

DOCKET NO. 615664

IN RE VIRGINIA ANN WHITESIDE
D/B/A JUST 1 MORE
PERMIT/LICENSE NOS. MB506793, LB506794

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BEFORE THE

TEXAS ALCOHOLIC

BEXAR COUNTY, TEXAS
(SOAH DOCKET NO. 458-06-0035)

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of January, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert M. Brown, II. The hearing convened on November 16, 2005, 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 December 13, 2005. 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 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.

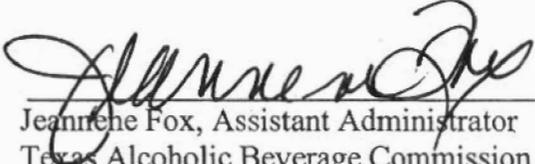
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on February 1, 2006, 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 11th day of January, 2006.

On Behalf of the Administrator,



Jeannette Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

CG\bc

Robert M. Brown, II
Administrative Law Judge
State Office of Administrative Hearings
San Antonio, Texas
VIA FACSIMILE: (210) 308-6854

Virginia Ann Whiteside
d/b/a Just 1 More
RESPONDENT
3354 Lasses.
San Antonio, Texas 78223-3859
CERTIFIED MAIL/RRR NO. 7001 2510 0000 7274 4615

Christopher Gee
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

San Antonio District Office

DOCKET NO. 458-06-0035

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

VIRGINIA ANN WHITESIDE
D/B/A JUST 1 MORE
PERMIT/LICENSE NOS. MB506793, LB506794
BEXAR COUNTY, TEXAS
(TABC CASE NO. 615664)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

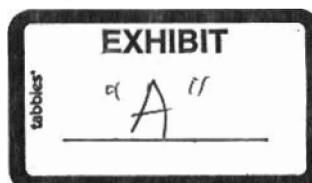
PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (TABC) brought this action against Virginia Ann Whiteside (Respondent) d/b/a Just 1 More. Staff alleged one violation of the Texas Alcoholic Beverage Code in that Respondent was intoxicated on the licensed premises on February 12, 2005. Staff's opening argument sought a 15-day suspension of Respondent's permits, but in closing, Staff argued for a 60-day suspension. The undersigned Administrative Law Judge (ALJ) disagrees with Staff's allegation as the evidence was insufficient to prove the violation and, therefore, recommends no penalty.

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.

On November 16, 2005, the undersigned ALJ convened the hearing at the State Office of Administrative Hearings (SOAH) offices located at 10300 Heritage Boulevard, Suite 250, San Antonio, Texas. TABC was represented at the hearing by Christopher Gee, Staff attorney. Respondent appeared pro se with the assistance of James Dzierzanski, a friend. The hearing concluded and the record closed on that same day.



II. DISCUSSION AND ANALYSIS

Respondent's licensed premises are located at 3354 Lasses, San Antonio, Bexar County, Texas. Respondent holds a mixed beverage permit MB506793 and a late hours permit LB506794, issued by the TABC on December 18, 2001. The permits have been continuously renewed.

A. Applicable Law

Pursuant to the TEX. ALCO. BEV. CODE ANN (Code), TABC may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or TABC rules in accordance with § 11.61(b)(2) of the Code. A permittee, permittee's agent, servant or employee who is intoxicated on the licensed premises violates § 11.16(b)(13) of the Code. TABC has the burden to prove any violation by a preponderance of the evidence.

B. TABC Contention and Evidence

Staff alleges that Respondent was intoxicated on her licensed premises on February 12, 2005, and offered two state police officers, Agents Dina K. Ahrens and Michael Hodges, as witnesses and two exhibits.

1. TABC Exhibits.

Staff's two exhibits were admitted without objections. Exhibit TABC-1 consists of certified copies of Respondent's two mixed beverage permits and an agreed order dated January 26, 2005, that suspended Respondent's permits for three days or payment of a civil penalty of \$450.00 *in lieu* of the suspension. Exhibit TABC-2 is a color picture of Respondent taken at the Bexar County Sheriff's Office on February 12, 2005.

