

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
MAJARIE BEATRICE HAJDIK	§	OF
D/B/A EL TROPICAL	§	
PERM NO. BG-289092	§	
AUSTIN COUNTY, TEXAS	§	
(TABC CASE NO. 566941)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) filed this case seeking disciplinary action against the wine and beer retailer's permit of Majarie Beatrice Hajdik d/b/a El Tropical (Respondent). Staff alleged that an agent, servant, or employee of Respondent sold, served, or delivered an alcoholic beverage to an intoxicated person, in violation of Section 61.71 (a)(6) of the Texas Alcoholic Beverage Code. Staff asked that consistent with the Commission's standard penalty chart, Respondent's permit should be suspended for a period of up to thirty days with a fine of up to \$150.00 dollars per day of suspension.<sup>1</sup> Respondent neither admitted nor denied selling the alcoholic beverage, but denied the purchaser was intoxicated on the date the incidence occurred. This proposal concludes Respondent committed the violation as alleged and recommends assessment of a penalty of a thirty day suspension.

**I. Procedural History, Jurisdiction, and Notice**

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

The hearing on the matter commenced on December 21, 1998, at the offices of State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. The hearing and record closed on December 28, 1998. Staff appeared and was represented by Clyde Burlison, Assistant Attorney General. Respondent appeared and was represented by Sidney Levine, Attorney at Law. Administrative Law Judge (ALJ) Veronica B. Dorsey presided.

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<sup>1</sup> The Commission's standard penalty chart, found at 16 TEX. ADMIN. CODE §37.60, provides that authorized Commission personnel, in an effort to settle a case involving alleged violations of the Texas Alcoholic Beverage Code or Commission rules, may offer a seven day suspension for a first-time violation involving a sale or service of an alcoholic beverage to an intoxicated person.

Pursuant to 11.64(a) of the Texas Alcoholic Beverage Code, a party may be assessed a penalty in lieu of license suspension of not less than \$150.00 per day nor more than \$25,000.00 per day of license suspension.

## II. Discussion

The Respondent possesses Wine and Beer Retailer's Permit No. BG-289092 issued by the Texas Alcoholic Beverage Commission (the Commission).

### A. Summary of the Parties' Positions

#### 1. Staff

In its Notice of Hearing, Staff alleged the following:

On or about the 5th day of November, 1995, an agent, employee, or servant of the Respondent, Majorie Beatrice Hajdik d/b/a El Tropical, did then and there on the licensed premise, sell, serve, or deliver an alcoholic beverage to an intoxicated person, in violation of Section 61.71(a)(6) of the Texas Alcoholic Beverage Code.

Based on the Commission's proposed penalty chart, Staff sought a thirty day suspension of Respondent's beer permit and a fine of up to \$150.00 dollars per day.

#### 2. Respondent

Respondent argued that a violation of 61.71(a) (6) of the Texas Alcoholic Beverage Code requires a culpable mental state. Respondent argued that the culpable mental state required under 61.71 (a) (6) is one of knowingly selling an alcoholic beverage to an intoxicated person, and Respondent did not "knowingly" sell, serve, or deliver an alcoholic beverage to an intoxicated person.

### B. Applicable Law

Section 61.71(a)(6) of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. (Vernon Supp. 1998), permits the commission or administrator to suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee sold, served, or delivered beer to an intoxicated person. Although Chapter 61 of the Code deals with retail dealer on- or off-premise licenses, Section 25.04 of the Code states that the provisions of the Code applicable to retail dealer licenses also apply to the cancellation and suspension of a wine and beer retailers' permit. Consequently, §61.71 is applicable to the misconduct alleged in this case.

### C. Evidence and Analysis

#### 1. Factual Background

It is not disputed that on the night of November 5, 1995, Juan Navarro was present at El Tropical when a Texas Alcoholic Beverage Commission (TABC) agent, Bernice

Burger, entered El Tropical to conduct a routine inspection to determine whether Respondent was maintaining compliance with applicable state laws. Upon entering the premises at approximately 1:45a.m., Agent Burger walked into El Tropical and walked towards the bar for the purpose of identifying herself to the bartender. In the process of walking towards the bartender, Mr. Federico Moreno Perez, Agent Burger observed Mr. Navarro standing at the bar. After introducing herself, she commenced an inspection of the coolers.

While Agent Burger was inspecting the bar area, Mr. Navarro ordered a beer. Mr. Perez, the bartender, pulled a beer out of the cooler and handed him a beer. Money was exchanged during this transaction. Agent Burger took Mr. Navarro out of the tavern, identified him, and arrested him for public intoxication. Agent Burger issued Mr. Perez a citation for serving alcoholic beverages to an intoxicated person.

## **2. Evidence Considered**

The evidence in this case consisted of the testimony of three witnesses together with two exhibits that included a copy of Respondent's wine and beer retailer's permit and an extemporaneous drawing which depicts the floor plan of the El Tropical bar.

## **3. Testimony**

### **a. Staff**

i. **Bernice Burger.** Agent Burger has been a TABC enforcement agent for 5 years. She stated she had observed more than one hundred intoxicated persons during her time as a certified peace officer. While walking towards Mr. Perez after she entered the bar at 1:45 a.m., she observed Mr. Navarro standing at the bar swaying and holding onto the bar for balance.

According to Agent Burger, Mr. Navarro asked for a beer in a slurred speech pattern. Mr. Perez pulled a beer out of the cooler and handed the beer to Mr. Navarro who paid for it. Agent Burger observed Mr. Navarro fumbling and having a difficult time retrieving the money from his wallet while paying for the beer. Agent Burger stated she observed the bartender take the money from Mr. Navarro, place the money in the register, and give Mr. Navarro change. Agent Burger estimated she was roughly 5 to 6 feet away from Mr. Navarro when he ordered the beer. Agent Burger also described Mr. Navarro as having a blank stare as he ordered the beer. In her opinion, Mr. Navarro was intoxicated to the point that he presented a danger to himself and others.

On cross-examination, Agent Burger stated she had an independent recollection of the case because she recognized Mr. Navarro as someone she had seen before in that both she and Mr. Navarro had been employed by the same company, approximately six to seven years before the date of November 5, 1995. Agent Burger used Mr. Navarro's driver's license to verify his identity. Agent Burger stated she had been at El Tropical establishment about ten minutes when she observed Mr. Navarro and Mr. Perez exchange

money for the purchase of a beer. She believed Mr. Navarro asked for a Budweiser beer because this specific brand of beer was mentioned in her report of this incident. Agent Burger testified that when she first observed Mr. Navarro she felt he was intoxicated, but she conducted a ten minute inspection before approaching him.

When asked if it was against the law for an intoxicated person to be on the premises, Agent Burger responded, "yes, it is."<sup>2</sup> Upon being asked whether she usually removes an intoxicated person after finding them on the premises, Agent Burger explained that she removes the intoxicated person after she has completed the task she came to do.

Agent Burger's reason, in her own words, for not interceding in Mr. Perez's sale of beer to Mr. Navarro was, "I never dreamed he would sell it to him."

Agent Burger recalled Mr. Navarro asking for a drink. She testified her positioning or location behind the bar prevented her from observing anything below waist level in that the bar obstructed that view. From the position behind the bar, she observed Mr. Perez place the beer on the counter, and Mr. Navarro pay for the beer. She immediately escorted Mr. Navarro out of El Tropical bar. Mr. Navarro appeared to be alone when the purchase transpired.

ii. **Federico Moreno Perez.** Mr. Perez testified that on Sunday November 5, 1995, he was the bartender at El Tropical. In his own words, he stated he was there, "that night for a couple of hours because she (Mrs. Hajdik) was doing something." He recalled Agent Burger issuing him a citation for serving, selling, delivering an alcoholic beverage to Mr. Navarro. Contrary to Agent Burger's testimony, he denied serving beer and alcoholic beverages to Mr. Navarro. Mr. Perez testified that in court he pled guilty to selling, serving, or delivering alcoholic beverages to Mr. Navarro.

On cross examination, Mr. Perez testified that sometimes he worked at El Tropical bar, but he maintains another full-time profession. He recalled arriving at El Tropical about 8:00 o'clock on the night of November 5, 1995. He testified that he was behind the bar when he observed Agent Burger enter El Tropical. The night of the incident was the first time he had ever seen Agent Burger.

While testifying, Mr. Perez created an extemporaneous diagram of the floor plan of El Tropical bar. According to Mr. Perez's testimony, Agent Burger came into the bar from the door which is in the lefthand corner of his hand drawn diagram marked and admitted as "Respondent's 1." When asked who entered with Agent Burger, he responded, "Well, I don't remember." He recalled the individuals who entered with Agent Burger were not uniformed policemen. He testified Agent Burger stood about six feet from Mr. Navarro. He testified Agent Burger never came behind the bar.

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<sup>2</sup> Unless otherwise noted, all quotations are taken directly from the official taped record of the hearing.

Mr. Perez testified that on the night of the incident he served Bud Lite beer to Mr. Navarro's girlfriend who was by Mr. Navarro's side. He recalled serving her beer the whole night. Mr. Perez testified that Mr. Navarro always ordered Miller Lite in past sales. When asked if he had served Mr. Navarro a beer when the agent was there, Mr. Perez responded, "no." Mr. Perez recalled Mr. Navarro's girlfriend obtaining the money for the purchase of beer from Mr. Navarro. Upon being asked if he had seen Mr. Navarro's girlfriend give him beer, Mr. Perez responded, "I don't know, I have many guys around, I don't pay attention." Mr. Perez testified that he knew it was illegal to serve alcohol to an intoxicated person. In addition, he testified that he tried to obey the law.

**b. Respondent**

**i. Majarie B. Hajdik.** Mrs. Hajdik, the Respondent and owner of El Tropical, testified that she understood it was an offense to sell to an intoxicated person. Consequently, on Saturdays at 1:00 a.m., she monitors the doors for minors, persons attempting to enter with beer, and intoxicated persons in order to prevent their entrance. She was monitoring the door when Agent Burger entered. She recalled seeing Agent Burger enter with two officers behind her.

When asked had there ever been any type of friction between her and Agent Burger, Mrs. Hajdik testified, "No because I've never had the pleasure of knowing who she was." Mrs. Hajdik elaborated and stated Agent Burger never stated who she was. Mrs. Hajdik testified that she had contacted Agent Burger's supervisor in the past. Upon being asked why she had contacted Agent Burger's supervisor, she answered, "she felt that Agent Burger was harassing her just about every weekend by walking in and just looking as if she did not exist."

Mrs. Hajdik stated she allowed Mr. Perez to operate the bar because he doesn't drink, he speaks Spanish, and he has a solid mind. She testified she has known Mr. Perez for approximately five years. In her opinion, he is a truthful person. She did not recall Mr. Perez ever serving alcoholic beverages to a minor or an intoxicated person. She also testified that most of the time she tends the bar at El Tropical.

On cross examination, Mrs. Hajdik remembered seeing Mr. Navarro in the bar. In her opinion, he was not intoxicated. She believed Mr. Navarro had pled guilty to public intoxication as a result of this incident. In her opinion he had pled guilty because he had to work. Mrs. Hajdik testified that from her monitoring position at the door she could see Agent Burger. As to her being able to see Mr. Navarro and Mr. Perez, Mrs. Hajdik stated she couldn't see behind the bar because people were standing around it."

**4. Analysis, Conclusion, and Recommendation**

The witnesses were diametrically opposed along party lines on the ultimate issue of whether Mr. Perez sold an alcoholic beverage to Mr. Navarro and whether Mr. Navarro was intoxicated. However, neither Mr. Perez nor Mrs. Hajdik controverted Agent Burger's specific observations of intoxication. Where Agent Burger testified Mr. Navarro was swaying and holding onto the bar for balance, Mr. Perez's testimony did not address Mr. Navarro's demeanor on the date of November 5, 1995. Likewise, Mrs. Hajdik testified that

she observed Mr. Navarro at the bar and in her opinion he was not intoxicated. However, her testimony did not specifically refute Agent Burger's assertion that Mr. Navarro was swaying, holding onto the bar, slurring his speech, and fumbling while tendering money. Neither Mr. Perez nor Ms. Hajdik testified there was nothing abnormal in Mr. Navarro's speech or coordination.

A determination regarding the correct definition of the term "intoxication" requires a review of case law. In *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987), the Texas Supreme Court addressed the issue of whether a person injured by an intoxicated driver is entitled to recover against the alcoholic beverage licensee who sold liquor to the intoxicated driver in violation of the Code. The Court stated that the "expressed public policy of the Alcoholic Beverage Code is the protection of the welfare, health, peace, temperance, and safety of the people of the state." Because the Code did not define the term "intoxication," the Court reasoned, it was to be given its commonly understood meaning: "[A] condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical faculties and a resulting diminution of the ability to think and act with ordinary care." The duty to quit serving alcohol arises when the licensee knew or should have known by the patron's demeanor, conduct, or appearance that the patron is intoxicated.

Based on the extent to which the agent observed Mr. Navarro's behavior, the ALJ concludes Staff proved by a preponderance of the evidence Mr. Navarro was intoxicated when Mr. Perez sold him the beer.

Mrs. Hajdik's testimony that she did not feel Mr. Navarro was intoxicated was not as persuasive as the testimony of Agent Burger which contained specific observations of intoxication indicators. Mrs. Hajdik's testimony did not provide specific facts as to why she did not feel Mr. Navarro was intoxicated. However, she did testify that Mr. Navarro entered El Tropical between 10:00 p.m. and 10:30 p.m. She further testified that she observed him drinking between dances. Agent Burger entered El Tropical at 1:45 a.m. She escorted Mr. Navarro out of the bar about fifteen minutes after she had entered. According to Mrs. Hajdik's testimony, Mr. Navarro was consuming alcohol off and on for a three hour period of time. This evidence that Mr. Navarro consumed alcohol off and on for a three hour span of time, though not proof Mr. Navarro was intoxicated, certainly fell short of substantiating any claim he was not intoxicated.

Respondent engaged in a line of questioning regarding Mr. Perez's knowledge of Mr. Navarro's alcohol preferences based on past sales. The purpose of the line of questioning was ostensibly both to show Mr. Perez had knowledge of Mr. Navarro's alcohol preference and to show Mr. Perez could not have sold the beer to Mr. Navarro because the beer was a Bud Lite, and Mr. Navarro only consumes Miller Lite beer, according to Mr. Perez. This line of questioning was weighed against Mrs. Hajdik's testimony that she usually tends bar at El Tropical, and Mr. Perez's testimony that he is a full time painter who was filling in for a couple of hours on the early morning of the incident in order to relieve Mrs. Hajdik. Based upon Mrs. Hajdik's and Mr. Perez's testimony, Mr. Perez's contact with Mr. Navarro is not a sufficient basis to conclude Mr. Perez did not sell a Bud Lite to Mr. Navarro.

Mrs. Hajdik testified that she could not have seen Mr. Navarro purchase a beer from her monitoring position at the door. Absent a possible effort to ensure Mr. Navarro was sober when he was standing at the bar after his beer purchase, there would have been no reason for her eyes to remain fixed on him while he was standing at the bar. Likewise, Mr. Perez was occupied with other customers who were standing around the bar. Consequently, the ALJ was not persuaded Mr. Perez made a conscious mental note of Mr. Navarro's behavior as he stood at the bar.

Based on the extent to which Agent Burger was able to observe Mr. Navarro, her testimony regarding Mr. Navarro's behavior, and her experience both as licensed peace officer and TABC agent, the ALJ concludes Staff proved by a preponderance of the evidence Mr. Navarro was intoxicated when he purchased the beer from Respondent. The ALJ was persuaded by the testimony of Agent Burger that she observed Mr. Navarro swaying, holding onto the bar, fumbling with money, slurring his speech, and having a blank stare.

The ALJ concludes Mr. Navarro was intoxicated as alleged by Staff, and the ALJ recommends Respondent's permit should be suspended for a period of thirty days.

### III. FINDINGS OF FACT

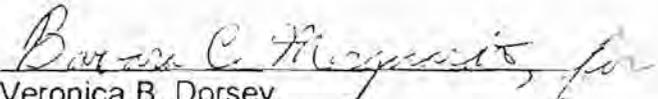
1. Majarie Beatrice Hajdik d/b/a El Tropical (Respondent) holds Wine and Beer Retailer's Permit No. BG-289092 issued by the Texas Alcoholic Beverage Commission (the Commission).
2. On September 23, 1998, Staff of the Texas Alcoholic Beverage Commission (Staff) mailed to Respondent a notice of hearing informing Respondent of the nature of the hearing, the legal authority and jurisdiction under which it was to be held, the particular sections and rules involved, and the matters asserted by Staff. The notice of hearing was received by Respondent.
3. A hearing in this case was held on December 21, 1998, at the offices of State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. The hearing and record closed on December 28, 1998. Staff appeared and was represented by Clyde Burleson, Assistant Attorney General. Respondent appeared and was represented by Sidney Levine, Attorney at Law. Administrative Law Judge (ALJ) Veronica B. Dorsey presided.
4. On the night of November 5, 1995, Juan Navarro was present at El Tropical when Texas Alcoholic Beverage Commission (TABC) agent Bernice Burger entered the premises to conduct a routine inspection to determine whether Respondent was maintaining compliance with applicable state laws.
5. At the time of the hearing, Agent Burger had been a TABC enforcement agent for 5 years. Agent Burger has observed more than 100 intoxicated individuals during her time as a certified peace officer.

6. Upon entering the premises on November 5, 1995, Agent Burger walked towards the bar. While walking towards the bar, Agent Burger immediately noticed Mr. Navarro swaying and holding onto the bar. Agent Burger took a position behind the bar.
7. While Agent Burger was inspecting the coolers, Mr. Navarro ordered a beer. Federico Moreno Perez, an employee of Respondent who was tending the bar, responded by selling a beer to Mr. Navarro. Mr. Navarro fumbled with money, slurred his speech, and had a blank stare as he paid for the beer.
8. Agent Burger escorted Mr. Navarro outside, asked him for identification, and arrested him for public intoxication.

#### IV. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to §106.13 of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq. (Vernon Supp. 1998).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of 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. ch. 2003 (Vernon 1998).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 1998).
4. Based on Findings 6-8, Respondent's employee sold beer to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §61.71(a)(6) (Vernon Supp. 1998).
5. Based on the foregoing, Respondent's permit should be suspended for a period of thirty days.

SIGNED this 22<sup>nd</sup> day of February, 1999.

  
Veronica B. Dorsey  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS