

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 3, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

RE: Docket No. 458-98-2267; Texas Alcoholic Beverage Commission vs. Top of the Strip, Inc.,
d/b/a Top O the Strip (TABC Case No. 576642)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Andrew del Cueto, Assistant Attorney General representing the Texas Alcoholic Beverage Commission, and to Tom Stolhandski, Attorney representing Respondent, Top of the Strip d/b/a Top O the Strip. For reasons discussed in the proposal, I recommend Respondent's permits be cancelled.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

Georgie B. Cunningham
Administrative Law Judge

GBC:et
Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - **HAND DELIVERY**
Andrew del Cueto, Assistant Attorney General, Texas Alcoholic Beverage Commission - **HAND DELIVERY**
Tom Stolhandske, Attorney at Law, 8301 Broadway, Suite 100, San Antonio, Texas. 78209 - **CERTIFIED**
MAIL NO. Z 383 248 866, RETURN RECEIPT REQUESTED



hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Section 5.43 of the Code and TEX. GOV'T CODE ANN. ch. 2003. Respondent asserted in closing argument that venue was not properly established, because no evidence was admitted showing Respondent's location. According to Section 11.015 of the Code, venue is established in the county where the permittee is located. Here, venue was properly established in Bexar County by the exhibit showing the Commission issued permits to Respondent to conduct business at 115 Nova Mae, San Antonio, Bexar County, Texas.

On January 4, 1999, Staff sent notice of the hearing by certified mail, return receipt requested, to Respondent at its address on file at the Commission. On January 29, 1999, the notice was returned to sender marked "unclaimed." The envelope indicated attempts to deliver the mail on January 6, 11, and 21, 1999.³ Staff asserted notice was sent also by facsimile transmission to the attorney who had represented Respondent in another matter before the Commission and was personally delivered to Respondent by the Commission's San Antonio staff. Staff did not present evidence of such service; however, Respondent appeared with counsel. The notice contained a statement of the time and place 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. Thus, the Commission's notice met the 10-day notice requirement set forth in Section 11.63 of the Code and the provisions of TEX. GOV'T CODE ANN. §2001.052.

Respondent objected to the lack of opportunity to engage in discovery or to meet informally with Commission representatives prior to the filing of the complaint. Respondent did not show it was denied any attempt to engage in discovery or had sought a continuance to engage in discovery or schedule a settlement conference with Staff. The hearing was recessed briefly on January 26, 1999, while Respondent was given an opportunity to examine Staff's file related to the matters alleged. Thereafter, Respondent did not file a motion on the record for a continuance. It is not required that notice be given before a complaint is filed, but only that the complaint itself adequately informs the licensee of an adjudicative hearing, according to *Guerrero-Ramirez v. Tex. St. Bd. of Med. Exam.*, 867 S.W.2d 911, 918 (Tex. App.-Austin 1993 n.w.h.).⁴

³ Staff called Ms. Morris as a witness to confirm the mailing address. Ms. Morris asserted she had been out of town on the dates of attempted delivery.

⁴ Respondent further objected to the late issuance of an order scheduling a prehearing conference and establishing prehearing requirements. The Judge reiterated at the hearing that he had cancelled the prehearing conference and withdrawn the requirements of the order.

III. DISCUSSION

A. Background

Respondent is a gentlemen's club which holds Mixed Beverage Permit No. MB-118573 and Mixed Beverage Late Hours Permit No. LB-118574 issued by the Commission. Staff alleged that Respondent's employees, agents, or servants served alcoholic beverages to three intoxicated persons on October 11, 1997, and to two intoxicated persons on November 14, 1998, in violation of Section 11.61(b)(14) of the Code. The parties presented documentary evidence and the testimony of 16 witnesses.⁵ Additionally, three members of a neighborhood association provided public comment. The evidence and public comments are summarized herein. Based on the evidence received, the Judge is persuaded that Respondent's employees served alcoholic beverages on the dates alleged to the five individuals who were intoxicated. The reasons for this conclusion and for the recommendation the permits be cancelled are discussed below.

B. Legal Standards Applied

Section 11.61(b)(14) provides that the Commission may suspend or revoke a permit if the permittee sells or delivers an alcoholic beverage to an intoxicated person. Although the term "intoxicated" is not defined in the Code, it is defined in TEX. PENAL CODE ANN. §49.01(2) as not having the normal use of one's mental or physical faculties by reason of the consumption of alcohol or having an alcohol concentration of 0.10 or more. In *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987), the Texas Supreme Court found intoxication meant "a condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical faculties and resulting diminution of the ability to think and act with ordinary care." While not controlling, the Penal Code definition provides insight as it is used in determining whether one is driving while intoxicated. In this case, the Court's definition is applied.

Section 1.04(1) of the Code defines alcoholic beverage as any beverage containing more than one-half of one percent of alcohol by volume. According to Section 1.04(15), beer is a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight, and does not include a beverage designated by label or otherwise by a name other than beer. Pursuant to the provisions of Section 101.67, the Commission grants prior approval for the sale of a particular beer in this state. Section 1.04(11) of the Code defines permittee as a person who is the holder of a permit or an agent, servant, or employee of that person.

⁵ Ms. Morris and Captain Jauregui testified about notice and jurisdictional issues addressed above. Their testimony is not summarized below.

C. Staff's Evidence Related to the October 1997 Allegation

1. Testimony of Charles McLennon

Charles McLennon, a San Antonio Police Department (SAPD) Vice Detective with over 23 years service, testified that he has arrested over 500 persons for offenses involving intoxication. He has participated in more than 25 similar undercover assignments looking for intoxicated persons in clubs. Based on his training and experience, he has learned to look for signs that a person is intoxicated. Detective McLennon testified that he and Detectives Davis and Gorhum were assigned to observe Respondent's club on October 10 - 11, 1997, because of previous complaints about fights, intoxicated persons, prostitution, and drug use, and because of a new complaint received via a city councilman. He added that he had never been in the club before this assignment.

Soon after their arrival at approximately 10:30 p.m. on October 10, 1997, the detectives noticed three individuals, later identified as Joe Michael Escalante, Francisco J. Rodulfo, and Steven Duron (the individuals), who were seated near the main stage. After a few minutes, the detectives were able to move to a vacant table within 9 to 10 feet of the individuals and continue their observations. Detective McLennon testified that the individuals were yelling loud, obscene remarks at the topless dancers. He witnessed one of the individuals grab a dancer and attempt to pull her off the stage. Later, he saw the same person grab a waitress by the waist and buttocks and attempt to hold her close. Detective McLennon observed one of the individuals stumble and fall into some chairs at a vacant table as he staggered to the rest room. One of the individuals rested his head for several minutes on the edge of the serving area adjacent to the stage. He described their conduct as obviously aggressive and added that most patrons in topless clubs do not ordinarily conduct themselves in that manner.

When Detective McLennon first noticed the individuals, they had numerous empty 12-ounce Budweiser beer bottles in front of them. He further testified he saw a waitress, later identified as Adelita Cisneros, serve each of them two 12-ounce bottles of Budweiser beer and one round of an unidentified clear liquid in a tall shot glass. He recognized her as a waitress by the way she was dressed. Moreover, she carried a serving tray and accepted money for drinks delivered. Based on his experience, training, and observations, Detective McLennon concluded that the individuals were intoxicated at the time Respondent's waitress served them alcoholic beverages. He believed that they were a potential danger to themselves or to the public. He and Detective Davis left Detective Gorhum to maintain visual contact, and other officers arrested the individuals at 12:20 a.m.

2. Testimony of Kenneth Parker Davis

Detective Davis, a nine-year SAPD officer, has arrested hundreds of persons for criminal offenses involving intoxication. He testified it is routine procedure for vice detectives to make arrests for public intoxication based on observation. They do not ordinarily perform field sobriety tests as officers do in making arrests for driving while intoxicated.

Detective Davis related that he accompanied Detectives McLennon and Gorhum on the undercover assignment to investigate the complaint about intoxicated patrons fighting in the parking lot. After the detectives noticed Messrs. Escalante, Rodulfo, and Duron, who appeared to be intoxicated, they moved to a vacant table about 10 feet away. He testified that the individuals exhibited loud, disruptive behavior yelling at the dancers. They were rowdy, swaying, and unsteady in their seats. One of the individuals stumbled against a table when he walked. Detective Davis observed that each of the men had blood shot eyes and slurred speech. He saw a waitress serve each of the men two bottles of beer and one round of a clear liquid from a glass of a type from which he had never seen anyone drink water. In addition to serving the individuals, the waitress took orders and served the detectives. In Detective Davis's opinion, the individuals were clearly intoxicated, not merely borderline drunk, before he saw the waitress serve them beer.

3. Testimony of Michael Gorhum

SAPD Sergeant Gorhum was assigned to the vice squad for nine years before being promoted approximately a year ago. He testified he has learned to recognize signs of intoxication and has experience in making arrests for public intoxication. According to Sergeant Gorhum, he sat with Detectives McLennon and Davis approximately 10 to 15 feet away from Messrs. Escalante, Rodulfo, and Duron for more than an hour prior to their arrest. He observed a large number of beer bottles on the table in front of the individuals, described them as boisterous and obviously intoxicated, and noticed one of the individuals swaying with his eyes half shut as he sat near the stage. Sergeant Gorhum testified he saw one of the individuals grab a waitress by the buttocks and pinch her. He overheard the waitress comment to another waitress, "Those guys are drunk." He watched one of the individuals draped over the bar in front of the stage with his head on his hand. According to Sergeant Gorhum, the individual who had his head on the table almost had to be carried out of the club by the uniformed officers who arrived to make the arrests.

Prior to the arrests, Sergeant Gorhum saw a waitress serve the individuals two rounds of beer. He identified the server as a waitress, because she carried a tray with alcoholic beverages on it, handed the individuals the bottles of beer, and took their money. All three detectives testified that the men they had been observing were the same men arrested for public intoxication at Respondent's club on October 11, 1997.

4. Testimony of Sergeant Ortiz

Sergeant Ortiz supervises SAPD vice detectives on the evening shift.⁶ He testified that he received the complaint about Respondent from his superior officer. Complaints may be filed directly by citizens, through city council members, from other police department divisions, and many other sources. It was his understanding that

⁶ Sergeant Ortiz' first name was inaudible.

the complaint had been lodged by a citizen to a city councilman and had come to the police department via city hall. He testified that during that year he had handled approximately a dozen complaints received from city council members. Because it is the police department's policy to investigate all complaints, he assigned detectives in his unit to observe Respondent's parking lot for several nights. After finding no disturbances in the parking lot, the detectives changed focus to inside the club to complete their investigation. Inside, the detectives found the individuals who were intoxicated. After the detectives filed the report regarding the three intoxicated individuals being served alcoholic beverages, he submitted the report to his lieutenant. He indicates it is department procedure for findings to be forwarded also to the deputy chief and chief.

5. Documentary Evidence

Health assessment forms for the San Antonio Metropolitan Health District, Public Inebriate Program show that Mr. Duron was detained from 1:18 a.m. until 6:10 a.m. on October 11, 1997. The assessment forms indicated Mr. Duron was "aggressive, violent, combative, and argumentative" and refused blood alcohol testing. The intoxilyzer test administered Mr. Escalante at 1:35 a.m. revealed he had a blood alcohol level of 0.166.⁷

An affidavit from the Commission's Marketing Practices Department shows that the Commission has not approved any beer for sale or service that contains exactly one-half of one percent of alcohol by volume. Detective McLennon's investigative report reveals that Ms. Cisneros had completed a seller training program instructing her in the recognition of intoxicated persons. The Commission issued her Certificate No. 460351757 effective February 23, 1997 through February 22, 1999.

D. Respondent's Evidence Related to October 1997 Allegation

Carol Wagner has been employed by Respondent for approximately nine and one-half years. She testified she completed the Commission's alcohol awareness course in February "two years ago." The three individuals were present when she began working at 8:00 p.m. She was the only bartender on duty, and no one served them 12-ounce Budweiser beer after she began work. She does not let patrons get intoxicated and did not see anyone who was intoxicated that evening.

According to Ms. Wagner, SAPD and Commission agents have inspected Respondent 15 times in the last six months. Once, they inspected the club on three consecutive days. Occasionally, the agents have commended her after finding no violations. She believes "they" were trying to force Respondent to close its business.

⁷ Staff did not present similar records for Mr. Rodulfo.

On cross examination, Ms. Wagner admitted she was busy, because of business that evening. Respondent does not keep records of where drinks are served by the waitresses. She admitted she had a job to do, could not watch everything in the club, and relied on the waitresses to monitor activities. Ms. Wagner was adamant that the police had wrongly charged Ms. Cisneros with serving the intoxicated individuals. According to Ms. Wagner, Ms. Cisneros was the bartender she had relieved at 8:00 p.m. Ms. Cisneros stayed merely to help serve snacks and clear tables. Ms. Wagner did not provide her any alcoholic beverages to serve patrons.

Respondent introduced a single-page document from the Commission's file stating, "PRIORITY - RECOMMEND CANCELLATION - PLEASE EXPEDITE." Respondent asserted the document supported its defense that the investigations are politically motivated.

E. Analysis

Three detectives who had extensive experience in recognizing signs of intoxication provided credible testimony about the numerous signs of intoxication Messrs. Escalante, Rodulfo, and Duron exhibited. The testimony that the individuals were clearly intoxicated, not merely borderline intoxicated, along with the waitress's comment that the individuals were intoxicated shows Respondent knew or should have known about their intoxication. Although Ms. Wagner testified the individuals were not served beer after 8:00 p.m., she admitted she was very busy and could not monitor all activity. They had numerous empty beer bottles on the table in front of them. Moreover, it is implausible that the individuals remained in the club from 8:00 p.m. until 12:20 a.m. without drinking any alcoholic beverages. Respondent's evidence is simply insufficient to refute a finding that the three individuals suffered the loss of the normal use of their mental and physical faculties because of alcohol. A preponderance of the evidence shows Messrs. Escalante, Rodulfo, and Duron were intoxicated.

Even though the record contains evidence that it was Ms. Cisneros who served the three individuals the two rounds of beer, the identity of the particular waitress is not critical in this hearing. The three detectives testified they recognized the server as Respondent's waitress by her dress and her acts of taking orders, delivering alcoholic beverages, and accepting money. The waitress even served the detectives. Thus, Respondent's employee served alcoholic beverages twice to three individuals who were intoxicated at the time of service.

F. Staff's Evidence Related to the November 1998 Allegation

1. Testimony of Nicolas Gutierrez, III

Mr. Gutierrez is a nine-year employee of the Commission on special assignment to SAPD. He has attended the Commission's training program related to recognizing and dealing with Code violations. He has written over 100 citations for

selling alcoholic beverages to intoxicated persons and approximately 500 citations for public intoxication. On November 14, 1998, Mr. Gutierrez accompanied SAPD Detectives Jesus B. Orta and Richard Holguin in an undercover assignment investigating a citizen complaint about Respondent's serving alcoholic beverages to intoxicated persons. According to Mr. Gutierrez, they were merely following policy in investigating a complaint. They had no personal motives to investigate the complaint and were under no pressure regarding the investigation.

Mr. Gutierrez testified that he and the two detectives entered the club and sat at a table about two to three feet away from two individuals later identified as Margarito Gallegos and Jesse Flores. He further testified they were in the club about 45 minutes observing the individuals, whom he described as extremely loud. According to Mr. Gutierrez, Mr. Gallegos walked to the rest room twice. He moved slowly and deliberately, had difficulty keeping his balance, swayed, and once had to steady himself on the back of a chair. Mr. Gutierrez observed that Mr. Gallegos would turn his head very slowly before being able to focus in a new direction. At times Mr. Gallegos acted unsure of where he was. Mr. Flores had difficulty counting his money to pay the waitress who served them 12-ounce bottles of Budweiser beer. Mr. Flores would look with lethargic movements at the waitress, look at the money, then look back at the waitress repeatedly. Based on his observations, Mr. Gutierrez had no doubt the two individuals were intoxicated before they were served the beer. Mr. Gallegos and Mr. Flores each drank about half of their beer before officers arrested them for public intoxication.

2. Testimony of Jesus B. Orta

Detective Orta testified he has issued many citations for public intoxication based on obvious signs of intoxication during his 17 years at SAPD. He helped Mr. Gutierrez and Detective Holguin investigate a complaint about Respondent's club. He and the other officers were seated at a table about four to five feet away from the two individuals. Detective Orta testified the two individuals were very loud, boisterous, slow moving, and made exaggerated hand gestures at the dancers. Mr. Gallegos walked slowly and deliberately holding chairs to steady himself when he went to the rest room. He observed that Mr. Flores had some difficulty focusing on his money and paying the waitress. Based on his observations of their conduct, he concluded that Mr. Flores and Mr. Gallegos were intoxicated.

3. Testimony of Charles McLennon

Detective McLennon was one of the officers who arrested Mr. Flores and Mr. Gallegos. He prepared the police report for their public intoxication charges. Detective McLennon described them as compliant, happy "drunks." He added they had slurred speech and swayed when they walked. He was close enough to them to smell alcohol on their breath. They were administered blood alcohol tests at the detention center and released after four hours, pursuant to SAPD policy.

4. Documentary Evidence

The narrative report prepared by Agent Gutierrez reveals he checked the Commission's records and confirmed that Maria Aldaco, the waitress who served Mr. Gallegos and Mr. Flores the beer, had attended an alcohol awareness course. The SAPD offense report indicates the investigators arrived at 12:15 a.m. and the arrests were made at 1:00 a.m. Both reports also state that Mr. Flores and Mr. Gallegos had blood-shot eyes. Otherwise, the contents of the reports are reflected in the officers' testimony, summarized above.

G. Respondent's Evidence Related to November 1998 Allegation

1. Testimony by James C. Garriott, Ph.D.

Dr. Garriott is a board certified forensic toxicologist who has performed research, written books and treatises on alcohol, and lectured on the effects of drugs and alcohol.⁸ Dr. Garriott reviewed the relevant SAPD report and the health assessment forms of the San Antonio Health Department Public Inebriate Program. Mr. Flores and Mr. Gallegos were examined at approximately 2:15 a.m. by medical personnel. The medical assessment of both individuals shows they were alert, oriented to person, place, and time, had clear speech, and were cooperative. Intoxilyzer tests reveal blood alcohol levels of 0.11 for Mr. Flores and 0.14 for Mr. Gallegos.

According to Dr. Garriott, a blood alcohol level of 0.11 is consistent with ingestion of four or five alcoholic beverages, or more if over an extended period of time. At this level of alcoholic influence, most individuals will show signs such as euphoria, sociability, talkativeness, decreased inhibitions, and may have some loss of efficiency in critical performance tests. It is not a high level of intoxication, and the individual may not show obvious signs of intoxication. He further testified that a blood alcohol level of 0.14 is consistent with symptoms such as loss of critical judgment, impairment of perception, memory, and comprehension. Signs may be minimal in individuals tolerant to alcohol and may not be apparent to the ordinary observer. Dr. Garriott did not believe Mr. Flores and Mr. Gallegos were markedly and obviously intoxicated at 1:15 a.m. when they were arrested.

When Dr. Garriott was informed during cross examination that previous testimony had shown that the two individuals had drunk only about half bottle of beer each within the 30 minutes prior to their arrest, he calculated that their blood alcohol level would have been higher when they were served the beer than when they were tested at 2:15 a.m. Their blood alcohol levels would have been diminishing at the time of the tests based on the fact that a blood alcohol level may take 30 minutes to an hour to reach its maximum level before subsiding. He calculated the blood alcohol

⁸ Although Dr. Garriott's testimony was not sworn testimony, a review of the record did not reveal any reason to doubt its truthfulness.

levels for Mr. Gallegos at 0.132 and for Mr. Flores at 0.15 when Ms. Aldaco served them the beer. Although signs of intoxication can vary with the individual, Dr. Garriott agreed that a person, such as a peace officer or club employee, trained in recognizing intoxicated persons should be able to recognize signs of intoxication at the level he estimated they were at the time they were served.

2. Testimony of Maria Aldaco

Ms. Aldaco has been employed by Respondent as a waitress for approximately a year and one-half. She testified that she took the Commission's alcohol awareness test in June or July 1998. Ms. Aldaco was working on November 14, 1998. When Mr. Flores and Mr. Gallegos arrived at the club, she escorted them to seats by the stage. She described them as "nice" and testified she did not notice any signs of intoxication, such as slurred speech, difficulty walking, or blood-shot eyes. She took their orders for Budweiser beer and served them. She remembered that one of the men paid for both drinks and had no trouble getting the money from his wallet.

Ms. Aldaco admitted on cross examination that she worked "a lot" of tables that evening and had made no notes to help her recall the events which occurred. Respondent was so busy two bartenders were on duty. Ms. Aldaco's job as waitress is her sole source of income. Related criminal charges are pending against Ms. Aldaco.

3. Testimony of Jesus Aldaco

Mr. Aldaco testified he was outside with the security guard waiting for his wife to complete her work when he saw the police escort Mr. Flores and Mr. Gallegos from the building. He overheard one of the men say, "I think we were picked out."

4. Testimony of Rose Vidaurri

Ms. Vidaurri, Respondent's 13-year employee, has taken the certification course six times. Ms. Vidaurri was working as a bartender on November 14, 1998. She saw Ms. Aldaco serve Mr. Flores and Mr. Gallegos and saw them drinking beer, but testified she observed nothing out of the ordinary. It was a busy evening, the music was loud, and people were talking to her. Ms. Vidaurri further testified that the Commission has increased its scrutiny of Respondent since the club reopened.

Ms. Vidaurri explained in cross examination that the bar is in a recessed area. The bartender takes orders verbally from waitresses on both sides of the bar. Unless someone is "running a tab," the bartender does not know which table is placing an order, and the waitresses may bring orders for several tables at the same time. Respondent has "open tables" in which any waitress can serve any table.

5. Testimony of Mario Buenrostro

Mr. Buenrostro, one of the managers, has worked for Respondent for ten years. He was on duty on November 14, 1998, and was behind the bar when the officers arrested Mr. Flores and Mr. Gallegos. He estimated that they were present 30 minutes prior to their arrest and said they were not causing any danger to themselves or to others. He did not believe they were intoxicated and were not causing any problems. Mr. Buenrostro testified that the person in charge of security and a person at the door check incoming patrons for identification and possible intoxication. He has noticed an increase in the Commission's "searches" since the other hearing.⁹ Officers have visited the club on an average of once weekly; however, he added that he is aware the Code permits officers to check the club at any time.

6. Testimony of Thomas Burris

Mr. Burris described himself as a 12-year patron who goes to the club two to three times weekly. He testified he usually spends \$100 to \$200 each visit buying drinks for "the girls." He came to the club for a birthday celebration about 7:00 p.m. but drank only three glasses of bourbon and coke. He observed Messrs. Flores and Gallegos arrive about 12:15 a.m. and saw Ms. Aldaco serve each of them a drink. He did not see them engage in any unusual behavior to indicate they were intoxicated, but admitted he did not watch them constantly.

7. Documentary Evidence

Respondent introduced the SAPD report related to the arrest of Messrs. Flores and Gallegos, a court document showing that Ms. Aldaco previously was placed on deferred adjudication rather than convicted of prostitution, the health assessment forms mentioned above, and Dr. Garriott's written analysis. Respondent attempted to impeach the detective's testimony with the police report, which indicated it had been routed to the theft division. The court record was used to correct Ms. Aldaco's testimony that she had been convicted previously.

H. Analysis

The detectives and Agent Gutierrez provided credible testimony about the numerous signs of intoxication Mr. Gallegos and Mr. Flores exhibited. Even though the blood alcohol tests are not decisive, they provide some evidence of intoxication. Dr. Garriott estimated that their blood alcohol levels were as high as 0.132 and 0.15 when they ordered the beer. Because their blood alcohol level was decreasing, their motor functions may have been improving by the time of their assessment. Furthermore, they were not at a high level of intoxication, according to Dr. Garriott. He established that trained peace officers and club employees should have been able to recognize the signs of intoxication.

⁹ Mr. Buenrostro did not identify the hearing he referenced.

Respondent's employees and patron testified they did not notice any signs of intoxication or anything out of the ordinary about Mr. Gallegos or Mr. Flores. On the other hand, Respondent did not establish how long or how closely the bartender and manager observed the two men. Neither did Respondent establish any details about the training or abilities of the people checking patrons as they arrived. The manager testified only that he did not believe they were intoxicated and were not causing problems. Evidence shows that the bartender works in a recessed area, takes orders from waitresses on both sides of the bar, and was busy that evening. Furthermore, the music was loud, and people were talking to the bartender.

Respondent did not show that the patron, Mr. Burris, had any expertise in recognizing signs of intoxication. By his own admission, Mr. Burris was attending a birthday party and did not watch the two men constantly. At the time of the hearing, Ms. Aldaco was still employed by Respondent and had related criminal charges pending. Understandably, she may have been reluctant to admit the two individuals she served appeared to have been intoxicated. Pursuant to the statutory standard set forth in Section 11.61(b)(14), the Commission does not have to show an individual was *obviously* intoxicated to establish a violation.

A preponderance of the evidence shows that the Messrs. Flores and Gallegos suffered the loss of the normal use of their mental and physical faculties because of alcohol. The evidence further shows that Respondent's waitress served beer to Mr. Gallegos and Mr. Flores while they were intoxicated.

I. Public Comment

Section 5.435 of the Code requires the Commission to adopt rules to provide the public with a reasonable opportunity to appear and speak on issues related to the hearing. This section further requires the Commission to consider the public comments in making a decision on the hearing. Mary Alice Ramsay, Rosemary Tipps, and Pauline Manuel, who reside near Respondent's club, provided public comment, summarized below.

Mrs. Ramsay and her husband live on a corner within 200 feet of Respondent. The Ramsays are troubled by loud cars speeding through their neighborhood, tire tracks on their lawn, screams, foul language, car alarms going off, gun-shot-like noises, and delivery trucks driving on neighborhood streets where trucks are prohibited. Mrs. Ramsay believes that always ignoring noise could place one in a dangerous situation. Every day Mr. Ramsay has to pick up beer and wine containers and other trash in their yard. Although Mrs. Ramsay did not have proof Respondent is responsible for these events, she observed they did not occur when Respondent was closed between May 4 and July 17, 1998. Mrs. Ramsay noted that police records reveal the police receives an average of one complaint weekly about Respondent. The complaints included disturbances, driving while intoxicated, injuries to person, robbery, theft, and a shooting on August 18, 1998. Mrs. Ramsay described the quality of life as "normal" when Respondent was closed and recommended permit revocation.

Mrs. Tipps commented that she has struggled for many years to get Respondent out of the residential neighborhood. Although the zoning commission advised the city council that Respondent should not be located there, a judge allowed Respondent to reopen after being closed for a month.¹⁰ Because of Respondent's loud, obnoxious noise, intoxicated patrons yelling, screaming, and throwing beer bottles, and loud traffic, she is unable to sleep until after Respondent closes about 2:00 a.m. According to Mrs. Tipps, intoxicated patrons who drive and a parking lot not clearly defined from the street create a danger. She fears going out at night when she hears shots and wishes the police could be present all of the time. Mrs. Tipps wants the neighborhood to return to its peaceful existence without Respondent.

Mrs. Manuel described a traffic hazard created by Respondent's patrons parking on the street leaving only one lane for traffic. Although the traffic hazard is Mrs. Manuel's biggest concern, she is aware one of her neighbors found an intoxicated person asleep in the yard.

J. Selective Enforcement

Respondent contended the 1997 complaint related to noise and fighting in the parking lot only, and the detectives were directed by a city councilman through the police chief to investigate other possible violations inside the premises after they failed to find any violations outside. Respondent further asserted that the investigation was a politically motivated, vote-getting scheme. Respondent presented testimony that SAPD and Commission agents have inspected the premises 15 times in the last six months or on the average of once weekly.

Respondent did not refute the testimony that the investigation arose from a citizen complaint about intoxicated patrons fighting in the parking lot. If the investigation did not reveal intoxicated patrons in the parking lot, it does not appear unreasonable for the detectives to look inside the club for intoxicated persons to complete their investigation. The detectives testified they were merely investigating complaints and had no personal interest in the club. The public comment provided insight that area residents are concerned about Respondent's operations, and numerous complaints are filed. In fact, one of the persons noted that police records show the police receive an average of one complaint weekly about Respondent. The complaints included disturbances, driving while intoxicated, injuries to person, robbery, theft, and a shooting. Moreover, evidence shows that complaints may be filed at the police department from many sources, and it is the policy of the police department to investigate all complaints. As stated in Section 101.07 of the Code, it is the duty of all peace officers, including those of cities, to enforce the provisions of the Code.

Likewise, the Commission's licensing records, discussed in the final section below, reveal a number of complaints against Respondent. It is also the Commission's policy to investigate all complaints. The Commission's agent testified he had been

¹⁰ Ms. Tipps did not provide the details of the events she referenced in this remark.

under no pressure regarding the complaint. Moreover, Respondent's manager volunteered he is aware the Code permits them to check the club at any time. It does not appear that the Commission actually expedited revocation action against Respondent on the 1997 complaint. Given the statutory charge to the Commission to protect the welfare, health, peace, temperance, and safety of the people of the state, it is not unreasonable that the Commission inspect the premises.

Respondent's assertion without more evidence fails to demonstrate selective enforcement. Instead, the evidence shows that investigations are conducted after complaints are received in conformance with established policy. Moreover, Respondent failed to provide *any* evidence of a politically motivated, vote-getting scheme.

K. The Defense of Seller-Server Training Certificates

Even though Respondent did not raise Section 106.14 of the Code as an affirmative defense, it should be addressed based on the evidence received. This section provides that the action of an employee selling or serving an intoxicated person is not attributable to the employer under certain circumstances. Section 106.14(a) provides that the actions of an employee shall not be attributable to the employer if: (1) the employer requires its employees to attend a Commission-approved seller training program; (2) the employee has actually attended such a training program; and (3) the employer has not directly or indirectly encouraged the employee to violate the law. Ms. Aldaco testified she attended an alcohol awareness course and the report of Agent Gutierrez confirmed that testimony; however, Respondent did not present any evidence that it met the other two criteria. Thus, the defense is not available for the November 1998 allegation.

Neither is the defense available for the October 1997 allegation. Although some evidence was presented that Ms. Cisneros had attended a seller training program, Ms. Wagner was adamant that it was not Ms. Cisneros who had served the three individuals. Because the identity of the waitress was not clearly established, the defense totally fails here.

L. Conclusion and Recommendation

Staff has shown by a preponderance of the evidence that Respondent or its employees served alcoholic beverages to five intoxicated persons on two different dates. Staff recommended cancellation of Respondent's permits. In the event its recommendation was not accepted, Staff recommended permit suspension. In support of its alternative recommendation, Staff presented permit records showing the Commission sanctioned Respondent six times between 1990 and 1996. Staff also presented evidence of Respondent's gross receipts and asked that they be considered along with the Commission's penalty chart and Respondent's previous violations. On May 24, 1999, Staff filed a copy of the decision of a Court of Appeals in another disciplinary case the Commission brought against Respondent. Although the Commission's records show a long history of violations, the hearing notice put into

issue only the five allegations of serving alcoholic beverages to intoxicated persons. Because this proposal recommends revocation, it is not necessary to consider the gross revenues, penalty chart, or the court's decision.¹¹

In the *El Chico* case mentioned above, the Court held that an alcoholic beverage permittee holds a duty to the public not to serve an alcoholic beverage to a person when the permittee knows or should know the patron is intoxicated. *Id.* at 314. The permits issued to Respondent gives it the privilege of selling alcoholic beverages in accordance with the terms of the Code. In spite of this privilege, the evidence substantiates the allegations that Respondent served or sold alcoholic beverages to five individuals on two separate dates, in violation of Section 11.61(b)(14) of the Code. Pursuant to this section, the Commission could revoke a permit for any single violation. Based on the multiple violations, this proposal for decision recommends permit cancellation.

IV. FINDINGS OF FACT

1. Top of the Strip, Inc. d/b/a Top O the Strip holds Mixed Beverage Permit No. MB-118573 and Mixed Beverage Late Hour Permit No. LB-118574 issued by the Texas Alcoholic Beverage Commission (the Commission).
2. Top O the Strip is a club located at 115 Nova Mae, San Antonio, Bexar County, Texas.
3. On January 4, 1999, the Commission sent notice of the hearing to Top of the Strip, Inc. d/b/a Top O the Strip at 16634 Fallen Tree Drive, San Antonio, Texas 78247-2024, by certified mail, return receipt requested.
4. The hearing notice contained statements of the time and place of the hearing, the legal authority under which the hearing would be held, and of the matters asserted.
5. The hearing was convened on January 26, 1999, at the State Office of Administrative Hearings, 1015 Jackson Keller Road, San Antonio, Texas, and was closed on March 22, 1999.
6. Joe Michael Escalante, Francisco J. Rodulfo, and Steven Duron were at Top O the Strip as of 8:00 p.m. on October 10, 1997.
7. As of 10:30 p.m. on October 10, 1997, Messrs. Escalante, Rodulfo, and Duron had a large number of beer bottles on the table in front of them.

¹¹ The decision may be neither relevant nor final.

8. Between 10:30 p.m. on October 10, 1997, and 12:20 a.m. on October 11, 1997, Messrs. Escalante, Rodulfo, and Duron: (1) were unusually loud and boisterous, (2) yelled obscenities at dancers and waitresses, (3) swayed in their seats, (4) waived their drinks in their hands, (5) had glassy, blood shot eyes, (6) were unsteady while seated and while standing, (6) staggered when they walked, (7) had slurred speech, and (8) had aggressive behavior.
9. One of individuals specified in Finding of Fact No. 6 stumbled and fell into a vacant chair as he walked toward the rest room.
10. One of the individuals specified in Finding of Fact No. 6 grabbed a dancer and attempted to pull her off the stage and pinched the buttocks of a waitress.
11. One of the individuals specified in Finding of Fact No. 6 rested his head on his hands on the bar adjacent to the stage and needed assistance walking out of Top O the Strip.
12. Twice between 10:30 p.m. on October 10, 1997, and 12:20 a.m. on October 11, 1997, a Top O the Strip waitress took drink orders from Messrs. Escalante, Rodulfo, and Duron; delivered each a 12-ounce bottle of Budweiser beer; and received payment for the beer.
13. One of the waitresses at the Top O the Strip acknowledged that Messrs. Escalante, Rodulfo, and Duron were intoxicated.
14. Margarito Gallegos and Jesse Flores entered Top O the Strip after midnight on November 14, 1998.
15. On November 14, 1998, Maria Aldaco was employed by Top O the Strip as a waitress.
16. Ms. Aldaco took drink orders from Mr. Gallegos and Mr. Flores, served each a 12-ounce bottle of Budweiser beer, and collected payment for the beer.
17. Between 12:15 a.m. on November 14, 1998, and 1:00 a.m. on November 14, 1998, Mr. Flores and Mr. Gallegos had: (1) slurred speech, (2) blood shot eyes, (3) loud, boisterous behavior, (4) slow movements, and (5) a strong smell of alcohol on their breath. Mr. Flores and Mr. Gallegos swayed when they walked and made exaggerated hand gestures at the dancers.
18. Mr. Flores had difficulty focusing on his money and paying the waitress.
19. Mr. Gallegos moved slowly and deliberately when he walked to the rest room twice, had difficulty keeping his balance, and had to steady himself once on the back of a chair.

20. At 2:15 a.m. on November 14, 1997, Mr. Flores had a blood alcohol level of 0.11.
21. At 2:18 a.m. on November 14, 1997, Mr. Gallegos had a blood alcohol level of 0.14.
22. Mr. Flores and Mr. Gallegos drank only half of their beer before being arrested for public intoxication at 1:00 a.m.
23. A blood alcohol level may take 30 minutes to an hour to reach its maximum level before subsiding.
24. The blood alcohol levels of Mr. Flores and Mr. Gallegos would have been higher when Ms. Aldaco served them beer than at 2:15 a.m. when they were tested.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Sections 6.01 and 11.61 of the TEX. ALCO. BEV. CODE ANN. (Vernon Supp. 1999).
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. ALCO. BEV. CODE ANN. §5.43 and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 1999).
3. As specified in TEX. ALCO. BEV. CODE ANN. §11.015, venue was properly established in Bexar County, Texas.
4. The Texas Alcoholic Beverage Commission provided adequate notice of the hearing pursuant to TEX. ALCO. BEV. CODE ANN. §11.63 and TEX. GOV'T CODE ANN. §2001.052.
5. Beer is an alcoholic beverage, as contemplated in TEX. ALCO. BEV. CODE ANN. §§1.04(15) and 101.67.
6. On October 11, 1997, Joe Michael Escalante was intoxicated, pursuant to *El Chico Corp. v. Poole* 732 S.W.2d 306 (Tex. 1987).
7. On October 11, 1997, Francisco J. Rodulfo was intoxicated, pursuant to *El Chico Corp. v. Poole* 732 S.W.2d 306 (Tex. 1987).
8. On October 11, 1997, Steven Duron was intoxicated, pursuant to *El Chico Corp. v. Poole* 732 S.W.2d 306 (Tex. 1987).

9. Top of the Strip, Inc. d/b/a Top O the Strip knew or should have known that Joe Michael Escalante, Francisco J. Rodulfo, and Steven Duron were intoxicated.
10. Top of the Strip, Inc. d/b/a Top O the Strip sold or served an alcoholic beverages to intoxicated persons on October 11, 1997, in violation of TEX. ALCO. BEV. CODE ANN. §11.61(b)(14).
11. On November 14, 1998, Margarito Gallegos was intoxicated, pursuant to *El Chico Corp. v. Poole* 732 S.W.2d 306 (Tex. 1987).
12. On November 14, 1998, Jesse Flores was intoxicated, pursuant to *El Chico Corp. v. Poole* 732 S.W.2d 306 (Tex. 1987).
13. Top of the Strip, Inc. d/b/a Top O the Strip knew or should have known that Margarito Gallegos and Jesse Flores were intoxicated.
14. Top of the Strip, Inc. d/b/a Top O the Strip sold or served an alcoholic beverages to intoxicated persons on November 14, 1998, in violation of TEX. ALCO. BEV. CODE ANN. §11.61(b)(14).
15. Based on the foregoing findings of fact and conclusions of law, the Texas Alcoholic Beverage Commission is justified in cancelling the mixed beverage permit and mixed beverage late hours permit held by Top of the Strip d/b/a Top O the Strip, pursuant to TEX. ALCO. BEV. CODE ANN. §11.61 (Vernon Supp. 1999).

SIGNED this 3rd day of June, 1999.


GEORGIE B. CUNNINGHAM
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS