

SOAH DOCKET NO. 458-07-4008

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

BEFORE THE STATE OFFICE

V.

**EXIT STAGE LEFT, INC.
d/b/a O2 Lounge,**

OF

Respondent

**EL PASO COUNTY, TEXAS
(TABC CASE NO. 499305)**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Petitioner) brought this enforcement action against Exit Stage Left, Inc. d/b/a O2 Lounge (Respondent) alleging that Respondent sold or delivered an alcoholic beverage to an intoxicated person. The Administrative Law Judge (ALJ) recommends a ten day suspension of Respondent's permit or, in lieu of suspension, payment of a \$1,500.00 civil penalty.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested issues in this proceeding. Therefore, those matters are addressed only in the Findings of Fact and Conclusions of Law.

On October 15, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901. The Petitioner was represented at the hearing by Lindy B. Hendricks, TABC Staff Attorney, who appeared telephonically. Respondent appeared and was represented by its attorney, Roger C. Davie. The record closed upon adjournment of the hearing on October 15, 2007.

On October 11, 2007, Respondent filed a Motion to Dismiss Claim for Failure to Timely Prosecute. After consideration of the arguments propounded, said motion was denied via written

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order on October 12, 2007. Respondent re-urged its Motion to Dismiss upon commencement of the hearing alleging that TABC's failure to timely prosecute affected Respondent's due process rights. Petitioner argued against the motion stating its numerous attempts to reach settlement or narrow the issues were ignored by Respondent.¹ Based on the arguments presented, the oral motion was denied.

II. APPLICABLE LAW AND ITS INTERPRETATION

The applicable law sets forth that TABC 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 sold or delivered an alcoholic beverage to an intoxicated person.² Section 11.61(b)(14) does not contain any language which would indicate that a specific intent to violate that statute is required.³

A licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated.⁴ The objective "reasonable prudent person" standard is used to determine whether the licensee should know the patron is intoxicated.⁵

¹ Ms. Hendricks argued the agency's diligence and indicated that she, and the enforcement division, telephoned and left numerous messages on: September 2005; June 20, 2006; July 20, 2006; November 6 and 29, 2006; December 4, 7 and 22, 2006; February 20 and 23, 2007; and August 17, 2007. The telephone calls were made to Respondent and to its legal counsel. All calls and messages were ignored. In addition, letters were sent out on August 29, 2005; July 20, 2006; November 6, 2006; and December 7, 2006.

² TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14) [Cancellation or Suspension of Permit].

³ *Fay-Ray v. Texas Alcoholic Beverage Comm'n.*, 959 S.W.2d 362, (Tex.App.-Austin, 1998).

⁴ *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).

⁵ 959 S.W.2d 362.

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III. EVIDENCE

On June 18, 2005, a "sale to intoxicated persons" (SIP) undercover operation was conducted at the O2 Lounge.⁶ Petitioner alleges that on that night, Respondent's bartender sold an alcoholic beverage to an intoxicated person.

A. Exhibits

Petitioner offered five exhibits: custodian of record affidavit and copy of permit number 092830 (Exhibit No. 1); the "green card" No. 7006 0810 0000 2204 3544 (Exhibit No. 2); photograph of Ronald Yuhasz (Exhibit No. 3); photograph of Christopher Clemente (Exhibit No. 4); and the TABC-El Paso incident report (Exhibit No. 5). All documents were admitted into evidence.

Respondent offered one exhibit: a drawing of the inside bar area of the establishment (Respondent's Exhibit No. 1). It was admitted into evidence.

B. Testimony

TABC Agent Wiest testified that on June 18, 2005, there were approximately 50 patrons inside the establishment, and another 100 patrons in the outside covered patio area. The bar establishment is small and it was crowded. In the course of conducting the SIP operation, he observed a male patron, outside in the patio area, who was leaning against the wall speaking to a Hispanic male and a woman. Agent Wiest observed that the male patron, later identified as Ronald Yuhasz, swayed as he stood. Yuhasz also had poor balance as he walked to the inside bar area. Once inside, the agent noted that Yuhasz had bloodshot eyes. Yuhasz was approached inside the establishment by another male patron identified as Christopher Clemente. Yuhasz and Clemente

⁶ Respondent currently operates under authority of a Mixed Beverage Permit, which includes the Beverage Cartage Permit, and a Mixed Beverage Late Hours Permit, issued for the premises known as O2 Lounge, located at 2700-08 North Mesa Avenue, El Paso, El Paso County, Texas 79902.

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used each other for balance as they waited to place a drink order. Yuhasz leaned against the bar counter for balance and ordered three drinks, which were sold to him by the bartender. Agent Wiest further observed that Yuhasz had poor coordination as he attempted to grab and hold the pen to sign for the drinks. The agent observed Yuhasz lean into the bar counter and speak to the bartender at a very close range.

IV. ANALYSIS

Agent Wiest had the opportunity to observe Yuhasz and determined that he depicted signs of intoxication. Did the bartender have the same opportunity to observe the indicators of intoxication on Yuhasz? Not all of them. The agent's observation, specifically the leaning against the wall, the swaying, and the poor balance as Yuhasz walked into the inside area were all observed as Yuhasz was outside. These signs of intoxication were not in open view, evident, or capable of being observed by the bartender who was inside behind the bar. Thus, they are not considered in answering the question of whether the bartender should have known that Yuhasz was intoxicated.

Thus, the bartender is held to an objective standard of what a reasonably prudent person would have observed. Based on the evidence of record, the bartender would have observed the following:

- Poor balance as Yuhasz and Clemente used each other for balance as they waited to place their drink order;
- Poor balance as Yuhasz leaned against the bar counter for balance;
- Yuhasz had poor coordination illustrated by his attempts to grab and hold the pen to sign for the drinks;
- Yuhasz leaned into the bar counter and spoke to the bartender at a very close range enabling the bartender the opportunity to note any slur speech, bloodshot eyes, and odor of alcohol.

Further, the incident report states that the bartender stood in front of Yuhasz and Clemente, as

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3. On September 13, 2007, the TABC issued its notice of hearing directed to Respondent's attorney of record. A copy of the notice was mailed to Respondent.
4. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. On October 15, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901.
6. The Texas Alcoholic Beverage Commission was represented at the hearing by Lindy B. Hendricks, TABC Staff Attorney.
7. Respondent was represented by Roger C. Davie, attorney at law.
8. On June 18, 2005, a "sale to intoxicated persons" (SIP) undercover operation was conducted at the O2 Lounge.
9. On June 18, 2005, there were approximately 50 patrons inside the establishment and another 100 patrons in the outside covered patio area. The bar establishment is small and it was crowded.
10. The bartender stood in front of Yuhasz and Clemente, as Yuhasz ordered.
11. The following objective indicators of intoxication were in open view, evident or capable of being observed by the bartender:
 - Poor balance as Yuhasz and Clemente used each other for balance as they waited to place their drink order;
 - Poor balance as Yuhasz leaned against the bar counter for balance;
 - Yuhasz had poor coordination illustrated by his attempts to grab and hold the pen to sign for the drinks;
 - Yuhasz leaned into the bar counter and spoke to the bartender at a very close range enabling the bartender the opportunity to note the slur speech, bloodshot eyes, and odor of alcohol.

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12. On June 18, 2005, Respondent's bartender sold an alcoholic beverage to an intoxicated person.

VL CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.
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 TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. Proper and timely notice of the hearing was effected on all parties pursuant to 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN § 11.63.
4. On June 18, 2005, Respondent's bartender sold an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).
5. Respondent's permits should be suspended for ten days, and Respondent should be allowed to pay \$1,500.00 in lieu of suspension.

SIGNED December 12, 2007.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE