

DOCKET NO. 599826

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| TEXAS ALCOHOLIC BEVERAGE<br>COMMISSION, Petitioner        | § | BEFORE THE TEXAS    |
|   | § |                     |
|   | § |                     |
| VS.   | § |                     |
|   | § |                     |
| RAUL AGUILAR, JR.<br>D/B/A PEPPER'S BISTRO,<br>Respondent | § | ALCOHOLIC           |
|   | § |                     |
|   | § |                     |
| PERMITS NO. BG670590, BL                                  | § |                     |
|   | § |                     |
|   | § |                     |
| TRAVIS COUNTY, TEXAS<br>(SOAH DOCKET NO. 458-11-7662)     | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 25<sup>th</sup> day of March, 2013, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Kerrie Jo Qualtrough presiding. The hearing convened on January 24, 2012 and the SOAH record closed March 16, 2012. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on May 1, 2012. 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. Exceptions were filed by Petitioner on May 24, 2012. Respondent replied on June 12, 2012. On June 13, 2012, the Administrative Law Judge filed a letter recommending that Petitioner's exceptions be overruled.

After review and due consideration of the Proposal for Decision, Petitioner's Exceptions, Respondent's reply and the Administrative Law Judge's June 13, 2012 letter, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**THEREFORE, IT IS ORDERED** that **NO ACTION** be taken against Respondent's Wine and Beer Retailer's Permit No. BG670590 and the associated Retail Dealer's On Premise Late Hours License.

This Order will become **final and enforceable** on the 19<sup>th</sup> day of April, 2013, **unless a Motion for Rehearing is filed by the 18<sup>th</sup> day of April, 2013.**

**SIGNED** this the 25<sup>th</sup> day of March, 2013, at Austin, Texas.

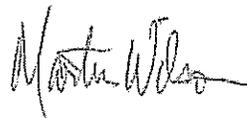


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Sherry K-Cook, Administrator  
Texas Alcoholic Beverage Commission

### **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 25<sup>th</sup> day of March, 2013.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Kerrie Jo Qualtrough  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711-3025  
**VIA FACSIMILE: 512.322.2061**

Raul Aguilar, Jr.  
d/b/a Peppers Bistro  
**RESPONDENT**  
8718 Birmingham Drive  
Austin, Texas 78748  
**VIA REGULAR MAIL**

Don E. Walden  
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***VIA REGULAR MAIL***  
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Judith L. Kennison  
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SOAH DOCKET NO. 458-11-7662

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| TEXAS ALCOHOLIC BEVERAGE<br>COMMISSION,<br>Petitioner     | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | BEFORE THE STATE OFFICE<br><br><br><br>OF<br><br><br><br>ADMINISTRATIVE HEARINGS |
| v.  |  |  |
| RAUL AGUILAR, JR. D/B/A<br>PEPPER'S BISTRO,<br>Respondent |  |  |

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this action against Raul Aguilar, Jr. d/b/a Pepper's Bistro (Respondent), seeking cancellation or suspension of Respondent's permit due to the sale of cocaine on the premises. The Administrative Law Judge (ALJ) finds that Staff failed to prove that Respondent violated Tex. Alco. Bev. Code § 11.61(b)(7) and 16 Tex. Admin. Code § 35.31, as alleged in Staff's Second Amended Notice of Hearing.<sup>1</sup>

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party contested jurisdiction or the sufficiency of the notice. Those issues will be addressed only in the findings of fact and conclusions of law.

ALJ Kerrie Jo Qualtrough convened the hearing in this matter on January 24, 2012, in the hearing rooms of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Staff was represented by staff attorney Judith L. Kennison. Respondent was represented by attorney Don E. Walden.

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<sup>1</sup> Staff Ex. 1.

Staff submitted written closing arguments on February 17, 2012, and Respondent filed his closing arguments on March 2, 2012. The deadline for Staff's response to Respondent's closing arguments was March 16, 2012, and the evidentiary record closed on that date.

## II. STAFF'S ALLEGATIONS AND APPLICABLE LAW

### A. Background

Respondent is the holder of Wine & Beer Retailer's On Premise Permit BG-670590, which includes the Retailer's On Premise Late Hours License.<sup>2</sup> Pepper's Bistro is located at 1926 E. Riverside Dr., Austin, Texas.

In early 2010, Respondent became aware that some of his customers were in possession of narcotics. Respondent testified that, as a result of these incidents, he contacted TABC for assistance, and TABC Staff recommended that he contact the APD. Respondent discussed the issue with APD, who then conducted undercover operations on the premises and purchased cocaine on three occasions from three females inside the bar. The dispute centers on whether these three women were the Respondent's employees, agents, or servants, and if not, whether Respondent knew or should have known that cocaine was being sold on the premises and failed to take reasonable steps to prevent the offense.<sup>3</sup>

### B. Allegations

In its Second Amended Notice of Hearing, Staff made three allegations regarding the sale of cocaine at Respondent's premises. Staff alleged:

1. On or about July 23, 2010, Respondent . . . or Respondent's agent, servant, or employee, sold or permitted others to sell a narcotic on the licensed premises. By selling or permitting others to sell a narcotic on the licensed premises, Respondent

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<sup>2</sup> Staff Ex. 2.

<sup>3</sup> 16 Tex. Admin. Code § 35.31(b).

violated Texas Alcoholic Beverage Code §§ 61.71(a)(17), and/or 11.61(b)(7), and 16 Texas Administrative Code § 35.31.

2. On or about July 24, 2010, Respondent . . . or Respondent's agent, servant, or employee, sold or permitted others to sell a narcotic on the licensed premises. By selling or permitting others to sell a narcotic on the licensed premises, Respondent violated Texas Alcoholic Beverage Code §§ 61.71(a)(17), and/or 11.61(b)(7), and 16 Texas Administrative Code § 35.31.
3. On or about July 31, 2010, Respondent . . . or Respondent's agent, servant, or employee, sold or permitted others to sell a narcotic on the licensed premises. By selling or permitting others to sell a narcotic on the licensed premises, Respondent violated Texas Alcoholic Beverage Code §§ 61.71(a)(17), and/or 11.61(b)(7), and 16 Texas Administrative Code § 35.31.

In its Reply to Respondent's Closing Argument, Staff clarified that Respondent holds a permit, not a license. Therefore, Staff is seeking disciplinary action pursuant to Tex. Alco. Bev. Code § 11.61(b)(7), since that section applies to permittees, such as Respondent.

As a penalty for the alleged violations, Staff requested that Respondent's permit be suspended for 50 days, with an opportunity to pay, in lieu of suspension, the rate of \$300 per day, or \$15,000.<sup>4</sup> Staff alleges that under TABC's penalty chart, a first violation of this type would result in a suspension of 25 to 35 days. Staff argues that "[f]or three violations, on two separate dates, a 50-day penalty is most appropriate or \$15,000 to encourage compliance."<sup>5</sup>

### C. Applicable Law

TABC may suspend or cancel a permit if "the place or manner in which the permittee conducts his 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 . . . ."<sup>6</sup>

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<sup>4</sup> Staff's Closing Argument, pgs. 7-8.

<sup>5</sup> Staff's Closing Argument, pg. 8. Staff's Second Amended Notice of Hearing alleges that three violations occurred on three separate dates: July 23, 24, and 31, 2010. Staff's Ex. 1, pgs. 1-2.

<sup>6</sup> Tex. Alco. Bev. Code § 11.61(b)(7).

Pursuant to TABC rules in effect in July 2010, a permittee violates Tex. Alco. Bev. Code § 11.61(b)(7) if any narcotic-related offense is committed:

- (1) by the . . . permittee in the course of conducting his/her alcoholic beverage business; or
- (2) by any person on the . . . permittee's licensed premises; and
- (3) the . . . permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense.<sup>7</sup>

A "permittee" is defined as "a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person."<sup>8</sup>

### III. DISCUSSION

#### A. Evidence

##### 1. Senior Patrol Officer Charles Maestas

Officer Maestas testified on behalf of Staff. He stated that APD had received information that persons were dealing cocaine on Respondent's premises. Therefore, APD decided to conduct undercover operations inside Pepper's Bistro.

On July 23, 2010, Officer Maestas and two other undercover officers were seated at a table in Pepper's Bistro, and made contact with a young woman named "Anna."<sup>9</sup> Officer Maestas testified that Anna was picking up empty bottles and cleaning tables, and it

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<sup>7</sup> 16 Tex. Admin. Code § 35.31(b)(3). The narcotic-related offense must be described in chapters 481 and 483 of the Texas Health and Safety Code. 16 Tex. Admin. Code § 35.31(c)(15). It is undisputed that selling cocaine is a narcotic-related offense.

<sup>8</sup> *Id.* § 1.04(11).

<sup>9</sup> "Anna's" real name is Gisela Sance.

appeared to him that Anna was an employee of Pepper's Bistro. He further stated that none of Respondent's employees had on any uniforms.

At some point, Officer Maestas gave Anna \$10 for a beer, even though the price of the beer was \$3. Officer Maestas testified that it was common for young women to ask more than the price of the beer and keep the difference, frequently sitting and talking with the customer after delivering the beer. Officer Maestas gave Anna \$20 for two beers, one for her and one for him. Anna purchased the beers and sat down with Officer Maestas. Officer Maestas did not receive any change from Anna.

During their conversation, Officer Maestas asked Anna for some "soda," which is a slang term for cocaine. Anna went near the DJ booth and talked with a male that Officer Maestas had seen go inside the DJ booth and speak over the microphone. Anna came back, sat down, and passed the cocaine to Officer Maestas by placing her hand on his leg.

## **2. Patrol Officer Shane Streepy**

Officer Streepy testified on behalf of Staff. He stated that Pepper's Bistro was a target of the undercover operation on July 23, 2010, because: he had received a complaint via email from APD's Organized Crime Unit about narcotic activity at the premises; a suspect in an unrelated "buy/bust" operation had gone to Pepper's Bistro to obtain cocaine; and the bar had a history of "calls for service."<sup>10</sup> He also coordinated with TABC Staff prior to the July 23, 2010 operation and had received a list of Respondent's employees.

Officer Streepy testified regarding what a proprietor should do if there is a problem with drugs in his bar. Officer Streepy stated that in the short term, a proprietor should call 911 to address the issue. For an ongoing problem, Officer Streepy advised that a proprietor should ask

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<sup>10</sup> A "call for service" is a call to 911. A call for service could be for any offense, not just a narcotic-related offense.

for assistance from APD to come up with a solution. Officer Streepy was not aware if Respondent had contacted APD.

### 3. Senior Officer Richard Cortez

Officer Cortez testified on behalf of Staff and was present with Officer Maestas at Pepper's Bistro on July 24, 2010.<sup>11</sup> According to Officer Cortez, he was there around 12:30 a.m. and the bar was crowded. He ordered beer from Anna, and she brought it to him after she overcharged him for the beer.

Anna brought a friend named Claudia Duran to the officers' table. Claudia talked and danced with Officer Cortez. He asked Claudia for some "soda," and he gave her \$20 for cocaine and \$10 for another beer. She made contact with a male at the DJ booth whom Officer Cortez believed was in charge of the music; however, Officer Cortez testified that the male was in a public area. She then returned to Officer Cortez and gave him the cocaine.

Officer Cortez was also involved in an undercover operation at Pepper's Bistro on July 31, 2010. On that night, Officer Cortez saw "Sandra" talking with the same male whom Officer Cortez thought was the DJ on July 24, 2010.<sup>12</sup> Officer Cortez motioned for Sandra to come to his table and gave her \$10 for a beer, which she brought him. He asked Sandra for "soda," and she initially stated "no" to his request. However, she later agreed, and Officer Cortez gave her \$20. He testified that it was hard for him to see where Sandra went, but she returned with the cocaine in a few minutes. Officer Cortez could not recall if he saw Sandra cleaning any tables.

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<sup>11</sup> Officer Maestas purchased cocaine early in the evening of July 23, 2010, and Officer Cortez was present at that time. However, the officers returned after midnight that same evening, and Officer Cortez purchased more cocaine on July 24, 2010.

<sup>12</sup> "Sandra's" real name was Graciela Gonzales.

#### 4. Leticia Valiente-Torres

Ms. Valiente-Torres is an employee of Respondent and testified on his behalf.<sup>13</sup> She is a bartender and works five nights a week from 4:00 p.m. to 2:00 a.m. She stated that she assumes she was at the bar on July 23, 24, and 31, 2010, because she works so many nights.

She testified that a lot of women will come to the bar and she would serve drinks to them. She stated that there are no waitresses at Pepper's Bistro, and that the bartenders clean the tables and pick up the empty bottles. Ms. Valiente-Torres testified that there are three security guards at Pepper's Bistro on the weekends.

Ms. Valiente-Torres' testimony was conflicting about whether she knew there were women at the bar pretending to be waitresses. At one point, she stated women had been in the bar using different names, cleaning tables, and pretending to work there. Ms. Valiente-Torres said that she did not interact with them, other than selling beer to them at the bar. She also testified that she reported this incident to Respondent. At another point, she testified that she was unaware that there were women at the bar engaged in such activities.

According to Ms. Valiente-Torres, Respondent is "always" present at the bar. She said that the employees at Pepper's Bistro do not sell drugs to the customers. She was aware that drugs were sold at Pepper's Bistro and the police came to the bar on two occasions regarding the sale of drugs.

#### 5. Ron Guyer

Mr. Guyer is a private security guard employed by Nationwide Security. Pursuant to a contract between Nationwide Security and Respondent, he performs security duties at Pepper's Bistro. He testified that there are two security guards a night working at Pepper's Bistro. One security guard is at the door and checks identification and performs pat downs, if necessary. He

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<sup>13</sup> Ms. Valiente-Torres testified through a certified interpreter.

also will exclude customers from Pepper's Bistro if they appear to be too intoxicated. The second security guard roams around inside, keeping the bar under control. The security guards wear a uniform of a black top and bottoms and a duty belt, which holds pepper spray, hand cuffs, etc.

Mr. Guyer testified that the security guards at Pepper's Bistro have apprehended customers who use or sell drugs. According to Mr. Guyer, the security guards are trained to confiscate the drugs, escort the customer out of the bar, and call APD. Mr. Guyer testified that prior to APD's undercover operations in July 2010, the security guards had expelled customers for the possession of drugs on March 12, March 13, March 14, March 19, and March 21, 2010.<sup>14</sup> He stated that he did not tolerate drug dealing in the bar, and he would lose his job if he did.

Mr. Guyer stated that Respondent had made changes to address the issue of the sale of cocaine in the men's bathroom. The security guards made more patrols and more checks on the bathroom and inside the bar. Mr. Guyer stated that there are no female security guards to check the women's bathroom.

Mr. Guyer testified that he has frequently seen women sitting and drinking at tables with men. However, he was unaware of any women who had posed as waitresses in the bar and solicited drinks from men and overcharged them.

Regarding the DJ booth, Mr. Guyer testified that only employees are allowed in the DJ booth. However, the DJ will set the microphone on the ledge adjacent to the booth for the customers to use. The customers will typically sing with the music or encourage people on the dance floor.

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<sup>14</sup> Resp. Ex. 4.

## 6. Raul Aguilar, Respondent

Respondent testified on his own behalf. In July 2010, Respondent had eight to 12 employees, including bartenders, a DJ, a cook, a cleaning lady, and the security guards under contract with Nationwide Security. He stated that he has never hired waitresses. Respondent testified that he spends a lot of time at the bar, although he spends more time at the bar on Friday and Saturday nights than he does on weeknights. He may leave the bar for an hour or two, but always returns to close the bar. He stated that he has never allowed his employees to sell drugs and he has no tolerance for illegal activities.

Respondent testified that during the first quarter of 2010, he noticed many calls had been made to APD regarding narcotics. His security guards had reported that people were selling drugs in the bathroom. The security staff would remove those individuals from Peppers' Bistro and call APD. Respondent stated that the officers would usually not arrest the person with the drugs unless the person had a criminal history. Respondent stated that he was trying to stop the drug sales on the premises, but the police needed to arrest all persons in possession of drugs for that to happen. He attempted to bar those persons from the premises, but it is difficult for his security guards to enforce that policy. Respondent asked the APD officers why they were not arresting all the persons with drugs on the premises. According to Respondent, the officers stated that they were trying to do their job, but APD was looking for the "big cat." Respondent stated that he was not satisfied with that response, because he had called 911 to get the police involved in an effort to protect his business and avoid problems.

Respondent testified that in May or June 2010, he contacted TABC for help and spoke with a lady who advised him to contact APD. She gave Respondent the phone number for the APD's Drug Enforcement Division and advised him to make a complaint. Respondent followed her directions and contacted APD. According to Respondent, APD responded that it could do a sting operation to help Respondent eliminate the problem in the bar. Respondent thinks that the undercover operations in late July 2010 were a result of his complaint to APD, which he believes was counterproductive because this enforcement case came about as a result of his efforts.

Regarding women acting as waitresses, Respondent testified that the practice occurs frequently with Hispanic clientele, such as his. Women will go from bar to bar and charge men a "companionship fee." He stated that he does not tolerate that practice and he sells beer at the set price. He said that he has ejected ladies from Pepper's Bistro for that practice.

Respondent testified that the DJ he employs is named Abraham, and he is still an employee. Respondent does not believe that Abraham is involved with narcotics or gave the cocaine to the three women in late July 2010. However, Respondent stated that he has an idea as to the identity of the male who purportedly gave the cocaine to the three women. Respondent told his security staff to keep an eye on that individual, and report to Respondent if they saw any drug activity so they could bar that person from the premises.

#### **7. Sergeant James Molloy**

Sergeant Molloy is employed by TABC and testified on behalf of Staff in its rebuttal case. Sergeant Molloy stated that prior to the July 2010 undercover operations, there were a lot of drug deals going on in the bathroom on Respondent's premises. Sergeant Molloy opined that Respondent should have hired more security personnel and more staff, as well as installing better lighting in the bar. Sergeant Molloy speculated that Respondent's security staff may have been focusing on excluding some types of clientele, while not excluding others. He further speculated that security staff may have been focusing on the front door, and not watching the rest of the bar.

Regarding the three women who sold cocaine to the undercover officers, Sergeant Molloy stated that in some bars it is common for women to have some arrangement with the bar owners regarding the solicitation of beer. The women would come to the premises, put their purses behind the bar, and sell beer to men. Sometimes, the women will charge the men a higher price for the beer, and keep the difference. Other times, the bartenders will track the number of beers the women sell and split the money with them at the end of the night. According to Sergeant Molloy, these women are sometimes called "bottle cappers" because they use the bottle caps to keep track of their beer sales.

Sergeant Molloy stated that Respondent should have known that the three women were on the premises and selling beer to men at inflated prices on the nights of July 23, 24, and 31, 2010. He recalled that Anna sold beer to two undercover officers on the same night, once at approximately 8:30 p.m., and again at 12:30 a.m. He speculated that Respondent should have known that Anna was in the bar all evening and making repeated trips to the bar and ordering multiple beers. However, Sergeant Molloy stated that there was no evidence in the record that Anna had been in Pepper's Bistro all evening and making repeated trips to the bar. He also said that there was no evidence in the record regarding Anna's activities other than when she interacted with the two undercover police officers.

## **B. Issues**

Staff alleged Respondent violated Tex. Alco. Bev. Code § 11.61(b)(7) and 16 Tex. Admin. Code § 35.31. A permittee must commit the violations, and that term is defined as "a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person."<sup>15</sup>

### **1. 16 Tex. Admin. Code § 35.31(b)(1): Are the three women Respondent's agents, servants, or employees?**

Staff's first allegation is that Respondent violated Tex. Alco. Bev. Code § 11.61(b)(7) because a narcotic-related offense was committed on the premises "by the . . . permittee in the course of conducting his/her alcoholic beverage business . . ."<sup>16</sup> Staff asserts that the three women were permittees because they were Respondent's agents, servants, or employees, pursuant to *Ackley v. State*.<sup>17</sup> According to Staff, *Ackley* holds that an employee is "a person who works for another in return for financial or other consideration."<sup>18</sup>

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<sup>15</sup> Tex. Alco. Bev. Code § 1.04(11).

<sup>16</sup> 16 Tex. Admin. Code § 35.31(b)(1).

<sup>17</sup> 592 S.W.2d 606 (Tex. Crim. App. 1980).

<sup>18</sup> *Id.* at 608.

Staff also relies on three PFDs, which found that women in similar situations were employees, and therefore permittees.<sup>19</sup> Staff further cites to Sergeant Molloy's testimony that women overcharging for drinks and pocketing the difference is a common occurrence in many bars, and is done so with the participation of the owner or his employees. Staff asserts that the women were Respondent's employees as indicated by their taking and delivering drink orders, as well as cleaning the tables.

Conversely, Respondent argues that, unlike the cases cited by Staff, there is no evidence that Respondent paid the three women any consideration for any work performed. In the other cases, there was evidence that the bartenders were participants in the schemes to overcharge customers for beers in exchange for companionship. Respondent states that the only evidence in this case showing that one of the three women performed a possible act of employment was the testimony of Officer Maestas that he saw Anna cleaning tables.

The ALJ concludes that Staff did not prove that the three women were Respondent's employees, agents, or servants. As stated in *Ackley*:

The Alcoholic Beverage Code does not define the terms "employee," "agent," and "servant."

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Generally speaking, an employee is simply a person who *works for another in return for financial or other compensation*. The test to determine whether one person is another's employee is whether or not he *is subject to the control* of the other person.

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An agent is one *who is authorized by another* to transact business or manage some affair for him, and to render to him an accounting of such transaction. The term "agency" denotes *a consensual relation existing between two persons*, by virtue of

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<sup>19</sup> *TABC v. Las Raices Garcia, Inc. d/b/a La Pantera*, SOAH Docket No. 458-09-3845 (bartender gave red tickets to the women to track beer sales); *TABC v. Melmat, Inc. d/b/a El Cubo*, SOAH Docket No. 458-10-1162 (women overcharged the customer and split the amount overcharged with the bartender); *TABC v. Ana Maria Villatoro d/b/a El Nuevo Amanecer*, SOAH Docket No. 458-10-5758 (woman who claimed she was an employee solicited a person to buy an alcoholic beverage).

which one of them is to act for and on behalf of the other, being subject to the other's control.

A servant is a person *employed by a master to perform service* in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master. . . .<sup>20</sup>

In this case, there is no evidence that Respondent entered into any agreement with the three women to perform a service in return for compensation. As shown in *Ackley*, the employment relationship requires an agreement between the employer and employee, principal and agent, and master and servant. There is no evidence that Respondent or his employees knew the three women were in the bar, cleaning tables, and delivering beer, and acquiesced to their services. Furthermore, when Respondent knew that there were women in the bar charging a companionship fee, he would remove the women from the premises. In addition, the evidence does not support a finding that Respondent should have known that the women were in the bar. There is no evidence that "bottle capping" was a common practice in Pepper's Bistro; therefore, the ALJ will not infer that Respondent permitted or tolerated the practice.

Staff argues that the ALJ should find that the officer's testimony is more credible than the testimony of Respondent and his employees who have a reason to lie. However, wholly missing from the officers' testimony is any statement that Respondent was in an employment relationship with any of the three women or had any knowledge that they were in the bar. The officers also did not testify that Respondent and his employees were aware of the women's presence. Although Sergeant Molloy speculates that Anna was in the bar all night long selling beer and cocaine, he also concedes that there is no evidence regarding Anna's activities that night other than the limited testimony of the two officers. The ALJ concludes that mere speculation is not sufficient to satisfy Staff's burden of proof.

