

DOCKET NO. 609348

IN RE E. CAMPBELL & CO..	§	BEFORE THE
D/B/A FIRST AND LAST BAR & GRILL	§	
PERMIT/LICENSE NOS. N-514581,	§	
PE514582	§	TEXAS ALCOHOLIC
	§	
HENDERSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-8347)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 19th day of May, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on February 2, 2005, and adjourned on that same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 1, 2005. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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 Respondent's permits be **SUSPENDED** for **fifteen (15) days**.

IT IS THEREFORE ORDERED that unless Respondent pays a civil penalty in the amount of **\$2,250.00** on or before the 19th day of July, 2005, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **fifteen (15) days, beginning at 12:01 A.M. on the 26th day of July, 2005**.

This Order will become final and enforceable on June 10, 2005, 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 19th day of May, 2005.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

CG/bc

—
The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

E. CAMPBELL & CO.
D/B/A FIRST AND LAST BAR & GRILL
RESPONDENT
PO BOX 1669
MABANK, TX 75147-1669
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1929 2945

Christopher Gee
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Longview District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 609348

REGISTER NUMBER:

NAME: E. CAMPBELL & CO.

TRADENAME: FIRST AND LAST BAR & GRILL

ADDRESS: 761 S. Gun Barrel Lane, Gun Barrel City, Henderson County, Texas 76147

DATE DUE: July 19, 2005

PERMITS OR LICENSES: N-514581, PE514582

AMOUNT OF PENALTY: \$2,250.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY IN THE AMOUNT OF \$2,250.00 ON OR BEFORE THE 19TH DAY OF JULY, 2005, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711**

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS, NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

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TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
Petitioner	§	
	§	
V.	§	OF
	§	
E. CAMPBELL & CO. D/B/A FIRST AND	§	
LAST BAR & GRILL	§	
HENDERSON COUNTY, TEXAS	§	
(TABC CASE NO. 609348)	§	
Respondent	§	ADMINISTRATIVE HEARINGS

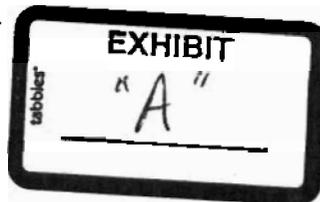
PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Staff) brought this disciplinary action against E. Campbell & Co., d/b/a First and Last Bar & Grill, 761 S. Gun Barrel Lane, Gun Barrel City, Henderson County, Texas, (Respondent), alleging that on or about February 6, 2004, Respondent or its agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person. The Administrative Law Judge (ALJ) finds that Staff has proven the allegations and recommends that Respondent's permits be suspended for 15 days.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On February 2, 2005, a public hearing was held before Jerry Van Hamme, Administrative Law Judge (ALJ), at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Christopher Gee, attorney. Mr. Campbell appeared for Respondent pro se. The record was closed on that date.



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II. LEGAL STANDARDS AND APPLICABLE LAW

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 the permittee sold or delivered an alcoholic beverage to an intoxicated person. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

III. EVIDENCE

A. Staff's Evidence and Contentions

1. Marcus Stokke

Marcus Stokke, an Enforcement Agent for the Texas Alcoholic Beverage Commission (Commission) testified that on February 6, 2004, he and other agents, including Agent Jeff Peel, conducted an investigation of Respondent's premises based on complaints Respondent was selling alcoholic beverages to intoxicated persons

Agent Stokke entered Respondent's premises along with another undercover agent at approximately 11:00 p.m. He observed a gentleman in the establishment who appeared intoxicated. The gentleman had slurred speech; red glassy eyes; was loud; took small steps; held onto chairs, bar stools, and the bar while walking to maintain his balance; and stumbled onto the dance floor, dancing alone, running in circles and yelling.

Agent Stokke observed Respondent's bartender sell a beer to this individual. He also observed the individual fumbling with his wallet while attempting to pay for the beer.

Agent Stokke called Agent Peel, who had remained outside in the parking lot, on a cell phone, informed him of the sale, and gave him a description of the individual. Agent Peel entered the establishment, made contact with the individual, and took him outside for field sobriety tests.

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2. Jeff Peel

Agent Jeff Peel testified he was waiting outside Respondent's establishment while Agent Stokke conducted the undercover investigation. Agent Stokke called him on a cell phone, informed him that a sale of an alcoholic beverage had been made to an apparently intoxicated individual, and described the individual's appearance. Agent Peel then entered Respondent's premises, observed the individual, watched him for approximately two minutes, and observed that he was having trouble standing and was being assisted to the bar by another person. Agent Peel also observed that he was very loud, louder even than the music in Respondent's establishment.

Agent Peel identified himself to the individual and escorted him outside for field sobriety testing. He observed that the individual's balance was unsteady while walking; that he spoke in broken sentences and incomplete words; swayed while standing; and had red, glassy eyes and slurred speech. In Agent Peel's opinion, the individual was highly intoxicated, so much so he did not believe it safe to have the individual perform field sobriety tests for fear he would lose his balance and injure himself. Agent Peel cited the individual for public intoxication and released him to a friend to be taken home.

B Respondent's Evidence and Contentions

1. Larry Parker

Larry Parker testified he spent approximately four hours on that date at the American Legion Post located across the street from Respondent's establishment. He was with a group of people, including the individual ultimately cited by Agent Peel for being intoxicated. Both he and that individual consumed alcoholic beverages at the American Legion Post.

At approximately 11:00 p.m., he and a group of others from the American Legion Post crossed the street and entered Respondent's establishment. He observed the allegedly intoxicated individual

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purchase a beer from Respondent's bartender and take a sip. He did not remember seeing any agents when he entered Respondent's establishment, but did remember Agent Peel entering the establishment looking for someone who had just come from the American Legion Post.

In Mr. Parker's opinion the individual that Agents Stokke and Peel described as intoxicated was not that intoxicated. The individual's slurred speech, for example, was likely caused by a speech impediment. His loud behavior was due to his natural out-going gregarious nature. Mr. Parker also did not recall seeing the individual staggering while at the American Legion Post. However, he could not testify from his own recollection whether the individual was intoxicated or not at the time the individual purchased the beer from Respondent's bartender.

2. Nancy Campbell

Nancy Campbell was present in Respondent's establishment on this date and testified that, in her opinion, the individual described by Agents Stokke and Peel as intoxicated was not intoxicated. She testified he ordered a beer and took one sip. She further agreed he had a speech impediment and a boisterous personality, and stated that the policy at Respondent's establishment was to cut off intoxicated persons and to not serve them alcoholic beverages.

3. Barbara Clark

Barbara Clark testified that she is a bartender at Respondent's establishment. Although she was not present at the premises on that date, she testified it was Respondent's policy to cut off intoxicated customers and to not serve them alcoholic beverages. She also testified it was common practice when a regular customer entered the premises for Respondent's bartenders to immediately serve up the customer's favorite beverage, so that by the time the customer reached the bar the beverage was waiting. It was, therefore, possible in her opinion for a bartender to serve a drink to an intoxicated person and not recognize the person was intoxicated until that person had reached the bar and had already consumed some of the waiting beverage.

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4. E. Campbell

Mr. Campbell testified that the policy at Respondent's establishment is to not serve intoxicated persons. He also testified that the American Legion Post across the street from Respondent's establishment over-serves its customers. As a result, they often cannot be served alcoholic beverages when they enter Respondent's establishment because they are already intoxicated.

IV. ANALYSIS

Respondent's witnesses provided compelling evidence on the record that Respondent has a policy of not serving alcoholic beverages to intoxicated persons, and that Respondent's establishment is run with a regard for Commission regulations and with the desire to provide a positive influence in the community. Respondent's witnesses at the hearing were credible and provided testimony showing that Respondent's establishment strives to provide a quality service to its customers.

However, the evidence in the instant case shows that, in this particular instance, Respondent's bartender sold alcoholic beverages to an intoxicated person.

There is no question that the individual was served an alcoholic beverage. Agent Stokke, Larry Parker, and Nancy Campbell all observed Respondent's bartender sell this gentleman a beer, and observed him take a sip of the beer. The only issue is whether he was intoxicated at the time of the sale.

Agents Stokke and Peel both testified that they observed him exhibit classic indicia of intoxication, including poor balance, slurred speech, red glassy eyes, and a loud, boisterous demeanor consistent with being intoxicated. In fact, Agent Peel believed his level of intoxication was so pronounced that they did not request that he perform any field sobriety tests for fear he would lose his balance and hurt himself.

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Respondent's witnesses disagreed that the gentleman was as intoxicated as the Agents believed. They testified that he was by nature out-going, gregarious, and loud, and that his behavior was more the result of his personality and speech impediment than intoxication.

However, the evidence shows he had been at the American Legion Post for approximately four hours before entering Respondent's establishment and had consumed alcoholic beverages during that four hours. In addition, the American Legion Post has a history of over-serving its customers and persons going from the American Legion Post to Respondent's establishment are often intoxicated before they enter Respondent's establishment.

