



## II. DISCUSSION

### A. Background.

Respondent currently operates under authority of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit issued to Respondent for the premises known as The Tap Bar and Restaurant, located at 408 East San Antonio Street, El Paso, El Paso County, Texas.

Respondent's administrative history begins in 1998 with a citation for place or manner of operation, to wit: Violation of Fire Code for which Respondent was assessed a civil penalty of \$2,250.00/15 day suspension; in September 1998 for a sale of alcoholic beverage to a minor for which Respondent was assessed a \$1,050.00/7 day suspension; in July 1999 for a cash law violation for which Respondent was assessed \$750.00/5 days suspension; in October 1999 for a cash law violation for which Respondent was assessed \$1,500.00/10 days suspension; in February 2000 for a cash law violation for which Respondent was assessed \$3,750.00/25 days violation; in November 2000 for sale of alcoholic beverage to a minor for which Respondent was assessed \$2,100.00/14 days violation; and in January 2001 for sale to intoxicated person for which Respondent was assessed \$1,050.00/7 days violation.

### B. Evidence.

TABC offered four exhibits, of which two were admitted. TABC's Exhibit No. 1 is a certified copy of the permits at issue and administrative history. Exhibit No. 4a/4b is a video recording of Respondent's employee at the police command center. Respondent did not offer any exhibits.

The following witnesses were called by TABC to testify to Count I: Maransazu Liceaga; El Paso police officers Dwayne L. Johnson, Jr., Ricardo Montes, and Michael Macias; and TABC agent Anthony Canonizado. Respondent's employee, Mariana Cordero, was called by TABC. She took plead the Fifth Amendment. Maria Theresa Centeno interpreted for Ms. Cordero. Respondent called one witness, Margarita Espinoza, a co-worker at the Tap Bar.

The following witnesses were called by TABC to testify to Count II: TABC agents Salvador Morales and Timothy W. Heidtman. Respondent did not present any witnesses regarding Count II.

### III. ARGUMENT

#### A. Background

The first count alleging that Respondent's employee was intoxicated on the licensed premise derives from a vehicular accident involving a pedestrian on the evening of December 7, 2002. With regard to the second count, On July 12, 2003, TABC participated in an undercover investigation known as the "Stop Sales to Intoxicated Persons" program. Undercover agents, posing as regular costumers, entered the Tap Bar establishment and observed the activities about the bar which resulted in the allegation of the sale or delivery of an alcoholic beverage to an intoxicated person, which is the subject the second count.

#### B. TABC's case

##### 1. Count I

###### a. Ms. Liceaga's testimony

Ms. Liceaga testified that she was downtown on the night of December 7, 2002, heading home, when she saw a green Ford truck at the intersection of the downtown exit and Campbell Street. She said the truck ran a red light and that it was traveling very fast. She observed a female driver and a male passenger. She testified that her vehicle was almost struck by the truck. Thereafter, she read an article in the newspaper about a vehicular accident in which a person had been hit and killed at the same intersection. She then telephoned the police to tell her story.

###### b. Officer Johnson's testimony

Dwayne L. Johnson, Jr., an El Paso police officer, testified that he responded to a call of a pedestrian accident at the intersection of Campbell and Franklin the night of December 7, 2002. He said that when he arrived there were other units at the scene, and that a pedestrian had been killed. The pedestrian was lying face down and had trauma to the body. Witnesses at the scene reported to him that they heard a 'boom' sound and saw a green pick-up truck, which fled the scene.

**c. Officer Montes' testimony**

Ricardo Montes, an El Paso police officer, testified that he received a call around 10 p.m. December 7, 2002, regarding a pedestrian accident in the downtown area. He learned that the vehicle involved in the accident was a green pick-up truck. He further testified that he began to look for the vehicle at bars in proximity to the downtown area. He saw the pick-up truck pulling out of the parking lot on the 1800 block of Diamond Street, about five minutes away from the accident scene. He testified that he stopped the pick-up, which was a green Ford F-150 truck with some damage to the front. The operator of the vehicle was Marian Cordero, a Hispanic female. She had bloodshot eyes, slurred speech and an odor of alcoholic beverage on her breath. There was a male passenger. He interviewed them separately. Upon being asked where she had been that night, the officer testified that Ms. Cordero told him she was coming from the Tap Bar. Officer Montes said she told him she drove north on Campbell Street, which is where the accident occurred, and that she turned right, or east, on Montana Street. The officer testified that upon further questioning, Ms. Cordero told him she was not involved in an accident and that her truck had "no damage." She told the officer that she had been there 5-10 minutes waiting for a friend.

Officer Montes then spoke with Ms. Cordero's passenger, who also told him they were coming from the Tap Bar, where they had been drinking. The passenger recounted and confirmed the route taken. He later changed his story and said that "he was asleep."

Officer Montes testified that he checked the truck for damage, which he found on the right side, on the grill, and under the hood. He said the truck had some blood drops on it. He said Ms. Cordero continued to tell him that the vehicle did not have any damage. Officer Montes said that he then radioed the officers at Campbell Street, the scene of the accident. He informed them that he had stopped the pick-up and that certain parts of it were missing. The officers at the scene informed him that they had some green fender parts. Officer Macias confirmed that the auto parts at the scene of the accident were the missing auto parts of the green truck he had stopped. The parts matched. Officer Montes asked for assistance. He said that he placed the male passenger in his car, and Officer Macias, who arrived to assist, placed Ms. Cordero in his car. The officers conferred about what they had seen. He said that while Officer Macias took Ms. Cordero to take a breath test and to do field

sobriety tests, he remained with the truck and the passenger.

**d. Testimony of Officer Macias**

Michael Macias, an El Paso police officer with the DWI task force, testified that on the evening of December 7, 2002, he heard a spot broadcast on a hit-and-run with fallen pedestrian. The broadcaster said to be on the look out for the vehicle, and that it was a possible DWI. The call indicated that the vehicle was last seen heading northbound on Campbell. Officer Macias testified that upon his arrival at the scene, Officer Montes was speaking with Ms. Cordero. Officer Macias said that she swayed as he escorted her to his vehicle, at which point he began to suspect she was intoxicated. He testified that he transported Ms. Cordero to the Mission Valley Regional Command Center to administer the field sobriety tests. He said that Ms. Cordero was given the tests in a controlled and well-lit room. He observed a total of six clues, out of possible six clues, on the horizontal gaze nystagmus test. On the walk and turn test, he observed five out of eight clues. On the one-leg-stand he observed three out of four clues. Officer Macias further testified that when he asked Ms. Cordero where she was coming from that night, she answered in Spanish "del Tap." (from the "Tap"). She also told him that she had left the bar between 9:30-10 p.m. Officer Macias said that Ms. Cordero told him she had been drinking beginning around 8-9 p.m. Based on the probable cause of intoxication derived from the field sobriety tests and the totality of the circumstances, officer Macias determined that she was impaired. He testified that she was thereafter transported to Thomason Hospital to submit a blood sample. The results of the blood test were .24, three times the legal limit of .08 for alcohol concentration.

**e. Testimony of Ms. Cordero.**

Ms. Cordero was called to testify by TABC. She testified that she never works on Saturdays. She further said that she was not at the Tap Bar that night, but at another bar. Thereafter, she asserted her Fifth Amendment right when asked further questions.

**f. Testimony of Agent Canonizado**

Anthony Canonizado, an enforcement agent with TABC, investigated the incident. He testified that he conferred with the police officers involved and with Ms. Cordero. He said that he went to the Tap Bar to speak with Ms. Cordero. He testified that when he interviewed Ms. Cordero, she admitted

to working the night of December 7, 2002.

**2. Count II**

**a. Testimony of Agent Morales**

Salvador Morales, an enforcement agent with TABC for 18 years, was at the Tap Bar on July 12, 2003, working undercover in a sales-to-intoxicated-persons' operation. He testified that he entered the Tap Bar at 7 p.m., observed the surroundings, and left. He said that he returned to the Tap Bar at 10 p.m. He said that he noticed that the same man—later identified as Julio Lopez—that had been sitting at the bar at 7 p.m. was still there. Because of the length of time that had elapsed since his first visit to the bar, he began to observe the individual. Agent Morales testified that he sat two seats over from the individual, and observed the man to be drinking beer; to have slow eye movement; to raise and lower his voice as he spoke in a repetitive manner; and to close his eyes and drop his head as if he were falling asleep. He observed this conduct for about 15 minutes. While the man was seated at the bar, and displaying the described symptoms, an employee working behind the bar, Maria Palacios, served him another 12 oz. bottle of beer. Mr. Lopez was thereafter arrested for public intoxication. Agent Morales made contact with Mr. Lopez later at the jail. He testified that Mr. Lopez was yelling and screaming, and making animal noises.

**b. Testimony of Agent Heidtman**

Timothy W. Heidtman, Jr., an enforcement agent with TABC, was part of the identification team, and he was contacted by agent Morales on July 12, 2003, about a possible intoxicated person, so went inside the Tap Bar. He testified that Mr. Lopez showed classic signs of intoxication: watery eyes, slow movement, and slumping. He escorted Mr. Lopez outside. He said Mr. Lopez was uncooperative and had a strong odor of alcoholic beverage on his breath. He testified that he concluded Mr. Lopez was very intoxicated.

**C. Respondent's case****1. Count I****a. Cross-examination of Ms. Cordero**

Respondent did not cross-examine TABC's witnesses, except for Ms. Cordero. Respondent asked Ms. Cordero whether she had worked on December 7, 2002, and Ms. Cordero denied working on that date. She also denied that she told Agent Canonizado that she did work on that date. Ms. Cordero also said that she never worked at the Tap Bar on Saturdays.

**b. Testimony of Ms. Espinoza**

Margarita Espinoza is Ms. Cordero's co-worker, and has known her for seven years. She testified that she worked December 7, 2002. She further testified that Ms. Cordero did not work that day, but that Ms. Cordero was at the Tap Bar that night.

**2. Count II**

No evidence nor testimony was presented by Respondent regarding Count II.

**IV. STATUTORY AUTHORITY**

The applicable legal statute with regard to the first allegation is found at TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13) which allows for the suspension or cancellation of a permit if the

Permittee<sup>1</sup> was intoxicated on the licensed premises.<sup>2</sup>

The applicable legal statute with regard to the second allegation is TEX. ALCO. BEV. CODE ANN. § 11.61 (b)(14) which allows for the suspension or cancellation of a permit if the Permittee sold or delivered an alcoholic beverage to an intoxicated person.<sup>3</sup>

Under TABC administrative rules, “intoxication” is defined as “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, or a controlled substance, a drug, or a combination of two or more of those substances into the body.”<sup>4</sup> It is also defined as having an alcohol concentration of 0.08 or more.<sup>5</sup>

## V. ANALYSIS

### A. Count I

The question to be answered is whether Respondent’s employee, Ms. Cordero, was intoxicated on the licensed premises, the Tap Bar, on December 7, 2002, not whether she was working there that night, or whether she was drinking there.

The testimony is conflicting, but there is compelling credible direct testimony from two police officers and one TABC agent which places Ms. Cordero at the Tap Bar on the night in question, right before the vehicular accident occurred. Officer Montes testified that Ms. Cordero told him she was

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<sup>1</sup> Permittee is defined as a person who is the holder of a permit provided for in the Texas Alcoholic Beverage Code, or an agent, servant or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

<sup>2</sup> TEX. ALCO. BEV. CODE § 11.61(b)(13).

TEX. ALCO. BEV. CODE § 11.61(b)(14)(V.T.C.A. 2001).

Texas Alcoholic Beverage Commission Rules, Chapter 50.2(2)(A).

<sup>5</sup> Texas Alcoholic Beverage Commission Rules, Chapter 50.2(2)(B).

coming from the Tap Bar and she described the route she took. Her passenger also said they were coming from the Tap Bar and described the same route taken to Officer Montes. Officer Macias also testified that Ms. Cordero said she had been at the Tap Bar, and that she had been drinking there. He also testified that she said she left around 9 p.m., right before the accident occurred. Agent Canonizado also testified that Ms. Cordero told him she had been at the Tap Bar the night at issue. Most importantly, Ms. Espinoza, Ms. Cordero's co-worker, testified that Ms. Cordero was at the bar that night. Three law enforcement officers testified that Ms. Cordero told them she had been at the Tap Bar the night of December 7, 2002, and her co-worker testified that she actually saw her at the Tap Bar the night at issue. Therefore, Ms. Cordero has been placed at the Tap bar on December 7, 2002. By her own admission to the officers that arrested her, Ms. Cordero had been drinking at the Tap Bar prior to her departure to the location where she was detained.

Whether Ms. Cordero was aware of the fact that she hit a pedestrian is unclear, and irrelevant, to this proceeding. The hit-and-run happened in the downtown area of El Paso City. The Tap Bar is also situated in the downtown area. Eyewitnesses placed the green truck at the intersection of Campbell and Franklin shortly after Ms. Cordero said she left the Tap Bar. TABC's various witnesses connected in great detail the facts surrounding the driving activities of Ms. Cordero on December 7, 2002. The matching truck pieces are direct evidence to link the hit-and-run and Ms. Cordero. It is clear that she was intoxicated. Her performance on the standardized field sobriety tests gave the officer probable cause to believe she was driving while intoxicated, which was confirmed with the results of the blood sample provided by Ms. Cordero.

## **B. Count II**

The negligence standard to which TABC referred requires a determination of whether a reasonable prudent person would have observed that Mr. Lopez was intoxicated. It is clear that Mr. Lopez exemplified classic signs of intoxication: slow movements, and slumping over at the bar as

if he were falling asleep. A reasonable prudent person should have known that Mr. Lopez had too much to drink. Agent Morales testified about the physical indicators of intoxication that he observed in Mr. Lopez as he sat at the bar of the Tap Bar on July 12, 2003. His testimony is credible. The applicable statute sets a standard of reasonable conduct by imposing a duty not to serve alcoholic beverages to a person when the licensee knows or should have known that the patron is intoxicated. The facts indicate that Permittee served Mr. Lopez when he was intoxicated.

## VI. CONCLUSION

On December 7, 2002, Yolanda Quintana d/b/a The Tap Bar and Restaurant, its agent, servant, or employee was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13).

On July 12, 2003, Yolanda Quintana d/b/a The Tap Bar and Restaurant sold or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

**THEREFORE**, having considered the evidence and arguments presented, the undersigned ALJ recommends that Respondent's licenses be canceled.

## VII. FINDINGS OF FACT

1. Yolanda Quintana d/b/a The Tap Bar and Restaurant (Respondent), holds a Mixed Beverage Permit MB-426726 and a late Hours Permit LB-426727, for the premises located in El Paso, Texas.
2. On August 25, 2003, TABC issued a notice of hearing asserting one allegation of Respondent's agent, servant, or employee was intoxicated on the licensed premises and a second allegation of a sale or delivery of an alcoholic beverage to an intoxicated person. The notice also stated the time and location of the hearing; the legal authority and jurisdiction under

which the hearing was to be held; and the particular sections of the statutes and rules involved.

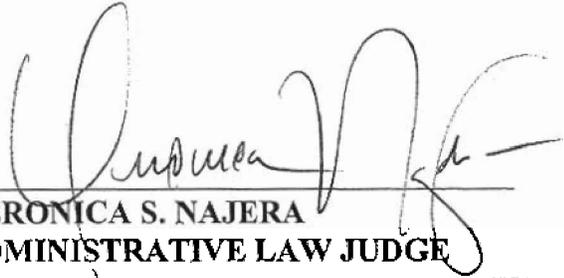
3. On October 23, 2003, the undersigned ALJ ruled that TABC's notice complied with the requirements of TEX. GOV'T CODE ANN. § 2001.052.
4. On the evening of December 7, 2002, Respondent's employee, Mariana Cordero, was intoxicated on the licensed premises, the Tap Bar and Restaurant.
5. On December 7, 2002, Ms. Cordero was driving a Ford pick-up and struck a pedestrian at the corner of Campbell and Franklin, in downtown El Paso, shortly after leaving the Tap Bar and Restaurant.
6. On December 7, 2002, Ms. Cordero was detained by an El Paso police officer after the vehicle suspected of being involved in the hit-and-run was spotted by the police officer.
7. On December 7, 2002, Ms. Cordero was driving while intoxicated.
8. On July 12, 2003, an undercover operation was conducted by the Texas Alcoholic Beverage Commission at the Tap Bar and Restaurant, located at 408 east San Antonio Street, El Paso, El Paso County, Texas 79901.
9. On July 12, 2003, TABC Agent Salvador Morales observed Julio Lopez at the bar at the Tap Bar and observed Mr. Lopez to exhibit various clues of intoxication, including watery eyes, slow movement, and slumping over at the bar as if he were asleep.
10. Agent Morales also observed Mr. Lopez to be drinking one beer, and to be served another.
11. On July 12, 2003, Mr. Lopez was intoxicated on the premises of the Tap Bar and did not have the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body.
12. On July 12, 2003, Respondent's employees sold or delivered an alcoholic beverage to Mr. Lopez, an intoxicated person.

### VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§ 6.01 and 11.61.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOVT. CODE ANN. §§ 2003.021(b) and 2003.042(5).
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOVT. CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact and pursuant to § 11.61(b)(13) and § 11.61(b)(14) of the Code, Respondent's permits are subject cancellation.
5. Based on the above findings of fact and conclusions of law, Respondent's permits should be canceled.

**SIGNED** March 10, 2004.



VERONICA S. NAJERA  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 603891**

IN RE YOLANDA QUINTANA	§	BEFORE THE
D/B/A THE TAP BAR AND	§	
RESTAURANT	§	
PERMIT NOS. MB-426726 & LB-426727	§	TEXAS ALCOHOLIC
	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-4305)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 15th day of April, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on October 23, 2003, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 10, 2004. 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 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.

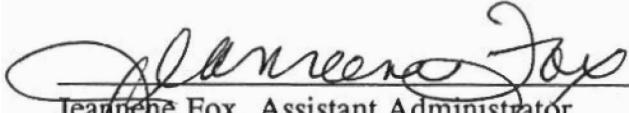
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Mixed Beverage Permit No. MB-426726 and Mixed Beverage Late Hours Permit No. LB-426727 are hereby **CANCELED FOR CAUSE**.

This Order will become final and enforceable on ~~May 6~~ <sup>May 17</sup>, 2004, 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.

26<sup>th</sup>  
WITNESS MY HAND AND SEAL OF OFFICE on this the 26<sup>th</sup> day of April, 2004.

On Behalf of the Administrator,



Jeanne Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

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**RESPONDENT**  
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**CERTIFIED MAIL NO. 7001 2510 0003 0098 4574**  
**RETURN RECEIPT REQUESTED**

Administrative Law Judge  
State Office of Administrative Hearings  
El Paso, Texas  
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Texas Alcoholic Beverage Commission  
Legal Division

El Paso District Office  
Licensing Division