

DOCKET NO. 582775

| | | |
|---------------------------------|---|---------------------|
| IN RE GREENVILLE ENTERTAINMENT | § | BEFORE THE |
| COMPANY | § | |
| D/B/A THE TEXAS STAR | § | |
| | § | |
| PERMIT NOS. N-185192, PE-185193 | § | TEXAS ALCOHOLIC |
| | § | |
| HUNT COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-99-0905) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 27th day of October, 1999, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr.. The hearing convened on June 22, 1999 and the record closed on July 13, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 10, 1999. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Respondent filed exceptions on September 27, 1999, Petitioner filed exceptions on September 29, 1999, and Judge Jones responded to both on October 8, 1999.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

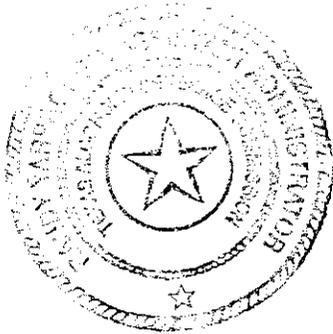
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-185192 & PE-185193 are hereby **SUSPENDED for a period of thirty, (30) days, beginning at 12:01 A.M. on the 27th day of January, 2000.**

This Order will become final and enforceable on November 17, 1999, unless a Motion for Rehearing is filed before that date.

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

WITNESS MY HAND AND SEAL OF OFFICE on this the 27th day of October, 1999.

On Behalf of the Administrator,



A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/pah

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 626-7448

Shanee Woodbridge, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Todd W. White
ATTORNEY FOR RESPONDENT
118 East Rusk
Rockwall, Texas 75087
CERTIFIED MAIL/RRR NO. Z 473 039 063

Greenville Entertainment Company
d/b/a The Texas Star
1739 Baywatch Drive
Rockwall, Texas 75087
CERTIFIED MAIL/RRR NO. Z 473 039 064

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Dallas District Office



**INTER-OFFICE COMMUNICATION
TEXAS ALCOHOLIC BEVERAGE COMMISSION**

October 22, 1999

TO: Gayle Gordon, Director of Legal

FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-0905
TABC Case No. 582775
Greenville Entertainment d/b/a Texas Star
Private Club Registration Permit (N-185192), Beverage Cartage
Permit (PE-185193)
Hunt County, Texas

I have read the attached record of the above referenced case and find the following:

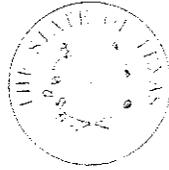
Based on the record, I concur with the finding of the Administrative Law Judge that the license at the above referenced location should be **SUSPENDED**. Please prepare an **ORDER** adopting the Proposal for Decision, suspending the License for a period of thirty (30) days

Please make a copy of this decision and submit it along with the order to the respective parties.

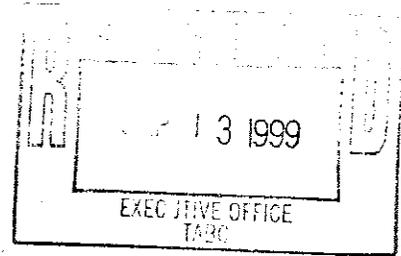
A handwritten signature in cursive script, reading "Randy Yarbrough", written over a horizontal line.

RY

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



September 10, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

CERTIFIED MAIL NO. Z 107 945 077, RETURN RECEIPT REQUESTED

**RE: Docket No. 458-99-0905; Texas Alcoholic Beverage Commission vs. Greenville Entertainment
d/b/a The Texas Star (TABC Case No. 582775)**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Todd W. White, attorney for Greenville Entertainment, d/b/a The Texas Star. For reasons discussed in the proposal, I recommend a thirty day suspension of Respondent's permit.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

