

**DOCKET NOS. 475628 & 506882**

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
CKAN INC.	§	ALCOHOLIC
D/B/A EXODUS	§	
PERMIT/LICENSE NO(s). MB224448, LB	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO.458-06-2698)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sarah G. Ramos. The hearing convened on the 14th day of September 2006. The hearing was not completed on September 14, 2006 and reconvened for the receipt of additional evidence on October 18, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 10th day of January 2007. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your permit(s) and/or license(s) will be **SUSPENDED** for fifteen (15) days.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of \$7,500.00 on or before April 22, 2007, all rights and privileges under the above described permits/licenses will be **SUSPENDED** for a period of fifteen (15) days, beginning at 12:01 A.M. on April 29, 2007.

This Order will become final and enforceable on April 4, 2007, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this March 8, 2007.

On Behalf of the Administrator,

  
Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

WMC\bc

The Honorable Sarah G. Ramos  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FAX (512) 475-4994

Don Edward Walden  
**ATTORNEY FOR RESPONDENT**  
7200 North Mopac, Suite 300  
Austin, TX 78731  
VIA FAX (512) 795-8079

CKAN INC.  
**RESPONDENT**  
d/b/a EXODUS  
5319 Presidio Rd  
Austin, TX 78745

W. Michael Cady  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Enforcement Division

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

January 10, 2007

Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

**HAND DELIVERY**

**RE: Docket No. 458-06-2698; Texas Alcoholic Beverage Commission v CKAN, INC.  
d/b/a Exodus Permit Nos. MB224448 and 2244499 Travis County, Texas**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

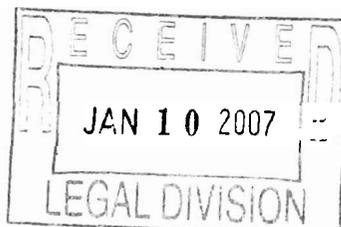
Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

  
Sarah G. Ramos  
Administrative Law Judge

SGR/ed  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**  
Michael E. Cady, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-  
**VIA HAND DELIVERY**  
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-  
**VIA HAND DELIVERY**  
Don Walden, Attorney at Law, Law Office of Don Walden, 7200 N. Mopac, Suite 300, Austin, TX 78731 -**VIA  
REGULAR MAIL**



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**SOAH DOCKET NO. 458-06-2698**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION,</b>	<b>§</b>	
<b>    Petitioner</b>	<b>§</b>	
<b>V.</b>	<b>§</b>	
	<b>§</b>	<b>OF</b>
<b>CKAN, INC.</b>	<b>§</b>	
<b>D/B/A EXODUS</b>	<b>§</b>	
<b>PERMIT NOS. MB224448 and 2244499</b>	<b>§</b>	
<b>TRAVIS COUNTY, TEXAS</b>	<b>§</b>	
<b>    Respondent</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) brought this disciplinary action against CKAN, Inc. d/b/a Exodus (Respondent) alleging that one of Respondent's employees was intoxicated on the premises and another employee served alcoholic beverages to intoxicated persons, and with criminal negligence, to a minor. The evidence proved only the allegation regarding sale of alcoholic beverages to intoxicated persons. For this violation, the Administrative Law Judge (ALJ) recommends a fifteen-day suspension, or in lieu of suspension, payment of a \$7,500 penalty.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

Commission staff attorney Michael E. Cady represented the Staff, and attorney Don E. Walden represented the Respondent. Neither party challenged notice or jurisdiction, and those matters are addressed only in the Findings of Fact and Conclusions of Law. The hearing was convened by ALJ Sarah G. Ramos at the State Office of Administrative Hearings, 300 W. Fifteenth Street, Austin, Texas, on September 14, 2006. Because the hearing was not completed that day, it was reconvened for the receipt of additional evidence on October 18, 2006. The record closed on November 13, 2006, after the parties had an opportunity to file written closing arguments.

Respondent holds Mixed Beverage Permit MB224448 and Mixed Beverage Late Hours Permit BN224449 for the premises located at 302-04 E. 6<sup>th</sup> Street, Austin, Texas, at which the club Exodus is operated.

## II. INTOXICATED EMPLOYEE ALLEGATION

### A. Evidence

#### 1. Judson Chapman

Austin Police Department (APD) Officer Chapman was on duty in Austin's Sixth Street area on May 21, 2005. As he was walked through an alley behind Sixth Street, he came across a man, later identified as David Lee White, who was sitting in an alcove at the back door of the Exodus premises. The door is not marked with the business's name, is not a public-access door, and is closed at most times, Officer Chapman stated.

Officer Chapman spoke with Mr. White to determine whether Mr. White was sick or intoxicated because he had vomited on the front of his shirt. Mr. White, who had a towel hanging out of his back pocket, told the officer that he was a bouncer at the club.

Officer Chapman then called for TABC agents, and when they arrived, they took over the investigation. Officer Chapman said he had no reason to believe Mr. White was lying and was not a bouncer at Exodus. When Officer Chapman has worked undercover as a bouncer, he has kept a towel in his back pocket because most bouncers have a such a towel when they are on duty.

## 2. TABC Agent Tricia Rutledge

Agent Rutledge, a certified peace officer, also was working in Austin's Sixth Street area on May 21, 2005. She responded to Officer Chapman's call for a TABC agent and went to the back of Respondent's premises.

Agent Rutledge said she works on Sixth Street about once a week, and except for club employees, she does not see people carrying towels in their back pockets. And, although Agent Rutledge saw vomit was on front of Mr. White's shirt, she did not see any on the towel in his pocket.

Mr. White told Agent Rutledge that a was a bouncer at Exodus and began work at 9:00 p.m. However, he said, because of his intoxicated state, a manager had put him in the alcove and called someone to come and get him. He also told her he had had four beers and three shots that evening. Because Mr. White appeared to be intoxicated, Agent Rutledge performed a horizontal gaze nystagmus test on him, during which he had difficulty standing.

Agent Rutledge placed Mr. White under arrest, and then went inside Respondent's premises where she met with Respondent's manager on duty that evening, Sami Derder. When Agent Rutledge approached him about the violation of having an intoxicated employee on the premises, Mr. Derder did not deny that Mr. White was an employee.

Agent Rutledge then transported Mr. White to the jail. Mr. White began vomiting at Eighth Street and Congress Avenue, and he did not stop until they arrived at the jail entrance.

### **3. TABC Agent Johnny King**

Another TABC agent working in the area, Agent King, also went to the back of Respondent's premises in response to Officer Chapman's call. Agent Rutledge asked Agent King to go inside Exodus and issue an administrative notice to the person in charge of the premises that evening. He left the notice with Mr. Derder, who told Agent King that he was the person in charge. Mr. Derder told Agent King that he had called "that man's girlfriend" to come get him.

Like Agent Rutledge, Agent King said he routinely works on Sixth Street and has not seen numbers of people with towels in their back pockets. When he was in El Paso, he did see bar patrons with towels; they had the towels because some of the clubs were not air-conditioned, he said.

### **4. Sami Derder**

The manager on duty at Respondent's premises on May 21, 2005, Mr. Derder has worked for Exodus's owner, Akram Nasreddine, for about ten years. Mr. Derder is responsible for the day-to-day operations at Exodus and is on duty six nights a week. Mr. Derder said persons who do not work in clubs sometimes carry towels in their back pockets.

According to Mr. Derder, Mr. White did remodeling and painting work at the club and completed the work a couple of days before May 21, 2005. Mr. Derder paid him at 8:30 or 9:00 p.m. that evening. Mr. White performed no other services for Exodus, Mr. Derder testified.

After Mr. White was paid, he left, but Mr. Derder saw him later when the employees monitoring the door entry told him Mr. White was outside the front door. Mr. Derder went out on sidewalk to talk with him, and Mr. White asked Mr. Derder to call his girlfriend to pick him up. Mr. White said he would wait in the back for her. Mr. Derder said then guided Mr. White to the

back alcove. The back door opens into the alley and was closed at the time because patrons are not allowed to enter or leave through that door. Employees use it to take out trash.

Through Mr. Derder, Exodus's payroll records were introduced into evidence. The record for May 20, 2005, lists eight employees and does not include Mr. White. Mr. Derder said he paid Mr. White in cash, but he did not have a cash receipt to support that testimony.

#### **5. Ayoub Saad**

Mr. Saad, the bar manager for Exodus, worked from 9:00 p.m. until 2:00 or 3:00 a.m. during the month of May 2005. Mr. Saad said Mr. White did some cleaning and painting at the club but was not an employee. Mr. White came into Exodus about 8:30 p.m. on May 21, 2005, to get his money for the painting work he had done earlier in the week; he took his money and left, Mr. Saad recalled. He added that Mr. White had no business being at Exodus during club hours.

#### **6. Akram Nasreddine**

Sole owner and president of CKAN, Inc., the corporation that holds the TABC permits, Mr. Nasreddine, was introduced to Mr. White by one of his employee at another business he owns, Austin Express Towing. The employee asked Mr. Nasreddine to give Mr. White a chance to be a wrecker driver. After Mr. White had trained for two days to be a driver, he then had to wait for approval from the APD. According to Mr. Nasreddine, Mr. White begged for some other work because he was completely out of money.

Mr. Nasreddine told Mr. Derder to allow Mr. White to do some painting and remodeling at Exodus. Mr. White worked as an independent contractor at Exodus and was never an employee or on the payroll. Contractors are paid separately in cash, he added. Mr. Nasreddine said he has never allowed an employee to be on duty while intoxicated.

Mr. Nasreddine also testified that the back door at Exodus is a fire exit, and it pushes open from the inside. The employees use it sometimes to take trash out or bring boxes in.

Mr. Nasreddine said he was introduced to Jennifer Worthington, another witness at the hearing, by a doorman who used to work for him. When she testified, Ms. Worthington worked at Mr. Nasreddine's towing company, but she did not work there on May 21, 2005.

#### **7. Jennifer Worthington**

Ms. Worthington testified that she was in a group of four people who went out socially on May 21, 2005. Mr. White, a friend of someone she knew, began the evening with the group. According to Ms. Worthington, Mr. White said nothing about going to work that evening.

The first place the group went on Sixth Street was Paradox, and they arrived there about 9 p.m. Mr. White could not get into Paradox because of his attire; he was wearing jeans, a black shirt, and tennis shoes. The others went inside Paradox, and Mr. White said he would find them later in the evening. Ms. Worthington next saw him outside of the Dizzy Rooster between 11:00 p.m. and midnight and, during the hearing, recalled that he had been singing and dancing to a song that was playing inside the Dizzy Rooster. Mr. White told the group that he had visited quite a few places downtown. In Ms. Worthington's opinion, Mr. White was intoxicated at that time. She also added that he had the towel because he had vomited on himself. As they talked, Mr. White, began acting belligerent. He sat down and said he was thinking about getting another drink. She did not see him again that evening.

**B. Arguments****1. Staff**

Staff noted Mr. White's statement that he was a bouncer at Exodus who went on duty at 9:00 p.m. In addition, Staff relied on law enforcement officer's testimony about Mr. Derder's failure to deny that Mr. White was employed there. There was no reason Mr. White would have had a towel in his back pocket if he had not been employed as a bouncer, Staff also argued. Further, Staff raised the question of why, if Mr. White had completed his work earlier in the week, Respondent would have required him to wait to be paid until a weekend evening. Staff also characterized Ms. Worthington's testimony as suspect because she is Mr. Nasreddine's employee. Relying on this evidence, Staff requested that Respondent's permits be suspended for ten days with the option to pay \$150 per day in lieu of suspension.

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**2. Respondent**

Respondent argued that Staff failed to meet its burden of proving Mr. White was an employee on May 21, 2005, or that he performed any duty of employment on that day. As demonstrated by Ms. Worthington's testimony, Mr. White went with others to Sixth Street for a social evening. Even if Mr. White had been Respondent's employee, he was not working when law enforcement officials discovered him behind Respondent's premises, Respondent contended.

**C. Analysis**

Staff alleged a violation of Texas Alcoholic Beverage Code (Code) § 11.61(13), which authorizes the Commission or Administrator to cancel a permit or suspend it for not more than 60 days if the permittee was intoxicated on the licensed premises. The ALJ finds the Staff failed to meet its burden of proof on this issue. No Staff witness saw Mr. White working that evening or inside the premises. Even if Mr. White's statement is accepted as true and he was a bouncer

at Exodus, he obviously had been relieved of duty and escorted to the back of the premises, away from any patrons, when Officer Chapman found him. Thus, the evidence does not establish that Mr. White was employed by Exodus while he was intoxicated.

### **III. ALLEGATIONS REGARDING SERVING ALCOHOL TO INTOXICATED PERSONS AND A MINOR**

#### **A. Evidence**

##### **1. Tamara Joseph**

APD Detective Tamara Joseph was working undercover on Sixth Street on September 11, 2005. Around midnight, she and another officer went into Exodus to observe patrons to determine whether minors or intoxicated persons were being sold alcoholic beverages.

A young man wearing white shirt drew her attention. Later identified as James Allen Bigon, he had slurred speech, poor balance, and bloodshot, watery eyes. His mouth was hanging open, and drool came out as he watched those who were dancing. At first, Mr. Bigon was standing by himself, and then another man, later identified as Jesse Seavolt, came to stand with him. Together, they went to bar and talked to bartender. The second man also had slurred speech.

Detective Joseph saw the men tilt their heads back to drink a shot and then walk away from bar with beers. When they ordered the drinks, their faces were eight-to-ten inches away from the bartender's, so Detective Joseph assumed the bartender could smell their breath. Officers later learned that Lindsay Mason was the bartender who served the two men.

##### **2. Agent Gregory Lewis**

Agent Lewis, a TABC enforcement agent and certified peace officer since 1998, was on duty September 10-11, 2005, and was working undercover with Detective Joseph. He noticed the same

two men that Detective Joseph did and saw them order shots that included Vodka. The men “downed” the shots, took two beers away from the bar with them, and staggered to table where they conversed with others. When the two men ordered the drinks, the bartender was only eight-to-ten inches from them.

Agent Lewis said the men had slurred speech; they were dropping letters and running words together. One man had moisture dribbling down side of his mouth as he watched the dance floor, and his hand movements were not smooth. They both had bloodshot, glassy eyes and unsteady movements and balance, like children who are learning to walk. According to Agent Lewis, both seemed equally impaired.

To Agent Lewis, the younger man did not appear to be to be a minor. But, he later learned that the man was a minor and had used fake identification to enter Exodus.

### **3. Agent King**

Agent King checked the drivers’ licenses of both men who were suspected of being intoxicated. One of them had fake identification, but his actual driver’s license showed he was born December 23, 1996, and was twenty years old that evening.

Agent King performed field sobriety tests on the men. They both had bloodshot eyes and slurred speech. After they failed field sobriety tests,<sup>1</sup> Agent King took the men into custody for public intoxication.

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<sup>1</sup> Mr. Bigon, in both eyes, lacked smooth pursuit, had distinct nystagmus at maximum deviation, and had nystagmus onset prior to 45 degrees; on the walk and turn test, lost balance during instructions, and started too soon, stopped while walking, and did not touch heel to toe; and on the one-leg stand, swayed while standing and put his foot down. Mr. Seavolt, in both eyes, lacked smooth pursuit, had distinct nystagmus at maximum deviation, and had nystagmus onset prior to 45 degrees; on the walk and turn test, lost balance during instructions, stepped offline, and used his arms for balance; and on the one-leg stand, swayed while balancing and used his arms for balance.

**4. Mr. Nasreddine**

Persons entering Exodus are given a wrist band if they are over 21, and their hands are stamped, Mr. Nasreddine testified. Servers are instructed not to sell alcohol to patrons who do not have a band and a stamp. Mr. Nasreddine said he requires every employee to attend TABC seller-server certification training. He has terminated about five employees who violated the rules against selling alcohol to minors or intoxicated persons. He said he did not fire Ms. Mason after this incident because her criminal case was dismissed, and she was not guilty.

**5. Mr. Derder**

Mr. Derder said he or another supervisor at Exodus meets with employees every two weeks and reminds employees not to sell alcohol to minors or intoxicated persons. Employees who violate the rules lose their jobs. The bouncers are specially trained to check identification and to ask for a second form of identification if what is presented looks suspect.

When Exodus is open for business, Mr. Derder walks through the club every ten to fifteen minutes to make sure everything is all right. He stations an employee in a corner to be sure the bartender is not selling to minors.

Mr. Derder testified that in September 2005, at least two employees on the payroll, Ronald Bethel and Christopher Williams, were not certified. In addition, he could not recall whether he was certified on the day the two men were arrested for public intoxication.

**6. Pertinent Exhibits**

Exhibit 9, the rules Exodus employees are required to sign and follow, prohibit serving intoxicated persons and minors. The rules require all employees to "look for underage drinkers throughout the night" and to remove alcoholic beverages from a minor and ask him or her to leave

the club. They require each bartender to pass and show proof that they have completed TABC's certification training. Bartenders are instructed not to serve any kind of alcoholic beverage to intoxicated persons and to ask the manager to get a taxi for them. If a person appears to be underage, the bartender must ask to see the wrist band and a valid Texas driver's license or identification card, and without these items, the person may not be served. Further, the rules state that a bartender who serves a minor will be fired.

Seller-server certificates for three employees were introduced into evidence as part of Exhibit 11. They showed that on September 11, 2005, Caitlin Blagrave, Jacqueline Sander, and Lindsay Mason, the bartender who served the two men, were seller-server certified.

#### **7. Respondent's Prior Violations**

As reflected in Respondent's licensing records, Mr. Nasreddine stipulated on November 7, 2003, that he intentionally, knowingly, and recklessly made a false statement and false representations in his personal history sheet filed with the Commission by failing to disclose he had been arrested in 1994 and 1995. Based on the stipulations, the TABC's action against him was dismissed without prejudice. In 1995 and 2000, actions were initiated against Respondent based on sales to minors or intoxicated persons. However, those actions were dismissed because the employees involved were seller-server certified, and there was insufficient evidence to indicate that Respondent directly or indirectly encouraged the sales.<sup>2</sup>

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<sup>2</sup> Ex. 2.

**B. Arguments****1. Respondent**

Relying on Ms. Mason's certification, Respondent argued that her actions cannot be attributed to the permittee unless Respondent encouraged her to violate the law. Further, even law enforcement officers did not think Mr. Bignon was a minor until he was arrested and his actual driver's license was located. Thus, Respondent argued, the employee did not act with criminal negligence when she served the minor.

**2. Staff**

If Respondent's employees had adequately checked identification, Mr. Bignon's false identification would have been discovered, Staff argued. As for the offense of serving intoxicated persons, Respondent cannot rely on the safe harbor defense afforded by Code § 106.14 because Mr. Derder, Mr. Nasreddine, and the persons who checked identification at the door were not seller-server certified.

Staff requested a 30-day suspension with no option to pay a civil penalty in lieu of suspension based on Respondent's sale of alcohol to intoxicated persons. Staff asked that several factors be considered as aggravating circumstances, including: serving two persons who were intoxicated; the bartender's close access to the men; the failure to identify the minor's invalid driver's license; the failure of other employees to notice the intoxicated men and ask them to leave; two prior allegations of serving alcohol to minors and Respondent's reliance on safe harbor defenses in those cases; and the public intoxication of the two men, which indicated they were a danger to themselves and others.

### C. Analysis

Staff alleged that Respondent's employee, with criminal negligence, served alcohol to a minor. A person acts with criminal negligence, or is criminally negligent:

with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.<sup>3</sup>

Because Mr. Bignon presented false identification and did not appear to be underage, the ALJ agrees with Respondent and finds that Staff did not sustain its burden of proving Ms. Mason, with criminal negligence, served a minor. The evidence did not support a conclusion that she should have been aware of a substantial and unjustifiable risk that Mr. Bignon was underage.

On the other hand, the evidence supports Staff's allegation that Respondent's employee served intoxicated persons. Based on Detective Joseph's and Agent Lewis's description of the two men and their proximity to Ms. Mason, it is clear that she should have recognized that the men were intoxicated. Even though the law enforcement officers were further away from the men than Ms. Mason was, they could hear slurred speech, see staggering walks, and see the drool on Mr. Bignon's face. Ms. Mason was as close as eight-to-ten inches from them and should have recognized their condition.

Respondent relies on Code § 106.14(a) for its affirmative defense. That section provides that the employee's actions are not attributable to the employer if:

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<sup>3</sup> Code § 1.08 and TEX. PEN. CODE ANN. §6.03 (d).

- (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 such law.

By rule, TABC has defined as *prima facie* evidence of indirect encouragement, within the meaning of Code §106.14(a)(3), the permittee's failure to insure that **all** employees possess currently valid seller-server certificates.<sup>4</sup> Another rule defines "employee" as one who sells, serves, dispenses or delivers alcoholic beverages under the authority of a license or permit, including persons who **immediately manage**, direct, supervise, or control the sale or service of alcoholic beverages.<sup>5</sup>

Pursuant to these rules, Respondent's violation cannot be excused based on the safe harbor provision. Although Respondent testified that all employees must be seller-server trained, certificates for only three out of eight employees were offered into evidence, and there was no evidence that Mr. Derder was seller-server trained. Mr. Derder immediately managed, directed, supervised, and controlled the sale or service alcohol at Exodus. He oversaw day-to-day operations, conducted staff meetings where employees were trained, paid persons who worked as independent contractors, and took care of unusual situations, such as Mr. White's presence when he was intoxicated. Clearly, Mr. Derder was responsible for supervising the sale of alcohol at Respondent's premises, and he was not seller-server certified. In addition, some of the other employees were not certified, including the bar manager, Mr. Saad. As a result, the ALJ finds that Respondent served an alcoholic beverage to intoxicated persons, in violation of Code

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<sup>4</sup> 16 TAC § 50.10(d).

<sup>5</sup> 16 TAC § 50.2 (4). The definition excludes the permittee's officers who do not manage, direct, supervise or control the sale or service of alcoholic beverages.

§ 11.61(b)(14). For this violation, the Commission or Administrator may suspend a permit for not more than 60 days or to cancel it.<sup>6</sup>

The Commission has adopted a Standard Penalty Chart at 16 TEX. ADMIN. CODE (TAC) § 37.60(a) (West 2005). The chart includes suggested sanctions for the Commission's agents, compliance officers, or other designated personnel to use when settling cases prior to a hearing. The suggested sanctions bind neither an ALJ nor the Commission and deviations from the chart are permitted if there are aggravating or mitigating circumstances. For the first violation of the sale of an alcoholic beverage to an intoxicated person, the suggested penalty is a ten-to-fifteen day suspension.

Even though the Standard Penalty Chart is not binding, it does provide some guidance in considering a penalty. The ALJ disagrees with Staff that actions which were initiated but dismissed should provide any basis upon which to enhance a sanction. As for Mr. Nasreddine's stipulations that he lied on his application, no action was taken in regard to that action. Thus, the ALJ also does not consider it an appropriate basis upon which to enhance a penalty. Further, as previously stated, Respondent is not accountable for the action involving the minor. Yet, the fact remains that Ms. Mason served two intoxicated persons, and Respondent's employees responsible for monitoring patrons either did not observe the men or failed to take action as they demonstrated obvious signs of intoxication. Accordingly, the ALJ recommends the highest level penalty for a first violation as suggested by the chart, fifteen days.

For this type of violation, the Commission may, but is not required to, allow the permittee the opportunity to pay a civil penalty in lieu of suspension. The civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended.<sup>7</sup> The amount of the civil penalty must be appropriate for the nature and seriousness of the violation when

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<sup>6</sup> Code § 11.61(b).

<sup>7</sup> Code § 11.64.

considering: (1) the type of license or permit held; (2) the type of violation; (3) any aggravating or ameliorating circumstances concerning the violation, including those enumerated in Code § 11.64(c); and (4) the permittee's or licensee's previous violations.<sup>8</sup> The aggravating or ameliorating circumstances most pertinent in this case are that Respondent reasonably could have prevented the violation if the bartender and other employees had been as observant as the law enforcement officers. But, while the evidence indicates that the bartender acted knowingly, there was no evidence to show the Respondent was aware of her actions during that particular transaction. Finally, Respondent has attempted to inform employees about its policy against serving intoxicated persons by requiring employees to sign the rules to that effect. In the ALJ's opinion, a civil penalty of no less than \$500 a day in lieu of suspension is appropriate because of the seriousness of the violation, the public intoxication of the men, and the other aggravating circumstances mentioned.

#### IV. FINDINGS OF FACT

1. CKAN, Inc. d/b/a Exodus (Respondent) holds Mixed Beverage Permit MB224448 and Mixed Beverage Late Hours Permit BN224449 for the premises located at 302-04 E. 6<sup>th</sup> Street, Austin, Texas, at which the club Exodus is operated.
2. On September 11, 2005, James Allen Bigon was in Respondent's premises.
3. Mr. Bignon's mouth was hanging open, drool came out as he watched those who were dancing, and his hand movements were not smooth.
4. Another patron at Exodus that evening, Jesse Seavolt, went with Mr. Bignon to the bar to purchase alcoholic beverages.
5. Both men had slurred speech; they were dropping letters and running words together.
6. As Mr. Bignon and Mr. Seavolt ordered drinks from the bar, Respondent's employee, Lindsay Mason, waited on them.

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<sup>8</sup> Code § 11.641(a).

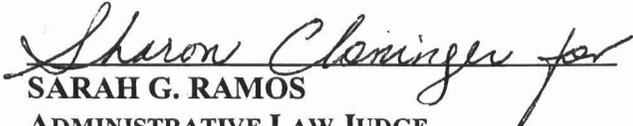
7. When the men ordered the drinks, they were eight-to-ten inches from Ms. Mason.
8. Ms. Mason served both men a shot that contained Vodka; the men “downed” the shots at the bar.
9. Ms. Mason also served the men beers which they took back to their seats.
10. Both men staggered when they walked, and they had bloodshot, glassy eyes and unsteady movements and balance, like children who are learning to walk.
11. Both men failed standard field sobriety tests that included the horizontal gaze nystagmus, walk-and-turn, and one-leg stand tests.
12. The men were arrested for public intoxication.
13. Respondent’s employees who were charged with the responsibility to observe patrons and determine whether any were intoxicated failed to take action to prevent Messrs. Bignon and Seavolt from being served alcoholic beverages, even though the men displayed obvious signs of intoxication.
14. Ms. Mason was seller-server certified.
15. A permittee indirectly encourages the sale of alcohol beverages to intoxicated persons when the permittee fails to insure that all employees possess currently valid seller-server certificates. 16 TEX. ADMIN. CODE § 50.10(d).
16. An employee is one who sells, serves, dispenses or delivers alcoholic beverages under the authority of a license or permit, including persons who immediately manage, direct, supervise, or control the sale or service of alcoholic beverages. 16 TAC § 50.2 (4).
17. Respondent’s manager, Sami Derder immediately managed, directed, supervised, and controlled the sale or service alcohol at Exodus.
18. Mr. Derder oversaw day-to-day operations, conducted staff meetings where employees were trained, paid persons who worked as independent contractors, and took care of situations involving intoxicated persons.
19. Neither Mr. Derder nor the bar manager were seller-server certified.
20. A notice of hearing was sent to Respondent on July 25, 2006, and included the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

21. The hearing was held at the State Office of Administrative Hearings, 300 W. Fifteenth Street, Austin, Texas, on September 14, 2006, and continued on October 18, 2006. Both parties were represented by counsel.

#### V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. (Code) §6.01.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5).
3. Proper and timely notice of the hearing was provided as required in accordance with the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Respondent served alcoholic beverages to intoxicated persons, in violation of Code § 11.61(b)(14).
5. For this violation, Respondent's permits should be suspended for fifteen days, pursuant to Code § 11.61.
6. In lieu of suspension, Respondent should be allowed to pay a civil penalty of \$500 per day for each day of the suspension. Code § 11.64.

**SIGNED January 10, 2007.**

  
SARAH G. RAMOS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS