

DOCKET NO. 580924

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
v.	§	
NATCO, INC.	§	ALCOHOLIC
d/b/a RIVER CITY CABARET	§	
PERMIT NOS MB-242770 & LB-242771	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-0740)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of May, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge ("ALJ") Harvel. The hearing convened on August 13, 2001, and adjourned August 17, 2001. The record was closed on December 19, 2001. The Administrative Law Judge made and filed a Proposal For Decision ("PFD") containing Proposed Findings of Fact and Conclusions of Law on February 14, 2002. This PFD was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record. Respondent's and Intervenor River City Cabaret, Ltd.'s filed Exceptions to the PFD on March 8, 2002. Intervenor, City of San Antonio, filed Exceptions to the PFD on March 7, 2002. Petitioner filed Exceptions to the PFD on March 6, 2002. Respondent's and Intervenor River City Cabaret, Ltd.'s Reply to Petitioner's and Intervenor City of San Antonio's Exceptions were filed on March 29, 2002. Petitioner's Replies to Respondent's Exceptions were filed March 29, 2002. On April 8, 2002, the ALJ, by letter, modified her PFD.

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 PFD, including those modified and referenced in her April 8, 2002, correspondence, and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein, except as follows:

The Administrative Law Judge did not properly apply or interpret applicable law, agency rules, and/or prior administrative decisions in relation to the possession of narcotics allegation in Charge XIII of the First Amended Notice of Hearing. While the ALJ found that the Respondent's dancers possessed and sold cocaine on the licensed premises (See PFD, pp.

20-22), the ALJ implied an element that the "management permitted" the offense, which is not required when the offense involves a permittee or its agent, servant, or employee. See Argument and Authorities under Petitioner's Exception No. 16., adopted and incorporated herein. Therefore, pursuant to the authority under the Texas Administrative Procedures Act, TEX. GOV'T CODE ANN. § 2001.058, the following Findings of Fact and Conclusions of Law are hereby made:

Findings of Fact:

29. On or about July 28, 1999, Griselda Rodriguez, a topless dancer at River City Cabaret exercised care, custody, and control over a white powdery substance while on the licensed premises.

30. The white powdery substance tested positive for cocaine.

Conclusions of Law:

11.a. On July 28, 1999, Griselda Rodriguez was an employee, agent, or servant of Respondent.

11.b. Pursuant to TABC Rule 35.41, cocaine is a narcotic.

11.c. By possessing a narcotic on the licensed premises, Respondent's, agent, servant, or employee, violated Texas Alcoholic Beverage Code § 104.01 (9) (Vernon 1995 and Supp. 2000) and 16 Texas Administrative Code § 35.41 (b) (West 2000)

11.d. Based on the above Findings of Fact and Conclusions of Law, Respondent's permits should be cancelled for cause.

The Administrative Law Judge did not properly apply or interpret applicable law, agency rules, and/or prior administrative decisions in relation to the sale of narcotics allegation in Charge XII of the First Amended Notice of Hearing. While the ALJ found that the Respondent's dancers possessed and sold cocaine on the licensed premises (See PFD, pp. 20-22), the ALJ implied an element that the "management permitted" the offense, which is not required when the offense involves a permittee or its agent, servant, or employee. See Argument and Authorities under Petitioner's Exception No. 16., adopted and incorporated herein. Therefore, pursuant to the authority under the Texas Administrative Procedures Act, TEX. GOV'T CODE ANN. § 2001.058, the following Findings of Fact and Conclusions of Law are hereby made:

Findings of Fact:

29. On or about July 28, 1999, Griselda Rodriguez, a topless dancer at River City Cabaret exercised care, custody, and control over a white powdery substance while on the licensed premises.
30. The white powdery substance tested positive for cocaine.
31. Griselda Rodriguez actually transferred the possession of the white powdery substance to an undercover SAPD Detective in the premise parking lot.

Conclusions of Law:

- 11.a. On July 28, 1999, Griselda Rodriguez was an employee, agent, or servant of Respondent.
- 11.b. Pursuant to TABC Rule 35.41, cocaine is a narcotic.
- 11.e. By selling and delivering a narcotic on the licensed premises, Respondent's, agent, servant, or employee, violated Texas Alcoholic Beverage Code § 11.61(b)(7) (Vernon 1995 and Supp. 2000) and 16 Texas Administrative Code § 35.31 (West 2000).
- 11.f. Based on the above Findings of Fact and Conclusions of Law, Respondent's permits should be cancelled for cause.

The Administrative Law Judge did not properly apply or interpret applicable law, agency rules, and/or prior administrative decisions in relation to the sexual solicitation allegations in Charges III, VII, and IX of the First Amended Notice of Hearing. While the ALJ found that the Respondent's dancers agreed to have sex with undercover police officers for money (See PFD, pp. 6-8, 12-13, and 15-16), the ALJ implied an element that the "management permitted or knew about" the offense, which is not required when the offense involves a permittee or its agent, servant, or employee. See Argument and Authorities under Petitioner's Exception No. 3, 8, and 11, adopted and incorporated herein. Therefore, pursuant to the authority under the Texas Administrative Procedures Act, TEX. GOV'T CODE ANN. § 2001.058, the following Findings of Fact and Conclusions of Law are hereby made:

Findings of Fact:

32. On April 27, 1999, Ms. Carreon, Ms. Flores, and Ms. Zuniga were employed as topless dancers at River City Cabaret.

33. On April 27, 1999, while at River City Cabaret, Ms. Carreon, Ms. Flores, and Ms. Zuniga offered and agreed to have sex with undercover SAPD officers for money (\$250.00 for each dancer).
34. On December 22, 1998, Ms. Serna, Chelsea Gallegos and Melissa Aguilar were employed as topless dancers at River City Cabaret.
35. On December 22, 1998, while at River City Cabaret, Ms. Serna, Chelsea Gallegos and Melissa Aguilar offered and agreed to have sex with undercover SAPD officers for money.
36. On December 30, 1998, Ms. Chelsea Gallegos was employed as topless dancer at River City Cabaret.
37. On December 30, 1998, while at River City Cabaret, Ms. Chelsea Gallegos offered and agreed to have sex with an undercover SAPD officers for money (\$100.00).

Conclusions of Law:

- 6.a. On or about the 27th day of April, 1999, an employee, agent, or servant of the Respondent, did then and there on the licensed premises engage in solicitations for sexual purposes, in violation of § 104.01(7) of the Texas Alcoholic Beverage Code.
- 6.b. On or about the 22nd day of December, 1998, an employee, agent, or servant of the Respondent, did then and there on the licensed premises engage in solicitations for sexual purposes, in violation of § 104.01(7) of the Texas Alcoholic Beverage Code.
- 6.c. On or about the 30th day of December, 1998, an employee, agent, or servant of the Respondent, did then and there on the licensed premises engage in solicitations for sexual purposes, in violation of § 104.01(7) of the Texas Alcoholic Beverage Code.
- 6.d. Based on the above Findings of Fact and Conclusions of Law Respondent's permits should be cancelled for cause.

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 Permit Nos. MB-242770 and LB-242771 and all privileges under the above described permits are hereby **CANCELED FOR CAUSE**.

This Order will become final and enforceable on **May 22, 2002**, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 1st day of May, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Administrative Law Judge Harvel
State Office of Administrative Hearings
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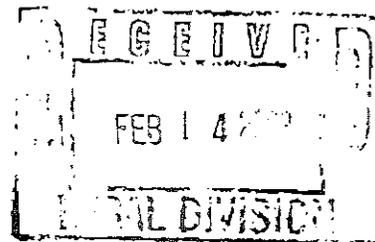
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San Antonio District Office
Licensing Division

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



February 14, 2002

Mr. Rolando Garza, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: SOAH Docket No. 458-01-0740; TABC Case No. 580924; *Texas Alcoholic Beverage Commission v. NATCO Inc., d/b/a River City Cabaret, Permit Nos. MB-242770 & LB-242771, Bexar County, Texas*

Dear Mr. Garza:

Please find enclosed a Proposal for Decision (PFD) that has been prepared for your consideration in the above referenced case. Copies of the PFD are being sent to Dewey Brackin, attorney representing the Texas Alcoholic Beverage Commission, Jennifer Riggs, representing Respondent, and Bradford Bullock, assistant city attorney for the City of San Antonio. For reasons discussed in the PFD, I recommend that the Mixed Beverage Permit and Late-Hours License be canceled because of false statements made on renewal applications, and that all pending renewal applications be canceled.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2001), each party has the right to file exceptions to the PFD. If any party files exceptions, all other parties may file a reply. A copy of any exceptions or replies must also be filed with the State Office of Administrative Hearings and served on the other parties in this case.

Sincerely,

Wendy K.L. Harvel
Administrative Law Judge

WKLH/lao
Enclosure

cc: Dewey Brackin, Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - HAND DELIVERY
Jennifer Riggs, Hill Gilstrap Adams & Graham, LLP, 1005 Congress Avenue, Suite 880, Austin, Texas 78701 -
REGULAR U.S. MAIL
Bradford Bullock, Office of the City Attorney, P.O. Box 839966, San Antonio, TX 78283 - REGULAR U.S. MAIL
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- HAND DELIVERY

G. Whether an employee, agent or servant of Respondents solicited for sexual purposes on December 22, 1998. 12

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I. Whether an employee, agent or servant of Respondents solicited for sexual purposes on December 30, 1998. 15

J. Whether Respondents solicited a customer to buy drinks on January 8, 1999. 16

K. Whether Respondents allowed a breach of the peace on their premises. . . . 17

L. Whether Respondents permitted the sale of a narcotic on the premises on July 28, 1999. 20

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N. Whether Respondents' agent, servant or employee was intoxicated on the licensed premises on December 8, 2000. 22

O. Whether Respondents served an alcoholic beverage to an intoxicated person. 23

P. Whether Respondents made false or misleading statements that Santiago V. Gutierrez had never been convicted of a felony. 23

Q. Whether Respondents made false or misleading statements in their renewal applications that the only stockholder in Natco, Inc. was Santiago Gutierrez. 25

R. Whether Respondents made false or misleading statements in their renewal applications were not being made for the benefit of someone else. 26

S. Whether Respondents engaged in subterfuge in allowing its permit to be displayed or used by an entity other than Natco, Inc., in losing exclusive occupancy and control of the licensed premises, and in engaging in a scheme to surrender control of the premises. 27

T. Whether Respondents permitted a patron to possess a narcotic on the licensed premises on December 22, 1998. 29

U. Whether Respondents permitted a patron to possess narcotics on the licensed premises on January 13, 1999. 30

V. Whether Respondents are not of good moral character or do not have a reputation for being peaceable and law-abiding citizens in the community. 30

W. Whether Respondents conduct their business in a way that is detrimental to the general welfare, health, peace, morals, and safety of the people. 31

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DOCKET NO. 458-01-0740

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
PETITIONER

BEFORE THE STATE OFFICE

V.

OF

NATCO, INC., D/B/A
RIVER CITY CABARET,
BEXAR COUNTY, TEXAS
(TABC CASE NO. 580924)
RESPONDENT

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ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) initiated this action against Natco, Inc. d/b/a River City Cabaret (Natco). The TABC seeks cancellation or suspension of Natco's Mixed Beverage Permit and Mixed Beverage Late-Hours License for the premises known as River City Cabaret, located at 107 East Martin, San Antonio, Texas, and to deny any pending renewal applications. The City of San Antonio (City) intervened in this action and also requests cancellation or suspension of Natco's permits and denial of any pending renewals. River City Cabaret, Ltd. (RCC, Ltd.), a limited partnership of which Natco is the general partner also intervened.¹ The Administrative Law Judge (ALJ) recommends that the Mixed Beverage Permit and Late-Hours License be canceled because of false statements made on renewal applications, and that all pending renewal applications be canceled.²

I. INTRODUCTION

Natco holds TABC Mixed Beverage Permit MB242770 and Mixed Beverage Late-Hours License LB242771. TABC and the City allege numerous violations of the Texas Alcoholic Beverage Code (Code) against Natco. The violations include allegations of among other things, lewd dancing, prostitution, the possession of narcotics, and making false statements on renewal applications.

¹ Because River City Cabaret, Ltd. intervened and is aligned with Natco, this Proposal for Decision refers to Natco and River City Cabaret, Ltd. as Respondents.

² This Proposal for Decision does not address the pending new application filed by RCC, Ltd. dated November 15, 1999 because both the TABC and the City alleged only that the current permit and pending renewals should be canceled and denied.

Natco holds the two TABC-issued permits for a topless nightclub called River City Cabaret (Club) in San Antonio. The Club is located in downtown San Antonio across from the Adams Mark hotel and adjacent to the San Antonio River.

II. NOTICE AND PROCEDURAL HISTORY

The TABC filed its Notice of Hearing on October 25, 2000, and filed a First Amended Notice of Hearing on February 5, 2001. The City filed its Petition in Intervention on November 29, 2000. RCC, Ltd. filed its Petition in Intervention on February 20, 2001. The ALJ granted the City's and RCC, Ltd.'s petitions on March 26, 2001. On May 22, 2001, the City filed its First Amended Petition in Intervention. The hearing took place on August 13-17, 2001 in the hearings rooms at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas with ALJ Wendy K. L. Harvel presiding. Dewey Brackin, attorney with the TABC legal division, represented the TABC. Dennis Drouillard and Bradford Bullock, assistant city attorneys, represented the City. Jennifer Riggs, attorney, represented the Respondents. The parties filed post-hearing briefs, and the record closed after final briefing on December 19, 2001.

III. JURISDICTION

Respondents contested the jurisdiction of the City to proceed in this case as intervenors. Respondents initially sought to strike the City's petition on the grounds that the affidavits supporting the petition were insufficient. The ALJ found that the affidavits were insufficient, but did not strike the petition, and instead gave the City an opportunity to cure the insufficiencies. The City subsequently filed revised affidavits. Respondents argue that the City's petition does not comply with the Code. Specifically, Respondents argue that the City's petition violates the provision requiring that a petition be "supported by the sworn statement of at least one credible person."³ In support of the petition, the City supplied the sworn statements of the Chief of Police of San Antonio, and of a City Councilman. The sworn statements supported the allegations in the petition, and both individuals filing the sworn statements are credible people. Therefore, the ALJ finds that the City has jurisdiction to proceed as an intervenor. The jurisdiction of the TABC and SOAH, with respect to the TABC's allegations, was not contested and is addressed in the findings of fact and conclusions of law without further discussion here.

³ TEX. ALCO. BEV. CODE § 11.62.

IV. BURDEN OF PROOF

The TABC and the City have the burden of proof in this case on each count. In this administrative case, the standard of proof is a preponderance of the evidence.⁴

V. ALLEGED VIOLATIONS

A. Whether Respondent engaged in or permitted lewd conduct on July 10, 1998.

The TABC alleges that on or about July 10, 1998, Nancy Silva, a dancer at River City Cabaret, ground her buttocks into the clothed genitals of a customer with the intent to sexually arouse or gratify the customer.⁵ The ALJ finds that Respondents permitted lewd or vulgar entertainment or acts and recommends the sanction of a 10-day suspension for this violation.

1. TABC's argument

The TABC argues that on July 10, 1998, a Bexar County Sheriff's Deputy, Roland Schuler, observed Ms. Silva grind her buttocks into the clothed genitals of a customer with the intent to sexually arouse the customer. The TABC argues that this is not permitted under the TABC rules on the Code.⁶

2. Respondents' arguments

Respondents counter the TABC's allegation with two arguments. The first argument is that the provision of the Code on which the TABC relies has been declared unconstitutional, thus the TABC cannot promulgate rules under an unconstitutional statute. The second argument is on the merits that Respondents did not permit lewd or vulgar entertainment or acts because they maintained strict policies against lewd conduct.

3. ALJ's analysis

a. Constitutionality of statute and rule

⁴ Respondents argued that violations of the Code that carry criminal charges require proof beyond a reasonable doubt. While that is true in any criminal case resulting from the same allegations, the standard in this case is a preponderance of the evidence.

⁵ This is Count 1 in the TABC's First Amended Notice of Hearing.

⁶ See TEX. ALCO. BEV. CODE § 104.01(6); 16 TEX. ADMIN. CODE § 35.41.

In 1984, the Texas Court of Criminal Appeals ruled that the applicable section of the Code is unconstitutional.⁷ Following that decision, in 1985, a Houston court of appeals concurred and held that the statute was unconstitutional in the administrative context.⁸ In 1994, the TABC amended its rule by defining lewd or vulgar entertainment as any sexual offense contained in the Texas Penal Code, Chapter 21, or any public indecency offense in the Penal Code, Chapter 43.⁹ No courts have addressed the issue of whether the current version of the TABC's rule is constitutional in an administrative context.

Statutes and rules that regulate business activity are allowed greater leeway than penal statutes.¹⁰ The Code is, however, both a regulatory and a penal statute. In this administrative case, the Code is used as a regulatory, and not a penal statute. If the TABC were to bring criminal charges under the section in question, Respondents would have a valid claim that the statute, and the rules promulgated under the statute are unconstitutional, as decided by the Court of Criminal Appeals.

In the administrative context, if a court has ruled that a statute is facially unconstitutional, the ALJ is bound by that decision. The Houston court of appeals decision is not binding on this ALJ because it applies solely to the facts in that case. The United States Supreme Court has held that "vagueness challenges which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."¹¹ In the *Wishnow* case, there was no allegation that the alleged actions involved First Amendment freedoms. Therefore, the Houston case applies only to the facts in that case. Because the court of appeals' ruling does not hold that TEX. ALCO. BEV. CODE §104.01(6) is facially unconstitutional, the ALJ does not have the authority to determine the constitutionality of the statute and rule as it is applied in this case. Because the issue of the statute's constitutionality is not properly before the ALJ, the merits of this charge are analyzed below.

b. Whether Respondents permitted lewd or vulgar entertainment or acts

The ALJ finds that Respondents permitted lewd or vulgar entertainment or acts and recommends the sanction of a 10-day suspension for this violation. Deputy Roland Schuler testified that while he was present in the Club in an undercover capacity, he observed Ms. Silva, a dancer,

⁷ *Wishnow v. State*, 671 S.W.2d 515 (Tex. Crim. App. 1984).

⁸ *Texas Alcoholic Beverage Comm'n v. Wishnow*, 704 S.W.2d 425 (Tex. App.—Houston 1985, no writ).

⁹ 16 TEX. ADMIN. CODE § 35.41.

¹⁰ *City of Webster v. Signal, Inc.*, 682 S.W.2d 644, 646 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

¹¹ *United States v. Mazurke*, 95 S. Ct. 710, 714 (1975).

grind her buttocks into the clothed genitals of a customer.¹² He testified that Ms. Silva continued this act for somewhat less than thirty seconds. He also testified that he believed it was her intent to arouse the customer.¹³ Respondents presented little evidence to refute Deputy Schuler's claim. Respondents' witnesses testified at length about the Club's policy against sexual contact.¹⁴ Although Respondents maintain a policy against sexual contact, the sexual contact occurred in the Club that night. No evidence was presented to indicate that anyone attempted to stop Ms. Silva from engaging in the contact, or that she was disciplined in any way following the incident. Ms. Silva's intent to arouse the customer can be inferred from the description of her actions Deputy Schuler provided. For these reasons, the ALJ finds that Respondents violated TEX. ALCO. BEV. CODE § 104.01(6).

The ALJ recommends a suspension of 10 days for this offense. Because the contact occurred for a brief period of time, and there was no evidence of an earlier offense, a 10-day suspension is warranted. The TABC rules provide for a 10-day suspension in the Standard Penalty Chart for the settlement of this type of offense.¹⁵ The ALJ finds that 10 days is a reasonable and appropriate penalty in this instance.

B. Whether Respondents solicited a customer to buy drinks on April 27, 1999.

The ALJ finds that Respondents' agent, servant or employee solicited a customer to buy drinks on April 27, 1999. The ALJ also finds however, that the violation could not reasonably have been prevented by Respondents and that the violation was committed without the knowledge of Respondents, and that Respondents did not knowingly violate the Code. Therefore, the ALJ recommends that no sanction be assessed against Respondents' permit and license for this violation.

1. TABC's and City's arguments¹⁶

TABC and the City argue that dancers at the Club solicited the purchase of drinks from two undercover San Antonio police detectives in violation of TEX. ALCO. BEV. CODE § 104.01(4). The TABC and the City presented the testimony of two officers in support of their allegations.

¹² Tr. Vol. 2 at 516-522.

¹³ *Id.*

¹⁴ Tr. Vol.1 at 139-140, 155-56, 159, 214-215; Vol. 2 at 449-50; Vol. 4 at 886-887, 925-26, 1003.

¹⁵ 16 TEX. ADMIN. CODE § 37.60(a).

¹⁶ Both the TABC and the City made this allegation. It is Count 2 in the TABC's First Amended Notice of Hearing, and Count 14 in the City's First Amended Petition in Intervention.

2. Respondents' argument

Respondents argue that the testimony provided by the undercover officers was too vague to support the allegation that three particular dancers solicited drinks. Furthermore, Respondents contend that if the dancers did solicit drinks, the Club has a strict policy against drink solicitation and if dancers do solicit drinks, it is without the knowledge or consent of the managers and outside of their control.

3. ALJ's analysis.

The ALJ finds that on April 27, 1999, three dancers at the Club solicited drinks from an undercover officer. Detective Thomas Brittain testified that while he was at the Club in an undercover capacity to attempt to purchase narcotics, three dancers (Michelle Carreon, Renee Flores and Vanessa Zuniga) sat at his table and solicited drinks from him.¹⁷ Although Detective Brittain did not recall at first whether one dancer or all three had solicited drinks from him, upon refreshing his recollection, he was able to recall that all three had asked him to purchase screwdrivers for them.¹⁸ The conduct of these dancers violates TEX. ALCO. BEV. CODE § 104.01(4).

Although the dancers violated the Code, the ALJ finds that under the circumstances, a suspension is not warranted. Detective Brittain testified that the dancers were sitting at his table in the Club when they asked him to purchase drinks for them. Certainly, the management of the Club would not sit at a table with customers and dancers, or use any other means to monitor the conversations at the table. Maria Ortiz, a dancer at the Club, testified that the Club has a policy against solicitation of drinks and that the Club enforces the policy.¹⁹ If a dancer at the Club solicits a customer for a drink, there is little chance of a manager overhearing the request. For these reasons, the ALJ finds that this violation of the Code could not reasonably have been prevented by the Respondents by the exercise of due diligence, that the dancers violated the Code without Respondents' knowledge, and that Respondents did not knowingly violate the Code. Therefore, the ALJ recommends that Respondents' license not be suspended for this violation, as permitted under TEX. ALCO. BEV. CODE § 11.64(b) and (c).

C. Whether an employee, agent or servant of Respondents solicited for sexual purposes on April 27, 1999.

The ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents violated § 104.01(7) of the Code. The ALJ also finds that the Respondents did not

¹⁷ Tr. Vol. 2 at 319-324.

¹⁸ *Id.*

¹⁹ Tr. Vol. 1 at 215.

permit this conduct nor could they have reasonably prevented it. The ALJ further finds that the violation was committed without the knowledge of Respondents, and that Respondents did not knowingly violate the Code.

1. TABC's and City's argument²⁰

The allegations of solicitation for a sexual purpose stem from the same undercover operation outlined in part V. B. above in which Detective Brittain participated. The TABC alleges that in addition to soliciting the officer for drinks, the three dancers also solicited the officers for sexual purposes, in violation of TEX. ALCO. BEV. CODE § 104.01(7). Detective Brittain testified that Ms. Carreon, Ms. Flores and Ms. Zuniga offered sex for \$250.00 for each woman, or \$750.00 for all three women.²¹ Officer Mark Litton, who was undercover that evening as well and seated with Detective Brittain, corroborated Detective Brittain's testimony that the dancers solicited sex for \$250.00 for each woman.²²

2. Respondents' argument

The Respondents argue that the undercover officers did nothing to determine whether the women had the intent to have sexual intercourse with the officers for money, or rather were flirting with the officers to encourage them to spend more money. Respondents further contend that the Club maintains a strict policy against prostitution, which is enforced.

3. ALJ's analysis

The Code prohibits a permittee from permitting solicitation for sexual purposes.²³ The offense of prostitution is committed when a person offers, agrees, or engages in sexual conduct for a fee.²⁴ Therefore, all that is required for an individual to commit the offense of prostitution is to offer sex for money. There is no requirement that the offer be accepted or that the act occur. Furthermore, the intent to consummate the offer is not an element of the offense.²⁵

Detective Brittain testified that the dancers were sitting at his table in the Club when they solicited him for sexual purposes. Certainly, the management of the Club would not sit at a table

²⁰ This allegation is Count 3 in the TABC's First Amended Notice of Hearing and is Count 19 in the City's First Amended Petition in Intervention.

²¹ Tr. Vol. 2 at 315-324, 351.

²² Tr. Vol. 2 at 414-415.

²³ TEX. ALCO. BEV. CODE § 104.01(7) (emphasis added).

²⁴ *West v. State*, 626 S.W.2d 159 (Tex. App.— Beaumont 1981, writ ref'd.)

²⁵ *Mattias v. State*, 731 S.W.2d 936, 937-40 (Tex. Crim. App. 1987).

with customers and dancers, or use any other means to monitor the conversations at the table. If a dancer at the Club solicits a customer for a sex, there is little chance of a manager overhearing the request. Ms. Ortiz, a dancer at the Club, testified that the Club has a policy against solicitation of prostitution and that the Club enforces the policy.²⁶ For these reasons, the ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents permitted solicitation for sexual purposes at the Club.

D. Whether Respondents permitted consumption of alcoholic beverages during prohibited hours.

The TABC and City allege that on May 20, 1999, Respondents permitted consumption of alcoholic beverages during prohibited hours.²⁷ Respondents contend that the drinks were served before 2:00 a.m., and that they were not consumed after 2:15 a.m. The ALJ finds that Respondents permitted the consumption of alcoholic beverages during prohibited hours and recommends their permits be suspended for 5 days.

1. TABC's and City's argument

The TABC and City rely on the testimony of Detective Troy Marek of the San Antonio Police Department, who testified that he noticed several cars in the parking lot of River City Cabaret around 2:40 a.m. and decided to investigate. Detective Marek further testified that he entered the Club through the open back door and once inside, he saw two individuals drinking at the bar. He asked them what they were drinking and they admitted drinking Malibu rum and coke. He saw that the drinks were fresh and that the ice was unmelted.²⁸ Because they were drinking after 2:15 a.m., he issued them Class C misdemeanor citations for drinking after hours. TABC and the City argue that because Respondents permitted alcohol to be served and consumed after hours, they violated TEX. ALCO. BEV. CODE § 61.71(a)(18).

2. Respondents' argument

Respondents rely on the testimony of John Lauthon, the Club's limousine driver. Mr. Lauthon testified he bought a Malibu rum and coke when it was "last call," around 1:45 or 1:50 a.m. He testified he finished drinking around 2:15 a.m. He also stated that Kimberly Rodriguez, a waitress at the Club, had a Malibu rum and coke at the same time. He testified that he was never seated with Ms. Rodriguez at the bar, as Detective Marek alleged. Contrary to Detective Marek's testimony, he stated that the ice in his drink was melted when Detective Marek arrived because it

²⁶ Tr. Vol. 1 at 215.

²⁷ The TABC's allegation is contained in Count 4 of the TABC's First Amended Notice of Hearing, and the City's allegation is contained in Count 15 of its First Amended Petition in Intervention.

²⁸ Tr. Vol. 2 at 462-468.

had been served to him before 2:00. He also stated that Detective Marek could not have seen him drinking at the bar when he walked in because the Club has a large brick support pole that would have blocked the detective's view of the bar.²⁹

3. ALJ's analysis

The ALJ finds that Respondent violated the Code by permitting the consumption of alcoholic beverages after hours. This allegation can only be evaluated on the credibility of the witnesses who testified. There is no dispute in this case that both Mr. Lauthon and Ms. Rodriguez were drinking Malibu rum and coke early that morning at the Club. Although Mr. Lauthon testified he and Ms. Rodriguez were not seated or drinking together, this testimony is controverted by Detective Marek, who claims to have seen the two of them together at the bar. The ALJ finds that Detective Marek's testimony is more credible. It is unlikely that two people would order the exact same drink at the same time and not be drinking together. Furthermore, Mr. Lauthon admitted that he was unaware of whether Ms. Rodriguez was drinking after 2:15 a.m., and could only testify about himself. Because the ALJ finds Detective Marek's testimony to be more credible, the TABC and the City proved by a preponderance of the evidence that Respondents permitted the consumption of alcoholic beverages at the Club after the hours when such consumption is allowed, in violation of TEX. ALCO. BEV. CODE § 61.71(a)(18).

The ALJ recommends a suspension of 5 days for this offense. There was no evidence of previous violations of this section of the Code. The TABC rules provide for a 5-day suspension in the Standard Penalty Chart for the settlement of this type of offense when the offense is a first offense.³⁰ The ALJ finds that 5 days is a reasonable and appropriate penalty in this instance.

E. Whether Respondents delivered an alcoholic beverage to an intoxicated person on April 2, 1999.

The ALJ finds that the TABC proved by a preponderance of the evidence that Natco's employee served alcohol to an intoxicated individual. For this violation, the ALJ recommends a 7-day suspension.

²⁹ Tr. Vol. 4 at 982-993.

³⁰ 16 TEX. ADMIN. CODE § 37.60(a).

1. TABC's argument³¹

The TABC argues that on April 2, 1999, Respondents' employee served alcohol to an intoxicated person in violation of the Code.³² The TABC relies on the testimony of law enforcement officers who were in the Club in an undercover capacity. Those officers testified they saw Genevieve Benavidez serve alcoholic beverages to the customers, who were intoxicated at the time.

2. Respondents' argument

Respondents argue that the officers' testimony lacked factual accuracy and consistency, and was therefore, unreliable. Specifically, Respondents contend that the officers could not remember the type of alcohol served to the customers, that they could not remember the layout of the Club, and that they could not remember where the customers were seated.³³ Respondents argue in the alternative that if the customers were intoxicated when served alcohol, the Respondents are not liable. Respondents rely on the protection of the TABC rule that prohibits suspending or canceling a permit for the first offense of selling to an intoxicated person if the permittee requires its employees to take a TABC approved seller/server training.³⁴

3. ALJ's analysis

The ALJ finds that the Respondents served two intoxicated individuals on April 2, 1999. Although it is not clear who served the customers when they were intoxicated, Respondents' agent served them. It is undisputed that the customers were served alcohol. At one point in the evening, the customers were taken downstairs because they were intoxicated. Ms. Benavidez, Officer Schuler, and Officer Gomez all testified the men were intoxicated at the time the police took them downstairs.³⁵

Respondents assert the affirmative defense that all waitresses are required to attend TABC approved seller/server training. The Code provides that a permittee is not responsible for the actions of an employee if certain requirements are met. Those requirements are: (1) the employer requires its employees to attend a Commission-approved seller training program; (2) the employee has actually attended such a training program; and (3) the employer has not directly or indirectly

³¹ This allegation is Count 5 in the TABC's First Amended Notice of Hearing.

³² See TEX. ALCO. BEV. CODE § 11.61(b)(14).

³³ River City Cabaret's Written Closing Argument at 29-30.

³⁴ See 16 TEX. ADMIN. CODE § 50.10

³⁵ Tr. Vol. 4 at 969-970; Vol. 2 at 527, 548-549.

encouraged the employee to violate such law.³⁶ Respondents do not meet the second requirement because Ms. Benavidez had not attended the required training program prior to April 2, 1999.³⁷ Therefore, Respondents cannot assert the defense that Ms. Benavidez had attended seller/server training at the time the intoxicated individuals were served.

For these reasons, the ALJ finds that Respondents served intoxicated individuals in violation of TEX. ALCO. BEV. CODE § 11.61(b)(14). The ALJ recommends a suspension of 7 days for this offense. The TABC rules provide for a 7-day suspension in the Standard Penalty Chart for the settlement of this type of offense.³⁸ The ALJ finds that 7 days is a reasonable and appropriate penalty in this instance.

F. Whether Respondents solicited a customer to buy drinks on December 22, 1998.

The ALJ finds that Respondents' employee or agent solicited a customer to buy drinks on December 22, 1998. The ALJ recommends, however, that no suspension be imposed.

1. TABC's and City's argument³⁹

The TABC and the City rely on the testimony of Detective Enrique Martinez to show that on December 22, 1998, Roxanne Serna solicited a drink from Detective Britain for her own consumption.⁴⁰

2. Respondents' argument

Respondents argue that Detective Martinez's testimony was too uncertain for the TABC and the City to meet the burden of proof. They further argue that the Club maintains a strict policy against drink solicitation, and therefore, the Club should not be held responsible. //

³⁶ TEX. ALCO. BEV. CODE § 106.14(a).

³⁷ Tr. Vol. 4 at 977.

³⁸ 16 TEX. ADMIN. CODE § 37.60(a).

³⁹ The TABC's allegation is contained in Count 6 of the TABC's First Amended Notice of Hearing, and the City's allegation is contained in Count 13 of its First Amended Petition in Intervention.

⁴⁰ See Tr. Vol. 1 at 226-227.

3. ALJ's analysis

The ALJ finds that on December 22, 1998, Ms. Serna solicited drinks from an undercover officer. Detective Martinez's testimony was clear that Ms. Serna sat at his table and asked him to buy her a drink.⁴¹ Ms. Serna's conduct violates TEX. ALCO. BEV. CODE § 104.01(4).

Although Ms. Serna violated the Code, the ALJ finds that under the circumstances, a suspension is not warranted. Detective Martinez testified that Ms. Serna was sitting at his table in the Club when she asked him to purchase a drink for her. Certainly, the management of the Club would not sit at a table with customers and dancers, or use any other means to monitor the conversations at the table. If a dancer at the Club solicits a customer for a drink, there is little chance of a manager overhearing the request. Ms. Ortiz, a dancer at the Club testified that the Club has a policy against solicitation of drinks and that the Club enforces the policy.⁴² For these reasons, the ALJ finds that this violation of the Code could not reasonably have been prevented by the Respondents by the exercise of due diligence, that the dancers violated the Code without Respondents' knowledge, and that Respondents did not knowingly violate the Code. Therefore, the ALJ recommends that Respondents' license and permit not be suspended for this violation, as permitted under TEX. ALCO. BEV. CODE § 11.64(b) and (c).

G. Whether an employee, agent or servant of Respondents solicited for sexual purposes on December 22, 1998.

The ALJ finds that the TABC and the City failed to prove that Respondents permitted an employee or agent to solicit for sexual purposes.

1. TABC's and City's arguments⁴³

The TABC and City allege that on December 22, 1998, three women solicited two undercover officers for sex. Detective Martinez testified that when he was on the premises with Detective Brittain in an undercover capacity, Ms. Serna, Chelsea Gallegos and Melissa Aguilar agreed to perform sexual acts with the detectives for money.⁴⁴ The alleged activity violates TEX. ALCO. BEV. CODE § 104.01(7).

⁴¹ Tr. Vol. 1 at 227.

⁴² Tr. Vol. 1 at 215.

⁴³ This allegation is Count 7 in the TABC's First Amended Notice of Hearing and is Count 16 and 17 in the City's First Amended Petition in Intervention.

⁴⁴ Tr. Vol. 1 at 222-227.

2. Respondents' argument

Respondents argue that the detectives did not know whether the women intended to complete the transaction, or were simply trying to convince the detectives to spend more money on legal activities at the Club. Respondents argue that the Club did not permit prostitution and had procedures in place specifically to discourage after-work contact between dancers and customers, such as ensuring all customers have left the premises before the dancers leave.⁴⁵ Finally, Respondents contend that since a dancer can make up to \$1,000.00 per night, there would be no reason for her to engage in prostitution for \$50.00.

3. ALJ's analysis

The Code prohibits a permittee from permitting solicitation for sexual purposes.⁴⁶ The offense of prostitution is committed when a person offers, agrees, or engages in sexual conduct for a fee.⁴⁷ Therefore, all that is required for an individual to commit the offense of prostitution is to offer sex for money. There is no requirement that the offer be accepted or that the act occur. Furthermore, the intent to consummate the offer is not an element of the offense.⁴⁸

Detective Martinez testified that the dancers were sitting at his table in the Club when they solicited him for sexual purposes. Certainly, the management of the Club would not sit at a table with customers and dancers, or use any other means to monitor the conversations at the table. If a dancer at the Club solicits a customer for a sex, there is little chance of a manager overhearing the request. Ms. Ortiz, a dancer at the Club, testified that the Club has a policy against solicitation of prostitution and that the Club enforces the policy.⁴⁹ For these reasons, the ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents permitted solicitation for sexual purposes at the Club.

⁴⁵ Tr. Vol. 1 at 163-164.

⁴⁶ TEX. ALCO. BEV. CODE § 104.01(7) (emphasis added).

⁴⁷ *West v. State*, 626 S.W.2d 159 (Tex. App.-- Beaumont 1981, writ ref'd.)

⁴⁸ *Mattias v. State*, 731 S.W.2d 936, 937-40 (Tex. Crim. App. 1987).

⁴⁹ Tr. Vol. 1 at 215.

H. Whether Respondents permitted lewd conduct on the premises on December 30, 1998.

1. TABC's and City's argument⁵⁰

TABC and the City argue that Respondents permitted lewd conduct in violation of TEX. ALCO. BEV. CODE § 104.01(6). They allege that on December 30, 1998, Jodie Northcut, a dancer at the Club, touched and kissed the breasts of Ms. Aguilar, another dancer, with the intent to sexually arouse others. Petitioners rely on the testimony of Detective Martinez, who testified he witnessed the events.⁵¹

2. Respondents' argument

Respondents contend that TEX. ALCO. BEV. CODE § 104.01(6) is unconstitutional.⁵² In the alternative, Respondents argue that the TABC and the City failed to prove that the intent of Ms. Northcut and Ms. Aguilar was to arouse or gratify sexual desires.

3. ALJ's analysis

The ALJ finds that Respondents permitted lewd conduct on December 30, 1998, by permitting sexual contact between two women at the Club. The ALJ recommends a suspension of 20 days. Detective Martinez testified that Ms. Aguilar was scheduled to perform a table dance for him, but was first going to perform one for another customer. When she was performing the table dance for the other customer, Ms. Northcut kissed and touched Ms. Aguilar's breasts. He further testified that they continued this behavior for five to ten minutes.⁵³ Respondents' witnesses testified at length about the Club's policy against sexual contact.⁵⁴ Although Respondents maintain a policy against sexual contact, the sexual contact occurred in the Club that night. No evidence was presented to indicate that anyone attempted to stop Ms. Northcut and Ms. Aguilar from engaging in the contact, or that they were disciplined in any way following the incident. The incident occurred in plain view where management of the Club could have stopped it. The women's intent to arouse the customers can be inferred from the description of their actions Detective Martinez provided. For these reasons, the ALJ finds that Respondents violated TEX. ALCO. BEV. CODE § 104.01(6) of the Code.

⁵⁰ The TABC's allegation is contained in Count 8 of the TABC's First Amended Notice of Hearing, and the City's allegation is contained in Count 24 of its First Amended Petition in Intervention.

⁵¹ Tr. Vol. 1 at 232-238.

⁵² The issue of the constitutionality of this provision of the code is addressed above in part V. A.

⁵³ Tr. Vol. 1 at 232-234.

⁵⁴ Tr. Vol. 1 at 139-140, 155-56, 159, 214-215; Vol. 2 at 449-50; Vol. 4 at 886-887, 925-26, 1003.

The ALJ recommends a suspension of 30 days for this offense. Because the conduct occurred for an extended period of time, a 30-day suspension is warranted. The TABC rules provide for a 15-20-day suspension in the Standard Penalty Chart for the settlement of the second violation of this type of offense.⁵⁵ The ALJ finds, however, that a somewhat harsher penalty should be imposed because the conduct occurred in plain view of employees of the Club, and the management should have known about this conduct occurring in the open on the premises. The ALJ finds that 30 days is a reasonable and appropriate penalty in this instance.

I. Whether an employee, agent or servant of Respondents solicited for sexual purposes on December 30, 1998.

The ALJ finds that the TABC and the City did not prove by a preponderance of the evidence that Respondents permitted an employee or agent to solicit for sexual purposes on December 30, 1998.

1. TABC's and City's arguments⁵⁶

The TABC and the City argue that on December 30, 1998, Ms. Gallegos agreed to have sexual intercourse with Detective Martinez for money. Detective Martinez testified that Ms. Gallegos offered to have sexual intercourse with him for \$100.00.⁵⁷ The alleged activity violates TEX. ALCO. BEV. CODE § 104.01(7).

2. Respondents' argument

Respondents argue that the detective did not know whether Ms. Gallegos intended to complete the transaction, or was simply trying to convince him to spend more money on legal activities at the Club. Respondents argue that the Club did not permit prostitution and had procedures in place specifically to discourage after-work contact between dancers and customers, such as ensuring all customers have left the premises before the dancers leave.⁵⁸ Finally, Respondents contend that since a dancer can make up to \$1,000.00 per night, there would be no reason for her to engage in prostitution for \$50.00. They also argue that the police did not inform

⁵⁵ 16 TEX. ADMIN. CODE § 37.60(a). A prior violation occurred on July 10, 1998, as outlined in part V.A. above.

⁵⁶ This allegation is Count 9 in the TABC's First Amended Notice of Hearing and is Count 18 in the City's First Amended Petition in Intervention.

⁵⁷ Tr. Vol. 1 at 227-230.

⁵⁸ Tr. Vol. 1 at 163-164.

them that Ms. Gallegos had engaged in solicitation before; they, therefore, had no knowledge of her alleged illegal activities and could not investigate her, or attempt to stop her without knowledge of her activities.⁵⁹

J. ALJ's analysis

The Code prohibits a permittee from permitting solicitation for sexual purposes.⁶⁰ The offense of prostitution is committed when a person offers, agrees, or engages in sexual conduct for a fee.⁶¹ Therefore, all that is required for an individual to commit the offense of prostitution is to offer sex for money. There is no requirement that the offer be accepted or that the act occur. Furthermore, the intent to consummate the offer is not an element of the offense.⁶²

Detective Martinez testified that Ms. Gallegos was at his table in the Club when she solicited him for sexual purposes. Certainly, the management of the Club would not sit at a table with a customer and a dancer, or use any other means to monitor the conversations at the table. If a dancer at the Club solicits a customer for a sex, there is little chance of a manager overhearing the request. In the case of Ms. Gallegos, because law enforcement did not notify the Club of Ms. Gallegos' earlier solicitation, the Club did not know about her illegal activities.⁶³ Ms. Ortiz, a dancer at the Club, testified that the Club has a policy against solicitation of prostitution and that the Club enforces the policy.⁶⁴ For these reasons, the ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents permitted solicitation for sexual purposes at the Club.

J. Whether Respondents solicited a customer to buy drinks on January 8, 1999.

The ALJ finds that Ida Lugo, a dancer at the Club, solicited a customer to buy her a drink. The ALJ recommends no suspension because Respondents could not have known about Ms. Lugo's conduct.

⁵⁹ The TABC and the City allege that Ms. Gallegos solicited on December 22 also, as discussed under part V. G. of the PFD.

⁶⁰ TEX. ALCO. BEV. CODE § 104.01(7) (emphasis added).

⁶¹ *West v. State*, 626 S.W.2d 159 (Tex. App.-- Beaumont 1981, writ ref'd.)

⁶² *Mattias v. State*, 731 S.W.2d 936, 937-40 (Tex. Crim. App. 1987).

⁶³ Tr. Vol. 1 at 162-163.

⁶⁴ Tr. Vol. 1 at 215.

1. TABC's argument

The TABC alleges that on January 8, 1999, Ms. Lugo, a dancer at the Club, solicited Detective Martinez for a drink, in violation of TEX. ALCO. BEV. CODE § 104.01(4). Detective Martinez testified that Ms. Lugo asked him to purchase an alcoholic beverage for her own consumption while she was sitting at his table.⁶⁵

2. Respondents' argument

Respondents argue that Detective Martinez testified that he believed Ms. Lugo was the individual who solicited a drink from him and that because his testimony is equivocal, that the TABC failed to meet its burden. Respondents further argue that they did not permit drink solicitation at the Club and that they were unaware of Ms. Lugo's conduct.

3. ALJ's analysis

The ALJ finds that Respondents violated TEX. ALCO. BEV. CODE § 104.01(4). The Code does not require that the permittee permit the drink solicitation.⁶⁶ A preponderance of the evidence indicates that Ms. Lugo solicited a drink from Detective Martinez for her own consumption. Detective Martinez testified that Ms. Lugo was sitting at his table in the Club when she asked him to purchase drinks for her. Certainly, the management of the Club would not sit at a table with customers and dancers, or use any other means to monitor the conversations at the table. Ms. Ortiz, a dancer at the Club testified that the Club has a policy against solicitation of drinks and that the Club enforces the policy.⁶⁷ If a dancer at the Club solicits a customer for a drink, there is little chance of a manager overhearing the request. For these reasons, the ALJ finds that this violation of the Code could not reasonably have been prevented by the Respondents by the exercise of due diligence, that Ms. Lugo violated the Code without Respondents' knowledge, and that Respondents did not knowingly violate the Code. Therefore, the ALJ recommends that Respondents' license not be suspended for this violation, as permitted under TEX. ALCO. BEV. CODE § 11.64(b) and (c).

K. Whether Respondents allowed a breach of the peace on their premises.

The TABC and the City allege that on May 6, 2000, the Respondents allowed a breach of the peace to occur on their premises when two customers were stabbed outside the Club in the parking

⁶⁵ Tr. Vol. 1 at 235-236.

⁶⁶ In contrast, the Code requires that the TABC show that the permittee permitted sexual solicitation.

⁶⁷ Tr. Vol. 1 at 215.

lot.⁶⁸ One of the customers died as a result of his injuries. Respondents argue that there was nothing they could have done to prevent the murder from occurring. The ALJ finds that Respondents are not responsible for the breach of the peace because the breach of the peace was beyond their control.

1. TABC's and City's arguments

TABC and the City argue that the Respondents could have prevented the stabbings if someone had called the police at the beginning of the fight. They contend that the police would have arrived within five minutes of the start of the fight and, therefore, no one would have been stabbed. They maintain that a reasonably prudent manager would have called the police immediately upon seeing numerous people fighting in the parking lot. They assert that the Respondents should have known the groups involved in the fight were antagonistic toward each other.

2. Respondents' argument

Respondents argue that the breach of the peace was beyond the control of the Respondents, that the people involved in the fight were properly supervised, and were not permitted to be on the licensed premises at the time of the fight. Respondents assert that when the fight occurred, employees were able to disperse everyone and that the fight ended shortly after it began. Once the fight ended, and those involved were leaving, the fight broke out again. At that point, Respondents' employees could not control the fight. Immediately thereafter, the stabbings occurred and Ernest Chatham, the manager, called the police. Respondents further contend that at the time of the fight, the individuals were not permitted to be on the licensed premises because the Club had closed for the night and the employees of the Club had asked everyone to leave.

3. ALJ's analysis

The ALJ finds that the breach of the peace was beyond the control of Respondents. The TABC may suspend or cancel a mixed beverage permit if a breach of the peace occurs on the licensed premises, or on premises controlled by the permittee, if the breach of the peace was not beyond the control of the permittee and resulted from the permittee's improper supervision of persons permitted to be on the licensed premises.⁶⁹

There is no dispute in this case that a breach of the peace occurred on the licensed premises. On May 6, 2000, Mike Gutierrez was stabbed to death in the parking lot of the Club. The stabbing constitutes a breach of the peace, and the parking lot is part of the premises controlled by the Respondents. Earlier in the evening, the two groups of people who were involved in the fight were

⁶⁸ The TABC's allegation is contained in Count 11 of the TABC's First Amended Notice of Hearing, and the City's allegation is contained in Count 26 of its First Amended Petition in Intervention.

⁶⁹ TEX. ALCO. BEV. CODE § 28.11.

in the Club, but did not fight while inside the building.⁷⁰ After the Club closed, while in the parking lot, several small fights started among people who had been inside the Club earlier.⁷¹ Ms. Ortiz, a former dancer at the Club, testified about what happened next. She testified that the fight stopped when one of the participants quit fighting and started to leave in his truck.⁷² Her testimony is corroborated by Christopher Hinojosa, who was a participant in the fight, and who was also a stabbing victim. He testified that the first fight, which lasted for approximately ten minutes, ended.⁷³ In fact, on the day the breach of the peace occurred, Mr. Hinojosa signed a sworn statement indicating "Everything calmed down and everybody went their separate ways."⁷⁴ The fight continued, however, when Mr. Gutierrez, the decedent, began hitting a truck that was leaving the premises, at which time, someone in the truck stabbed him.⁷⁵ Ms. Ortiz further testified that when she saw the individuals in the truck exit the truck, she went inside because she knew at that time the fight would continue until the police arrived.⁷⁶ Both Ms. Ortiz and Mr. Hinojosa testified that the fight started after the Club closed at 2:00 a.m. It is undisputed that Mr. Chatham called the police at 2:18 a.m.

Based on the evidence presented, the Respondents successfully squelched the first fights that ensued in the parking lot. The Respondents did not need the services of the police during the first fights because those fights were quickly dissolved. After the first fight was over, the participants were preparing to leave, when the decedent instigated a second fight. The stabbings occurred during the second fight. The second, deadly fight occurred so quickly that it was beyond Respondents' control. Not only was it beyond their control, but the Respondents could not have known that another, more dangerous fight would follow. The Respondents were able to end the first fights and those involved in the fights were leaving. For these reasons, the ALJ finds that the TABC and the City failed to prove that Respondents violated TEX. ALCO. BEV. CODE § 28.11.

⁷⁰ Tr. Vol. 1 at 65, 82, 187, 201, 204.

⁷¹ Tr. Vol. 1 at 188-189.

⁷² Tr. Vol. 1 at 190, 196.

⁷³ Tr. Vol. 1 at 48.

⁷⁴ Ex. R13.

⁷⁵ Tr. Vol. 1 at 190-191.

⁷⁶ Tr. Vol. 1 at 193.

L. Whether Respondents permitted the sale of a narcotic on the premises on July 28, 1999.

The ALJ finds that the TABC failed to prove that Respondents permitted the sale of a narcotic on the premises.

1. TABC's argument⁷⁷

The TABC alleges that on July 28, 1999, Detective Litton was in the Club in an undercover capacity. When he was in the Club, Crystal Kitchens, a dancer, assisted Detective Litton in setting up a drug deal with Griselda Rodriguez, another dancer. Detective Litton testified Ms. Rodriguez delivered three twenty-dollar packets of cocaine to him in the parking lot at the Club.⁷⁸ The TABC charged Respondents with a violation of TEX. ALCO. BEV. CODE §§ 104.01(9), 11.61(b)(7), and 16 TEX. ADMIN. CODE § 35.31.

2. Respondents' argument

Respondents argue that they prohibit drugs on the premises and have immediately fired employees who have used or purchased drugs, including Ms. Rodriguez.⁷⁹ Respondents contend that on the night she sold the narcotics, Ms. Rodriguez was not working at the Club and was in street clothes at the bar when Detective Litton approached her. Respondents also argue that no evidence was presented to indicate that the Club's management knew about the sale or should have known.

3. ALJ's analysis

The ALJ finds that the TABC failed to prove that Respondents violated the Code. The TABC charged Respondents alternatively with two violations. The first alternative is committing a narcotics offense in the course of conducting their business, in violation of 16 TEX. ADMIN. CODE § 35.31(b)(1). The second alternative is that they knew or should have known of the offense, or the likelihood of its occurrence, and failed to take reasonable steps to prevent it, in violation of 16 TEX. ADMIN. CODE § 35.31(b)(2) and (3).⁸⁰

The TABC did not prove that Respondents committed a narcotics offense in the course of conducting business. A preponderance of the evidence demonstrated that Ms. Rodriguez was not working at the Club on the evening she sold narcotics to Detective Litton. Furthermore, no evidence

⁷⁷ This allegation is Count 12 in the TABC's First Amended Notice of Hearing.

⁷⁸ Tr. Vol. 2 at 403-410.

⁷⁹ Tr. Vol. 1 at 162; Vol. 4 at 925.

⁸⁰ See also TEX. ALCO. BEV. CODE § 104.01(9).

was presented that the management of the Club was aware that Ms. Rodriguez was involved in a drug deal that evening or any other evening. The evidence showed the contrary, that when management of the Club learned Ms. Rodriguez had sold narcotics, they fired her.

The TABC also did not prove that Respondents knew or should have known of the offense, or the likelihood of its occurrence, and failed to take reasonable steps to prevent it. The TABC presented no evidence that a manager or owner knew Ms. Rodriguez was dealing drugs. They also presented no evidence that a manager or owner saw her at the Club that evening. Furthermore, Detective Litton spoke to her at the bar, and the management would have no means by which to overhear the conversation. Therefore, the TABC failed to show that Respondents knew or should have known of the offense. Furthermore, Respondents took reasonable steps to prevent drug offenses. Any employee found using or selling drugs was fired immediately, which would certainly be a deterrent if employees wanted to keep their jobs. For these reasons, the ALJ finds that the TABC failed to prove that Respondents violated TEX. ALCO. BEV. CODE §§ 104.01(9), 11.61(b)(7), and 16 TEX. ADMIN. CODE § 35.31.

M. Whether Respondents permitted the possession of a narcotic on the premises on July 28, 1999.

The ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents permitted the possession of a narcotic on the premises.

1. TABC's and City's argument⁸¹

The TABC and City base this allegation on the same facts as those established for the allegation that Respondents permitted the sale of a narcotic on the premises on the same date. The TABC's argument is addressed above in part L. The TABC alleges that Respondents violated TEX. ALCO. BEV. CODE §§ 104.01(9), 11.61(b)(7), and 16 TEX. ADMIN. CODE § 35.31.

2. Respondents' argument

Respondents re-urge the same argument against this charge as they do against the charge for the sale of narcotics on the premises, addressed above in part L.

3. ALJ's analysis

The ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents permitted the possession of narcotics on the premises. As outlined above in part V. L., Respondents maintained a strict policy against the possession, use or sale of drugs on the

⁸¹ This allegation is Count 13 in the TABC's First Amended Notice of Hearing and Count 23 of the City's First Amended Petition.

premises. Furthermore, the only way Respondents would have known Ms. Rodriguez possessed narcotics in her car would have been to have searched her car after she arrived that evening. Certainly, Respondents do not have the duty to search the cars in the parking lot to determine whether those individuals may possess narcotics on the premises, just as they have no duty to make a physical search of people entering the bar to determine whether they possess drugs. The steps Respondents took to ensure that drugs were not possessed on the premises were reasonable. For the above reasons, the ALJ finds that the TABC and the City failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE §§ 104.01(9), 11.61(b)(7), and 16 TEX. ADMIN. CODE § 35.31.

N. Whether Respondents' agent, servant or employee was intoxicated on the licensed premises on December 8, 2000.

The ALJ finds that the TABC failed to prove by a preponderance of the evidence that Respondents' agent, servant or employee was intoxicated on the licensed premises.

1. TABC's argument⁸²

The TABC argues that on December 8, 2000, Roxanne Naomi Belasquez was arrested for driving while intoxicated after leaving the Club. Officer Juan Morales, the arresting officer, testified that Ms. Belasquez admitted she had been drinking at work.⁸³ Ms. Belasquez admitted she drank six alcoholic beverages between 3:00 p.m. and 12:00 a.m. while at work.⁸⁴ Therefore, the TABC argues, Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(13) because their employee was intoxicated on the premises.

2. Respondents' argument

Respondents argue that after leaving the Club, Ms. Belasquez went to Bennigan's where she drank two Long Island Iced Teas.⁸⁵ Following her departure from Bennigan's, she was arrested. Therefore, Respondents argue there was no credible evidence that Ms. Belasquez was intoxicated on the Club's premises.

⁸² This is Count 14 in the TABC's First Amended Notice of Hearing.

⁸³ Tr. Vol. 3 at 576-577.

⁸⁴ Tr. Vol. 4 at 995-996.

⁸⁵ Tr. Vol. 4 at 996.

3. ALJ's analysis

The ALJ finds that the TABC did not prove by a preponderance of the evidence that Ms. Belasquez was intoxicated on the premises. Officer Morales arrested Ms. Belasquez at 2:30 a.m. on December 8, 2000.⁸⁶ Ms. Belasquez left the Club around midnight, and credibly testified that she then went to Bennigan's where she consumed more alcohol. No testimony was provided by any witness who saw Ms. Belasquez at the Club on the evening she was arrested. Therefore, the ALJ finds that the TABC failed to prove by a preponderance of the evidence that Ms. Belasquez was intoxicated on the premises.

O. Whether Respondents served an alcoholic beverage to an intoxicated person.

The TABC's allegations stem from the same facts as those discussed in part V. N. above.⁸⁷ Respondents assert the same arguments as they did in part V. N. As discussed above, the TABC did not prove by a preponderance of the evidence that Ms. Belasquez was intoxicated on the premises. Therefore, they also did not prove that Respondents served her an alcoholic beverage when she was intoxicated.

P. Whether Respondents made false or misleading statements that Santiago V. Gutierrez had never been convicted of a felony.

The ALJ finds that Respondents made false or misleading statements on renewal applications filed with the TABC when Santiago V. Gutierrez did not disclose his felony convictions. For these violations, the ALJ recommends that the Commission cancel Respondents' permits.

I. City's arguments⁸⁸

The City argues that Mr. Gutierrez signed three TABC applications under oath, indicating that he had never been convicted of a felony. Specifically, the City alleges that he did this on three renewal applications dated December 13, 1994, December 12, 1995, and December 11, 1996, when he omitted the convictions for attempted robbery and for conspiracy to distribute cocaine and marijuana. The City further alleges Mr. Gutierrez signed a renewal application on December 23, 1997, under oath, where he included the conviction for attempted robbery, but again omitted a felony conviction for conspiracy to distribute cocaine and marijuana, of which he had been convicted in

⁸⁶ Tr. Vol. 3 at 587.

⁸⁷ This allegation is Count 15 in the TABC's First Amended Notice of Hearing.

⁸⁸ The City's allegations related to false statements made by Mr. Gutierrez related to his felony convictions are contained in Counts 1, 3, 6, and 8. The TABC's allegations related to false statements are in Count 16 of the TABC's First Amended Notice of Hearing.

1993.

2. Respondents' arguments

Respondents argue that they indicated Mr. Gutierrez had been convicted of the felony of attempted robbery on the original application in December 1993. The statement on the December 13, 1994 application was in error, Respondents allege, and was not an attempt to deceive the TABC because Mr. Gutierrez's conviction had been disclosed previously. Respondents make the same arguments for the December 1995 and 1996 renewal applications. For the 1997 application, Respondents argue again that it was an error and not intentional that the felony was not included.

3. ALJ's analysis

The ALJ finds Respondents violated the Code with respect to the December 1994, 1995, 1996, and 1997 renewal applications. The ALJ recommends that the Commission cancel Respondents' Mixed Beverage Permit and Mixed Beverage Late Hours License.

In December 1993, Respondents disclosed Mr. Gutierrez's conviction for attempted robbery in 1978.⁸⁹ They also disclosed that Mr. Gutierrez had been paroled in November 1979 and completed his parole in June 1986. Mr. Gutierrez was listed as the vice-president of Natco on the original and renewal applications.⁹⁰ Certainly, they knew that they had a duty to disclose Mr. Gutierrez's felony conviction at that time, even though the conviction was remote in time from the date they submitted the application. In three subsequent renewal applications, they did not disclose the conviction for attempted robbery again, but then did disclose it in 1997.⁹¹ Respondents never disclosed that Mr. Gutierrez had been convicted in 1993 of conspiracy to distribute cocaine and marijuana.

The Code provides that a permit may be suspended or canceled if the "permittee made a false or misleading statement in connection with his original or renewal application."⁹² The TABC rules provide for cancellation only in the Standard Penalty Chart for this type of violation.⁹³ Although Respondents argue they did not intend to deceive the TABC and that the felonies were an error of omission, the ALJ finds this argument highly dubious. Respondents listed Mr. Gutierrez on the application and application renewal forms, then failed, after 1993, to list his felony convictions. The

⁸⁹ Ex. P12.

⁹⁰ Exs. P8 - P12.

⁹¹ Exs. P11 (The 1994 renewal application), P10 (The 1995 renewal application), P9 (The 1996 renewal application), P8 (The 1997 renewal application).

⁹² TEX. ALCO. BEV. CODE § 11.61(b)(4).

⁹³ 16 TEX. ADMIN. CODE § 37.60(a).

inclusion of the attempted robbery conviction in the 1997 renewal, and the omission of the new, more serious felony of conspiracy to distribute cocaine and marijuana demonstrates both that Respondents knew felony convictions should be disclosed and they chose consciously to omit the more recent, more serious felony.

The preponderance of the evidence shows Mr. Gutierrez is a convicted felon, and that he repeatedly failed to disclose a conviction he is obligated by law to disclose. Therefore, the ALJ finds that Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(4). Because of the nature of the violation, the ALJ recommends that the Commission cancel Respondents' permits.

Q. Whether Respondents made false or misleading statements in their renewal applications that the only stockholder in Natco, Inc. was Santiago Gutierrez.

The ALJ finds that Respondents made false or misleading statements in their renewal applications that the only stockholder in Natco, Inc. was Santiago Gutierrez.

1. City's argument⁹⁴

The City argues that Respondents listed Santiago Gutierrez as the sole shareholder in Natco, when he was not the sole shareholder.⁹⁵ The City argues that Santiago V. Gutierrez was also a shareholder in Natco at the time the 1995 and 1996 renewal applications were filed. The City relies on the testimony of TABC agent Al Luna who testified that he obtained records for the Secretary of State and applications for loans that indicated Santiago V. Gutierrez held stock in Natco.⁹⁶ The parties stipulated that tax returns from 1995 and 1996 indicated that Santiago V. Gutierrez and his wife reported income from dividends from Natco. The City asserts that by not disclosing that Santiago V. Gutierrez was also a shareholder, Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(4).

2. Respondents' argument

Respondents argue that the sole shareholder of Natco at the time of the 1995 and 1996 renewal applications was Santiago Gutierrez. Santiago V. Gutierrez testified that Santiago Gutierrez

⁹⁴ The allegations regarding false or misleading statements related to the shareholders in Natco, Inc. are Counts 2 and 5 in the City's First Amended Petition. The TABC's First Amended Petition contains these allegations in Count 16.

⁹⁵ There are two individuals named Santiago Gutierrez. The Santiago Gutierrez listed as the sole shareholder in Natco, Inc.'s renewal applications is not a convicted felon. He is the father of Santiago V. Gutierrez, who was convicted of attempted robbery in 1978 and of conspiracy to distribute cocaine and marijuana in 1993.

⁹⁶ Tr. Vol. 3 at 622-623.

was the only shareholder of Natco.⁹⁷ Respondents also assert that the documents about which Agent Luna testified were not admitted into evidence.

3. ALJ's analysis

The ALJ finds that the City proved by a preponderance of the evidence that Respondents made a false or misleading statement on their 1995 and 1996 renewal applications when listing the stockholders in Natco. The ALJ finds that since Santiago V. Gutierrez received dividend income from Natco in 1995 and 1996, he must have been a shareholder in the corporation. Because Respondents listed Santiago Gutierrez as the sole shareholder, they violated TEX. ALCO. BEV. CODE § 11.61(b)(4). The TABC rules provide for cancellation only in the Standard Penalty Chart for this type of violation.⁹⁸ For this reason, the ALJ recommends that Respondents' permit and license be canceled for these violations.

R. Whether Respondents made a false or misleading statement in their renewal applications that the applications were not being made for the benefit of someone else.

The ALJ finds that the TABC and the City failed to prove that Respondents made false or misleading statements that the applications were not being made for the benefit of someone else.

1. TABC's and City's argument⁹⁹

The TABC and City contend that Respondents made false statements on their renewal applications when they did not indicate that the applications were made for the benefit of another. Natco held the permit, and on the renewals did not disclose that it was making the application for RCC, Ltd., the limited partnership of which Natco was the general partner.¹⁰⁰

2. Respondents' argument

Respondents argue that they did not make false statements on their applications when they listed Natco on the renewal permits, but did not indicate that the permit was sought for the benefit of RCC, Ltd. Respondents contend that TABC policy requires that a general partner must sign for a limited partnership and only one general partner is required to sign the application. Furthermore, Respondents assert that the City has always been aware of the ownership interests in the Club at least

⁹⁷ Ex. P 33 at 40.

⁹⁸ 16 TEX. ADMIN. CODE § 37.60(a).

⁹⁹ The allegations regarding whether the applications indicated they were submitted for the benefit of another are Counts 4, 7 and 9 in the City's First Amended Petition and Count 16 in the TABC's First Amended Notice of Hearing.

¹⁰⁰ See Exs. P4 through P11.

since 1997 when Respondents filed suit against the City challenging city ordinances, complaining of delays and seeking damages. That same year, Respondents argue, the City brought a nuisance suit against Respondents, naming RCC, Ltd., its general and limited partners as defendants.

3. ALJ's analysis

The ALJ finds that the City and TABC failed to prove by a preponderance of the evidence that Respondents made a false or misleading statement on their renewal applications. The TABC requires that the general partner of a limited partnership sign and transact business.¹⁰¹ The TABC's requirement is consistent with Texas law related to limited liability partnerships that states "a limited partner is not liable for the obligations of a limited partnership."¹⁰² The general partner in a limited liability partnership has the liabilities of a partner in a regular partnership.¹⁰³ Natco is the general partner of RCC, Ltd. Therefore, it had the responsibility to file and sign the TABC renewal applications. Because it was the general partner and held a 51 percent interest in RCC, Ltd., it was not seeking a renewal of the permit for the benefit of someone else.¹⁰⁴ Rather, it sought the renewal to benefit itself as the controlling general partner with a majority interest in the limited partnership. The renewal application requires that if there is a change in the applicant entity, a new application must be filed.¹⁰⁵ There was no change in Natco itself and it was still the entity controlling the Club. For these reasons, the ALJ finds that the City and the TABC failed to prove this violation of TEX. ALCO. BEV. CODE § 11.61(b)(4).

S. Whether Respondents engaged in subterfuge in allowing its permit to be displayed or used by an entity other than Natco, Inc., in losing exclusive occupancy and control of the licensed premises, and in engaging in a scheme to surrender control of the premises.

The ALJ finds that the City failed to prove Respondents engaged in subterfuge.

1. City's argument¹⁰⁶

The City first alleges that Respondents have been engaging in subterfuge since November 1999, which is when Natco withdrew as general partner in RCC, Ltd., in that Natco consented to the

¹⁰¹ Ex. R20 (TABC Application Manual, at III. D.)

¹⁰² TEX. REV. CIV. STAT. art. 6132a-1 §3.03(a).

¹⁰³ TEX. REV. CIV. STAT. art. 6132a-1 §4.03(b).

¹⁰⁴ Exs. P28a through 28C, Tr. Vol. 4 at 837-838, 1017.

¹⁰⁵ See, e.g. Ex. P10 at page 1 of 4 of the renewal application.

¹⁰⁶ These allegations are contained in Count 10, 11 and 12 of the City's First Amended Petition. The TABC did not join in these allegations.

use of its permit by RCC, Ltd. in violation of TEX. ALCO. BEV. CODE §§ 11.03, 11.05, and 109.53.¹⁰⁷

The City then asserts that since the Club's opening, sometime before November 1999, Respondents have engaged in subterfuge in that RCC, Ltd. has always been the entity using the permit.¹⁰⁸

2. Respondents' argument

Respondents contend that the TABC and the City have engaged in a pattern of improper law enforcement actions in an attempt to close the Club without cause. One attempt to close them has been the issue of who will control the premises and maintain the permit. Respondents have filed a lawsuit alleging abusive practices by law enforcement.¹⁰⁹

3. ALJ's analysis

The ALJ finds that the City failed to prove by a preponderance of the evidence that Respondents engaged in subterfuge after November 1999. The City's First Amended Petition addresses subterfuge occurring from November 1999 to the present only. Therefore, the ALJ will address only those actions occurring since that date.

On November 4, 1999, counsel for the TABC sent counsel for Respondents a letter indicating that it was enclosing handwritten changes to a draft agreed order in this case.¹¹⁰ One of the requirements of the agreed order was that Natco could not exercise any control or authority over the premises. On the same day, November 5, 1999, Natco withdrew as general partner of RCC, Ltd.¹¹¹ On November 15, 1999, RCC, Ltd. filed a new application for mixed-beverage permits for the Club.¹¹² That application has not been approved. In November 1999, Respondents attempted to follow the directions provided by the TABC as to how they should organize their business so that new permits would be granted. For some reason, the agreed order was not entered in this case. When Respondents received a written document from the TABC, indicating what would need to happen for the Club to stay in operation, they acted immediately in accordance with the TABC's instructions. Subterfuge is defined as a deception by strategy in order to conceal, escape, or evade.¹¹³

¹⁰⁷ Petitioner and Protestant (Intervenor)'s Closing Argument at 35.

¹⁰⁸ Petitioner and Protestant (Intervenor)'s Closing Argument at 36.

¹⁰⁹ RCC's Written Closing Argument at 76 n.1.

¹¹⁰ Ex. R1.

¹¹¹ Ex. R2; Ex. R27 at 2.

¹¹² Ex. R27.

¹¹³ Merriam-Webster's Dictionary.

The City presented no evidence that Respondents attempted to deceive the TABC after November 1999. Therefore, the ALJ finds that the City failed to prove that Respondents engaged in subterfuge.

T. Whether Respondents permitted a patron to possess a narcotic on the licensed premises on December 22, 1998.

The ALJ finds that the City failed to prove Respondents permitted a patron to possess a narcotic on the licenses premises on December 22, 1998.

1. City's argument¹¹⁴

The City alleges that on December 22, 1998, Frank Medrano, a patron of the Club, possessed cocaine on the licensed premises in violation of TEX. ALCO. BEV. CODE §§11.61(b)(2) and 104.01(9). The City relies on the testimony of Detective Brittain. Detective Brittain testified that while he was in the Club in an undercover capacity, he told a dancer that he was interested in purchasing cocaine. He then saw the dancer talk with someone at the bar who then approached his table. The individual who approached his table was Mr. Medrano. Mr. Medrano then went with Detective Brittain to the men's restroom where he sold the detective what the detective believed to be cocaine, and what would later test positive for cocaine.¹¹⁵

2. Respondents' argument

Respondents argue that they do not permit anyone to possess drugs on the premises. They refer to their policies against drug use as discussed in parts V. L. and V. M. above.

3. ALJ's analysis

The ALJ finds that the City failed to prove by a preponderance of the evidence that Respondents permitted a patron to possess a narcotic on the licensed premises. Detective Brittain testified that the dancer who found Mr. Medrano was at Detective Brittain's table in the Club. Certainly, the management of the Club would not sit at a table with customers and dancers, or use any other means to monitor the conversations at the table. Detective Brittain also testified that he purchased the narcotics from Mr. Medrano in the bathroom. Again, management would not violate the privacy of patrons by policing the bathrooms at all times to determine whether illegal activities were occurring. Therefore, the ALJ finds that the City did not prove by a preponderance of the evidence that Respondents permitted a patron to possess a narcotic on the premises.

¹¹⁴ This allegation is contained in Count 20 of the City's petition.

¹¹⁵ Tr. Vol. 2 at 332-342, 380-386, 392-393.

U. Whether Respondents permitted a patron to possess narcotics on the licensed premises on January 13, 1999.

The City makes the same arguments and relies on the testimony of Detective Brittain as discussed above under part V. T.¹¹⁶ Respondents argue that the City offered no evidence of any activity occurring on or about January 13, 1999. After carefully reviewing the record, the ALJ finds that no evidence was presented about activity occurring in the Club on or about January 13, 1999. Detective Brittain testified about events that occurred in December 1998. Therefore, the ALJ finds that the City failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE §§ 11.61(b)(2) and 104.01(9).

V. Whether Respondents are not of good moral character or do not have a reputation for being peaceable and law-abiding citizens in the community.

The ALJ finds that Santiago V. Gutierrez, an officer of Natco, does not have a reputation for being a peaceable and law-abiding citizen in the community. Therefore, the ALJ recommends that the Commission cancel Respondents' permits.

1. City's argument¹¹⁷

The City argues that based on the numerous alleged violations against Respondents, it is apparent that Respondents are not of good moral character or do not have a reputation for being peaceable and law-abiding citizens. The Code provides that a permit may be suspended or canceled if the permittee is not of good moral character or his reputation for being a peaceable and law-abiding citizen in the community where he resides is bad.¹¹⁸

2. Respondents' argument

Respondents assert that the City has engaged in a lengthy campaign to attempt to put the Club out of business. They assert that the City tried to prevent them from going into business and then forced the Club to close for alleged health code violations.¹¹⁹

¹¹⁶ The allegations of narcotics possession are contained in Counts 21 and 22 of the City's First Amended Petition. The TABC did not join in these allegations.

¹¹⁷ This allegation is contained in Count 28 of the City's First Amended Petition. The TABC did not join in this allegation.

¹¹⁸ TEX. ALCO. BEV. CODE § 11.61(b)(6).

¹¹⁹ For a detailed discussion of Respondents' claims of alleged improper actions by the City, see RCC's Written Closing Argument at 73-78.

3. ALJ's analysis

The ALJ finds that because of Mr. Gutierrez's conviction for conspiracy, one of Natco's officers does not have the reputation of being a peaceable and law-abiding citizen. Therefore, the ALJ recommends that the permits be canceled.

W. Whether Respondents conduct their business in a way that is detrimental to the general welfare, health, peace, morals, and safety of the people.

The ALJ finds that the City failed to prove that Respondents conduct business in a way that is detrimental to the general welfare, health, peace, morals and safety of the people.

1. City's argument¹²⁰

The City argues that based on the numerous alleged violations against Respondents, it is apparent that Respondents conduct their business in a manner that is detrimental to the general welfare, health, peace, morals and safety of the people. The Code provides that a permit may be suspended or canceled if the "place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency."¹²¹

2. Respondents' argument

Respondents assert the same arguments addressed above under part V. V.

3. ALJ's analysis

The ALJ finds that the City did not prove by a preponderance of the evidence that Respondents conduct business in a manner that is detrimental to the general welfare, health, peace, morals, and safety of the people and the public sense of decency. The Code requires proof of each element.¹²² The City did not prove by a preponderance of the evidence that the general welfare, morals, health, peace, safety, and public sense of decency of the public is harmed by Respondents' business. Many of the alleged violations in this case related to morals, peace and safety were not proven by a preponderance of the evidence. There was no evidence presented that the public sense of decency is harmed by the Club. Therefore, the ALJ finds that the City failed to prove by a preponderance of the evidence that the Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(7).

¹²⁰ This allegation is contained in Count 29 of the City's Petition. The TABC did not join in this allegation.

¹²¹ TEX. ALCO. BEV. CODE § 11.61(b)(7).

¹²² The Code lists the elements that suspension or cancellation must be based on in the conjunctive, i.e. with the use of the word "and." Therefore, each element must be proved.

VI. SUMMARY OF ALJ'S FINDINGS

The ALJ finds that Respondents' Mixed-Beverage Permit and Mixed-Beverage Late Hours License should be canceled. The ALJ bases this recommendation on the evidence presented at the hearing that Respondents made false and misleading statements on their renewal applications. The statements omitted the fact that Santiago V. Gutierrez had been convicted of the felony of conspiracy to distribute cocaine and marijuana. This serious omission is grounds for the cancellation of the permit and license.

Several other allegations were brought against Respondents, including numerous counts of drink solicitation, solicitation for sexual purposes, and lewd dancing. For the most part, the ALJ found that the TABC Staff did not prove those charges. The charges that the ALJ found were proven were violations of the Code, but were not so serious as to warrant cancellation of Respondents' permit and license. Therefore, the ALJ recommends a suspension of 52 days in total for those allegations. The following chart summarizes the date, the alleged violation, the ALJ's finding with respect to each violation and the recommended suspension, if applicable.

Date	Alleged Violation	ALJ's Finding	Recommended Suspension
July 10, 1998	Lewd Conduct	Affirmative	10 days
April 27, 1999	Drink Solicitation	Affirmative	0 days
April 27, 1999	Sexual Solicitation	Negative	-----
May 20, 1999	After-hours Consumption	Affirmative	5 days
April 2, 1999	Serving intoxicated person	Affirmative	7 days
December 22, 1998	Drink Solicitation	Affirmative	0 days
December 22, 1998	Sexual Solicitation	Negative	-----
December 30, 1998	Lewd Conduct	Affirmative	30 days
December 30, 1998	Sexual Solicitation	Negative	-----
January 8, 1999	Drink Solicitation	Affirmative	0 days
May 6, 2000	Breach of the Peace	Negative	-----
July 28, 1999	Sale of Narcotics	Negative	-----

July 28, 1999	Possession of Narcotics	Negative	-----
December 8, 2000	Intoxicated employee	Negative	-----
December 8, 2000	Serving intoxicated person	Negative	-----
Various	False or misleading statement -- felony	Affirmative	Cancel
Various	False or misleading statement -- stockholder	Affirmative	Cancel
Various	False or misleading statement -- benefit of another	Negative	-----
Various	Subterfuge	Negative	-----
December 22, 1998	Possession of a narcotic	Negative	-----
January 13, 1999	Possession of narcotics	Negative	-----
Various	Lack of Reputation as law-abiding citizen	Affirmative	Cancel
Various	Conduct business in a manner detrimental to general welfare, safety, etc.	Negative	-----

VII. FINDINGS OF FACT

A. Jurisdiction, Notice and Procedural History

1. The TABC filed a Notice of Hearing on October 25, 2000, and a First Amended Notice of Hearing on February 5, 2001.
2. The City of San Antonio (City) filed its Petition in Intervention on November 29, 2000, and a First Amended Petition in Intervention on May 22, 2001.

3. In support of its Petition in Intervention, the City provided sworn statements of the Chief of Police of San Antonio and of a City Councilman, both credible people.
4. River City Cabaret, Ltd. (RCC, Ltd.) filed its Petition in Intervention on February 20, 2001.
5. The Administrative Law Judge (ALJ) granted the City's and RCC, Ltd's petitions in intervention on March 26, 2001.
6. The hearing convened in San Antonio, Texas on August 13, 2001 and was adjourned on August 17, 2001. After submission of briefs and reply briefs, the ALJ closed the record on December 19, 2001.
7. Natco, Inc. (Natco) holds Texas Alcoholic Beverage Commission (TABC) Mixed Beverage Permit MB242770 and Mixed Beverage Late-Hours License LB242771.

B. Background

8. River City Cabaret (Club) is a topless nightclub located at 107 East Martin Street, San Antonio, Texas.
9. Natco holds the TABC-issued permits for the Club.
10. At the time of the allegations made in this case, Natco was a general partner in River City Cabaret, Ltd. (RCC, Ltd.) (collectively, Respondents).

C. Alleged Violations

11. On July 10, 1998, Nancy Silva, a dancer at the Club, knowingly touched a customer's clothed genitals with the intent to sexually arouse him.
12. No one attempted to stop Ms. Silva from engaging in the contact, nor was she disciplined following the incident.
13. On April 27, 1999, Renee Flores, Vanessa Zuniga and Michelle Carreon, dancers at the Club, asked San Antonio Police Detectives, Thomas Brittain and Mark Litton to purchase alcoholic beverages for the women's own consumption.
14. On May 20, 1999, Respondents' waitress and limousine driver consumed alcoholic beverages after 2:15 a.m.
15. Respondents' bartender permitted the consumption of alcoholic beverages after legal alcohol consumption hours.

16. On April 2, 1999, Respondents' employee delivered alcoholic beverages to two customers who were intoxicated and not in the full use of their physical or mental faculties when the alcoholic beverages were delivered.
17. The employee who delivered the alcoholic beverages had not received seller/server training approved by the TABC.
18. On December 22, 1998, Respondents' dancer, Roxanne Serna, asked Detectives Britain and Enrique Martinez to purchase an alcoholic beverage for her own consumption.
19. On December 30, 1998, Respondents permitted Jodie Northcut and Melissa Aguilar, two dancers at the club, to touch and kiss each other's breasts during a table dance.
20. Ms. Northcut and Ms. Aguilar had the intent to sexually arouse a customer.
21. On January 8, 1999, Respondents' dancer, Ida Lugo, asked Detective Martinez to buy her an alcoholic beverage for her own consumption.
22. Santiago V. Gutierrez was an officer of Natco.
23. Santiago V. Gutierrez was convicted of attempted robbery in 1978 and of conspiracy to distribute cocaine and marijuana in 1993.
24. Respondents did not disclose on the 1994, 1995, and 1996 renewal applications that Santiago V. Gutierrez had been convicted of attempted robbery in 1978.
25. Respondents did not disclose on the 1994, 1995, 1996, and 1997 renewal applications that Santiago V. Gutierrez had been convicted of conspiracy to distribute cocaine and marijuana in 1993.
26. Santiago V. Gutierrez was a stockholder in Natco.
27. Respondents did not disclose that Santiago V. Gutierrez was a stockholder in Natco on its renewal applications.
28. Santiago V. Gutierrez does not have the reputation for being a peaceable and law-abiding citizen in the community.

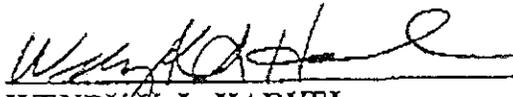
VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE § 11.46(a).

2. The City of San Antonio has jurisdiction to intervene under TEX. ALCO. BEV. CODE §11.62.
3. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE §§ 2003.021(b) and 2003.042(6).
4. The parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE § 2001.051.
5. Natco, Inc. (Natco) and River City Cabaret, Ltd. (RCC, Ltd.) (collectively, Respondents) violated TEX. ALCO. BEV. CODE § 104.01(6) as defined by 16 TEX. ADMIN. CODE § 35.41, in that they permitted acts of sexual contact with the intent to arouse or gratify sexual desires on River City Cabaret's (Club's) premises on July 10, 1998 and December 30, 1998.
6. The TABC failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 104.01(7) on April 27, 1999, December 22, 1998, or on December 30, 1998.
7. Respondents violated TEX. ALCO. BEV. CODE § 104.01(4), on April 27, 1999, December 22, 1998 and January 8, 1999, in that they solicited drinks for their own consumption.
8. Respondents violated TEX. ALCO. BEV. CODE § 105.06, in that they permitted the consumption of alcoholic beverages during prohibited hours.
9. Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(14) in that they sold, served and delivered an alcoholic beverage to an intoxicated person on April 2, 1999.
10. The TABC failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 28.11.
11. The TABC failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 104.01(9) or 16 TEX. ADMIN. CODE § 35.31 on December 22, 1998, January 13, 1999, or July 28, 1999.
12. The TABC failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(13) on December 8, 2000.
13. The TABC failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(14) on December 8, 2000.

14. Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(4) in that they made false or misleading statements on renewal applications when they did not disclose Santiago V. Gutierrez's convictions.
15. Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(4) in that they made false or misleading statements on renewal applications in that they did not disclose that Santiago V. Gutierrez was a stockholder in Natco.
16. The City failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(4) by not listing RCC, Ltd. in the permit renewal applications.
17. The City failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE §§ 11.05 and 109.53 by engaging in subterfuge.
18. The City failed to prove by a preponderance of the evidence that Respondents violated TEX. ALCO. BEV. CODE § 11.61(b)(7).
19. The TABC has the authority to suspend or cancel Respondents' permits pursuant to TEX. ALCO. BEV. CODE § 11.61(b)(6) because Santiago V. Gutierrez does not have a reputation for being a peaceable and law-abiding citizen.
20. The TABC has the authority to cancel or suspend Respondents' permits pursuant to TEX. ALCO. BEV. CODE § 11.61.
21. Based on the Findings of Fact and Conclusions of Law, Respondents' permits should be canceled pursuant to the TABC's authority under TEX. ALCO. BEV. CODE § 11.61.

SIGNED February 14, 2002.


WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 8, 2002

Mr. Rolando Garza, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

VIA INTERAGENCY MAIL

RE: SOAH Docket No. 458-01-0740; TABC Case No. 580924; Texas Alcoholic Beverage Commission v. NATCO Inc., d/b/a River City Cabaret, Permit Nos. MB-242770 & LB-242771, Bexar County, Texas

Dear Mr. Garza:

The parties in this case filed exceptions and replies to the Proposal for Decision (PFD). After reviewing the exceptions and replies, the Administrative Law Judge (ALJ) agrees with the following exceptions:

- "RCC's General Exception to PFD's Findings against 'Respondent,'" which can be found at page 5 of *Respondent's and Intervenor's Exceptions to Proposal for Decision*.
- "Exception to Finding of Alleged Violation of Serving to an Intoxicated Person," which can be found at page 12 of *Respondent's and Intervenor's Exceptions to Proposal for Decision*.

The PFD should, therefore, be modified accordingly. This modification does not change the ALJ's ultimate recommendation in the case that the permit should be canceled.

Sincerely,

A handwritten signature in black ink, appearing to read "Wendy K.L. Harvel".

Wendy K.L. Harvel
Administrative Law Judge

WKLH/lao

xc: Dewey Brackin, Attorney, TABC, 5806 Mesa, Suite 160, Austin, TX - VIA INTERAGENCY MAIL
Jennifer Riggs, Hill Gilstrap Adams & Graham, LLP, 1005 Congress Avenue, Suite 880, Austin, TX 78701
REGULAR U.S. MAIL
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cause” but it is not a mere technicality, particularly in light of the fact that all violations of the Alcoholic Beverage Code constitute crimes. TEX. ALCOHOLIC BEV. CODE ANN. §§1.05, 101.61. The COSA petition should be dismissed in its entirety as a result.

Therefore, Respondent NATCO and Intervenor RCC request that the COSA petition be dismissed in its entirety and that all evidence introduced in the hearing by COSA be stricken from the record.

RCC’s GENERAL EXCEPTION TO PFD’s FINDINGS AGAINST “RESPONDENTS”

Intervenor River City Cabaret, Ltd. generally excepts to the use of the term “Respondents” in the PFD because this language fails to differentiate whether the alleged violation was against Respondent NATCO, Inc. or Intervenor River City Cabaret, Ltd. NATCO and RCC are separate legal entities, particularly since NATCO withdrew as RCC’s majority general partner upon the direction of the TABC. RCC, Ltd. submitted a new original application to the TABC as directed by TABC. PFD at 1, Fn 2.

RCC recognizes this is a unique situation. The TABC directed River City Cabaret, Ltd. to disassociate with NATCO as a means of satisfying TABC’s expectations for enforcement. As the ALJ correctly noted “When Respondents received a written document from the TABC, indicating what would need to happen for the Club to stay in operation, they acted immediately in accordance with the TABC’s instructions.” PFD at 28; *see also* Hearing Exhibits R-1 – R-4, and R-5; Tr. Vol. 4 at 948-49 testimony of Collis White; Tr. Vol. 4 at 1034-37, 1054-55 testimony of Keith Dullye. River City Cabaret, Ltd. cooperated with TABC in this regard but, to RCC’s surprise, finds acts alleged to have been committed by NATCO being used against RCC. For this reason, RCC excepts to language in the PFD that does not distinguish between these separate legal entities.

No prosecution for the alleged after-hours drinking occurred. Tr. Vol. at 987. In addition, for there to have been a violation of Tex. Alc. Bev. Code Ann. § 105.06(c), the consumption must have occurred *in a public place*. A closed bar at 2:40 a.m. in which no customers are present is not a public place. The two individuals charged were both employees, one a waitress and the other the bar's limo driver.

NATCO and RCC except to the Honorable ALJ's finding on Alleged Violation #D based on a lack of evidence supporting a standard of proof beyond a reasonable doubt that the alleged violation occurred. NATCO and RCC also except based on there being no evidence in the record that the alleged violation occurred *in a public place*.

EXCEPTION TO FINDING OF ALLEGED VIOLATION OF SERVING AN INTOXICATED PERSON

NATCO and RCC except to the Honorable ALJ's finding in Alleged Violation #E, because, on the face of the finding itself, there was insufficient evidence on which to conclude that a violation occurred. PFD at 9. As to the allegation that an RCC employee, specifically Ms. Benavidez, served an intoxicated person, the PFD says, "Although it is not clear who served the customers when they were intoxicated, Respondents' agent served them." PFD at 10. This sentence demonstrates that TABC and COSA did not prove the specific allegation they made against NATCO, i.e., that Ms. Benavides served customers who were intoxicated. To prove that NATCO served an intoxicated person, TABC and COSA must prove not only that *someone* representing NATCO served an intoxicated person but also must prove *who* served the intoxicated person. To allow Respondent to be punished without requiring proof of *who* served the intoxicated person is to eviscerate the affirmative defense in the TABC rule protecting permittees, such as NATCO, if servers attend TABC approved seller/server training. NATCO and RCC are entitled to hearing notice so they can prepare all of their defenses, including the Respondent NATCO's and Intervenor RCC's Exceptions to Proposal for Decision and Motion to Dismiss for Want of Jurisdiction

affirmative defense of seller/server training. Without the prosecution having to allege *who* the offending server was, NATCO and RCC are denied proper notice for the hearing. In finding "it is not clear who served the customers when they were intoxicated," the Honorable ALJ did not find, by even a preponderance of the evidence, that the violation occurred as alleged, i.e., that Ms. Benavidez committed the offense.

This is particularly egregious in this case, because Ms. Benavidez had been employed by NATCO for just a few days when the alleged incident occurred. She was within the 30-day grace period provided in the TABC seller/server training rule. Contrary to the Honorable ALJ's statement that Respondent cannot assert the defense because Ms. Benavidez had not yet attended the required training, the fact is that the training *requirement* had not taken effect for this brand new employee of less than 30 days on the job.

In addition, this alleged violation is a criminal offense. Based on the hearing record and the PFD itself, it is clear that TABC and COSA did not prove beyond a reasonable doubt that NATCO committed this offense without the affirmative defense of the TABC seller/server training.

EXCEPTION TO FINDING OF ALLEGED VIOLATION OF MAKING A FALSE OR MISLEADING STATEMENT ON A RENEWAL APPLICATION

NATCO and RCC except to the Honorable ALJ's finding on Alleged Violation #P and particularly except to the recommendation that NATCO's permit be cancelled based on this alleged violation. PFD at 23.

This finding is based on two run-ins with the law involving Mr. Gutierrez. Santiago V. Gutierrez was the President of NATCO, Inc. The hearing record shows that Mr. Gutierrez was convicted of a felony in 1978, was paroled in 1979, and was released from parole in 1986. Hearing Exhibit R-21. The hearing record also shows that Mr. Gutierrez received probation on Respondent NATCO's and Intervenor RCC's Exceptions to Proposal for Decision and Motion to Dismiss for Want of Jurisdiction

PETITIONER'S EXCEPTIONS

3. Petitioner excepts to the liability recommendations on the April 27, 1999 sexual solicitations allegations.

Under the Code, a permittee is **strictly liable** for the actions of its agents, servants, or employees, even though the acts are against the instructions of the employer. Bradley v. Texas Liquor Control Board, 108 S.W.2d 300, 306 (Tex.Civ.App.-- Austin 1937, no writ); Code §1.04(11). Dancers who must fill out applications, must receive permission before they can dance, and who are called to the stage by a DJ are considered employees for purposes of the Code, regardless of their alleged tax status. Bruce v. State, 743 S.W.2d 313 (Tex.App.-Hous.[14th Dist.], writ ref'd). Finally, the Federal Courts have looked into the employment status issue in regard to Social Security employment benefits, and have determined that topless dancers are employees of topless clubs. Reich v. Circle C Investments, 998 F.2d 324 (5th Cir.). The Wishnow case analysis, cited by Respondent, and applied by the court regarding permitting lewd acts, only applies to non-employee **customers** who engage in sexual acts on a licensed premise. A permit or manager does not have to overhear the solicitation in order for the permittee to be held liable for a prostitution allegation. See TABC v. R & R Entertainment, Inc., SOAH No. 458-00-0433 (Houston 2000).

The offense of prostitution is committed when a person offers, agrees, or engages in sexual conduct for a fee. West v. State, 626 S.W.2d 159 (Tex.App.-Beaumont 1981, writ ref'd). Simply quoting prices, even without protracted negotiations or overt acts to follow through on the arrangement is sufficient to establish offer or agreement. Anguiano v. State, 774 S.W.2d 344, (Tex.App.-- Hous.[14th Dist.] 1989, no writ). Furthermore, the intent to consummate the offer is not an element of

the offense. Mattias v. State, 731 S.W.2d 936 (Tex. Crim.App 1987).

8. Petitioner excepts to the liability recommendations on the December 22, 1998, sexual solicitations allegations. See argument and authorities in Exception No. 3, above.

11. Petitioner excepts to the liability recommendations on the December 30, 1998, sexual solicitations allegations. See argument and authorities in Exception No. 3, above.

16. Petitioner excepts to the liability recommendations on the July 28, 1999, narcotic sale and possession allegations.

Under the Code, a permittee is **strictly liable** for the actions of its agents, servants, or employees, even though the acts are against the instructions of the employer. Bradley v. Texas Liquor Control Board, 108 S.W.2d 300, 306 (Tex.Civ.App.-- Austin 1937, no writ); Code §1.04(11). Dancers who must fill out applications, must receive permission before they can dance, and who are called to the stage by a DJ are considered employees for purposes of the Code, regardless of their alleged tax status. Bruce v. State, 743 S.W.2d 313 (Tex.App.-Hous.[14th Dist.], writ ref'd). Finally, the Federal Courts have looked into the employment status issue in regard to Social Security employment benefits, and have determined that topless dancers are employees of topless clubs. Reich v. Circle C Investments, 998 F.2d 324 (5th Cir.). The Wishnow case analysis, cited by Respondent, and applied by the court regarding permitting sale of narcotics, only applies to non-employee **customers** who possess or sell drugs on a licensed premise. A manager does not have to overhear or witness a dancers' narcotics sale in order for the permittee to be held liable for a sale or possession of

narcotics. The court erroneously implies a “permitted” element to the allegation. See Code, Section 104.01(9); see also TABC v. Greek Palace, Inc., SOAH No. 458-01-1516 (El Paso 2001); TABC v. Emma Toucet, SOAH No. 458-01-0501 (Lubbock 2002); TABC v. MC/VC Inc., SOAH No. 458-01-1020 (Corpus Christi 2001).