION AND ANALYSIS

In addressing the allegations which form the basis of this cause, the ALJ bears in mind that a permit issued by the TABC is not a matter of right but rather a matter of privilege which may be renewed, extended, limited, or denied. It is the permittee's responsibility to conduct his business in such a manner that warrants that privilege. In the instant case, the TABC has authority to cancel a permit if it is found that the permittee engaged in any of the listed prohibited acts enumerated in the Code. Whether an applicant has conducted his business so as to jeopardize the peace, morals, health, or safety of the general public cannot be determined by a set formula. It is in this context that this analysis is undertaken.

The ALJ gives considerable weight to the evidence regarding purchases of narcotics by law enforcement on the premises, specifically to the events which occurred on January 9, 13, and 15, 2009. Sergeant Raul Apodaca has first-hand knowledge of the narcotic sales which transpired, and he testified at hearing he openly purchased cocaine from an employee.

The "secret room" discovered on July 4, 2009, is also relevant. Detective Harvel described that a round opening was on a very thin wall adjoining the bar. Light came through the opening.³⁰ On the other side was the bar.³¹ It is evident from the testimony that the wall is not a weight-bearing wall, and the door to the room from the bar was removed. Detective Harvel opined this appeared to be the room where the narcotics were packaged.³² The ALJ agrees with his conclusion. Furthermore, the hole was visible on the bar's side. There was a piece of wood

²⁹ Tr. at p. 157.

³⁰ Tr. at p. 120.

³¹ Tr. at p. 90-91.

³² Tr. at p. 92.

underneath the hole. Detective Harvel said a drink could be placed on the wood.³³ Detective Harvel further stated a cocaine bundle could go through the aperture.³⁴ The ALJ further concludes this opening was used to transmit the narcotic upon a sale. Further, Respondent argued he did not own the area that held the secret room. However, the relevant analysis is control, not ownership.³⁵ From the facts in evidence, most notably the surveillance system on the bar and the wall opening, it is more likely than not that the adjacent secret room was under the direct or indirect control of the Respondent.

There is also evidence of record regarding police responses to the establishment resulting in the seizure of cocaine from the premises. These are situations in which the drug was not attributable to anyone since it was found in places such as the bathroom or pool tables. Unlike a criminal case, ownership determination of the narcotics is not an element of this case. These are facts evidencing how the permittee conducts his business. The evidence reveals that the sale of narcotics was done quite openly and routinely. Narcotics were located in open spaces, visible to the bartender. Narcotics were also located in locked spaces accessible only to bar employees. The permittee was never at the bar on the dates detailed in section II above. This is of import because it represents the permittee's involvement, or lack thereof, in the management and control of the bar. The Code places on the Respondent the duty to manage and control all aspects of the bar's operations. It appears from the evidence of record that the permittee was not managing the establishment, or he condoned the narcotics activity since it was so openly and routinely conducted. Both scenarios are unacceptable under the Code.

Based on the evidence, the ALJ finds that narcotic related offenses have occurred routinely on the bar's premises. Therefore, Respondent has conducted his business in a manner which warrants cancellation based on the peace, morals, health, or safety of the general public. The ALJ recommends cancellation of his TABC permits.

³³ Tr. at pp. 121-22.

³⁴ Tr. at p. 122, lines 1-4.

³⁵ Code at § 11.49 [Premises Defined] (a) In this Code, "premises" means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

IV. FINDINGS OF FACT

1. Notice of hearing was issued on November 4, 2010.
2. A hearing convened on March 17, 2011, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus Rogelio Simiano Garces d/b/a Charanda Lounge (Respondent or bar).
3. The hearing reconvened on April 4, 2011.
4. The hearing was held before Administrative Law Judge (ALJ) Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas.
5. Staff was represented by David T. Duncan, staff attorney. Respondent was represented by Jesse A. Herrera, attorney.
6. The record closed on April 4, 2011.
7. ~~The Charanda Lounge operates under the authority of a wine and beer retailer's on premise permit, which includes a retailer's on premise late hours license, issued in December 1994.~~
8. The listed permittee is Rogelio Simiano Garces.
9. The bar is situated in El Paso, County of El Paso, Texas.
10. The bar's administrative history includes nine written warnings for various alleged TEX. ALCO. BEV. CODE ANN. (Code) violations and two permit suspensions for sale to minor and possession of uninvoiced alcoholic beverages.
11. On August 20, 2005, narcotic filled balloons in the proximity of the pool table in the bar and a clear plastic bag with narcotics located in a chalk bowl used for pool cues were seized.
12. On September 6, 2007, cocaine sales were being made at the bar by two employees. The cocaine was kept in a locked storage area. One employee directed customers wanting to purchase narcotics to the other employee. Both were inside the bar area.
13. On December 16, 2008, undercover officers openly bought cocaine from a man at the bar known as "Cabano." The bartender was aware of the man and pointed to him.
14. On January 6, 2009, another undercover cocaine purchase was made by the same officer and from the same person as detailed in number 13 above.

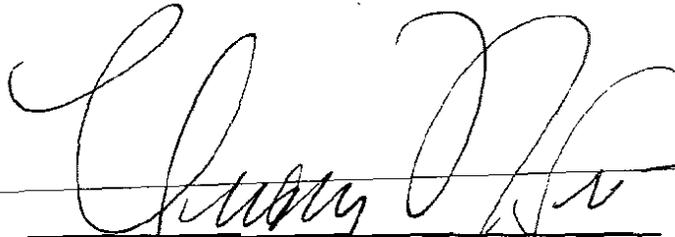
15. Sergeant Raul Apodaca with the El Paso Sheriff's Office purchased bindles of cocaine on January 9, 13 and 15, 2009, from a bar's employee. The employee was a maintenance staff named Antonio Gomez. Mr. Gomez retrieved the cocaine from a locked storage area.
16. On January 16, 2009, 13 bindles of cocaine were found inside a plastic bin with magnetic strip attached to a beverage metal cart located in the storage area. A money bag on a desk in the storage area was found with over \$2,000.00 cash. Mr. Gomez possessed a large bundle of 20 dollar bills totaling \$2,293.00 on his person.
17. On March 5, 2009, a small baggie with cocaine was in a toilet in the janitorial closet.
18. On July 4, 2009, numerous items were located in the small adjacent to the bar: 80 baggies of cocaine consistent with street-level sales, two ledgers with names and paid amounts, \$4,000.00 cash, a small scale, a taser, and surveillance cameras giving images of the bar's entrance and the entire bar area. All items seized tested positive for cocaine.
19. On July 4, 2009, a camera in the adjacent "secret room" was giving a live feed of the bar.
20. ~~The "secret room" originally was connected to the bar via a door, and it resembled an abandoned kitchen.~~
21. The thin wall enclosing the "secret room" was erected, and the door from inside the bar to the room was removed. The opening on the wall of the "secret room" was large enough for cocaine bindles to pass through.
22. Two torn cocaine baggies and one diamond fold were located in the bar's restrooms during a routine bar check on June 20, 2009.
23. On September 11, 2009, 19 cocaine bindles were found inside the towel dispenser in the women's bathroom.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to CODE §§ 5.31 and 5.35.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042.

3. Notice of hearing was provided pursuant to 1 TEX. ADMIN. CODE (TAC) § 155.401 and Code § 11.63.
4. Based upon the Findings of Fact, narcotic related offenses were conducted on the licensed premises, in violation of Code § 61.17(a)(1) and 16 TAC § 35.31(c)(15).
5. Based upon the Findings of Fact, Respondent conducted his business in a manner which warrants the cancellation of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people, pursuant to Code § 61.71(a)(17).
8. Respondent's wine and beer retailer's on premise permit, which includes a retailer's on premise late hours license, number BG-302315, should be cancelled.

SIGNED April 19, 2011.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS