

DOCKET NOS. 623046, 626965, 624861

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
	§	
NELCRIS ENTERPRISES INC. D/B/A ZONA LATINA NITE CLUB, Respondent	§	ALCOHOLIC
	§	
	§	
PERMITS MB701699, LB	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-4441)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of April, 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 Lindy Hendricks presiding. The hearing convened on September 19, 2014 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on October 27, 2014. 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. No exceptions were filed.

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 therein 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 Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent's Mixed Beverage Permit MB701699, and the associated Mixed Beverage Late Hours Permit, are hereby **CANCELLED**.

This Order will become final and enforceable on the 16th day of May, 2015, unless a Motion for Rehearing is filed by the 15th day of May, 2015.

SIGNED this the 22nd day of April, 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 22nd day of April, 2015.



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

Clyde Burleson

ATTORNEY FOR RESPONDENT

1533 W. Alabama, Suite 100

Houston, TX 77006

VIA FIRST CLASS MAIL, CMRRR#70120470000133035145

Sandra Patton

ATTORNEY FOR PETITIONER

TABC Legal Division

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

Alejandra Argueta

From: Cecelia Brooks
Sent: Tuesday, December 02, 2014 11:39 AM
To: Dina Powell
Cc: Alejandra Argueta
Subject: SOAH files for Houston cases

Good Morning Dina:

I have the SOAH files on the following Houston cases that Mr. Wilson may need to review.

- d/b/a G Cabaret
- d/b/a Community Food Market
- d/b/a Jet Lounge
- d/b/a Zona Latina Nite Club
- d/b/a Mudbugs
- d/b/a Bayou City Ice House
- d/b/a Mia Bella Trattoria
- d/b/a Greens Parkway Food

These files are in Legal and ready to be picked up.

Thanks.

Cecelia L. Brooks
Legal Assistant III
TABC Legal Division - HQ
5806 Mesa Drive
Austin, Texas 78731
(512) 206-3490 Office
(512) 206- 3492 Direct Line
(512) 206-3498 Fax

“All great achievements require time.” – Maya Angelou

State Office of Administrative Hearings



OCT 29 2014

Cathleen Parsley
Chief Administrative Law Judge

October 27, 2014

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-4441; Texas Alcoholic Beverage Commission vs. Nelcris Enterprises Inc. d/b/a Zona Latina Nite Club

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 that reads "Lindy Hendricks".

Lindy Hendricks
Administrative Law Judge

LH/mr

Enclosure

xc Sandra K. 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**
Clyde Burleson, Attorney for Respondent, 1533 W. Alabama, Suite 100, Houston, TX 77006 - **VIA REGULAR MAIL**

**SOAH DOCKET NO. 458-14-4441
(TABC CASE NOS. 623046, 626965, 624861)**

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
v.		OF
NELCRIS ENTERPRISES INC. D/B/A ZONA LATINA NITE CLUB, (Permit Nos. MB701699, LB) Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) seeks cancellation of the alcoholic beverage permit held by Nelcris Enterprises Inc. d/b/a Zona Latina Nite Club (Zona Latina or Respondent). For reasons discussed in this Proposal for Decision, the Administrative Law Judge (ALJ) finds Petitioner proved all but one of its allegations. The ALJ recommends that Respondent’s permit be cancelled.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits convened on September 19, 2014, at 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Lindy Hendricks. Staff was represented by attorney Sandra K. Patton. Respondent was represented by attorney Clyde Burleson. The record closed at the conclusion of the hearing.

II. DISCUSSION

A. Background

Zona Latina is located at 4740 Dacoma Street, Suite A, in Houston, Texas, and holds mixed beverage and mixed beverage late hours permit number MB701699. In previous cases,

Respondent has been cited for the same types of violations that are alleged in this case: sale during prohibited hours on April 21, 2012, and permitting consumption during prohibited hours on July 31, 2010.¹

In its amended notice of hearing, Staff alleged the following violations:

- December 21, 2013, April 5, 2014, and April 13, 2014 - **permit consumption of an alcoholic beverage during prohibited hours**, in violation of Texas Alcoholic Beverage Code (Code) §§ 11.61(b)(2) and (22), and 105.06;
- December 21, 2013 and April 5, 2014 - **sale of an alcoholic beverage during prohibited hours**, in violation of Code §§ 11.61(b)(2) and (23), and 105.03;
- April 5, 2014 - **possession or permit possession of a narcotic on the licensed premises**, in violation of Code §§ 11.61(b)(2) and 104.01(9), and 16 Texas Administrative Code (TAC)§ 35.41(b);
- April 13, 2014 - **permit a minor to possess or consume an alcoholic beverage**, in violation of Code §§ 11.61 (b)(2) and 106.13.

Staff presented the testimony of TABC Agents Dwight Green, Peter Gonzales, Erin Fontenot, and Gabriel McCourtney.

B. Sale and Permitting Consumption of Alcoholic Beverages During Prohibited Hours on December 21, 2013

Agent Green testified he entered Zona Latina on December 21, 2013, at 4:43 a.m., in an undercover capacity. Inside the bar, he observed approximately 15 patrons, a bartender, and bouncers. Agent Green went to the bar where the bartender explained that he could buy a small clear cup of mixed alcoholic beverages for \$10 or a large red Dixie cup for \$15. Agent Green purchased two alcoholic beverages from the bartender: a whiskey and coke for \$10, and a vodka and juice for \$15. The bartender was later identified as Jackie Reyes. Agent Green observed patrons drinking alcohol from clear and red Dixie cups and texted the outside or “open” team about the violations. Agent Green testified that when the open team arrived, the bouncers ran into the bar and said, “Shut everything down! TABC is here!”

¹ Staff Ex. 1.

Agent Gonzales entered Zona Latina as part of the open team. He made contact with the manager, identified as Ramon Israel Sanchez. Mr. Sanchez told Agent Gonzales that the owner of Zona Latina, Mr. De La Rosa, had instructed him to continue to sell alcohol after 2:00 a.m. Mr. Sanchez confirmed that bartender was selling alcohol during prohibited hours. Agent Gonzales interviewed Ms. Reyes who admitted selling alcohol after 2:00 a.m. even though she knew it was illegal to do so.

C. Possession of Narcotics, Sale and Permitting Consumption of Alcoholic Beverages During Prohibited Hours on April 5, 2014

On April 5, 2014, Agent Green entered Zona Latina at 3:34 a.m. in an undercover capacity. He testified the business was open. A bouncer checked his identification at the front door and charged a \$10 cover charge. Inside the bar, Agent Green was able to purchase a vodka and juice for \$15 from a bartender later identified as Vanessa Hall. Agent Green observed patrons drinking alcoholic beverages from red plastic cups. He also observed four patrons seated at a table with a bucket of ice containing a bottle of vodka. He watched them pour vodka into plastic cups and drink from the cups.

Agent Green testified that he observed a manager later identified as Francisco Gonzales, Jr. Moments before the TABC open team arrived, Mr. Gonzales yelled that the police were there and told the bartender to shut everything down.

Agents Gonzales, Fontenot, and McCourtney entered Zona Latina at 3:45 a.m. as part of the open team. Agent McCourtney testified that he observed bouncers working the front door, a deejay playing music, and approximately twenty people drinking alcoholic beverages. In a side room, Agent McCourtney observed six or seven patrons pouring and drinking from a bottle of vodka. After the patrons left, Agent McCourtney found three clear plastic bags containing a white powdery substance on the floor between the couch and glass wall. One of the bags contained eight smaller packages of the substance. Agent McCourtney testified that, in his experience and training, the substance was packaged for sale and distribution. The substance field-tested positive for cocaine.

On cross-examination, Agent McCourtney agreed that it is difficult to detect drugs on customers. People will ditch drugs to avoid detection when TABC enters an establishment. In this case, the cocaine was only found after agents pulled the seats from the wall. No employee was seen handling the cocaine. Agent McCourtney did not know if the employees of Zona Latina permitted the cocaine to be there.

Agent Fontenot testified she inspected the bar where she located an open box of Swisher Sweets cigarettes. The box was placed on a shelf, six to seven feet behind the bar. Among the cigarettes in the box, Agent Fontenot found marijuana. According to Agent Fontenot, the box could only have been placed there by an employee because it was an area not accessible to patrons.

D. Permit Consumption of Alcoholic Beverages by a Minor and During Prohibited Hours on April 13, 2014

On April 13, 2014, at 2:40 a.m., agents with the Comptroller's Office entered Zona Latina to seize cash for alleged tax delinquencies. TABC agents Green and McCourtney accompanied them. Upon their arrival, Agent McCourtney observed two men working the front door, the lights were low, and music was being played by a deejay.

