

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 24, 1999



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

VIA CERTIFIED MAIL
P 906 424 091

RE: Docket No. 458-98-2318; Texas Alcoholic Beverage Commission vs. MC/VC, INC. d/b/a PARTY PLACE CABARET (TABC Case No. 579358)

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 attorney for Texas Alcoholic Beverage Commission, and to James R. Lawrence, attorney for Party Place Cabarett. For reasons discussed in the proposal, I recommend that no action be taken against Respondent.

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.

JUN 28 1999

Texas Alcoholic Beverage Commission

Sincerely,

A handwritten signature in black ink, appearing to read "Eder P. Ruiseco".

Eder P. Ruiseco
Administrative Law Judge

EPR:mar

Enclosure

xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - **Facsimile, 512-475-4994**
Andrew Del Cueto Staff Attorney, Texas Alcoholic Beverage Commission -
Certified Mail No. P 906 424 092 Return Receipt Requested
James R. Lawrence, Attorney at Law, 1743 Third St., Corpus Christi, Texas 78404 -
Certified Mail No P 906 424 093, Return Receipt Requested

DOCKET NO. 458-98-2318

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
	§	
MC/VC, INC. D/B/A PARTY PLACE CABARET MB-243299, LB-243300 & PE-243301 NUECES COUNTY, TEXAS (TABC DOCKET NO. 579358)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC), as Petitioner, brought this action recommending to the Texas Alcoholic Beverage Commission (Commission) that the mixed beverage permit, mixed beverage late hours permit, and a beverage cartage permit held by MC/VC, Inc., d/b/a Party Place Cabaret, Corpus Christi, Nueces County, Texas (Respondent), be canceled or suspended. Petitioner alleged that Respondent, or its agent, servant and/or employee was intoxicated on the licensed premises. This act was alleged to violate Section 11.61(b)(13), of the TEXAS ALCOHOLIC BEVERAGE CODE (Code).

This proposal recommends that no action be taken against Respondent, as there was insufficient credible evidence to support the allegation. Petitioner did not prove that Respondent's employee was intoxicated, as defined by the Texas Penal Code, Section 49.01(2)(A).

I. Notice

Notice of the intention to suspend the Respondent's license for violating: §11.61(b)(13) of the Code by permitting an employee to be intoxicated on the licensed premises, was sent to Respondent on July 7, 1998.

There are no contested issues of notice, venue or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion.

II. Procedural History

On January 12, 1999, a pretrial conference was conducted by telephone, and orders were issued on January 13 and January 27, 1999. The pretrial order scheduling the pretrial hearing and final hearing was issued on December 30, 1998.

On January 21, 1999, a public hearing was held in the State Office of Administrative Hearings ("SOAH") in Corpus Christi, Nueces County, Texas, before Edel P. Ruiseco, Administrative Law Judge (ALJ).

Petitioner appeared by Andrew Del Cueto, of the Texas Office of the Attorney General. Respondent appeared by James Lawrence, attorney. The parties announced ready and the hearing was concluded on January 21, 1999; the ALJ left the record open until March 1, 1999, to permit the parties time to file proposed findings of fact and conclusions of law. The record was closed on March 2, 1999.

III. Jurisdiction

The Commission has jurisdiction over this matter pursuant to §§11.61(c) and 6.01, of the Code. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(6). The parties stipulated that notice and jurisdiction were proper, and questions of venue were waived by the parties.

IV. Discussion

General: Respondent is a registered sexually oriented business ("SOB") located in and licenced by the City of Corpus Christi, in Nueces County, Texas. It holds permits MB-243299, LB-243300, and PE-243301, permitting it to sell alcoholic beverages to its patrons. The events that gave rise to the allegation occurred on June 12, 1998.

Allegation: Petitioner alleged that Respondent violated Section 11.61(b)(13), of the Code, and alleged in pertinent part that Respondent, or its employee, agent, or servant, was, on June 12, 1998, intoxicated on the licensed premises.

V. Evidence

A. Petitioner's Evidence

Petitioner offered the testimony of two witnesses to support the allegations contained in the Notice of Hearing.

1. Agent Wiley: Agent Howard Wiley III, testified that he has been a peace officer for 11 years, the last year with TABC as an agent. The Agent included amongst his credentials that he is certified as a Practitioner in the Standardized Field Sobriety Tests (STSF), which is a government approved test for determining intoxication and consists of three separate tests, i.e., the horizontal gaze nystagmus (HGN) test; the Walk-and-Turn task; and the 1-Leg Stand task. Additionally, he has a Master's degree in Criminal Justice. The Agent advised that it is the policy of TABC to perform all the tests which comprise the STSF testing, but that sometimes the 1-Leg Stand and Walk-and-Turn tasks are not administered for various reasons.

On June 12, 1998, agents Wiley and Arthur Munsell were assigned to assist Corpus Christi Police Department's officer Garrett in an inspection of the licensed premises. Wiley indicated that he saw Respondent's employee, Ms. Marivel Vera ("Vera"), apparently after having finished a table dance, and she "appeared significantly unsteady" as she walked back into the dressing room with vice officer Garrett. Further Wiley testified that she was weaving, had slurred speech and a stupor-like expression, as well as a very strong odor of an alcoholic beverage on her breath, and she admitted she had "5 or 6 drinks". He also noted that Vera had a stud in her tongue. He did not question whether such stud affected her adversely, but opined that Vera's slurred speech was not due to the stud. Wiley implied that he did not know Vera, or how she spoke before the investigation. Based on his observations, Wiley requested Vera perform a field sobriety test to ascertain whether or not she was intoxicated. Agent Wiley performed the HGN test, which is a test to ascertain whether the eyes involuntarily jerked during the test. He testified that Vera was swaying and had to steady herself by putting her hand on the wall, and that during the test she swayed back and forth and did not keep her head perfectly still. Wiley stated that the other two tests comprising the SFST were not administered, because he declared that it was solely his decision, and he felt it was unsafe for Vera due to her level of intoxication. He stated that it was his judgment that if performing the test would place the subject in imminent danger of falling or injuring his/herself, the test is not given. Vera was taken into custody after the HGN test demonstrated to the agent that she had nystagmus during all phases of the test, except vertical nystagmus, which indicates drugs in the subject's system.

In response to questions on how he administered the HGN, Agent Wiley responded that he always asks the subject four questions after telling them to keep their head perfectly still: 1) are you taking any medication; 2) do you have any head injuries; 3) are you a diabetic; and 4) do you have any other medical conditions that might effect this test. He also mentioned that he asks about hard contacts. He testified that he moved the stimulus and notes any clues of nystagmus (jerking of the eye). He tests for two clues for each phase, the first being smooth pursuit, the second being at 45 degrees; and the last being at maximum deviation. Wiley stated that Vera was weaving and had to put her hand on the wall to steady herself, but although she was significantly unsteady, he was still able to administer the HGN.

Under cross-examination, Agent Wiley admitted that he did not include in his written report important evidence regarding Vera's condition before entering the dressing room, i.e., that she was significantly unsteady and that Officer Garrett was presumed behind her because of concern that she might fall and injure herself. In addition, Agent Wiley noted that he follows the standardized tests exactly as stated in the National Highway Transportation Safety Administration's Standard Field Sobriety Testing manual ("the Manual")¹, so that his testimony could be consistent, and he stated that he did not give any other tests, e.g., alphabet, finger count, etc., because he was not trained in such. He noted that he first used the flashlight for the HGN, but because she was having difficulty seeing the stimulus, he moved into a more well-lit area. Agent Wiley stated that he began the test by holding the stimulus 12" from her eyes, moved from (his perspective) from the left to the center, center to the right, and returned to the center [this indicates testing the right eye first, instead of the left].

¹ DWI Detection and Standardized Field Sobriety Testing - Student Manual, U.S. Department of Transportation, National Highway Traffic Safety Administration, P. O. Box 25082, Oklahoma City, OK, 73125-5050, (405) 954-3112 [HS 178 R10/95]

In response to questions of why instruments to measure intoxication were not used, Agent Wiley stated that he did not have access to the portable breath test (PBT) equipment, and the law prohibited the use of an Intoxilyzer instrument except for DWI testing.

2. Agent Munsell: TABC agent Arthur Munsell, was designated as the Commission's representative and was present during all testimony, based on the fact that TABC represented that the agent would be called to testify only as an expert witness, even though he was present outside the licensed premises during the arrest of Vera. However, he testified as to facts of this case, which testimony is included herein, but which was not given any weight.

Agent Munsell, an agent for 17 years, is also an instructor regarding Standard Field Sobriety Tests (of which the HGN test is one of a battery of three tests), and instructs officers of the Corpus Christi Police Department. The ALJ took judicial notice of the Manual, as requested by Petitioner. Agent Munsell described the accuracy of the tests, and explained the procedures for test administration, and stated that if the HGN was not administered according to the Manual, the test was invalid. The agent did not see the HGN test performed, but briefly saw Vera as she was led out, handcuffed, and placed into the patrol car. The agent testified that from his vantage point, he believed Vera was intoxicated. The agent further testified that it was not necessary, but it is the better practice, for another person to perform the HGN to confirm the findings of the first person. He did not know why this was not done in this case.

The agent confirmed Agent Wiley's testimony regarding the reason no scientifically-accepted tests for intoxication were administered to Vera. He noted that the scientific instrument for determining the blood-alcohol level in a person's system, i.e., the intoxilyzer instrument, is located at the Nueces County jail, but belongs to the Texas Department of Public Safety and cannot be administered unless the person is accused of driving while intoxicated. Blood tests are not offered because it is not the practice of TABC to offer this option.

The agent further testified that it is a permittee's responsibility to ascertain from TABC or the seller, before purchasing the business, whether or not prior violations existed. Agent Munsell did confirm that the only way the prospective purchaser could find out from TABC whether or not prior violations existed was if authorization was obtained from the seller to get such information, or if the purchaser was an officer of the corporation that was selling the business. He stated that, even if she had an authorization, a prospective purchaser would not be shown the Commission's file, unless the purchaser knew of specific violations.

B. Respondent's Evidence

The evidence offered by the Respondent consisted of two witnesses, Ms. Theresa Reed and Mr. Larry Joseph Stessman.

1. Ms. Skaggs (Reed): Ms. Theresa Skaggs (erroneously referred to as Reed), owner of the leased premises, testified that she was the new owner of the licensed premises and stated that she had purchased the property prior to the violations the basis of this action. When she purchased the property before June 12, 1998, she was not advised of prior violations. She further testified that she purchased the business entity, including the name and all assets. She stated that she was never advised of any prior violations, either by the seller or by the

Commission, even though she had conferred with the Commission employees on several occasions.

2. Mr. Stessman: Mr. Larry Joseph Stessman, manager of the licensed premises, has been employed as manager for the previous five years. Mr. Stessman was working at the club on the evening of June 12, 1998, when the inspection took place. He indicated that the agents arrived at about 10:30 or 11:00 o'clock p.m., and agent Wiley checked tables while the vice officer went to the back and requested dancer information. Mr. Stessman obtained the records, which is the usual procedure in these matters, and escorted the dancers to the back room to be questioned. He stated that Vera was the last one to be sent because she was dancing, and he led her back to the dressing room where she opened her locker, washed her mouth out with Listerine, and went to the officer to be questioned. Mr. Stessman stated that no one followed her or led her into the dressing room, contradicting the testimony of Agent Wiley, and stated further that she had danced her sets without incident, and he knew her since employed, and she was not intoxicated.

Mr. Stessman further noted that he was schooled by TABC in identifying intoxicated persons, which is required before being able to serve alcoholic beverages. Mr. Stessman further opined that Vera did not stumble or stagger while walking, and that any slurred speech resulted from the tongue piercing which Vera recently had (a silver stud was inserted into the center of her tongue). He confirmed that he knew that her tongue was swollen and inflamed, and such condition caused her to speak with a slur, because she did not speak with a slur before the piercing. Mr. Stessman stated that he saw the HGN test being administered, and that it took about 30-40 seconds, but that he was too far to hear what was being said. Mr. Stessman confirmed that dancers drink while working, customers buy drinks, and he did not know how many Vera had, if any.

C. Arguments of Parties

1. Petitioner: Petitioner argues that all the elements proving the violations occurred and the license of Respondent should be suspended or canceled.

Petitioner argues that there is but one issue before this tribunal, which is whether or not Vera was intoxicated, to which Respondent agreed. Both parties agreed that TABC has no definition of intoxication, and that the only possible issue was if Vera was an employee of Respondent, which Respondent does not dispute.

Petitioner suggests that "intoxicated" be defined by the dictionary or as used in the Texas Penal Code, §49.01², and such suggestion was not contested by Respondent. Therefore, for all purposes herein, the definition of "intoxicated" will be pursuant to the Texas Penal Code.

Petitioner stresses that the agent who conducted the HGN test was well-qualified and that such test was administered correctly, as confirmed by an expert in the administration of

²Texas Penal Code, §49.01. Definitions. In this chapter: (2) "Intoxicated" means:
(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . or any other substance into the body; or
(B) having an alcohol concentration of 0.10 or more.

such test. Petitioner argues that only one of the three standard field sobriety tests was given because the agent felt that Vera was too “unbalanced” and intoxicated to perform the tests without falling, striking her head and injuring herself. Petitioner contends the Manual instructs students not to give all the tests if it would be a danger to the subject. Petitioner argues that the agent’s observations warrant a finding that Vera did not have the normal use of her mental or physical faculties due to drinking alcoholic beverages, and the licensed premises should therefore be suspended for twenty-five days.

2. Respondent. Respondent argued there was insufficient evidence to show that Vera was intoxicated, and pointed out inconsistencies in Agent Wiley’s statements. In addition, Respondent claimed that the HGN test was not properly conducted according to the Manual, because Vera’s head was not perfectly still, which could result in an inaccurate and invalid test. Lastly, Respondent pointed out that Agent Munsell’s observations could not possibly confirm Agent Wiley’s determination that Vera was intoxicated, because his testimony was supposed to be as an expert only and not as to facts, and his observations were from too far a distance and for too short a period to be given any weight.

D. Legal Authority:

Respondent’s licenses or permits may be suspended or canceled pursuant to the authority in §11.61(b)(13) of the Code, which reads in pertinent part as follows:

Sec. 11.61. CANCELLATION OR SUSPENSION OF PERMIT.

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . .

(13) the permittee was intoxicated on the licensed premises.

E. Conclusion

The evidence presented does not support that permittee’s employee was intoxicated and therefore permittee’s license should not be canceled.

The major points of contention are: the agent did not attempt the battery of tests comprising the SFST; the HGN test was not valid because it was not administered according to the procedures in the Manual (pertinent parts thereof attached hereto as Appendix A); and the contradictory nature of the testimony. Both parties referred to the testing procedures set out in the Manual, therefore, evidence regarding the HGN was viewed strictly as against the procedures contained in the Manual. In other words, if the SFST was properly administered, then the interpretation of the agent as to whether Vera was intoxicated, would be valid. If not properly administered, then the interpretation of the test results would be invalid.

Respondent’s arguments are: that the HGN was not properly administered, and that the facts do not support basing a determination of intoxication on the HGN test alone. Petitioner argues that the HGN was properly administered and that no further field sobriety tests were administered due to the intoxication level of the respondent.

Was the HGN properly administered?

Based on the prohibition (see Appendix 1, paragraph VIII-12) emphasized in the Manual that the tests are compromised if any one element of the tests is changed or not administered in the prescribed manner, the evidence shows that the HGN was compromised. The testimony of Agent Munsell further confirmed that the test would be invalid if any phase was not administered according to the Manual. The HGN test was not properly administered in the following procedures: the question of contact lenses; the sequence of the phases of the HGN was not followed as specified; and the test was not administered in the prescribed manner because the wrong eye was tested first.

The Manual states that the test begins with the question "are you wearing contact lenses?" The question was addressed four times and the testimony was that the first question concerned whether or not medication was taken or if the person was a diabetic. In one response, no reference to contact lenses was made. When the question concerning contact lenses was asked, it was whether the subject had "hard contacts", which person could confuse a person if he/she wore the more popular "soft" contact lenses.

Agent Wiley testified that he administered the sequences of HGN tests by checking first the lack of smooth pursuit, then onset of nystagmus prior to 45 degrees, and then checked for distinct nystagmus at maximum deviation. The Manual, on at least three different occasions, emphasizes that the test sequence is: smooth pursuit, maximum deviation, and then 45 degrees. The sequence was administered incorrectly.

Agent Wiley testified that he administered the HGN test exactly as follows: he began at the left and moved the stimulus to the center, then from the center he moved the stimulus to the right, and then moved the stimulus back to the center for the next test. This shows that the agent tested the right eye first, rather than the left eye, as stated in the Manual.

Does the HGN support the other facts that Vera was intoxicated?

Agent Wiley first described Vera's condition as being unsteady, having slurred speech and a stuporous look, and with an odor of alcoholic beverage. The indicia of intoxication barely supports a decision to administer a field sobriety test, considering that the clues were eliminated by other evidence. First, the slurred speech and stuporous look was a result of a recent tongue piercing, and was evident with the first response. Next, the odor of alcoholic beverage on her breath is expected under the circumstances of the work environment. Being "unsteady" is conclusory, but can be explained by the area being dimly lit and the dancer had high-heel shoes. With the factors relied on to assess intoxication being questionable and evident from the circumstances, the HGN results must have been relied upon to determine intoxication.

The evidence does not support that the HGN test was a reliable determination that the subject was intoxicated. There was no confirming HGN test administered by another officer, as suggested as a good practice by the expert, and no reason given why such was not even attempted. In addition, neither of the two other tests comprising the SFST was attempted, nor were any non-physical field sobriety tests administered even though referenced in the Manual. The reasons given for not attempting other tests were not convincing.

The permutee's manager testified that Vera had been dancing; that she did not stumble or stagger; that his opinion from daily contact was that she was not intoxicated; that Vera's recent tongue-piercing left her tongue swollen and inflamed; and that the tongue piercing and pain therefrom accounted for the expression and slurred speech.

Agent Wiley's changing testimony and failure to note in his report, "significantly unsteady" walking of Vera into the dressing room weighed against his credibility. It was first stated that Vera "walked" to the dressing room; then changed in stages as the question was re-asked, from walked, to appeared unsteady, to staggered, and to Vera being significantly unsteady. Additionally, no mention was made at first that Officer Garrett had to assist Vera to the dressing room, ostensibly to keep her from falling and possibly injuring herself. Also, the manager contradicted the statement, as he testified that he himself escorted Vera to the dressing room, which is the normal procedure. The implication was that this was necessary to avoid the officers from being accused of improper behavior since the dancers were often scantily clad and bare-breasted.

Agent Wiley's reason for only administering one test was that he felt that to administer the physical balance tests could result in injury to Vera. Yet, the evidence was that Vera danced without incident, walked to the dressing room, opened her locker, used mouthwash, and had no trouble doing such acts or following instructions of the officer. Apparently, Vera did not evidence any unsteadiness until in the dressing room, where she became unsteady, weaved, and required putting her hand on the wall to maintain balance. The evidence does not show that Vera was so unsteady that the administering, or the attempt to administer, the physical balance tests of the SFST, could result in injury. Nor does the evidence show that the Walk-and-Turn test could not be administered for the reasons stated in the Manual, i.e., no dry, hard, level, non slippery surface, unsafe conditions, etc. Agent Wiley did not indicate the floor to be unlevel and rough, and the room without adequate lighting - all reasons for not administering the 1-Leg stand task. Additionally, the Manual's statements that "suspect's safety should be considered at all times" cannot be stretched to encompass the circumstances in this case, which would warrant no further tests be given for her safety.

Evidence that Vera was able to comprehend what was occurring is shown by her being able to indicate to the agent that she could not see the stimulus in the HGN test, and was moved into a better lit area. This did not support that the agent still felt she was mentally and physically incapacitated.

The Manual also notes that other tests may be administered which would assist in a determination of intoxication, i.e., alphabet, count down, finger count, and the preliminary breath test. Agent Wiley did not administer any of these to confirm his determination of intoxication.

The HGN test result is a subjective opinion, since only the administrator saw nystagmus, and based on the nystagmus formed the opinion of intoxication. Even though the manager was near, unless he was directly in front of Vera, he would not be able to see nystagmus in her eyes. On the other hand, if either or both of the two other tests comprising the SFST battery were administered, the manager would have been able to attest to whether or not Vera exhibited clues of intoxication, e.g., raising her arms or putting her foot down for balance during the 1-leg stand, etc. Since the determination of intoxication is subjective, and since the Respondent's ability to operate a business rests on such determination, the administration of the test and clues of intoxication require close scrutiny.

Despite the fact that Agent Munsell is an acknowledged expert in the field of SFST, his statement that he believed the subject to be intoxicated after seeing her being escorted to the patrol vehicle in the parking lot, is not given much weight because he only glimpsed Vera step from the door into the vehicle, and did not have the time and was not close enough to be able to make such an accurate assessment.

Respondent's main argument was the fact that Agent Wiley indicated to Vera that she was to keep her head perfectly still, yet states that Vera was weaving, staggering, very or significantly unsteady, and because of such imbalance the test results could not have been accurate. Nothing in the Manual addresses whether or not the test is affected by the subject's head not being perfectly still, but the implication is that it has no effect, since it includes that the swaying and head movement of the subject may be considered an additional sign of intoxication.

Respondent's arguments related to the improper administration of the HGN test plus the fact that the HGN test was the only standard field sobriety test given to Vera cast doubt on agent Wiley's conclusion that Vera was intoxicated on Respondent's premises on June 12, 1998.

Petitioner did not meet its burden of proof to show that Respondent's employee was intoxicated. One agent's opinion, without valid testing as stated in the Manual, is insufficient to deprive a person of the ability to do business. Petitioner could easily have attempted the other two tests, of the three-test battery, or could have offered other tests which would have shown the employee to be intoxicated - if indeed she were. However, Petitioner's evidence of intoxication consisted of one agent's opinion, based on a test that was not administered in accordance with instructions in the Manual. The test must be held invalid because it was not performed pursuant to the Manual, and there was no evidence that conducting the test in the manner other than according to the Manual results in a valid test result. In fact, the Manual indicates the opposite. Therefore, the nystagmus test, being invalid, was not given any weight.

In addition, the single test offered is suspect, if only because nothing the officer says is verifiable by a third party. If a logical reason had been given for only conducting the HGN, or other evidence, such as failing the heel-to-toe, or the one-leg stand test, etc., been offered, a supportable finding of intoxication could be made.

Also, the agent did not know what was normal use of faculties of the employee. An odor of alcoholic beverage on a person in a bar is not unusual, although it was given weight in arriving at a decision. However, the agent did not note red, watery or bloodshot eyes - a common indicator of intoxication. The agent's description of the employee's unsteadiness changed during the testimony and therefore was discounted. The slurred speech was obviously due to the tongue piercing, and was not given any weight. Therefore, when viewed at its best, the only evidence of intoxication is the agent's opinion on the HGN test and it is insufficient to warrant a cancellation or suspension of the license.

VI. Findings of Fact

1. Respondent is a sexually oriented business ("SOB"), commonly called a gentlemen's club, and holds Permit Nos. MB-243299, LB-243300 and PE-243301.
2. Respondent received a Notice of Hearing on or about December 23, 1998, which advised Respondent of the allegation.
3. The hearing was convened January 21, 1999, at SOAH office in Corpus Christi, Nueces County, Texas. The hearing was closed on March 2, 1999.
4. Andrew del Cueto, Assistant Attorney General, represented the Commission, and James R. Lawrence, Esquire, represented Respondent.
5. On June 12, 1998, two TABC agents and several police officers from the Corpus

Christi Police Department went to premises of Respondent to conduct an inspection.

6. Vera, employed by Respondent, was working on the evening of June 12, 1998, and was examined for purposes of intoxication.

7. The evidence of intoxication is insufficient to warrant cancelation or suspension of a license.

8. It was not shown by a preponderance of the evidence that Vera was intoxicated on Respondent's premises on June 12, 1998.

VII. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to Section 11.61 of the Code.

2. The State Office of Administrative Hearings has jurisdiction over this proceeding pursuant to TEX. GOV'T CODE ANN. Chapter 2003.

3. Based on Findings of Fact 2 through 4, proper and timely notice of the hearing was afforded the parties pursuant to the Administrative Procedure Act, Chapter 2001, TEX. GOV'T CODE ANN.

4. Based on Findings of Fact Nos. 5 through 8, there are no grounds demonstrated by a preponderance of the evidence, to take disciplinary action against the Respondent's permits based on events of June 12, 1998.

IT IS THEREFORE PROPOSED, that Respondent not be assessed any penalty.

Signed this 18th day of June, 1999



EDEL F. RUISECO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

EXCERPTS FROM THE MANUAL

[Note: The Manual is the student manual from which most peace officers and TABC agents are taught how to conduct and administer DWI detection and the SFST. It provides a step-by-step detailed explanation of, the purpose for, and how each test should be administered, and is the “bible” for law enforcement officers regarding SFST. Reference made to the Manual includes the chapter by Roman numeral and the page number by cardinal number. After the 40-hour classroom instruction and an internship requiring from 50-100 actual SFST, the student becomes “certified” in conducting the HGN test.]

The Manual states (emphasis added by **bolding** of words):

(IV-1) Effective DWI enforcers **do not leap to the arrest/no arrest decision**. Rather, they **proceed carefully through a series of intermediate steps**, each of which helps to identify the collective evidence.

(IV-2) Sometimes there are DWI contacts in which Phase Three [Pre-arrest screening] never occurs. **There are cases in which you would not administer formal tests to the driver**. These may occur when the driver is **grossly intoxicated** or badly injured, or refuses to submit to tests.

(IV-7) **One of the most critical tasks . . .** is the recognition and retention of facts and clues... **The evidence gathered . . . must be documented. . .**

(VI-5) **ADDITIONAL TECHNIQUES:**

Alphabet - the subject to recite a part of the alphabet

Count Down - count out loud 15 or more numbers in reverse sequence

Finger Count - touch the tip of the thumb in turn to the tip of each finger on the same hand while simultaneously counting up 1, 2, 3, 4; then to reverse direction while counting down 4, 3, 2, 1.

(VII-2) **PRELIMINARY BREATH-TEST**

The **preliminary breath test (PBT)** can help to corroborate all other evidence and to confirm your judgment as to whether the suspect is under the influence.

(VIII-7) N. The “standardized” elements of the Horizontal Gaze Nystagmus test

(1) Standardized Administrative Procedures

Hold the stimulus 12-15 inches in front of the suspect’s eyes

Keep the tip of the stimulus slightly above the suspect’s eyes

Always move the stimulus smoothly

Always check for all 3 clues in both eyes, starting with suspect’s left eye

Check the clues in this sequence: [these instructions are repeated twice more - VIII-17]

Lack of smooth pursuit;

Distinct nystagmus at maximum deviation;

Onset of nystagmus prior to 45 degrees.

(VIII-12) **But it is also necessary to emphasize one final and major point. This validation applies ONLY WHEN THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER. . . IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED**

(VIII-15) Specific Procedures **Begin by asking “are you wearing contact lenses”, make a note whether or not the suspect wears contacts before starting the test.**

(VIII-21) 4. Test Conditions **Walk-and-Turn test requires a designated straight line, and should be conducted on a dry, hard, level, nonslippery surface, under relatively safe conditions. There should be sufficient room for suspects to complete nine heel-to-toe steps. If these conditions do not exist, suspects should be asked to perform this test elsewhere or only HGN should be used. SUSPECTS AND OFFICER’S SAFETY SHOULD BE CONSIDERED AT ALL TIMES.**

(VIII-24) 4. Test Conditions **One Leg Stand requires a reasonably level, and smooth surface. There should be adequate lighting for the suspect to have some visual frame of reference. Suspect’s safety should be considered at all times.**