Further, the officers did not see Respondent or his employees actually participate in the women's schemes. The officers did not testify that the bartenders were keeping track of the

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<sup>20</sup> *Ackley*, 592 S.W.2d at 608 (citations omitted) (emphasis added).

women's sales<sup>21</sup> or splitting the proceeds with them.<sup>22</sup> The officers only thought that the three women were employees. However, what the officers may have thought about the women's employment status does not prove by a preponderance of the evidence that Respondent was in an employment relationship with the three women sufficient to establish that the women were permittees. To accept Staff's position would mean that any person pretending to be an employee and committing crimes on the premises could potentially subject the true permittee to administrative sanctions, regardless of the knowledge or acquiescence of the permittee.

Before a person meets the definition of a permittee, *Ackley* requires an agreement or relationship between the employee and the employer, not just speculation as to the employment status of an individual. Evidence of any connection between Respondent and the three women is absent from this evidentiary record. Therefore, the ALJ concludes that Staff did not meet its burden of proof that Respondent violated 16 Tex. Admin. Code § 35.31(b)(1) since the evidence does not support Staff's assertion that the three women were permittees, as that term is defined by Tex. Alco. Bev. Code § 1.04(11).

**2. 16 Tex. Admin. Code § 35.31(b)(2) & (3): Did Respondent know or should Respondent have known that cocaine was sold on the premises and, if so, did Respondent fail to take reasonable steps to prevent the offense?**

Staff's second allegation is that Respondent violated Tex. Alco. Bev. Code § 11.61(b)(7) because a narcotic-related offense was committed on the premises and the "permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense."<sup>23</sup> It is undisputed that three narcotic-related offenses were committed on Respondent's premises. What is disputed is whether Respondent knew or, after exercising reasonable care, should have known of the offense

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<sup>21</sup> *TABC v. Las Raices Garcia, Inc. d/b/a La Pantera*, SOAH Docket No. 458-09-3845 (bartender gave red tickets to the women to track beer sales).

<sup>22</sup> *TABC v. Melmat, Inc. d/b/a El Cubo*, SOAH Docket No. 458-10-1162 (women overcharged the customer and split the amount overcharged with the bartender).

<sup>23</sup> 16 Tex. Admin. Code § 35.31(b)(2) & (3).

or its likelihood of occurring and whether he failed to take reasonable steps to prevent its occurrence.

Staff argues that Respondent should have known about the drug sales occurring on the premises and should have taken steps to prevent the criminal acts. Staff asserts that Respondent should have done more to stop the criminal activity and that calling the police when drug possession is obvious is not enough. According to Staff, Respondent should have had more security staff, should have been at the bar more than just “sporadically,” and should not have relied on his staff to control his customers. Staff further asserts that the drug transactions took place at or near the DJ booth, yet the DJ did not inquire or intervene during any of the transactions. Sergeant Molloy also testified that Respondent should have installed better lighting since the bar was so dark.

Respondent counters that there is no evidence that Respondent or his employees allowed the sale of narcotics on the premises. Respondent asserts that he called TABC looking for help to stop the criminal activity. In response, TABC told Respondent to contact APD, and Respondent did just that. Further, Respondent argues that there is no evidence that Staff’s suggested remedial actions would have stopped the criminal activity that is the subject of this hearing. In addition, Respondent points out that Sergeant Molloy testified that it would have been better if Staff had provided these recommendations to Respondent when he called for help in 2010, instead of making the recommendations during the hearing.

Narcotics were sold on the licensed premises, thereby satisfying the first prong of the violation, found in 16 Tex. Admin. Code § 35.31(b)(2). However, the ALJ finds that Staff did not meet its burden to prove that Respondent violated the second prong found in 16 Tex. Admin. Code § 35.31(b)(3). Although Respondent knew that drugs had been sold in the bathrooms, there is no evidence that he knew or should have known after the exercise of reasonable care that drugs were being sold by women in the manner that occurred on July 23, 24, and 31, 2010. Further, Staff did not prove by a preponderance of the evidence that Respondent failed to take reasonable steps to prevent the offense.

Respondent testified that he knew that women had been in the bar in the past posing as waitresses, and charging a companionship fee. However, Respondent did not condone that practice, and he testified that he would remove women from the premises who engaged in such practices. This evidence is consistent with Ms. Valiente-Torres' testimony. She stated that she reported to Respondent when she knew of women in the bar pretending to be waitresses. However, there is no evidence that Respondent or any employee knew that women pretending to be waitresses were also selling cocaine on the premises. The preponderance of the evidence shows that prior to the July 2010 undercover operations, the drug transactions were taking place in the men's bathroom, and Respondent had stepped up patrols of the bathroom in response. The evidence does not support a finding that Respondent knew or should have known through the exercise of reasonable care that women were on the premises engaging in the sale of cocaine in the manner that occurred on July 23, 24, and 31, 2010.

