SOAH DOCKET NO. 458-06-0116

Texas Alcoholic Beverage Commission	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
	§	
Cowpokes, Inc., d/b/a Dallas	§	
Permit Nos. MB-529470 & LB-529471	§	ADMINISTRATIVE HEARINGS
TABC Case No. 467973		

ORDER MODIFYING PROPOSAL FOR DECISION

On this day the above referenced matter came before me for consideration. I have reviewed the file, including the testimony presented at the hearing, the depositions filed of record, the Proposal for Decision (PFD) of the Administrative Law Judge (ALJ), exceptions, responses to exceptions and the briefs filed by the parties.

I have modified the Proposal For Decision 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 have further determined that ALJ's reliance on deposition testimony of agency staff to determine the law to apply to the case is error. I have also determined that many of the ALJ's findings of fact are either mixed findings of fact and conclusions of law, or legal conclusions and do not contain a finding of fact, and because they do not apply or interpret the law correctly, I refuse to adopt, or attempt to modify their content. I therefore make the following findings of fact and conclusions of law in support of my decision:

I.

FINDINGS OF FACT

1. The following Findings of Fact are adopted without modification: Nos. 1, 2, 3, 4a, 4b, 4c, 4e, 4f, 4h, 4i, 4j, 4k, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5i, 5j, 5k, 5l, 6a, 7a, 8c, 9b, 10b,12, 13, 14.

2. The following Findings of Fact are not adopted because they are in fact conclusions of law: Nos. 4, 4d, 5, 5n, 6, 6b, 6c, 7, 7b, 8, 8b, 9, 10, and 11.

3. The following Findings of Fact are not adopted because they are against the great weight of the evidence presented: 8a, 9a, and 10a.

4. Finding of Fact No. 4g is not adopted because it is against the great weight of the evidence and is directly contradicted by and inconsistent with Finding of Fact No. 4e, 4h, 4i, and 4j.

5. Findings of Fact No. 4l and 5m, are not adopted because they contain mixed findings of fact and conclusions of law, and apply the incorrect law and standards to the violations alleged. Specifically, the ALJ makes the following statements:

> '[4]l. Mr. Avila was not a danger to himself or another person until he got into his car and started the engine, so was not publicly intoxicated at the time Ms. Benjamin served him his last beverage.'
>
> '[5]m. At the time Ms. Cannon served Mr. Haid, and at the time he [Mr. Haid] was arrested for public intoxication, he [Mr. Haid] was not belligerent, violent, loud, obnoxious, combative, aggressive, or using profanity, and was not attempting to drive a motor vehicle, so was not a danger to himself or another.'

It is difficult to tell from these statements whether the ALJ is making a finding regarding whether Ms. Benjamin and Ms. Cannon served Mr. Avila and Mr. Haid an alcoholic beverage or whether she is making a finding regarding the conduct of Messiers Avila and Haid at the time of their arrests for public intoxication. Presumably since these statements fall under Finding of Fact Nos. 4 and 5, she is discussing facts relevant to a violation of §11.61(b)(14) of the Code by the permittee. *(See footnote 1)* The §11.61(b)(14), administrative violation for which Ms. Benjamin and Ms. Cannon were cited, has only the following elements: 1) the permittee (or employee, agent or servant), 2) sold or served, 3) an alcoholic beverage, 4) to an intoxicated person.

There is no definition of "intoxication" in the Alcoholic Beverage Code or rules; however, it is not a technical term, and it is not modified in the context of the section to require any more than its common meaning. The common meaning adopted by the TABC for intoxication under §11.61(b)(14) is "a condition when, due to the consumption of alcoholic beverages, a person suffers

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1 The guilt or innocence of an individual for a criminal offense under the Code, or under the Penal Code are not within the jurisdiction of the State Office of Administrative Hearings and it is not an element of a violation under §11.61(b)(14) of the Code.

impaired mental or physical faculties and a resulting diminution of the ability to think and act with ordinary care.", adopted from *El Chico, v. Poole*, at 732 S.W.2d 306 (Tex. 1987, rehearing denied). A definition of intoxication for purposes of §11.61(b)(14) can also be adopted from §49.01(2), of the Penal Code to the extent it relates to the consumption of alcoholic beverages: "not having the normal use of mental or physical faculties by reason of introduction of alcohol...or having an alcohol concentration of 0.08 or more". *See also footnote 2*

Other sections of the Code also serve to illustrate that where a higher or different standard or degree of intoxication is intended, the plain language of the statute makes this clear. Compare §11.61(b)(14) to §2.02, of the Code, which requires that the individual be "obviously intoxicated to the extent he presents a clear danger to himself or others". Section 2.02 comes close, but is not the same as the definition for the criminal offense of public intoxication in §49.02, of the Penal Code which defines public intoxication as "appears in a public place while intoxicated to a degree that the person may endanger the person or another". See also §106.041, under which a minor commits an offense while having any detectable amount of alcohol in the minor's system.

Under §11.61(b)(14), there is also no requirement that the permittee have any knowledge or "culpable mental state" at the time of the sale or delivery that the person to whom they sell or deliver is intoxicated. This becomes clear when compared to other sections of the Code where a culpable state for the seller/server is required for a violation to occur. See for example §101.63, under which a person commits an offense only if the person has the necessary culpable state of criminal negligence. See also §2.02 of the Code, which provides a statutory cause of action for civil liability as well as a revocation proceeding under §6.01(b) of the Code. Section 2.02 provides both a culpable mental state for the server or provider of the alcoholic beverage -- it must be apparent to the provider--and a much higher level or degree of intoxication for the individual.

The ALJ's Findings of Fact No. 4l and 5m inextricably intertwine the different standards that apply to public intoxication (§49.02, Penal Code), a criminal offense against the individual served, sale of an alcoholic beverage to an intoxicated person, an administrative violation against the

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2 See *Campos v. State,* 623 S.W.2d 657 (Tex Cr.App.1981). It has been held that it is not necessary to define "intoxicated" or "intoxication" in the court's instructions to the jury since the terms are not technical and have a commonly understood meaning. Citing, *Driggs v. State,* 151 Tex.Cr.R. 391, 208 S.W.2d 557 (1948); *Eddins v. State,* 155 Tex.Cr.R. 202, 232 S.W.2d 676 (1950), and cases there cited; *Kimbro v. State,* 157 Tex.Cr.R. 438, 249 S.W.2d 919 (1952); *Galan v. State,* 164 Tex. Cr.R. 521, 301 S.W.2d 141 (1957); *Ragland v. State,* 391 S.W.2d 418 (Tex.Cr.App.1965).

permittee, (§11.61(b)(14)) and additionally add a culpable mental state for the server, an element of neither. These multiple and clearly erroneous applications of law justify excluding the Findings of Fact Nos. 4l and 5m from being considered as a basis for decision as either Findings of Fact or Conclusions of Law.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5, Subchapter B, §§6.01 and 11.61.
2. The State Office of Administrative Hearing has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to the Texas Government Code and §5.43(a), Texas Alcoholic Beverage Code.
3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act, §2001.051 and 2001.052 of the Texas Government Code and §11.63 Texas Alcoholic Beverage Code, and §155.55 of Title 1 Texas Administrative Code.
4. Based upon the ALJ's adopted Findings of Fact No. 4a, 4b, 4c, 4e, 4h, 4i, 4j, and 4k the permittee's employee, agent or servant, Ms. Benjamin, sold or delivered an alcoholic beverage to an intoxicated person, Mr. Avila on the night of March 30, 2005, in violation of §11.61(b)(14) of the Texas Alcoholic Beverage Code.
5. Based upon the ALJ's adopted Findings of Fact No 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5i, 5j, 5k, and 5l, the permittee's employee, agent or servant, Ms. Cannon, sold or delivered an alcoholic beverage to an intoxicated person, Mr. Haid on the night of July, 6, 2005, in violation of §11.61(b)(14) of the Texas Alcoholic Beverage Code.
6. Based upon the ALJ's adopted Findings of Fact in Nos. 6a, 7a, 8a, 9b, 10b, and 11, the Staff did not sustain its burden under 16 TAC §45.103 because it failed to show that the practices of the permittee result in excessive consumption of alcoholic beverages by consumers. The use of the plural in the rule suggests that more than one instance of excessive consumption by consumers be shown to have occurred during a given promotion, or that the practices of the permittee result in excessive consumption, defined

as public intoxication violations by consumers over a period of time, such that a reasonable person could conclude that the place and manner in which the permittee conducts his business adversely affects the general welfare, health, peace, morals and safety of the public, or the public sense of decency. The Staff also failed to sustain its burden to show that the practices of the permittee impaired the ability of the permittee to monitor or control the consumption of alcoholic beverages by consumers.

7. Based upon Conclusion of Laws No. 4 and 5, the permit shall be suspended for a period of 15 days, with the opportunity to pay a civil penalty in lieu of suspension at $150 per day or $2250.00.

IT 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 your license(s) are hereby SUSPENDED.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **$2,250.00** on or before the **2nd** day of **April 2008**, all rights and privileges under the above described permits will be **SUSPENDED for a period of fifteen (15) days, beginning at 12:01 A.M. on the 9th day of April 2008.**

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

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this February 1, 2008, at Austin, Texas.

On behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Cowpoke Inc.
d/b/a Dallas
RESPONDENT
7113 Burnet Rd. #109
Austin, Texas 78757
VIA REGULAR MAIL

Charles R. Webb
ATTORNEY FOR RESPONDENT
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Austin, Texas 78734
VIA FACSIMILE: (512) 266-1329

Mr. Jesse Castillo
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VIA FACSIMILE: (210) 630-4210

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

Judith L. Kennison
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Austin District Office
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 467973 **REGISTER NUMBER:**

NAME: COWPOKES, INC. **TRADENAME: DALLAS**

ADDRESS: 7113 Burnet Rd. #109, Austin, Texas 78757

DATE DUE: April 2, 2008

PERMITS/LICENSES NO(S): MB-529470 & LB-529471

AMOUNT OF PENALTY: $ 2,250.00

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 <u>ONLY</u> IF YOU PAY THE <u>ENTIRE AMOUNT ON OR BEFORE THE DUE DATE</u>. 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. <u>No personal or company check nor partial payment accepted</u>. 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.

SOAH DOCKET NO. 458-06-0116

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	**OF**
V.	§	
	§	
COWPOKE, INC.	§	**ADMINISTRATIVE HEARINGS**
D/B/A DALLAS	§	
PERMIT NOS. MB-529470 AND	§	
LB-529471	§	
TRAVIS COUNTY, TEXAS	§	
(TABC CASE NO. 467973),	§	
Respondent	§	

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (Staff, TABC) requested that the permits of Cowpoke, Inc. d/b/a Dallas (Respondent) be canceled, because Respondent or its employees violated the Texas Alcoholic Beverage Code and TABC rules by serving intoxicated persons on March 30 and July 6, 2005; by holding an on-premises promotion that induced customers to drink excessively, or prevented Respondent from adequately monitoring customers' drinking, on March 30 and May 18, 2005; and by holding an on-premises promotion, thereby negatively affecting public welfare and safety, on July 6, 2005. The Administrative Law Judge (ALJ) finds Staff failed to prove Respondent committed the alleged violations, and recommends that Respondent's permits not be canceled.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits convened January 20, 2006, at the State Office of Administrative Hearings (SOAH), 300 West 15th Street, Fourth Floor, Austin, Texas, before ALJ Sharon Cloninger. TABC was represented by its staff attorneys Judith L. Kennison and W. Michael Cady. Respondent appeared through its attorneys Charles Webb and Jesse R. Castillo. Evidence was presented, and the record closed February 21, 2006, after the submission of written closing arguments.

II. BACKGROUND

Respondent is the holder of a Mixed Beverage Permit (MB529470)[1] and Mixed Beverage Late Hours Permit (LB529471)[2] issued by TABC for the premises known as Dallas (Dallas), which is located at 7113 Burnet Road, No. 101, Austin, Travis County, Texas, and whose mailing address is 7113 Burnet Road, No. 109, Austin, Texas 78757.

Pursuant to a recommendation made by the Sunset Commission in the fall of 2004[3], the TABC Enforcement Division shifted its emphasis from general enforcement to increasing public safety by reducing the number of intoxicated drivers.[4] The shift came about in part due to studies that indicate that upwards of 50 percent of all arrests for driving while intoxicated (DWI) in the United States originate in the retail service of an alcoholic beverage.[5] TABC set out to identify which drinking establishments were producing a high volume of DWIs, in order to work with the permittees toward voluntary compliance with TABC rules, with the goal of reducing the number of intoxicated persons driving away from their premises.[6]

TABC identified Dallas as an "at-risk location" in January 2005,[7] based on Austin Police Department (APD) statistics that when asked, a number of drivers arrested by APD for DWI told the arresting officers they had their last alcoholic beverage at Dallas. Since Dallas had been identified as an "at-risk location" by January 2005, there are apparently APD statistics from 2004 upon which

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[1] TABC Exhibit 2.

[2] *Id.*

[3] Testimony of James Samuel Smelser, TABC Chief of Enforcement; *see also* Deposition of Mr. Smelser, Respondent's Exhibit 18, page 16, lines 5-17.

[4] Deposition of Mr. Smelser, Respondent's Exhibit 18, page 20, lines 13-16.

[5] Testimony of Mr. Smelser; *see also* Deposition of Mr. Smelser, Respondent's Exhibit 18, page 20, lines 21-25.

[6] Deposition of Mr. Smelser, Respondent's Exhibit 18, page 25, line 1, through page 26, line 9; and Deposition of TABC Agent Timothy Humphreys, Respondent's Exhibit 19, page 36, lines 20-24.

[7] Testimony of Mr. Smelser; *see also* Deposition of Mr. Smelser, Respondent's Exhibit 18, at page 28, lines 18-22, in which Mr. Smelser does not specifically name Dallas, but refers to a list he has seen in the newspaper, presumably the list developed by APD.

the designation is based. However, no 2004 statistics are in evidence. Instead, Staff presented evidence that 39 drivers arrested by APD for DWI between January 1, 2005, and October 6, 2005, told the arresting officers, when asked where they had consumed their last alcoholic beverage, that it had been at Dallas.[8] The Austin Fire Department (AFD) capacity for Dallas is 885 people.[9]

The 2005 APD statistics showed that 73 percent of the DWI arrests of Dallas patrons occurred either late on Wednesday nights or early on Thursday mornings.[10] On the dates of alleged violations in this case, as well as other Wednesdays between January and August 2005, Dallas offered a 69-cent beer, wine, and well drink special on Wednesday nights, which TABC believed led to the higher number of DWI arrests of Dallas patrons late Wednesdays and early Thursdays.

In January 2005, Lt. Saenz and APD representatives met with Dallas General Manager William "Bill" Thompson to discuss ways to ensure patrons would not become intoxicated then drive away from the club, and to bring to Respondent's attention the possibility that theWednesday night drink specials might attract a greater number of customers and lead to more DWIs on those nights. As a result of the meeting, Dallas set up a taxi cab stand in front of a fast food restaurant in its parking lot, eventually paying for two or three rides per month for intoxicated customers; and began offering free soft drinks to designated drivers.[11] However, when the number of DWI arrests of persons who said their last alcoholic drink had been consumed at Dallas did not drop in February,

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[8] Testimony of Sharon Bauer, APD Police Planner and Traffic Analyst. Ms. Bauer testified she began working on DWI data in 2002, with APD's mission being to reduce fatalities related to consumption of alcohol by deploying police officers to DWI "hot spots" identified in the reports. The Burnet Road and Research Boulevard corridors were identified as areas to patrol. She said that by Fall 2004, she was preparing a monthly report that was first shared with Lt. Robert Saenz (who oversees TABC's operations in the Austin District, according to his testimony) in January 2005. *See also* TABC Exhibit 3.

[9] TABC Exhibit 3. While Dallas is number one on the APD list as far as the number of DWI arrests, other drinking establishments on the list have a higher per capita DWI arrest rate when their AFD capacity is taken into consideration. No evidence was presented as to how many of the DWI arrests resulted in convictions.

[10] Testimony of Ms. Bauer; and testimony of Lt. Saenz. *See also* TABC Exhibit 3.

[11] Testimony of Mr. Thompson.

TABC decided to conduct a sting operation to determine if bartenders and waitresses at Dallas were serving intoxicated customers.[12]

The TABC sting operation, carried out in cooperation with APD, resulted in arrests and/or citations on the nights of March 30, May 18, and July 6, 2005:

- After Dallas closed at 2 a.m. on the night of March 30, 2005, Aramando[13] Avila was arrested for public intoxication in the parking lot where he had gotten into his car, started the engine, and had either fallen asleep or passed out. Respondent's employee Sonya Benjamin, a bartender, was issued a citation by TABC for serving beer to an intoxicated person, Mr. Avila.

- On Wednesday, May 18, 2005, Dallas patron Joseph Herzer was arrested for public intoxication by TABC Agent Stephen McCarty. No bartender or waitress was cited by TABC for serving or selling alcoholic beverages to Mr. Herzer, but Dallas was given an on-premises violation citation.

- On Wednesday, July 6, 2005, Respondent's employee Candice Cannon, a bartender, was issued a TABC citation for serving beer to an intoxicated person identified as Brian Haid, who was arrested for public intoxication at Dallas that night.

TABC Agent Humphreys filed the administrative cases resulting from the above alleged violations, and APD handled the criminal cases against the individuals for the same violations.[14]

III. ALLEGATIONS, APPLICABLE LAW, AND PENALTY

A. Allegations

Pursuant to the Second Amended Notice of Hearing issued by TABC on November 18, 2005, after SOAH Docket Nos. 458-06-0116 and 458-06-0117 were consolidated, Dallas is alleged to have committed the following violations:

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[12] Testimony of Lt. Saenz. Also, the APD arrest statistics are: January-5, February-10, March-2, April- 4 , May-5, June-3, July-2, August-5, September-3, and none by October 6, 2005. *See* TABC Exhibit 3.

[13] Throughout the evidence, Mr. Avila's first name is variously spelled as "Amando," "Armando," or "Aramando."

[14] Deposition of Agent Humphreys, Respondent's Exhibit 19, page 40, lines 12-23.

1. Violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14)

Staff alleges that on March 30, 2005, and on July 6, 2005, Respondent or its agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

2. Violation of TEX. ALCO. BEV. CODE § 11.61(b)(7) and 16 TAC § 45.103(c)(11)

Staff alleges that on March 30, 2005, and May 18, 2005, Respondent or its agent, servant, or employee engaged in a practice to induce consumers to drink alcoholic beverages to excess or that would impair the ability of Respondent to monitor or control the consumption of alcoholic beverages by consumers, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) and 16 TAC § 45.103(c)(11).

3. Violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and 101.61, and 16 TAC § 45.103(c)(11)

Staff alleges that the place or manner in which the permittee conducts its business warrants the cancellation or suspension of its permits based on the general welfare, health, peace, morals and safety of the people and the public sense of decency, because on July 6, 2005, Respondent engaged in an on-premise[s] promotion in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and 101.61, and 16 TAC § 45.103(c)(11) .

B. Applicable Law

1. Texas Alcoholic Beverage Code

a. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7)

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 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[.]

b. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14)

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 sold or delivered an alcoholic beverage to an intoxicated person.

c. TEX. ALCO. BEV. CODE ANN. § 101.61

A person who fails or refuses to comply with a requirement of the Texas Alcoholic Beverage Code or a valid TABC rule, violates the Texas Alcoholic Beverage Code.

2. TEXAS PENAL CODE § 49.02

A person commits an offense [of public intoxication] if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another. TEX. PENAL CODE § 49.02(a).

3. TABC Rules

a. 16 TAC § 45.103(a)

This rule is adopted to prohibit those practices by on-premise [sic] retail establishments that are reasonably calculated to result in excessive consumption of alcoholic beverages by consumers. Such practices constitute a manner of operation contrary to the public welfare, health and safety of the people in violation of §§ 11.61(b)(7) and 61.71(a)(17) of the Alcoholic Beverage Code.

b. 16 TAC § 45.103(b)

Excessive consumption of alcoholic beverages shall be determined by the standard of public intoxication articulated in § 49.02 of the Penal Code.

c. 16 TAC § 45.103(c)(11)

Retail licensees and permittees may not engage in any practice, whether listed in this rule or not, that is reasonably calculated to induce consumers to drink alcoholic beverages to excess, or that would impair the ability of the licensee or permittee to monitor or control the consumption of alcoholic beverages by consumers.

4. Definition of "Intoxication"[15]

a. Public intoxication standard applies to this proceeding

The Texas Alcoholic Beverage Code does not define "intoxication" or "intoxicated" for purposes of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) or 11.61(b)(14). TABC rules do define "excessive consumption" as the term is used in 16 TAC § 45.103(c)(11) as the public intoxication standard set out in the Texas Penal Code. Based on TABC rules and the testimony of Mr. Smelser, TABC's Chief of Enforcement, as well as that of the head of TABC's Austin District operations, Lt. Saenz, the ALJ finds the definition of public intoxication at TEX. PENAL CODE § 49.02 to be the applicable standard for the alleged violations in this proceeding.

1. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7)

The ALJ relies on 16 TAC § 45.103(a), which references TEX. ALCO. BEV. CODE ANN. §11.61(b)(7), to find that the definition of "excessive consumption" found at 16 TAC § 45.103(b), *supra*, applies to the alleged "place or manner" violations.

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[15] The ALJ will only address the definition of "intoxication" as it relates to the SOAH administrative hearing, which is a civil proceeding, and not how the word might be defined for purposes of the APD's pursuit of criminal convictions for the same offenses.

