

On October 11, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, 401 E. Franklin Avenue, Suite, El Paso, Texas 79901. The Petitioner was represented at the hearing by Ramona M. Perry, TABC Staff Attorney, who appeared telephonically. Respondent appeared and was represented by its attorney, Sergio Gonzalez. The record remained opened for post-hearing briefs and written closing arguments until October 19, 2007.

II. APPLICABLE LAW

1. Count I: Sale of an alcoholic beverage to an intoxicated person.

The TABC may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee sold or delivered an alcoholic beverage to an intoxicated person.¹ A specific intent to violate that statute is not specifically required. Section does not contain any language which would indicate that a specific intent to violate that statute is required.²

A licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated.³ The “reasonable prudent person” standard is used to determine whether the licensee should know the patron is intoxicated.⁴

2. Count II: Intoxicated licensee on the licensed premises.

¹ TEX. ALCO. BEV. CODE ANN. (Code) § 11.61(b)(14) [Cancellation or Suspension of Permit].

² *Fay-Ray v. Texas Alcoholic Beverage Comm'n.*, 959 S.W.2d 362, (Tex.App.-Austin, 1998); Code § 11.61(b)(14).

³ *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).

⁴ 959 S.W.2d 362.

Being intoxicated on the licensed premises is characterized by the Alcoholic Beverage Code as conduct which is lewd, immoral, or offensive to public decency, and no person authorized to sell beer at retail, nor his agent, servant, or employee may engage in or permit such conduct on the premises.⁵ Furthermore, the TABC may suspend for not more than 60 days or cancel an original or renewal retail dealer's license if it is found, after notice and hearing, that the permittee violated a provision of the Code or a rule.⁶

3. Count III: Possession on the licensed premises of an alcoholic beverage not authorized to be sold on the licensed premises.

The TABC may suspend for not more than 60 days or cancel an original or renewal retail dealer's license if it is found, after notice and hearing, that the licensee possessed on the licensed premises, an alcoholic beverage not authorized to be sold on the licensed premises, or permitted an agent, servant, or employee to do so.⁷

Specifically, no wine and beer retailer may possess distilled spirits⁸ or liquor containing alcohol in excess of 17 percent by volume.⁹ Additionally, a retail dealer's on-premise licensee may not possess on the licensed premises an alcoholic beverage which is not authorized to be sold on the premises.¹⁰

⁵ Code § 104.01(5) [Regulation of Retailers: Lewd, Immoral, Indecent Conduct].

⁶ Code § 61.71(1) [Grounds for Cancellation or Suspension: Retail Dealer].

⁷ *Id.* at § 61.71(9).

⁸ Code § 104(3) defines distilled spirits as alcohol, spirits of wine, whiskey, rum, brandy, gin, or any liquor produced in whole or in part by the process of distillation.

⁹ Code § 25.09 [Possession of Certain Beverages Prohibited].

¹⁰ Code § 69.12 [Possession of Certain Beverages Prohibited].

III. EVIDENCE AND ANALYSIS

Petitioner offered six exhibits: custodian of record affidavit and copy of permit number BG-527986 (Exhibit No.1); the “green card” (Exhibit No. 2); handwritten paper seized at the premises (Exhibit No. 3); TABC-El Paso incident report from agent Robert Chavez (Exhibit No. 4); TABC-El Paso incident report from agent Oscar Menchaca (Exhibit No. 5); two tequila bottles “El Jimador” (Exhibit Nos. 6a and 6b). All documents and items were admitted into evidence. Respondent did not offer any exhibits.

1. Count I: Sale of an alcoholic beverage to an intoxicated person.

On March 4, 2006, an investigation was conducted at Goldie’s Bar by TABC agents.¹¹ Petitioner alleges that on that night, Respondent’s bartender sold an alcoholic beverage to an intoxicated person.

A. Testimony

TABC Agent Chavez testified that on March 4, 2006, he checked activity inside the bar by looking through a window before entering. The agent observed a male, later identified as Ricardo Ramirez, standing at the bar facing the window. He had a clear view of Mr. Ramirez, and observed that the he had a distant stare, droopy eyes and was having difficulty separating bills from a wad of money he held in his hand. At this point, the bartender placed a 12 ounce beer bottle in front of Mr. Ramirez. The agent noticed that there were two other beer bottles on the bar counter in front of Mr. Ramirez. The bartender stood in front of the patron and engaged in a brief conversation with him as he paid for the beer. Upon entering, the agent sat at the bar facing Mr. Ramirez. Mr. Ramirez was leaning against the bar counter for support. The agent said Mr. Ramirez could not maintain his

¹¹ Respondent currently operates under authority of a Wine and Beer Retailer’s Permit and a Retail Dealer’s on Premise Late Hours Permit, issued for the premises known as Goldie’s Bar, located at 1430 Myrtle Avenue, El Paso, El Paso County, Texas 79905.

balance to stand. When the agent approached Mr. Ramirez, he had a delayed reaction and appeared to not comprehend what the agent was saying to him.

B. Analysis

Agent Chavez had the opportunity to observe Mr. Ramirez and determined that he depicted signs of intoxication. The bartender had the same opportunity to observe the indicators of intoxication on Mr. Ramirez. The bartender is held to an objective standard of what a reasonably prudent person would have observed. Based on the evidence of record, the bartender would have observed the following:

- Poor balance as Mr. Ramirez leaned against the bar counter for balance;
- Mr. Ramirez showed poor coordination of his fine motor skills when he had difficulty separating bills from a wad of money he held in his hand;
- Mr. Ramirez leaned into the bar counter and spoke to the bartender enabling the bartender to note any slur speech, bloodshot eyes, and odor of alcohol.

There were sufficient objective indicators of intoxication in open view and capable of being observed by the bartender. Thus, the ALJ finds that Petitioner met its burden of proof on this issue.

2. Count II: Intoxicated licensee on the licensed premises.

A. Testimony

During the course of the March 4, 2006 inspection, Respondent was present at the bar. Petitioner alleges that Respondent was also intoxicated. Agent Chavez said that Respondent was agitated because the bartender was being arrested, and Respondent was argumentative with the TABC agents. The Respondent called 911 and requested police assistance. During the inspection, Agent Chavez engaged in conversation with Respondent. Agent Chavez testified that he was able to understand Respondent when she spoke. He also said that his focus was not on her. Respondent was allowed to close and secure the bar that night.

B. Analysis

Agent Chavez's sole explanation for concluding that Respondent was intoxicated, was her interference with their investigation by her "unusual response" to their presence. He explained that normally owners are apologetic in such circumstances, and Respondent was not.

The following factors weigh against a finding of intoxication against the Respondent:

- Agent Chavez engaged in detail questioning regarding the bar operations and bartender certification with Respondent;
- Respondent was able to answer all the questions posed to her;
- Respondent was able to communicate with the agents conducting the investigation;
- Agent Chavez testified that he was able to understand Respondent as she spoke;
- Respondent called 911 requesting assistance at the bar and was able to communicate with the dispatcher;
- Agent Chavez allowed Respondent to close and secure the bar.

The fact that the agent allowed Respondent to close and secure the bar is of import. She obviously had the mental and physical faculties to do so. None of the usual indicators of intoxication are in evidence regarding Respondent, i.e. poor balance, bloodshot eyes, loss of motor skills, loss of normal speech, loss of ability to comprehend. Therefore, the fact that she was agitated is not enough to support a finding of intoxication.

3. Count III: Possession on the licensed premises of an alcoholic beverage not authorized to be sold on the licensed premises.

A. Testimony

Agent Oscar Menchaca testified that he conducted an inspection of Goldie's Bar on April 6, 2007. In the course of the inspection, he found a half empty tequila bottle on the bar counter. Respondent told him "it is not behind the bar," referring to the tequila bottle. Agent Menchaca testified that a patron initially claimed ownership of the tequila bottle, but subsequently recanted stating he was only trying to help his friend. One of the bartenders working that night told Agent Menchaca that the tequila bottle belonged to the Respondent and that tequila shots were sold for \$2.00. Agent Menchaca further said that Respondent threw away a paper which had numerical figures and handwritten notations about tequila shots sold.¹² He retrieved the crumpled paper from the trash. A second empty tequila bottle was found inside a storage area.

B. Analysis

It is an undisputed fact that two tequila bottles were found on the licensed premises on March 6, 2007. Of much dispute is the interpretation of the applicable rules. Respondent argues that the location of the bottle, which was on the bar counter, not behind the bar, is of consequence. Respondent interprets the bottle's location as being on the client's side of the bar, thereby absolving the Respondent of control.

The applicable Code section prohibits *possession* on the licensed premises of an alcoholic beverage not authorized to be sold on the licensed premises. Obviously, Respondent is not authorized to sell distilled spirits. Respondent's license only allows her to sell beer and wine.

¹² See TABC Exhibit No. 3.

Tequila is a distilled spirit.¹³ It also has alcohol in excess of 17 percent by volume.¹⁴ There is absolutely no reference in the Code or TABC's rules regarding a difference between the "client's side of the bar" and "behind the bar." The mere fact that the bottles were on the licensed premises gives the Respondent both actual and constructive possession of them.

Respondent also argued that patrons may bring their own alcoholic beverages into the licensed premises. This argument is not supported by law. This is not a BYOB establishment. The establishment has a specific permit, with definite parameters. There are specific exceptions to the prohibition against possession of an unauthorized alcoholic beverage in section 61.71 of the Code.¹⁵ None of the exceptions are applicable to this case. Thus, the ALJ finds that Petitioner met its burden of proof on this issue.

IV. SUMMATION

Based on the evidence of record and analysis of the applicable law, the ALJ recommends the following:

1. Count I:

A 10-day suspension, or a \$1,500.00 civil penalty, based on the following factors:

- There is no evidence of record indicating that Respondent is a repeat violator.¹⁶
- The violation is not a major regulatory nor a health, safety, and welfare violation; and
- One occurrence of the one violation was proven.

¹³ Code § 1.04(3) [Definitions].

¹⁴ Exhibits 6(a) and (b) have 35 percent alcohol by volume.

¹⁵ Section 61.71(9) of the Code prohibits possession of an alcoholic beverage not authorized to be sold on the licensed premises, *except as permitted by §§ 22.06, 24.05, or 102.05.*

¹⁶ See TABC Exhibit No. 5 page 3.

2. Count II:

For the reasons stated in section III above, the evidence of record is insufficient to support a finding that the licensee was intoxicated on the licensed premises. No suspension is recommended.

3. Count III:

Based on Respondent's disregard of its permitting parameters and the nature of the violation which is characterized as a major regulatory violation, the ALJ recommends a 20-day suspension, or a \$3,000.00 civil penalty.

V. FINDINGS OF FACT

1. Maria Estela Granillo d/b/a Goldie's Bar currently operates under authority of a Wine and Beer Retailer's Permit, which includes a Retail Dealer's On-Premise Late Hours Permit, issued for the premises known as Goldie's Bar, located at 1430 Myrtle Avenue, El Paso, Texas 79905.
2. The permit was issued on December 17, 2002, and has been continuously renewed.
3. On August 23, 2007, the Texas Alcoholic Beverage Commission issued its notice of hearing directed to Respondent's attorney of record. A copy of the notice was mailed to Respondent.
4. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. On October 11, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901. The record closed on October 19, 2007.
6. TABC's Staff was represented at the hearing by Ramona M. Perry, TABC Staff Attorney.
7. Respondent was represented by Sergio Gonzalez, attorney at law.
8. On March 4, 2006, an investigation was conducted at Goldie's Bar by TABC agents.

9. The bartender stood in front of Ricardo Ramirez, a male patron, as he ordered.
10. The following objective indicators of intoxication were in open view, evident or capable of being observed by the bartender:
 - Poor balance as Mr. Ramirez leaned against the bar counter for balance;
 - Mr. Ramirez showed poor coordination of his fine motor skills, illustrated when he had difficulty separating bills from a wad of money he held in his hand;
 - Mr. Ramirez leaned into the bar counter as he spoke to the bartender, enabling the bartender the opportunity to note any slurred speech, bloodshot eyes, and odor of alcohol.
11. On March 4, 2006, Respondent's bartender sold an alcoholic beverage to an intoxicated person.
12. On April 6, 2007, an inspection of Goldie's Bar was conducted by TABC agents.
13. On April 6, 2007, a half empty tequila bottle was on the bar counter and an empty tequila bottle was in a storage area on the licensed premises.
14. Respondent possessed two tequila bottles on the licensed premises on April 6, 2007.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.
 2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
 3. Proper and timely notice of the hearing was effected on all parties pursuant to 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN § 11.63.
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4. On March 4, 2006, Respondent's bartender sold an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).
5. On April 6, 2007, Respondent possessed alcoholic beverages not authorized to be sold on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. § 61.71(9).
6. Respondent's permits should be suspended for a total of 30 days, or Respondent should be allowed to pay \$4,500.00 in lieu of suspension.

SIGNED December 17, 2007.



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

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



December 17, 2007

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

VIA FACSIMILE NO. 512-206-3350

RE: Docket No. 458-07-3020
Texas Alcoholic Beverage Commission v. Maria Estela Granillo d/b/a Goldie's Bar

Dear Ms. Fox:

Please find enclosed the Proposal for Decision on the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Veronica S. Najera".

Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings
El Paso Regional Office

VSN/cr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings - **VIA Docket Change Form**

Ramona Perry, Attorney, TABC Legal Division - **VIA Facsimile No. 713-426-7965**

Sergio Gonzalez, attorney at Law - **VIA Facsimile No. 915-779-3630**