

DOCKET NO. 608109

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
	§	
VS.	§	
	§	ALCOHOLIC
D. HOUSTON, INC.	§	
D/B/A TREASURES,	§	
Respondent	§	
PERMITS MB256488, LB256489	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-12-6270)	§	BEVERAGE COMMISSION

**CORRECTED ORDER**

**CAME ON FOR CONSIDERATION** this 30th day of May, 2013, the above-styled and numbered cause.

*This Corrected Order is issued to clarify that no action will be taken against these permits as a result of this case. An error was discovered in the ordering paragraph of the original Order dated May 29, 2013, which some people on the service list may have already received. This Corrected Order wholly replaces the May 29, 2013 Order, and the effective date and Motion for Rehearing deadline set forth in this Corrected Order are the applicable dates.*

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Lindy Hendricks presiding. The hearing convened on June 22, 2012 and the SOAH record closed on the same date. The Administrative Law Judge signed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 15, 2012. The Proposal for Decision was properly served on all parties by mail on August 16, 2012, and the parties were given an opportunity to file exceptions and replies as part of the record herein. Exceptions were filed by the Petitioner on August 31, 2012 and on September 14, 2012, Respondent filed a Response to the Exceptions. On September 19, 2012, the ALJ filed an Amended Proposal for Decision to include a finding that on October 28, 2011, Perla Rodriguez was an agent, servant or employee of Respondent. No exceptions were filed in response to the Amended Proposal for Decision.

After review and due consideration of the Proposal for Decision, the Exceptions and Response thereto and the Amended Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Amended

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.

Although I adopt the proposed Findings and Conclusions, I am concerned with the ALJ's disagreement with the proposition that a guilty plea in the criminal conviction may be used to show Ms. Rodriguez was intoxicated on the licensed premises and by Finding of Fact No. 5, which states that "No credible evidence was offered at the hearing establishing Respondent's agent, servant, or employee was intoxicated". When a criminal conviction is obtained based on "liquor violation – intoxicated on licensed premises", it is surely some credible evidence that the person convicted was intoxicated on the licensed premises. While it is true that criminal cases have a different burden of proof than administrative cases, it is in fact a heavier burden. The ALJ may disagree for some reason that it is not persuasive evidence of intoxication, but a criminal conviction is clearly relevant, credible evidence.

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 in this case against Mixed Beverage Permit MB256488 and Mixed Beverage Late Hours Permit LB256489.

This Order will become **final and enforceable** on the 25th day of June, 2013, **unless a Motion for Rehearing is filed by the 24th day of June, 2013.**

**SIGNED** this the 30th day of May, 2013, at Austin, Texas.



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Edwin C. Swedberg, 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 30th day of May, 2013.



---

Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Lindy Hendricks  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, TX 77018  
**VIA FACSIMILE: (512)322-2061**

D. Houston, Inc.  
d/b/a Treasures  
**RESPONDENT**  
P.O. Box 570427  
Houston, TX 77257-0427  
**VIA REGULAR MAIL**

Ronald Monshaugen  
**ATTORNEY FOR RESPONDENT**  
1225 North Loop West, Suite 640  
Houston, TX 77008  
**VIA REGULAR MAIL**  
**AND VIA FACSIMILE: (713)880-5297**

Sandra Patton  
**ATTORNEY FOR PETITIONER**  
TABAC Legal Division

**DOCKET NO. 608109**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
	§	
	§	
	§	
<b>VS.</b>	§	
	§	<b>ALCOHOLIC</b>
<b>D. HOUSTON, INC. D/B/A TREASURES, Respondent PERMITS MB256488, LB256489</b>	§	
	§	
	§	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-12-6270)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 29th day of May, 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 (ALJ) Lindy Hendricks presiding. The hearing convened on June 22, 2012 and the SOAH record closed on the same date. The Administrative Law Judge signed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 15, 2012. The Proposal for Decision was properly served on all parties by mail on August 16, 2012, and the parties were given an opportunity to file exceptions and replies as part of the record herein. Exceptions were filed by the Petitioner on August 31, 2012 and on September 14, 2012, Respondent filed a Response to the Exceptions. On September 19, 2012, the ALJ filed an Amended Proposal for Decision to include a finding that on October 28, 2011, Perla Rodriguez was an agent, servant or employee of Respondent. No exceptions were filed in response to the Amended Proposal for Decision.

After review and due consideration of the Proposal for Decision, the Exceptions and Response thereto and the Amended Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Amended 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.

Although I adopt the proposed Findings and Conclusions, I am concerned with the ALJ's disagreement with the proposition that a guilty plea in the criminal conviction may be used to show Ms. Rodriguez was intoxicated on the licensed premises and by Finding of Fact No. 5,

which states that “No credible evidence was offered at the hearing establishing Respondent’s agent, servant, or employee was intoxicated”. When a criminal conviction is obtained based on “liquor violation – intoxicated on licensed premises”, it is surely some credible evidence that the person convicted was intoxicated on the licensed premises. While it is true that criminal cases have a different burden of proof than administrative cases, it is in fact a heavier burden. The ALJ may disagree for some reason that it is not persuasive evidence of intoxication, but a criminal conviction is clearly relevant, credible evidence.

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 the application of D. Houston, Inc. d/b/a Treasures for renewal of Mixed Beverage Permit MB256488 and Mixed Beverage Late Hours Permit LB256489 be **GRANTED**.

This Order will become **final and enforceable** on the 22nd day of June, 2013, **unless a Motion for Rehearing is filed by the 21st day of June, 2013.**

**SIGNED** this the 29th day of May, 2013, at Austin, Texas.



---

Edwin C. Swedberg, 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 29th day of May, 2013.



---

Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Lindy Hendricks  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, TX 77018  
**VIA FACSIMILE: (512) 322-2061**

D. Houston, Inc.  
d/b/a Treasures  
**RESPONDENT**  
P.O. Box 570427  
Houston, TX 77257-0427  
**VIA REGULAR MAIL**

Ronald Monshaugen  
**ATTORNEY FOR RESPONDENT**  
1225 North Loop West, Suite 640  
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**VIA REGULAR MAIL**  
**AND VIA FACSIMILE: (713) 880-5297**

Sandra Patton  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

RECEIVED

AUG 17 2012

August 16, 2012

TABC HOUSTON  
LEGAL

Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA REGULAR MAIL

**RE: Docket No. 458-12-6270 Texas Alcoholic Beverage Commission vs. D. Houston Inc d/b/a Treasures**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

  
LINDY HENDRICKS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

LH/dg  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL  
Sandra K. Patton, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008- VIA REGULAR MAIL (with Certified Evidentiary Record and 1 hearing CD)  
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL  
Ronald A. Monshaugen, Attorney at Law, 1225 North Loop West, Ste. 640, Houston, TX 77008 -VIA REGULAR MAIL

2020 North Loop West Suite 111 Houston, Texas 77018  
713.957.0010 (Telephone) 713.812.1001 (Fax)  
[www.soah.state.tx.us](http://www.soah.state.tx.us)

**SOAH DOCKET NO. 458-12-6270  
(TABC Case No. 608109)**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>VS.</b>	§	
	§	<b>OF</b>
<b>D. HOUSTON INC. D/B/A TREASURES, Respondent PERMIT NOS. MB256488, LB</b>	§	
	§	
<b>HARRIS COUNTY, TEXAS</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

D. Houston, Inc. d/b/a Treasures (Respondent or Treasures) holds a mixed beverage permit and mixed beverage late hours permit from the Texas Alcoholic Beverage Commission (TABC) for the premises located at 5647 Westheimer, Houston, Harris County, Texas 77056. TABC staff sought cancellation of Treasure’s permit alleging that Respondent had violated the Texas Alcoholic Beverage Code (Code) by (1) conducting its business against the general welfare, health, peace, morals, safety, and sense of decency; (2) having an intoxicated agent, servant, or employee on the licensed premises; (3) engaging in or permitting an act of sexual contact intended to arouse or gratify sexual desires; and (4) violating condition #7 of the Waiver Order dated October 4, 2011, by failing to monitor the VIP, separate, or private areas of the club. After a review of the evidence of record and applicable law, the Administrative Law Judge (ALJ) concludes Staff has not met its burden of proof with regard to the allegations and does not recommend a penalty.

**I. PROCEDURAL HISTORY**

Notice and jurisdiction were otherwise not contested and are discussed only in the Findings of Facts and Conclusions of Law. On June 22, 2012, the hearing was convened by ALJ Lindy Hendricks with the State Office of Administrative Hearings (SOAH), 2020 North Loop West,

Suite 111, Houston, Texas. Attorney Sandra Patton represented Staff. Respondent appeared and was represented by attorneys Ronald Monshaugen and Al Van Huff. The record closed at the conclusion of the hearing that day.

## II. DISCUSSION

### A. Applicable Law

TABC issues licenses and permits and supervises and regulates persons issued a license or permit under the Code and their places of business. The Code provides the authority to take an action on a license or permit, including the suspension or cancellation of the privilege to operate a licensed business if it is found that a violation of the Code occurred.

Pursuant to Code § 11.61(b)(2), TABC may suspend for not more than 60 days or cancel a permit if the permit holder violates a provision of the Code. Section 104.01(6) of the Code prohibits a permit holder or his agent, servant, or employee, from permitting lewd or vulgar entertainment or acts. Additionally, 16 Tex. Admin. Code (Rules) § 35.41 defines lewd and vulgar entertainment or acts as any sexual offenses contained in the Texas Penal Code, Chapter 21, or any public indecency offenses contained in the Texas Penal Code, Chapter 43.

Pursuant to Code § 11.61(b)(13), TABC may suspend for not more than 60 days or cancel a permit if Respondent or Respondent's agent, servant, or employee was intoxicated on the licensed premises. Finally, Code § 11.61(b)(7) states TABC may suspend for not more than 60 days or cancel a permit if the permit holder conducts his business in a manner that is detrimental to the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

Staff has the burden of proof to show Respondent violated those sections of the Code or Rules by the preponderance of the evidence. Following is a summary of the relevant evidence.

**B. Evidence**

Kirk Milton is an officer with the Houston Police Department, Vice Division. Officer Milton testified that on October 28, 2011, he entered Treasures in an undercover capacity to conduct an investigation. Officer Milton described the club including the open back area of the club. A person walking through the back area could observe everything and everyone. At this point, Officer Milton was unable to recall his investigation without referring to his offense report. After reviewing his report, Officer Milton testified that a dancer approached him. The dancer whose stage name was Chicago was later identified as Perla Rodriguez. She was wearing a band majorette costume with red stripes for Halloween. They agreed to talk in the back area of the club. According to Officer Milton, Ms. Rodriguez asked him to buy her a drink. After the drink, Ms. Rodriguez asked to give him a table dance to which he agreed. Officer Milton was seated in a recliner chair during the private dance. He testified that Ms. Rodriguez straddled, facing him, and moved as if to gratify him sexually. Ms. Rodriguez pressed her clothed genital area to Officer Milton's clothed genital area. Officer Milton testified the dance was cut short and lasted only a few minutes, less than the duration of one song. Ms. Rodriguez stated she had to go to the restroom and asked for \$20 for the dance. According to Officer Milton, Ms. Rodriguez placed her arms around Officer's Milton's neck and told him not to leave. Officer Milton paid \$20 for the dance. He believed the purpose of the dance was to sexually gratify him. Officer Milton testified he would not recognize if someone was a manager or bouncer, and could not tell if anyone was walking around the area. Officer Milton testified that he intended to charge Ms. Rodriguez with sexual contact or touching. Officer Milton testified he was unaware that an intoxicated employee was an administrative violation but added the charge because his supervisor determined Ms. Rodriguez was intoxicated. Upon further questioning, Officer Milton stated he believed Ms. Rodriguez was intoxicated because she held his neck and told him not to leave. Officer Milton thought this was unusual and considered it to be a sign of intoxication. Staff offered copies of Ms. Rodriguez's criminal convictions for being intoxicated on the licensed premises and touching Officer Milton while performing a striptease.

On cross-examination, Officer Milton testified he could not remember much of the incident without his report and that the report was prepared to help him remember the case. Officer Milton did not recall if Ms. Rodriguez asked him to buy her a drink, but he believed she did. His offense

report stated that after a brief period of time talking with Ms. Rodriguez, Officer Milton ordered her a drink. Officer Milton testified he was unaware that solicitation of drinks by an employee was an administrative violation. The report described Ms. Rodriguez as wearing a short black dress, contrary to Officer Milton's testimony that she wore a band majorette costume. One part of the report stated that Officer Milton asked Ms. Rodriguez for a table dance, but he testified and other parts of the report showed that she asked to perform a dance. Officer Milton agreed that he has no independent recollection of the dance aside from what was in the report. There is no mention in the report of Ms. Rodriguez holding Officer Milton's neck, the behavior that Officer Milton attributed to her intoxication. Officer Milton did not see Ms. Rodriguez consume any alcoholic beverages. He agreed the report does not mention any odor of an alcoholic beverage, slurred speech, or any other sign of intoxication. No standardized field sobriety tests were conducted.

David Davari is the president of Treasures, which has been in business since 1995. He testified that Treasures is a bikini bar where people come, drink, and get table dances. According to Mr. Davari, the dancers are independent contractors and must fill out an independent contractor contact form. The forms are submitted to managers. The managers instruct dancers on the law and acceptable conduct. Dancers are required to cover their nipples with latex and to wear full bottom bikinis. Mr. Davari testified that managers are responsible for ensuring the dancers are properly covered. Dancers who violate the law are terminated. Mr. Davari testified many dancers have been terminated. He testified that managers actively monitor the club for possible violations and that Officer Milton was not in a private or VIP room with Ms. Rodriguez.

### III. ANALYSIS

Respondent argues that it is not responsible for the actions of Ms. Rodriguez because she was an independent contractor. The ALJ will begin by addressing the independent contractor argument.

Respondent argues that Ms. Rodriguez was an independent contractor and not an agent, servant, or employee. After considering the evidence, the ALJ finds that Ms. Rodriguez is an agent, servant, or employee of Respondent for purposes of the Code. The testimony indicates that Treasures is a bikini bar where customers come to drink and get table dances. The business relies on

the services and entertainment provided by dancers. Dancers are monitored by managers and are terminated if they violate the law. While dancers may be transient and temporary in nature with dancers coming to and from other businesses, the fact remains that Treasures could not be a bikini bar without dancers. Dancers draw customers to Respondent's business and make money by dancing for them. In return, Respondent profits from customers who come to see the dancers, buy drinks, and pay for table dances. Respondent and dancers profit from this symbiotic relationship. For these reasons, the ALJ finds that Ms. Rodriguez is an agent, servant, or employee of Respondent for purposes of the Code.

Although there were four violations listed in the Second Amended Notice of Hearing, Staff predicates the first violation on conduct reflected in the remaining three allegations. In other words, Staff alleges that Respondent is operating in a detrimental manner by committing violations II, III, and/or IV. Therefore, the ALJ will address allegations II, III, and IV first.

Staff alleges that Ms. Rodriguez was an intoxicated agent, servant, or employee on the licensed premises. No evidence of intoxication such as an odor of an alcoholic beverage, slurred speech, bloodshot eyes, or unsteady balance was offered. Staff concedes that no signs of intoxication were listed on the report. There are insufficient articulable facts to establish intoxication. The report provided only a conclusory statement that Ms. Rodriguez was intoxicated. Officer Milton testified he believed Ms. Rodriguez was intoxicated because she held his neck and told him not to leave. He thought this was unusual and considered the behavior to be a possible sign of intoxication. It is equally likely that Ms. Rodriguez did not want to lose a customer when she left for the restroom. The ALJ does not find this evidence persuasive to support a finding that Ms. Rodriguez was intoxicated. Staff argues that the guilty plea in the criminal conviction may be used to show Ms. Rodriguez was intoxicated on the licensed premises. The ALJ does not agree. There are many reasons why a person may take a plea on a criminal case, none of which has to do with actual guilt or innocence. Moreover, the burden of proof on a criminal case is different from an administrative hearing.

As to the allegation that Respondent's agent, servant, or employee engaged in or permitted an act of sexual contact intended to arouse or gratify sexual desires, the testimony and offense report contain numerous inconsistencies. The ALJ does not find the officer's recitations of the facts to be credible. After reviewing the report, Officer Milton could not recall facts contained in the report and yet recalled other facts not in the report. Officer Milton had little independent recollection of the investigation and the dance that is the subject of the alleged sexual contact. For these reasons, the ALJ finds the credible evidence does not support the allegation contained in charge III.

Finally, Staff alleges Respondent violated condition #7 of the Waiver Order dated October 4, 2011, by failing to monitor the VIP, separate, or private areas of the club. The evidence irrefutably established Officer Milton was in an open back area of the club. There was no evidence that Officer Milton was in a VIP, separate, or private area of the club during his interaction with Ms. Rodriguez. No violation could be attributed to an improper monitoring or surveillance of a VIP, separate, or private area of the club as alleged in charge IV.

Based on the totality of the evidence, the ALJ does not find sufficient evidence to show Respondent conducted his business against the general welfare, health, peace, morals, safety, and sense of decency. Thus, the ALJ recommends that no suspension, cancellation, or penalty be imposed against Respondent.

#### IV. FINDINGS OF FACT

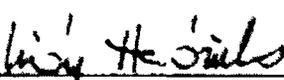
1. D. Houston, Inc. d/b/a Treasures (Respondent/Treasures) is the holder of Mixed Beverage Permit MB256488 and Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 5647 Westheimer, Houston, Harris County, Texas. This permit was originally issued on July 27, 1995, and was in effect on October 28, 2011.
2. An Amended Notice of Hearing dated May 23, 2012, was issued by TABC Staff notifying the parties of the date, time, place, and nature of the hearing. The notice included the legal authority and jurisdiction under which the hearing was to be held, the particular sections of the statutes and rules involved, and matters asserted. At the hearing, Respondent agreed and TABC Staff proceeded under the Second Amended Notice of Hearing dated June 22, 2012.

3. On June 22, 2012, a hearing was convened by ALJ Lindy Hendricks at the State Office of Administrative Hearings in Houston, Texas. Staff was represented by attorney Sandra Patton. Respondent was represented by attorneys Ronald Monshaugen and Al Van Huff. The record closed on June 22, 2012, at the adjournment of the hearing.
4. No credible evidence was offered at the hearing establishing Respondent's agent, servant, or employee was intoxicated or engaged in an act of sexual contact intended to arouse or gratify sexual desires.
5. No credible evidence was offered at the hearing establishing Respondent's managers failed to monitor the VIP, separate, or private areas of the club pursuant to the Waiver Order dated October 4, 2011.
6. No credible evidence was offered at the hearing establishing that Respondent conducts its business contrary to the general welfare, peace, morals, and safety of the people and the public sense of decency.

#### V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Tex. Alco. Bev. Code (Code) chs. 5, 11, and 28, and §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over all matters related 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 ch. 2003.
3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401 and Code § 11.63.
4. Based on the Findings of Fact, there is insufficient evidence of record to uphold a finding under Code § 11.61.
5. The ALJ does not recommend a sanction in this case.

**SIGNED August 15, 2012.**

  
\_\_\_\_\_  
**LINDY HENDRICKS**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**