Agent Green observed two bartenders working behind the bar. They were later identified as Ms. Hall and Ms. Reyes. Agent Green observed two patrons seated at the bar, directly in front of the bartenders, drinking from red plastic cups. One of the patrons was identified as Ariel Duarte who stated he was drinking vodka and juice. Mr. Duarte also told Agent McCourtney he was a minor and presented his driver's license which showed a date of birth of August 24, 1996. According to Agent McCourtney, Mr. Duarte appeared older than his age.

Agent Green testified that administrative notices were issued at the conclusion of each investigation in December and April. Agent Gonzales testified that he also issued Zona Latina citations in August 2014 for prohibited hours violations.

E. Parties' Contentions

Respondent argued that the possession of drugs violations cannot be attributed to Zona Latina because the marijuana and cocaine were not linked to any employee. As for permitting a minor to consume alcohol, Respondent argues that Mr. Duarte did not look like a minor. Although Respondent did not deny the sale or consumption of alcohol during prohibited hours, Respondent sought mitigation in the penalty to be assessed. Respondent requested that a suspension be assessed in lieu of cancellation, asserting the prohibited-hours violations were not violent, gang-related, or public safety issues.

Respondent's permit history includes two prior prohibited hours violations, the latest of which resulted in a 45-day suspension or \$13,500 civil penalty in March 2012. Staff argued that the evidence showed Respondent continues to sell alcohol and allow patrons, including a minor, to consume alcohol during prohibited hours. Moreover, the bartenders who sold alcohol during prohibited hours on April 13, 2014, were the same bartenders who sold on December 31, 2013, and April 5, 2014. Additionally, the bouncers and manager helped notify the bartenders to the presence of TABC agents. Because of its manner of operation and permit history, Staff recommended Respondent's permits be cancelled for cause.

F. Analysis**1. Permit Minor to Consume Alcohol**

It is a violation of the Code if a permittee with criminal negligence permitted a minor to consume an alcoholic beverage. A permittee acts with criminal negligence when the permittee should have been aware of a substantial and justifiable risk that the circumstances exist or the result will occur. The failure to perceive the risk must constitute a gross deviation from the care an ordinary person would have exercised under the same circumstances.²

In this case, the ALJ finds that Respondent did not act with criminal negligence in

² Tex. Penal Code § 6.03(d).

allowing Mr. Duarte to consume alcohol. The evidence shows that Mr. Duarte did not have a youthful appearance such that it was unreasonable for the bartenders to assume he was 21 years of age or older. Their failure to perceive the risk was not a gross deviation from the care an ordinary person would have exercised under the same circumstances.

2. Possession of a Narcotic

It is a violation of the Code when a permittee possesses or permits the possession of a narcotic on the licensed premises. The ALJ finds that the cocaine located behind the lounge seats could not be attributed to any employee. It was not found until agents moved a lounge seat away from the wall. It was not shown that an employee possessed or permitted the possession of cocaine. On the other, the ALJ finds that the permittee possessed or permitted the possession of marijuana. The marijuana was located on a shelf behind the bar in an area reserved for employees. The ALJ finds that Respondent should have known about the marijuana on the premises. The marijuana was in plain sight in an open box of cigarettes where the employees worked.

3. Sale or Permitting Consumption During Prohibited Hours

The Code prohibits the sale of alcoholic beverages after 2 a.m. and the consumption of any alcoholic beverages after 2:15 a.m.³

Respondent did not dispute the allegations that it sold or permitted the consumption of alcohol during prohibited hours. The ALJ finds that the evidence establishes that Respondent violated the Code by selling and permitting consumption of alcohol after hours. Respondent's late hour's permit allows the sale of mixed beverages until 2:00 a.m. and its consumption until 2:15 a.m. At 4:43 a.m., on December 31, 2013, a bartender at Respondent's establishment sold Agent Green a whiskey and coke and a vodka and juice. Agent Green also observed patrons consuming alcoholic beverages at that time. At 3:34 a.m., on April 5, 2014, a bartender at Respondent's establishment sold Agent Green a vodka and juice drink. Agent Green also

³ Code §§ 11.61(b)(2), (22), (23) ; 105.03; and 105.06.

observed four patrons drinking vodka at that time. At 2:40 a.m., on April 13, 2014, Agent Green observed patrons drinking alcoholic beverages, including vodka and juice.

G. Appropriate Penalty

The ALJ recommends that Respondent's permit be cancelled. In summary, the evidence supports a finding that Respondent sold and permitted consumption of alcoholic beverages during prohibited hours and possessed or permitted possession of a narcotic on the licensed premises.

Given the number of violations and its manner of operation, the ALJ finds a pattern of disregard for the Texas Alcoholic Beverage Code and regulations. Respondent had not taken any remedial action to abide by the Code, even after previously agreeing to a 45-day suspension of its permits. Respondent continued to sell alcohol, at an inflated price, during prohibited hours. Respondent's employees took measures instead to avoid detection by selling alcohol in plastic cups and having employees shout warnings when the TABC open team appeared. The employees knew it was illegal to sell alcohol after hours but stated they were told to do so by the owner. The same bartenders who sold on earlier investigations were not terminated and continued to sell during prohibited hours. Because of the cumulative history of Respondent's violations, three of which are repeat violations, in less than one year, the ALJ recommends that Respondent's permits should be cancelled.

III. FINDINGS OF FACT

1. Nelcris Enterprises Inc. d/b/a Zona Latina Nite Club (Zona Latina or Respondent) is located at 4740 Dacoma Street, Suite A, in Houston, Texas, and holds mixed beverage and mixed beverage late hours permit number MB701699.
2. Respondent has been cited for prior violations for a sale during prohibited hours on April 21, 2012, and permitting consumption during prohibited hours on July 31, 2010.
3. Staff of the Texas Commission on Alcoholic Beverages (Commission) issued notices of hearing, alleging multiple violations of the Texas Alcoholic Beverage Code (Code). The notices were sent to Respondent on July 21, 2014 and August 15, 2014.

4. The notices stated the time, place, and nature of the hearing; legal authority and jurisdiction under which the hearing was to be held; statutes and rules involved; and matters asserted.
5. The hearing on the merits convened on September 19, 2014, at 2020 North Loop West, Suite 111, in Houston, Texas. Staff attorney Sandra Patton represented Staff, and attorney Clyde Burleson represented Respondent. The record closed at the conclusion of the hearing.
6. In 2013 and 2014, Respondent's owner instructed the employees to sell alcoholic beverages after 2:00 a.m.
7. On December 21, 2013, at 4:43 a.m., Respondent's bartender, Jackie Reyes, sold an alcoholic beverage during prohibited hours.
8. Ms. Reyes admitted selling alcohol after 2:00 a.m. even though she knew it was illegal.
9. Ms. Reyes permitted patrons to consume alcoholic beverages at 4:43 a.m. during prohibited hours on December 21, 2013.
10. When the TABC outside or "open" team arrived, bouncers warned the employees to stop selling.
11. On April 5, 2014, at 3:34 a.m., Respondent's bartender, Vanessa Hall, sold an alcoholic beverage during prohibited hours.
12. On the same day, Ms. Hall permitted patrons to consume alcoholic beverages at 3:34 a.m. during prohibited hours.
13. When the TABC open team arrived the same day, Respondent's manager, Francisco Gonzales, warned employees to stop selling alcoholic beverages.
14. On April 5, 2014, marijuana was in an open cigarette box located on a shelf behind the bar in an employee-only restricted area of Respondent's premises.
15. On April 13, 2014, Respondent's employees permitted patrons to consume alcoholic beverages at 2:40 a.m. during prohibited hours.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to Code ch. 5 and § 11.61.
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 findings of fact and conclusions of law, pursuant to Code § 5.43 and Tex. Gov't Code ch. 2003.

3. Respondent received notice of the hearing, pursuant to Tex. Gov't Code §§ 2001.051-.052.
4. Respondent sold and permitted the consumption of alcoholic beverages during prohibited hours and thus violated Code §§ 11.61(b)(2), (22), (23); 105.03; and 105.06.
5. Marijuana is a narcotic because it is a substance defined in the Texas Controlled Substances Act § 481.002.
6. Respondent possessed or permitted the possession of a narcotic, namely marijuana, on the licensed premises and thus violated Code §§ 11.61(b)(2) and 104.01(9), and 16 Texas Administrative Code § 35.41(b).
7. Respondent's permits should be cancelled. Code § 11.61.

SIGNED October 27, 2014.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS