

DOCKET NO. 458-98-1551  
[TABC CASE NO. 577737]

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
MWS ENTERTAINMENT, INC D/B/A DEJA VU MB-223686 & LB-223687 DALLAS COUNTY, TEXAS	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) alleged a permittee violated the Texas Alcoholic Beverage Code (Code) by engaging in or permitting conduct that was lewd, immoral, or offensive to public decency when, on the licensed premises, its dancers made sexual contact with patrons, asked patrons to buy them alcoholic beverages, and solicited a patron to pay for sex. Petitioner alleged the permittee also violated the Code by selling alcohol to a minor and employing two underage girls as dancers.

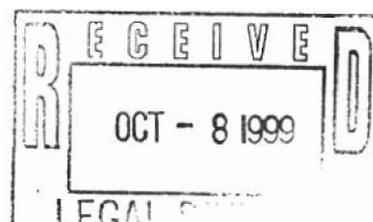
The permittee denied the allegations and contended the police reports and testimony were fabricated. It also asserted it should not be disciplined, regardless of the truth of the allegations, because Petitioner engaged in impermissible discriminatory enforcement. It contended further that some of the charges should be dropped because the statutory standard "lewd conduct" applicable to those charges is unconstitutionally vague.

This Proposal recommends that the permittee's permits be canceled because many of the matters charged were proved by a preponderance of the evidence; there were several violations; and the permittee's violation record is poor. The Proposal concludes that the permittee did not prove the necessary elements of impermissible discriminatory enforcement and the TABC has no authority to declare the statutes it is charged with enforcing to be unconstitutional.

**1. JURISDICTION AND NOTICE**

The TABC has jurisdiction over this proceeding pursuant to Code, §§ 11.61(b) and 106.13. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of 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 ANN. ch. 2003.

The parties stipulated that Respondent presently holds Permit Nos. MB-223686 and LB-223687



## II. PROCEDURAL HISTORY

The request for hearing was filed with SOAH on August 27, 1998. Notice of the hearing was mailed to counsel for MWS Entertainment Inc., d/b/a Deja Vu (Respondent) by certified mail, return receipt requested, on September 22, 1998. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052. No party objected to notice. Prehearing conferences were held on September 28, 1998, November 2, 1998, December 15, 1998, and January 8, 1999.

The hearing began on January 11, 1999, and concluded on January 14, 1999. It was held at the SOAH offices in Dallas, Texas. Timothy E. Griffith, Staff Attorney, represented Petitioner, with Texas Alcoholic Beverage Commission Sergeant John Busby acting as party representative. Charles J. Quaid, Attorney, represented Respondent, with Ron D. Shaddox acting as party representative. James W. Norman, Administrative Law Judge (ALJ), presided.

The parties were given until March 29, 1999, to file posthearing briefs and until April 13, 1999, to file replies. Due to delays in the transcripts, these times were later extended until June 1, 1999, and July 1, 1999, respectively. Both parties filed posthearing briefs on June 1, 1999, and Respondent filed a reply brief on July 1, 1999. The hearing record closed on July 1, 1999.

## III. DISCUSSION

### A. Respondent's Contention that Charges Should be Dropped

#### 1. Impermissible Discriminatory Enforcement

##### a. Respondent's Contentions

Respondent contended this case should be dismissed, regardless of whether the evidence supported the charges, because Petitioner has targeted it and certain other clubs featuring female striptease (topless bars) for impermissible discriminatory prosecution. Respondent cited State v. Malone Service Company, 829 S.W.2d 763 (Tex. 1992), which states the requirements for establishing a discriminatory enforcement claim. The court stated at page 766:

To establish a claim of discriminatory enforcement, a defendant must first show that he or she has been singled out for prosecution while others similarly situated and committing the same acts have not. *See United States v. Rice*, 659 F.2d 524, 526 (5<sup>th</sup> Cir. 1981); Wolf v. State, 661 S.W.2d 765, 766 (Tex. App.--Fort Worth 1983, writ ref'd. n.r.e.). It is not sufficient, however, to show that the law has been enforced against some and not others. The defendant must also show that the government has purposefully discriminated on the basis of such

impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.

In support of its assertion that Petitioner has discriminated on the basis of an impermissible consideration, Respondent cited Schad v. Borough of Mount Ephram, 452 US 61, 101 Sct. 2176, 68 Led 671 (1981), holding that nude dancing is a protected expression under the First and Fourteenth Amendments of the United States Constitution.

**(i) Impermissible Purpose<sup>1</sup>**

Respondent produced evidence to show the City of Dallas (City) has for many years through zoning ordinances attempted to force it and other clubs in certain areas of Dallas to either close down or move to parts of town where topless bars are not disfavored. It contended the first zoning ordinances required the dancers to wear more clothing, but the clubs frustrated the City by complying.<sup>2</sup> The evidence showed that subsequent ordinances, requiring more clothing, were struck down by the courts. Respondent introduced testimony to show that neighborhood groups opposing the dance halls met with City officials in an attempt to find ways to force them out of the area. One City employee acknowledged that the City wanted the clubs to move. Respondent introduced memoranda written by a Dallas police lieutenant which contained instructions that Respondent and other clubs in the disfavored area were to be “targeted” for inspections to produce evidence to justify a lawsuit to close them down. The evidence showed that in the four months following the memoranda, Dallas police officers made almost all the charges that are the subject of this hearing. Respondent pointed out that numerous charges were often made within a few minutes of each other.

Respondent cited testimony from Texas Alcoholic Beverage Commission Sergeant John Busby that a substantial percentage of Petitioner’s cases in Dallas are generated by the Dallas Police Department (DPD). Sergeant Busby acknowledged that DPD provides significant assistance to Petitioner in helping it enforce the laws within its jurisdiction. He acknowledged he has not seen other clubs with so many charges within a 90-day period. He agreed, with the

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<sup>1</sup> Respondent maintained the evidence discussed in this section also proves the charges were fabricated. The evidence will be discussed in greater detail in a subsequent section addressing that issue.

<sup>2</sup> Respondent and certain other clubs in Dallas are designated Class A dance halls because they changed the attire of their dancers in response to the referenced ordinance, which prohibited sexually oriented businesses (SOBs) from operating within 1,000 feet of certain places such as schools, residential areas, churches, parks, historic districts, hospitals, and day care centers (protected areas). The ordinance required existing SOBs which fell within the ordinance’s ambit to “amortize,” or recoup their investment, over a specified period of time and then close. By covering the areola of the dancers’ breasts with opaque non-flesh colored material and causing the dancer to wear bikini bottoms, Respondent and other clubs complied with the ordinance (and a subsequent amendment), and became designated as Class A dance halls rather than SOBs.

exception of one case he made, that the charges brought by Petitioner rest on the credibility of Dallas police officers. (Vol. III, pp. 87, 90, 99-100).<sup>3</sup>

Respondent introduced testimony from Steve Craft, a corporate officer for four other topless bars in Dallas, in which Mr. Craft asserted he informed TABC Lieutenant Fincher and other officers that the charges were "trumped up" because the City disliked topless dancing at Respondent's club and other Class A dance halls. According to Mr. Craft, Lieutenant Fincher stated Petitioner had no choice but to accept cases from DPD, and his clubs could either settle by accepting a shut down or administrative fine, or ask for a hearing. He testified she told him if he won an administrative hearing, Petitioner might view the situation differently. (Vol. III, pp. 277-81).

Respondent representative Ron Shaddox testified one of Petitioner's officers was shocked during a meeting with Respondent concerning a previous disciplinary action when he found out Respondent was being charged with 15-month old violations. Mr. Shaddox testified the officer left the meeting to talk to his supervisor, but then returned and said he had no choice but to go forward with the charges, that Respondent could either settle or ask for a hearing. (Vol. IV, pp. 27-30).<sup>4</sup>

On the basis of Mr. Shaddox's and Mr. Craft's testimony, Respondent maintained the City's actions and alleged intentional discriminatory behavior must be imputed to Petitioner because Petitioner has not exercised independent judgment on whether to proceed with the charges. Disputing an argument by Petitioner that it is improper to impute the City's motives to it because motives of a private entity cannot be imputed to the state, Respondent pointed out the City is not a private entity. It contended the City and Petitioner are acting in tandem as shown by the above-described testimony from Mr. Shaddox, Mr. Craft, and Sergeant Busby. Respondent cited case law holding that both the City and Petitioner are agents of the state.

Former City Director of Planning, Sheryl Peterman, testified the City's official position, as stated in the preamble of a recently enacted ordinance, is that Respondent and other businesses like it have frustrated the City.<sup>5</sup> When asked in a deposition whether she agreed it was the first time an industry has been targeted by the City, Ms. Peterman answered it was the only one she

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<sup>3</sup> Unfortunately, the transcript pages are not numbered sequentially for the four days of hearing. The reporters simply started over at page one for the beginning of each day. Because of that, the ALJ has cited the transcript for the first day of the hearing, January 11, 1999, as Volume I, and for the subsequent days as Volumes II through IV.

<sup>4</sup> Sergeant Busby agreed it would be unusual for the City to hold charges for a year before forwarding them to Petitioner. (Vol. III, p. 87).

<sup>5</sup> A part of the preamble of an ordinance passed by the Dallas City Council on May 28, 1997, states "a number of the businesses in the city that provide sexual stimulation and gratification to their patrons have circumvented and frustrated the intent of Chapter 41A by operating Class A dance halls . . ." (Ex. 67). It is undisputed that Respondent is one of the Class A dance halls referred to.

remembered. She agreed the City wants Respondent and clubs like it to move. (Vol. III, pp. 160, 180, 186). Respondent pointed to a draft memorandum from Ms. Peterman to Assistant City Manager Ramon Miguez, which expressed "legal concerns" if the City selected only disfavored clubs for compliance proceedings (proceedings brought by the City against clubs for failing to comply with ordinances). (Ex. 74).

## (ii) Discriminatory Prosecution

Respondent cited testimony from a variety of people to support its contention that it has been singled out for prosecution while others similarly situated and committing the same acts have not. (This is the first prong of a discriminatory enforcement defense under Malone).

Steve Craft testified that three of the topless bars he is involved with are similar to Respondent because they are Class A dance halls in an area of town where the City does not want them to continue their present operation. He maintained the fourth club, Cabaret Royale, is classified as an SOB and located in an area that is not disfavored. He asserted there is a "huge difference" in City police enforcement between Caberet Royale and his other clubs. He testified he could only think of two times policemen have been in Cabaret Royale in the last year; they were Officers Michael McMurray and Victoria Ligenza.<sup>6</sup> According to Mr. Craft, those officers went into his other three clubs one or more times a week until September 1998 (Vol. III, pp. 253-4).

Detective Michael McGee testified he has never been in The Men's Club and has been in Caberet Royale one time; he said it would not surprise him if there were no cases pending against those clubs (Vol. I, pp. 143-4). Detective Don Waterson testified he does not go into Club 2000 or Blue Planet to check for lewd dancing because he only goes into topless bars for that purpose (Vol. I, pp. 231-2). Detective Craig Reynerson testified he has never been in Club 2000, Cowboys Red River, or Blue Planet (Vol. II, p. 341).<sup>7</sup>

Officer Victoria Ligenza testified as follows. She has never been into Pappasito's restaurant for a bar check, has not been into Pappadeuux's restaurant, and does not know whether she has been into the Cottage Lounge. Caberet Royale and The Men's Club, both of which are SOBs, are in the part of Dallas where she works. She believes she has been in Caberet Royale several times, but is not certain how many. She believes she has been into The Men's Club more than once or twice. The City has no problem with SOBs existing more than a thousand feet from a protective area, but it does have a problem with Respondent and other topless bars because they are located within 1000 feet of protected areas. She agreed the City wants Respondent and

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<sup>6</sup> Except for Officer Michael McMurray, all of the police officers or detectives who testified at the hearing made charges in this case.

<sup>7</sup> Although the evidence is not completely clear, Club 2000, Cowboys Red River, and Blue Planet, and the subsequently referenced Cottage Lounge, Country 2001, Dave & Buster's bar, Pappasito's restaurant, and Pappadeuux's restaurant do not appear to be topless bars.

certain other topless bars closed at their current locations if they continue to feature female striptease. She acknowledged the police usually bring a paddy wagon when they raid a topless bar and park police cars in front of the bar's entry ways. (Vol II, pp. 207-9, 210, 212, 245-7, 253).

Officer McMurray testified he tries to check bars at least once a year and preferably every six months, but he does not check restaurant bars. He has never done a bar check at the Cottage Lounge, Country 2001, or Dave's & Buster's bar. The police usually do not bring paddy wagons to non-topless clubs, but do to topless bars. (Vol. III, pp. 237-8, 240, 44-5).

Sergeant Busby testified it is rare to have a case against The Men's Club. He indicated he thought there was a case against Caberet Royale, but is not sure there still is. (Vol. III, pp. 92-3).

#### **b. Petitioner's Contentions**

Petitioner contended Respondent did not establish a discriminatory enforcement defense because it failed to prove Petitioner did not bring enforcement actions against other topless bars where there had been sexual contact, drink solicitation, prostitution, and child exploitation offenses.

Sergeant Busby testified that Petitioner does not enforce the laws selectively, i.e., against some clubs, but not others. He maintained the only criterion for pursuing a case is whether there is a violation of the Code, applicable rules, or the Texas Penal Code (Penal Code). (Vol. III, pp. 102-3). He testified DPD is required by law to send Petitioner copies of violations on licensed premises. He maintained Petitioner reviews the cases, and will only bring charges if it looks like the elements of a case are present; if the elements are not there, Petitioner will not pursue the case. According to Sergeant Busby, Petitioner has disregarded some of the cases sent by DPD before: he asserted Petitioner is not swayed by whether DPD gets offended in that circumstance. (Vol. III, pp. 90, 100)

Sergeant Busby testified he thought there were several topless bars scattered throughout Dallas that have cases pending. He indicated the "lower levels" of the TABC have not received any instructions to target Respondent. Reviewing Respondent's history of violations (Ex. 17), he maintained he could not recall seeing another club with as many violations for public lewdness and other problems. He testified he personally went to Respondent's club on February 20, 1998, and saw an instance of sexual contact; he maintained no one sent him to Respondent's club that day. (Vol. III, pp. 53-8, 61, 73-4, 76-7, 91-2).

Petitioner cited case law holding that discriminatory enforcement is never presumed; the party asserting the defense must show a clear intentional discrimination. Malone at 767.

Petitioner maintained this action was brought because of the matters stated in the Notice of Hearing and to prevent the harmful secondary effects of criminal conduct associated with

topless bars. Petitioner cited Exhibit 17, Petitioner's violation record, to show its motive is to achieve compliance with the Code rather than shut down businesses. That exhibit shows a number of instances where Respondent has paid a civil penalty in lieu of a suspension of its permits.

Petitioner cited cases which hold, in selective enforcement cases, the motives of a private entity which may have filed the complaint that led to the enforcement action cannot be imputed to the state.

**c. Analysis**

This Proposal concludes Respondent did not prove the first prong of a discriminatory enforcement claim, that it had been singled out for prosecution "while others similarly situated and committing the same acts have not". Malone at 766. As a result, it is not necessary to reach a determination on the second prong, whether prosecution has been based on an impermissible consideration.

The latest United Supreme Court case on discriminatory enforcement is United States v. Armstrong, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), where the defendant claimed discriminatory enforcement on the basis of race.<sup>8</sup> The defendant was charged with conspiring to possess and intent to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846. He based his discriminatory enforcement claim on an affidavit from a paralegal at the Office of Federal Public Defender which indicated that in every one of the 24 §§ 841 and 846 cases closed by the office in 1991 the defendant was black; an affidavit from a drug treatment center asserting there are an equal number of caucasian drug users and dealers as minorities; an affidavit from a criminal defense attorney stating that many non-blacks are prosecuted in state courts for the same offenses; and a newspaper article stating that almost all federal criminal prosecutions for crack cocaine were against blacks. The prosecutor introduced evidence showing the decision to prosecute met the general criteria for prosecutions and a report which concluded that networks controlled by Jamaicans, Haitians, and black street gangs dominate the manufacture and distribution of crack cocaine. Finding the district court correct in its determination that the defendant made a "colorable showing" of discriminatory enforcement (thereby allowing it to engage in discovery on that issue), the Ninth Circuit Court of Appeals held the defendant was not required to show the government had failed to prosecute similarly situated individuals. The U.S. Supreme Court reversed, and stated the following at pages 1486 - 1489 of its opinion:

A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the

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<sup>8</sup> Federal cases are persuasive in this case because discriminatory enforcement claims are based on the equal protection component of the Due Process Clause of the Fifth Amendment and on the Fourteenth Amendment. Armstrong at 1482; Malone at 766. The Malone court cited a United States Fifth Circuit case as authority for the standard it specified. (Texas cases are also based on Article 1, § 3 of the Texas Constitution (which also concerns equal protection).)

charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.

...

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary."

...

... The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." [citations omitted]. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

...

In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection clause.

...

... [Respondent's] study [showing that all 24 cocaine prosecutions closed by the Office of Federal Public Defender in 1991 were against blacks] failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. ... Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence.

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<sup>9</sup> Armstrong has been followed in cases involving discriminatory enforcement claims which are not based on race. U.S. v. Hastings, 126 Fd.3d 310, 313-4 (4<sup>th</sup> Cir. 1997, cert. den. 118 S.Ct. 1388); Stemler v. City of Florence, 126 Fd3d 856, 873 (6<sup>th</sup> Cir. 1997, cert. den. 118 S.Ct. 1796).

In this case, Respondent produced no evidence to show that any topless bar in an area of Dallas that was not disfavored could have been prosecuted, but was not. In fact, there was no showing that *any* other topless bar could have been prosecuted, but was not. There was simply no showing that any club other than Respondent had engaged in any of the acts Respondent was charged with.

Respondent's showing that *some* DPD officers had gone into *some* Class A dance halls more often than they went into two SOBs, The Men's Club and Cabaret Royale, did not show that Cabaret Royale and The Men's Club could have been prosecuted, but were not. Moreover, there was no attempt to show how many other SOBs there are in Dallas, how often DPD went into those clubs, or whether any of those clubs could have been prosecuted, but were not. On the basis of Armstrong, Mr. Craft's testimony that Officers McMurray and Ligenza went into his Class A dance halls more often than they went into Cabaret Royale appears to fit into the category of "personal conclusions based on anecdotal evidence." Armstrong at 1489.

Another factor throwing doubt on Respondent's discriminatory enforcement complaint stems from its history of violations. Sergeant Busby testified he could not ever recall seeing a club with as many violations as Respondent. (Vol. III, p. 61). According to DPD Vice Section Captain Eddie Walt, a demonstrated history of noncompliance could be a reason to target a business. (Vol. III, p. 225). Discriminatory enforcement because of noncompliance is not an impermissible purpose. One DPD officer indicated he went into Respondent's club because that could make cases there. (Vol. I, p. 264).

Respondent's discriminatory enforcement defense should be denied for an entirely separate reason. Respondent's evidence to prove discriminatory enforcement is not relevant to three allegations. Charges that Respondent employed two underage dancers stemmed from a call for police at that location. (Vol. II, pp. 178, 255). There was absolutely no evidence that the police would not have responded to a call or forwarded such a violation to Petitioner if it had occurred in some other SOB or Class A dance hall. The other case was a sexual contact charge filed by Sergeant Busby. There was virtually no evidence that Petitioner, as distinguished from the City, was motivated by an impermissible purpose. To the contrary, Respondent's contention was that the City's purported motivations should be imputed to Petitioner; that assertion would not apply to cases made by Petitioner that would have been pursued anyway. Nothing in the record showed Petitioner would not have pursued the case filed by Sergeant Busby, even if there had been no other cases. Petitioner had pursued several other cases against Petitioner in the past. (Ex. 17). Sergeant Busby testified the only criteria for pursuing cases is whether there was a violation of state law, including the Code, rules, and Penal Code. (Vol III, pp. 102-103). As discussed below, these three cases were clearly proven by a preponderance of the evidence. Because of Respondent's history of violations, this Proposal would recommend a cancellation of Respondent's permits on the basis of these cases alone.

2. Respondent's Assertion that the Term "Lewd Conduct" is Unconstitutionally Vague<sup>10</sup>

(a) Respondent

Respondent asserted the charges involving lewd conduct should be dropped because the statute is unconstitutionally vague, vague as applied to it, and vague when involving an expression protected under the First Amendment of the United States Constitution and Article I, Section 8 of the Texas Constitution. Citing Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972) and Meisner v. State of Texas, 907 S.W.2d 664 (Tex. App. -- Waco 1995, no writ), Respondent argued that determining whether a statute is void for vagueness involves a two-part inquiry. The first is whether an individual of ordinary intelligence receives sufficient information from the statute to know what conduct is proscribed. The second is whether the law provided sufficient notice for law enforcement personnel to prevent arbitrary and erratic enforcement. Citing Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) and Long v. The State of Texas, 931 S.W.2d 285 (Tex. Crim. App. 1996), Respondent contended the vagueness doctrine demands a greater degree of specificity when First Amendment expression is involved. It contended that most U. S. Supreme Court opinions on vague statutes focus on whether the laws permit indiscriminate, arbitrary, erratic, and selective enforcement against unpopular causes.

Respondent asserted the evidence in this case shows arbitrary, erratic, and selective use of the term "lewd conduct" to target unpopular businesses which the City has tried to close for 13 years.

(b) Petitioner

Petitioner contended lewd conduct has been specifically defined at 16 TEX. ADMIN. CODE § 35.41(a) and made applicable to Section 104.01(6) and other provisions of the Code. That section provides:

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<sup>10</sup>Most of the cases in the Notice of Hearing were brought under authority of Section 104.01(6) of the Code which 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:

...

(6) permitting lewd or vulgar entertainment or acts.

....

The following words and terms, when used in this chapter, shall have the following meanings, except when the context clearly indicates otherwise.

- (1) Lewd and vulgar entertainment or acts -- Any sexual offenses contained in the Texas Penal Code, Chapter 21, or any public indecency offenses contained in the Texas Penal Code, Chapter 43. (See Texas Alcoholic Beverage Code, §104.01(6).)

Petitioner maintained certain Penal Code provisions applicable to this case have been held constitutional in the face of a vagueness challenge. These include: sexual contact, held constitutional in Byrum v. State, 762 S.W. 2d 685, 687 (Tex. App.-- Houston /14th/ 1988, no writ); the "prostitution statute," held constitutional in Young Sun Lee v. State, 681 S.W. 2d 656, 662 (Tex. App.-- Houston /14th/ 1984, writ ref'd.); and the "drink solicitation statute," held constitutional in Vela v. State, 776 S.W.2d 721, 724 (Tex. App.-- Corpus Christi 1989, no writ). Petitioner asserted the "child exploitation statute" has not been challenged. It maintained the statutes in question are not unconstitutionally vague because they provide reasonable notice of the forbidden conduct in terms that persons of common intelligence can understand.<sup>11</sup>

(c) Analysis

Respondent's contentions should be rejected because there has been no judicial declaration, in a civil setting, that Section 104.01(6) in combination with 16 TEX. ADMIN. CODE § 35.41 is unconstitutionally vague. Four considerations are relevant to this recommendation. First, a state agency has no power to decide the constitutionality of the underlying law it is enforcing. Central Power and Light Company v. Sharp, 960 S.W.2d 617, 618 (Tex. 1997); Birdville Independent School District v. First Baptist Church of Haltom City, 788 S.W.2d 26, 29 (Tex. App.-- Fort worth 1988, writ den.).

Second, Section 104.01(6) has been declared unconstitutionally vague in several cases, including Texas Alcoholic Beverage Commission v. Wishnow, 704 S.W.2d 425, 427 (Tex. App.--Houston /14th/ 1985, no writ) (Wishnow II).

Third, the Texas Court of Criminal Appeals held, in Wishnow v. State, 671 S.W.2d 515, 517 (Tex. Crim. App.-- 1984) (Wishnow I), that a lower court's attempt in a criminal case to engraft Penal Code provisions on to Section 104.01(6) by statutory construction did not remedy its constitutional defects.

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<sup>11</sup> In every instance where the Notice of Hearing alleged lewd conduct under Section 104.01(6) or Section 104.01 of the Code as a basis for disciplinary action, it also referred to 16 Tex. Admin. Code § 35.41 to more specifically define the term by reference to the Penal Code. In each case, evidence from the officers tracked the Penal Code elements of the offense.

Fourth, the court in Wishnow v. Texas Alcoholic Beverage Commission, 757 S.W.2d 404 (Tex. App.-- Houston /14th/ 1988, writ den.) (Wishnow III), which held paragraph (2) of Section 104.01 constitutional, stated the notice standards in a civil proceeding involving regulatory statutes governing business conduct are less strict than in criminal cases.

Fifth, there has been no ruling, in a civil setting, on the validity of TABC's attempt to more specifically define Section 104.01(6) by enacting Section 35.41. Based on the above-stated considerations, Respondent's contentions that Section 104.01(6) is unconstitutionally vague should be rejected because no court has made that determination and TABC has no authority to conclude that Section 104.01(6) (as further defined by Section 35.41) is invalid.

As a final note on this issue, it should be pointed out here that this Proposal will recommend cancellation of Respondent's permits wholly aside from the Section 104.01(6) charges.

## **B. Party Contentions and Evidence on the Allegations**

### **1. Contentions Generally Applicable to Charges**

#### **a. Fabricated Charges**

##### **(i) Respondent**

In addition to disputing the evidence concerning particular allegations, Respondent contended and produced evidence to support its assertion that all of the DPD cases were fabricated. This evidence revolved around the fact that for many years the City has wanted Class A dance halls to move or close. Many of Respondent's assertions and some of its evidence on this issue has already been described under the discussion of impermissible discriminatory enforcement at Part III.A.1 above. This includes the City's attempts to place restrictions on the dancers' clothing at Class A dance halls through zoning ordinances; the preamble to a 1997 ordinance stating Class A dance halls have circumvented and frustrated the City; memoranda to indicate the DPD wanted to target Respondent for enforcement; the fact that virtually all the cases were made in the four months following the memoranda; Sergeant Busby's testimony that he had never seen so many cases against one club within a 90-day period; evidence and assertions that Petitioner has accepted cases from DPD without exercising any independent discretion; former City Director of Planning Sheryl Peterman's testimony that the City wants Respondent and clubs like it to move and that she has never seen an industry targeted like this; and, Ms. Peterman's draft memorandum to an assistant city manager expressing concerns if the City targeted only disfavored clubs.

The following is a more specific discussion of some of these matters.

#### **(-a-) Lieutenant Hughes' Memoranda**

Memoranda concerning the targeting of Respondent and other Class A dance halls came from DPD Lieutenant Tammie Hughes, who was formerly the head of a S.A.F.E. team. S.A.F.E. teams consist of police officers, fire and code inspectors, and, at times, vice and Texas Alcoholic Beverage Commission officers and health inspectors. The team enforces abatement statutes relating to criminal activity on the premises, including prostitution, drug dealing, organized crime, street gang activity, gambling, and the discharge of firearms. (Vol. III, pp. 109-112). On August 1, 1997, Lieutenant Hughes received a memorandum from DPD Sergeant Ray Ball stating he had been provided with a list of 11 dance halls during a meeting with Assistant City Manager Miguez and Chief of Police Bolton. The memorandum was a survey of those clubs showing the amount of abatable activity. It stated Respondent was among the lowest of the 11 clubs. (Ex. 68).

On August 7, 1997, Lieutenant Hughes issued memoranda (Exs. 71-73) to Northwest Operations Division Deputy Chief Daniel Garcia, Vice Section Captain Eddie Walt, and Narcotics Division Deputy Chief Roger Duncan. The memoranda stated the S.A.F.E. team had been asked to provide nuisance abatement assistance with "SOB problems" located in the Northwest Patrol Division, and indicated a preliminary review of the listed locations (including Respondent) does not support a "nuisance abatement lawsuit." The memoranda went on to say:

...

If possible target these locations for site specific enforcement, or gather criminal intelligence we may be able to use later should we file a lawsuit. . .

...

Your cooperation in this matter will assist our efforts significantly in providing evidence to the courts in the event of a lawsuit.

The memoranda stated they had been asked to make monthly updates on these locations to the City Manager's Office.

On August 28, 1997, Lieutenant Hughes issued an "operational plan" for inspections of five clubs (Ex. 69). Three of the clubs, including Respondent, ranked low in terms of abatable activity in Sergeant Ball's August 1 memorandum. The plan stated the following concerning the operation's purpose:

In response to the complaint from the City Manager's Office these locations have been targeted by a community activist group for purpose of community revitalization. A preliminary investigation revealed TABC violations and Dallas P.D. Arrests for public intoxication have occurred at all these locations. . . .

Lieutenant Hughes issued a later memorandum (misdated as August 5, 1997) to Deputy Chief Daniel Garcia of the Northwest Operations Division (Ex. 70), which stated:

On August 31, 1997, we were provided a list of eleven dance halls in the Northwest area that Assistant City Manager Ramon Miguez wanted targeted. . .

A preliminary investigation was conducted at the following locations:

...

De Ja Vu . . .

...

There was little or no abatable activity to warrant a full investigation at this time.

.....

Respondent contended the August 7 memoranda were literally the "smoking gun" in which DPD officials were advised to target Class A dance halls for future nuisance abatement lawsuits. It cited Lieutenant Hughes' testimony where she agreed that the purpose of such a lawsuit would be to close down a business. (Vol. III, p. 137).

Respondent emphasized the fact that virtually all the cases against it were made during the August to December 1997 time period, immediately after Lieutenant Hughes' memoranda. It asserted the City's efforts to shut it down proves the charges were false.

#### **(-b-) Zoning Ordinance Lawsuits**

Respondent introduced copies of judgments in several lawsuits to show the City's efforts to restrict the type of dress worn by the dancers and to suspend the Class A dance hall licenses have been unsuccessful. In a case dated March 3, 1995 (Ex. 87), a United States district court struck down a City ordinance which required covering of the entire breast below the top of the areola of the dancers' breasts. The court stated there was no evidence that requiring the dancers to wear bikini tops would reduce the deleterious secondary effects associated with certain types of SOBs. On February 5, 1996, a state district court held a City ordinance used to suspend the licenses of several Class A dance halls to be unconstitutionally vague and overbroad (Ex. 90). (The ordinance authorized the suspension of a dance hall license based on a finding that "the licensee or the employee of a licensee has demonstrated inability to operate or manage the dance hall premises in a peaceful and law abiding manner, thus necessitating action by law enforcement officers".)<sup>12</sup> The ruling was upheld by the Dallas Court of Appeals (Ex. 92). On March 3,

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<sup>12</sup> MD II Entertainment, Inc. d/b/a The Fare West, and Duncan Burch v. City of Dallas, Bennie R. Click in his Capacity as Chief of Police of the City of Dallas, and the Permit and License Appeal Board of the City of Dallas, Texas.

1998, a United States district court preliminarily enjoined a City ordinance requiring dancers to wear bikini tops because there was no evidence to support the City's conclusion that requiring the dancers to wear the tops would reduce the harmful secondary effects associated with topless bars (Ex. 93). The court stated ". . . it is likely that the City's main goal in enacting the ordinance was to restrict the essential expressive nature of the Intervenor's business, therefore making it a content based restriction which would not be permitted by the United States Constitution."<sup>13</sup>

Respondent contended these cases show the City's hostility to it and other Class A dance halls, and demonstrates its intention to shut them down.

### **(-c-) Claims of Abusive Enforcement**

In addition to his testimony described under Part III.A.1 relating to discriminatory enforcement, Steve Craft described allegedly harsh tactics used by DPD against his club, including a raid in which about 10 police officers pulled up to the front door in a paddy wagon, blocked off the parking lot, posted officers in the front and back, and detained all the employees (Vol. III, pp. 259-60). He testified he met with police officials to protest the activity, but with the only apparent result being to irritate one of the officers he complained about. He contended local organizations have attempted to have his and similar businesses shut down. (Vol. III, pp. 263-9). He asserted the raids take two to three and one-half hours. He testified the DPD S.A.F.E. teams have also been abusive. According to Mr. Craft, S.A.F.E. teams have turned on the lights and turned the music down while doing inspections during business hours, and have given his business a below-70 failing grade when two days before the regular City inspector gave it a passing grade of 88. (Vol. III, 269-75). In his opinion, the City has targeted clubs in disfavored areas (Vol III. p. 285). He testified he has had numerous conversations with Petitioner's personnel trying to persuade them that DPD is engaging in improper enforcement, but without success (Vol. III, 276-7).

Mr. Craft referred to a March 28, 1995, Dallas Morning News article, which indicated citizen groups had complained about topless clubs in the Northwest Highway area in a meeting with City officials (Ex. 89). Respondent pointed out that within a few months of the meeting, DPD suspended several Class A dance hall licenses (Exs. 76-83).<sup>14</sup>

Citing a television interview in which Texas Alcoholic Beverage Commissioner Roy Orr was questioned about Petitioner's practice of allowing permittees to pay civil penalties rather than suspending their licenses (Ex. 90), Respondent asserted the City turned to Petitioner to close these businesses down after it was stymied in the courts.

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<sup>13</sup> Baby Dolls Topless Saloons, Inc., d/b/a Baby Dolls Saloon-East v. City of Dallas at pp. 3 and 4 of the Order.

<sup>14</sup> The suspensions were later overturned based on holdings that the ordinance under which the City brought the cases was unconstitutionally vague and overbroad.

In addition to his previous testimony relating to impermissible discriminatory enforcement under Part III.A.1, Mr. Shaddox testified he has run a variety of clubs for 28 years. He testified S.A.F.E. teams have never come into his clubs until the last couple of years. According to Mr. Shaddox, a regular health inspector gave Respondent a grade of 96 two days after a S.A.F.E. team gave it a below passing grade in the 60's. He asserted he never had a problem with a regulatory authority trying to take his license before 1996 (Vol. III, pp. 7-13).

Mr. Shaddox stated his belief that Petitioner started to move towards canceling Respondent's license when, in April 1997, it filed the same charges the City had unsuccessfully tried to use to suspend Respondent's dance hall license. (Vol. IV, pp. 24-7).<sup>15</sup> As previously discussed, he testified the TABC officer he dealt with was surprised that cases more than a year old were being pursued, but indicated after talking to his supervisor that the cases would be prosecuted. He testified Petitioner's attorney also told him he had no choice but to go forward with that case. Eventually, they settled the case and Respondent agreed to an Order in which it chose to pay a \$9,000.00 civil penalty in lieu of a 60-day suspension of its permits (Vol. IV, pp. 30, 42-43, Ex. 17). Respondent asserted this case was filed within 90 days after the television news cast involving Mr. Orr.

Mr. Shaddox testified he was not even aware of the charges that form the basis of this case until December 1997 (after officers had made cases in the club for about three months). The City never came to him in any effort to achieve voluntary compliance. (Vol. IV, pp. 47-8). Respondent contended this testimony shows the City was not trying to obtain voluntary compliance, as it claimed, but to shut its operation down.

According to Mr. Shaddox, the worst case of a police raid occurred when the police came in wearing sky masks with a paddy wagon parked outside. He indicated they took the girls to the wagon, in scanty clothing, on a cold day, and later took them to the police station, where they kept them until about 4:00 a.m. (Vol. IV, pp. 50-2).

Mr. Shaddox testified he believed the charges have been fabricated in order to close his business. (Vol. IV, pp. 84-5).

#### **(-d-) Other Matters**

Respondent pointed to certain testimony from Captain Walt, including the following. Because of personnel constraints, he must prioritize his work. He is aware the City has asked the state legislature to add public lewdness to the definition of "abatable nuisances" under the Texas Civil Practices and Remedies Code. (Vol. III, pp. 190, 223).

Pointing to evidence that the officers began to go into the Respondent's club within a couple of weeks of Lieutenant Hughes' memoranda. Respondent questioned testimony from the

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<sup>15</sup> As indicated above, the ordinance under which the City tried to prosecute Class A dance halls was declared invalid.

officers that they had not been instructed to go into Respondent's club. Respondent maintained any assertion that the timing of the visits was merely coincidental was not credible.

Respondent pointed out that officers who ordinarily worked prostitution cases did not even stay to make those cases, and cited testimony from Officer McMurray that there have not been many prostitution charges in the clubs (Vol. III, p. 244).

Respondent contrasted the testimony of the officers who went into the clubs to find lewd dancing, which often indicated they saw several instances of sexual contact, with testimony from other officers who looked for drink solicitation. Respondent asserted that the officers making the drink solicitation cases did not see any lewd dancing, and the officers making the sexual contact cases did not make lewd dancing cases. Respondent also questioned the fact that no sexual contact cases were made against customers (as opposed to the dancers).

Respondent asserted its history shows that until approximately 1993, it had operated with only nominal incidents. It contended this changed when "matters heated up with the City and the tactics began to shift to [the] use of contrived lewdness cases to take [its] license." In support of this assertion, it cited its mixed beverage gross receipts data filed with the Comptroller of Public Accounts (Ex. 66) (showing its gross taxable liquor sales), its violation record (Ex. 17), Sergeant Busby's testimony that there were no lewdness charges against Respondent through 1993 (Vol. III, p. 85), and Mr. Shaddox's testimony that Respondent never had problems with an authority trying to take its license before April 1996 (Vol. IV, pp. 13-4).

Respondent asserted the officers repeatedly acknowledged they did not testify in any criminal cases against the dancers.

#### **(ii) Petitioner**

Countering Respondent's contentions of fabrication and targeting, Petitioner pointed out that each officer testified the charges were not fabricated and no one told them to lie. DPD Vice Section Commander Captain Eddie Walt testified vice officers have not been instructed to shut down Respondent, and he is not aware of any present intent by the City to do so. Captain Walt maintained the only businesses targeted for compliance are ones with an exhibited history of violations. (Vol. III, pp. 223-5).

Captain Walt maintained officers are seldom told where to go on a day-to-day basis. He asserted he has no knowledge of officers being told where to go in this case, and he did not instruct the officers under his command to go into Respondent's club in the August - December 1997 time period. (Vol. III, pp. 191-2). He maintained no one has told him that the City council is upset because Respondent and other similar clubs have not moved. (Vol. III, pp. 216-7).

Petitioner cited testimony from officers, stating they work an area to control criminal activity, rather than to target a club, and they were never told to go into Respondent's business or other clubs in the Northwest Highway area. (Vol. I, pp. 140, 185-6, 250).

Petitioner asserted the S.A.F.E. team inspections had nothing to do with City zoning problems or an objection to topless bars, but were focused on the deleterious criminal activity associated with topless bars.

Lieutenant Hughes testified she does not know of anyone who has told officers to lie or fabricate charges, and indicated there could be severe consequences for anyone doing so. (Vol. III, p. 142). Petitioner asserted the officers would be subjected to criminal charges for perjury and falsification of public documents if they lied.

## **b. Scienter**

### **(i) Respondent**

Citing Lee v. City of Newport, an unpublished 1991 Sixth Circuit opinion (cert den'd., 503 U.S. 959), Respondent argued the evidence must show Petitioner knew or should have known that the (alleged) violations occurred, or that it turned a blind eye to the conduct. Respondent maintained the court in Lee held, in the case of a First Amendment protection, the licensee may not be convicted with no other showing than the illegal conduct occurred on its premises. In Lee, one of the licensee's employees was convicted of prostitution. The court struck down a city ordinance upon which the conviction was based.

Citing Texas Alcoholic Beverage Commission v. J. Square Enterprises, 650 S.W. 2d 531 (Tex. App. - 1983, no writ) (finding there was no evidence to satisfy the express statutory requirement that the sale of alcohol to a minor must be knowing) and Irven v. State, 136 S.W.2d 608 (Tex. Crim. App.-- 1940) (declaring the statutory standard "offensive to the public decency" to be unconstitutionally vague), Respondent contended the Texas courts have "effectively extrapolated a scienter requirement" by requiring the evidence to show a TABC license holder knew or should have known of the illegal activity before its license may be canceled.

Respondent contended the evidence failed to show that it knew, should have known, or turned a blind eye to the activity. It argued to the contrary, management has attempted to put controls in place, including zero tolerance for drug use, sign warnings against drink solicitation, and hiring extra personnel to watch the dancers. Respondent cited Lieutenant Hughes' memorandum to the effect there was little abatable activity at Respondent's club.

### **(ii) Petitioner**

Petitioner cited Ex Parte Sheridan, 974 S.W.2d 129, 133 (Tex. App.-- San Antonio 1998, no writ), for a holding that a scienter finding is not necessary to cancel an alcoholic beverage license. The Sheridan court simply looked at the text of the applicable Code provision (making

a false statement on an application) to determine whether a showing of knowledge by the permittee was required.

Citing State v. Houdaille Industries, Inc., 632 S.W.2d 723, 730, (Tex. 1982), Petitioner argued it is legitimate for a statute to hold a licensee liable for violations without proof of knowledge or intent. In that case, the state sought civil penalties against Houdaille for placing shipments with an uncertified carrier in violation of the TEX. REV. CIV. STAT. ANN. art. 911b, the Motor Carrier Act. Reversing the lower court determinations that Houdaille must have had knowledge of the alleged wrong before civil penalties could be imposed, the court cited a number of U. S. Supreme Court cases holding, in a governmental regulatory context, it was appropriate to place the risk of noncompliance on licensees, who have the opportunity of informing themselves, rather than on an innocent and helpless public.

Petitioner argued, in the alternative, that the knowledge of Respondent's employees is imputed to Respondent by statutory law. (It is undisputed that the dancers were Respondent's employees.) Under Section 1.04(11) of the Code, "permittee" is defined as "a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person." Under Section 1.04(16) of the Code, "licensee" is defined as "a person who is the holder of a license provided in this code, or any agent, servant, or employee of that person."

Petitioner also argued the record contains ample evidence to find the scienter requirement was met even if that requirement does apply. It pointed to testimony that the prohibited conduct occurred in a large, open, public area, observable by management. Petitioner cited Respondent's violation history (Ex. 17) to demonstrate gross and uncaring management. It also cited Detective McGee's testimony that he has seen Respondent's management personnel walking around with headsets (Vol. I, pp. 183-4), and Sergeant Busby's testimony indicating another dancer told the dancer he charged with sexual contact that he was observing her (Vol. III, p. 54).

### (iii) Analysis

Respondent's contentions should be rejected.<sup>16</sup> In effect, Respondent's contention is that Section 104.01 of the Code should be declared invalid. The Lee court struck down a city ordinance which, like Section 104.01, authorized disciplinary action on the basis of both the licensee's and the licensee's employees' actions "without any showing that the operator had any control over the conduct of employees or that the operator willfully ignored prohibited activities or otherwise knew of, or should have known of, or condoned illegal conduct on the part of the operator's employees, agents, or servants" (p. 5 of unpublished opinion). However, as previously indicated, it is inappropriate for an agency to declare the statutes it is charged with administering to be unconstitutional. Central Power and Light ; Birdville Independent School District.

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<sup>16</sup> This analysis will not include a discussion of Houdaille and Sheridan because the courts in those cases did not render an opinion concerning Respondent's assertion that the cancellation of a license involving a constitutionally protected activity requires a greater degree of proof.

Moreover, as an unpublished opinion in a foreign jurisdiction, Lee is not binding in a Texas proceeding.

In addition to the above-stated matters, the evidence in this case met the Lee “knew of or should have known of” standards.<sup>17</sup> The court’s ruling in Wishnow III is instructive on the evidence necessary to prove a permittee should have known of prohibited conduct. In that case, a permit was suspended under Section 104.01(2) of the Code (prohibiting a permittee from engaging in or permitting certain conduct, including “the exposure of [a] person or permitting a person to expose his person”). The evidence showed indecent exposure by several patrons and delivery of cocaine on the premises. The permittee contended he “could not see and did not know” of the prohibited conduct. The court stated at pages 409-410 of the decision:

... In the instant case, however, the Commission’s Order was based on statutes which do not affirmatively require a showing of actual knowledge. Case law construing those statutes holds that except in criminal prosecutions, the “knew or should have known” standard is appropriate. [citations omitted.]

Furthermore, the Alcoholic Beverage Code holds a permittee responsible for supervising the premises, and the appellant’s oral testimony at the TABC hearing emphasized the strict control he claims to exert over his establishment and the operation of his business....

...

Finally, appellant admits that Wish’s club is a bar for “swingers” which term, he further admits, refers to mate-sharers or spouse-swappers. The club actually prints and distributes to patrons a statement of this purpose which suggests that “if the concept of swinging offends a person, that person should seek other places for entertainment.” Since the stated purpose of the club is sexually oriented, whether couples are technically intended to meet for on premises sexual contact or simply to arrange for subsequent off premises liaisons, appellant is charged with notice of the potential for the type of sexual activity which was found by the TABC to have occurred. His defense that he did not see the actual acts of exposure complained of is no defense at all.

As for the delivery of cocaine, appellant relies on his lack of actual knowledge ... Appellant has established by his own testimony that he frequently and routinely monitored activity in the parking lot of the club. The individual charged with delivery of cocaine was employed as a “doorman” whose primary duty it was to work the front door and monitor the area adjacent thereto....

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<sup>17</sup> Respondent asserted that the Respondent must have known or “should have known” of the illegal conduct to be held accountable.

...  
We find that there was substantial evidence to support the administrative order....

....  
Much of the evidence in this case is similar to the evidence which caused the Wishnow III court to conclude the permittee should have known of the prohibited activity. Mr. Shaddox emphasized the steps Respondent has taken to monitor its activities, including weekly training meetings with managers and monthly meetings with dancers. He testified that, before it had underage dancer problems, Respondent attempted to make sure the girls were at least 18 by checking drivers' licenses and conducting interviews. He indicated Respondent keeps a book which shows each state's drivers license. (Vol. IV, pp. 53-6, 60).

Mr. Shaddox testified Respondent had meetings with its managers to establish policies and tighten up procedures after the 1994 lewd dancing problems. He indicated the management staff was increased for heightened monitoring. He said, under the club's policy, a dancer receives one warning for inappropriate dancing; if she does it again, she is fired. (Vol. IV, pp. 57-8).

Mr. Shaddox asserted the club has a long-standing policy against drink solicitation; it has placed a sign on its wall reminding its employees of this (Ex. 99). He maintained none of Respondent's customers has ever killed someone in a drunk-driving accident. He asserted, when Respondent notices patrons are inebriated, they are asked to leave. He indicated, at times, Respondent has called a cab for drunken patrons. According to Mr. Shaddox, an alcoholic beverage certificate is required for all of Respondent's employees who come into contact with customers, with the exception of the dancers. He testified Respondent has a zero tolerance policy for drug use. (Vol. IV, pp. 58-61, 64).

Mr. Shaddox stated his belief that Respondent's management staff does a good job policing the business. (Vol. IV, p. 74).

There are other similarities to Wishnow III. The sexual contact, prostitution, and drink-solicitation charges against Respondent relate to the explicit purposes of its business, sexual orientation and the sale of alcohol. Moreover, management was aware that dancers performed table dances wearing very little clothing. It was aware of and permitted patrons to buy drinks for dancers. On the basis of Wishnow III, Respondent is charged with notice of the potential for sexual contact, prostitution, and drink solicitation.

The evidence that Respondent should have known that the underage girls were not 18 is even stronger. Mr. Shaddox testified, in effect, that the manager who hired the girls was negligent because he did not conduct a proper interview before employing them.

Based on the matters stated above and on the court's analysis in Wishnow III, the evidence shows Respondent should have known of the violations. As in Wishnow III, any assertion by Respondent that it did not actually see the acts is no defense at all.

Other evidence (which is discussed more fully below) strengthens the above-stated conclusion. There was undisputed evidence that the violations occurred in a large, open room observable by management. In Sergeant Busby's case, the offending dancer was actually warned by another club employee (a dancer) that he was observing her. In at least two of the drink-solicitation cases, involving Kimberly Rumph and Paula Cornell, the waitress was standing at the table when the dancer solicited the drink.

An additional comparison between Lee and this case is useful. The Lee court emphasized the licensee's uncontradicted testimony that she was not aware of the prostitution. Mr. Shaddox was the only representative of Respondent to testify. None of the dancers testified. Mr. Shaddox never said Respondent did not know of any prohibited activity. To the contrary, when Respondent's attorney asked him if he thought the charges were fabricated, he said they were "fabricated or greatly exaggerated." (Vol. IV, p. 84). When asked by the Court whether he thought Sergeant Busby was lying about the case he made, Mr. Shaddox testified he did not think so. (Vol. IV, p. 86).

## 2. Specific Charges

### a. Sexual Contact

The Notice of Hearing alleged 32 separate instances of dancers at Respondent's club knowingly engaging in one or more acts of sexual contact, with the intent to arouse or gratify the sexual desires of a person. The notice stated this conduct violated Section 104.01(6) of the Code (providing that no person authorized to sell beer at retail, nor his agent, servant, or employee may permit lewd or vulgar entertainment or acts on the premises); the notice referred to 16 Tex. Admin. Code § 35.41, which defined lewd or vulgar acts to include sexual offenses under Chapter 21 of the Penal Code. Section 21.01(2) of the Penal Code defines sexual contact as touching the anus, breast, or any part of the genitals of another person with the intent to arouse or gratify the sexual desire of any person. Section 21.07(a)(3) of the Penal Code makes it an offense for a person to knowingly engage in an act of sexual contact in a public place, or if not in a public place, for the actor to be reckless about whether another person who is present will be offended by the act.

#### (i) Contentions Applicable to All Sexual Contact Charges

##### (-a-) Petitioner

Petitioner emphasized the disjunctive nature of Section 21.07(a)(3) of the Penal Code, which requires the dancer either to have intended to arouse or gratify the sexual desires of any person or to have been reckless about whether another person who was present would be offended or alarmed by the sexual contact. Petitioner asserted one or both of these requirements were

satisfied by the following evidence: the contact was so prevalent that it was routine, like an assembly line; the dancers stripped down to sexually provocative clothing during the dances; some dancers made sexually provocative comments to the officers; the contact occurred in a large, open, public place, that was observable by patrons and management; patrons and employees were encouraged to consume alcoholic beverages; the dancers simulated varying methods of sexual intercourse; and the dancers rubbed their bare breasts into the officers' faces. Petitioner pointed out the officers testified to the intentional and reckless nature of the dancers' actions. It contended, even without that testimony, there was abundant evidence from which the trier of fact could conclude that the statutory requirements were met.

Petitioner tendered numerous certified copies of *nolo contendere* pleas in which dancers pled "no contest" to Class A misdemeanor charges against them for public lewdness. The ALJ sustained Respondent's objections to the pleas, but stated he would review that ruling on the basis of any case law submitted in posthearing briefs to show the pleas were probative to prove the dancers engaged in sexual contact. Petitioner contended in its brief that the pleas could be used for the limited purposes of impeachment.

#### **(-b-) Respondent**

Respondent argued that the ALJ's rulings on the *nolo contendere* pleas, on the basis of Rule 803(22) of the Texas Rules of Evidence, were correct. That rule states the following as an exception to the hearsay rule:

**(22) Judgment of Previous Conviction.** In civil cases, evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), judging a person guilty of a felony, to prove any fact essential to sustain a judgment of conviction. . . .

Citing Rule 609 of the Texas Rules of Evidence, Respondent pointed out a witness could be impeached only by evidence of a felony or a crime involving moral turpitude. According to Respondent, the dancers were not convicted of felonies or of crimes involving moral turpitude. It pointed out Petitioner was not attempting to impeach the dancers' testimony (they did not testify), but was tendering the pleas as independent evidence to prove they engaged in the acts alleged.

#### **(-c-) Analysis Relating to *Nolo Contendere* Pleas**

The *nolo contendere* pleas cannot be used to prove the dancers committed lewd conduct (the criminal offense charged). (This is also true of a misdemeanor guilty plea in one case.) TEX. R. CIV. EVID. § 803(22). The authors in the Texas Practice series on evidence stated:

.... As explained by the federal Advisory Committee: "Practical considerations require the exclusion of convictions of minor offenses, not because the

administration of justice at its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent.”<sup>18</sup>

The authors also stated a guilty plea should not come into evidence as an admission under Rule 801(e)(1)(A) or as a declaration against interest under Rule 803(24) if it would not be admissible under Rule 803(22).

The pleas cannot be admitted as impeachment evidence because they were not offered for that purpose.

## (ii) Case Filed by Sergeant Busby

### (-a-) Testimony and Contentions

Sergeant Busby testified he went to Respondent’s club on February 20, 1998, at which time he saw an instance of sexual contact. He maintained he observed Chastity Rodriguez perform a dance for a patron, during which she rubbed her head against his genital area while he was sitting with his legs spread open; she then straddled him and rubbed her genital area against his, going “up and down,” simulating sexual intercourse; the final sexual contact occurred when she turned around and started grinding her buttocks against his genital area. He maintained there was actual contact between the dancer’s body and the patron’s genital area. He stated his belief that the actions appeared to be deliberate. He asserted she was wearing a white G-string and nothing else (Vol. III, pp. 53-8). He indicated another dancer walked over to Ms. Rodriguez while he was observing her and said something to her; after that, she looked at him and did not touch the patron again. (Vol. III, p. 54).

Sergeant Busby stated his opinion that Ms. Rodriguez intended to arouse the patron sexually or provide him with sexual gratification. He indicated he thought she acted recklessly because the acts occurred in an open room observable by other patrons, who could have been offended by what happened. He asserted he was offended by what she did. (Vol. III, pp. 56-7). He testified that no one from the City or DPD asked him to fabricate the charges, and stated the lower levels of TABC have not received directives to target Respondent for any reason. (Vol. III, pp. 58, 73-4).

Sergeant Busby testified further that: he did not see any other lewd dancing while he was there (Vol. III, p. 58); he was not there in an undercover capacity, but does not recall whether he was displaying his badge (Vol. III, pp. 54-5); he has personally given warnings to Respondent, and, at times, has just talked to management without issuing warnings (Vol. III, p. 60); and he could not recall seeing a business with as many violations as Respondent has (Vol. III, p. 1; Ex. 17).

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<sup>18</sup> 2 Steven Goode et al., Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal § 803.27 (2d ed. 1993).

Sergeant Busby testified the patron was identified and released. He maintained he did not see the patron commit any violations (his touching her rather than vice versa). (Vol. III, pp. 58-9).

Respondent pointed out that Sergeant Busby acknowledged he was about 15 feet away from Ms. Rodriguez and the patron when he said he saw the sexual contact. (Vol. III, p. 88), and that he did not file criminal charges against the dancer. It questioned whether he was certain about whether there was actual contact.

**(-b-) Analysis**

The charge filed by Sergeant Busby was clearly proved by a preponderance of the evidence. The fact he was 15 feet away from the incident did not discredit his testimony because he indicated he could observe from that distance and he was positive about what he saw. Respondent's attempts to show DPD had targeted it did not apply to Sergeant Busby's testimony. Mr. Shaddox' testimony that he did not dispute the incident (Vol. IV, p. 86) lent credence to Sergeant Busby's testimony.

**(iii) Cases Filed by Detectives Michael McGee, James Craig Dewees, and Robert Gutkowski**

**(-a-) Petitioner's Evidence and Contentions**

Most of the cases filed were from Detectives McGee, Dewees and Gutkowski, who in most of the cases, worked together in a pair or threesome. All of their cases concerned incidents of sexual contact. As argued by Respondent, most of the reports described virtually the same actions by the dancers. They stated the dancer was dancing on stage, reached out her hand to be helped to the floor, danced for the detective, rubbed her breasts in the detective's face, and turned around and sat on the detective's lap while grinding her genitals or vagina into his genital area, simulating sexual intercourse. The reports stated the acts were committed with the intent to arouse or gratify the sexual desire of a person, in a public place, and the dancer was reckless about whether another person was present who could be offended by her actions.<sup>19</sup>

The following reports on different dancers at different dates contained the description outlined above: Detective Dewees' reports of September 25, 1997, on Shannon McDaniel (Ex. 26), Tanya Dawn Allen (Ex. 27), and Kristen Marie Pruitt (Ex. 28); of October 16, 1997, on Ashley Elizabeth Novak (Ex. 29), Carolyn Marie Sellers (Ex. 24), and Tanya Dawn Allen (Ex. 25); and of December 11, 1997, on Terri Braly (Ex. 22), and Dawn Marie Truitt (Ex. 23); Detective Gutkowski's reports of June 3, 1998, on Joy Lynn Wiggins (Ex. 30) and Carolyn Marie

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<sup>19</sup> Although parts of the officers' reports were vigorously objected to, the detectives provided unobjected testimony that the contents of the reports were true before the report was ever tendered into evidence and objected to. After the reports were received into evidence, the detectives gave unobjected testimony which restated the matters contained in the reports.

Sellers (Ex. 31); of December 11, 1997, on Jeanna Elizabeth Hudgens (Ex. 34); of October 16, 1997, on Rejha Daryanani (Ex. 35), Mary Elevyn Halstead (Ex. 36), Ashley Elizabeth Novak (Ex. 37), and two reports on Leigh Ann Zacha (Exs. 8 and 38);<sup>20</sup> and Detective McGee's reports of December 11, 1997, on Kathleen EATINGER (Ex. 2); of October 16, 1997, on Tawnya Redd (Ex. 7) and Carolyn Marie Sellers (Ex. 10), and of September 25, 1997, on Shannon L. McDaniel (Ex. 12).

Detective Gutkowski's December 11, 1997, reports on Maria Villa (Ex. 32) and Diana Lynn Hoffman (Ex. 33) described the same pattern, except they did not say the dancer reached out her hand to be helped off the stage. Detective McGee's report of October 16, 1997, on Chastity A. Rodriguez (Ex. 9) described the same conduct with two exceptions: it did not state the dancer was helped off the stage and did state she rubbed her head into the detective's genital area. Detective McGee's report of December 11, 1997, on Brandy Michelle Sellers (Ex. 4) stated she reached out her hand to be helped off the stage; during a dance placed her foot in the detective's crotch and rubbed his genital area; and turned towards (rather than away from) the detective, sat in his lap and began grinding her genital area into his genital area, simulating sexual intercourse. Detective McGee's December 11, 1997, report on Lisa D'Ann Roberts (Ex. 5) stated she reached out with her hand to be helped off the stage, kneeled in front of the detective during a dance and placed her head in his lap, and rubbed his genital area through his clothing and gently bit his genital area; she then turned her back to him, sat in his lap, and began grinding her genital area into his genital area, simulating sexual intercourse.

Testimony from Detectives Dewees, Gutkowski, and McGee concerning the violations was essentially the same as their reports. This was also true of testimony from all the other officers who made sexual contact charges. They testified generally that the sexual contact occurred in an open room which was a public place, and no one at the City or DPD told them to fabricate their reports or go into Respondent's club. On some, but not all of the charges, they stated they could see similar conduct by the same or other dancers while they were there. On many charges, they testified the acts should have been observable to management because they happened in an open area. They testified generally that they were not trying to harass Respondent and preferred compliance to filing disciplinary cases. They often asserted the sexual contact appeared to be part of a routine or pattern.

#### **(-b-) Respondent's Evidence and Contentions**

In addition to its assertions that none of the DPD cases were credible, Respondent attacked the Dewees, Gutkowski, and McGee charges in particular. Noting that DPD reports are required to be factually specific (Vol. II p. 52), it asserted strongly that it is not credible for so many incidents of sexual contact to be exactly the same.

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<sup>20</sup> Detective Gutkowski filed reports describing a dance by Ms. Zacha for both him and Detective McGee on October 16, 1997 (Exs. 8 and 38).

Respondent questioned Detective Dewees' testimony that he never read reports by Detectives Gutkowski and McGee (Vol. I, pp. 300-1), in light of the fact that many of the reports are virtually identical. It emphasized the sameness of the reports by pointing out that Detective Gutkowski was able to prepare a report (Ex. 35) based on what Detective McGee observed. (Vol. II, p. 26).

Respondent pointed to Mr. Shaddox' testimony stating that dancers must go through a three-stage rotation before leaving to do a table dance. According to Mr. Shaddox, if a dancer left before a rotation was over, a manager would ask her to return to the stage immediately; after that, management would admonish her about leaving the stage before their rotation was finished. (Vol. IV, pp. 76-7). Respondent contrasted this with the officers' repeated testimony that the dancers left the stages to do table dances for individual patrons.

Respondent strongly emphasized the speed with which these detectives made numerous charges. As can be seen from the reports, the charges by Detectives Dewees, Gutkowski, and McGee were on four days, September 25, 1997, October 16, 1997; December 11, 1997, and June 3, 1998. The four September 25, 1997, offenses are shown to have occurred between 10:25 p.m. and 11:40 p.m. (Exs. 12 and 26-28). The 10 October 16, 1999, offenses were shown to have occurred between 10:55 p.m. and 11:35 p.m. (Exs. 8-10, 24, 25, 29, and 35-8). The five offenses reported by Detective Dewees for December 11, 1997, were shown to have occurred between 2:30 p.m. and 3:05 p.m. (Exs. 2, 4, 5, 22 and 23). The three offenses reported by Detective Gutkowski for December 11, 1997, were shown to have occurred at about 5:00 p.m. (Exs. 32-34). The two offenses reported by Detective Gutkowski on June 3, 1998, occurred at 2:40 p.m. and 2:50 p.m.

Respondent cited certain testimony from all three officers, including the following. Detective McGee: he did not take into account where the lewd conduct occurred (that it would be less offensive at a topless bar than at a mall); he has never been in The Men's Club and has been in Cabaret Royale one time; his normal assignment is to work prostitution and sometimes gambling; he was not assigned to go into Respondent's club; he did not ticket management for the lewd conduct charges; it is not his function to contact management to tell them they had a problem; and he did not write tickets charging the patrons (Vol. I, pp. 131-7, 143, 150-1, 154, 175, 191). Detective Gutkowski: he is not aware of any reason for going to Respondent's club; and he acknowledged a dancer might not realize her conduct was offensive to patrons (Vol. I, pp. 42, 46). Detective Dewees testified his primary assignment is prostitution, but acknowledged he did not wait at Respondent's club to see if he could make that charge. (Vol. I, pp. 296, 304).

#### (-c-) Analysis

This cases are too similar to be credible. It is not believable that so many cases over a period of several months would be almost identical. Any argument that the dancers were just following a set routine was disproved by reports from other officers (to be discussed below) which showed some variation in the dances. The officers' testimony in the great majority of the cases, that the dancers reached out to be helped down from the stage, also casts doubt on their

testimony. Mr. Shaddox testified that the dancers were not permitted to leave the stage and would get into trouble for doing so. No other officer testified he helped a dancer off the stage.

(iv) **Cases Filed by Detectives Timothy Prokoff, Don Waterson, and Daniel S. Town**

Working together, Detectives Prokoff, Waterson, and Town filed four sexual contact cases on September 5 and 6, 1997.

(-a-) **Detective Town**

Detective Town's testimony and first report indicated the following. He went into Respondent's club at about 10:40 or 10:45 p.m. on September 5, 1997. At about 11:00 p.m., a dancer named Katherine Olmstead approached him and Detective Prokof and asked "Who wants a nasty dance?" Detective Town said "Okay". Ms. Olmstead was wearing a pink mini-dress and introduced herself as "Katherine." She straddled his chair and began dancing. She ground and thrust her clothed buttocks and vagina against his clothed genitals while she faced towards him; she then did the same thing facing away from him. Her actions simulated sexual intercourse. While facing away from him, she repeatedly bent forward, reached back between her legs and squeezed his clothed genitals with her hand. She continued this for several minutes with the intent to sexually arouse him. The sexual contact occurred in front of other detectives and several patrons who could have plainly seen the conduct. He believes she acted recklessly by engaging in sexual contact in front of numerous patrons who could see what was happening. The contact occurred in a large room which was open to the public. Management could have observed what was going on. He did not fabricate the report. No one from the City or DPD told him to do so. (Ex. 20; Vol. I, pp. 263-4).

Detective Town's testimony and second report indicated the following. At about 11:50 p.m. on September 5, 1997, a dancer named Camile Danimal asked him if he was ready to "get molested," and he said "sure." She was wearing a leopard skin dress and said her stage name was "Cha Cha." She performed a table dance for him, began rubbing his chest and thrust her buttocks in an up and down motion against his clothed genitals, while she was facing him; she then turned away from him and did the same thing; she was simulating sexual intercourse. In his opinion, she intended to arouse him. He believes she acted recklessly by what she said to him and because others were present who could see what was going on and could have been offended. He saw her engage in similar conduct with other patrons. It is possible management could have seen what was going on; there was nothing to obstruct its vision. No one at the City or DPD told him to fabricate his story. He was not targeting Respondent's club for selective enforcement; no one told him to go there. The visit was self-initiated. He has written up other topless clubs for violations. (Vol. I, pp. 239-51, 58; Ex. 19). He stated. "I would never file a case that wasn't absolutely clearly public lewdness. I would never file a marginal case. . . ." (Vol. I, p. 254).

Detective Town testified he has been in Respondent's club "maybe four or five times" over a period of six years; the reason he was there so often in the fall of 1997 was a self-initiated investigation; he acknowledged he did not write a ticket for the club. He agreed that what might be offensive in a setting outside the club might not be offensive to patrons in the club. He agreed that another officer might disagree with him on whether a violation occurred, and discretion can play a role in a determination of when to file a complaint. (Vol. I, pp. 249-54).

Respondent pointed to testimony from Detective Town agreeing that in his reports, the two dancers performed similar acts. (Detective Town asserted the dances were similar, up to a point). (Vol. I, p. 262). Respondent contended Detective Town's statements that his reports, saying one dancer asked if he wanted to get molested and another whether he wanted a nasty dance, constituted boiler plate language. It cited his testimony saying only that it was possible that management could have known what was occurring. (Vol. I, p. 241). It emphasized the fact that he did not make cases involving customers. (Vol. II, pp. 258, 260).

**(-b-) Detective Prokof**

Detective Prokof's testimony and report showed the following. At about 11:50 p.m., after dancing on the main and side stages, Paula Elaine Shelton approached him and asked if she could perform a table dance for him. He agreed. During the dance, she rubbed her buttocks, breasts, and head against his genitals through his short pants. She also turned and faced away from him and rubbed her buttocks into his genital area, simulating sexual intercourse. At the end of the dance, she brushed the back of her hands against his genitals. During a second dance, she rubbed her buttocks and breasts against his genitals and then grabbed his penis through his short pants and began squeezing and rubbing it with her right hand. In his opinion, the sexual contact was knowing, and done with the intent to arouse or gratify his sexual desire. It occurred in a public place where others could see and be offended by the conduct. Management could have observed what was going on. She was wearing a G-string only. He does not remember her dancing for anyone else before him, but did remember seeing other dancers performing similar dances. No one at the City or DPD told him to fabricate his charges; he could be suspended or terminated for doing so. (Vol. III, pp. 9-16; Ex. 59).

Respondent pointed to testimony from Detective Prokof that in a lewd dancing case against Kelly Ann Miller,<sup>21</sup> the police report was similar to this case in that it stated he was wearing short pants, and that she grabbed his genitalia during the second dance. Detective Prokof agreed that Detective Town had also stated his genitals were grabbed the same night during the second dance. (Vol. III, p. 42).

Respondent pointed out he did not file a charge against Respondent's management on these charges.

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<sup>21</sup> This case was included in the Notice of Hearing, but Petitioner withdrew it.

### **(-c-) Detective Waterson**

Detective Waterson's testimony and report indicated the following. He was in Respondent's club on September 5, 1997, and the early morning of September 6, 1997. At about 12:30 a.m., a dancer named Jill Charties<sup>22</sup> performed a table dance, during which she ground her buttocks into his crotch area. She did so in a large room which was a public place with reckless disregard for whether another person who was present might be offended. Other persons could have observed the contact, and Respondent's management should have been able to see it as well. He saw her before and after the dance doing the same type of dance for others. In his opinion, she was "working the crowd". Most of the other girls were doing the same types of dances. He believed she was trying to sexually arouse him. No one told him to fabricate his story and he did not do so; he believes he would be terminated if he lied. He was not targeting Respondent's club on this date. He has performed other investigations in topless bars not located on Northwest Highway. (Vol. III, pp. 208-15; Ex. 18).

Detective Waterson acknowledged he normally does not go into topless bars unless there is a complaint. He indicated he was at the club for about 45 minutes or an hour before the incident occurred. (Vol. I, pp. 216-7, 219, 221).

### **(-d-) Analysis**

These cases were proved by a preponderance of the evidence. Unlike the cases filed by Detectives Gutkowski, Dewees and McGee, each case varies from the others in significant ways. The fact there were some similarities is not surprising since it would not be plausible for each dance to be completely unique. The officers made four cases in about an hour and a half, rather than numerous cases in a short time like the previously discussed DPD cases.

Respondent made much of the fact that Detective Town's report contained the "nasty dance" and "get molested" comments. Reports from almost all the other officers did not include those comments. However, Detective Martin's report (discussed below) also indicated a suggestive invitation from Ms. Danimal ("come play with me"). His report is corroborative of Detective Town's report. Moreover, Detective Town's reports concerning the facts surrounding the sexual contact generally went into more detail than those of the other officers. In both of his cases, Detective Town specifically described what each dancer was wearing and gave Ms. Danimal's stage name. It seems implausible that he would include matters in his report that could be easily disproved if he was trying to fabricate.

In connection with these and subsequent charges, it is important to discuss Respondent's strong assertions that the City was targeting it for enforcement. Even if that charge is assumed to be true, the assumption does not necessarily mean an individual officer fabricated a particular

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<sup>22</sup> Ms. Chartres' name is spelled Chartres and Charties in the reports.

charge. The record showed that lying and fabricating reports are very serious criminal offenses. To simply assume that *every* officer committed those offenses because the City was hostile to Class A dance halls is not realistic. As previously indicated, Respondent failed to call any dancer to the stand and produced no evidence relating to the specific facts of a particular charge. Based on those considerations, this Proposal does not find that Respondent's charges of widespread fabrication and lying were persuasive.

**(v) Detectives Doyle Furr, Mike Mendez, and Charles Avery**

These charges were made by Detectives Furr and Mendez or Furr and Avery working together.

**(-a-) Detective Doyle Furr**

Detective Furr's report and testimony concerning sexual contact indicated the following. He and Detective Avery entered Respondent's club at about 10:00 p.m. on August 27, 1997. At about 11:00 p.m., Jilly Chartres approached him, and after soliciting a drink (to be discussed below), she performed a table dance during which she took off her mini-dress and exposed her bare breasts, rubbed her breasts in his face, slid down and rubbed her breasts into his genital area, and softly bit his genital area. While she was getting dressed, she reached down and rubbed his genitals through his clothing. In his opinion, she knowingly engaged in an act of sexual contact with the intent to arouse the sexual desire of a person in a public place. He believed someone could be offended by what they saw. No one at the City or DPD told him to fabricate the charges. She was wearing a "T-back" or G-string. (Vol. II, pp. 128-33; Ex. 45).

Detective Furr testified he was sitting on a chair as high or higher than a barstool, i. e., about 36 to 40 inches high. He thought Ms. Chartres' height was "five something." (Vol. II, pp. 133-6). Respondent contended it was not physically possible for Ms. Chartres to grind her buttocks onto Detective Furr's groin while he was sitting on a chair that high. Detective Furr acknowledged he did not see any lewd dancing on December 26, 1997. (Vol. II, p. 115).

**(-b-) Detective Charles Avery**

Detective Avery's testimony and report indicated the following. He and Detective Furr were at Respondent's club at about 11:00 p.m. on August 27, 1997. After dancing topless on several stages, Christina Louise Tarrazas approached him and asked if he would like a table dance. She performed four dances, during which she sat on his lap and rubbed her buttocks against his genitals. She also rubbed her knees and the back of her head against his genitals. Her actions did not appear to be accidental. During the second dance, she sat on his lap facing him, and repeatedly rubbed her vagina against his genitals. The contact occurred in a public place. In his opinion, she touched him with the intent to arouse and gratify his sexual desires or the sexual desires of other patrons. Her actions were reckless because they could have been offensive to other patrons. The contact occurred in an open, public place. He did not see her make sexual contact with others. He noticed there were other dances going on, but he could not

see the sexual contact. No one told him to fabricate his story or to lie. No one told him to go to Respondent's club or tell him it was their objective to shut the club down. (Vol. II, pp. 165-71; Ex.49).

Respondent pointed out Detective Avery's report matches Detective Furr's in that they were both on barstools.

**(-c-) Detective M. A. Mendez**

Detective Mendez' testimony and report showed the following. He and Detective Furr entered Respondent's club at about 11:00 p.m. on December 26, 1997. At about 11:40 p.m., Estella Rena Ramirez approached him and asked to do a table dance for him. He agreed. While dancing, she rubbed her buttocks on his crotch, simulating sexual intercourse. She was wearing a "T-back". She touched his crotch and grabbed his penis through his jeans. She simulated oral intercourse by placing her head in his crotch area and moving her head up and down while touching his crotch with her face. In his opinion, she was trying to sexually arouse him and anyone else who was watching. She was acting recklessly because anyone observing her actions could have been offended. The contact occurred in a public place and open area. Management could have seen what was happening. An individual who identified himself as the owner talked with him after the incident. Ms. Mendez was performing similar dances before his dance. Other dancers were also making sexual contact that night. No one told him to fabricate the charges or to lie. (Vol. II, pp. 147-53; Ex. 48).

Detective Mendez testified he was sitting at the high barstool that night. He acknowledged the acts of the dancer Detective Furr had testified about were similar to this incident in that the dancer rubbed against him and put her head between his legs. (Vol. II, p. 161). Respondent questioned the possibility of a relatively short female rubbing her buttocks against a person sitting on a barstool.

**(-d-) Analysis**

These charges were proved by a preponderance of the evidence. These cases did not involve numerous similar charges over a short period of time. There were unique aspects to each charge. On August 27, 1997, the officers made two charges after being at the club for about an hour. One charge was made on December 26, 1997, after about 40 minutes.

Respondent argued it was physically impossible for the dancers to grind their buttocks into the officers' groins because they were on barstools. However, Detective Furr did not allege that activity. Detective Avery testified that Ms. Tarrazas sat in his lap. Detective Mendez testified Ms. Ramirez was "basically just sitting on my - almost on my lap, but trying to - I had my legs spread open and she continuously tried to grind her buttocks into my crotch area." (Vol. II, p. 148). The record did not show how tall Ms. Ramirez was, whether she wore shoes, or exactly how high the barstool was. Although a fuller explanation of how Ms. Ramirez rubbed her

buttocks into Detective Mendez' groin would have been preferable, the mere fact he sat on the barstool was not sufficient to discredit his testimony.

(vi) **Detective Warren R. Martin**

(-a-) **Evidence and Contentions**

Detective Martin's report and testimony indicated the following. He and Detective S. W. Wright entered Respondent's club at about 11:45 p.m. on February 5, 1998. About 15 minutes later, he was approached by a dancer named Camille Danimal who said her name was "Sugar Lips;" she said "come play with me." She performed a dance, during which she rubbed the top of her head and face into his genital area. She was wearing a G-string only. The contact occurred in a large open area that was a public place. In his opinion, the contact was made with the intent to arouse sexual desire. He believed she acted recklessly because it occurred in a public place. As soon as she left him, she went to a man next to him and performed the same dance. It seemed to be a pattern. He did not see sexual contact by other dancers. In his opinion, management could have seen what happened. (Vol. II, pp. 286-91; Ex. 55).

Detective Martin testified further as follows. He has been into Respondent's club before, but has not made cases. He conceded the dance did not sexually arouse him and is not sure whether others were sexually aroused. (Vol. II, p. 292-4). He maintained he has not reviewed other officers' reports where the dancer asked questions like "come play with me." (Vol. II, p. 301). He and his partner both made a case within about 30 minutes. (Vol. II, p. 303).

(-b-) **Analysis**

This charge was proved by a preponderance of the evidence. Detective Martin made a single charge. Detective Martin's description of Ms. Danimal's suggestive invitation is similar to Detective Furr's report on the same dancer. The two reports corroborate each other.

**b. Underage Girls Working as Topless Dancers**

The Notice of Hearing alleged Respondent or its employee, agent, or servant, permitted, employed, authorized, or induced two children, Amy Pintor and Candace Takits, to work topless on the licensed premises in violation of Sections 43.251 of the Penal Code, § 11.61(b)(2) and (7) and 104.01 of the Code and 16 Tex. Admin. Code §§ 35.31(b)(10) and 35.41(a).

Section 104.01 of the Code provides that no person authorized to sell beer at retail, nor his agent, servant, or employee may engage in or permit conduct on the premises which is lewd, immoral, or offensive to the public decency. Rule 35.31(b)(10) states any violation of law on the premises that had a detrimental effect on the general welfare, health, peace, and safety of the people is sufficient grounds to suspend or cancel a permit under Section 11.61(b)(7) of the Code. Rule 35.41 defines lewd acts to include public indecency offenses specified in Chapter 43 of the Penal Code. Paragraphs 2 and 7 of Section 11.61(b) of the Code provide, respectively, that the

TABC may suspend or cancel a license if a permittee violates a provision of the Code or a rule, or if the place or manner in which the permittee conducts its business warrants the cancellation or suspension of a permit based on the general welfare, health, peace, morals, and safety of the people and the public sense of decency. Section 43.251 of the Penal Code states a person commits an offense if the person employs a child in a sexually oriented business or any business permitting, requesting, or requiring a child to work nude or topless; the statute defines "child" to mean a person under 18 years of age.

(i) Evidence and Contentions

(-a-) Officer Ligenza

DPD Officer Victoria Ligenza testified as follows. On March 22, 1998, she received a call from officers at Respondent's club requesting her assistance. She found two juveniles, Amy Pintor and Candace Takits, working at the club as topless dancers. Candace Takits was 14 years old and Amy Pintor was 16. She said the girls looked their ages. They told her they danced there. There is only topless dancing at the club. They showed her the identification (ID) they used to secure employment. She deals with a lot of runaways and prostitutes on the street. She has a very good record in catching juveniles trying to pass themselves off as adults. (Vol. II, pp. 177-97). She has not focused her investigation on Respondent or other topless bars along the Northwest Highway. No one told her to fabricate her reports. (Vol. II, pp. 243-4).

Officer Ligenza testified further as follows. Respondent's management personnel stated they thought one girl might possibly not be of age, but her ID checked out. Officer Ligenza challenged management on its assertion because her eye color and height did not match her ID. Looking at the picture on one of the IDs, she could tell it was not the same girl. (Vol. II, pp. 197-9).

Petitioner contended these are the most shocking and disconcerting charges in this proceeding. It asserted these violations alone are sufficient to justify a cancellation of Respondent's permits.

Officer Ligenza agreed the City would like for Respondent and several other Class A dance halls to have SOB licenses to operate. She acknowledged the City wants Respondent and similar businesses to close at their current locations. She acknowledged she has not made a prostitution case at Respondent's club. She testified she thought she had been in Cabaret Royale and The Men's Club more than one time, but cannot remember how many. (Vol. II, pp. 204, 238, 245-7, 253).

Respondent contended certain additional evidence was significant, including the following. She performs bar checks, but has never been into other bars at Pappasito's restaurant, Pappadeux's restaurant, Embassy Suites Hotels, or the Cottage Lounge across the street from Respondent's clubs. She has gone into topless clubs with paddy wagons. The police park their cars in front of clubs' entrances. She does not recall filing any TABC bar check cases against

Respondent. She acknowledged Respondent had a copy of the girls' drivers licenses and IDs on file. (Vol. II, pp. 206-12, 17)

**(-b-) Detective Michael Woodbury**

Detective Woodbury testified as follows. He went to Respondent's club on March 22, 1998, in response to a call for police at that location. He identified one girl who was underage. It later turned out there were two underage girls there; they took them both home. The girls names were Amy Pintor and Candace Takits. They admitted they were dancers. The door to their dressing room was open when he was there. He saw them in the dressing room without tops and wearing G-strings. Although management personnel stated the IDs the girls gave them appeared valid, the pictures on the IDs did not look like the girls. (Vol. II, pp. 255-7, 60, 63, 81).

Detective Woodbury testified the girls did not appear at first to have a youthful appearance (younger than 17, 18, or 19), but as he talked to them, he could see they were young by their mannerisms and speech. He talked to them at least 30 minutes and maybe longer. (Vol. II, pp. 264-6, 79).

Detective Woodbury acknowledged he has not heard of Respondent having a problem with underage dancers before. He has not seen other dancers at Respondent's club that appeared to be underage. He agreed that Officer Ligenza is responsible for watching and monitoring the Northwest Highway clubs (Vol. II, pp. 267-8, 75).

**(-c-) Ron Shaddox**

Mr. Shaddox testified as follows. The manager who hired the girls was terminated. Prior to this incident, Respondent's practice was to look at the girls' IDs and interview them. The manager in this case did not properly interview the girls. They have now instituted a new policy whereby each girl is thoroughly interviewed, their ID is photographed, and they are required to sign their names under their driver's licenses. Their signature will generally trip them up if it is false; this has worked for the club several times. Respondent never had a problem in the past with underage dancers. (Vol. IV, pp. 53-6).

Respondent contended there was a glaring contradiction between Officer Ligenza's and Detective Woodbury's testimony. It asserted Detective Woodbury said the girls looked of age. It also pointed to Detective Woodbury's testimony that he has not known of Respondent previously having problems with underage dancers. It noted the following additional matters: no criminal charges were filed in this case, corrective measures were taken by Respondent, and Officer Ligenza watches topless dance halls and has never had a problem with prostitution at Respondent's club. (Vol. II, p. 238).

**(-d-) Analysis**

This charge was clearly proved. As can be seen from Mr. Shaddox' testimony, it was not even denied. The only issue in this case, was whether Respondent should have known the girl were underage. Both officers testified they appeared underage. Officer Ligenza testified she immediately thought so. Officer Woodbury could tell after talking to them. Both officers testified that at least one girl's ID did not match her appearance. Mr. Shaddox testified the manager was negligent in hiring the girls. The evidence clearly showed Respondent should have known of the violation.<sup>23</sup>

**c. Drink Solicitation**

The Notice of Hearing alleged that on five separate occasions, dancers at Respondent's clubs solicited officers to buy them alcoholic beverages in violation of Section 104.01(4) of the Code, thereby warranting the suspension or cancellation of its permits under Section 11.61(b)(2) of the Code. Section 104.01(4) states no person authorized to sell beer at retail, nor his agent, servant or employee may engage in or permit the solicitation of any person to buy drinks for consumption by the retailer or any of its employees. Section 11.61(b)(2) provides that TABC may suspend for not more than 60 days or cancel the permit of any permittee found to have violated a provision of the Code or TABC rules.

**(i) Evidence Generally Applicable to All Cases**

Mr. Shaddox testified it is strictly against Respondent's rules for the dancers to solicit drinks. He testified the club has a sign posted on one of its walls informing its dancers and other employees that they are prohibited from asking a customer to buy them drinks. The sign states the dancers may accept a drink if offered. He maintained the dancers do not get a kickback for soliciting drinks. (Vol. IV, pp. 65, 73; Ex. 99).

**(ii) Detective Prokof**

Detective Prokof's testimony and report indicated the following. At about 12:15 a.m., on August 16, 1997, he and Detective Tremain entered Respondent's club. A dancer named Kelly Holmes approached him and asked him to buy her a "shot" of tequila. He purchased the tequila from a waitress for \$5.75. He was sitting with another dancer named Kelly Miller at the time;

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<sup>23</sup> The underage dancer charges were based on Section 11.61(b)(7) of the Code in addition to other provisions. Section 11.61(b)(7) authorizes TABC to cancel or suspend a permit based on the following finding:

the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

The Wishnow III court determined, at page 408, that this provision is not unconstitutionally vague.

she and Ms. Holmes were good friends. The request and purchase occurred in an open area accessible to the public and other patrons. The drink should have been visible to management. No one from the City or DPD asked him to fabricate his report or to lie. (Vol. III, pp. 33-6, 8; Ex. 64)

Detective Prokof acknowledged it was not uncommon for dancers to sit with patrons and have drinks. He admitted it might be hard to hear conversations between patrons and dancers. (Vol. III, p. 37).

Respondent contended it was not plausible for a dancer to just walk up to Detective Prokof, without any prior conversation, and request a drink.

### (iii) Detective Furr

Detective Furr's first drink-solicitation report and testimony stated the following. At about 10:00 p.m. on August 27, 1997, Detectives Furr and Avery entered Respondent's club. A dancer named Jilly Chartres, wearing a black mini-dress, sat on Detective Furr's lap. She asked him if he would buy her a glass of white wine. He said he would. When a waitress came by, Ms. Chartres ordered a glass of wine and told her to put it on Detective Furr's tab. The waitress brought the wine. While Ms. Chartres' attention was diverted, he smelled the glass and determined that it contained wine. The incident happened in an open, public place which was accessible to patrons. In his opinion, management could have seen her drinking the wine. (Vol. II, pp. 122-5; Ex. 44).

Detective Furr's second drink-solicitation report and testimony showed the following. Detectives Furr and Mendez entered Respondent's club on December 26, 1997. At about 10:00 p.m., a dancer named Kimberly Rumph sat down next to Detective Furr and asked him to buy her a beer. Ms. Rumph turned to a waitress and said something to her. She turned back to Detective Furr and asked if he would buy her anything she wanted. He said he would. She turned back to the waitress and ordered a drink. The waitress returned with a Bud Lite beer and Detective Furr paid the waitress \$4.75. Ms. Rumph drank part of the beer and returned to dance. The incident occurred in an open, public place, where other patrons could see what was going on. Other employees could see what was going on. No one at the City or DPD told him to fabricate his report or to lie. (Vol. II, pp. 104-9; Ex. 43).

Detective Furr testified other dancers did not solicit drinks from him. He agreed it was noisy in the club and it would be hard to hear what was going on a couple of tables away. He indicated he did not see lewd dancing when he was there. He acknowledged it was not impermissible for a patron to offer to buy a dancer a drink. He stated he is not aware of dancers' receiving commissions on drinks. He acknowledged he had testified in other hearings where the City has tried to take the licenses of topless clubs. (Vol. II, pp. 74, 111, 113-6, 138 ).

#### (iv) Detective Craig Reynerson

Detective Reynerson's first drink-solicitation report and testimony stated the following. Detectives Reynerson and D. S. Tremain entered Respondent's club at about 10:20 p.m. on October 6, 1997. A dancer named Paula Charlene Cornell approached them and sat down at their table. A waitress came to the table and asked if anyone wanted a drink. Detective Reynerson said no and the waitress started to walk off. Ms. Cornell stopped her and then turned to Detective Reynerson and asked if it was okay if she got a drink. He said sure and Ms. Cornell ordered a bourbon. A few minutes later, the waitress returned with the drink and asked Detective Reynerson to pay. He paid \$5.75 for the drink. Ms. Cornell drank the bourbon. The incident happened in an open area, which was accessible to the public. Management could have seen what went on. He saw other dancers drinking, but does not know whether they solicited drinks from patrons. No one at the City or DPD told him to fabricate his report or to lie. (Vol. II, pp. 313-6, 344-5; Ex. 56)

Detective Reynerson's second drink-solicitation report and testimony indicated the following. He and Detective Tremain were at Respondent's club at about 10:50 p.m. on October 6, 1997, when a dancer named Audrey Marie Griffing sat down at the table. After performing a table dance, she turned to Detective Reynerson and asked him to buy her a drink. He said he would and she ordered a glass of wine from a waitress. The waitress returned with the wine and turned to Detective Reynerson for payment. He paid her \$5.50. She drank some of the wine. The incident occurred in an open area with other patrons around. Management could have observed what happened. No one with the City or DPD told him to fabricate his report or to lie. (Vol. II, pp. 329-33; Ex. 57).

Respondent cited Detective Reynerson's testimony that he has not gone to non-topless clubs to investigate lewdness or prostitution. It pointed out he did not recall being at the club because of a complaint, even though his report states they were there because of an "alcohol violations" complaint. (Exs. 56 and 57; Vol. II, pp. 341-42). Respondent contrasted his testimony that he did not see lewd dancing (Vol. II, p. 343) with that of other officers who said it was rampant. Respondent asserted Detective Reynerson's testimony showed it was not clear whether Ms. Cornell had asked him to buy her a drink instead of just asking if it was okay with him if she purchased one herself. (Vol. II, p. 345). Detective Reynerson conceded that management cannot always hear what a dancer says at a table. (Vol. II, p. 346). Respondent pointed to the fact there was an DPD internal affairs investigation of Detectives Reynerson and Tremain over an incident at Baby Dolls (another Class A dance hall). (Vol. II, p. 338). Respondent asserted Detective Reynerson admitted he might have misunderstood what Ms. Cornell asked.

#### (v) Analysis

These charges were proved by a preponderance of the evidence. A previously asserted argument by Respondent that the officers making drink-solicitation charges did not make sexual contact charges was not accurate. Detectives Prokof and Furr made both types of charges.

The fact that Ms. Holmes simply walked up to Detective Prokof and asked for a drink, without any prior conversation, did not seem implausible since she was good friends with the dancer sitting at Detective Prokof's table.

As asserted by Respondent, the fact Detective Reynerson did not recall being at the club because of a complaint, detracted from his credibility. However, the reason for his going to the club was irrelevant to the facts showing the violation. There would not have been a compelling reason for him to have remembered facts that were irrelevant to the charges. Contrary to Respondent's contentions, Detective Reynerson was certain in his opinion that the dancer solicited a drink from him.

The more difficult issue to decide is whether Respondent should have known the drink solicitation was occurring. As argued by Respondent, factors weighing against a finding that it should have were its attempts to stop drink solicitation, the noise that made it hard to hear what was said, and the fact the dancers do not receive commissions on drinks. However, the evidence showed that Respondent took pains to police the club and was charged by the Code with doing so. One of the prime purposes of the club was selling alcohol. The permit at issue is a permit to sell alcohol. In the cases involving Ms. Rumph and Ms. Cornell, the waitress witnessed the solicitation. In the case of Kelly Holmes, another dancer, Kelly Miller, witnessed the solicitation. The waitresses were Respondent's employees. Based on those factors and the court's analysis in Wishnow, this Proposal concludes that Respondent should have known of the violations.

#### **d. Prostitution**

The Notice of Hearing alleged that Respondent or its employee, agent, or servant, engaged in or permitted conduct on the premises that was lewd, immoral, or offensive to the public decency, as defined in 16 Tex. Admin. Code § 35.41, in violation of Section 104.01(6) and (7), when a dancer solicited Detective Prokof to engage in sexual conduct for hire, warranting a suspension of its permit under Section 11.61(b)(2) of the Code. Section 11.61(b)(2) (permitting a cancellation or suspension for a Code violation), Section 35.41 of the TABC rules (more specifically defining lewd and vulgar conduct by reference to the Penal Code), and Section 104.01(6) of the Code (prohibiting lewd or vulgar acts or entertainment on the premises) have been discussed. Section 104.01(7) states a permittee may not permit solicitations of persons on the premises "for immoral or sexual purposes."

#### **(i) Evidence and Contentions**

Detective Prokof's report and testimony stated the following. He and Detective Tremain were at Respondent's club at about 11:45 p.m. on August 15, 1997. A dancer named Kelly Ann Miller asked to perform a table dance for Detective Prokof and he agreed. She performed two table dances: during the second, she rubbed his genitals through his short pants with both her hands. After the second dance, he asked her if she ever saw patrons after work; she answered if he had the money, she had the time. He asked her how much money and she said she would need at least a hundred dollars. He said that was not a problem and she asked what he would

expect for that much. He said he would expect to have sexual intercourse with her. She said he could engage in sexual intercourse with her for that amount. She told him to wait in a nearby parking lot for her after she got off work at 2:00 a.m. She appeared to be serious. No one at the City or DPD told him to fabricate his report or to lie. (Vol. III, pp. 26-30; Ex. 61).

Petitioner contended Respondent is responsible for Ms. Miller's conduct under Section 1.04(11) and (14) of the Code, which defines a permittee to include the permit holder's employees. In response to contentions by Respondent that \$100.00 is not a significant amount compared to what dancers earn in an evening, Petitioner pointed out the sexual liaison was intended to occur after hours.

Detective Prokof acknowledged he has made prostitution cases before in which he failed to meet the alleged perpetrator to exchange money, and he has been cross-examined for not doing so. He agreed it would provide stronger evidence of intent to meet the accused and exchange money. (Vol. III, pp. 37-8, 41-2). Respondent asserted Detective Prokof's failure to meet with Ms. Miller after hours shows the incident never occurred.

Respondent cited testimony from Ron Shaddox that dancers make a minimum of \$200.00 and as much as \$500.00 a night. (Vol. IV, p. 88). Respondent contended this evidence shows the implausibility of Ms. Miller's engaging in prostitution for \$100.00. Ms. Shaddox also maintained he is not aware of other prostitution charges involving Respondent. (Vol. IV, p. 87).

#### (ii) Analysis

This charge was proved by a preponderance of the evidence. As argued by Respondent, \$100.00 would not seem to be a large amount to pay a dancer for prostitution. However, Detective Prokoff swore that it did occur. His testimony was found to be credible in sexual contact and drink-solicitation cases. As in other cases, the dancer was not called to testify. It is conceivable that her motive was not money, but sexual desire. Overall, Detective Prokoff's sworn testimony is more persuasive than Respondent's assertion that he would lie to help the City close down Respondent's business.

#### e. Selling Alcohol to a Minor

The Notice of Hearing alleged one instance of Respondent selling alcohol to a minor. However, Petitioner did not present any evidence on this charge.

#### C. Recommended Discipline

This Proposal recommends that Respondent's permits be canceled. Sergeant Busby testified he could not recall seeing a permittee with as many violations as Respondent. (Vol. III, p. 61). Respondent has signed waiver Orders and paid civil penalties on nine separate instances of violations since early 1993. The first seven all occurred in 1993 and each of those concerned Respondent's failure to timely remit taxes. (Ex. 17).

On March 3, 1995, Respondent agreed to an Order suspending its license for 10 days unless it paid a civil penalty of \$1,500.00 by a specified date. In the Order, Respondent agreed that on September 7, 1994, six instances of the following violation occurred: "permit public lewdness, sexual contact, obscene acts on license premise." The Order was signed by Mr. Shaddox' son, Michael Shaddox. (Ex. 17).

On March 14, 1997, Respondent waived a hearing and agreed to an Order in which its permits were suspended for 60 days unless it paid a civil penalty of \$9,000.00 within a specified date. The violations included eight charges of sexual contact and three charges of drink solicitation. The Order stated that by signing the Order, Respondent did not admit and specifically denied the charges. It also stated that for administrative purposes, the 11 violations would be counted as one. (Ex. 17).

The proven violations in this case include nine instances of sexual contact, two instances of employing underage girls to dance topless, five instances of drink solicitation, and one instance of prostitution. On two previous occasions, Respondent's dancers were found to have engaged in sexual contact. The TABC standard penalty chart at 16 TEX. ADMIN. CODE § 37.60(a) states the recommended penalty for the third instance of sexual contact is a 30-day suspension to cancellation.<sup>24</sup> The chart does not contain a recommended penalty for drink solicitation. The chart recommends a penalty of 15 days to cancellation for a single instance of prostitution and the same penalty for a single instance of employment harmful to a minor.

In view of Respondent's history of violations, the 17 violations described in this Proposal certainly warrant a cancellation of Respondent's permits.

A final word should be said concerning Respondent's employment of underage girls for topless dancing. In view of Respondent's violation history, this Proposal concludes that those violations alone warrant the cancellation of its permits. Respondent's assertions that its agreement to the previous Orders were simply to buy its peace or that Michael Shaddox was naive in signing an Order were an attempt to minimize the effect of the violations after the fact. The argument was not persuasive.

#### IV. CONCLUSION

This Proposal recommends that Respondent's permits be canceled because of the evidence showed 16 separate violations, including eight instances of sexual contact, two instances of

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<sup>24</sup> The TABC rules also state the following, at 16 TEX. ADMIN. CODE § 37.60(g):

The standard penalty chart does not bind a hearing examiner, the administrator, or his designee as to penalties for any violation determined to have occurred by the facts presented in an administrative hearing and the record of that proceeding shall be the determining factor as to the sufficiency of the penalty assessed.

employing underage girls, five instances of drink solicitation, and one instance of prostitution solicitation. The recommendation was also based on Respondent's previous violation history. The Proposal concludes the permittee did not prove the necessary elements of impermissible discriminatory enforcement and TABC has no authority to declare the statutes it is charged with enforcing to be unconstitutional.

**V.  
FINDINGS OF FACT**

1. MWS Entertainment, Inc., d/b/a Deja Vu (Respondent) holds Permit Nos. MB-223686 and LB-223687.
2. A Notice of Hearing was issued in this case on September 22, 1998. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; and a short and plain statement of the matters asserted. No party objected to notice.

**Sexual Contact**

3. Texas Alcoholic Beverage Commission (TABC) Sergeant John Busby went to Respondent's club on February 20, 1998; Respondent's club is a public place. While he was there, the following occurred:
  - a. A dancer named Chastity Rodriguez performed a dance for a patron, during which she rubbed her head against the patron's genital area while he was sitting with his legs spread open;
  - b. Ms. Rodriguez then straddled the patron's lap and rubbed her genital area against his genital area in an up and down motion simulating sexual intercourse;
  - c. After that, the dancer turned around and ground her buttocks into the patron's genital area;
  - d. During the dance, another dancer walked over to Ms. Rodriguez and said something to her; she looked at Sergeant Busby and did not touch the patron again;
  - e. Ms. Rodriguez intended to sexually arouse the patron and provide him with sexual gratification;

- f. Ms. Rodriguez acted recklessly because the acts occurred in an open room observable by other patrons who could have been offended by her actions; and
  - g. Sergeant Busby was offended by what he saw.
4. Detective Daniel S. Town was at Respondent's club on September 5, 1997, during which the following occurred in a large room open to the public:
- a. At about 11:00 p.m., a dancer named Katherine Olmstead approached him and asked, "Who wants a nasty dance?"; Detective Town agreed to the dance;
  - b. Ms. Olmstead straddled Detective Town's chair while facing him and then ground and thrust her clothed buttocks and vagina against his clothed genitals, simulating sexual intercourse; she then performed the same actions while facing away from him;
  - c. Ms. Olmstead repeatedly bent forward, reached back between her legs and squeezed Detective Town's clothed genitals with her hand;
  - d. Ms. Olmstead intended to sexually arouse Detective Town; and
  - e. Ms. Olmstead acted recklessly by engaging in the activity described in parts b - d of this finding in front of others who could see what was happening;
5. In addition to the matters described in Finding of Fact No. 4, Detective Town experienced the following at Respondent's club on September 5, 1997:
- a. At about 11: 50 p.m., a dancer named Camile Danimal asked Detective Town if he was ready to "get molested." He answered in the affirmative.
  - b. Ms. Danimal performed a table dance for Detective Town, during which she faced him and thrust her buttocks in an up and down motion against his clothed genitals, simulating sexual intercourse; she then performed the same actions while facing away from him;
  - c. Ms. Danimal intended to arouse Detective Town's sexual desires;
  - d. Ms. Danimal's actions were reckless because other patrons could have seen what was occurring and have been offended; and

- e. There was nothing to obstruct the vision of Respondent's management from seeing what was occurring.
6. Detective Timothy Prokof was at Respondent's club on September 5, 1997, at which time the following occurred:
    - a. A dancer named Paula Elaine Shelton approached Detective Prokof and asked if she could perform a table dance for him and he agreed;
    - b. During the dance, Ms. Shelton rubbed her buttocks, breasts, and head against his genitals through his short pants;
    - c. Ms. Shelton faced away from Detective Town and rubbed her buttocks into his genital area, simulating sexual intercourse;
    - d. At the end of the dance, Ms. Shelton brushed the back of her hands against Detective Prokof's genitals;
    - e. During a second dance, Ms. Shelton rubbed her buttocks and breasts against Detective Prokof's genitals and then grabbed his penis through his short pants and began squeezing and rubbing it;
    - f. Ms. Shelton's actions described in this finding were done with the intent to arouse or gratify Detective Prokof's sexual desire;
    - g. The conduct occurred in a public place, where others could have seen and been offended by her his conduct; and
    - h. Respondent's management could have observed Ms. Shelton's conduct.
  7. Detective Don Waterson was at Respondent's club on September 6, 1997, at which time the following occurred:
    - a. At about 12:30 a.m., a dancer named Jill Charties performed a table dance for Detective Waterson during which she ground her buttocks into his crotch area;
    - b. Ms. Charties was trying to sexually arouse Detective Waterson;
    - c. The dance was in a large room, and was performed with reckless disregard to whether others could see what was going on and be offended; and
    - d. Other patrons and Respondent's management could have observed Ms. Charties' actions.

8. Detective Doyle Furr was at Respondent's club on August 27, 1999, at which time the following occurred:
  - a. At about 11:00 p.m., a dancer named Jill Chartres approached Detective Waterson and performed a table dance;
  - b. During the dance, Ms. Chartres rubbed her bare breasts into Detective Furr's face, slid down and rubbed her breasts into his genital area, and softly bit his genital area;
  - c. While she was getting dressed, Ms. Chartres reached down and rubbed Detective Furr's genitals through his clothing;
  - d. Ms. Chartres intended to arouse a person's sexual desire in a public place; and
  - e. Others could have been offended by Ms. Chartres' actions.
  
9. Detective Charles Avery was at Respondent's club on December 26, 1997, at which time the following occurred:
  - a. A dancer named Christina Louise Tarrazas approached Detective Avery and asked if he would like a table dance;
  - b. Ms. Tarrazas performed four dances, during which she sat on Detective Avery's lap and rubbed her buttocks against his genitals;
  - c. Ms. Tarrazas rubbed her knees and the back of her head against Detective Avery's genitals;
  - d. During the second dance, Ms. Tarrazas sat in Detective Avery's lap while facing him, and repeatedly rubbed her vagina against his genitals;
  - e. Ms. Tarrazas' actions occurred with the intent to arouse Detective Avery's sexual desire or the sexual desire of other patrons; and
  - f. the contact occurred in an open, public place.
  
10. Detective Mike Mendez entered Respondent's club on December 26, 1997, at which time the following occurred:
  - a. a dancer named Estella Rena Ramirez approached Detective Mendez, asked to do a table dance for him, and he agreed;

- b. while she was dancing, Ms. Ramirez rubbed her buttocks on Detective Mendez' crotch, simulating sexual intercourse;
  - c. Ms. Ramirez touched Detective Mendez' crotch through his jeans and grabbed his penis through his jeans;
  - d. Ms. Ramirez simulated oral intercourse by placing her head in Detective Mendez' crotch area and moved it up and down while touching his crotch with her face;
  - e. Ms. Ramirez was trying to sexually arouse Detective Mendez and anyone else who was watching;
  - f. Ms. Ramirez acted recklessly because anyone observing her actions could have been offended; and
  - g. Respondent's management could have seen what was occurring.
11. Detective Warren Martin entered Respondent's club on February 5, 1998, at which time the following occurred:
- a. At about midnight, Detective Martin was approached by a dancer named Camile Danimal who said "come play with me."
  - b. Ms. Danimal performed a dance during which she rubbed the top of her head and her face into Detective Martin's genital area;
  - c. Ms. Danimal's action occurred in a large open area that was a public place; and
  - d. Ms. Danimal's actions were made with the intent to arouse the sexual desire of Detective Martin or others.

### **Underage Dancers**

12. On March 22, 1998, two girls, Amy Pintor and Candace Takits, were working as topless dancers at Respondent's club.
- a. Amy Pintor was 16 years old at the time;
  - b. Candace Takits was 14 years old at the time;
  - c. Upon questioning, both girls appeared to be their ages;

- d. The height and eye-color description on at least one girl's identification did not match her appearance; and
  - e. One of Respondent's managers who hired the girls did not perform a proper interview before doing so.
13. The manner in which Respondent has conducted its business is contrary to the general welfare, health, peace, morals, and safety and on the public sense of decency.

#### Drink Solicitation

14. Detective Prokof was at Respondent's club on August 16, 1997, at which time the following occurred:
- a. A dancer named Kelly Holmes approached Detective Prokof and asked him to buy her a "shot" of tequila;
  - b. Detective Prokof purchased the tequila from a waitress for \$5.75; and
  - c. Another dancer, Kelly Miller, was sitting at the table with Detective Prokof when the drink solicitation occurred.
15. Detective Furr was at Respondent's club on August 27, 1997, at which time the following occurred:
- a. A dancer named Jilly Chartres sat on Detective Furr's lap and asked him if he would buy her a glass of wine and he agreed;
  - b. When a waitress came by, Ms. Chartres ordered a glass of wine and told the waitress to put the charge on Detective Furr's tab; and
  - c. The waitress brought the wine to Ms. Chartres.
16. Detective Furr was at Respondent's club on December 16, 1997, at which time the following occurred:
- a. A dancer named Kelly Rumph sat down next to Detective Furr and asked him to buy her a beer;
  - b. Ms. Rumph then turned toward a waitress and said something to her;

- d. The height and eye-color description on at least one girl's identification did not match her appearance; and
  - e. One of Respondent's managers who hired the girls did not perform a proper interview before doing so.
13. The manner in which Respondent has conducted its business is contrary to the general welfare, health, peace, morals, and safety and on the public sense of decency.

#### Drink Solicitation

14. Detective Prokof was at Respondent's club on August 16, 1997, at which time the following occurred:
- a. A dancer named Kelly Holmes approached Detective Prokof and asked him to buy her a "shot" of tequila;
  - b. Detective Prokof purchased the tequila from a waitress for \$5.75; and
  - c. Another dancer, Kelly Miller, was sitting at the table with Detective Prokof when the drink solicitation occurred.
15. Detective Furr was at Respondent's club on August 27, 1997, at which time the following occurred:
- a. A dancer named Jilly Chartres sat on Detective Furr's lap and asked him if he would buy her a glass of wine and he agreed;
  - b. When a waitress came by, Ms. Chartres ordered a glass of wine and told the waitress to put the charge on Detective Furr's tab; and
  - c. The waitress brought the wine to Ms. Chartres.
16. Detective Furr was at Respondent's club on December 16, 1997, at which time the following occurred:
- a. A dancer named Kelly Rumph sat down next to Detective Furr and asked him to buy her a beer;
  - b. Ms. Rumph then turned toward a waitress and said something to her;
  - c. Ms. Rumph turned back to Detective Furr and asked him if he would buy her anything she wanted;

- d. Detective Furr agreed;
  - e. Ms. Rumph then turned back to the waitress and ordered a beer; and
  - f. The waitress returned with a Bud Lite beer and Detective Furr paid her \$4.75.
17. Detective Craig Reynerson was at Respondent's club on October 6, 1997, at which time the following occurred:
- a. A dancer named Paula Charlene Cornell approached him and sat at his table;
  - b. A waitress came to the table and asked if anyone wanted a drink;
  - c. Detective Reynerson said "No" and the waitress started to walk off;
  - d. Ms. Cornell stopped the waitress and turned to Detective Reynerson and asked if it was okay for her to have a drink;
  - e. Detective Reynerson agreed and Ms. Cornell ordered bourbon;
  - f. A few minutes later, the waitress returned with the drink; and
  - g. Detective Reynerson paid \$5.75 and for the bourbon.
18. On the same date as the matters described in Finding of Fact No. 16, the following occurred:
- a. At about 10:50 p.m., a dancer named Audrey Marie Griffing sat down at his table and, after performing a table dance, asked Detective Reynerson to buy her a drink;
  - b. Detective Reynerson agreed and she ordered a glass of white wine from a waitress;
  - c. The waitress returned with the wine and Detective Reynerson paid her \$5.50.

### Prostitution

19. Detective Prokof was at Respondent's club on August 15, 1997, at which time the following occurred:

- a. A dancer named Kelly Ann Miller performed a table dance for Detective Prokof;
- b. After a second dance, Detective Prokof asked Ms. Miller if she ever saw patrons after work;
- c. Ms. Miller answered if he had the money, she had the time;
- d. Detective Prokof asked how much money she meant, and Ms. Miller said at least \$100.00;
- e. Detective Prokof said that was not a problem and Ms. Miller asked what he would expect for that;
- f. Detective Prokof said he would expect to have sexual intercourse with her and she agreed.

#### Facts Generally Applicable to All Charges

20. Respondent has taken steps to monitor its activities, including weekly training meetings with managers and monthly meetings with dancers.
21. Before it had underage dancer problems, Respondent attempted to make sure the girls were at least 18 years old by checking drivers' licenses and conducting interviews. Respondent keeps a book which shows each state's drivers license.
22. Respondent has had meetings with its managers to establish policies and tighten up procedures after lewd dancing violations in 1994. The management staff has been increased for heightened monitoring. A dancer receives one warning for inappropriate dancing; if she does it again, she is fired.
23. Respondent has a long-standing policy against drink solicitation, and has placed a sign on its wall reminding its employees of the policy.
24. Respondent believes its management staff does a good job policing its business.
25. Respondent's club is a bar featuring topless dancing and "table dances" where scantily clothed female dancers perform dances for male patrons.
26. Respondent permits patrons to purchase drinks for dancers.
27. Two of the explicit purposes of Respondent's business are sexual orientation and the sale of alcohol.

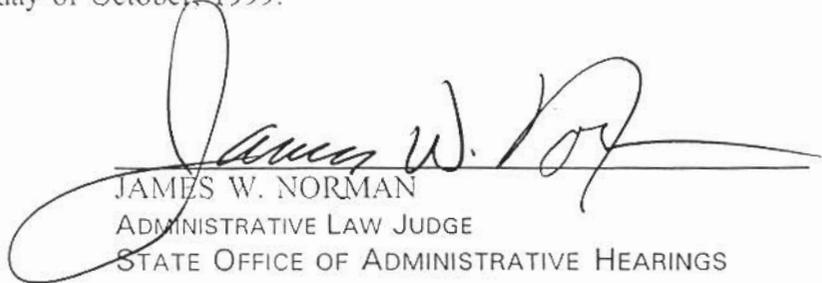
28. Ron Shaddox was the only representative of Respondent to testify; none of the dancers testified. Mr. Shaddox never denied knowledge of the activities which form the basis of the charges against Respondent.
29. Respondent has signed waiver Orders and paid civil penalties on nine separate instances of violations since early 1993.
  - a. The first seven violations occurred in 1993 and each one concerned Respondent's failure to timely remit taxes.
  - b. On March 3, 1995, Respondent agreed to an Order suspending its license for 10 days unless it paid a civil penalty of \$1,500.00 by a specified date. In the Order, Respondent agreed that on September 7, 1994, six instances of the following violation occurred: "permit public lewdness, sexual contact, obscene acts on license premise."
  - c. On March 14, 1997, Respondent waived a hearing and agreed to an Order in which its permits were suspended for 60 days unless it paid a civil penalty of \$9,000.00 within a specified period. The violations included eight charges of sexual contact and three charges of drink solicitation. The Order stated that for administrative purposes, the eleven violations would be counted as one.

## VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding. Tex. Alco. Bev. Code (Code) § 11.61(b).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of 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 Ann. ch. 2003.
3. Respondent received adequate notice in accordance with Tex. Gov't Code Ann. §2001.052.
4. Based on Findings of Fact Nos. 3 - 11 and 14 - 27, Respondent is charged with notice of the potential for sexual contact, prostitution, and drink solicitation. Wishnow v. Texas Alcoholic Beverage Commission, 757 S.W.2d 404 (Tex. App.--Houston /14th/ 1988, writ den.)

5. Based on Findings of Fact Nos. 3 - 29, Respondent knew or should have known of the violations. Any assertion by Respondent that it did not actually see the acts is no defense at all. Wishnow v. Texas Alcoholic Beverage Commission, 757 S.W.2d 404 (Tex. App.-- Houston /14th/ 1988, writ den.)
6. Based on Conclusions of Law Nos. 4 and 5, Respondent permitted the matters described in Findings of Fact Nos. 3 - 11 and 14 - 19. Tex. Alco. Bev. Code § 104.01 (4), (6), and (7).
7. Based on Findings of Fact Nos. 3 - 11 and Conclusions of Law Nos. 4 - 6, Respondent violated the Texas Alcoholic Beverage Code during nine occasions when its dancers had impermissible sexual contact with patrons. TEX. ALCO. BEV. CODE §106.01(6); 16 Tex. Admin. Code § 35.41; Tex. Pen Code Ann. § § 21.01 and 21.07.
8. Based on Findings of Fact Nos. 14 - 18, and Conclusions of Law Nos. 4 -6, Respondent violated the Texas Alcoholic Beverage Code by permitting the solicitation of persons to buy alcoholic beverages for consumption by its employees. TEX. ALCO. BEV. CODE ANN. § 104.01(4).
9. Based on Finding of Fact No. 19 and Conclusion of Law Nos. 4 - 6, Respondent has violated a provision of the Texas Alcoholic Beverage Code by permitting a solicitation of a person for sexual purposes on the premises. TEX. ALCO. BEV. CODE ANN. § 104.01(7).
10. Based on Conclusions of Law Nos. 8 - 9, the Texas Alcoholic Beverage Commissioner or administrator may suspend for not more than 60 days or cancel Respondent's permits. Tex. Alco. Bev. Code Ann. § 11.61(b)(2).
11. Based on Findings of Fact Nos. 12 - 13, the Texas Alcoholic Beverage Commissioner may suspend for not more than 60 days or cancel Respondent's permits. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).
12. Based on Conclusions of Law Nos. 10 and 11, both jointly and separably, Respondent's permits should be canceled.

SIGNED this 8<sup>th</sup> day of October, 1999.

  
JAMES W. NORMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS