

DOCKET NO. 628629

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
	§	
	§	
VS.	§	
	§	ALCOHOLIC
DELEON AND ERSKINS INVESTMENTS, LLC	§	
D/B/A WATER'S EDGE BAR AND BAIT, Respondent	§	
	§	
	§	
PERMITS MB867149, LB, PE	§	
	§	
GALVESTON COUNTY, TEXAS (SOAH DOCKET NO. 458-15-2502)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of July, 2015, 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) Timothy Horan presiding. The hearing on the merits convened on April 10, 2015 and the SOAH record closed that same day. The Administrative Law Judge issued a Proposal for Decision containing Findings of Fact and Conclusions of Law on May 29, 2015. The Proposal for Decision was properly served on all parties and the parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by either party.

After review and due consideration of the Proposal for Decision, 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.

THEREFORE, IT IS ORDERED that **NO ACTION** be taken to suspend Respondent's permits based on the allegation that permittee Jessie Deleon was intoxicated on the licensed premises on September 6, 2014.

This Order will become **final and enforceable** on the 4th day of August, 2015, **unless a Motion for Rehearing is filed by the 3rd day of August, 2015.**

SIGNED this the 10th day of July, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
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 10th day of July, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

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

Deleon and Erskins Investments, LLC
d/b/a Water's Edge Bar and Bait
RESPONDENT
P.O. Box 125
Hitchcock, TX 77563
VIA FIRST CLASS MAIL, CMRRR #70090960000121490998

Clyde Burleson

ATTORNEY FOR RESPONDENT

1533 W. Alabama Street, Suite 100

Houston, TX 77006

VIA FIRST CLASS MAIL, CMRRR #70090960000121491001

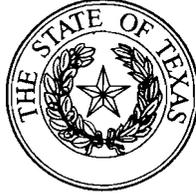
Sandra Patton

ATTORNEY FOR PETITIONER

TABC Legal Division

VIA E-MAIL: sandra.patton@tabc.texas.gov

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
May 29, 2015

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JUN 01 2015

LABC HOUSTON
LEGAL DEPT.

Sherry K-Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-15-2502; Texas Alcoholic Beverage Commission vs. Deleon & Erskins Investments L.L.C. d/b/a Water's Edge Bar and Bait

Dear Ms. Cook:

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Horan", written over a horizontal line.

Timothy Horan
Administrative Law Judge

TH/mr
Enclosure

xc Sandra Patton, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008
- **VIA REGULAR MAIL**
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 **VIA REGULAR MAIL** (with Certified Evidentiary Record and 1 Hearing CD/s)
Clyde Burlison, Attorney at Law, 1533 Alabama Street, Suite 100, Houston, TX 77006 -**VIA REGULAR MAIL**

jurisdiction are addressed in the findings of fact and conclusions of law without further discussion.

II. APPLICABLE LAW

The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found that the permittee, or permittee's agent, servant, or employee was intoxicated on the premises. Tex. Alco. Bev. Code (Code) §§ 104.01(5), 11.61(b)(13), and 11.61(b)(2).

"Intoxication," is defined as not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body. Tex. Penal Code § 49.01(2)(A).

III. DISCUSSION

On March 21, 2014, TABC issued Mixed Beverage Permit MB-867149, which included a Mixed Beverage Late Hours Permit and Beverage Cartage Permit, for Respondent's premises located at 7827 2nd Street, Hitchcock, Galveston County, Texas.

Agent Michael Ramsey, an enforcement agent for TABC, testified that on September 6, 2014, he conducted an investigation of Respondent's premises (the Bar) to check for compliance with the Code. He testified that Agent Sherk, who was working in an undercover capacity at the Bar, told him that he had observed two individuals sitting at the bar who appeared to be intoxicated. Agent Ramsey then entered the bar and observed two men sitting at the bar. From prior visits, he knew the men to be Dannon Erskins and Jessie Deleon, co-owners of the Bar. Agent Ramsey conversed with the men and noticed that Mr. Deleon had red watery eyes and his speech seemed more slurred than usual. Agent Ramsey also observed that Mr. Deleon had slow deliberate movements. He asked them both to go outside. Once outside he detected an odor of alcoholic beverage on their breath and asked both men to take a portable breath test (PBT) and they each agreed. He stated that he did not use the PBT results as a basis

of his probable cause to believe Mr. Deleon was intoxicated. At the hearing, he did not testify as to the results of the PBT.

Both men told Agent Ramsey that they had been drinking alcohol and had consumed several drinks throughout the evening. Agent Ramsey testified that Mr. Erskins exhibited a few indicators of intoxication but that he could not decide definitively if Mr. Erskins was in fact intoxicated.

Based on his observations of Mr. Deleon and the admission to drinking alcohol, Agent Ramsey made the determination that Mr. Deleon was intoxicated. Agent Ramsey testified that he did not have Mr. Deleon perform any field sobriety tests because a "reasonable person" would consider Mr. Deleon to be intoxicated. Agent Ramsey did not place Mr. Deleon under arrest for intoxication because he lived next door to the bar. He then issued Respondent an administrative citation for having an intoxicated permittee on the licensed premises and left the bar.

Dannon Erskins testified at the hearing that he and Mr. Deleon work together for an industrial contractor and that they are co-owners of the Bar. He stated that they had been on a work assignment in Louisiana for the past 2 months and worked 14-hour shifts, 7 days a week. He and Mr. Deleon had been up since 4 a.m. that morning and were extremely tired from their work assignment for the past 2 months. They went directly to their Bar from the airport, arrived at the Bar at approximately 8:30 p.m., greeted the bar manager, and left to attend a birthday party for a friend. Mr. Erskins stated that they each had consumed two beers at the party. After approximately an hour and a half, they left the party and went back to their Bar. While at the Bar, each had one alcoholic beverage and were just starting a second drink when Agent Ramsey approached them at the bar. Mr. Erskins stated that they knew Agent Ramsey from prior visits and they had conversed with him about football on many occasions. He told Agent Ramsey that they were very tired from work and also that they had consumed several drinks that evening. Mr. Erskins further testified that he has known Mr. Deleon for 15 years and that he was not intoxicated that night.

At the hearing, Mr. Deleon testified that he was extremely tired from working long shifts for the past two months, and that he told Agent Ramsey that he had consumed several alcoholic drinks. Mr. Deleon testified that his eyes were red because he suffers from severe allergies and that he was not intoxicated on the night in question.

IV. ANALYSIS AND RECOMMENDATION

It is undisputed that Mr. Deleon was the co-owner of the Bar and on the premises on September 6, 2014. It is also undisputed that he admitted consuming several alcoholic drinks and had an odor of alcoholic beverage on his breath.

The issue to be decided is whether Mr. Deleon was intoxicated on the licensed premises. "Intoxication" is defined as not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body. Tex. Penal Code § 49.01(2)(A).

Many of the characteristics attributed to Mr. Deleon's behavior which Agent Ramsey felt demonstrated intoxication, (red eyes, slow movements, slurred speech), are subjective assessments. In fact, Agent Ramsey testified that Mr. Deleon's speech was more slurred than usual. One is able to conclude from this statement that Mr. Deleon's speech is always somewhat slurred. Mr. Deleon testified that he was extremely tired and his eyes were red because he suffered from allergies. It is not unreasonable for a person who suffers from extreme allergies to have red eyes.

Agent Ramsey testified that he administered a PBT to Mr. Deleon, but never testified to the results of the PBT. He stated that he did not use any results from the PBT as a basis for his probable cause and further chose not to conduct any standardized field sobriety tasks with Mr. Deleon. He did not place Mr. Deleon under arrest for intoxication and allowed him go home that same night.

Agent Ramsey chose to rely upon subjective criteria as a “reasonable person” in making the determination that Mr. Deleon was intoxicated. Lacking any objective measures for the level of alcohol content, physical impairment, or mental impairment attributable to Mr. Deleon at the time, the ALJ finds that Staff’s evidence is insufficient to support that Mr. Deleon was intoxicated on the licensed premises.

V. FINDINGS OF FACT

1. Deleon & Erskins Investments L.L.C. d/b/a Water’s Edge and Bar (Respondent) holds a Mixed Beverage Permit, MB-867149, which includes the Mixed Beverage Late Hour Permit and Beverage Cartage Permit, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 7827 2nd Street, Hitchcock, Galveston County, Texas.
2. The permit was issued on March 21, 2014.
3. On September 6, 2014, Jessie Deleon, co-owner of Water’s Edge Bar and Bait was observed by TABC Agent Michael Ramsey, having a drink at the bar on Respondent’s premises. Agent Ramsey detected an odor of alcoholic beverage on Mr. Deleon’s breath. He also observed him to have slow deliberate movements and noted his speech was more slurred than usual.
4. Mr. Deleon admitted consuming several alcoholic beverages.
5. Agent Ramsey performed a portable breath test (PBT) on Mr. Deleon but did not use the results in determining intoxication. The results of the PBT are not in evidence.
6. Agent Ramsey did not objectively test Mr. Deleon for intoxication. He did not perform any standardized field sobriety tasks on Mr. Deleon to determine intoxication.
7. Based upon Agent Ramsey’s observations described in Finding of Fact No. 3, he made the determination that Mr. Deleon was intoxicated.
8. Agent Ramsey did not arrest Mr. Deleon for being intoxicated on the licensed premises.
9. For the 2 months prior to September 6, 2014, Mr. Deleon had been working 14-hour shifts each day.
10. The observations made by Agent Ramsey were as likely to be attributed to Mr. Deleon’s fatigue and allergies.

11. There is insufficient proof that on September 6, 2014, Mr. Deleon was intoxicated on the licensed premises.
12. On February 25, 2015, Staff issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice to the parties contained the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
13. The hearing in this matter convened on April 10, 2015, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Timothy Horan. Sandra K. Patton, staff attorney, represented TABC Staff at the hearing. Clyde Burleson, attorney, represented Respondent. The hearing concluded and the record closed the same day.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Texas Alcoholic Beverage Code (Code) ch. 5 and §§ 11.61 (b)(2), 11.61 (b)(13) and 104.01 (5).
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code ch. 2003.
3. Respondent received notice of the proceedings and hearing, pursuant to Tex. Gov't Code §§ 2001.051 and 2001.052 and 1 Tex. Admin. Code ch. 155.
4. The preponderance of evidence does not support that Jessie Deleon was intoxicated on the licensed premises in violation of the Code §§ 104.01(5), 11.61 (b)(13), and 11.61(b)(2).
5. Based on the findings of fact and conclusions of law, Respondent's permit should not be suspended.

SIGNED MAY 29, 2015.


TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS