

DOCKET NO. 592612

IN RE DAVID E. BRISTER	§	BEFORE THE
D/B/A NEW BLUE ROOM	§	
PERMIT NO. BG-138649	§	
LICENSE NO. BL-264712	§	TEXAS ALCOHOLIC
	§	
NUECES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2253)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 25th day of July, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Kyle J. Groves. The hearing convened and adjourned on May 24, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 28, 2001. This 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. BG-138649 and License No. BL-264712 are **SUSPENDED**.

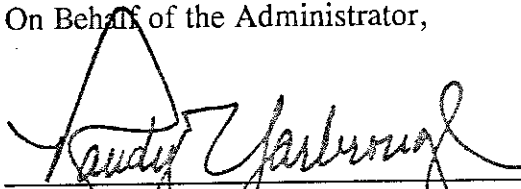
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$2,250.00** on or before the **18th day of October, 2001**, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of **fifteen (15) days, beginning at 12:01 A.M. on the 25th day of October, 2001**.

This Order will become final and enforceable on August 15, 2001, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 25th day of July, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (361) 884-5427

Joseph R. Barroso
ATTORNEY FOR RESPONDENT
5350 S. Staples, Suite 401
Corpus Christi, Texas 78411
VIA FACSIMILE (361) 994-0069 AND
CERTIFIED MAIL NO. 7000 1530 0002 0413 2820

David E. Brister
d/b/a New Blue Room
RESPONDENT
5301 Kostoryz
Corpus Christi, Texas 78415-1905
CERTIFIED MAIL NO. 7000 1530 0002 0413 2837

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Corpus Christi District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 592612

REGISTER NUMBER:

NAME: DAVID E. BRISTER

TRADENAME: NEW BLUE ROOM

ADDRESS: 5301 Kostoryz, Corpus Christi, Texas 78415-1905

DATE DUE: October 18, 2001

PERMITS OR LICENSES: BG-138649, BL-264712

AMOUNT OF PENALTY: \$2,250.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 18TH DAY OF OCTOBER 2001, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

DOCKET NO. 458-01-2253

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
	§	
vs.	§	
	§	OF
DAVID E. BRISTER	§	
D/B/A NEW BLUE ROOM	§	
PERMIT NO. BG-138649	§	
LICENSE NO. BL-264712	§	
NUECES COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks suspension of Permit No. BG-138649 and License No. BL-264712 held by David E. Brister, d/b/a New Blue Room (Respondent or Licensee) for allegedly: 1. allowing a breach of the peace on the licensed premises, which was not beyond the Licensee's control, and which resulted from the Licensee's improper supervision of persons on the premises and 2. the Licensee being intoxicated on the licensed premises. Petitioner seeks to suspend Respondent's permit for 30 days for the breach of the peace and for 15 days for the intoxication or, in lieu of suspension, to assess a civil penalty against Respondent in the amount of \$150.00 per day of violation for a total of \$6,750.00. The Administrative Law Judge recommends that Petitioner's action for intoxication be sustained and Petitioner's action for breach of the peace be overruled.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

The hearing in this case was convened on May 24, 2001, at the State Office of Administrative Hearings in Corpus Christi, Texas before Administrative Law Judge Kyle J. Groves. Christopher Burnett, staff attorney, represented Petitioner. Respondent was represented by Attorney Ron Barroso. The record remained open until June 15, 2001 so the parties could file closing arguments. There are no contested issues of jurisdiction or notice. Therefore, these matters are addressed as findings of fact and conclusions of law without further discussion here.

II. DISCUSSION

Petitioner called two witnesses: TABC Agent Arthur Mansell and David Charles. Petitioner offered 19 exhibits and all were admitted. Petitioner's exhibit one is a certified copy of Respondent's license, permit and violation history. Petitioner's exhibits two through 19 are various photographs of the scene of the incident and of Respondent.

Respondent called three witnesses: Fred Barrera, Jr., Dawnielle Grieder and the Respondent himself. Respondent offered six exhibits and all were admitted. Respondent's exhibit one is a diagram of the New Blue Room and exhibits two through six are photographs of the scene of the incident.

A. Petitioner's Witnesses

1. Arthur Mansell

Arthur Mansell is a TABC enforcement officer. On August 20, 2000, he received a call from the Corpus Christi Police Department in reference to an assault at Respondent's place of business. Upon arrival at Respondent's, Mansell spoke with a police officer. The officer told Mansell that the victim of the assault had been taken to the hospital. The suspect in the assault was Respondent.

Mansell read Respondent his Miranda warnings and proceeded to question him. Respondent admitted to being involved in a fight and to beating the victim. Respondent said the victim had broken into a storage room at Respondent's place of business.

Mansell testified that he observed Respondent to have slurred speech, a strong odor of alcohol on his breath, unsteady balance and a sway. Mansell said he is certified in administering the Horizontal Gaze Nystagmus test, and he administered the test to Respondent. Respondent exhibited six clues of intoxication on the test. Mansell testified that he believed Respondent was extremely intoxicated.

Mansell said he observed blood on the sidewalk near Respondent's place of business. Mansell also testified that the victim of the assault was David Charles.

Mansell took numerous photographs of the scene of the assault, Respondent's clothing, Respondent's person, and David Charles (Petitioner's Exs. 2-19).

2. David Charles

David Charles' recollection of the incident is poor because that evening he had consumed a 12-pack of beer and one-half bottle of Bacardi. He testified that he only recalls breaking into the

storage shed, leaving the premises, and coming back later after he had obtained a flashlight. He does not remember the fight. He said that at some point he blacked out and woke up in the hospital the next day.

B. Respondent's Witnesses

1. Fred Barrera, Jr.

On August 20, 2000, Barrera was a patron at the New Blue Room. He arrived at approximately 10:30 p.m. He said he saw Respondent drinking coffee. Barrera said Respondent was not intoxicated.

At approximately midnight, Barrera saw that the door to the storage shed had been kicked in. He informed Respondent of this and they went outside and waited for the person who had kicked in the shed door to return. Barrera said when that person returned, Respondent and the individual started fighting.

2. Dawnielle Grieder

Dawnielle Grieder is a bartender at the New Blue Room. She was working on August 20, 2000. She testified that Respondent had consumed beer earlier in the evening, but he had started drinking coffee at approximately 10:30 p.m. She did not observe Respondent to have slurred speech or a sway.

3. David Brister

David Brister is the owner of the New Blue Room. On August 20, 2000, he arrived at the New Blue Room at approximately 7:00 p.m. to play in a pool tournament. He drank three or four beers during the evening. He testified that he consumed his last beer at approximately 10:30 p.m. He said he was not intoxicated.

At approximately midnight, Barrera informed Respondent that the door to his storage shed had been kicked in. Respondent inspected the shed and determined that nothing was missing. Thinking that the individual that kicked the door in may return, Respondent waited outside.

Within five minutes, Charles did return. Respondent yelled at him, but Charles began to flee. Respondent testified that he jumped over a fence that separates his property from the public sidewalk and caught Charles.

Brister said that he held Charles and told him that he was going to call the police. Charles resisted and Brister said that he struck Charles a few times in the face. Brister was pulled off of Charles, but Charles came back at Brister and the fight started again. After the fight, Charles fell on

his face in the street. Brister said he was struck by Charles, but it did not hurt.

III. APPLICABLE LAW

1. Section 61.71(a)(1) of the Texas Alcoholic Beverage Code states: "The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee: (1) violated a provision of this code or a rule of the commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period ..." Tex. Alco. Bev. Code Ann. §61.71 (Vernon 1995).

2. Section 11.64(a) of the Texas Alcoholic Beverage Code states, in pertinent part: "When the commission or administrator is authorized to suspend a permit or license under this code, the commission or administrator shall give the permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended . . ." Tex. Alco. Bev. Code Ann. §11.61 (Vernon 1998).

3. Section 2003.021(b) of the Texas Government Code states in pertinent part: "The office (1) shall conduct all administrative hearings in contested cases under Chapter 2001 that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency; (2) shall conduct administrative hearings in matters for which the office is required to conduct the hearing under other law . . ." Tex. Gov't. Code Ann. §2003.021 (Vernon 1998).

4. Section 2001.051 of the Texas Government Code states: "In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case." Tex. Gov't. Code Ann. §2001.051 (Vernon 1998).

5. Section 69.13 of the Texas Alcoholic Beverage Code states: "The commission or administrator may suspend or cancel the license of a retail beer dealer after giving the licensee notice and the opportunity to show compliance with all requirements of law for retention of the license if it finds that a breach of the peace has occurred on the licensed premises or on premises under the licensee's control and that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control." Tex. Alco. Bev. Code Ann. §69.13 (Vernon 1995 and Supp. 2001).

7. Section 104.01 (5) of the Texas Alcoholic Beverage Code states: "No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the

premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts: (5) being intoxicated on the licensed premises ...". Tex. Alco. Bev. Code Ann. §104.01 (Vernon 1995 and Supp. 2001).

8. Section 25.04 of the Texas Alcoholic Beverage Code states: "(a) A wine and beer retailer's permit is issued by the commission or administrator. The qualification of applicants and the application for and issuance of the permit are governed by the same provisions which apply to the application for and issuance of a retail dealer's on-premise license. (b) The provisions of this code applicable to the cancellation and suspension of a retail dealer's on-premise license also apply to the cancellation and suspension of a wine and beer retailer's permit." Tex. Alco. Bev. Code Ann. §25.04 (Vernon 1995 and Supp. 2001).

IV. DISCUSSION

1. Breach of the Peace

For this alleged violation, Petitioner seeks to suspend Respondent's license and permit for 30 days, or in the alternative, assess a penalty of \$4,500.00. Petitioner asserts Respondent allowed a breach of the peace on the licensed premises, which was not beyond the Licensee's control, and which resulted from the Licensee's improper supervision of persons on the premises.

It is not disputed that on August 20, 2000, Respondent and David Charles engaged in a fight. It is also not disputed that the fight ensued because Charles had broken into a storage shed located on Respondent's property.

However, the testimony of Arthur Mansell and Respondent shows that the fight did not take place on the licensed premises. The evidence shows that the fight took place on a public sidewalk and in the street. The location of the fight is actually separated from Respondent's licensed premises by a fence. While the court does not condone the action taken by the Respondent, the evidence shows that the Petitioner has failed to show Respondent violated the provisions of Section 69.13 of the Texas Alcoholic Beverage Code.

2. Intoxicated Permittee

For this alleged violation, Petitioner seeks to suspend Respondent's license and permit for 15 days, or in the alternative, assess a penalty of \$2,250.00. Petitioner asserts Respondent was intoxicated on the licensed premises.

Section 49.01 of the Penal Code states: "(2) 'Intoxicated' means: (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance

into the body; or (B) having an alcohol concentration of 0.08 or more." Tex. Penal Code Ann. §49.01 (Vernon 2000).

Respondent's three witnesses all testified that they did not believe Respondent was intoxicated. However, Arthur Mansell testified that he observed Respondent to have slurred speech, a strong odor of alcohol on his breath, unsteady balance and a sway. Mansell said he is certified in administering the Horizontal Gaze Nystagmus test, and he administered the test to Respondent. Respondent exhibited six clues of intoxication on the test. It was Mansell's opinion that Respondent was extremely intoxicated.

The court believes that Agent Mansell is better qualified to make the determination of intoxication than are Respondent's witnesses. Petitioner has met its burden in showing Respondent was intoxicated.

V. PROPOSED FINDINGS OF FACT

1. The hearing in Docket No. 458-01-2253 was convened on May 24, 2001 before Administrative Law Judge Kyle J. Groves at the State Office of Administrative Hearings in Corpus Christi, Texas. Christopher Burnett, staff attorney, appeared on behalf of the Texas Alcoholic Beverage Commission (Petitioner). Attorney Ron Barroso appeared for Respondent.

2. Respondent was notified of the factual allegations against Respondent in the Notice of Hearing issued by Petitioner on March 14, 2001.

2. Respondent was notified of the date, time, and location of the scheduled hearing by the Notice of Hearing issued by Petitioner on March 14, 2001.

3. Respondent holds Wine and Beer Retailer's Permit No. BG-138649 and Retail Dealer's On-Premise Late Hours License No. BL-264712.

4. On August 20, 2000, Respondent was intoxicated on the licensed premises.

5. On August 20, 2000, Respondent did not allow a breach of the peace on the licensed premises.

IV. PROPOSED CONCLUSIONS OF LAW

1. Petitioner has jurisdiction over this case pursuant to Tex. Alco. Bev. Code Ann. §11.61 (Vernon 1998).

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including issuing this Proposal for Decision with findings of fact and

conclusions of law, pursuant to Tex. Gov't. Code Ann. §2003.021 (Vernon 1998).

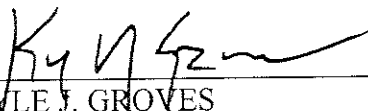
3. Respondent received proper and timely notice of the hearing in this case.

4. Respondent was intoxicated on the licensed premises in violation of Tex. Alco. Bev. Code Ann. §104.01 (Vernon 1995 and Supp. 2001).

5. Respondent did not allow a breach of the peace on the licensed premises in violation of Tex. Alco. Bev. Code Ann. §69.13 (Vernon 1995 and Supp. 2001)

6. Based upon the Findings of Fact and Conclusion of Law No. 4, Petitioner's adverse action of suspending Respondent's Permit No. BG-138649 and License No. BL-264712 for 15 days or, in lieu of suspension, assessing a civil penalty against Respondent in the amount of \$150.00 per day of violation for a total of \$2,250.00, is proper.

SIGNED on this 28th day of June, 2001.



KYLE J. GROVES
Administrative Law Judge
State Office of Administrative Hearings