2. Testimony of Agent Ahrens

Agent Ahrens testified that she accompanied Agent Hodges to the Respondent's premises around 2:30 A.M. on February 12, 2005, based a complaint of after-hours alcohol consumption on the premises. Agent Hodges found the door locked, knocked, and identified himself. The door was

opened within a minute or two. Respondent let the agents in and walked back to the bar area with a staggered walk. Agent Ahrens observed that Respondent to have disheveled hair, slurred speech, and glassy eyes. She further noted that Respondent used a chair for support and swayed while standing. She believed that the Respondent was a danger to herself based on her observations.

3. Testimony of Agent Hodges

Agent Hodges testified that he is certified to give standardized field sobriety tests including the horizontal gaze nystagmus test. He observed that the Respondent had an unsteady balance; odor of alcoholic beverage; slurred speech, and bloodshot, glassy eyes. She would spray saliva, repeat herself twice, and vary her cadence when speaking. A glass of ice that smelled of distilled spirits was in front of Respondent who denied that it was her drink. Based on his observations, he asked Respondent to take a portable breath test that Respondent refused. She agreed to take field sobriety tests when asked. He administered the Rhomberg balance test on the dance floor. She opened her eyes and raised her arms during the test against his instructions. Agent Hodges then stopped further testing as a safety measure. Respondent never fell or was assisted in her balance. He arrested Respondent. He identified TABC-2 as a photograph of Respondent taken after her arrest on February 12, 2005, but could not give any more specific time.

C. Respondent's Contention and Evidence

Respondent denied that she was drunk and contended that criminal charges had been dismissed against Respondent in this matter. The Respondent testified that around 1:45 A.M., she had been called to go to her business premises as the band was not "breaking down" their equipment in a timely manner. Her premises close at 2:00 A.M. She had been awakened at home by the call, got dressed, and drove to the premises where she arrived five minutes ahead of the TABC agents. She heard and opened the door for the agents. She denied being slow to answer, but did say that she had arthroscopic knee surgery in January 2005, that effected her walk. She denied that the glass that the agents saw was her drink as she found it when cleaning up. She refused the portable breath test, but she offered to take a blood test. She went to the bathroom and returned to the bar area during the first half hour or more that the agents were on the premises. The Rhomberg balance test given was something she could not ever do as she has poor balance. She further contends that Agent Hodges offered the one-leg stand test, but she complained of her bad legs and never completed it.

D. Analysis

It is undisputed the Respondent is the person who holds two TABC permits for her business, was present at her business premises on February 12, 2005, at 2:30 A.M., and opened the door for Agents Ahrens and Hodges. Respondent's contention that she the criminal charges had been dismissed in this matter does not preclude TABC's enforcement action against Respondent for a Code violation. Therefore, the first issue to be determined is whether Respondent was intoxicated on her licensed premises on February 12, 2005.

The two agents spent the first half hour or more investigating the complaint of after-hours consumption of alcohol on the premises. When Agent Hodges focused on Respondent's possible intoxication, he had reasonable suspicion based on his and Agent Ahrens' observations. Despite refusing the portable breath tester which would be of limited use in this proceeding, Respondent did submitted to field sobriety testing. Agent Hodges' field sobriety investigation did little to prove that Respondent was intoxicated. He conducted the Rhomberg balance field sobriety test. He offered no explanation why he did not use the horizontal gaze and nystagmus test or any other standardized field sobriety test beyond stating that further testing was stopped for Respondent's safety. However, that reason was inexplicable as she had not fallen or needed assistance while the agents were investigating the original complaint, during her trips to and from the front door, bathroom, and dance floor, or when she was performing the balance test on the dance floor.

Great weight was given to Respondent's knee surgery of January 2005. At the hearing, without being disparaging, Respondent's hair and eyes were not unlike what is seen in Exhibit TABC-2 or reported by the agents. In addition, she repeated herself and varied speech cadence at the hearing. While the agents' observations of the Respondent gave reasonable suspicion to believe that Respondent was intoxicated, the evidence in the case indicates that she was not intoxicated.

III. RECOMMENDATION

The undersigned ALJ recommends that Staff's allegation not be sustained and Respondent's permits not be suspended.

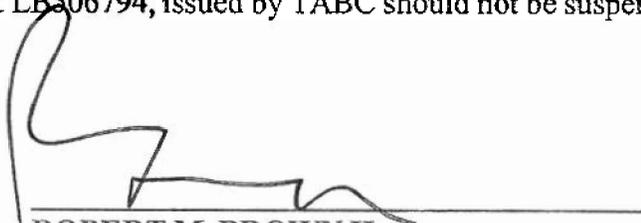
IV. FINDINGS OF FACT

1. Virginia Ann Whiteside (Respondent) doing business as (d/b/a) Just 1 More (Club) holds a Mixed Beverage Permit MB506793 and a Mixed Beverage Late Hours Permit LB506794 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 3354 Lassess, San Antonio, Bexar County, Texas.
2. On February 12, 2005, Respondent was at Respondent's Club premises at 2:30 A.M.
3. On that day at that time, Respondent exhibited the following characteristics commonly associated with intoxicated individuals: slurred speech; bloodshot eyes; unsteady balance; and an odor of alcoholic beverages about her person.
4. Respondent agreed to take field sobriety tests when asked by TABC Agent Michael Hodges.
5. Agent Hodges administered one field sobriety test during which the Respondent opened her eyes and used her arms for balance against his instructions.
6. Respondent told Agent Hodges that a nearby glass of liquor was not her drink, that she had bad legs, and that she was not drunk.
7. Agent Hodges arrested Respondent for being intoxicated some 30 to 40 minutes after his arrival at the premises.
8. The Respondent had knee surgery in January 2005, that effected her balance and gait.
9. At the hearing, Respondent's general appearance and the repetitiveness and cadence of her speech were similar to what is seen in Exhibit TABC-2 or described by Agent Dina K. Ahrens and Agent Hodges.
10. On February 12, 2005, Respondent was not intoxicated at her licensed premises.
11. On August 23, 2005, TABC Staff issued a notice of hearing notifying all parties that a hearing would be held concerning this enforcement action and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
12. A hearing in this matter was conducted and closed on November 16, 2005, at the State Office of Administrative Hearings, 10300 Heritage Boulevard, Suite 250, San Antonio, Texas, before the undersigned Administrative Law Judge with TABC was represented by Staff Attorney, Christopher Gee, and Respondent appeared *pro se*.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, Subch. B.
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 as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon the foregoing Proposed Findings of Fact, Respondent was not proven by a preponderance of evidence to be intoxicated on her licensed premises on February 12, 2005.
5. Based on Conclusion of Law No. 4, Respondent's Mixed Beverage Permit MB506793 and Mixed Beverage Late Hours Permit LB506794, issued by TABC should not be suspended.

SIGNED: December 13, 2005.



ROBERT M. BROWN II
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 13, 2005



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

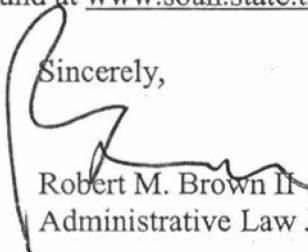
RE: Docket No. 458-06-0035 TABC vs Virginia Ann Whiteside d/b/a Just 1 More

Dear Mr. Steen:

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

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

Sincerely,


Robert M. Brown II
Administrative Law Judge

RMB/ilap
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
Christopher Gee, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA REGULAR MAIL
Joan Bates, Deputy General Counsel, Legal Division, P O Box 13127, Austin 78711- **VIA REGULAR MAIL**
Virginia Ann Whiteside d/b/a Just 1 More, 3354 Lasses, San Antonio, Tx 78223-3859 -**VIA REGULAR MAIL**