

DOCKET NO. 458-03-4288

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

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BEFORE THE STATE OFFICE

V.

OF

**CYROOS, INC. d/b/a
CHEERS SHOT BAR
PERMIT NOS. MB-238578, LB-238579
and PE-238580
(TABC DOCKET NO. 604606)**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Alleging the sale of an alcoholic beverage to an intoxicated patron, the Staff of the Texas Alcoholic Beverage Commission (“TABC”) brought this action against Cyroos, Inc. d/b/a Cheers Shot Bar (“Cheers” or “Permittee”). Both parties called fact witnesses, and the witnesses testified about their observations of the patron. In this Proposal for Decision, the administrative law judge (“ALJ”) finds the evidence was insufficient to establish that a reasonably prudent person would have observed the patron to be intoxicated.

I. NOTICE, PROCEDURAL HISTORY, AND JURISDICTION

Notice or jurisdiction were not disputed and are discussed only in the Findings of Fact and Conclusions of Law. The hearing for this case was conducted September 22, 2003, at the State Office of Administrative Hearings, 300 West Fifteenth Street, Austin, Texas, before ALJ Sarah G. Ramos. TABC Staff Attorney Dewey A. Brackin represented Staff, and attorney David Chambers represented Permittee. The record closed when the hearing concluded the same day.

II. DISCUSSION

A. Legal Standard

TABC is authorized to suspend or cancel a permit if the permittee sells or delivers an alcoholic beverage to an intoxicated person.¹ "Permittee" includes the permit holder as well as the holder's agent, servant, or employee.² Staff bears the burden of proof.³

For purposes of this proceeding, "intoxication" means not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body.⁴

B. Evidence

No exhibits were admitted into evidence. The ALJ took administrative notice of the notice of hearing, which indicated that Cheers holds Mixed Beverage Permit MB-238578, Late Hours Permit LB-238579, and Beverage Cartage Permit PE-238580.

1. Witnesses

a. John Kenneth King

TABC Agent King has been a licensed peace officer for five years and previously served as a Hays County Deputy Sheriff. He testified based on his recollection and on an offense report he prepared two weeks after the incident in question.

On March 15, 2003, Agent King was stationed on Sixth Street in Austin, Texas. He saw a white male staggering as he moved east. Agent King followed the man, later identified as John

¹ TEX. ALCO. BEV. CODE ("the Code") § 11.61(b)(14).

² The Code § 1.04(11).

³ 1 TEX. ADMIN. CODE ("TAC") 155.41(b).

⁴ 16 TAC § 50.2(2)(A).

Tower,⁵ to Cheers. As he followed Mr. Tower, Agent King noticed that Mr. Tower bounced into people along the way. When Mr. Tower reached the Cheers entrance, the two doormen looked at Mr. Tower and began laughing but allowed him to enter.

Agent King could not hear the conversation between Mr. Tower and the doormen. Yet, as Agent King entered Cheers, he told one doorman that he could not believe the doorman had let Mr. Tower in. Agent King did not tell any Cheers employees inside the bar that he thought Mr. Tower was intoxicated. Instead, he decided to see how the events unfolded.

According to Agent King, Cheers was very crowded; people were almost "shoulder to shoulder." After he first entered Cheers, Agent King had difficulty locating Mr. Tower. He went up some stairs onto a landing and saw Mr. Tower standing at the end of the bar closest to the front door. Agent King was 40-45 feet away from Mr. Tower. But, he said, the lighting was adequate for him to see Mr. Tower, and nothing obstructed his view. From his higher vantage point, he was able to see Mr. Tower better than if Agent King had been on the floor level.

From where Agent King was standing, he could see Mr. Tower swaying back and forth. Mr. Tower had trouble keeping his head up, but he did not place his head onto the bar.

Agent King said he saw a Cheers bartender, Robert Phinney, approach Mr. Tower and then walk away from him. Mr. Phinney returned with a beer. Agent King saw Mr. Tower reach into his pocket and pull out a "wad" of money. Mr. Phinney had his hands on the bar looking at Mr. Tower, waited on him for some time, and then finally walked away. When Mr. Phinney returned to Mr. Tower about five minutes later, Mr. Tower put the "wad" of money on the bar, and Mr. Phinney took some money from it.

After observing the transaction between Mr. Phinney and Mr. Tower, Agent King made his way through the crowd to where Mr. Tower was standing with his head lowered. Mr. Tower had his

⁵ Mr. Tower was visiting Austin from Illinois.

hand on the beer, and his eyes were watery and bloodshot. Agent King spoke to Mr. Tower and asked him his name, but the agent could not understand anything he said in reply.

After taking Mr. Tower outside with him, Agent King placed him under arrest for public intoxication. An officer in another jurisdiction, who happened to be riding with Agent King that night, held Mr. Tower under one arm pit. Agent King could not state whether or not Mr. Tower required assistance for standing. But, the agent did not want Mr. Tower to fall, and he wanted to maintain control of him. It took seven to ten minutes to walk with Mr. Tower back to the patrol car, Agent King testified.

