

DOCKET NO. 458-03-1544

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
V.	§	
	§	OF
ITALIAN BROTHERS INC. D/B/A	§	
GINO'S ITALIAN GRILL	§	
PERMIT NO MB254321; LB254322	§	
TRAVIS COUNTY, TEXAS	§	
TABC CASE NO. 601415	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Commission) alleged that the permittee's employee was intoxicated on the licensed premises in violation the Texas Alcoholic Beverage Code. The staff of the Commission (the Staff) seeks a seven day suspension of Italian Brothers, Inc. d/b/a Gino's Italian Grill's (Respondent or Gino's) alcoholic beverage permits, or in lieu of the suspension, a civil penalty of \$150 per day for each day of the recommended penalty range. Respondent argued that the Staff failed to carry its burden of proof because it did not prove that the employee on the premises was intoxicated. The Administrative Law Judge finds the Staff proved that Respondent's employee was intoxicated on the licensed premises. She recommends a seven-day suspension of Respondent's permit, or instead of the suspension, a civil penalty of \$1,050.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The parties stipulated that notice was adequate, and neither party contested jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here. The hearing convened on April 24, 2003, at the offices of the State Office of Administrative Hearings in Austin, Texas. The Staff was represented by its counsel, Gayle Gordon. Respondent was represented by its owner, Greg Lawson.

II. INTOXICATED EMPLOYEE ON THE LICENSED PREMISES

A. Background. Respondent holds Mixed Beverage Permit BM254321 and Mixed Beverage Late Hours Permit LB254322, for a premises known as Gino's Italian Grill in Austin.¹ On August 4, 2002, officers of the Commission went to the Respondent's premises after seeing numerous cars in the parking lot at 2:00 a.m. Tricia O'Cayce, a Commission agent and licensed peace officer, testified that when she entered Gino's at 2:00 a.m., she saw Randañi Turner, the manager, at a table to the east of the bar, talking to a female customer. She testified she saw him

¹ TABC Ex. 1.

walk from the table to the bar and he was unsteady on his feet; she noticed he had droopy eyes and bumped into chairs while he walked. She recognized Mr. Turner because she had previously arrested him for being intoxicated on the licensed premises. When Mr. Turner saw her, he left the licensed premises. After he left Gino's, Mr. Turner went to his car, where Ms. O'Cayce caught up to him. She asked him to exit the vehicle, and her partner performed field sobriety tests on him.

John King, Ms. O'Cayce's partner, testified that he did not notice Mr. Turner when he first entered the premises. He testified that once Ms. O'Cayce told him she wanted to question Mr. Turner, he saw Mr. Turner trying to leave Gino's with a female customer. He caught up to Mr. Turner at Mr. Turner's car, and he noticed that Mr. Turner had bloodshot eyes and slurred speech. He testified that Mr. Turner said, "I'm not that drunk this time." Mr. King administered the horizontal gaze nystagmus test and noticed a lack of smooth pursuit in both eyes, distinct nystagmus in both eyes at maximum deviation, and prior to 45 degrees – all indications of intoxication. On the one leg stand test, Mr. Turner was unable to hold his foot up past the count of three, and used his arms for balance. On the walk and turn test, Mr. Turner walked three steps, rather than nine, and then turned. He also used his arms for balance.²

Respondent called three witnesses who were at Gino's and saw Mr. Turner on the evening he was arrested. John David Rankin, Mr. Turner's friend, testified that he went to a concert with Mr. Turner around 4:00 p.m. They left the concert around 10:00 p.m. and then went to Gino's. He testified that he did not see Mr. Turner drinking during the evening. After leaving the concert in San Antonio around 10:00 p.m., they first went to Dripping Springs to take someone home, and then went to Gino's. He believes they arrived at Gino's around midnight. He left Gino's before the Commission agents arrived.

Michael Mikeska, an employee at Gino's, testified that he saw Mr. Turner that night, and he did not think that Mr. Turner was intoxicated. Mr. Mikeska is TABC-certified to recognize the signs of intoxication. He also testified he heard Ms. O'Cayce say that she would go to the bar every night until she shut the bar down.³ He did not see Mr. Turner bump into any chairs at Gino's.

Georgeanna Thompson, Respondent's bartender, testified that she was bartending when Mr. Turner arrived. She has been TABC certified for 18-20 years. She testified that she talked to Mr. Turner. She did not believe he was intoxicated and did not see Mr. Turner stumble. She testified she did not serve Mr. Turner alcohol.

B. The Allegations and Parties' Positions. The Staff alleged that Mr. Turner was an agent, servant, or employee of Gino's. As such, he was prohibited by TEX. ALCO. BEV. CODE ANN.

² TABC Ex. 3.

³ Ms. O'Cayce denied she said this, but she admitted she said she would return to Gino's until the problem was corrected.

§104.01(5) from being intoxicated on the licensed premises.⁴

Respondent does not deny that Mr. Turner is a manager at Gino's and that he was on the licensed premises that night. Respondent does contend, however, that Mr. Turner was not intoxicated. Respondent further argues that it is the victim of overzealous enforcement by Ms. O'Cayce based on her statement that she would attempt to close the establishment.

C. Discussion. A preponderance of the evidence establishes that Mr. Turner was intoxicated on the licensed premises. Mr. King testified that Mr. Turner's eyes were bloodshot, his speech was slurred, and he performed poorly on the field sobriety tests. Ms. O'Cayce testified that Mr. Turner was unsteady on his feet in Gino's. Furthermore, Mr. Turner stated to the officers that he was "not that drunk." Both TABC officers testified that, in their opinion, Mr. Turner was intoxicated on the licensed premises.

As to the allegation that Ms. O'Cayce acted overzealously in her enforcement actions, there is some evidence that she focused on Mr. Turner in her investigation. She testified she noticed Mr. Turner when she entered the bar, and that she wanted to talk with him. In her discussions about the evening, she, at the very least, indicated that she would continue to return to Gino's until she saw that the problem with Mr. Turner was solved. Although there is some evidence that Ms. O'Cayce may have acted overzealously in making contact with Mr. Turner, her actions do not rise to such a level to indicate that her enforcement actions were improper.

D. Conclusion and Recommendation. It was the Staff's burden to prove, by a preponderance of the evidence, that Respondent's agent, servant, or employee was intoxicated on the licensed premises. It carried that burden.

The Staff is seeking a seven-day suspension of Respondent's permits, which is consistent with the recommended suspension according to the Commission's established penalty matrix.⁵ Respondent is entitled to an opportunity to pay a civil penalty in lieu of a suspension of the permits.⁶ The Staff requested a \$150 per day penalty, which is the lowest amount that may be imposed.⁷ The ALJ finds that the Staff's recommendation is appropriate in this case based on the facts presented.

⁴ Section 104.01 provides:

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.

⁵ 16 TEX. ADMIN. CODE §37.60(a).

⁶ TEX. ALCO. BEV. CODE ANN. §11.64(a); 16 TEX. ADMIN. CODE §37.60(b).

⁷ TEX. ALCO. BEV. CODE ANN. §11.64(a).

III. FINDINGS OF FACT

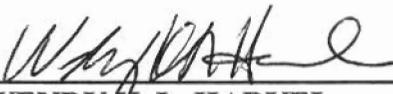
1. Italian Brothers, Inc. d/b/a Gino's Italian Grill (Respondent) holds Mixed Beverage Permit No. MB254321 and Late Hours Permit LB254322, for a premises known as Gino's Italian Grill in Austin.
2. On August 4, 2002, officers of the Texas Alcoholic Beverage Commission (Commission), went to Respondent's premises after noticing a large number of cars in the parking lot at 2:00 a.m.
3. Upon entering the premises, one Commission officer noticed Mr. Randall Turner walking with an unsteady gait and bumping into chairs.
4. Mr. Turner is Respondent's employee.
5. After following Mr. Turner to his car, one of the officers performed field sobriety tests on Mr. Turner.
6. The field sobriety tests indicated that Mr. Turner was intoxicated.
7. On January 24, 2003, the staff of the Commission issued a notice of hearing notifying Respondent of a hearing on allegations it had violated the Texas Alcoholic Beverage Code.
8. A hearing on the allegations against Respondent was held on April 24, 2003. Both parties appeared and participated in the hearing.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Subchapter B of Chapter 5, and TEX. ALCO. BEV. CODE ANN. §§6.01 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over all matters pertaining to the contested case hearing, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was timely and adequate, as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
4. On August 4, 2002, Mr. Turner was an employee of Respondent, and he was intoxicated on the licensed premises.
5. Respondent violated TEX. ALCO. BEV. CODE ANN. §104.01(5) because its agents, servants, or employees engaged in prohibited conduct on the licensed premises in that an employee was intoxicated on the licensed premises.

6. The recommended suspension for a violation of TEX. ALCO. BEV. CODE ANN. §104.01(5) is seven days for a first violation, as contemplated by 16 TEX. ADMIN. CODE §37.60(b).
7. Respondent is entitled to pay a civil penalty of not less than \$150 per day in lieu of suspension of his permit, as contemplated by TEX. ALCO. BEV. CODE §11.64(a) and 16 TEX. ADMIN. CODE §37.60(b).
8. The Commission is justified in suspending Permit Nos. MB254321 and LB254322 held by Respondent for seven days, or imposing a \$1,050 civil penalty in lieu of the suspension.

SIGNED this 6th day of May 2003.



WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 601415

IN RE ITALIAN BROTHERS INC.	§	BEFORE THE
D/B/A GINO'S ITALIAN GRILL	§	
PERMIT NOS. MB254321 & LB254322	§	
	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-1544)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 30th day of May, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Wendy K. L. Harvel. The hearing convened on April 24, 2003 and adjourned April 24, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 6, 2003. 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 Nos. MB254321 and LB254322 are herein **SUSPENDED**.

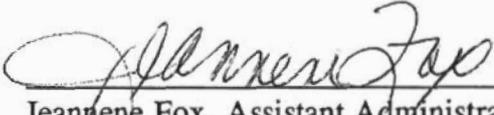
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,050.00 on or before the 16th day of July, 2003, all rights and privileges under the above described permits will be **SUSPENDED** for a period of seven (7) days, beginning at 12:01 A.M. on the 23rd day of July, 2003.

This Order will become final and enforceable on June 20, 2003, 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.

SIGNED on this the 30th day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/vr

The Honorable Wendy K. L. Harvel
Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE (512) 475-4994

Greg Lawson
Italian Brothers Inc.
RESPONDENT
d/b/a Gino's Italian Grill
730 W. Stassney Ln. "A"
Austin, Texas 78745
CERTIFIED MAIL NO. 7001 2510 0003 8688 8937

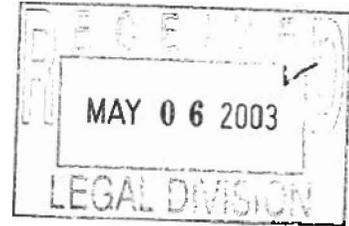
Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division
Austin District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



May 6, 2003

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: Docket No. 458-03-1544; Texas Alcoholic Beverage Commission v. Italian Brothers Inc., d/b/a Gino's Italian Grill Permit No. MB254421; LB254322 Travis County, Texas TABC Case No. 601415

Dear Ms. Fox:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above-referenced case. A copy of the Proposal for Decision is being sent to Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission (TABC), and to Greg Lawson, Respondent. For reasons discussed in the Proposal for Decision, the Administrative Law Judge recommends a seven-day suspension of Respondent's permit, or instead of the suspension, a civil penalty of \$1,050.

Pursuant to TEX. GOV'T CODE ANN. §2001.062, each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or replies must also be filed with the State Office of Administrative Hearings and served on the other parties in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy K. L. Harvel".

Wendy K. L. Harvel
Administrative Law Judge

WH/laa
Enclosure

xc: **Gayle Gordon**, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, TX 78731 - **VIA HAND DELIVERY**
Greg Lawson, Italian Brothers Inc., d/b/a Gino's Italian Grill, 730 W. Stassney Ln., "A", Austin, TX 78745- **VIA REGULAR MAIL**
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**