

DOCKET NO. 605167

IN RE ZANE LADONNE ELLISON	§	BEFORE THE
D/B/A BIG DADDY ZANE'S	§	
PERMIT/LICENSE NOS. MB406382,	§	
LB406383, PE406384	§	TEXAS ALCOHOLIC
	§	
ECTOR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-6448)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 9th day of November, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on July 9, 2004 and adjourned on July 9, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 16, 2004. 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.

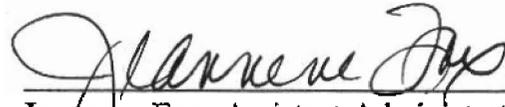
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **no action** be taken against Respondent's permits.

This Order will become final and enforceable on November 30, 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 this the 9th day of November, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

CG/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Scott Tidwell
ATTORNEY FOR RESPONDENT
VIA FACSIMILE (432) 367-8853

- Zane Ladonne Ellison
d/b/a Big Daddy Zane's
RESPONDENT
PO BOX 70501
ODESSA, TX 79769
VIA REGULAR MAIL

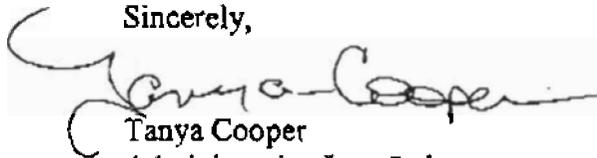
Christopher Gee
ATTORNEY FOR PETITIONER
TABC Legal Section

Odessa District Office

Licensing Division

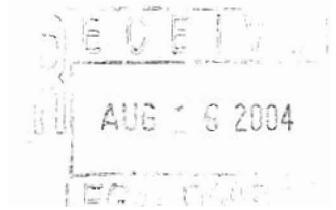
Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tanya Cooper", is written over a light gray rectangular background.

Tanya Cooper
Administrative Law Judge

attachments



DOCKET NO. 458-04-6448

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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BEFORE THE STATE OFFICE

v.

OF

ZANE LADONNE ELLISON
D/B/A BIG DADDY ZANE'S
ECTOR COUNTY, TEXAS
(TABC CASE NO. 605167)

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Zane LaDonne Ellison d/b/a Big Daddy Zane's (Respondent), alleging a violation of the Texas Alcoholic Beverage Code (the Code) in that Respondent or its agent, servant or employee, Dawna Autrey, was intoxicated on the licensed premises.¹ TABC Staff sought a twenty-day suspension of Respondent's permits.²

The Administrative Law Judge (ALJ) did not find the evidence sufficient to establish that Respondent, or its agent, servant or employee, Dawna Autrey, was intoxicated on the premises.

¹ 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. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13).

Permittee means a person who is the holder of a permit provided for in the Code, or any agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

² When the Texas Alcoholic Beverage Commission is authorized to cancel or suspend a permit, the civil penalty may be authorized to be not less than \$150 or more than \$25,000 for each day the permit was to have been suspended. TEX. ALCO. BEV. CODE ANN. § 11.64(a).

Accordingly, the ALJ recommends that no enforcement action be taken against Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 28, 29, and 44, TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 11.61, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.* (the Rules). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. chs. 2001 and 2003. There were no contested issues of notice or jurisdiction in this proceeding.

On July 9, 2004, a hearing convened before ALJ Tanya Cooper, at the Justice of the Peace Courtroom, 400 S. Main Street, 2nd Floor, Midland, Texas. TABC Staff was represented at the hearing by Christopher G. Gee, TABC Staff Attorney. Respondent appeared and was represented by Scott M. Tidwell, Attorney at Law. The hearing concluded on that day, but the record remained open at the parties' request until July 30, 2004, in order to allow the parties to submit written arguments.

II. EVIDENCE

Respondent holds a Mixed Beverage Permit, MB-406382, a Mixed Beverage Late Hours Permit, LB-406383, and a Beverage Cartage Permit, PE-406384, issued by TABC for Respondent's premises located at 6840 W. University, Odessa, Ector County, Texas. TABC Staff alleges that on April 25, 2003, Respondent's employee, Dawna Autrey, was intoxicated on the licensed premises. Respondent's licensing history was admitted into evidence. TABC Agent John Deering and Sergeant Justin Scott, Texas Comptroller of Accounts, testified for TABC Staff. Respondent, along with Kristie Fisher and Dawna Autrey, also testified at the hearing.

At approximately 11:30 p.m. on April 25, 2003, Agent Deering and Sgt. Scott were at the

licensed premises. Both officers were participating in a cooperative law enforcement sting operation that was focusing on tobacco sales to minors violations. During the course of that activity, both officers had an opportunity to observe Dawna Autrey.

Sgt. Scott testified that he first noticed Ms. Autrey while she was seated at the end of the bar. According to Sgt. Scott, Ms. Autrey had an alcoholic beverage, a Smirnoff cooler, in her hand. Sgt. Scott said he observed Ms. Autrey get up and walk around behind the bar. As she walked, her hand was resting on the bar, as if to use the bar for a guide to steady herself in Sgt. Scott's opinion. Sgt. Scott alerted Agent Deering that Ms. Autrey was possibly intoxicated. He said he continued to observe Ms. Autrey for approximately thirty minutes and noted she had an odor of alcoholic beverage on her breath, spoke loudly, and appeared unsteady on her feet.

Agent Deering, a TABC agent with 19 years experience, described his contact with Ms. Autrey that night. Agent Deering said that he saw Ms. Autrey both as she was seated at the bar and as she walked behind the bar. According to Agent Deering, Ms. Autrey was speaking loudly and became argumentative as information was sought by the officers concerning the premises' operation. Ms. Autrey was insistent that Respondent should be called to the licensed premises in order to provide the information that was being requested by the officers. Agent Deering said that he thought Ms. Autrey's coordination was poor because she was observed "feeling" her way along the bar with her hand.

Agent Deering said that he took Ms. Autrey outside to speak further with her and evaluate her condition. Agent Deering testified that Ms. Autrey told him that she was Respondent's employee at the licensed premises, but that she was "off-duty" at the time. Agent Deering said he observed Ms. Autrey's eyes were red; and there was an odor of alcoholic beverage on her breath as she spoke. According to Agent Deering, Ms. Autrey told him she had consumed a six-pack of beer.

As contact continued between Agent Deering and Ms. Autrey, Agent Deering stated that she became increasingly argumentative. Due to her argumentative demeanor and unsteady balance, Agent

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Deering said that he elected to not perform any standardized field sobriety tasks with Ms. Autrey. Agent Deering further stated that Ms. Autrey asked for a breathalyzer test after she was advised by him that he thought she was intoxicated. According to Agent Deering, he had a portable breath testing ("PBT") device with him at the premises. Agent Deering said administering a "PBT" to a person suspected of being intoxicated was under the discretion of any agent according to TABC policies. In this instance, Agent Deering said that he elected to not provide this test to Ms. Autrey because he thought she was intoxicated based upon his observations of her.

Kristie Fisher, a former employee of Respondent, testified next. Ms. Fisher was the bartender in charge of the premises on April 25, 2003. According to Ms. Fisher, Ms. Autrey arrived at Big Daddy Zane's around 10:30 p.m.. When Ms. Autrey first arrived, she was making preparations for a birthday party to be held the next day. Ms. Fisher said she was very busy. There were a lot of people inside the premises and it was noisy. Ms. Fisher testified that she needed some assistance due to the crowd, so Ms. Autrey helped her catch up by bussing some of the tables, filling up the ice well, washing dishes, and placing corks in bottles of newly opened alcoholic beverages, despite not being on duty.

Ms. Fisher said that she had known Ms. Autrey for approximately 10 years. Over that time, Ms. Fisher said that she had never seen Ms. Autrey consume much alcoholic beverage, perhaps a beer or some other similar beverage on occasion. Ms. Fisher acknowledged that Ms. Autrey did have one drink in her presence that evening, a Smirnoff cooler, but had only taken a couple of sips from it before the officers arrived.

Ms. Fisher testified that the officers began asking her about the cigarette machine, and she did not know how to answer the officers' questions. According to Ms. Fisher, she asked Ms. Autrey if she knew what the officers were asking for. At that point, Ms. Autrey suggested to her and the officers that Respondent should be telephoned and asked to come to the premises. Then, the officers would be able to get the information they wanted directly from Respondent. Ms. Fisher said she did not see Ms. Autrey and Agent Deering as they went outside the bar, but did recall hearing the side door to the premises slam.

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Dawna Autrey testified that she was Respondent's employee, but she was not on duty that day. She said that she came by the licensed premises at approximately 10:30 p.m. checking on supplies for a birthday party scheduled for the next day. The licensed premises was busy, so she helped Ms. Fisher after checking on party decorations. Ms. Autrey said she cleaned ashtrays, washed some dishes, and restocked the ice well because it was low. After finishing those tasks, Ms. Autrey said she got a Smirnoff Ice and sat at the end of the bar.

Ms. Autrey denied being intoxicated. She said she drank a lot of Coca-Cola, usually around a six-pack throughout any given day. When asked about the amount she had to drink that day, she said that she told Agent Deering, "a six-pack of Coke," not a six-pack of beer. Ms. Autrey testified that she asked Agent Deering for an Intoxilyzer test when confronted by him about possibly being intoxicated. According to Ms. Autrey, Agent Deering refused her request stating that the type of testing she requested was only available for persons suspected of driving while intoxicated.

Respondent testified he was aware of two citations that were issued to his employees on April 25, 2003, at the licensed premises: Sale of Tobacco to a Minor and Employee Intoxicated on the Premises. Respondent said that both citations had been subsequently dismissed.

Respondent stated that he lives in close proximity to the licensed premises. On April 25, 2003, he was in his home monitoring activities at the premises via a video surveillance system. He noticed some activity in the parking lot and called over to the licensed premises on the telephone asking if there were any problems. Ms. Autrey answered the telephone. Respondent said that Ms. Autrey looked outside and reported back that there were some men talking in the parking lot, but that there were no signs of trouble.

Respondent continued to monitor the activities at the premises from his home. He saw the officers enter the licensed premises, which was full of customers. At that point, he saw Ms. Autrey seated at the end of the bar. Later, Ms. Autrey's husband came to Respondent's home and told him that Ms. Autrey had been arrested. Respondent said he made arrangements for a bondsman to meet Ms. Autrey at the jail,

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and that she was released shortly after her arrival at the jail. He stated that he did not go over to the premises because he thought it would only add to the confusion with the number of customers and law enforcement officers present.

Respondent testified that he later investigated Ms. Autrey's activities on April 25, 2003, to determine for himself if she were intoxicated on that evening. He stated he found nothing to suggest that she was impaired. According to Respondent, Ms. Autrey did not drink alcoholic beverages to any great extent. Respondent said that he observed Ms. Autrey's activities while at the licensed premises for approximately 15 minutes over the surveillance system on that date; and in addition, spoke with her via the telephone. He confirmed seeing her take one drink from the Smirnoff Ice.

Respondent concluded his testimony stating that he had known Ms. Autrey for many years. He said that she was an emotional person, and would get upset, and perhaps even mouthy, if she thought that she was being wrongly accused. Respondent stated that in his opinion, Ms. Autrey was not intoxicated; however, that she might owe Agent Deering an apology for some of her comments made during their contact.

Respondent's current permits were reissued by TABC on January 13, 2004. The licensing history for this premises, reflected in TABC's Exhibit 1, documents past violations, including a violation for an intoxicated employee on the premises. The licensing information concerning prior violations at Respondent's premises, however, does not show that Ms. Autrey has been involved in or associated with those activities. The prior incident of an intoxicated employee involved Kristie Fisher, and had occurred at the licensed premises on April 6, 2003. Respondent did not contest that this violation, or the breach of the peace and sale to an intoxicated person violations, that occurred at the same time. A 17-day suspension of Respondent's permits, or payment of a civil penalty in the amount of \$2550.00 in lieu of suspension, was accepted by Respondent as the penalty in that instance.

III. ANALYSIS

The issues to be determined concerning this alleged violation are:

1. Whether Ms. Autrey was Respondent's agent or employee; and
2. If Ms. Autrey was Respondent's agent or employee, whether she was intoxicated on the licensed premises.

Evidence presented in this matter established that Ms. Autrey was Respondent's agent or employee while she was at the licensed premises on April 25, 2003. Although she may not have been the bartender on-duty, she was at the premises performing tasks associated with or incidental to her employment. Ms. Autrey inventoried supplies planning for a birthday party to be held at the licensed premises on the next day. Because the premises was busy with a large number of patrons, she cleared tables, washed dishes, and restocked the ice well with alcoholic beverages to assist the bartender, Ms. Fisher. Ms. Autrey spoke with Respondent just prior to law enforcement officers entering the premises when he called to inquire about the numerous car lights he was observing on the premises' parking lot.

Next the ALJ must determine whether Ms. Autrey was intoxicated on the licensed premises. "Intoxication" or "intoxicated" is not defined by the Code. Intoxication is generally deemed to be a state of diminished capability in a person, either in terms of mental or physical abilities, which can occur as a result of consumption of alcoholic beverages or an alcohol concentration determined to be at a specified level in a person's system by use of an objective measuring device.³ The ALJ finds that TABC Staff failed

³ The Texas Penal Code Section 49.01 defines intoxication as:

(A) not having the normal use of physical or mental faculties by reason of the introduction of alcohol... or

(B) having an alcohol concentration of 0.08 or more.

to meet its burden of proof by a preponderance of the evidence in showing that Ms. Autrey was intoxicated on the licensed premises.

Many of the characteristics attributed to Ms. Autrey's behavior, which the officers felt demonstrated intoxication, (red eyes, poor balance exhibited by touching the bar to steady herself and "feeling" her way along the bar to her drink, speaking loudly, and having the odor of alcoholic beverage on her breath) are subjective assessments, which are also equally consistent with actions of a sober person found in the same or similar circumstances as Ms. Autrey on that evening. People standing near a bar will often place their hands on it while standing in a resting position or while moving along the side of a bar. "Feeling" for an object is not unusual if a person wants to keep their eyes on something or someone else other than the object being reached for. The ALJ believes it is reasonable that Ms. Autrey would be interested in closely observing the actions of law enforcement personnel while they were on the licensed premises. Persons in bars frequently have red eyes due, in part, to cigarette smoke. Tobacco products were, in fact, sold at this licensed premises, and those sales were the initial reason drawing law enforcement officers to the premises. In the ALJ's opinion, it would not be unreasonable to expect that Ms. Autrey's eyes, like many other people's eyes, could be sensitive to tobacco smoke in a room and become red. The evidence revealed the bar was very busy. Again, it is not unreasonable to expect a person would need to speak loudly in order to be heard. It is undisputed that Ms. Autrey had consumed a portion of at least one alcoholic beverage and had been working with containers of alcoholic beverage just prior to the officers arrival. Her activities while at the licensed premises accounts for the alcoholic beverage odor on her person, but does not necessarily support that she was intoxicated.

Agent Deering testified that Ms. Autrey told him she consumed a six-pack of beer. According to Ms. Autrey it was a six-pack of Coca-Cola. Tensions appeared high at the time this comment was made by Ms. Autrey. In weighing this conflicting evidence, the ALJ believes that a lack of effective communication occurred between Agent Deering and Ms. Autrey concerning her statement about consuming a six-pack.

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During their contact, the evidence shows the Ms. Autrey repeatedly asked Agent Deering to provide her with a breath test. Agent Deering confirmed in his testimony that he had a portable breath testing device ("PBT") at his disposal while at the licensed premises; however, he opted in his discretion not to use it. Further, Agent Deering did not attempt to conduct any standardized field sobriety tests with Ms. Autrey. Rather, Agent Deering chose to rely on subjective indicia, as discussed above, in his decision to arrest Ms. Autrey for being intoxicated while on the licensed premises. Lacking any of these objective measures for the level of alcohol content, physical impairment, or mental impairment attributable to Ms. Autrey at the time, the ALJ finds that TABC's evidence is insufficient to support that Ms. Autrey was intoxicated on the licensed premises.

The evidence in this case established that Ms. Autrey had been at the licensed premises for approximately one hour prior to the law enforcement officers' arrival. She had worked at tasks requiring use of both her mental and physical faculties. She had spoken to Respondent by telephone just prior to the officers entering the licensed premises. Respondent testified he did not believe Ms. Autrey was intoxicated on the premises, and he had spoken with her and had the opportunity to observe her activities via his video surveillance equipment before the officers arrived. In the ALJ's opinion, if Respondent had thought anything was amiss in Mrs. Autrey's actions, he would have taken immediate action to remove her from the premises since the premises' licensing history, as reflected in TABC's Exhibit 1, showed that Respondent had accepted a penalty for the same violation involving another employee just a few weeks prior to this incident.

Additionally, the evidence in this matter reflects that Ms. Autrey was released from police custody shortly after her arrest and that the criminal charge made against her for the violation of "Employee Intoxicated on the Licensed Premises," was dismissed. Accordingly, the ALJ finds that TABC Staff's evidence is insufficient to establish this violation against Respondent.

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IV. RECOMMENDATION

For reasons cited in the ALJ's Analysis above, the ALJ recommends that Respondent's permits not be suspended for any period of time.

V. PROPOSED FINDINGS OF FACT

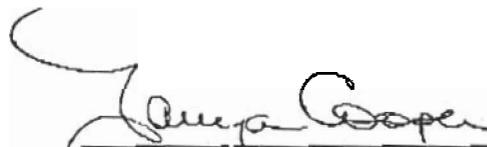
1. Zane LaDonne Ellison d/b/a Big Daddy Zane's (Respondent) holds a Mixed Beverage Permit, MB-406382, a Mixed Beverage Late Hours Permit, LB-406383, and a Beverage Cartage Permit, PE-406384, issued by TABC for the premises located at 6840 W. University, Odessa, Ector County, Texas.
2. At approximately 11:30 p.m. on April 25, 2003, law enforcement officers, TABC Agent John Deering, and Texas Comptroller of Public Accounts Sgt. Justin Scott, were at the licensed premises described in Finding of Fact No. 1, conducting a sting operation for tobacco sales to minors violations.
3. Dawna Autrey, Respondent's employee, was at the licensed premises when the officers referred to in Finding of Fact No. 2 arrived.
4. While at the licensed premises, Ms. Autrey inventoried supplies for a birthday party to be held the next day, bussed tables, washed dishes, disposed of empty containers of alcoholic beverages, and filled the ice well with alcoholic beverages.
5. Ms. Autrey partially consumed one bottle of Smirnoff Ice, an alcoholic beverage.
6. Ms. Autrey spoke loudly, had red eyes, and rested a hand on the bar for guidance as she walked around the bar.
7. Based upon TABC Agent Deering's subjective observations described in Finding of Fact No. 6, Ms. Autrey was arrested for the Texas Alcoholic Beverage Code violation of 'Employee Intoxicated on the Licensed Premises.'
8. TABC Agent Deering did not objectively test Ms. Autrey for intoxication with an available portable breath testing ("PBT") device or by administering standardized field sobriety tasks.
9. Respondent observed Ms. Autrey's appearance via video surveillance equipment and spoke with her just prior to the officers' arrival at the licensed premises. In his opinion, Ms. Autrey was not intoxicated.

10. Although it was undisputed that Ms. Autrey had consumed some alcoholic beverage before coming in contact with law enforcement officers, observations concerning her set forth in Finding of Fact No. 6 were as likely to be observed in a sober person in the same or similar situation as an intoxicated person.
11. The criminal charge against Ms. Autrey for being intoxicated on the licensed premises was dismissed.

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 28, 29, and 44, and §§ 6.01 and 11.61, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.*
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. chs. 2001 and 2003.
3. Respondent received adequate notice of the proceedings and hearing.
4. Based upon Proposed Findings of Fact No. 4, Ms. Autrey's mental and physical abilities were not diminished as a result of consumption of alcoholic beverages, nor was any evidence produced that supported she had an alcohol concentration at any level in her system to suggest she was impaired due to consuming alcoholic beverage.
5. Based on the foregoing Proposed Findings of Fact Nos. 4 - 8 and Conclusion of Law No. 4, the preponderance of the evidence does not support that Respondent's agent or employee, Dawna Autrey, was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(13).
6. Based on the foregoing Proposed Findings of Fact Nos. 4 - 8 and Proposed Conclusion of Law No. 5, Respondent's Mixed Beverage Permit, MB-406382, Mixed Beverage Late Hours Permit, LB-406383, and Beverage Cartage Permit, PE-406384, should not be suspended.

SIGNED August 16, 2004.


TANYA COOPER, Administrative Law Judge
State Office of Administrative Hearings

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 16, 2004

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

Christopher Gee, Staff Attorney
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

Scott Tidwell,
Attorney for Respondent

VIA FACSIMILE 432/367-8853

**RE: Docket No. 458-04-6448; Texas Alcoholic Beverage Commission vs Zane Ladonne Ellison
d/b/a Big Daddy Zane's (TABC Case No. 605167)**

Dear Mr. Steen:

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 Christopher Gee, attorney for Texas Alcoholic Beverage Commission, and to Scott Tidwell, attorney for Respondent. The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Zane Ladonne Ellison d/b/a Big Daddy Zane's (Respondent), alleging a violation of the Texas Alcoholic Beverage Code in that Respondent or its agent, servant or employee, Dawna Autry, was intoxicated on the licensed premises. TABC Staff sought a twenty-day suspension of Respondent's permits.

The Administrative Law Judge (ALJ) did not find the evidence sufficient to establish that Respondent, or its agent, servant, or employee, Dawna Autry, was intoxicated on the premises. Accordingly, the ALJ recommends that no enforcement action be taken against Respondent's permits.