

DOCKET NO. 522599

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
CUS AUSTIN LLC	§	ALCOHOLIC
D/B/A COYOTE UGLY SALOON	§	
PERMIT/LICENSE NO(s). MB551071	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-2693)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Steven M. Rivas. The hearing convened on 14th day of December 2006 and adjourned that same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 5th day of March 2007. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions were filed and the Administrative Law Judge did not recommend any changes to the proposal for Decision.

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

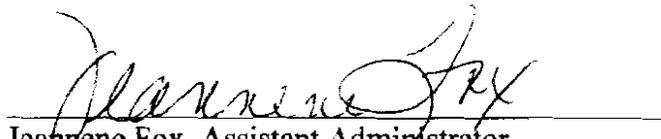
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations against your permit(s) and/or license(s) are hereby **DISMISSED**.

This Order will become final and enforceable on March 3, 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 6, 2008. at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Honorable ALJ Steven M. Rivas
State Office of Administrative Hearings
VIA FAX (512) 475-4994

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Licensing Division

Enforcement District Office

Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas 78701. Petitioner was represented at the hearing by Michael Cady, TABC Staff Attorney. Respondent appeared and was represented by David O. Chambers, attorney. The hearing adjourned that same day, but the record remained open until January 5, 2007, to allow the parties an opportunity to file written closing arguments.

II. DISCUSSION

A. Applicable Law

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

B. Evidence

1. Petitioner's Evidence

a. Detective James Boujema

Staff called Detective James Boujema to testify on behalf of TABC. Detective Boujema is employed by the Austin Police Department (APD) and is part of the DWI enforcement unit. On February 25, 2006, Detective Boujema was taking part in a sting operation as an undercover officer. The sting, which was a joint effort between the TABC and APD, was aimed at citing bartenders who served alcoholic beverages to intoxicated persons.

Detective Boujema testified that he entered Respondent's premises located at 501 East Sixth Street, Austin, Texas, at approximately 11:30 p.m. Soon after arriving, Detective Boujema testified that he positioned himself near the bar close to the front door and observed two females kissing each

other in a manner that drew the attention of other patrons. According to Detective Boujemaa, each girl was accompanied by a male companion. It was not clear if the male companions were the husbands or boyfriends of the girls. Detective Boujemaa characterized the kissing as “prolonged” and that the girls were “laughing and fondling” each other while kissing. According to Detective Boujemaa, the bar was crowded and noisy at this time. Detective Boujemaa also stated that other patrons in the bar were watching the girls kiss, and that their male companions attempted to separate them on two occasions, but they refused to be separated.

When the girls separated, Detective Boujemaa testified that one of them, later identified as Jadee Potter, fell down in front of the bar. Detective Boujemaa stated Ms. Potter then stood up at the bar and ordered a drink. The bartender, later identified as Kathleen Lozano, took the order and gave Ms. Potter a drink. Throughout his observation of Ms. Potter, Detective Boujemaa asserted that she exhibited unsteady balance, red bloodshot eyes, and that her “mannerisms” indicated that she had lost her mental and physical faculties. Based on his observations, Detective Boujemaa believed Ms. Lozano had served an intoxicated person and notified other members of the sting operation including TABC agents Stephen McCarty and John Altum. Detective Boujemaa left the premises shortly after midnight.

According to Detective Boujemaa, Ms. Lozano should have known that Ms. Potter was intoxicated. Additionally, Detective Boujemaa contended that Ms. Potter was a potential danger to herself and others because she could have fallen, created a disturbance, or attempted to drive home.¹

b. Phillip Acevedo and Stephen McCarty

Phillip Acevedo and Stephen McCarty testified they are both agents for TABC. Agent Acevedo was also working undercover on the night in question. Agent Acevedo testified that he

¹ Staff did not plead any elements under the “dram shop act” at TEX. ALCO. BEV. CODE ANN. § 2.02 (Causes of Action).

observed Ms. Potter briefly but did not observe her kissing another girl. Agent Acevedo testified that he overheard a conversation between two individuals he believed were employed by Respondent. According to Agent Acevedo, one of the individuals commented that Ms. Potter was “hammered.” Agent Acevedo did not confirm the identity of the individuals, but believed they were employed by Respondent because they were wearing radios and were not “socializing” with other people. Agent Acevedo admitted that he could have easily ascertained the identity of the individuals. Furthermore, Agent Acevedo acknowledged the bar was noisy, yet he was still able to overhear the conversation. Agent Acevedo admitted he did not make a report of the incident, nor did he observe Ms. Potter causing any trouble or doing anything against the law.

Agent McCarty was also working undercover on the night in question. Agent McCarty testified he was contacted by Detective Boujemaa and in turn contacted other open cover agents who were working on the sting operation. Agent McCarty testified that he ultimately arrested Ms. Potter and Ms. Lozano and transported them to the Travis County Jail for booking. Ms. Potter was arrested for public intoxication and Ms. Lozano was arrested for selling an alcoholic beverage to an intoxicated person. Agent McCarty’s affidavit for warrant of arrest and detention was admitted as evidence.²

c. John Altum

John Altum testified that he is an agent with TABC. On the night in question, he was working as an open cover member of the sting operation. Agent Altum testified he was contacted by Detective Boujemaa and Agent McCarty about an intoxicated person on Respondent’s premises. When Agent Altum arrived, he stated Ms. Potter was on the patio area of the premises. According to Agent Altum, Ms. Potter was “hanging” on her companion’s arm but did not seem intoxicated.

Agent Altum testified that he approached Ms. Potter on the patio and asked her to step

² Agent McCarty arrested Ms. Lozano under TEX. ALCO. BEV. CODE ANN. § 101.63 (Sale of an Alcoholic Beverage to an Intoxicated Person). *State of Texas v. Kathleen Ms. Lozano*, Cause No. 727942, in the County Court at Law No. 7, of Travis County, Texas, dismissed on December 13, 2006, for insufficient evidence.

outside the bar in order to determine if she was intoxicated. According to Agent Altum, Ms. Potter kept asking him why she had to leave the bar. Agent Altum stated Ms. Potter did not resist, but rather argued with Agent Altum as to why she was being contacted by the police. Agent Altum admitted Ms. Potter's confusion may have been due to the fact that she resides in Idaho and may not be familiar with TABC regulations.

Agent Altum brought Ms. Potter to a secure area in order to perform standardized field sobriety tests. At this point, Agent Altum stated, Ms. Potter refused to perform any tests and sat down on the curb. Agent Altum admitted he did not videotape any of Ms. Potter's actions at this time, even though he had a video recorder in his possession. Agent Altum argued he did not videotape Ms. Potter because the video recorder is used to record a person's performance on field sobriety tests and since Ms. Potter refused to perform any tests, Agent Altum stated he did not videotape any of her actions.

Agent Altum admitted that when he initially approached Ms. Potter she was not causing any problems or arguing. Additionally, Agent Altum noted that she was "no danger to anyone or herself" at that point.

2. Respondent's Evidence

a. The surveillance videotape

On the night in question, a surveillance camera documented the actions of Ms. Potter, Ms. Lozano, and other patrons. The time-stamp on the tape reflected a start time of approximately 11:39 p.m. The camera was situated near the ceiling and overlooked the premises from south to north. The camera's view included the serving area of the bar, the cash registers, and an area where patrons stood and loitered. The premises appeared very crowded and festive. Patrons lined the bar area and stood in the loitering area. As many as three female employees or patrons danced on top of the bar at any given time. Ms. Lozano and two other female bartenders worked at a rapid pace. The

bartenders took drink orders, made and served drinks, rang up customers on the cash registers, and cleaned the bar area. Several bar patrons walked into the camera's view and ordered drinks at the bar. The premises were reasonably well-lit and visibility was good. Occasionally, lights would flash with the music that was provided by a jukebox or a disc jockey. The surveillance tape had no sound, but it was apparent that music was being played loudly based on the recorded footage of the patrons who had difficulty talking into their cell phones.

At approximately 11:39 p.m., the tape showed two couples standing at the bar area near the south entrance of the premises. There was nobody standing between the couples and the camera, and there were no other obstructions. One couple was comprised of Ms. Potter and an unidentified male. The other couple is an unidentified male and female. Shortly after the tape began, Ms. Potter was seen kissing her male companion, and the other couple were kissing each other, too.

At approximately 11:40 p.m., Ms. Potter and the unidentified female begin kissing each other. The females kissed intermittently for the next five minutes and paused long enough to laugh and joke around with their male companions. Ms. Lozano appeared to notice the girls kissing for 2-3 seconds before having to tend to other bar patrons.

While the girls continued to kiss, the activity at the premises remained the same as females danced atop the bar and other patrons ordered drinks and milled about. A few patrons stopped and noticed the girls momentarily, but most patrons had their attention on the dancing females atop the bar area. A few men were seen as they entered the immediate area where the girls were kissing. The men ordered drinks and watched the girls kiss each other for a while. Once their drinks arrived, the men left the area and said nothing to the girls and made no contact with them.

The camera also captured the male companions attempt to intervene in the girls' embrace. The males did not appear forceful or determined in their attempt to separate the girls. The males were seen laughing during their endeavor to intervene.

At approximately 11:45 p.m., the girls abruptly stopped kissing. Ms. Potter subsequently put on her coat. The next several minutes showed the girls standing at the bar talking to their male companions. The activity inside the premises remained lively. Up to this point, Ms. Potter had no drink in hand, however, her male companion appeared to have a drink in his hand.

At approximately 11:48 p.m., the other unidentified couple left Ms. Potter and her male companion. At this time, Ms. Potter grabbed her male companion's empty glass and carried it to the bar. Ms. Potter then ordered a drink from Ms. Lozano and was observed to be leaning on the bar in the same manner as every other bar patron. Ms. Potter's drink arrived in less than a minute. Ms. Potter and her male companion stood at the bar alone for the next few minutes.

At approximately 11:51 p.m., Ms. Potter turned around and bent down to pick up a stool that had fallen a few feet behind her. It is unclear how the stool fell over or how long it had been on the floor. It did not appear that Ms. Potter knocked it over because she was standing very close to the bar area and the stool was not in view of the camera. After Ms. Potter picked up the stool, she sat down on the stool and her male companion stood closely behind her. Ms. Potter sat on the stool and interacted with her male companion and encouraged the dancers atop the bar.

For the next several minutes, Ms. Lozano continued to take drink orders from several other patrons. Ms. Lozano also maintained the bar area, as well. Ms. Potter and her male companion remained at the bar area and continued to interact with each other and partake in the festive atmosphere. At approximately 12:04 a.m., the videotape stopped from this angle.

At approximately 12:10 a.m., the tape started again and showed a different angle of the premises. This new viewpoint was a wide-angle shot from a camera situated near the ceiling facing north to south. The footage showed a large loitering area where close to 100 patrons were seen as they socialized and interacted with each other and the girls dancing atop the bar area. It was nearly impossible to see Ms. Potter from this new vantage point. However, the general upbeat activity of the premises was captured on this camera angle.

The next camera angle, began at approximately 12:16 a.m., and depicted the patio area of the premises overlooking Neches Street. At approximately 12:18 a.m., two TABC agents walked onto the patio away from the camera. One minute later, the camera showed Ms. Potter lead the two TABC agents and her male companion toward the camera and out of the premises. It is unclear whether they went through the bar area to leave the premises, or if they exited the premises through the patio. Ms. Potter walked unassisted and, at one point, turned around and walked backwards to address the two agents. More people appeared to observe Ms. Potter as she left the bar with agents in tow, than when she was kissing the unidentified female. The footage ended at this point.

Detective Boujemaa viewed the videotape during his cross-examination. After viewing the tape, Detective Boujemaa stated that he did not believe Ms. Potter “fell all the way to the ground,” but instead believed she lost her balance at the time she picked up the fallen stool. Detective Boujemaa also stated that Ms. Potter’s “sexual conduct” was not a sign of intoxication and “did not endanger her or any other person around her.” Furthermore, after watching the video, Detective Boujemaa admitted he could not testify that Ms. Lozano observed Ms. Potter’s “falling action” when she bent over to pick up the stool.

b. Daniel Huckaby

Daniel Huckaby is Respondent’s general manager and was working at the premises on the night in question. Mr. Huckaby stated he is responsible for running the bar from “top to bottom,” including hiring and firing employees and operating the surveillance cameras. Mr. Huckaby testified that he remembered when the TABC open cover team approached him and told him that they had arrested Ms. Potter and that they were going to arrest Ms. Lozano for serving alcoholic beverages to an intoxicated person.

Mr. Huckaby testified that he informed the open cover agents that he had surveillance cameras on the premises, but the agents told him they did not want to view any of the footage at that time. Furthermore, Mr. Huckaby testified that he attempted to obtain more information from the

agents regarding the incident, but the agents told him they were unable to provide him much information, other than time of arrest, based on the covert nature of the operation.

Mr. Huckaby testified that he was able to identify Ms. Potter on the surveillance footage from the limited amount of information given to him by the agents. In doing so, Mr. Huckaby asserted, he had to cull the footage from 13 different cameras on the premises. Mr. Huckaby stated he first located Ms. Potter on the surveillance video as she was leaving the patio area with the TABC agents. Mr. Huckaby testified he was then able to go back and identify her from the footage captured by the camera overlooking the bar area near the entrance.

According to Mr. Huckaby, the footage captured by the cameras is digitally recorded and saved on a hard drive. Additionally, Mr. Huckaby stated, the system will automatically delete footage that has been stored for 3 to 4 days pursuant to the system's memory capacity, unless it is saved onto a disc. Based on the surveillance operating system, Mr. Huckaby contended, he had only a few days to save the footage in question without the benefit of a police report and limited information from TABC.

Mr. Huckaby acknowledged there was a gap of footage between 12:04 a.m. and 12:10 a.m. Mr. Huckaby stated he did not believe the footage in this period would be helpful since the alleged service to an intoxicated person had already been saved on disc. Additionally, Mr. Huckaby asserted, he saved Ms. Potter's actions (kissing another female) that led to her and Ms. Lozano's arrest.

Mr. Huckaby asserted that each bartender employed on the premises was TABC-certified, including Ms. Lozano, and that Ms. Lozano knew the policy of not selling to intoxicated persons.³ Additionally, Mr. Huckaby stated, Ms. Lozano did nothing wrong and was not disciplined over this

³ Respondent did not plead the "safe harbor" affirmative defense under TEX. ALCO. BEV. CODE ANN. § 106.14.

incident.⁴ Mr. Huckaby further asserted that none of the 15 Coyote Ugly establishments have ever been cited for any alcohol-related violation.⁵

c. Michelle Keller

Michelle Keller is Respondent's assistant manager. Ms. Keller testified that Ms. Potter's behavior on the night in question was nothing unusual for the bar. Ms. Keller characterized the establishment as a "woman-empowering bar," and the act of females kissing happens "all the time." Ms. Keller added that certain days of the week are known as "lesbian night" to accommodate their large lesbian and bi-sexual clientele. Ms. Keller testified that Ms. Lozano was head bartender and dance captain and that her responsibilities included serving customers and choreographing dance routines. Ms. Keller also stated Ms. Lozano was responsible for working on register No. 4, the busiest register on the premises. On a typical Saturday night, Ms. Keller contended, over 1,000 patrons may visit the premises. Yet, despite its festive atmosphere, each employee is trained to "cut off" individuals who appear intoxicated, according to Ms. Keller.

C. Analysis and Recommendation

The evidence in this case is insufficient to show that Respondent's bartender, Ms. Lozano, sold an alcoholic beverage to an intoxicated person. The catalyst of TABC's action stems from Ms. Potter and another female kissing near the bar serving area. The sight of two women kissing may draw interest from a reasonable person, but is not a sign of intoxication, nor does it present a danger to anyone according to Staff's witness, Detective Boujemaa.

⁴ Ms. Lozano was later promoted to manager of the Coyote Ugly Saloon in Nashville, Tennessee.

⁵ Coyote Ugly Saloons have locations nationwide including Chicago, Dallas, Las Vegas, New Orleans, Miami, and San Antonio.

Ms. Keller characterized Coyote Ugly as an institution known for its racy environment. The music, the dancing, the lights, the alcohol, and the wait staff dancing atop the bar area, contribute to an atmosphere that tests the boundaries of suitable behavior, but do not cross over as evidenced by the testimony of Ms. Keller and the fact that no Coyote Ugly establishment has ever been cited for an alcohol-related violation.

The surveillance video refutes the testimony of TABC's witnesses, including Detective Boujemaa. No witness other than Detective Boujemaa observed Ms. Potter behave in a manner that may have suggested she was intoxicated. In addition to testifying that kissing is not a sign of intoxication, Detective Boujemaa admitted after viewing the tape, that Ms. Lozano could not have seen Ms. Potter lean down to pick up the stool. This "falling action" and Ms. Potter's kissing made up the totality of circumstances that led to Ms. Lozano's arrest. Yet, Ms. Lozano cannot be held accountable in this case if females kissing each other was not uncommon, and she was unable to witness the "falling action," which amounted to nothing more than leaning over to lift a stool.

Agent Acevedo observed Ms. Potter very briefly. He overheard a conversation between two unidentified individuals in a noisy bar where one commented that Ms. Potter was "hammered." Yet Agent Acevedo testified that Ms. Potter was not causing any trouble and was having a good time. Agent Acevedo added this was not against the law. Agent Acevedo also testified that the act of females kissing each other is not a sign of intoxication.

Agent McCarty's testimony was largely refuted by the videotape and other evidence presented by Respondent. Agent McCarty testified that he was contacted by Detective Boujemaa regarding Ms. Potter's behavior inside the bar and arrived on the scene. In his affidavit for warrant of arrest and detention, Agent McCarty wrote that "Officer Boujemaa and myself observed subject kiss another girl then fall to the ground in front of bar. Subject got up and ordered a rum and coke. Bartender saw subject fall down to ground." This affidavit was proven inaccurate on several grounds. First, Agent McCarty did not observe the girls kissing because he was not on the premises at the time it was happening. Based on the testimony of Detective Boujemaa and Agent McCarty,

Detective Boujemaa contacted *and talked to* Agent McCarty outside of the premises after Ms. Potter's kissing behavior and "falling action" occurred. Next, Agent McCarty observed even less of a "falling action" than Detective Boujemaa because Agent McCarty was not inside the premises when this "action" occurred either. Finally, Agent McCarty's knowledge that Ms. Lozano "saw subject fall to the ground" was refuted by Detective Boujemaa's testimony that Ms. Lozano could not have seen her "falling action" when she bent over to lift a stool. Agent McCarty also viewed the surveillance tape and admitted on cross-examination that the "evidence that's come forward now has probably raised a dispute" that Ms. Potter ever fell to the ground.

Agent Altum's testimony did not support TABC's case because he did not observe Ms. Lozano sell or serve anything to Ms. Potter. Furthermore, Agent Altum observed none of Ms. Potter's behavior before he confronted her on the patio. The only evidence that may have supported TABC's case was Ms. Potter's refusal to perform any field sobriety tests. However, Agent Altum admitted her refusal could have been attributed to her frustration in not understanding why she was singled out at the bar. Additionally, Ms. Potter's action in refusing to perform any tests could have been videotaped because Agent Altum had a video recorder in the secure area where Ms. Potter refused to perform the tests.

The evidence on the record is insufficient to establish that Respondent, or its agent Ms. Lozano, sold an alcoholic beverage to an intoxicated person, namely Ms. Potter, in violation of § 11.61 (b) (14) of the Code. Therefore, the ALJ recommends no suspension or civil penalty be imposed on Respondent.

III. FINDINGS OF FACT

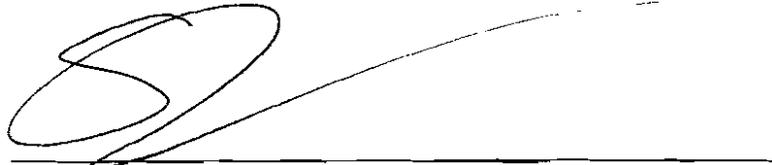
1. CUS Austin LLC d/b/a Coyote Ugly Saloon (Respondent) holds a Mixed Beverage Permit, Caterer's Permit, Mixed Beverage Late Hours Permit, MB551071, which includes the Beverage Cartage Permit, issued by the Texas Alcoholic Beverage Commission (Petitioner) for the premises located at 501 East Sixth Street, Austin, Texas 78701.
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2. On February 25, 2006, at approximately 11:40 p.m., Detective James Boujemaa observed Jadee Potter and an unidentified female kissing each other at Respondent's premises near the bar area. The two females kissed each other intermittently for the next five minutes.
3. Ms. Potter ordered and was served an alcoholic beverage from Kathleen Lozano, a bartender employed by Respondent.
4. While standing at the bar, Ms. Potter bent over to pick up a barstool that had fallen over.
5. Ms. Lozano did not see Ms. Potter lean over to pick up the stool.
6. Ms. Potter and her male companion were approached by TABC Agent John Altum on the patio of the premises.
7. Ms. Potter refused to perform field sobriety tests and was arrested for public intoxication.
8. Ms. Lozano was also arrested for serving an alcoholic beverage to an intoxicated person.
9. On July 25, 2006, Petitioner sent a notice of hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
10. The hearing on the merits convened December 14, 2006, at the State Office of Administrative Hearings, 300 West 15th Street, Fourth Floor, Austin, Texas 78701. Petitioner was represented by TABC Staff Attorney Michael Cady. Respondent was represented by David O. Chambers, attorney. The hearing adjourned that day, but the record remained open until January 5, 2007, so the parties could file written closing arguments.
11. The act of two females kissing is not a sign of intoxication.
12. Ms. Potter's actions drew minimal attention from the other patrons of the bar.
13. Ms. Potter had a good time and caused no disturbance on Respondent's premises on the night in question.
14. Respondent's bar is a place where the act of females kissing each other is not an unusual occurrence.
15. Ms. Lozano did not observe any intoxicating behavior on the part of Ms. Potter.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 61.71.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing 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 effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.
4. Based on the above Findings of Fact, Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 11.61 (b) (14).
5. Respondent's permit should not be suspended nor should Respondent pay a civil penalty.

SIGNED March 5, 2007.



**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**