Furthermore, although Respondent has a policy not to serve intoxicated persons, bartenders in Respondent's establishment might unknowingly serve an intoxicated person before determining that the individual was intoxicated. And this individual exhibited classic indicia of intoxication. Agents Stokke and Peel with their combined experience as Commission agents both individually and collectively considered this individual highly intoxicated, and even Mr. Parker, a friend and customer of Respondent's establishment was, to his credit and as a reflection of his honesty, unable to testify that the individual was not intoxicated at the time the individual purchased the beer from Respondent's bartender.

Based on the evidence in the record, Staff has shown, by a preponderance of the evidence, that Respondent, or Respondent's agent, servant, or employee, sold or delivered an alcoholic beverage to an intoxicated person.

V. RECOMMENDATION

Staff requested that Respondent's permits be suspended for 20 days. However, having reviewed the Commission Penalty Chart, 16 TEX. ADMIN. CODE § 37.60(a), the range of penalties for this offense includes a 15 day suspension. Based on the evidence in this case, the ALJ recommends

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that Respondent's permits be suspended for 15 days.

VI. FINDINGS OF FACT

1. On May 16, 2002, the Commission issued Private Club Registration Permit, N-514582 and Beverage Cartage Permit, PE-514582, to E. Campbell & Co., d/b/a First and Last Bar & Grill, 761 S. Gun Barrel Lane, Gun Barrel City, Henderson County, Texas.
2. On February 6, 2004, at approximately 11:00 p.m. an individual in Respondent's establishment exhibited indicia of intoxication. In particular, he had slurred speech; red, glassy eyes; took small steps and held onto chairs, bar stools, and to the bar while walking to maintain his balance; was loud; stumbled onto the dance floor and danced alone, running in circles and yelling; was assisted off the dance floor and to the bar by another person; spoke in broken sentences with incomplete words; had trouble standing; was louder than the music in the establishment; and fumbled with his wallet while paying for a beer.
3. Respondent's bartender sold an alcoholic beverage to the intoxicated person.
4. The person was so highly intoxicated that the Commission agent did not request that he perform any field sobriety tests for fear he would lose his balance and injure himself.
5. The Commission agent cited him for public intoxication. He was released to a friend to be taken home.
6. On August 19, 2004, Staff sent a Notice of Hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
7. The hearing on the merits convened February 2, 2005, at the State Office of Administrative Hearings, 6333 Forest Park Rd., Suite 150-A, Dallas, Texas, 75235. Staff was represented by Christopher Gee, attorney. Mr. Campbell appeared *pro se*. The record was closed on that date.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.61(b)(2)
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for

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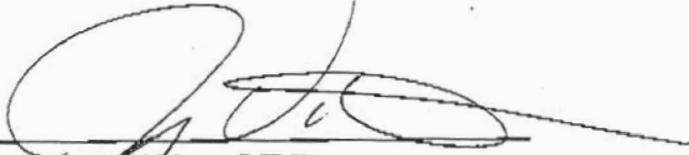
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decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.
4. Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).
5. Based on the foregoing Findings and Conclusions, Respondent's permits should be suspended for 15 days.

SIGNED April 1, 2005.



JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

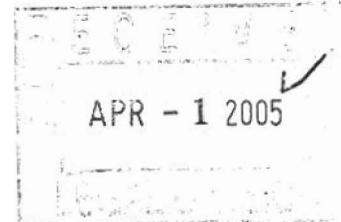
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State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 1, 2005



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

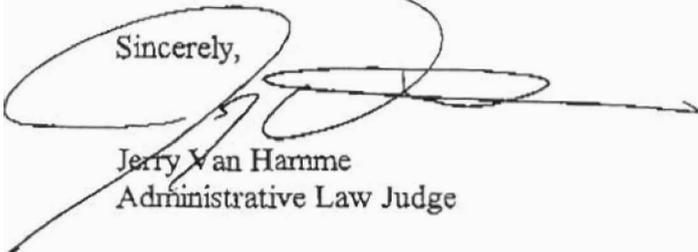
RE: Docket No. 458-04-8347/TABC vs. E. Campbell & Co. d/b/a First and Last Bar & Grill

Dear Ms. Fox:

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.

Sincerely,


Jerry Van Hamme
Administrative Law Judge

JVH/sc
Enclosure

cc: Christopher Gee, Agency Council for Texas Alcoholic Beverage Commission, Via Fax; E. Campbell & Co., Respondent, Via Regular Mail