Staff also argues that the DJ, Abraham, should have intervened and stopped the drug transactions between the women and a male near the DJ's Booth. However, by its very nature, the sale of drugs is a clandestine affair, as demonstrated by Officer Maestas' testimony that Anna passed the cocaine to him by placing her hand on his leg. There is no evidence showing that Abraham saw or was even able to see the participants in the drug transaction. His lack of intervention does not demonstrate that Respondent or his employees allowed the drug sales.

Regardless of whether Respondent's knowledge of the drug transactions in the bathroom satisfies the first part of section 35.31(b)(3), the preponderance of the evidence demonstrates that Respondent took reasonable steps to prevent the occurrence of sales. In response to the drugs in the men's bathroom, Respondent's security personnel began conducting more patrols inside the premises and checking the bathrooms more frequently. Whenever the security staff found drugs on the premises, they removed the individuals and contacted APD. Those individuals were then barred from Pepper's Bistro.

But most importantly, Respondent took the extraordinary step of contacting APD and TABC for help in stopping the drug sales and protecting his business. The ALJ disagrees with Staff's assertion that Respondent's calls for help were insufficient because "Respondent cannot

simply turn a blind eye or just make telephone calls to alleviate the problem.”<sup>24</sup> Respondent did exactly what TABC Staff advised him to do: he called APD for assistance. In fact, Staff’s own witness, Officer Streepy, testified that was exactly what Respondent should do: call APD for assistance to find a long term solution to the drug problem. Respondent followed Staff’s advice and contacted APD to seek help in stopping the drug transactions. This is not “turning a blind eye” to the problem; it is a proactive step that indicates Respondent was not complicit in and did not tolerate the drug dealing occurring in the bar. Staff’s statement that Respondent turned a blind eye to the drug sales is not supported by the evidence.

Staff advised Respondent in 2010 to call APD, and that advice was reasonable. The ALJ finds that calling both TABC and APD for help are reasonable steps to take to stop the sale of narcotics from occurring on the premises. Respondent increased the patrols within Pepper’s Bistro and within the men’s bathroom. He expelled customers who were in possession of drugs and called 911. Respondent took reasonable steps to prevent the sale of narcotics, and thereby did not commit a violation of 16 Tex. Admin. Code § 35.31(b)(3).

### C. Summary

The ALJ concludes that Staff failed to meet its burden of proof that on July 23, 24, and 31, 2010, Respondent violated Tex. Alco. Bev. Code § 11.61(b)(7) and 16 Tex. Admin. Code § 35.31. The preponderance of the evidence indicates that the three women in the bar were not employees, agents, or servants, and thereby, not permittees as that term is defined by 16 Tex. Admin. Code § 1.04(11). Therefore, Staff did not meet its burden of proof that a narcotic-related offense was committed by the permittee, as required by 16 Tex. Admin. Code § 35.31(b)(1). There is no evidence that Respondent knew or should have known that women were posing as waitresses and selling drugs in the bar on July 23, 24, and 31, 2010. Nor does the evidence show that Respondent failed to exercise reasonable care and that he should have known that the women were selling drugs on the premises. Further, Respondent took reasonable steps to prevent the offense by contacting the enforcement agencies to help him stop the drug

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<sup>24</sup> Staff’s Closing Argument and Brief, pg. 7.

transactions occurring in Pepper's Bistro. His security guards increased their patrols within the bar and would eject from the bar any customers in possession of drugs. The ALJ concludes that the preponderance of the evidence does not support findings that Respondent committed the violations as alleged by Staff in the Second Amended Notice of Hearing. The ALJ recommends that TABC deny Staff's request for administrative sanctions and adopt the following findings of fact and conclusions of law.

#### IV. FINDINGS OF FACT

1. Raul Aguilar, Jr. d/b/a Pepper's Bistro (Respondent) is the holder of Wine & Beer Retailer's On Premise Permit BG-670590, which includes the Retailer's On Premise Late Hours License. Pepper's Bistro is located at 1926 E. Riverside Drive, Austin, Texas.
2. On November 15, 2011, Staff of the Texas Alcoholic Beverage Commission (TABC) sent to Respondent a Second Amended Notice of Hearing.
3. The 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 Staff.
4. Administrative Law Judge Kerrie Jo Qualtrough convened the hearing in this matter on January 24, 2012, in the hearing rooms of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Staff was represented by staff attorney Judith L. Kennison. Respondent was represented by attorney Don E. Walden.
5. Respondent spends a lot of time on the premises. Although he may leave the premises for an hour or two in the evenings, he always returns to close the premises. He works more on Friday and Saturday evenings than he does on weeknights.
6. Respondent knew that women would sometimes pretend to be waitresses, obtain beer for men, and charge them a companionship fee. Respondent does not allow that practice on his premises and removes women from the premises if they engage in that practice.
7. In early 2010, Respondent was aware that drug transactions were occurring on the premises in the men's bathroom. In response, Respondent's security staff began making more patrols inside the premises, including the men's bathroom.
8. Respondent did not tolerate drug sales on the premises. When Respondent's staff found drugs on the premises, they would eject the customer from the premises and contact the Austin Police Department (APD) by calling 911.

9. Respondent was dissatisfied with APD's response to the calls. APD would only arrest the customer possessing the drugs if the customer had a prior criminal history.
10. In May or June 2010, Respondent contacted TABC for help to address the drug sales on the premises. The Staff of TABC advised Respondent to contact APD and file a complaint. Staff's advice was reasonable.
11. In May or June 2010, Respondent contacted APD for help, as advised by TABC, and he filed a complaint. APD told Respondent that it could conduct undercover operations inside Pepper's Bistro.
12. On July 23, 2010, an undercover officer purchased cocaine from a woman named Gisela Sance, also known as Anna. The officer thought Anna was Respondent's employee because he saw her clean tables. The officer ordered a beer from Anna, who overcharged for the beer and kept the change. Anna then sat down and talked with the officer, and he asked her if he could buy some cocaine. Anna left the table, approached the DJ's booth, spoke with a male, and returned to the table. Anna passed the cocaine to the officer by placing her hand on his leg.
13. Respondent and his employees did not know and had no reason to know that Anna was on the premises acting as a waitress and selling cocaine. Respondent did not employ Anna to work on the premises. Neither Respondent nor his employees authorized or acquiesced to Anna's activities.
14. On July 24, 2010, an undercover officer purchased cocaine from a woman named Claudia Duran. The officer ordered a beer from Claudia, who overcharged for the beer and kept the change. Claudia talked with the officer, and he asked her if he could buy some cocaine. The officer gave Claudia \$20, and she left the table, approached the DJ's booth, spoke with a male, and returned to the table. Claudia gave the cocaine to the officer.
15. Respondent and his employees did not know and had no reason to know that Claudia was on the premises acting as a waitress and selling cocaine. Respondent did not employ Claudia to work on the premises. Neither Respondent nor his employees authorized or acquiesced to Claudia's activities.
16. On July 31, 2010, an undercover officer purchased cocaine from a woman named Gisela Gonzales, also known as Sandra. The officer ordered a beer from Sandra, who overcharged for the beer and kept the change. Sandra talked with the officer, and he asked her if he could buy some cocaine. The officer gave Sandra \$20 and she left the table, and returned with the cocaine.
17. Respondent and his employees did not know and had no reason to know that Sandra was on the premises acting as a waitress and selling cocaine. Respondent did not employ Sandra to work on the premises. Neither Respondent nor his employees authorized or acquiesced to Sandra's activities.

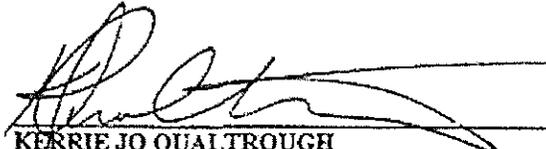
18. Respondent and his employees did not know and had no reason to know that the three women were selling cocaine on the premises on July 23, 24, and 31, 2010.
19. Respondent and his employees exercised reasonable care in the way business was conducted on the premises on July 23, 24, and 31, 2010.
20. Respondent took reasonable steps to prevent the sale of narcotics on the premises.
21. Neither Respondent nor his employees sold narcotics on the licensed premises on July 23, 24, and 31, 2010.
22. Neither Respondent nor his employees permitted other persons to sell narcotics on the licensed premises on July 23, 24, and 31, 2010.
23. Respondent did not conduct his business in a place or manner that warrants the cancellation or suspension of his permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

#### V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code ch. 5, subch. B, and § 11.61.
2. SOAH 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. Tex. Gov't Code ch. 2003.
3. Proper and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051 and 2001.052; Tex. Alco. Bev. Code § 11.63; and 1 Tex. Admin. Code § 155.401.
4. Based on the above findings of fact, Staff failed to prove by a preponderance of the evidence that the three women were the Respondent's employees, agents, or servants.
5. Based on the above findings of fact and conclusions of law, Staff failed to prove by a preponderance of the evidence that the three women were permittees. Tex. Alco. Bev. Code § 1.04(11).
6. Based on the above findings of fact and conclusions of law, Staff failed to prove by a preponderance of the evidence that Respondent violated Tex. Alco. Bev. Code § 11.61(b)(7) and Tex. Admin. Code § 35.31.

7. Based on the above findings of fact and conclusions of law, Respondent's permit should not be suspended or cancelled. Tex. Alco. Bev. Code § 11.61.

**SIGNED** May 1, 2012.



**KERRIE JO QUALTROUGH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**