Therefore, Staff must prove that Respondent's on-premises promotion on March 30, 2005, and May 18, 2005, was reasonably calculated to induce customers to excessively consume alcoholic beverages to the point of public intoxication in order to prevail on the allegation that Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).

2. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14)

The ALJ relies on the testimony of Mr. Smelser and Lt. Saenz to find that the public intoxication standard applies to the alleged "sale to an intoxicated person" violations of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14). Although the term "intoxicated" is not defined in TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), the TABC Chief of Enforcement Mr. Smelser testified by deposition that the public intoxication standard set out in TEX. PENAL CODE § 49.02(a) should be applied.[16]

Lt. Saenz testified on cross examination that a person could be legally intoxicated pursuant to TEX. PENAL CODE § 49.01–that is, have a blood alcohol concentration of at least 0.08 grams of alcohol per 110 liters of breath–for purposes of a DWI arrest, yet not meet the standard of public intoxication, which requires that an intoxicated person may endanger himself or another person. He said the APD statistics indicated there might be a problem at Dallas, so TABC investigated the club to determine if Respondent's employees were serving obviously intoxicated patrons who might be a danger to themselves or others, in attempt to prevent those patrons from getting out on the roadway. He said if a customer has a blood alcohol concentration of 0.08, but does not exhibit signs of intoxication, TABC will not file a "sale to intoxicated persons" citation.

In its closing argument, Staff states "The consistent testimony of all TABC witnesses clearly stated that 'an intoxicated person' for purposes of committing a sale to intoxicated person and on-premise[s] violations, is a person who exhibited outward signs of intoxication, i.e. bloodshot eyes, slurred speech, loss of motor functions and may be a danger to himself or others."[17]

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[16] Deposition of Mr. Smelser, Respondent's Exhibit 18, page 50.

[17] Petitioner's Final Summation and Closing Argument, at 2.

Staff also argues that in fairness to the seller/server, TABC does not cite a violation of TEX. ALCO. BEV. CODE § 11.61(b)(14) against a seller/server and permittee unless the person exhibited signs of intoxication and may have been a danger to himself or others–factors sufficient to establish probable cause to arrest the person for public intoxication.[18]

Therefore, Staff must prove that Respondent's employees served publicly intoxicated patrons on March 30, 2005, and July 6, 2005, to prevail on the allegation that Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

3. 16 TAC § 45.103(c)(11)

The ALJ relies on the TABC rule found at § 45.103(b), which defines "excessive consumption" as being the public intoxication standard set out in TEX. PENAL CODE § 49.02, for determining whether the alleged violations of 16 TAC § 45.103(c)(11) occurred.

Therefore, Staff must prove that Respondent's on-premises promotions on March 30, 2005, and May 18, 2005, were reasonably calculated to induce customers to excessively consume alcoholic beverages to the point of public intoxication in order to prevail on the allegation that Respondent violated 16 TAC § 45.103(c)(11) on either of those dates.

Finally, Staff must prove that Respondent's on-premises promotion on July 6, 2005, was reasonably calculated to cause patrons to drink until they became publicly intoxicated if Staff is to prevail on the allegation that Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and 101.61 and 16 TAC § 45.103(c)(11) on that date.

b. Elements of public intoxication

Under relevant case law, warrantless arrest for public intoxication requires that the suspect be not merely intoxicated, but intoxicated to such an extent that he may endanger himself or

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[18] *Id.*, at 3.

another.[19] Case law does not require the danger to be immediate. Potential danger is adequate to establish the endangerment element of public intoxication.[20]

Examples of endangerment to oneself or others while intoxicated include belligerent or violent behavior,[21] intent to drive an automobile while intoxicated;[22] being in a location in which the person might be hurt due to his intoxicated state;[23] or an admission that the intoxicated person has plans to commit a violent act.[24] While the examples are not exclusive, the ALJ will use them as guidelines as to whether Mr. Avila, Mr. Haid, and Mr. Herzer were in fact publicly intoxicated.

C. Penalty

Upon Respondent's objection, no evidence of aggravating circumstances was permitted to be introduced at the hearing on the merits, because Staff's answer to Respondent's Interrogatory No. 13 was that no aggravating circumstances were considered in the recommended penalty, and that "[t]he recommended penalty was within the minimum range for the two violations in this case."[25] Staff's answer relates to SOAH Docket No. 458-06-0117 prior to its consolidation with SOAH Docket No. 458-06-0116, so refers to the two alleged violations on March 30, 2005, of (1) selling an alcoholic beverage to an intoxicated person and of (2) engaging in a practice reasonably calculated

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[19] Simpson v. State (App. 1 Dist. 1994) 886 S.W. 2d 449, petition for discretionary review refused. *See also* City of San Juan v. Gonzalez (App. 13 Dist. 2000) 22 S.W.3d 69.

[20] Meek v. Texas Department of Public Safety, 178 S.W.3d 925 (Tex.App.–Dallas 2005); Gallagher v. State, 778 S.W.2d 153, 154 (Tex.App.–Houston[1st.Dist.]1989, no pet.)

[21] Officer saw man throw down sign and talk belligerently, after getting out of a car. Raley v. Fraser, C.A.5(Tex.)1984, 747 F.2d 287. Man was arguing violently in the middle of the street. Simpson v. State, *supra*. Intoxicated person threw beer bottle in general direction of bartender: Loden v. State (Cr.App. 1978) 561 S.W.2d 2.

[22] Person gets behind the wheel of a car after walking in a swaying and stumbling manner for 20-25 feet. Alexander v. State (App. 1 Dist. 1982) 630 S.W.2d 613.

[23] Person was in intoxicated condition in public parking lot where cars traveled in and out. White v. State (App. 4 Dist. 1986) 714 S.W. 2d 78.

[24] Intoxicated person said he has killed people and plans to kill more people. Banda v. State (Cr.App.1994) 890 S.W. 2d 42, certiori denied 115 S.Ct. 2253, 515 U.S. 1105, 132 L.Ed.2d 260.

[25] *See* Respondent's Exhibit 5.

to induce consumers to drink alcoholic beverages to excess or that would impair the ability of Respondent to monitor or control their consumption level.

Pursuant to the Standard Penalty Chart found at 16 TAC § 37.60, the penalty for a first violation of sale to an intoxicated person under TEX. ALCO. BEV. CODE § 11.61(b)(14) is 10-to-15 days suspension of the permit, and for a second violation is 15-to-30 days suspension of the permit.

The Standard Penalty Chart lists the penalty for a place or manner on-premise[s] promotion that violates TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) as 15 days suspension-to-cancellation of permit, regardless of the number of violations.

However, the penalties set out in the Standard Penalty Chart are not binding upon a TABC administrator as far as imposing a penalty, or upon an ALJ, as far as recommending a penalty, when an administrative proceeding has occurred. 16 TAC § 37.60(g).

IV. EVIDENCE AND ANALYSIS

A. On March 30, 2005, and July 6, 2005, did Respondent or its employee sell or deliver an alcoholic beverage to an intoxicated person?

1. March 30, 2005

a. Testimony of APD Detective Kelly Davenport

APD Detective Kelly Davenport testified on behalf of TABC that she was working undercover at Dallas on Wednesday, March 30, 2005, looking for patrons who were obviously intoxicated. She arrived with APD Officer Amy Lynch, who also was working undercover. She said upon her arrival, Dallas was "jam packed" around the bars and dance floor, although patrons could still move around the pool tables.

Detective Davenport said that among the patrons she observed was Mr. Avila, who "looked fine" at 11 p.m. At that time he was standing at the corner of the dance floor and the bar tended by

Ms. Benjamin, with two long-neck beers in his hand, talking to someone, she said. Detective Davenport said she saw him drink the two beers, and saw him drink at least one more beer later on, but could not say how many he consumed in total while she was at Dallas.

Detective Davenport said she observed Mr. Avila about every half hour as she made the loop around the dance floor, that he was always at the same corner, and that Ms. Benjamin tended the bar the entire time Detective Davenport was at Dallas. She said Mr. Avila and Ms. Benjamin were as close as a bar-width apart from one another as Ms. Benjamin served patrons, close enough for Ms. Benjamin to detect signs of intoxication.

Detective Davenport testified that when Dallas closed at 2 a.m. and the lights came up, she observed that Mr. Avila's appearance and stance had noticeably changed from when she had first seen him at 11 p.m. She described him as "diminished" as far as his awareness and physical state. She said he had bloodshot eyes, his head was "heavy," his shirt was not neatly tucked, and he was leaning, almost as if for support. She said she walked within three feet of him, but did not speak to him.

Detective Davenport said she thought Mr. Avila was obviously intoxicated, and suspected he could be arrested for public intoxication. She testified that as an undercover police officer, she needed to rely on uniformed law enforcement officers outside to investigate him for public intoxication. However, she said she had trouble reaching the outside officers on her cell phone. She left the building, then saw Mr. Avila leave via the west entrance and walk to his parked car at the north end of the parking lot.

She said Mr. Avila swayed and stared at his car keys, then got in and started the car. She said she walked up to his car to open the door, and saw him lean over and go to sleep. She said it was at that point that she determined Mr. Avila was a danger to himself and met the criminal elements of public intoxication, because a car is a weapon.

b. Austin Police Officer Amy Lynch

Austin Police Officer Amy Lynch is a member of the department's Alcohol Control Team. She arrived at Dallas at approximately 10 p.m.[26] March 30, 2005, to work undercover to see if bartenders were serving alcoholic beverages to intoxicated patrons. She said Detectives Davenport, Tamara Joseph and Ronald Russell were also there, working undercover. She said she paired up with Detective Davenport, and the two of them made note of a patron who was later identified as Mr. Avila, who appeared to be intoxicated.

Officer Lynch said Mr. Avila was standing next to the south bar located between the restrooms. She said she saw him buy two Budweisers before the drink special ended at 11 p.m., and saw him drink them. She testified that Mr. Avila bought other beers between 11 p.m. and last call, but that she did not keep track of the number. She said she then saw Mr. Avila buy a beer during last call, at about 1:50 to 1:55 a.m., in a cash transaction that took about 30 seconds. She said she was standing 15-to-20 feet away from Mr. Avila when the sale occurred. She described the bartender who sold the last beer to Mr. Avila as a young female with dark hair and blonde highlights, later identified as Ms. Benjamin.

At closing time, Officer Lynch observed Mr. Avila to appear more disheveled than he had earlier, to have an untucked shirt, to be leaning on the bar with his left arm, sliding forward along the bar. She said his appearance had deteriorated between 11 p.m. and last call, and that he was drinking his last beer as the bar was closing.

Officer Lynch said she attempted unsuccessfully to use her cell phone to notify uniformed law enforcement officers outside that they should detain Mr. Avila for possible public intoxication. She said she had not called the uniformed officers as soon as the last sale to Mr. Avila occurred, probably because it was too loud inside Dallas to be heard on a cell phone.

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[26] Detective Russell states the undercover officers arrived at 11 p.m., *infra*.

Officer Lynch said it should have been obvious to Ms. Benjamin that Mr. Avila was intoxicated, because he had lost the normal use of his mental or physical faculties due to the introduction of alcohol into his body. However, she also testified that before last call, she could have "gone either way" as to whether Mr. Avila was publicly intoxicated, because while he was obviously intoxicated, he was not necessarily a danger to himself or others. She said it was later, in the parking lot, when she realized Mr. Avila intended to drive his car, that she called in the marked units to detain him for public intoxication.

c. Testimony of APD Detective Ronald G. Russell

APD Detective Russell testified that he worked undercover at Dallas from 11 p.m. to 2 a.m. on the night of March 30, 2005. He said he entered the club at about 11 p.m., after happy hour, with APD Detectives Davenport and Lynch. He testified that Mr. Avila was arrested for public intoxication after 2 a.m., but said he is not the police officer who identified Mr. Avila as being publicly intoxicated to law enforcement officers waiting outside.

Detective Russell prepared an Affidavit for Warrant of Arrest and Detention[27] related to Mr. Avila's arrest, based on information provided to him by Officer Lynch. The affidavit states that at 1:45 a.m. on March 31, 2005, Mr. Avila had very glassy eyes, and a puffy, sleepy face indicative of someone who is very intoxicated. It also states that when Mr. Avila spoke with Ms. Benjamin, he had very slurred and thick-tongued speech, and attempted to kiss her hand when she served him. The affidavit concludes that at last call, Mr. Avila purchased one more beer from Ms. Benjamin, even though he was obviously intoxicated.

d. Testimony of APD Detective Tamara Joseph

APD Detective Joseph testified that she worked undercover at Dallas on March 30, 2005. She said she arrived at 10 p.m. or so, and stayed until 2 a.m. March 31, 2005. She said she did not

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[27] *See* Exhibit 1, attached to Deposition of Agent Humphreys, Respondent's Exhibit 19.

personally observe Mr. Avila, but was involved in identifying Ms. Benjamin as the bartender who had served him.

e. Deposition of TABC Agent Timothy Humphreys

TABC Agent Humphreys was assigned to work with the APD Alcohol Control Team in carrying out the sting against Dallas.[28] He and two other TABC agents were at Dallas on March 30, 2005, participating in the undercover operation for which APD supplied the undercover officers to see if bartenders or waitresses were selling alcoholic beverages to intoxicated customers.[29] Agent Humphreys' role was to wait in a car in a parking lot across the street to be available for undercover officers to call him if they believed a violation had occurred.[30]

Agent Humphreys stated that at closing time, he did not see anyone leave Dallas who he thought was publicly intoxicated.[31] He saw Mr. Avila, but said there was nothing about the way Mr. Avila was walking to his car that would indicate he was publicly intoxicated.[32] The APD undercover officers then gave him a description of Ms. Benjamin, and he went inside Dallas and made contact with her and brought her outside.[33] By that time, the APD officers had gotten into their unit across the parking lot, from where they confirmed Ms. Benjamin was the bartender who had sold a beer to Mr. Avila.[34] He said he did not ask Ms. Benjamin for a bar tab as evidence that she had served Mr. Avila.[35]

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[28] Deposition of Agent Humphreys, Respondent's Exhibit 19, page 38, lines 5-7.

[29] *Id.*, page 46, line 17, through page 47, line10.

[30] *Id.*, page 47, lines11-18; page 50, lines 9-11; and page 52, lines 14-22.

[31] *Id.*, page 67, lines 16-20.

[32] *Id.*, at 71.

[33] Agent Humphreys' testimony at this point contradicts his earlier statement about being in the parking lot at closing time. Here, he states he went inside and eontaeted Ms. Benjamin prior to closing time, at about 1:30 a.m. *See* Deposition of Agent Humphreys, Respondent's Exhibit 19, page 81, line 22 through page 83, line 13.

[34] Deposition of Agent Humphreys, Respondent's Exhibit 19, page 76, lines 6-24.

[35] *Id.*, page 79, lines 1-7.

f. Report of Ortho Duboise IV[36]

APD Officer Ortho Duboise IV arrested Mr. Avila for public intoxication at approximately 2 a.m. the night of March 30, 2005. According to the report, he and APD Officer J. Burns made contact with Mr. Avila in Dallas' south parking lot, where Mr. Avila was unconscious, sitting in the driver's seat of a car, with the engine running. Officer Duboise observed an odor of alcoholic beverage on Mr. Avila's breath, found him difficult to understand when he spoke, and saw him stumble when getting out of the car, to the point he had to be supported by Officer Burns. After determining Mr. Avila was a danger to himself and others due to fact he was passed out behind the wheel of a running car, in a public place, with no other transportation home, the officers arrested him for public intoxication.

g. Testimony of Sonya Benjamin, Respondent's employee

Respondent's witness Ms. Benjamin is the Dallas bartender who was cited by TABC on March 31, 2005, for serving an intoxicated person, Mr. Avila. Ms. Benjamin testified that on March 30, 2005, she and one other bartender were working at the south bar.[37] She said her shift began at 9 p.m.

Ms. Benjamin said she first served Mr. Avila between 10:30 p.m. and 11 p.m., when he bought one Bud Light beer.[38] She said Mr. Avila might have gone to the restroom during the evening, but otherwise stayed in front of her until the lights came up at 2 a.m., sometimes facing the dance floor, sometimes facing the bar. She said she served him a total of four Bud Light beers, the last one at around 1:40 a.m. for last call. On cross examination, she agreed that he could have bought more beer at another bar in the club.

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[36] The report is attached to the Deposition of Agent Humprhreys, Respondent's Exhibit 19.

[37] *See* Respondent's Exhibit 10.

[38] Officer Lynch testified that Mr. Avila bought two beers before 11 p.m.

Ms. Benjamin said that when she served Mr. Avila his last beer, he was not staggering; did not have slurred speech; did not fumble for his money; was not loud, obnoxious or rude; did not use profanity; and exhibited no signs of intoxication, although he seemed more relaxed than he had earlier in the evening. She said she did not notice if his eyes were red or glassy, even after the lights came up at closing time. She testified that in her opinion, Mr. Avila was not obviously intoxicated or publicly intoxicated.

h. Testimony of Mr. Thompson

Mr. Thompson, who has been Dallas' general manager for 17 years, testified on Respondent's behalf that he saw Mr. Avila around the bar on March 30, 2005, but has no personal knowledge of what Mr. Avila looked like after leaving Dallas. He said he knew that night that Ms. Benjamin had been given a TABC citation for serving an intoxicated person, Mr. Avila.

2. July 6, 2005

a. Testimony of APD Detective Russell

On Wednesday, July 6, 2005, Detective Russell worked undercover at Dallas with other APD officers, looking for the sale of an alcoholic beverage to an intoxicated person. He said intoxicated patrons typically exhibit poor motor skills, have difficulty walking, have glazed-over eyes, and might be leaning against a wall or lying on the bar. He said the goal of the undercover officers is to find a person who is so intoxicated it should be obvious to everyone, including drinking establishment employees. He said it is APD policy to observe a bartender make two sales to an obviously intoxicated person before arresting the bartender. He said the reasoning is that the bartender should not have sold an alcoholic beverage to the intoxicated person the first time, but definitely should not have sold a second time, because the customer would have consumed the first sale, and would be even more intoxicated.

He said that on July 6, 2005, he first observed a possibly intoxicated person, Mr. Haid, at 7:45 p.m., leaning over the dance rail, with glassy eyes and a beer in his hand. He testified that Mr.

Haid was under observation the entire time until his arrest for public intoxication at approximately 9:30 p.m.

Detective Russell said that at 8 p.m., he saw Mr. Haid walk in an exaggerated way to the beer tub where the server was later identified as Ms. Cannon. He said Mr. Haid bought two 69-cent Miller Lites for himself, and dropped his change in the beer tub. He said Mr. Haid was swaying and leaning as he looked for the coins, but did not find them and walked off to shoot pool.

Detective Russell said Mr. Haid then walked back to the dance floor with one beer in each hand, and drank a friend's full beer as well as his two. Detective Russell testified Mr. Haid walked back to Ms. Cannon's beer tub, swaying and leaning; that he clanged two beer bottles together, almost broke them, and started laughing hysterically. He said Ms. Cannon completed the sale of another two beers to Mr. Haid, to make a total of six beers: the one he had in his hand at 7:45 p.m., his friend's beer, and the four he purchased from Ms. Cannon.

Detective Russell testified that the undercover officers then called in two TABC agents to make contact with Mr. Haid. He said by that time, Mr. Haid had consumed all of his fifth beer, and was drinking his sixth beer. He said the TABC agents asked Mr. Haid to step outside. Detective Russell said he did not make contact with Mr. Haid or Ms. Cannon at any time, and left just as Mr. Haid was being taken into custody. He said he did not see Mr. Haid perform the field sobriety tasks. In Detective Russell's opinion, Mr. Haid was so flagrantly intoxicated that it should have been obvious to anyone coming into contact with him.

b. Testimony of APD Detective Joseph

Detective Joseph arrived at Dallas between 7 p.m. and 7:30 p.m. on July 6, 2005. She said she did not personally observe Mr. Haid, that it was Detective Russell who developed the probable cause for his arrest. However, she said she observed Mr. Haid drink four beers between 7:45 p.m. and 9 p.m. or so, and observed him from a distance when he bought two longneck beers.

c. Testimony of TABC Agent James Malloy

TABC Agent James Malloy was a member of the arrest team working with undercover police officers at Dallas on July 6, 2005. He arrived between 7 p.m. and 8 p.m., and waited outside until one of the officers called him regarding a patron, who turned out to be Mr. Haid, and an employee of Dallas, later identified as Ms. Cannon. He then went inside and made eye contact with Detective Russell to ensure Mr. Haid was the correct patron, and escorted Mr. Haid outside; TABC Agent Trisha O'Casey Rutledge contacted Ms. Cannon and brought her outside.

Agent Malloy said he identified Mr. Haid, interviewed him, and conducted field sobriety tasks. He said Mr. Haid exhibited six out of six clues for impairment on the horizontal gaze nystagmus task, three out of eight clues for impairment on the walk and turn task, and one of four clues of impairment on the one leg stand task. He said based on the observations of the undercover officers, the field sobriety task results, and his own observations that Mr. Haid had a strong odor of alcoholic beverage on his breath, bloodshot and watery eyes, slurred speech, delayed responses, and had admitted drinking four beers, he arrested him for public intoxication. Agent Malloy explained that it was Detective Russell who had determined that Mr. Haid was publicly intoxicated, but that he gathered additional evidence. He said he knows Detective Russell and trusts his judgment.

d. Testimony of TABC Agent Trisha O'Casey Rutledge

On July 6, 2005, TABC Agent Rutledge was part of a cover team assisting APD officers who were working undercover in Dallas. She said she is the TABC agent who cited Ms. Cannon for serving an intoxicated person.[39]

Agent Rutledge said that in general, an obviously intoxicated person has bloodshot eyes, slurred speech, a strong odor of alcoholic beverage on the breath, difficulty with motor skills,

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[39] Agent Rutledge testified as to signs of intoxication Mr. Haid exhibited after his arrest, but because these are signs that he did not exhibit before Ms. Cannon sold him beer, they are not relevant to the alleged violation of serving an intoxicated person.

difficulty walking, trouble comprehending, and is sometimes loud or boisterous, depending on the personality.

e. Testimony of Candice Cannon

On July 6, 2005, Ms. Cannon worked as a waitress at Dallas, serving beer from an ice-filled trough sitting on cinder blocks about four feet high. The beer tub was open from 8 p.m. to 1:45 a.m. Ms. Cannon said that from about 8:15 p.m. or 8:30 p.m. until about 10:30 p.m., she served Mr. Haid four Bud Light and Miller Lite longneck beers. She said he first bought one beer, then came back with a friend and bought two beers, and bought one more beer the last time she served him.

She described Mr. Haid as quite friendly, and mumbling a bit. She said she leaned down from the two-foot raised platform she was standing on to talk to him, and could understand him "just fine." She said during one purchase, she accidentally dropped Mr. Haid's change into the beer tub because she looked away when someone called her. She said it was not Mr. Haid who dropped the change; rather, the change did not get from her hand to his, and dropped into the tub.

She said when she served Mr. Haid his last beer, he was walking fine, did not have bloodshot eyes, did not have an odor of alcoholic beverage, and was not leaning, or grabbing onto anything for support. She said his speech was not slurred, and he was not loud, obnoxious, combative, aggressive, or using profanity. In her opinion, Mr. Haid was not a danger to himself or others, and was not publicly intoxicated.

f. Testimony of Mr. Thompson

Respondent's General Manager Mr. Thompson testified he was present at Dallas on July 6, 2005, when he was notified between 10 p.m. and 10:30 p.m. that a TABC agent had taken a patron outside, so he walked out to the parking lot to see what was happening. He said he found a TABC agent administering field sobriety tasks to Mr. Haid, and saw him check Mr. Haid's eyes, have Mr.

Haid stand on one leg, and perform the heel-to-toe test.[40] Mr. Thompson testified that he did not see Mr. Haid stagger or lose his balance while walking heel-to-toe. He also said he heard Mr. Haid say, "They're taking me to jail," and understood him clearly, noting that his speech was not slurred. He said he did not notice Mr. Haid's eyes, but saw no signs of impaired motor skills or balance, and no signs of nausea or loss of bladder or bowel control. He said Mr. Haid was not argumentative. He said he thought the TABC agent would not arrest him for public intoxication, because Mr. Haid was not a danger to himself or others.

Mr. Thompson testified he was aware that night that Ms. Cannon was cited by TABC for serving an intoxicated person, Mr. Haid. He said that had he been the server, he would have served Mr. Haid, because he did not appear to be intoxicated.

3. ALJ's analysis

a. Respondent's employee did not serve an intoxicated person on March 30, 2005.

It is undisputed that Respondent's employee Ms. Benjamin served Mr. Avila at least three beers sometime between 10:30 p.m. and 1:55 a.m. on the night of March 30, 2005. However, Staff did not prove that Mr. Avila was intoxicated to the degree that he may endanger himself or another person–pursuant to TEX. PENAL CODE § 49.02–at the time Ms. Benjamin served him any of the beers, and thus did not prove Ms. Benjamin served an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

Detective Davenport testified she did not believe Mr. Avila was publicly intoxicated until he got behind the wheel of his car in the Dallas parking lot, started the engine, and leaned against the window and fell asleep. Detective Lynch said she could have "gone either way" as to whether Mr. Avila was publicly intoxicated at the time Ms. Benjamin served him his last beer, because although he was obviously intoxicated, he was not necessarily a danger to himself or another person. Agent Humphreys said he observed Mr. Avila leave Dallas and walk across the parking lot, but said there was nothing about the way he walked that indicated he was publicly intoxicated. Ms. Benjamin

[40] Presumably the TABC agent conducted the three standardized field sobriety tasks known as the horizontal gaze nystagmus test, the one leg stand, and the walk and turn.

testified that in her opinion, Mr. Avila was neither intoxicated nor publicly intoxicated when she served him at last call. Officer Duboise arrested Mr. Avila for public intoxication after determining he was a danger to himself and others due to the fact he was passed out behind the wheel of a running car, in a public place, with no other transportation home.

The reported signs of intoxication exhibited by Mr. Avila prior to and at the time Ms. Benjamin sold beer to him do not include belligerent or violent behavior, an intention to drive an automobile, or any other behavior or situation that a reasonable person would believe might constitute endangerment to himself or another person. Therefore, Staff failed to prove that Respondent's employee served or sold an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE § 11.61(b)(14) on March 30, 2005.

b. Respondent's employee did not serve an intoxicated person on July 6, 2005.

The evidence establishes that on July 6, 2005, Ms. Cannon sold four beers to Mr. Haid at Dallas. However, the evidence is insufficient to prove Mr. Haid was publicly intoxicated at the time Ms. Cannon sold him any of the beers.

Detective Russell testified that Mr. Haid was "flagrantly intoxicated," but did not testify as to any behavior or situation that constituted endangerment to Mr. Haid or others, except perhaps for clanging two beer bottles together. Had the beer bottles broken, a reasonable person could believe Mr. Haid may have been a danger to himself or another. However, the beer bottles did not break.

Agent Malloy arrested Mr. Haid for public intoxication, and testified that Mr. Haid exhibited several clues of impairment on three field sobriety tasks, had a strong odor of alcoholic beverage on his breath, bloodshot and watery eyes, slurred speech, delayed responses, and admitted drinking four beers, but did not specify how Mr. Haid was a danger to himself or others, or list any signs of intoxication–such as falling or being belligerent or violent–that would indicate Mr. Haid may have been a danger to himself or others.

The only testimony regarding Mr. Haid's demeanor came from Mr. Thompson, who said Mr. Haid was not argumentative, and from Ms. Cannon, who described him as "quite friendly." She also said he was not loud, obnoxious, combative, aggressive, or using profanity.

Because Staff did not prove Mr. Haid may have been a danger to himself or another person, the ALJ finds Respondent's employee did not serve an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14) on July 6, 2005.

B. Did Respondent violate TEX. ALCO. BEV. CODE § 11.61(b)(7)[41] and 16 TAC § 45.103(c)(11) on March 30, 2005, and May 18, 2005, by engaging in any practice that is reasonably calculated to induce consumers to drink alcoholic beverages to excess, or that would impair the ability of the licensee or permittee to monitor or control the consumption of alcoholic beverages by consumers?

1. Testimony of Mr. Smelser

Mr. Smelser, Chief of TABC's Enforcement Division, testified that while Dallas' 69-cent drink special meets the definition of an on-premises promotion, TABC is not concerned with what price drinking establishments charge for drinks, but rather with whether they serve intoxicated persons. He said service to intoxicated persons could be the result of drink specials which lead a customer to drink to excess, lack of adequate wait staff to monitor or control customers' consumption of alcoholic beverages, or both. He said TABC has not adopted a recommended ratio of wait staff to customers to ensure adequate monitoring or control during an on-premises promotion.

In his deposition, Mr. Smelser said it is not against the law to hold an on-premises promotion, unless it results in publicly intoxicated people.[42] He said that if a permittee engages in a practice reasonably calculated to induce customers to drink to excess, it would lead to more than one or two publicly intoxicated persons on the premises on a given night.[43] He said he did not believe that one

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[41] Staff cites TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) in its Second Amended Notice of Hearing related to violations alleged to have occurred on March 30, 2005, and March 18, 2005, but does not quote the language of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7): "...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;..."

[42] Deposition of Mr. Smelser, Respondent's Exhibit 18, page 60, lines 9-20.

[43] *Id.*, at 61-62.

arrest for public intoxication out of 1,492 customers is an indication that a drinking establishment's practice is reasonably calculated to induce customers to drink excessively.[44] He also said that if a TABC agent goes to a location on eight occasions, and does not see a publicly intoxicated person on seven of those occasions, when the club is running the same drink special and on-premises promotion, it would be hard to conclude the drinking establishment is engaging in a practice reasonably calculated to induce customers to drink to excess.[45]

2. Testimony of Mr. Thompson

a. Wednesday night drink special

Mr. Thompson testified that in March 2005, the Wednesday night drink special consisted of 69-cent domestic beer, wine, and well drinks from 8 p.m. to 10 p.m., with slightly higher prices between 10 p.m. and 11 p.m.,[46] and regular prices from 11 p.m. to 2 a.m. He said Dallas also subcontracted shots to a small company whose waitress circulated through the crowd, but that the shot drinks were eliminated in July 2005.

Mr. Thompson said Lt. Saenz told him TABC believes the 69-cent drink promotion is the cause of the DWI arrests of Dallas patrons as reported by APD, because most of those arrests occurred on Wednesday nights or early Thursday mornings. But Mr. Thompson noted that there was a rush at 10:30 p.m. Wednesdays, after the 69-cent drink special had ended. He speculated the reason for the rush was because Dallas was the social scene in Austin, Texas, on Wednesday nights. He said usually the club was still at capacity at 11 p.m. Wednesday nights when the higher-priced drink special ended, and people would have to form a line outside so that two could come in as two left the building.

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[44] *Id.* Note that the ALJ does not know where the number 1,492 came from, unless it is from the idea that Dallas has a capacity of 885 people, and customers flow in and out over a period of time.

[45] *Id.*, page 62, lines 9-13. Agent Humphreys said TABC was at Dallas every Wednesday night from May 18, 2005, through July 6, 2005, unless something came up, which the ALJ calculates to be eight Wednesdays. Deposition of Agent Humpreys, Respondent's Exhibit 19, page 113, line 25 through page 116, line 3.

[46] The testimony regarding the price of drinks from 10 p.m. to 11 p.m. Wednesdays varied with the witnesses, but they consistently said it was higher than 69 cents yet below the regular price, depending on the drink.

Mr. Thompson said the purpose of the on-premises promotion was to "get people through the door early, to get a base crowd for the rest of the night." He disputed the idea that Dallas was selling drinks below cost, and when asked, said even at 69 cents, there was a profit on a well drink, which costs Respondent between 15 cents and 17 cents.

b. Wednesday night staffing

Mr. Thompson said he believes the club was staffed adequately to handle its capacity of 885 people on March 30, May 18, and July 6, 2005. He said employees were "watching every square foot of the club," which has five bars and two beer stations. He said that a manager[47] was on duty, always circulating, usually on the floor or in the parking lot, but sometimes in the office. He said the disc jockey is up high where he can watch over the club, and there were eight bartenders and between five and eight waitresses–which he characterized as "plenty of servers"–and eleven security guards working, as well as two uniformed guards from the Travis County Constable's Office who were on duty outside from 8 p.m. to 11 p.m. He said the eleven security guards wore white shirts with the Dallas logo, but did not have the word "security" on their shirts.

Mr. Thompson said the two uniformed guards were stationed at the exit door to handle situations beyond the capability of the other Dallas security guards. He said one security guard was at the door to check I.D.s, and another was there to ensure nobody brought an alcoholic beverage onto the premises. He said the remaining nine security guards were stationed around the club, with three or four of them circulating through the establishment, and one stationary at the back bar. He said the Dallas door staff also checked the parking lot, and kept in contact with the manager via walkie talkies.

Mr. Thompson testified that on Wednesday nights there are two bartenders at the front bar, two bartenders at the middle bar, one bartender at the corner bar, and one bartender at the bar near the front door. He said the beer troughs are staffed by waitresses. He said the bar backs keep the bartenders supplied with anything necessary to serve drinks, including fruit, straws, and glassware,

[47] Mr. Thompson said he was the manager on duty on March 30, May 18, and July 6, 2005, unless he was on vacation.

because the bartenders need to serve customers without taking time to cut limes for drinks, for instance. He testified that only TABC certified seller-servers work at the bars, and that new employees are not trained until they obtain their TABC seller-server certification.

Mr. Thompson testified that wait staff generally have about 30 seconds to observe a person before making a sale, during which time they ascertain whether the person is intoxicated and should not be allowed to make the purchase. He said if a bartender or waitress cuts a patron off, security is called. He said managers have had to intervene before, telling the customer, "I'm sorry, but my server has determined that she is no longer comfortable serving you." He said the manager backs up the server's determination. He said the manager or an employee also finds out if the intoxicated patron has a ride or needs to take a taxi home.[48]

Mr. Thompson said that on a typical Wednesday night, the line at the beer tub is five-to-ten people deep. He said the waitresses are not encouraged to move the line quickly, and not reprimanded if the line moves slowly. He said the individual server monitors the number of drinks going to a customer, their condition, and decides whether to continue serving them. He said if the customer is running a tab, the server can keep track of the number of drinks that way. Otherwise, the server must make a mental note of how many drinks a customer has bought. He agreed that a customer could circulate and buy drinks from different servers. He said the security guards only ask customers how many drinks they have had if they appear to be intoxicated. He said on any given night, the number varies, but they usually identify three or four customers who they believe might be intoxicated, and find rides home for them.

Mr. Thompson said when the crowd approaches capacity, he instructs security guards to have customers form a line outside, so that as two patrons leave the building, two more may come in. He said during Wednesday night happy hours, the crowd typically builds until around 10:30 p.m. to 11 p.m., when the "two out, two in" plan usually needs to be used until about midnight or 12:30 a.m.,

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[48] Mr. Thompson said Dallas pays for two or three rides per month if a person is intoxicated, spending about $25 per trip. He said he did not know if Dallas sent anyone home in a cab on March 30, May 18, or July 6, 2005.

when there still might be 700 customers in the building. He said last call is at 1:40 a.m., and when the lights come up at 2 a.m., security guards ask customers to move to the front of the club.

3. Testimony of Ms. Benjamin

Ms. Benjamin testified that on Wednesdays at 11 p.m., when the drink specials end, the crowd typically thins out a little, with most people leaving at 1 a.m., although customers are still on the premises until 2 a.m.

Ms. Benjamin testified that nobody encourages employees to violate TABC rules and regulations, that employees receive no bonus for selling more drinks, and that there are no incentives for selling more, such as being rotated to other locations within the bar that might yield more tips. She said merit is determined by seniority and experience behind the bar, not by who sells the most or least drinks.

She said Respondent posts a list of rules for serving alcoholic beverages, that includes not serving intoxicated persons, and information on how to handle intoxicated customers. She said the list is posted in three areas, including the back office and waitress room, but could not remember the third location.

4. March 30, 2005

a. Testimony of TABC Agent John King

TABC Agent John King testified that on March 30, 2005, he was stationed across the street from Dallas to be called in by APD undercover officers if needed and to observe for on-premises violations. He was called by the undercover officers, and was inside the bar for approximately 15 seconds. He described it as crowded toward the dance floor and side rails, but not at the very front. He said he saw Dallas staff members behind the bar, a host at the door, and an I.D. checker. He testified he was told by his supervisor to write an on-premises promotion violation citation if he saw a violation based on the public intoxication standard set out in TEX. PENAL CODE § 49.02.

No Office Discretion – wrong Penal Code

b. Testimony of APD Detective Russell

APD Detective Russell and two other APD officers worked undercover at Dallas from about 11 p.m. to 2 a.m. the night of Wednesday, March 30, 2005. He testified that he saw dozens of patrons who could have been arrested for public intoxication during the time he was on the premises, but did not specify which patrons he observed, what signs of intoxication each of them exhibited, or how any of them may have been a danger to themselves or others.

Detective Russell said the club was packed wall-to-wall when he arrived at 11 p.m., just as the drink special was ending. He said the crowd changed between 11 p.m. and 1 a.m., with about 100 patrons leaving at 11 p.m. and more filtering out beginning at 1 a.m. However, he testified that people were still coming in at 11 p.m.

He said he saw two or three Dallas employees at the door: one to take money, one to I.D. customers, and the manager. He said he saw two or three employees at each of the five bars, and saw several behind the two beer tubs. He said he has no idea how many waitresses were working that night. He said he saw at least one waitress selling shots, but did not know for how much. He said he did not see any of Respondent's employees checking the crowd inside, although there were a couple of security guards outside.[49]

He described long lines at the bars. He said he saw a few sales, but it was too loud for conversation so patrons would simply point to their previous drink and indicate how many they wanted to buy. He estimated it took about 30 seconds for bartenders and waitress to take and fill each order.

c. Testimony of APD Detective Tamara Joseph

APD Detective Joseph was at Dallas from approximately 10 p.m. until 2 a.m. the night of March 30, 2005, to work undercover. She described the club as "crowded," although she could not

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[49] Detective Russell testified that he worked undercover at Dallas on more than one occasion, and does not specifically remember if the security guards outside were uniformed or not on March 30, 2005, but stated that they usually wore uniforms.

guess how many people were there, as opposed to "packed" like it was when she worked undercover on July 6, 2005.

She said she watched one person in particular, who ordered a mixed drink and paid for it, then threw up on the bar, at which point the bartender returned the money, took the drink back, and called security.

In addition, she said she saw an estimated 20-to-30 publicly intoxicated patrons over the four-hour period, but did not identify any of the patrons or describe any of the signs of intoxication she observed, except to say some of the patrons were holding longnecks or drinks. She said she could not tell how long any of them had been there, and did not see any of them buy an alcoholic beverage.

d. APD Detective Kelly Davenport

APD Detective Davenport testified that she worked undercover at Dallas on March 30, 2005, to spot obviously intoxicated customers, that is, those who had lost the normal use of mental or physical capacity to the point they might endanger themselves or others. She said she arrived with Officer Lynch shortly before the drink special began. She said she did not know the details of the on-premises promotion, but was told in the APD briefing that it was a drink special night.

She described seeing three bars in Dallas: a small one right in front, one along the far wall parallel to the length of the dance floor, and one along the width of the dance floor. She said that upon her arrival, people were lined up six-to-ten deep at the bar, and several people were walking away from the bar with two drinks or two beers each. She said she did not see a line at the "parallel" bar.

On cross examination, she agreed said that the crowd thinned slightly when the drink special ended, but that Dallas remained crowded until closing time.

e. Officer Amy Lynch's written report

Officer Lynch stated in her written report for March 30, 2005,[50] that "[a]fter the 'happy hour' ended at 11 p.m. (69 cent drinks), the crowd thinned slightly but remained heavily occupied for the duration of the operation which ended at approximately 2:30 a.m."

f. Testimony of Ms. Benjamin

Ms. Benjamin said she obtained her TABC seller-server certification in September 2002,[51] and was certified when she began working as a waitress[52] at Dallas, but that her certification had lapsed in September 2004, and was not current on March 30, 2005. She said that in the TABC seller-server training session, she was taught signs of intoxication such as slurred speech, staggered walking, fumbling with money, droopy eyes, and leaning on the bar. She explained that she has cut off service to customers who she believed were one drink away from becoming intoxicated. She said if the person became upset, she called security, who asked them to leave the premises and called a cab for them if they needed a ride.

Ms. Benjamin stated that as a bartender, she was paid $2.13 per hour plus tips, and explained it is how a server interacts with customers that determines tip amounts, not the number of alcoholic beverages sold. That is, there is no tip incentive to continue serving a person, because it is not necessarily the case that the more drinks a customer purchases, the more the bartender receives from him in tips.

5. May 18, 2005

a. Testimony of Stephen McCarty

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[50] *See* Exhibit 1, attached to Deposition of Agent Humphreys, Respondent's Exhibit 19.

[51] Respondent's Exhibit 8. Ms. Benjamin said she renewed her certification in April 2005, and continues to work as a bartender at Dallas Nightclub.

[52] Ms. Benjamin said she was promoted to bartender one-and-a-half years later.

TABC Agent Stephen McCarty testified he entered Dallas at about 10:50 p.m. on Wednesday, May 18, 2005, when a drink special was in progress. He calculates there were about 200 customers inside, and 10-to-12 Dallas staff. He said there were roughly three bars, and a beer trough filled with ice, staffed by an employee, adjacent to the disc jockey's booth. He said he had waited outside from about 10 p.m. to 10:50 p.m. to be called by APD undercover officers, but was not, so he went inside on his own.

Agent McCarty testified that within 10 minutes he saw a person he believed to be intoxicated, later identified as Mr. Herzer, standing in the rear of the club, next to the dance floor with his eyes closed, swaying, and consuming "a mixed drink of distilled spirits." Agent McCarty said he asked Mr. Herzer to accompany him to the manager's office, and that Mr. Thompson was present during the public intoxication investigation. He said Mr. Herzer admitted drinking "four mixed distilled spirit drinks, and three distilled spirit drinks" from 9:30 p.m. to 11 p.m. He said Mr. Herzer was not belligerent or cursing, or loud or obnoxious. He said Mr. Herzer's speech was not slurred. He said Mr. Herzer was able to walk to the manager's office, and able to follow his commands. Agent McCarty said he administered field sobriety tasks, then arrested Mr. Herzer for public intoxication. He said he had determined Mr. Herzer may be a danger to himself because he had consumed seven alcoholic beverages in one-and-a-half hours and was in a public place, where he could walk into traffic or drive away.

Agent McCarty said that as a result of Mr. Herzer's arrest, he issued an administrative warning to Mr. Thompson. On cross examination, he said he was instructed by Lt. Saenz, his supervisor, to write an on-premises promotion violation if he found one publicly intoxicated patron who had consumed alcoholic beverages during the drink special. Office Discretion

In Agent McCarty's opinion, the 69-cent drink price induced customers to drink excessively, and Mr. Herzer's consumption of seven alcoholic beverages is evidence that Dallas had lost control of its ability to monitor its customers.

b. Testimony of Mr. Thompson

Mr. Thompson said he was working on May 18, 2005, when he was told around 10:30 p.m. that TABC agents were taking a possibly intoxicated customer into the storage area, where there was good lighting and the music was not loud, to conduct an investigation. Mr. Thompson went to the storage area to observe the investigation. He said he was standing six-to-seven feet from the customer, identified as Mr. Herzer, when the TABC Agent administered the horizontal gaze nystagmus and one leg stand field sobriety tasks. Mr. Thompson said Mr. Herzer's eyes were clear; he was cooperative, doing everything he was asked to do; he was conversing with the agents and his speech was not slurred; he was not off balance at all; and he admitted consuming three or four drinks. Mr. Thompson said although he observed no signs of public intoxication, Mr. Herzer was arrested for public intoxication and taken from the premises through the back door. He said TABC did not identify the bartender or waitress who had served Mr. Herzer, and did not cite Respondent or any of Respondent's employees as a result of Mr. Herzer's arrest.

4. ALJ's analysis

It is undisputed that Dallas offered on-premises promotions on March 30, 2005, and May 18, 2005. However, there is insufficient evidence to prove either promotion was reasonably calculated to induce customers to excessively consume alcoholic beverages. Under 16 TAC § 45.103, for there to be a showing of excessive consumption, there must be evidence of patrons becoming publicly intoxicated as a result of the promotion. TABC's own Chief of Enforcement, Mr. Smelser, testified in his deposition that if a permittee engages in a practice reasonably calculated to induce customers to drink to excess, it would lead to more than one or two publicly intoxicated persons on the premises on a given night. He said he did not believe that one arrest for public intoxication out of 1,492 customers is an indication that a drinking establishment's practice is reasonably calculated to induce customers to drink excessively. He also agreed that if the same TABC agent goes to a location on eight occasions, and does not see a publicly intoxicated person on seven of those occasions, when the club is running the same drink special and on-premises promotion, it would be hard to conclude the drinking establishment is engaging in a practice reasonably calculated to induce customers to drink to excess.

In this case, the evidence is that TABC and APD conducted sting operations at Dallas on March 30, 2005, and on eight consecutive Wednesday nights from May 18, 2005, through July 6, 2005. Based on the testimony, it is likely sting operations were conducted on additional Wednesday nights between March 30, 2005, and May 18, 2005, but specific dates are not in evidence. The testimony also establishes that Dallas was either at its capacity of 885 people on each of those nights, or at near capacity. The ALJ finds Mr. Smelser's opinion persuasive that one or two public intoxication arrests under these circumstances is not sufficient to conclude Respondent engaged in a practice reasonably calculated to induce customers to drink excessively.

Mr. Avila was the only Dallas patron arrested for public intoxication on the night of March 30, 2005. The evidence shows he bought one or two beers between 10:30 p.m. and 11 p.m., during the drink special, and his last beer between 1:40 a.m. and 1:55 a.m., nearly three hours after the drink special ended at 11 p.m. Even if it is assumed Mr. Avila was publicly intoxicated in his car in the Dallas parking lot after 2 a.m., the ALJ does not find that the drink special led to his excessive consumption. He only purchased one or two beers during the drink special. According to the TABC "Approximate Blood Alcohol Percentage in One Hour" chart,[53] a person who weighs 160 pounds[54] and consumes one beer in one hour, has an estimated blood alcohol concentration of 0.02, and is "possibly" influenced by the alcohol. A 160-pound person who consumes two beers in one hour has an estimated blood alcohol concentration of 0.05 and falls within the "possibly" influenced range. Therefore, even if he drank two beers purchased before the drink special ended, Mr. Avila did not excessively consume alcohol as a result of the on-premises promotion.

Mr. Herzer was the only Dallas patron arrested for public intoxication on May 18, 2005. However, there is no evidence that Mr. Herzer may have been a danger to himself or others, which is one of the elements of TEX. PENAL CODE § 49.02, from which 16 TAC § 45.103 derives the definition of "excessive consumption." Being intoxicated in a public place is not enough to establish that a person may be a danger to himself or others, despite Agent McCarty's opinion that Mr. Herzer could have walked into traffic or driven away from the premises. The fact is, Mr. Herzer

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[53] Respondent's Exhibit 3.

[54] Mr. Avila weighs about 165 pounds. *See* attachment to Testimony of Agent Humphreys, Respondent's Exhibit 19.

was not outside the building, and was not behind the wheel of a car or about to get into a car. Without showing that Mr. Herzer may have been a danger to himself or others, Staff did not prove Mr. Herzer excessively consumed alcoholic beverages. Without proving there was excessive consumption of alcoholic beverages, the first condition of 16 TAC § 45.103 is not met.

Neither does the ALJ find that the on-premises promotion impaired Respondent's ability to monitor or control the consumption of alcoholic beverages by consumers. Mr. Thompson's testimony establishes that Dallas had adequate staffing on the dates in question and that employees were "watching every square foot of the club."

Although Detective Russell said he saw dozens of patrons who could have been arrested for public intoxication on March 30, 2005, and Detective Joseph said she saw 20-to-30 publicly intoxicated patrons over a four-hour period on that same date, neither of them was asked at the hearing to describe the patrons or the signs of intoxication they observed. The ALJ cannot find there were "dozens" or "20-to-30" publicly intoxicated patrons on the premises on March 30, 2005, without underlying facts to support the detectives' conclusions.

Detective Joseph testified that on March 30, 2005, she saw one patron order a mixed drink and pay for it, then throw up on the bar, at which point the bartender returned the money, took the drink back, and called security. Without more information to establish intoxication and rule out illness, the ALJ cannot conclude that this particular patron was publicly intoxicated. However, what the incident does show is that Respondent's employee adequately controlled the situation by taking the mixed drink back and calling security.

Staff did not prove Respondent violated 16 TAC § 45.103 on March 30, 2005, or on May 18, 2005. Because Staff did not prove Respondent violated 16 TAC § 45.103, Staff failed to prove that Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) on those dates.

C. Does the place or manner in which Respondent conducts its business warrant the cancellation or suspension of its permits based on the general welfare, health, peace, morals and safety of the people and the public sense of decency, because on July 6,

2005, Respondent engaged in an on-premises promotion that violated TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and 101.61, and 16 TAC § 45.103(c)(11)?

1. Testimony of APD Detective Russell[55]

On Wednesday, July 6, 2005, APD Detective Russell, who is one of three detectives on the department's Alcohol Control Team, worked undercover at Dallas, looking for sale of an alcoholic beverage to an intoxicated person.[56] He was in the building from at least 8:28 p.m., when he opened a tab, to 10:09 p.m., when he closed the tab after purchasing 12 Wednesday night drink specials at 69 cents each for himself and two other undercover police officers.[57] Upon cross examination, Detective Russell said he did not drink any of the purchased alcoholic beverages that night, and was not intoxicated.

Detective Russell testified that the undercover officers were looking for patrons who were extremely intoxicated, those with signs of intoxication such as glazed-over eyes, difficulty walking, very poor motor skills, and who were leaning against a wall or lying on the bar. He said the signs of an extremely intoxicated person should be obvious to everyone, including drinking establishment employees. Detective Russell said more than one undercover officer is necessary to observe a particular patron or employee, because if one undercover officer watches someone, the patron or employee becomes suspicious.

Detective Russell said that in his experience in working undercover at Dallas, he has found Respondent to do a "good job" of screening out minors and people attempting to bring alcoholic beverages into the building. But he said during the three hours he was at the club on July 6, 2005, he observed dozens of publicly intoxicated patrons, although he did not describe the patrons or the signs of intoxication they exhibited. He explained there were not enough police officers on hand to

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[55] Detective Russell's testimony regarding his role in the arrest of Mr. Haid on July 6, 2005, is set out *supra*.

[56] Detective Russell explained that pursuant to TEX. ALCO. BEV. CODE ANN. § 101.63, it is a crime to sell an alcoholic beverage to a habitual drunkard, intoxicated or insane person. However, the administrative hearing before SOAH is a civil proceeding, and Staff did not plead this misdemeanor offense.

[57] *See* Respondent's Exhibits 6 and 7.

arrest all of them. However, at approximately 10 p.m., the undercover officers identified one patron–Mr. Haid–as intoxicated, and called in a TABC agent to investigate.

Detective Russell said Dallas was not crowded when he arrived at about 7:45 p.m., but that people started pouring in at 8 p.m., when the 69-cent drink special began with an announcement over a loudspeaker. He said Dallas was packed by 9 p.m. He testified that at 10 p.m., the 12-ounce longneck beer price was raised from 69 cents to $1.69 apiece. He believed the special was to end at 11 p.m., but was not sure. He said the club was still packed when he left shortly after 10 p.m.

2. Testimony of APD Detective Tamara Joseph[58]

Detective Joseph said she arrived at Dallas between 7 p.m. and 7:30 p.m. on July 6, 2005, to work undercover as a member of APD's Alcohol Control Team. She said she observed "several" patrons who she believed were impaired by the use of drugs or alcohol to the point they may endanger themselves or another. She testified that some of them were holding long-neck beers, but did not describe specific patrons or their respective signs of intoxication.

3. Testimony of TABC Agent Malloy[59]

Agent Malloy arrived at Dallas between 7 p.m. and 8 p.m. to work as a member of the cover team waiting outside to assist the undercover officers. After being called by the undercover officers at 9:24 p.m., he went inside the building "for a few minutes" to make contact with Mr. Haid. He described the bar as "pretty crowded."

4. Testimony of TABC Agent Trisha O'Casey Rutledge[60]

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[58] Detective Joseph's testimony regarding the arrest of Mr. Haid on July 6, 2005, is contained earlier in this Proposal for Decision.

[59] Agent Malloy's testimony regarding the arrest of Mr. Haid on July 6, 2005, appears earlier in this Proposal for Decision.

[60] Agent Rutledge's testimony regarding her role in the July 6, 2005 arrest of Brian Haid is set out above.

Agent Rutledge testified that Mr. Haid had his car keys at the time he was arrested for public intoxication. She said while she was talking with Ms. Benjamin and Mr. Thompson, Mr. Haid managed to light a cigarette in the front seat of her car, despite being handcuffed with his hands behind his back. She said he had destroyed several cigarettes in the process, which she cleaned up. She testified that during the 15-minute drive to the Travis County Jail, Mr.Haid became more verbally combative, and had to be told at least six times why he had been arrested and why he was *en route* to jail. She said Mr. Haid admitted buying four beers for 69 cents each. She said she believes he was displaying more signs of intoxication after his arrest because the alcohol he had consumed was being absorbed into his system rather than eliminated from it, causing his blood alcohol percentage to rise.[61]

5. ALJ's Analysis

It is undisputed that Dallas offered an on-premises promotion on July 6, 2006. However, there is insufficient evidence to prove the promotion was reasonably calculated to induce customers to excessively consume alcoholic beverages. Mr. Haid was the only Dallas patron arrested for public intoxication on that night, and the ALJ has found he was not a danger to himself or others. Therefore, the evidence does not support the allegation that Respondent violated 16 TAC § 45.103.

Although Detective Russell testified that during the three hours he was at the club on July 6, 2005, he observed dozens of publicly intoxicated patrons, no testimony was elicited from him to support that conclusion. Detective Joseph testified that she observed "several" patrons who she believed were impaired by the use of drugs or alcohol to the point they may endanger themselves or another, but the only supporting testimony elicited from her was that some of them were holding longneck beers. Based on the aforementioned evidence, the ALJ cannot conclude that patrons had excessively consumed alcoholic beverages as a result of the on-premises promotion that night.

In addition, Mr. Thompson's testimony that Dallas was adequately staffed to monitor and control customers on July 6, 2005, is not controverted. Because there is insufficient evidence to

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[61] Agent Rutledge testified that the Approximate Blood Alcohol Percentage In One Hour chart admitted as Respondent's Exhibit 3 is a useful tool, but should only be used as a guideline because people metabolize alcohol at different rates.

show that customers excessively consumed alcoholic beverages as a result of the on-premises promotion, or that any Dallas patrons were arrested for DWI–a breach of the peace–on July 6, 2005, at all, much less as a result of excessively consuming alcoholic beverages during the on-premises promotion, the ALJ must find that Respondent's on-premises promotion did not adversely affect public safety or peace, and that Respondent did not violate either TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) or 16 TAC § 45.103(c)(11) on that date.

V. CONCLUSION

Staff did not prove by a preponderance of the evidence that Respondent or its employees violated the Texas Alcoholic Beverage Code or TABC rules by serving intoxicated persons on March 30, 2005, or July 6, 2005; by holding an on-premises promotion reasonably calculated to induce customers to consume alcoholic beverages to excess, or that prevented Respondent from adequately monitoring customers' alcoholic beverage consumption, on March 30, 2005 or May 18, 2005; or by holding an on-premises promotion, thereby negatively affecting public welfare and safety, on July 6, 2005. The Administrative Law Judge (ALJ) finds there was insufficient evidence to prove Respondent committed the alleged violations, and recommends that Respondent's permits not be canceled.

VI. FINDINGS OF FACT

1. Cowpoke, Inc. d/b/a Dallas (Respondent) is the holder of a Mixed Beverage Permit and Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 7113 Burnet Road, No. 101, Austin, Travis County, Texas, and whose mailing address is 7113 Burnet Road, No. 109, Austin, Texas 78757.

2. On March 30, May 18, and July 6, 2005, Respondent held an on-premises promotion from 8 p.m. to 10 p.m., during which time the price of domestic beers, wine, and well drinks was 69 cents; and from 10 p.m. to 11 p.m., during which time the price of domestic beer was raised to $1.69, and some other drinks sold for below their regular price. The specials ended at 11 p.m. and the regular price was charged for alcoholic beverages until closing time at 2 a.m.

3. The Austin Fire Department capacity for Respondent's licensed premises, known as Dallas (Dallas), is 885 people.

4. On March 30, 2005, Respondent's employee Sonya Benjamin did not serve an alcoholic beverage to an intoxicated person.

a. On the night of March 30, 2005, Ms. Benjamin was working as a bartender at Dallas and served at least three beers to Armando Avila between about 10:30 p.m. and 1:55 a.m.

b. APD Officer Amy Lynch, who was working undercover with other APD officers including Detective Kelly Davenport, saw Ms. Benjamin sell Mr. Avila his last beer of the night sometime between 1:40 a.m. and 1:55 a.m.

c. Detective Davenport and Officer Lynch observed Mr. Avila inside Dallas from about 11 p.m. to 2 a.m. on the night of March 30, 2005.

d. Mr. Avila did not exhibit signs of intoxication at 11 p.m. on March 30, 2005.

e. By 1:55 a.m. on March 31, 2005, Mr. Avila had bloodshot eyes, his head was "heavy," his shirt was not neatly tucked, and he was leaning, almost as if for support.

f. At closing time, Detective Davenport and Officer Lynch left the building and waited for Mr. Avila to come outside.

g. There was nothing about the way Mr. Avila walked across the parking lot to his car that would indicate he was publicly intoxicated.

h. Mr. Avila swayed and stared at his car keys before getting into his car, starting the engine, and leaning over to fall asleep.

i. After Mr. Avila got into his car and started the engine, Detective Davenport and Officer Lynch determined he was publicly intoxicated, and called the arrest team to investigate.

j. Mr. Avila was arrested for public intoxication by APD Officer Ortho Duboise IV, after the officer found him to be intoxicated and a danger to himself and others due to operating a motor vehicle.

k. TABC cited Ms. Benjamin for service to an intoxicated person.

l. Mr. Avila was not a danger to himself or another person until he got into his car and started the engine, so was not publicly intoxicated at the time Ms. Benjamin served him his last beer.

5. On July 6, 2005, Respondent's employee Candice Cannon did not serve an alcoholic beverage to an intoxicated person.

a. On July 6, 2005, Ms. Cannon was working as a waitress at a beer station at Dallas and sold Brian Haid four beers between 8 p.m. and 9:30 p.m.

b. APD Detective Ronald Russellwas working undercover with other APD officers and saw Ms. Cannon sell Mr. Haid the four beers.

c. Detective Russell observed Mr. Haid from 7:45 p.m. until his arrest for public intoxication occurred at approximately 9:30 p.m.

d. At 7:45 p.m., Mr. Haid had glassy eyes and was leaning over the dance rail with a beer in his hand.

e. At about 8 p.m., Mr. Haid walked in an exaggerated way to Ms. Cannon's beer station, bought two 69-cent beers, and swayed and leaned over the beer tub to look for his change, which Ms. Cannon had dropped when she attempted to hand it to him.

f. Mr. Haid walked back to the dance floor, drank his two beers, and also drank a friend's full beer.

g. Mr. Haid returned to Ms. Cannon's beer station, swaying and leaning as he walked. He clanged two beer bottles together, nearly broke them, and laughed hysterically.

h. Ms. Cannon sold Mr. Haid two more beers, for a total of four beers purchased.

i. The APD undercover officers called TABC agents in to make contact with Mr. Haid, who by that time had consumed the beer he had in his had at 7:45 p.m., his friend's beer, and three of the four beers he had purchased from Ms. Cannon.

j. TABC Agent James Malloy detained Mr. Haid and escorted him outside, where he administered standardized field sobriety tasks, on which Mr. Haid exhibited six out of six clues of impairment on the horizontal gaze nystagmus task, three out of eight clues of impairment on the walk and turn task, and one out of four clues of impairment on the one leg stand task.

k. Based on the observations of the undercover officers, Mr. Haid's performance on the field sobriety tasks, and Agent Malloy's observations that Mr. Haid had a strong odor of alcoholic beverage on his breath, bloodshot and watery eyes, slurred speech, and delayed responses, and had admitted drinking four beers, Agent Malloy arrested Mr. Haid for public intoxication.

l. TABC Agent Trisha O'Casey Rutlege issued Ms. Cannon a citation for serving an intoxicated person.

m. At the time Ms. Cannon served Mr. Haid, and at the time he was arrested for public intoxication, he was not belligerent, violent, loud, obnoxious, combative, aggressive, or using profanity, and was not attempting to drive a motor vehicle, so was not a danger to himself or another.

n. Mr. Haid was not publicly intoxicated when Ms. Cannon served him.

6. On March 30, 2005, Respondent did not engage in a practice reasonably calculated to induce customers to drink alcoholic beverages in excess.

   a. Mr. Avila was the only Dallas patron arrested for public intoxication on the night of March 30,2 005.

   b. Mr. Avila only purchased one or two beers during the on-premises promotion, which at most would have given him an estimated blood alcohol concentration of 0.05, which is possibly influenced.

   c. Mr. Avila did not become publicly intoxicated as a result of the on-premises promotion.

7. On May 18, 2005, Respondent did not engage in a practice reasonably calculated to induce customers to drink to excess.

   a. Mr. Herzer is the only Dallas patron arrested for public intoxication on May 18, 2005.

   b. Mr. Herzer was not a potential danger to himself or others as the result of excessive alcoholic beverage consumption during Dallas' on-premises promotion.

8. On March 30, 2005, Respondent did not engage in a practice that would hamper its ability to monitor the alcoholic beverage consumption of its customers.

   a. Every square foot of the premises was monitored by a Dallas employee during and after the on-premises promotion on March 30, 2005.

   b. One patron ordered a mixed drink and paid for it, then threw up on the bar. Respondent's employee adequately controlled the situation by taking the drink back, returning the money, and calling security.

   c. Out of hundreds of customers in the club on March 30, 2005, only one Dallas patron was arrested for public intoxication.

9. On May 18, 2005, Respondent did not engage in a practice that would hamper its ability to monitor or control the alcoholic beverage consumption of its customers.

   a. Every square foot of Dallas was monitored by Respondent's employees during and after the on-premises promotion on May 18, 2005.

   b. Out of hundreds of customers in the club on May 18, 2005, only one Dallas patron was arrested for public intoxication.

10. On July 6, 2005, Respondent did not conduct its business in a place or manner warranting the cancellation or suspension of its permits based on the general welfare, health, peace,

morals and safety of the people and the public sense of decency, by engaging in an on-premises promotion.

a. Every square foot of Dallas was monitored by Respondent's employees during and after the on-premises promotion on July 6, 2005.

b. Out of hundreds of customers in the club on July 6, 2005, only one Dallas patron was arrested for public intoxication.

11. One or two public intoxication arrests on the night of an on-premises promotion, when there are hundreds of patrons on the premises, does not indicate Respondent engaged in a practice reasonably calculated to induce customers to engage in excessive consumption of alcoholic beverages.

12. On November 18, 2005, TABC sent its Second Amended Notice of Hearing to Respondent.

13. The Second Amended Notice of Hearing contained a statement of the location and the 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 allegations and the relief sought by the Commission.

14. The hearing on the merits was convened on January 20, 2006, at the State Office of Administrative Hearings, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas, before Administrative Law Judge Sharon Cloninger. The Commission appeared through its staff attorneys Judith L. Kennison and W. Michael Cady. Respondent appeared through its attorneys Charles Webb and Jesse R. Castillo. Evidence was presented, and the record closed February 21, 2006, after the parties submitted written closing argument.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.61.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. §11.63; and 1 TEX. ADMIN. CODE (TAC) §155.55.

4. Based on the above Findings of Fact, Respondent or its employee did not violate TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

5. Based on the above Findings of Fact, Respondent did not violate TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) or 101.61, or 16 TAC 45.103(c)(11).

6. Based on Conclusions of Law Nos. 5 and 6, cancellation of Respondent's permits is not warranted under TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and (14).

SIGNED April 21, 2006.

SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS