

DOCKET NO. 543550

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
TAZZ MAN INC.	§	
D/B/A HARDBODY'S OF ARLINGTON	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB268562	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-07-2124)	§	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 Robert Jones. The hearing convened on April 13, 2007 and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 31, 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 have been filed. The Administrative Law Judge has ruled on the Exceptions:

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 your permit(s) are hereby **CANCELLED FOR CAUSE, effective January 3, 2008.**

This Order will become final and enforceable on December 5, 2007, 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 November 9, 2007, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK\bc

Honorable Judge Robert Jones
Administrative Law Judge
VIA FAX (817) 377-3706

Timothy E. Griffith
Respondent's Attorney
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Plano, TX 75074
VIA FAX (469) 742-9521

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RESPONDENT
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Arlington, TX 76005
Regular Mail

Steven Swander
ATTORNEY FOR RESPONDENT
VIA FAX (817) 338-0249

Barbara Moore
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 31, 2007

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-5498

**RE: Docket No. 458-07-2124; Texas Alcoholic Beverage Commission vs Tazz Man Inc.
d/b/a Hardbody's of Arlington, (TABC Case No. 543550)**

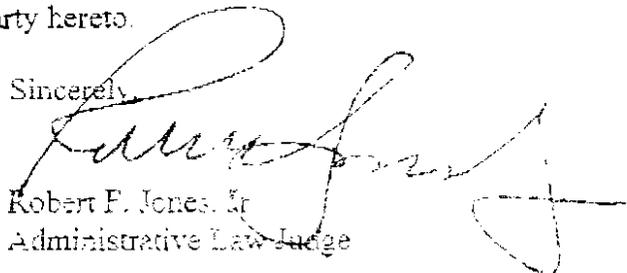
Dear Mr. Steen:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Barbara Moore, attorney for Texas Alcoholic Beverage Commission, and to Tim Griffith, attorney for the Respondent. Tazz Man Inc d/b/a Hardbody's of Arlington (Respondent) holds mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit (collectively) MB-268562. Respondent operates a nightclub called Hardbody's of Arlington (the club or Hardbody's) located at 3101 East Abram Street in Arlington, Tarrant County, Texas. The Staff of the Texas Alcoholic Beverage Commission (TABC) sought cancellation of Hardbody's permit alleging that Respondent had violated the Texas Alcoholic Beverage Code by (1) soliciting or permitting solicitation of a person for immoral or sexual purposes on the permitted premises, and (2) engaging in or permitting an act of sexual contact intended to arouse or gratify sexual desires on the permitted premises.

This proposal finds (1) Respondent's employee solicited a person for immoral or sexual purposes on the permitted premises, (2) Respondent's employee engaged in an act of sexual contact intended to arouse or gratify sexual desires on the permitted premises, and (3) Respondent permitted an act of sexual contact intended to arouse or gratify sexual desires on the permitted premises. The Administrative Law Judge (ALJ) recommends the permits be canceled.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,


Robert F. Jones, Jr.
Administrative Law Judge

DOCKET NO. 458-07-2124

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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BEFORE THE STATE OFFICE

VS.

OF

TAZZ MAN INC. D/B/A
HARDBODY'S OF ARLINGTON,
Respondent
TARRANT COUNTY, TEXAS
(TABC CASE NO. 543550)

ADMINISTRATIVE HEARINGS

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DOCKET NO. 458-07-2124

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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VS.

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TAZZ MAN INC. D/B/A
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Respondent
TARRANT COUNTY, TEXAS
(TABC CASE NO. 543550)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Tazz Man Inc. d/b/a Hardbody's of Arlington (Respondent) holds mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit (collectively) MB-268562. Respondent operates a nightclub called Hardbody's of Arlington (the club or Hardbody's) located at 3101 East Abram Street in Arlington, Tarrant County, Texas. The Staff of the Texas Alcoholic Beverage Commission (TABC) sought cancellation of Hardbody's permit alleging that Respondent had violated the Texas Alcoholic Beverage Code by (1) soliciting or permitting solicitation of a person for immoral or sexual purposes on the permitted premises, and (2) engaging in or permitting an act of sexual contact intended to arouse or gratify sexual desires on the permitted premises.

This proposal finds (1) Respondent's employee solicited a person for immoral or sexual purposes on the permitted premises, (2) Respondent's employee engaged in an act of sexual contact intended to arouse or gratify sexual desires on the permitted premises, and (3) Respondent permitted an act of sexual contact intended to arouse or gratify sexual desires on the permitted premises. The Administrative Law Judge (ALJ) recommends the permits be canceled.

I. JURISDICTION AND PROCEDURAL HISTORY

A. General

On March 9, 2007, Staff issued a notice of violation to Respondent and informed Respondent of Staff's intention to seek a cancellation or suspension of Respondent's permits. The matter was referred to the State Office of Administrative Hearings (SOAH). On April 3, 2007, Staff issued a Notice of Hearing (NOH), and served it on Respondent's attorney by facsimile transmission. The case was set for hearing on April 13, 2007.

On April 13, 2007, a public hearing was convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Barbara Moore, an attorney with the TABC Legal Division. Respondent appeared through its comptroller, Timothy Corbett, and its counsel, Timothy E. Griffith and Steven Swander. The hearing ended on April 13, 2007. The record was closed on June 8, 2007, after Petitioner was allowed to file additional documentary evidence and the parties filed final argument and replies.

B. Respondent's Objections to the Notice of Hearing

Respondent filed a pleading called "Respondent's Objections to Notice" on the morning of the hearing, with the ALJ's leave. The Objections raise a number of procedural or pleading complaints which are disposed of here. