

**DOCKET NO. 596142**

IN RE ALBERTO URESTI  
D/B/A BURROLAND  
PERMIT NO. BG-285073

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BEFORE THE  
  
TEXAS ALCOHOLIC  
  
BEVERAGE COMMISSION

BEXAR COUNTY, TEXAS  
(SOAH DOCKET NO. 458-02-1347)

**ORDER**

**CAME ON FOR CONSIDERATION** this 25<sup>th</sup> day of July, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cathleen Parsley. The hearing convened on March 28, 3003, and adjourned on the same day.. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 3, 2002. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date Exceptions were filed by Respondent on July 2, 2002.

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 except for Conclusion of Law No 9, which is hereby changed to reflect a warning in lieu of a suspension.

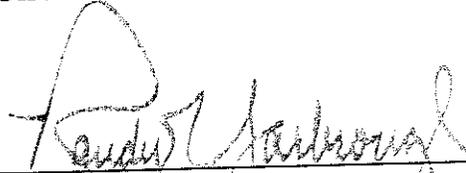
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Proposal for Decision is upheld but that Respondent is hereby **WARNED** not to violate the applicable Code sections.

**This Order will become final and enforceable on August 15, 2002**, 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 25<sup>th</sup> day of July, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

Carlos Uresti  
**ATTORNEY FOR RESPONDENT**  
**VIA FACSIMILE (210) 921-0430**

Alberto Uresti  
d/b/a Burroland  
**RESPONDENT**  
1222 W. Harding  
San Antonio, Texas 78221  
**CERTIFIED MAIL NO. 7001 2510 0000 7276 6495**

The Honorable Cathleen Parsley  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (512) 475-4994**

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Division

San Antonio District Office  
Licensing Division

SOAH DOCKET NO. 458-02-1347

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE STATE OFFICE

V.

OF

ALBERTO URESTI D/B/A  
BURROLAND  
PERMIT NO. BG-285073  
BEXAR COUNTY, TEXAS  
(TABC CASE NO. 596142)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Commission) alleged that the permittee, Alberto Uresti, or his agents, servants, or employees, were intoxicated on Mr. Uresti's premises in violation the Texas Alcoholic Beverage Code. The staff of the Commission (the Staff) seeks a thirty- to sixty-day suspension of Mr. Uresti's alcoholic beverage permit, or in lieu of the suspension, a civil penalty of \$150 per day for each day of the recommended penalty range. Mr. Uresti argued that the Staff failed to carry its burden of proof in that it did not prove that the intoxicated persons were his agents, servants, or employees. The Administrative Law Judge finds the Staff proved that Mr. Uresti's agents and employees were intoxicated on the licensed premises, but it did not demonstrate why a thirty- to sixty-day penalty should be imposed. She recommends a seven-day suspension of Mr. Uresti's permit, or instead of the suspension, a civil penalty of \$1,050.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

The parties stipulated that notice was adequate, and neither party contested jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here. The hearing convened on March 28, 2002, at the offices of the State Office of Administrative Hearings in San Antonio, Texas. The Staff was represented by its counsel, Dewey Brackin. Mr. Uresti was represented by his counsel, Carlos Uresti and Roberto Maldonado.

After the presentation of evidence, counsel for Mr. Uresti made an oral Motion to Dismiss, urging that the case be dismissed because the Staff had failed to prove the case. The Staff made an oral response. The Administrative Law Judge advised the parties she would carry the motion forward and rule on it in the proposal for decision. The evidentiary record was closed at the conclusion of the hearing that day.

## II. INTOXICATED AGENTS OR EMPLOYEES ON THE LICENSED PREMISES

**A. Background.** Mr. Uresti holds a wine and beer retailer's permit, No. BG-285073, for a premises known as Burroland in San Antonio.<sup>1</sup> On June 8, 2001, officers of the San Antonio police force's vice unit and agents of the Commission, acting on a complaint received by the Commission that Mr. Uresti was serving alcoholic beverages to minors and intoxicated persons, that he was violating late hours provisions, and that there was some narcotic activity on the premises, went to Burroland. Jesus B. Orta, a detective with the San Antonio police vice unit, testified that when he drove up to the east end of the premises, he saw eight to ten Latin males standing in front of their cars in the premises' parking lot next to a dumpster. One of the men broke off from the group and went behind the dumpster. According to Detective Orta, the man was staggering. The detective ordered the man to step away from the dumpster, but the man ignored him. Detective Orta then went to the man, told him to place his hands on the dumpster, and gave him a quick frisk for weapons. The man did not obey the detective's commands; for example, he would not keep his hands on the dumpster, and Detective Orta had to force his hands up to the dumpster. Detective Orta could smell alcohol on the man's breath, and after he handcuffed him and turned him around, the detective could see the man had bloodshot eyes. Also, he was staggering, his speech was slurred, and Detective Orta realized his commands were not registering with the man.

Detective Orta arrested the man for public intoxication because he believed the man was a danger to himself or others, he did not have control of his faculties or his judgment, and he was incoherent. At some point, the man told Detective Orta that his father owned the bar, that he worked there, that they were just trying to make a living, and wondered what was wrong because he had not done anything wrong. Detective Orta subsequently identified the man as Michael Uresti.

Another officer, a Detective Lopez, arrested Lorenzo Uresti, who apparently had been inside the bar. Lorenzo Uresti was offered the opportunity to take a portable breath test, and he accepted the offer. The results of the portable breath test showed his alcohol concentration to be 0.14. He was also arrested for public intoxication. According to the police reports, Lorenzo Uresti indicated to Detective Lopez that he and his brother were owners of Burroland, along with their father, and they were trying to make a living.

After both Michael and Lorenzo Uresti were arrested and placed into patrol cars, the Commission's agent, Joseph Reilly, who was a part of the team of agents and officers responding to the complaint, went out to the cars to talk to them. They were obviously intoxicated, he testified, because, as he explained the charges and the problems, they needed him to repeat things to them. Agent Reilly also smelled alcohol on their breath and on their persons, and the back area of the police vehicles smelled of alcohol. According to Agent Reilly, Michael Uresti made a statement to him that he did not know why the officers were bothering them (the Urestis) because they were "just trying to make a living here."

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<sup>1</sup> Exh. 1.

**B. The Allegations and Parties' Positions.** The Staff alleged that Lorenzo Uresti and Michael Uresti were agents, servants, or employees of Alberto Uresti. As such, they were prohibited by TEX. ALCO. BEV. CODE ANN. §104.01(5) from being intoxicated on the licensed premises.<sup>2</sup>

In Mr. Uresti's view, the Staff failed to prove that allegation because it failed to prove that Lorenzo and Michael Uresti were Mr. Uresti's agents, servants, or employees. Mr. Uresti pointed to what he asserted was confusion in the police reports about whether Lorenzo Uresti or Michael Uresti made the statement about owning Burroland with Alberto Uresti and trying to make a living at the bar.

**C. Discussion.**

**1. Servant, Agent, or Employee.** The ALJ agrees with Mr. Uresti that the only direct evidence the Staff presented demonstrating Michael and Lorenzo Uresti's relationship to the licensed premises was their statements to Detectives Orta and Lopez and Agent Reilly. Detective Lopez did not testify, but it should be said that Detective Orta and Agent Reilly were very good, credible witnesses.<sup>3</sup> Conversely, Mr. Uresti did not offer any evidence rebutting the Staff's evidence of the owner-employee relationship between Mr. Uresti and Michael and Lorenzo Uresti. Mr. Uresti did not testify, nor did Lorenzo or Michael Uresti, and as the Staff noted, Mr. Uresti did not offer any documentary evidence controverting his sons' statements. The only evidence that Lorenzo and Michael Uresti did not own or were not employed by or at Burroland was a statement Mr. Uresti

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<sup>2</sup> Section 104.01 provides:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

(5) being intoxicated on the licensed premises.

<sup>3</sup> The ALJ was not persuaded that Detective Orta and Agent Reilly contradicted each other in their testimony. Detective Orta testified that Michael Uresti claimed he worked at the bar with his father, who owned the establishment. Michael Uresti apparently said much the same thing to Agent Reilly. Agent Reilly's report indicates that Lorenzo Uresti made a similar statement, which Mr. Uresti claimed was a contradiction in the evidence. However, as the ALJ understands it, Lorenzo Uresti made such a statement to Detective Lopez, which Agent Reilly's report apparently reflects. Perhaps Agent Reilly misstated in his report which brother made a statement of ownership or employment directly to him (Agent Reilly), but the ALJ is convinced it was an error by the agent and nothing more. Neither Agent Reilly's nor Detective Orta's police reports were offered into evidence, so it is impossible to determine exactly what either of those reports said, and the issue was not much clarified during the hearing.

Mr. Uresti also attempted to challenge Agent Reilly's credibility by questioning him about whether he had filed an oath of office and a bond as required by TEX. ALCO. BEV. CODE ANN. §5.14. Three points will be made about that line of questioning. First, §5.14 requires the oath (which Agent Reilly testified he took in 1983 when he was hired at the Commission) to be filed with the Commission, not the Secretary of State, as Mr. Uresti asserted. Second, Agent Reilly has not executed a bond, he stated, but §5.14 says that its representatives are required to execute a bond "as required by the Commission." There is no evidence whether the Commission has such a requirement. Third, the questioning was not particularly relevant to an inquiry about Agent Reilly's credibility.

made to Agent Reilly after the agent told him that Lorenzo and Michael Uresti had been arrested for public intoxication and after they had said to Detectives Orta and Lopez, out of their father's presence, that they owned the bar with their father. The ALJ finds the younger Urestis' statements to the authorities more credible on the subject,<sup>4</sup> particularly as Mr. Uresti did not take the stand to dispute them.

Agent Reilly testified that he saw two dump trucks belonging to Uresti Trucking parked in the parking lot that night. It is a possibility that Michael and Lorenzo Uresti were referring to working for the trucking company when they stated they were owners of the business and were trying to make a living. The ALJ finds that an unlikely possibility, for this reason. There was no evidence from Mr. Uresti demonstrating that his sons worked only for the trucking company and not for Burroland. If his sons had no agency or employee relationship with the bar, one would have expected Mr. Uresti to have offered it.

**2. The Premises.** One of the elements of a violation of §104.01(5) is that the offensive conduct occur on the licensed premises. Apparently Detective Lopez first made contact with Lorenzo Uresti inside Burroland, so there would seem to be no serious question that he was on the licensed premises. Michael Uresti, however, was outside the bar, in what Detective Orta described as the parking lot of the premises when the detective first contacted him. The premises can include an establishment's parking lot.<sup>5</sup>

Neither party addressed whether the parking lot was a part of the licensed premises here. There is also no evidence that Burroland shared the parking lot with other businesses. Given that Mr. Uresti did not dispute that it was Burroland's parking lot under his direct or indirect control, the ALJ will assume the parking lot was a part of Burroland's premises, and that Michael Uresti was on the licensed premises at the time Detective Orta first contacted him and then arrested him.

**3. Intoxication.** The evidence reflects that both Michael and Lorenzo Uresti were intoxicated on the licensed premises. Before addressing the evidence regarding intoxication, however, the ALJ would make the following observation. In the notice of hearing, the Staff relies on 16 TEX. ADMIN. CODE §50.2(a)(2) for the definition of "intoxication." The trouble is that the definition appears to apply, rather than broadly to all references to "intoxicated" or "intoxication" in the Alcoholic Beverage Code, only to matters pertaining to alcohol education and awareness under 16 TEX. ADMIN. CODE Chapter 50. Section 50.2 begins with this preamble:

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<sup>4</sup> On cross-examination, counsel for Mr. Uresti questioned Detective Orta about the lack of mention in his report of the incident of Michael Uresti's statement to the detective that his father owned Burroland and that he worked at the bar. Detective Orta agreed it was not in his report, but testified that it was an oversight. Also, he was arresting Michael Uresti for public intoxication, not working on a Commission enforcement case, and at the time, did not attribute much importance to Michael Uresti's statements. As noted in the text, the ALJ found Detective Orta a very credible witness.

<sup>5</sup> TEX. ALCO. BEV. CODE ANN. §§1.04(19) and 11.49(a). See, e.g., *Richardson v. State*, 823 S.W.2d 773 (Tex. App. – Fort Worth 1992, error granted).

(a) The following words and terms, *when used in this chapter*, shall have the following meanings, unless the context clearly indicates otherwise. (Emphasis added.)

The rule then goes on to define several terms, including intoxication, for which the rule employs the definition of "intoxicated" set out in §49.01 of the Texas Penal Code.

The use of the phrase "when used in this chapter" would indicate that the words and terms referred to are meant for use only when applying Chapter 50 of the Commission's rules. There is no evidence or argument that Chapter 50's definitions, and specifically the definition of intoxication, apply to proceedings brought to enforce Chapter 104 of the Alcoholic Beverage Code, as this one was, or that they apply generally to the Alcoholic Beverage Code, or that Chapter 50's definitions have been extended to apply to situations other than those having to do with alcohol education and awareness.

Mr. Uresti filed special exceptions on March 18, 2002, and asserted that the allegation in the notice of hearing charging "[Mr. Uresti] and or [*sic*] his agent, servant or employee, on or about June 8, 2001, [were] 'intoxicated'" was "vague, general, indefinite and fails to properly define 'intoxicated'." He did not complain that the Chapter 50 definition of "intoxication" was inapplicable.

So, essentially the parties are at a draw on this matter. The Staff did not demonstrate that Chapter 50's definition is applicable, but Mr. Uresti did not complain that it is not. The ALJ, however, concludes that without some evidence or argument from the Staff that the Chapter 50 definition has some bearing on the Commission's proceedings in general, the language of Section 50.2(a) limits the use of the definitions to Chapter 50 of the rules.

The question then becomes what definition of "intoxicated" should be used, and it seems logical to look to the legal definition of "intoxicated" as set out in the Texas Penal Code. That definition is as follows:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

(B) having an alcohol concentration of 0.08 or more.<sup>6</sup>

The evidence clearly establishes that Michael Uresti was intoxicated. Detective Orta testified that Michael Uresti's breath smelled of alcohol, his eyes were bloodshot, his speech was slurred, he staggered, and he either ignored or was unable to carry out the detective's orders when he was

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<sup>6</sup> TEX. PEN. CODE ANN. §49.01.

arrested. It was Detective Orta's opinion that Michael Uresti was a danger to himself or others and that he did not have full possession of his faculties.

It is a closer question with Lorenzo Uresti. Detective Lopez, the officer who arrested Lorenzo Uresti, did not testify at the hearing, so it is impossible to know his impressions of Lorenzo Uresti's condition that night, or whether Mr. Uresti underwent field sobriety tests other than the portable breath test. For evidence of Lorenzo Uresti's intoxication, the record includes the portable breath test result of 0.14, the smell of alcohol on his breath, as reported by Agent Reilly, and that he also needed Agent Reilly to repeat to him the charges and the circumstances in which he found himself after he was arrested and placed in the police car with Michael Uresti.

The Staff asserted in its opening arguments that the result of the portable breath test was quantitative, objective evidence of Lorenzo Uresti's intoxication, especially given that 0.08 alcohol concentration is the level determined by the State of Texas to be intoxication *per se* for purposes of a driving while intoxicated (DWI) case. The ALJ agrees that the result from a portable breath test is an *indicator* of intoxication, but not that a portable breath test result is an absolute determinant of intoxication, if that is what the Staff was suggesting. Detective Orta testified that he and his colleagues use the portable breath test to determine probable cause in cases of public intoxication. Presumably, then, the officers who use it employ it for that limited purpose, and not as the final word on whether a person is intoxicated. Detective Orta also stated that the portable breath test he uses is calibrated through the intoxilyzer used for DWI cases at the City of San Antonio, and while that does give one some confidence that the reading may be at least close to accurate, it still does not necessarily confer on a portable breath test result the same level of reliability and credibility one would assign to a result from a properly-performed breath test done on a properly-calibrated intoxilyzer. Also, there is no evidence that Detective Lopez administered the portable breath test as anything other than one of several indicators of intoxication, or for any reason other than to determine probable cause.<sup>7</sup>

With that said, the inquiry is whether the evidence was sufficient to establish Lorenzo Uresti's intoxication, and the ALJ finds that it was. He had alcohol on his breath, and as indicated by the portable breath test, a significant level of alcohol concentration in his system. The level of alcohol was such that he could not comprehend fully what Agent Reilly explained to him, indicating some impairment of his mental faculties.

**D. Conclusion and Recommendation.** It was the Staff's burden to prove, by a preponderance of the evidence, that Mr. Uresti's agents, servants, or employees were intoxicated on the licensed premises. It carried that burden. By their own admissions, Michael and Lorenzo Uresti owned Burroland with their father, and worked there. On June 8, 2001, both of them were intoxicated while they were on the premises, and it is irrelevant for purposes of Section 104.01(5) whether they were actually working at or in the bar that night. They were intoxicated on the premises, which is prohibited. As the Staff noted, one cannot ensure that one's patrons are not

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<sup>7</sup> See *Fernandez v. State*, 915 S.W.2d 572 (Tex. App. – San Antonio 1996, no writ).

minors or are not intoxicated themselves if one's agents and employees are not in control of their own faculties. The evidence is sufficient to establish that Mr. Uresti violated §104.01(5) of the Code, and the case against him should not be dismissed. To that end, Mr. Uresti's Motion to Dismiss is denied.

The issue then becomes the appropriate sanction for the case. The Staff is seeking a thirty-to sixty-day suspension of Mr. Uresti's permit. The ALJ is unclear why the Staff would propose a suspension of that length when, for a first violation of this nature (and there is no evidence that this is not Mr. Uresti's first violation), the recommended suspension is seven days, according to the Commission's established penalty matrix.<sup>8</sup> Absent any showing that this offense was particularly egregious or serious and why, which might justify deviating from the penalty matrix, or a showing that this is not the first violation for Mr. Uresti, the ALJ will rely on the Commission's matrix for her recommendation of a seven-day suspension of his permit. Mr. Uresti is entitled to an opportunity to pay a civil penalty in lieu of a suspension of his permit.<sup>9</sup> The Staff requested a \$150 per day penalty, which is the lowest amount that may be imposed.<sup>10</sup>

Mr. Uresti's Motion to Dismiss should be denied. The ALJ also recommends that his alcoholic beverage permit BG-285073 be suspended for seven days, or that he be permitted to pay a civil penalty of \$1,050 (\$150 a day x seven days) in lieu of the suspension.

### III. FINDINGS OF FACT

1. Alberto Uresti holds a wine and beer retailer's permit, No. BG-285073, for a premises known as Burroland in San Antonio.
2. On June 8, 2001, officers of the San Antonio police force's vice unit and agents of the Texas Alcoholic Beverage Commission (the Commission), acting on a complaint received by the Commission about possible violations of the Texas Alcoholic Beverage Code occurring on Burroland's premises, went to Burroland.
3. Eight to ten males were standing in front of their cars in the premises' parking lot next to a dumpster.
4. One of the men, identified as Michael Uresti, a son of Alberto Uresti, broke off from the group and went behind the dumpster.

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<sup>8</sup> 16 TEX. ADMIN. CODE §37.60(a).

<sup>9</sup> TEX. ALCO. BEV. CODE ANN. §11.64(a); 16 TEX. ADMIN. CODE §37.60(b).

<sup>10</sup> TEX. ALCO. BEV. CODE ANN. §11.64(a).

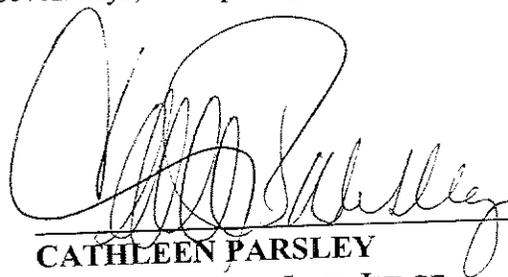
5. Michael Uresti was staggering, his speech was slurred, his breath smelled of alcohol, his eyes were bloodshot, and he ignored or could not follow the instructions of the police detective who had made contact with him.
6. Michael Uresti was a danger to himself or others, he did not have control of his faculties or his judgment, and he was incoherent.
7. Lorenzo Uresti, also a son of Alberto Uresti, had been inside the bar.
8. Lorenzo Uresti took a portable breath test, and the result showed he had an alcohol concentration of 0.14.
9. Lorenzo Uresti's breath smelled of alcohol, and he needed the Commission's agent to repeat things to him.
10. Lorenzo Uresti's mental faculties were impaired by the introduction of alcohol
11. Both Michael and Lorenzo Uresti owned Burroland with their father, and worked at Burroland.
12. On January 11, 2002, the staff of the Commission issued a notice of hearing notifying Alberto Uresti of a hearing on allegations he had violated the Texas Alcoholic Beverage Code.
13. On March 19, 2002, pursuant to an order of the Administrative Law Judge, the Staff issued an amended notice of hearing to Alberto Uresti.
14. A hearing on the allegations against Mr. Uresti was held on March 28, 2002. Both parties appeared and participated in the hearing.
15. There is no evidence that Alberto Uresti has previously allowed his agents, servants, or employees to be intoxicated on the licensed premises, or has otherwise been found to have violated any provision of the Texas Alcoholic Beverage Code.
16. There is no evidence demonstrating why the events of June 8, 2001, were particularly egregious or serious.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Subchapter B of Chapter 5, and TEX. ALCO. BEV. CODE ANN. §§6.01 and 61.71.

2. The State Office of Administrative Hearings has jurisdiction over all matters pertaining to the contested case hearing, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was timely and adequate, as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
4. On June 8, 2001, Michael and Lorenzo Uresti were agents, servants, or employees of Alberto Uresti d/b/a Burroland.
5. On June 8, 2001, Michael and Lorenzo Uresti were intoxicated on the licensed premises, *i.e.* Burroland.
6. Alberto Uresti d/b/a Burroland violated TEX. ALCO. BEV. CODE ANN. §104.01(5) because his agents, servants, or employees engaged in prohibited conduct on the licensed premises in that they were intoxicated on the licensed premises.
7. The recommended suspension for a violation of TEX. ALCO. BEV. CODE ANN. §104.01(5) is seven days for a first violation, as contemplated by 16 TEX. ADMIN. CODE §37.60(b).
8. Alberto Uresti is entitled to pay a civil penalty of not less than \$150 per day in lieu of suspension of his permit, as contemplated by TEX. ALCO. BEV. CODE §11.64(a) and 16 TEX. ADMIN. CODE §37.60(b).
9. The Commission is justified in suspending Permit No. BG-285073 held by Alberto Uresti d/b/a Burroland for seven days, or imposing a \$1,050 civil penalty in lieu of the suspension.

**SIGNED May 3, 2002.**



**CATHLEEN PARSLEY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**