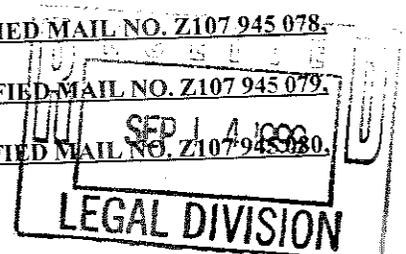
Sincerely,

A handwritten signature in cursive script, appearing to read "Robert F. Jones, Jr." followed by a flourish.
Robert F. Jones, Jr.
Administrative Law Judge

SEP 13 1999

RFJ:ds
Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - **CERTIFIED MAIL NO. Z107 945 078, RETURN RECEIPT REQUESTED**
Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - **CERTIFIED MAIL NO. Z107 945 079, RETURN RECEIPT REQUESTED**
Todd W. White, Attorney at Law, 118 E. Rusk, Rockwall, Texas 75087 - **CERTIFIED MAIL NO. Z107 945 080, RETURN RECEIPT REQUESTED**



The Vinnedge Building
2100 N. Main Street, Suite 10 ♦ Fort Worth, Texas 76106
(817) 626-0003 Fax (817) 626-7448

DOCKET NO. 458-99-0905

| | | |
|----------------------------------|---|-------------------------|
| TEXAS ALCOHOLIC BEVERAGE | § | BEFORE THE STATE OFFICE |
| COMMISSION | § | |
| | § | |
| | § | |
| VS. | § | OF |
| | § | |
| GREENVILLE ENTERTAINMENT | § | |
| D/B/A THE TEXAS STAR | § | |
| PERMITS NOS. N-185192, PE-185193 | § | |
| HUNT COUNTY, TEXAS | § | |
| (TABC CASE NO. 582775) | § | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Greenville Entertainment d/b/a the Texas Star alleging (1) that an employee of Respondent was intoxicated on the licensed premises, (2) that Respondent, through its employees, served or delivered an alcoholic beverage to a minor, (3) that Respondent, through its employees, served or delivered an alcoholic beverage to an intoxicated person, and (4) that Respondent, through its employees, sold liquor to a non-member so as to constitute an "open saloon," all violations of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permit and license be canceled or suspended. This proposal finds that the allegations against Respondent are true in part and not true in part. The Administrative Law Judge (ALJ) recommends suspension of Respondent's permits.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under §§ 11.61(b)(2),(13) & (14), 106.13, and 32.17, TEX. ALCO. BEV. CODE. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under §2003.021, TEX. GOV'T CODE. There were no contested issues of notice or jurisdiction in this proceeding.

On May 24, 1999, the Staff issued its Notice of Hearing, admitted into evidence as Petitioner's Exhibit Number 1. The notice was directed to Greenville Entertainment d/b/a the Texas Star by and through its attorney of record. On June 22, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent was represented at the hearing by Todd W. White, Attorney at Law. The record was closed on July 13, 1999.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under § 11.61(b)(2) of the Code to cancel a permit if it is found that the permittee has violated a provision of the Code during the existence of the permit. Under § 1.04(11), "permittee" means "an agent, servant, or employee" of the permittee. A permit may be suspended for not more than 60 days or canceled if it is found the "permittee" was intoxicated on the licensed premises. TEX. ALCO. BEV. CODE § 11.61(b)(13). A permit may be canceled or suspended for not more than 60 days if it is found the permittee "with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor." TEX. ALCO. BEV. CODE § 106.13(a). "A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." TEX. ALCO. BEV. CODE § 1.08; TEX. PENAL CODE § 6.03(d). A permit may be suspended for not more than 60 days or canceled if it is found "the permittee sold or delivered an alcoholic beverage to an intoxicated person." TEX. ALCO. BEV. CODE § 11.61(b)(14). A private club registration permit may be canceled or suspended for a period of time not exceeding 60 days "on finding that the permittee club has sold, offered for sale, purchased, or held title to any alcoholic beverage so as to constitute an open saloon." "[T]he term "open saloon" means any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink or in broken or unsealed containers, or a place where any alcoholic beverage is sold or offered for sale for on-premises consumption." TEX. ALCO. BEV. CODE § 32.17(a)(1) & (2).

EVIDENCE AND PARTIES' CONTENTIONS

The Staff's Exhibit 2 proved that Respondent was issued Private Club Registration Permit, N-185192, and Beverage Cartage Permit, PE-185193. The permits were issued on September 8, 1986, and have been continuously renewed. The permits were issued to Greenville Entertainment d/b/a the Texas Star (Texas Star). Texas Star's licensed premises is located at Interstate Highway 30, 3.8 miles west of Interstate Highway 34, Greenville, Hunt County, Texas. Staff alleged that (1) on January 23, 1999, an employee of Respondent, Christopher Dale Harris, was intoxicated on the licensed premises, (2) that on February 7, 1999, Respondent, through its employee, Christopher Dale Harris, served or delivered an alcoholic beverage to a minor, John Sanders, (3) that Respondent, through its employee, Christopher Dale Harris, served or delivered an alcoholic beverage to an intoxicated person, Jamey Dent, and (4) that Respondent, through its employee, Christopher Dale Harris, sold liquor to a non-member so as to constitute an "open saloon,"

1. January 23, 1999 sale to Christopher Harris

a. Testimony of Danny Brothers

Danny Brothers, an agent of the TABC, testified that he was at Texas Star on January 23, 1999. On that evening, Brothers observed an individual, later identified by him to be Christopher Harris, enter the premises. James Taylor, the manager of Texas Star on duty that night, identified Harris [to Brothers] as an employee of Respondent. Harris was not working that night. When Harris entered the licensed premises, Brothers observed Harris to stagger, stumble, and nearly lose his balance and fall. Harris told Brothers he had consumed a couple of beers. Brothers concluded that Harris was intoxicated, and took Harris into custody. Brothers did not have Harris attempt any field sobriety tests, for reasons of Harris' safety; Brothers was concerned that Harris might fall and injure himself during the tests. Brothers arrested Harris for "permittee intoxication on licensed premises." Brothers did not offer Harris an intoxilyzer test.

b. Testimony of Christopher Harris

Harris explained that he had been working as a roofer all day, and was in the process that evening of celebrating his birthday. Harris admitted he had consumed alcohol that night, consisting of a beer and a shot, and one other drink. Harris denied that he was intoxicated. Harris attributed his appearance to being tired from work, from his general clumsiness, i.e., "tripping over his own feet," and to the effects of a prescription pain reliever, being taken for his back. Harris stated he was being cautious combining alcohol with the medication, and had curtailed his drinking for that reason.

c. The Parties Contentions

TABC argues that Brothers observations and opinion are sufficient evidence of intoxication,¹ and that TEX. ALCO. BEV. CODE § 11.61(b)(13), which states that "the commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee was intoxicated on the licensed premises," does not require Harris to be working while intoxicated to authorize a penalty against Respondent. Respondent contrariwise argues the evidence in the case is insufficient to support a finding that Harris was intoxicated, such evidence consisting of Brothers unsupported opinion, without the benefit of field sobriety tests, or analytical evidence. Respondent attacks TABC's reading of § 11.61(b)(13) as being beyond the Legislative intent, and requiring Respondent to be, in effect, "a 24 hour a day babysitter of its employees."

1

"Intoxicated" means not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body. TEX. PEN. CODE § 49.01(2)(A).

2. February 7, 1999

a. The Testimony of Eric Pearson and Laramie Mergerson

Eric Pearson, an agent of the TABC, testified that he was at Texas Star on February 7, 1999, in an undercover capacity. Pearson was accompanied by Laramie Mergerson, who is also an agent of the TABC. Pearson and Mergerson observed a transaction involving three persons. The three persons were Christopher Harris, who was working as a bartender, John Sanders, who was working as a "bar-back" that evening, and a patron of the premises named Jamey Dent. Pearson and Mergerson saw Harris prepare an alcoholic beverage called "rocket fuel," a combination of Everclear and Barcardi 151 Rum. Harris handed the drink to Sanders, who in turn delivered the drink to Dent. Neither Pearson and Mergerson saw any money exchanged between Harris and Sanders, Sanders and Dent, or Harris and Dent. Pearson saw Dent consume the "rocket fuel."

Pearson and Mergerson noticed that Sanders was dressed in the "uniform" of a waiter at the Texas Star. They also remarked on his youthful appearance. Pearson and Mergerson observed that Dent was staggering on his feet, had slurred speech, had a flushed face, and had the odor of an alcoholic beverage about his person. Mergerson heard Dent remark that he was "drunk." Both Pearson and Mergerson heard Dent request Sanders move a trash can close to him as he was going to vomit. Pearson reported Sanders remarked on Dent's level of intoxication, about the time Sanders delivered the drink to Dent. Pearson and Mergerson did not make an arrest of anyone out of the transaction, for fear of compromising their undercover status. Pearson and Mergerson called TABC Agent Kenneth Peters to Texas Star to take action based upon their observations.

b. Testimony of Christopher Harris

Harris testified that he sold the "rocket fuel" to Dent. Harris denied that Dent was intoxicated, and stated that Dent was a member of the club. Harris acknowledged that Sanders was a minor, but also said that Sanders was working that evening, and merely delivered the drink to Dent. Harris said Sanders was a "minor" member of the club, and as such was allowed to be in the club, but not drink. Harris also stated Sanders was allowed to serve drinks to patrons.

c. Testimony of John Sanders

Sanders testified that on February 7, 1999, he was eighteen years of age. Sanders denied delivering [or even touching] the "rocket fuel" to Dent, insisting that Harris placed the drink on the bar, and shoved the drink to Dent. Sanders said he was working as a bar-back. Sanders denied talking to Dent at all, aside from saying hello.

d. The Parties Contentions

i. Sale or Delivery to a minor

TABC argues that Pearson and Mergerson observations of Harris handing the "rocket fuel" to Sanders are sufficient evidence of a violation of TEX. ALCO. BEV. CODE § 106.13(a), which states "the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that . . . the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor." Since Harris knew Sanders was underage the TABC argues the delivery to Sanders was at least criminal negligence, as defined in the applicable statutes.² Respondent contends that there was no sale to Sanders, as both Pearson and Mergerson admitted they did not see money exchanged between Harris and Sanders. Further, Respondent cited TEX. ALCO. BEV. CODE § 106.05(b)(1), which states "[a] minor may possess an alcoholic beverage while in the course and scope of the minor's employment if the minor is an employee of a licensee or permittee and the employment is not prohibited by this code." § 106.09(a) states that "no person may employ a person under 18 years of age to sell, prepare, serve, or otherwise handle liquor, or to assist in doing so." The thrust of Respondent's argument is that it was not illegal for Sanders to possess the "rocket fuel" for the purpose of delivering the drink to Dent.

ii. Sale or Delivery to constitute an open saloon

TABC argued that since Harris delivered the "rocket fuel" to Sanders, Sanders was in effect "served" a drink by Harris. Since Sanders is a minor, he may not be served an alcoholic beverage, see TEX. ALCO. BEV. CODE § 106.06, and cannot be a member of the club. Under § 32.01(a)(2), a "private club registration permit authorizes alcoholic beverages belonging to members of the club to be . . . served for on-premises consumption only to members of the club." Accordingly, serving a drink to Sanders constituted Respondent an "open saloon" as defined in § 32.17(b), "any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink or in broken or unsealed containers, or a place where any alcoholic beverage is sold or offered for sale for on-premises consumption." Running an open saloon is grounds for cancellation or suspension under § 32.17(a)(1). Respondent replies that (1) there was no sale to Sanders, and (2) it was not illegal for Sanders to possess the "rocket fuel" for the purpose of delivering the drink to Dent.

2

A person is "criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." TEX. ALCO. BEV. CODE § 1.08; TEX. PENAL CODE § 6.03(d).

iii. Sale or delivery to an intoxicated person

TABC argues that Dent was undoubtedly served an alcoholic beverage by Sanders, which was made by Harris. TABC argues that Pearson and Mergerson observations and opinion are sufficient evidence of Dent's intoxication, and that TEX. ALCO. BEV. CODE § 11.61(b)(14), which states that the "commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true . . . the permittee sold or delivered an alcoholic beverage to an intoxicated person," was violated by Respondent. Respondent argues that no sobriety testing was done by Pearson and Mergerson, or by Peters, the arresting officer. Respondent points out that Pearson and Mergerson saw Dent consume only one drink, and that Pearson and Mergerson had each had at least one drink themselves.

ANALYSIS

1. January 23, 1999 sale to Christopher Harris

Two questions are presented. Was Christopher Harris intoxicated at the Texas Star on January 23, 1999? Assuming that the answer to the first question is "yes," does TEX. ALCO. BEV. CODE § 11.61(b)(13) apply whether Harris was working at Texas Star or not? Agent Brothers offered his opinion that Harris was intoxicated, basing the opinion on Harris' staggering and stumbling entry into Texas Star, and Harris' near loss of his balance. Harris did tell Brothers he had consumed a couple of beers, and testified that he had in fact consumed a beer and a shot, and one other drink. Harris denied that he was intoxicated. Harris said he was tired from work. Harris described himself as clumsy. Harris testified he was taking a prescription pain reliever, and stated he was being cautious combining alcohol with the medication, and had curtailed his drinking for that reason. Turning to the definition of intoxication,³ there is no evidence that Harris did not have the normal use of his mental faculties. Harris did demonstrate a loss of physical faculties, as typified by his staggering and stumbling. The evidence is insufficient to allow a finding that Harris' loss of control was by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance Harris's body. The ALJ cannot find Harris was in Texas Star while intoxicated. Accordingly the issue of whether § 11.61(b)(14) applies in this case is not reached, and the ALJ expresses no opinion on the merits of the question.

2. February 7, 1999

3
"Intoxicated" means not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body. TEX. PEN. CODE § 49.01(2)(A).

i. Sale or Delivery to a minor

Three questions are presented. Was Sanders a minor on February 7, 1999? If the answer is "yes," was an alcoholic beverage sold or delivered to Sanders? If the answer to the second question is "yes," was Sanders' possession of the alcoholic beverage legally excused? Sanders, by his own testimony, was eighteen years of age on February 7, 1999, and was a minor under the law.⁴ Although Sanders denied it, Pearson and Mergerson observed, and Respondent in its pleadings has conceded, that Harris delivered an alcoholic beverage of Sanders. Pearson and Mergerson saw Harris prepare an alcoholic beverage called "rocket fuel," a combination of Everclear and Bacardi 151 Rum. Harris handed the drink to Sanders, who in turn delivered the drink to Dent. Neither Pearson and Mergerson saw any money exchanged between Harris and Sanders, Sanders and Dent, or Harris and Dent. Pearson saw Dent consume the "rocket fuel." Pearson and Mergerson noticed that Sanders was dressed in the "uniform" of a waiter at the Texas Star. Harris testified that he sold the "rocket fuel" to Dent. Harris acknowledged that Sanders was a minor, but also said that Sanders was working that evening, and merely delivered the drink to Dent. Harris said Sanders was a "minor" member of the club, and as such was allowed to be in the club, but not drink. Harris also stated Sanders was allowed to serve drinks to patrons. TEX. ALCO. BEV. CODE § 106.05(b)(1), states "[a] minor may possess an alcoholic beverage while in the course and scope of the minor's employment if the minor is an employee of a licensee or permittee and the employment is not prohibited by this code." § 106.09(a) which states that "no person may employ a person under 18 years of age to sell, prepare, serve, or otherwise handle liquor, or to assist in doing so," does not prohibit Sanders from working at Texas Star. The ALJ finds that it was not illegal for Sanders to possess the "rocket fuel" for the purpose of delivering the drink to Dent, and no sale or delivery to a minor prohibited by § 106.13(a) occurred.

ii. Sale or Delivery to constitute an open saloon

Under the same reasoning as set out in (2)(i), above, since Sanders was in possession of the alcoholic beverage under § 106.05(b)(1), the delivery or "service" of the beverage to Sanders did not constitute Texas Star an open saloon under §§ 32.01(a)(2) and 32.17(b).

iii. Sale or delivery to an intoxicated person

One question is presented. Was Jamey Dent intoxicated when he was delivered the "rocket fuel," on February 7, 1999? Harris testified that he sold the "rocket fuel" to Dent. Harris denied that Dent was intoxicated. Pearson and Mergerson observed that Dent was staggering on his feet, had slurred speech, had a

⁴
"Minor" means a person under 21 years of age. TEX. ALCO. BEV. CODE § 106.01.

flushed face, and had the odor of an alcoholic beverage about his person. Mergerson heard Dent remark that he was "drunk." Both Pearson and Mergerson heard Dent request Sanders move a trash can close to him as he was going to vomit. Pearson reported Sanders remarked on Dent's level of intoxication, about the time Sanders delivered the drink to Dent. Pearson saw Dent consume the "rocket fuel." Dent demonstrated the classic indicators of intoxication: staggered walk, slurred speech, flushed face, and the persistent odor of an alcoholic beverage on his person. These were all factors Harris could have observed himself. Dent indicated he was intoxicated to the point he was about to be physically ill. Nevertheless, Dent consumed the powerful "rocket fuel" when Sanders delivered it to him. Dent demonstrated a loss of his mental and physical faculties through the ingestion of alcohol.

Respondent attempted to raise the "seller/server" defense available to it under § 106.14. In PREHEARING ORDER NUMBER ONE, issued May 20, 1999, the Respondent was required to file a brief statement "summarizing the facts that are in dispute and the facts that are not in dispute, and the issues of law presented in the case. RESPONDENT'S ANSWER & PREHEARING STATEMENT, filed on June 7, 1999, made no assertion of the "seller/server" defense, and upon objection by TABC evidence concerning the defense was excluded and a "trial amendment" of Respondent's pleadings was denied. Respondent has renewed its assertion of the "seller/server" defense in its post-hearing filings; the request to raise the defense is again denied.

RECOMMENDATION

Under TEX. ALCO. BEV. CODE § 11.61(b)(14), Respondent is subject to suspension of its permits for not more than 60 days or cancellation of its permits. In some cases the Respondent might be given an opportunity to pay a fine in lieu of a suspension. However, since Respondent has been found to have served an alcoholic beverage to an intoxicated person, under TEX. ALCO. BEV. CODE § 11.64(a) the commission must determine whether Respondent may have the opportunity to pay a civil penalty rather than have its permit suspended. The commission sets the amount of the penalty and in doing so considers the economic impact a suspension would have on Respondent. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended. Under TABC regulation, found at 16 TEX. ADMIN. CODE § 37.61(b), in determining whether to deny Respondent the option to pay a civil penalty in lieu of a suspension, the Commission considers:

- (1) the type of permit or license held by the violating licensee or permittee and whether the sale of alcoholic beverages constitutes the primary or partial source of the licensee or permittee's business;
- (2) the type of violation or violations charged;

- (3) the licensee's or permittee's record of past violations; and
- (4) any aggravating or ameliorating circumstances.

Under § 37.61(c) aggravating or ameliorating circumstances may include but are not limited to:

- (1) whether the violation was caused by intentional or reckless conduct by the licensee or permittee;
- (2) the number, kind and frequency of violations of the Alcoholic Beverage Code and rules of the commission committed by the licensee or permittee;
- (3) whether the violation caused the serious bodily injury or death of another; and/or
- (4) whether the character and nature of the licensee's or permittee's operation are reasonably calculated to avoid violations of the Alcoholic Beverage Code and rules of the commission.

The ALJ recommends that Private Club Registration Permit, N-185192, and Beverage Cartage Permit, PE-185193 held by Greenville Entertainment d/b/a the Texas Star (Texas Star), located at Interstate Highway 30, 3.8 miles west of Interstate Highway 34, Greenville, Hunt County, Texas, be suspended for a period of thirty (30) days. The ALJ further recommends that Respondent not have the opportunity to pay a civil penalty rather than have the permit or license suspended. The basis for these recommendations are as follows:

- (a) Respondent holds a private club permit and the sale of alcoholic beverages likely constitutes the primary source of the Respondent's business;
- (b) Respondent was **charged** with serving intoxicated persons, selling to minors, and open saloon violations; and
- (c) Respondent's record of past violations shows complaints for sales to intoxicated persons, public intoxication, minors in possession, and sales or other violations concerning minors.
- (d) any aggravating or ameliorating circumstances
 - (i) the violation was caused by intentional or reckless conduct of the employee of the Respondent;

(ii) Respondent's history shows similar, numerous, and frequent violations of the Alcoholic Beverage Code and rules of the commission;

(iii) the violation did not cause serious bodily injury or death of another; and/or

(iv) the character and nature of the Respondent's operation is not reasonably calculated to avoid violations of the Alcoholic Beverage Code and rules of the commission, e.g. the sale of a drink called "rocket fuel", a potent mixture of grain alcohol and high proof rum, indicates Respondent's business panders to the intoxication of its members.

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, should be denied.

FINDINGS OF FACT

1. Greenville Entertainment d/b/a the Texas Star (Texas Star) was issued Private Club Registration Permit, N-185192, and Beverage Cartage Permit, PE-185193, on September 8, 1986.
2. Texas Star's licensed premises are located at Interstate Highway 30, 3.8 miles west of Interstate Highway 34, Greenville, Hunt County, Texas.
3. On February 7, 1999, Texas Star, through its employee, Christopher Harris, sold an alcoholic beverage to an intoxicated person, Jamey Dent.
4. On May 24, 1999, the Staff of the Texas Alcoholic Beverage Commission issued its Notice of Hearing. The notice was directed to Greenville Entertainment d/b/a the Texas Star by and through its attorney of record. The Notice was received on May 26, 1999.
5. On June 22, 1999, a hearing convened before ALJ Robert F. Jones Jr., SOAH, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent was represented at the hearing by Todd W. White, Attorney at Law. The record was closed on July 13, 1999.

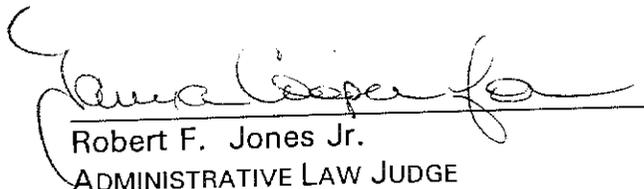
CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this

matter under § 11.61(b)(14), TEX. ALCO. BEV. CODE.

2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to §2003.021, TEX. GOV'T CODE.
3. Respondent received adequate notice of the proceedings and hearing, pursuant to § 2001.052, TEX. GOV'T CODE., and 1 TEX. ADMIN. CODE §§ 155.25(d)(3) and 155.27.
4. Based on Findings of Fact Nos. 1, 2, and 3, Greenville Entertainment d/b/a the Texas Star violated § 11.61(b)(14), TEX. ALCO. BEV. CODE.
6. Based on Conclusion of Law No. 4, Greenville Entertainment d/b/a the Texas Star's Private Club Registration Permit, N-185192, and Beverage Cartage Permit, PE-185193, should be suspended for thirty (30) days.

SIGNED this 10th day of September, 1999.



Robert F. Jones Jr.

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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