

**TABC DOCKET NO. 495770**

IN RE REYNALDO CORNEJO § BEFORE THE TEXAS ALCOHOLIC  
D/B/A CLUB CASINO §  
PERMIT NO. BG-553697 §  
TRAVIS COUNTY, TEXAS §  
(SOAH DOCKET NO. 458-06-0977) § BEVERAGE COMMISSION

**ORDER MODIFYING PROPOSAL FOR DECISION**

On this day the above referenced matter came before me for consideration. I have reviewed the Proposal for Decision (PFD) of the Administrative Law Judge (ALJ), exceptions, responses to exceptions and the motions and briefs filed by the parties.

I have modified the PFD as authorized by §5.43, of the Alcoholic Beverage Code and §2001.058 of the Government Code. I have determined that the ALJ did not properly apply or interpret the applicable law in this case. I therefore make the following findings of fact and conclusions of law in support of my decision:

I.

**APPLICABLE LAW AND INTERPRETATION OF LAW**

The administrator disagrees with the ALJ's analysis that §104.01 does not apply to an off-duty employee. The expressed public policy of the Alcoholic Beverage Code is the protection of the welfare, health, peace, temperance, and *safety* of the people of the state. Code § 1.03 *El Chico v. Poole*; 732 S.W.2d 306 (Tex. 1987) Because a permittee may not be found to sell, serve or deliver an alcoholic beverage to themselves under the §§11.61(b)(14), 61.71(a)(6) and 101.63, because of their special right of access to alcoholic beverages on the licensed premises, §§11.61(b)(13) and 104.01(6) extend the prohibition of being intoxicated on a licensed premises to the permittee, his agent, servant, or employee for the same public policy reasons that the permittee may not sell, serve or deliver an alcoholic beverage to an intoxicated person.

The plain language of §11.61(b)(13) and 104.01(6) provide that it is a violation for the 1) permittee (or agent, servant or employee) to be 2) intoxicated and 3) *on the licensed premises*. No interpretation is required, because the provision is plain on its face and unambiguous. It does not state or suggest the additional requirements implied by the ALJ. Specifically it does not require that the permittee is intoxicated while conducting the business of the licensed premises or engaged in the duties of their employment.

In view of the public policy served by the enactment of §§11.61(b)(13) and 104.01(6), the prohibition against a permittee, agent, servant or employee being intoxicated on a licensed premises applies to the permittee, agent, servant or employee who is *on the licensed premises*, regardless of whether the permittee, agent, servant or employee is actively engaged in the operation of the business or their duties of employment.

## II.

### FINDINGS OF FACT

1. Findings of Fact Nos. 1, 2, 3, and 5 are adopted *in their entirety*.
2. Finding of Fact No. 4 is *deleted* because whether an employee is on-duty or off-duty is not relevant and is not an element of the enforcement action brought.

## III.

### CONCLUSIONS OF LAW

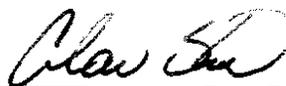
1. Conclusions of Law Nos. 1, 2, 3 are adopted in their entirety.
2. Conclusion of Law No. 4 is changed to read as follows: On May 8, 2005, Rosalba Escobedo-Armargo was an employee of Club Casino and was intoxicated on the licensed premises in violation of §104(5) of the Texas Alcoholic Beverage Code.

**IS THEREFORE ORDERED**, by the 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 Wine and Beer Retailer's Permit is hereby **SUSPENDED**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of \$4000.00 on or before the **25<sup>th</sup> day of February, 2008**, all rights and privileges under the above-described permit will be **SUSPENDED** for a period of **20 days**, beginning at **12:01 A.M.** on March 5, **2008**.

This Order will become final and enforceable on February 25, 2008, unless a Motion for Rehearing is filed before that date.

Signed on the 31<sup>st</sup> day of January 31, 2008.



Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

Administrative Law Judge  
State Office of Administrative Hearings  
Austin, Texas  
**VIA FAX (512) 475-4994**

Don Walden  
**ATTORNEY FOR RESPONDENT**  
7200 N. Mopac, Suite 300  
Austin, Texas 78731  
**VIA FAX (512) 795-8079**

Reynaldo Cornejo  
d/b/a Club Casino  
**RESPONDENT**  
5500 S. Congress  
Austin, Texas 78745

Judith L. Kennison  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission

Licensing Division

Austin District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 495770**

**REGISTER NUMBER:**

**NAME: REYNALDO CORNEJO**

**TRADENAME: CLUB CASINO**

**ADDRESS: 5500 S. Congress, Austin, Texas 78745**

**DATE DUE: February 25, 2008**

**PERMITS/LICENSES NO(S): BG553697**

**AMOUNT OF PENALTY: \$ 4,000.00**

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

**Mail this form along with your payment to:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
P.O. Box 13127  
Austin, Texas 78711**

**Overnight Delivery Address: 5806 Mesa Drive, Austin, Texas 78731**

**You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.**

Attach this form and please make certain to include the Docket # on your payment.

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No.

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

June 20, 2006



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

**HAND DELIVERY**

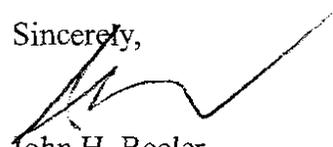
**RE: Docket No. 458-06-0977; Texas Alcoholic Beverage Commission v. Reynaldo Cornejo d/b/a Club Casino**

Dear Mr. Steen:

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

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

Sincerely,

  
John H. Beeler  
Administrative Law Judge

JHB/sb  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**

✓Judith Kennison, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-

**VIA HAND**

**DELIVERY**

Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-

**VIA HAND DELIVERY**

Don E. Walden, Attorney, 7200 North Mopac, Suite 300, Austin, TX 78731-**VIA REGULAR MAIL**

**DOCKET NO. 458-06-0977**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner**

**V.**

**REYNALDO CORNEJO D/B/A  
CLUB CASINO,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Reynaldo Cornejo d/b/a Club Casino (Respondent) alleging that on or about May 8, 2005, Rosalba Escobedo-Armargo, Respondent's agent, servant, or employee, was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. (the Code) §§ 104.01(5), 25.04, and/or 61.71(a)(1). TABC seeks a 60-day suspension of Respondent's alcoholic beverage permit, or in lieu of the suspension, a civil penalty of \$150 per day for each day of the recommended penalty. The Administrative Law Judge (ALJ) recommends no action be taken against Respondent's permit or license.

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

ALJ John H. Beeler convened the hearing on April 4, 2006, at the State Office of Administrative Hearings in Austin, Texas. Staff attorney Judith Kennison appeared on behalf of TABC. Don E. Walden appeared on behalf of Respondent. The record closed on April 21, 2006, after the parties filed post-hearing briefs. There were no contested issues on notice or jurisdiction; therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion.

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## II. DISCUSSION

### A. Background

Respondent does not contest the allegations as set out in the notice of hearing. Respondent does, however, contend that the intoxicated employee was off duty and, therefore, not prohibited from being intoxicated on the premises. TABC contends that the statute applies even if the employee was off duty.

### B. Applicable Law

TEX. ALCO. BEV. CODE ANN. § 11.61(b) states:

(b) 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:

(13) the permittee was intoxicated on the licensed premises.

TEX. ALCO. BEV. CODE ANN. § 104.01(5) 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 the public decency, including, but not limited to any of the following acts:

(5) being intoxicated on the licensed premises.

### C. TABC's Argument

TABC argues that the wording of the above statutes is unambiguous and does not require that the intoxicated employee be on duty for a violation to occur. TABC also sets out six examples of why the statute should apply to off-duty employees. They are as follows: 1) the employee is committing the crime of Public Intoxication with the tacit approval of management, 2) it sets a bad example for patrons who observe the intoxicated employee on the premises, 3) it sets a bad example

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for the on-duty employees, 4) it puts the bartender and wait staff in awkward positions when they have to cut off intoxicated patrons when the intoxicated off-duty employee is sitting next to them, 5) an intoxicated, off-duty employee has all the apparent authority and influence of an on-duty employee, and is more inclined to make bad decisions, and 6) the permittee/licensee would be allowed to be intoxicated on the premises.

#### **D. Respondent's Argument**

Respondent argues that the statutes apply only to employees who are on-duty and to interpret otherwise would undermine the purpose of the code. TABC's position would require Respondent to eject the intoxicated off-duty employee from the premises causing a safety concern. It is always safer to keep an intoxicated person, off-duty employee or patron, on the premises.

#### **E. Analysis**

The ALJ agrees with Respondent that TEX. ALCO. BEV. CODE ANN. § 104.01(5) applies only to employees who are on duty. Prior to 1989, it was a violation to permit an intoxicated person to remain on the premises. Until that date, TEX. ALCO. BEV. CODE ANN. § 104.01(5) read,

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 the public decency, including, but not limited to any of the following acts:

(5) being intoxicated on the licensed premises *or permitting an intoxicated person to remain on the licensed premises.*

The reason the italicized portion of the statute was removed is consistent with the idea that it is unsafe to eject intoxicated persons from the premises. There is no reason it would be any safer if the intoxicated person happened to be an off-duty employee. It does make sense to not allow an intoxicated person perform duties associated with the sale of alcohol, thus the prohibition of intoxicated employees on the job.

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The ALJ notes that the language preceding the enumerated acts states that “No...employee may engage or permit conduct...including, but not limited to the following acts,” which could be read to prohibit allowing even patrons to be to be intoxicated on the premises. However, a careful reading of all of the enumerated acts reveals that the ones that could apply to patrons all include the “or permit” language, while the ones that could only apply to employees do not. For example, “1) the use of loud and vociferous or obscene, vulgar, or indecent language, *or permitting its use;*” versus, “8) failing or refusing to comply with state or municipal health or sanitary laws or ordinances.” It is thus clear that it is a violation if employees are intoxicated on the premises, but not if patrons are.

The term “employee” is defined in another part of the Code only as one who is involved in the sale or delivery of alcohol and excludes others, such as officers of a corporate permittee, from the definition. TEX. ALCO. BEV. CODE ANN. § 50.2. While that section concerns who must attend a seller server course and is not directly applicable to the statute in question, it does demonstrate that the term “employee” does not always mean anyone employed by the premises.

The six examples set out by TABC to demonstrate the problems that would be caused if the statute did not apply to off-duty employees are certainly of concern, but, for most of them, the same would be true of non-employees who were regular and valued patrons. For example, a bartender would find it more uncomfortable to refuse to serve an intoxicated regular customer than a first time customer. The problem is one of familiarity, not of employment. The other examples cited by TABC simply require the expected good judgement of the on-duty, sober employees.

It is reasonable to not allow intoxicated employees to work on a licensed premises, but not reasonable to eject them and create safety concerns. The statute was certainly written with safety of the public in mind, and therefore, must refer to an employee as one on duty on the premises. Because the statute applies only to employees who are on duty, the ALJ finds that no violation occurred.

### III. FINDINGS OF FACT

1. The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Reynaldo Cornejo d/b/a Club Casino (Respondent) alleging that on or about

- May 8, 2005, Rosalba Escobedo-Armargo, Respondent's agent, servant, or employee, was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. (the Code) §§ 104.01(5), 25.04, and/or 61.71(a)(1).
2. Administrative law Judge John H. Beeler convened the hearing on April 4, 2006, at the State Office of Administrative Hearings (SOAH) in Austin, Texas. Staff attorney Judith Kennison appeared on behalf of TABC. Don E. Walden appeared on behalf of Respondent. The record closed on April 21, 2006, after the parties filed post-hearing briefs.
  3. Club Casino currently operates under the authority of a Wine and Beer Retailer's Permit No. BG553697 and Retail Dealer's On-Premise Late Hours License BL553698, in Austin, Travis County, Texas.
  4. Rosalba Escobedo-Armargo was employed by Club Casino on May 8, 2005, but was not on duty that evening.
  5. Rosalba Escobedo-Armargo was intoxicated at Club Casino on May 8, 2005.

#### IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Subchapter B of Chapter, and §§ 6.01, 11.61, 61.71, and 32.01.
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 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 May 8, 2005, Rosalba Escobedo-Armargo was not an employee of Club Casino as that term is contemplated by TEX. ALCO. BEV. CODE ANN. § 104.01(5).
5. Based on the above findings of fact and conclusions of law, no action should be taken against Respondent's license or permit.

**SIGNED June 20, 2006.**



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**JOHN H. BEELER**  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS