

DOCKET NO. 588435

IN RE HUACHUCA, INC.	§	BEFORE THE
D/B/A TOM AND JERRY'S BAR & GRILL	§	
PERMIT NOS. MB409533, LB409534,	§	
& PE409535	§	TEXAS ALCOHOLIC
	§	
McLENNAN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1492)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 9th day of November, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened and adjourned on August 11, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 17, 2000. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, 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.

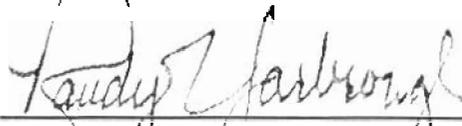
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permits Nos. MB409533, LB409534 and PE409535, are herein **SUSPENDED** for thirty (30) days, beginning at 12:01 A.M. on the 9th day of February, 2001, unless the Respondent pays a civil penalty in the amount of \$4,500.00 on or before the 2nd day of February, 2001.

This Order will become final and enforceable on November 30, 2000, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 9th day of November, 2000.

On Behalf of the Administrator,



**Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission**

CB/bc

**The Honorable Suzan Moon Shinder
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (254) 750-9380**

**Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994**

**Charles Youts
ATTORNEY FOR RESPONDENT
P.O. Box 7175
Waco, Texas 76714-7175
CERTIFIED MAIL/RRR NO. Z 473 039 305**

**Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section**

**Licensing Division
Waco District Office**

DOCKET NO. 458-00-1492

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

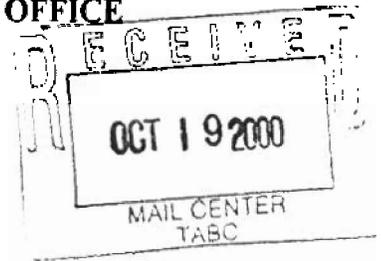
HUACHUCA, INC.
D/B/A TOM AND JERRY'S
BAR & GRILL
PERMIT NOS. MB409533,
LB409534, PE409535
MCLENNAN COUNTY, TEXAS
(TABC CASE NO. 588435)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS



PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission) initiated this action seeking a thirty day suspension of the permits, or \$150.00 per day civil penalty in lieu of suspension, of Huachuca, Inc., d/b/a Tom And Jerry's Bar & Grill (Respondent), based on the Commission's allegation that on February 8, 2000, Respondent maintained a disorderly establishment, in violation of Texas Alcoholic Beverage Code (Code) §11.61(b)(9), because the licensed premises was occupied by more than the maximum number of persons allowed under the Building Code, resulting in dangerous overcrowding. Respondent contended that the licensed premises was not occupied by more than the maximum number of persons allowed under the Building Code at that time. Additionally, Respondent questioned whether or not an excessive number of persons on the premises constituted a "disorderly establishment" under the Code. This Proposal For Decision agrees with the Commission and recommends a suspension of thirty days, or \$150.00 per day civil penalty in lieu of suspension.

I. Jurisdiction, Notice, and Procedural History

The hearing on the merits convened on August 11, 2000, before Administrative Law Judge Suzan Shinder, in the offices of the State Office of Administrative Hearings (SOAH) in Waco, McLennan County, Texas. Petitioner appeared by and through its staff attorney, Christopher Burnett. Respondent appeared by its attorney, Charles Youts. The hearing was concluded the same day, but the record was left open until September 1, 2000, solely for the parties to submit written argument supporting their position regarding whether or not exceeding the maximum capacity under the building code constituted the maintenance of a disorderly establishment under the Code. However, neither party submitted the described written argument, and the record closed on September 1, 2000.

The Commission and SOAH have jurisdiction of this matter as reflected in the Conclusions Of Law. The notice of intent to institute the enforcement action and of the hearing met the notice requirements imposed by statute and rule as set forth in the Findings Of Fact and Conclusions of Law.

II. The Evidence

It was not disputed that Respondent is the holder of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit, issued by the Commission for the premises known as Tom And Jerry's Bar & Grill, located at 801 Wooded Acres Drive, Waco, McLennan County, Texas 76710-4545, and has been the holder of these permits at all relevant times.

The Testimony of Commission's Witness, Fire Marshall, Chief Jerry Wayne Hawk:

Chief Hawk has been with the Waco Fire Department since 1977. It is his responsibility to conduct arson investigations, and to enforce the Fire Code for the city of Waco, Texas; which includes compliance with building occupancy restrictions under the Fire Code. The occupancy limit of any building is determined by the Building Code and building officials, who inspect the building and determine the occupancy limit based on the square footage available to occupants in the building.

Chief Hawk was familiar with Respondent's licensed premises, and has determined that the occupancy limit for the licensed premises is 298 persons, inclusive of employees as well as patrons. He made an inspection of Tom And Jerry's Bar and Grill (the bar) on February 8, 2000, at approximately 11:00 p.m., in response to complaints from law enforcement officials in the city of Waco, that there was an ongoing problem with over-occupancy at this bar. When Chief Hawk arrived at the bar he observed that the bar's parking lot was full, and that patrons were also parking in adjacent parking lots, including an apartment parking lot, and the post-office parking lot across the street.

When he approached the facility, he followed an unidentified man who was seeking access to the bar. Chief Hawk heard one of the bar's doormen, Eric Locker, tell this man that the bar was at its occupancy limit of 298. The man spoke again, and Mr. Locker allowed this man to enter the bar. When Chief Hawk entered the bar he observed that the bar was so crowded, people were standing "elbow to elbow" and "body to body." He counted the number of persons occupying the bar, utilizing a mechanical counter, having a final count of 366 people. At this time, he directed that employees of the bar not admit any more persons. He does not recall any of the bar employees asking him to show them his mechanical counter. While on the scene, he showed the number on his mechanical counter to Lieutenant Scott, to a T.A.B.C. agent, and to police officers. It took approximately ten minutes to make this count. The count did not include persons inside the restrooms, but did include those standing in line for the restrooms. He did much of his count from the upstairs, which facilitated the count, since he did not have to walk through the crowd as he counted. He could not be positive that he did not count anyone twice, nor could he be positive that he included everyone present.

Overcrowding in a building is dangerous because, as a result of overcrowding, aisle-ways and exit-ways are not clear for emergencies. The entrance of emergency personnel is impeded, and the exit of the occupants, in an emergency, is impeded. Such overcrowded conditions have led to disastrous results in the past when, for example, people stacked up in doorways, unsuccessfully trying to exit a burning building, resulting in catastrophic loss of life.

This was the second ticket for overcrowding that has been issued to Respondent. Respondent paid the first ticket a couple of years prior, and did not contest it. Subsequently, as a result of some

improvements in the bar, the original occupancy limit was raised to the current occupancy level of 298.

The Testimony of Commission's Witness, Fire Marshall, Lt. Randall Lane Scott:

Lieutenant Randall Lane Scott has been with the Waco Fire Department since 1981, and his duties are those of a fire-marshal. He was with Chief Hawk during the inspection of the bar on February 8, 2000; however, he did not make an independent count of the persons occupying the bar on that evening. There were several law-enforcement personnel accompanying Chief Hawk for that inspection: Lieutenant Scott, T.A.B.C. Agent Tom Dickson, and; several police officers.

The Testimony of Respondent's Witness, Freddie Louis Sanders:

Mr. Sanders was employed by the bar as the general manager for the bar, on February 8, 2000, but was not present when the Fire Marshall arrived. Mr. Sanders left the bar at approximately 11:00 p.m., and returned to the bar at approximately 11:20 p.m., after he received a telephone call informing him that the fire-marshal was inspecting the building. Mr. Sanders first approached Tom Dickson, an agent for T.A.B.C., then spoke to Chief Hawk. Mr. Sanders asked the Chief what was going on, because he observed that "they were filing people out the doors." Chief Hawk responded that the bar was being closed down for over-occupancy. At that time, he asked what number Chief Hawk got on his counter, and the Chief told him, "366." When Mr. Sanders first asked to see the counter, the Chief ignored him. When Mr. Sanders later asked to see Chief Hawk's counter, the Chief told him that he did not have the counter. Mr. Sanders did not see Chief Hawk's counter at any time. At this time, Mr. Sanders offered to make a count of persons exiting the building. He told the Chief that his doormen were making a count of persons exiting the building, and Mr. Sanders asked the Chief if he wanted to wait until this count was completed. The Chief did not accept Mr. Sanders offer, but continued filling out the citation, and told Mr. Sanders to "do whatever you want to do."

It is the practice of the bar to have two doormen with mechanical counters at the door. One of these men counts the persons entering the bar, and the other man counts the persons exiting the bar. The difference between the two amounts is the number of persons inside the bar. They have had this practice since prior to his employment with the bar in July of 1999. This is not the practice every night, but is the practice only on evenings when they are extremely busy. Tuesday night is regularly one of the busiest nights for the bar, and the evening of the inspection was a Tuesday night.

Mr. Sanders has been in the bar business in various capacities since 1972. He has been in this business as management for over twenty years. After a person has been in this business for awhile, a person can get "a feel" for whether or not a bar is overcrowded. When he left the bar at approximately 11:00 p.m. on the evening of the inspection, he did not believe the bar had more than 298 persons inside, and did not have any trouble exiting the bar, or moving about in the bar. In his opinion they were not over their maximum occupancy on that evening.

The Testimony of Respondent's Witness, Chad Edward Pruett:

Chad Edward Pruett is twenty-four years of age, and appeared somewhat nervous and uncertain as he testified during the hearing on the merits. He had been working at the bar for four months as of February 8, 2000, and was employed as a doorman for the bar on that date. He is currently employed by the club, as a doorman. Mr. Pruett was working in his capacity as doorman when Chief Hawk came inside the bar. When Chief Hawk asked Mr. Pruett what his counters were on that evening, he told the Chief, "298." Chief Hawk asked to see the counters, and at some unspecified time Mr. Pruett responded to this request by putting the counters on the counter-top. The difference between the "in" and the "out" counters was 298. To Mr. Pruett's knowledge, he did not admit anyone else after the maximum occupancy of 298 was reached. He only briefly observed the Chief inside the club, and did not notice the Chief using a mechanical counter. Mr. Pruett did see the Chief and the Lieutenant standing about half-way up the stairs at one point. Where the Chief and the Lieutenant were standing was the best location to look out over the whole club. When the Chief came back down the stairs, he returned to Mr. Pruett's station by the door. At that time, Mr. Pruett again told the Chief that the counters were at 298. However, the Chief told Mr. Pruett that the bar was over-capacity. Mr. Pruett's counter was not "padded," but was correct, and the maximum capacity was not exceeded. Mr. Pruett's count included the patrons and the employees. On February 8, 2000, he counted the people who exited after the fire marshals closed the bar. He estimates that between fifteen and twenty patrons left before he started this exit count, but these persons were still "counted out." His exit count was not in excess of 298.

Another person was working with Mr. Pruett, as a doorman, on February 8, 2000. Mr. Pruett only knows this man by his nickname, "Skeeter." Skeeter was working the door and checking identification for the patron's age, and Mr. Pruett sat behind the cash register. Only minors have to pay to get in, and Mr. Pruett estimates that about five percent of the total crowd would be minors. Although Skeeter was more experienced, Mr. Pruett was in charge of the count, and was taking money from the persons entering the bar, as well as managing the count of persons entering and exiting the bar, at the same time. Mr. Pruett worked both the "entering" and the "exiting" counters that evening. Skeeter was assisting Mr. Pruett in keeping track of those persons leaving the bar. For example, if Skeeter did not think that Mr. Pruett was paying attention when three patrons left the bar, he would tell Mr. Pruett, "three people out." Then Mr. Pruett would count them out on the exit counter. Mr. Pruett cannot remember what the counters read on the evening of February 8, 2000. He could not estimate the total number of persons that entered the bar over the course of the evening, but he estimated that between 100 and 300 persons left the bar during the course of the evening. He is not very good with math, so he uses a calculator to subtract the difference between the two calculators.

That evening was extremely busy, and was their busiest night. It is possible that he did not count everyone entering and leaving the bar. It is possible that there were more than 298 persons in the bar, but he does not believe it to be likely. Mr. Pruett relies on Skeeter's accuracy at these times, when Mr. Pruett is occupied with other duties in addition to the count. When they reach capacity, people who want to enter the bar have to wait outside until other patrons leave the bar.

The Testimony of Respondent's Witness, Tina Rheanne Trail:

Tina Rheanne Trail has been employed at the bar for three years. She was working at the bar in the capacity of a waitress-manager, or "head-waitress," on February 8, 2000. She was present when Chief Hawk entered the bar, and saw him immediately after he came into the bar. She was waiting on nine tables on that evening in addition to her supervisory duties. At the time the Chief entered the bar, one or two of her tables were empty because these patrons had just left. She had been cleaning, and she was taking a break. It was unusual to be able to take a break on Tuesday evenings, because this was usually their busiest night. There are about thirty tables in the club. Around nine or ten p.m. it usually starts to get busy, requiring four to five waitresses on the floor to handle the tables. A waitress is never given more than nine tables. Ms. Trail and another waitress worked the busier side of the bar on February 8, 2000, and it was not that busy that evening. However, it was a busy night.

III. Discussion

Pursuant to Section 11.61(b)(9) of the Texas Alcoholic Beverage Code (Code), the Commission must prove that Respondent, or Respondent's agent, servant, or employee, maintained a disorderly establishment on February 8, 2000. On that date, Chad Edward Pruett and Eric Locker were the doormen for Respondent, on duty at Tom And Jerry's Bar & Grill (the bar). The acts and omissions of the doormen, Chad Pruett and Eric Locker, are the acts and omissions of the Respondent-permittee, as contemplated by Section 1.04(11) of the Code, which includes any agent, servant, or employee of the holder of the permit as the "permittee."

Petitioner contended that Respondent maintained a "disorderly establishment" because, based on the Building Code, Respondent had exceeded the occupancy limit of 298, in violation of the Fire Code for the city of Waco, Texas, on February 8, 2000. Respondent did not dispute that to exceed the occupancy limit of 298 would be a violation of the Waco Fire Code. However, Respondent not only contended that there were not more than 298 persons occupying the building prior to the entry of law enforcement personnel; Respondent also suggested that to exceed the occupancy limit might not be equivalent to maintaining a "disorderly establishment." Based on this, the construction of the phrase "disorderly establishment" is addressed as follows:

Section 1.02 of the Code (Vernon 1995) states that the Code Construction Act (Chapter 311, Government Code) applies to the construction of each provision in the Code, unless otherwise expressly provided. Pursuant to TEX. GOV'T. CODE ANN. §311.011 (Vernon 1985), words and phrases are to be read in context and construed according the rules of common usage. Pursuant to TEX. GOV'T. CODE ANN. §311.023 (Vernon 1985) the object sought to be attained and the common law may be considered "among other matters," in the construction of a statute. Pursuant to TEX. GOV'T. CODE ANN. §311.003 (Vernon 1985) the rules (of construction) in chapter 311 are not exclusive, but are meant to describe, clarify, and guide in the construction of codes.

In that case law construing the phrase "disorderly establishment" could not be located, the rules of statutory construction alone will be applied to this section. Because a court must not legislate, a statute's unambiguous language must be applied in this exercise, giving the words of the statute their

usual and ordinary meaning. See: *Bridgestone/ Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (TEX.1994).

The phrase “disorderly establishment” is not defined in any dictionary. Although “establishment” is a fairly unambiguous term, and not a contested issue in the instant case, the definition of “disorderly” is less clear. According to one dictionary, “disorderly” is the adjective form for the noun “disorder.” “Disorder” is then first defined as a “breach of peace or public order.” WEBSTER’S DICTIONARY 110 (1990). “Disorderly” is also defined as “untidy” or “unruly,” and as violative of a constituted order; “contrary to public order....” RANDOM HOUSE COLLEGE DICTIONARY 382 (Rev. ed. 1988). A dictionary of legal terms defines “disorderly” as contrary to the rules of good order and behavior; violative of the public peace or good order; turbulent, riotous, or indecent. BLACK’S LAW DICTIONARY 422 (5th ed. 1979). Conduct that is “disorderly” would include the creation of a hazardous condition with an act which served no legitimate purpose, by the reckless creation of a risk of public inconvenience or alarm. BLACK’S LAW DICTIONARY 422 (5th ed. 1979).

The fundamental rule in statutory construction is to determine and give effect to the legislature’s intent. *Liberty Mutual Insurance Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (TEX. 1998); *Chisholm v. Bewley Mills*, 155 TEX. 400, 287 S.W.2d 943, 945 (TEX. 1956). The construction of “disorderly establishment” must be in the context of the statute as a whole, consistent with the overall intent of the legislature. If ambiguity does not result from the usual and ordinary meaning of the word(s) and the overall intent of the legislature, as evidenced by the statute as a whole, then the interpretive exercise should stop. See: *Bridgestone/ Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (TEX.1994).

Section 1.03 of the Code (Vernon 1995) states that the Code shall be liberally construed for the protection of the welfare, health, peace, temperance, and safety of the people of the state. It would be extremely difficult to establish any connection between an establishment being untidy and the protection of the people of the state as articulated in Section 1.03 of the Code. However, utilizing the definition of a “breach of public order,” “violative of a constituted order,” and “contrary to public order,” this difficulty does not exist in the context of the intent of the Code, that being to protect the people of the state. Therefore, utilizing this common definition of the term, there is no persistent ambiguity that would support any additional analysis, or construction, of the meaning of “disorderly establishment.”

Based on this construction, when Respondent exceeded the occupancy limit of 298, Respondent was maintaining a disorderly establishment, in that: This large assemblage of persons resulted in a condition that created the risk of a substantial and immediate danger of injury to all persons in the establishment. This creation of a hazardous condition was a risk to the public safety, in violation of the Fire Code for the city of Waco, Texas. The possible consequences of overcrowding, to the extent that the maximum occupancy is exceeded, can be devastating in the event of an emergency. Overcrowding can hinder access of emergency personnel. It can prevent the exit of large numbers of persons in the event of a fire, resulting in avoidable injury and death of occupants. Avoiding this risk to the public safety is the purpose for the legal limitations on occupancy on such a public building.

The counting method, utilizing two doormen and two mechanical counters, is not practiced every night at the bar. This method is only utilized on evenings when the bar is extremely busy. The evening in question was a Tuesday night, and Tuesday night is regularly one of the busiest nights for the bar. On February 8, 2000, Mr. Pruett was responsible for both the "entrance" and the "exit" counters, even though there were two doormen working the door. It should be noted that this is not the method of counting that the general manager for the bar, Mr. Sanders, stated was the usual practice of counting on extremely busy nights. Mr. Sanders stated that one doorman would be responsible for the count of persons entering the bar, and the other doorman would be responsible for the count of persons exiting the bar. In the instant case, Mr. Pruett was responsible for both counters. Based on the counting method utilized by Mr. Pruett, it was likely that persons exiting the building were sometimes counted twice, once by Mr. Pruett, and again by Mr. Pruett based on Skeeter's representation of a number of persons "out."

Neither intent, nor motive are required to satisfy the relevant section of the Code. However, the belief of the persons counting the people entering and exiting the establishment is some evidence of the number of persons within the establishment at that time. Mr. Pruett's demeanor, his current employment, and his stated mathematical skills adversely affect the credibility of his testimony, and he may or may not have been aware that the maximum occupancy had been exceeded. Skeeter, an employee of Respondent, who had more experience than Mr. Pruett, was the other doorman that night, and Mr. Pruett relied on Skeeter's accuracy. It is likely that Skeeter is Eric Locker, the doorman observed by Chief Hawk to admit a person seeking entrance, after Mr. Locker informed that person that they had already reached their occupancy limit. Based on this, it is likely that Mr. Locker believed that the maximum occupancy had been exceeded and was deliberately admitting persons after he knew the maximum occupancy limit had been reached. All of this makes it more likely that more than 298 persons were in the bar that evening, exclusive of law enforcement personnel, when Chief Hawk made his count.

Mr. Pruett observed that the evening in question was extremely busy, and their busiest night. Although he believes that the exact count of persons in the bar was 298, he admits that it is possible that there were more than 298 persons in the bar before law enforcement personnel entered the bar. Chief Hawk observed that the occupant's were "elbow to elbow" and "body to body," and he counted 366 persons inside the building, excluding some occupants of the bathrooms. While neither the count of Mr. Pruett nor Chief Hawk are exact, based on all of the most credible evidence, it is more likely than not, that more than 298 persons were in the bar that evening, exclusive of law enforcement personnel, when Chief Hawk made his count, exceeding the allowed maximum occupancy.

A perfect count of the number of persons in the bar is not the criteria for making a finding that the bar contained in excess of the maximum allowable number of persons under the Fire Code. Whether there were more than 298 persons occupying the bar, exclusive of law enforcement personnel, is the criteria. Based on all of the above, it is more likely than not that there were substantially more than 298 persons occupying the bar on February 8, 2000, exclusive of law enforcement personnel. This violation of the Fire Code for the city of Waco, Texas, is the maintenance of a "disorderly establishment" under the Texas Alcoholic Beverage Code.

IV. Findings of Fact

1. On June 2, 2000, the Texas Alcoholic Beverage Commission (Commission) notified Huachuca Inc. d/b/a Tom And Jerry's Bar & Grill (Respondent) of the hearing on the merits, scheduled for August 11, 2000, in the Notice of Hearing served on Respondent by Certified Mail, No. 473040259, as evidenced by the notice's Certificate of Service. The Commission's Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

2. At the August 11, 2000, hearing on the merits, the Commission appeared by its attorney Christopher Burnett, and the Respondent appeared by its attorney, Charles Youts. Both parties stipulated that there were no contested issues of notice or jurisdiction in this proceeding.

3. The hearing was convened on August 11, 2000, at the Hearings Facility of the State Office of Administrative Hearings, 801 Austin Avenue, Suite 750, Waco, Texas. All parties appeared, and evidence and argument were heard. The record was left open until September 1, 2000, solely for the parties to submit written argument supporting their position regarding whether or not exceeding the maximum capacity under the Building Code constituted the maintenance of a disorderly establishment under the Texas Alcoholic Beverage Code. However, neither party submitted written argument.

4. Respondent is the holder of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit, issued by the Commission for the premises known as Tom And Jerry's Bar & Grill, located at 801 Wooded Acres Drive, Waco, McLennan County, Texas 76710-4545, and has been the holder of these permits at all relevant times.

5. Chad Pruett and Eric Locker were employed as doormen for Respondent on February 8, 2000, responsible for counting persons as they entered and exited the bar, and responsible for the prevention of the accumulation of more than 298 persons in the bar at any one time. Eric Locker intentionally admitted a minimum of one person, exclusive of law enforcement personnel, after he was aware that the bar had exceeded the maximum occupancy limit.

6. There were more than 298 persons in the bar, exclusive of law enforcement personnel, when Chief Hawk counted the occupants of the bar, on February 8, 2000.

7. Exceeding the occupancy limit of 298 creates an extremely hazardous condition that is a risk of immediate danger of serious, even fatal, injury to persons in the establishment.

8. This was the second time that Respondent was cited for exceeding the maximum occupancy limit in the bar.

V. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5, of the TEX. ALCO. BEV. CODE (Vernon 1995)(Code).

2. The State Office of Administrative Hearings has jurisdiction over the 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)(Vernon 2000).
3. As referenced in Findings of Fact Nos. 1-3, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. Based on Finding of Fact No. 5, the acts and omissions of Chad Edward Pruett and Eric Locker, Respondent's doormen on February 8, 2000, are the acts and omissions of the permittee, as contemplated by Section 1.04(11) of the Code (Vernon 1995) which would include any agent, servant, or employee of the holder of the permit as the "permittee."
5. It is a violation of the Fire Code for the city of Waco, Texas, for Respondent to have more than 298 occupants in the building at any one time.
6. Based on Finding of Fact No. 6, Respondent was in violation of the Fire Code for the city of Waco on February 8, 2000.
7. Based on Findings of Fact Nos. 6 and 7, Respondent was maintaining a disorderly establishment on February 8, 2000, in violation of Code section 11.61(b)(9)(Vernon 1995).
8. Pursuant to Section 11.61(b)(2) of the Code (Vernon 1995), the Commission may suspend for not more than sixty days or cancel a permit if it is found, that the permittee violated a provision of the Code or a rule of the Commission.
9. Pursuant to Section 11.64 of the Code (Vernon 1995 & Supp. 2000), when the Commission is authorized to suspend a permit or license, the amount of the civil penalty in lieu of suspension, may not be less than \$150.00 per day for each day the permit or license was to have been suspended.
10. Based on Findings of Fact Nos. 5-8, and Conclusions of Law Nos. 4-8, a thirty day suspension of Respondent's permits is warranted. In the alternative, based on Conclusion of Law No. 9, Respondent should pay a civil fine of \$150.00 per day for thirty days, for a total of \$4500.00.

Signed this 17th day of October, 2000.



Suzan Moon Shinder
Administrative Law Judge