Agent King did not use any field sobriety tests on Mr. Tower. Even so, because Mr. Tower apparently was unable to state his name and to count money, Agent King concluded that Mr. Tower was more intoxicated than the average intoxicated person.

b. Afshin Mohammadzadeh

Mr. Mohammadzadeh is the general manager of Cheers, and his father owns the bar. He did not dispute the fact that Mr. Phinney, who served Mr. Tower a beer, did not have current seller-server certification. But, he disagreed as to whether Mr. Tower was intoxicated.

As outlined by Mr. Mohammadzadeh, Cheers has specific screening procedures to keep intoxicated persons out of the premises. Rather than having one doorman, which is the typical number for bars, Cheers has two. The doormen are required to check the front and back of the identification presented. If a doorman suspects that someone may be intoxicated, the doorman is to ask a question or two. If a person staggers or cannot speak, the doorman is required to keep the person out of the bar. The manager and security guard walk around inside the bar. If anyone orders more than three rounds of drinks, employees begin to observe the person more closely. It is hard to observe someone if it is the person's first drink, Mr. Mohammadzadeh testified.

Mr. Mohammadzadeh saw Mr. Tower as he was being arrested outside Cheers. As he recalled the situation, Mr. Tower was standing by himself. No one was holding him up. To Mr. Mohammadzadeh, Mr. Tower appeared to be sober. If Mr. Tower had been intoxicated before being arrested, he became sober very quickly, Mr. Mohammadzadeh said.

c. Adam Rogers

Mr. Rogers is the manager of Cheers. When Agent King arrested Mr. Tower, he took Mr. Rogers outside to see him. Agent King told Mr. Rogers, "He's obviously drunk." However, according to Mr. Rogers, Mr. Tower was dumbfounded. He was standing on his own and not stumbling. Mr. Rogers observed Mr. Tower for two to four minutes. According to Mr. Rogers, an intoxicated person cannot become sober in such a short time.

d. Fernando Sanchez

Mr. Sanchez is the Cheers doorman who let Mr. Tower in, and he testified that he was the only doorman working that night. He recalled that he asked Mr. Tower whether he had his identification, and Mr. Tower said, "yeah." Mr. Sanchez asked to see it, and Mr. Tower said, "all right," and showed it to him. To Mr. Sanchez, Mr. Tower seemed like a normal person. He showed Mr. Sanchez his identification without fumbling, and he did not sway or stagger. Mr. Sanchez did not recall that Agent King said anything to him.

Mr. Sanchez saw Mr. Tower when he was brought outside about thirty minutes after he entered Cheers. For several minutes, Mr. Tower stood handcuffed next to Mr. Sanchez, and Mr. Sanchez did not see anything about Mr. Tower that caused him to think he was intoxicated.

e. Robert Phinney

Mr. Phinney is the bartender who served Mr. Tower. As Mr. Phinney recalled the events, he saw Mr. Tower walk up to the bar, and Mr. Phinney asked what he needed to drink. Mr. Tower said he wanted Dos Equis, and Mr. Phinney asked, "bottle or draft?" Mr. Tower said, "draft."

Mr. Phinney left and got the beer. He returned to Mr. Tower who tried to give him two dollars. Mr. Phinney said the only confusion Mr. Tower had was with the price. There is a sign in Cheers that says pints are \$1.50, but the price applies only Monday through Thursday. Mr. Phinney told him the price was \$3.50. Mr. Phinney took the order of the customer next to Mr. Tower while Mr. Tower took out the extra money. Mr. Tower took out two more dollars and gave them to Mr. Phinney.

Mr. Tower was better about paying than many customers, Mr. Phinney testified, and the two of them had no trouble interacting. Mr. Tower spoke clearly and made his decision about what he wanted quickly. The entire transaction took less than a minute, Mr. Phinney said.

Mr. Phinney was aware a TABC agent was in the bar at the time. Consequently, he was careful about what he was doing. Mr. Phinney said he would have gone overboard to make sure he did not get into a "situation."

After Agent King took Mr. Tower outside, he went back into Cheers to take Mr. Phinney out to arrest him for serving an intoxicated person. Mr. Phinney stood beside Mr. Tower and then rode with him to the jail.

C. Parties' Arguments

Staff argued that Agent King was a more credible witness than the Cheer's witnesses because they had a reason not to tell the truth. Their jobs could be in jeopardy, and Mr. Phinney had criminal charges pending. Also, Agent King does this type of work for a living, and he is adept at identifying

intoxicated persons. Staff also noted the pertinent law sets a negligence standard. Code § 11.61(b)(14) does not require that someone knowingly served another. Staff requested a 30 - 60 day suspension and asked that no penalty be ordered in lieu of suspension.

Cheers noted that its employees were aware a TABC agent was on the premises and would not have served an intoxicated person, particularly under those circumstances. Also, because Agent King could not state whether Mr. Tower needed support for standing or whether the person who held him did so simply to maintain control of him, the permittee emphasized its evidence indicating Mr. Tower's lack of intoxication. Several witnesses saw Mr. Tower when he was outside, and none thought he was intoxicated. He could not have been sober when he was standing outside if he had been intoxicated inside the bar, Cheers maintained.

III. ANALYSIS

The negligence standard to which the Staff referred requires a determination of whether a reasonably prudent person would have observed Mr. Tower as intoxicated.⁶ In the ALJ's opinion, Staff did not meet its burden on proof on this issue. The first sign of intoxication Agent King noticed was Mr. Tower's staggering down the street. Agent King was unable to hear the conversation between the doorman and Mr. Tower, and he did not see Mr. Tower when he first walked into Cheers. Thus, it is impossible to know whether the bartender, Mr. Phinney, saw Mr. Tower stagger.

Agent King said Mr. Tower swayed, had difficulty keeping his head raised, and had bloodshot and watery eyes. While these could be signs of intoxication, they could also be signs of other things, such as fatigue, moving to music, or staying in a smoke-filled environment. Short of other indicators, they were not sufficient to establish intoxication. As for the inability to count money, Agent King was quite a distance away from Mr. Tower. Certainly, Mr. Phinney could have been motivated to recall the events in the most favorable light, since he was charged with a crime.

⁶ *Fay-Ray v. TABC*, 959 S.W. 2d 362, 366 (Tex. App. – Austin 1998, no writ).

On the other hand, given Agent King's distance from the transaction and Mr. Phinney's explanation of Mr. Tower's confusion about the beer's price, the ALJ cannot say that Agent King's interpretation of the events was more plausible than Mr. Phinney's. Agent King could not understand Mr. Tower; again, however, there are other possible explanations for this. Obviously, Mr. Tower was able to make his order known to Mr. Phinney or else Mr. Phinney would not have known what to give to him.

In summary, the greater weight of evidence did not establish that Mr. Phinney should have known Mr. Tower to be intoxicated. Since Staff bore the burden of proof, the ALJ recommends no action against Cheers as a result of the allegation of serving alcohol to an intoxicated person.

IV. PROPOSED FINDINGS OF FACT

1. Cyroos, Inc. d/b/a Cheers Shot Bar ("Cheers") holds Mixed Beverage Permit MB-238578, Late Hours Permit LB-238579, and Beverage Cartage Permit PE-238580, for premises located in Austin, Texas.
2. On August 19, 2003, the Texas Alcoholic Beverage Commission's ("TABC's") Staff issued a notice of hearing to Cheers, alleging the sale of an alcoholic beverage to an intoxicated patron on March 15, 2003.
3. The 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.
4. The hearing on the allegations was held September 22, 2003, at the State Office of Administrative Hearings, 300 West Fifteenth Street, Austin, Texas. Both parties were represented.
5. The patron who was alleged to have been intoxicated was observed staggering toward Cheers, but there was no evidence that the bartender saw the patron staggering.
6. After the patron entered Cheers, he placed a drink order at the bar.
7. Although the patron was observed swaying and with a lowered head, he did not place his head on the bar.

8. A Cheers bartender served the patron a beer, and the patron was observed placing a "wad" of money on the bar to pay for the beer.
9. Although a TABC agent who subsequently spoke with the patron found his answers to be incomprehensible, the bartender had been able to understand the patron.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ("the Code") § 11.46(a)(8) (Vernon 1995 and Supp. 2003).
2. SOAH has jurisdiction to conduct the administrative hearing in this matter and to issue this Proposal for Decision under Code § 5.43 and TEX. GOV'T CODE ANN. Chapter 2003 (Vernon 2003).
3. Proper and timely notice of the hearing was afforded the parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Staff bore the burden of proof in this proceeding. 1 TEX. ADMIN. CODE ("TAC") 155.41(b).
5. The negligence standard applicable in this case is whether a reasonably prudent person would have observed the patron as intoxicated. *Fay-Ray v. TABC*, 959 S.W. 2d 362, 366 (Tex. App. – Austin 1998, no writ).
6. As defined in 16 TAC § 50.2(2)(A), "intoxication" means not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body.
7. There was insufficient evidence to prove that the Cheers bartender would have observed the patron as intoxicated.
8. Staff failed to meet its burden of proof.
9. No action should be taken against Cheers as a result of this proceeding.

Signed November 21, 2003.



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

DOCKET NO. 604606

IN RE CYROOS, INC.	§	BEFORE THE
D/B/A CHEERS SHOT BAR	§	
PERMIT NOS. MB-238578, LB-238579	§	
& PE-238580	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-4288)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 30th day of December, 2003, 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 September 22, 2003, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 21, 2003. 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.

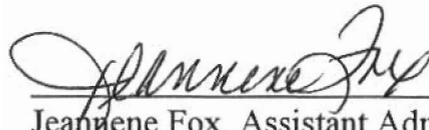
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations in Docket No. 604606 regarding Permit Nos. MB-238578, LB-238579 and PE-238580 are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on January 20, 2004, 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.

SIGNED on this the 30th day of December, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

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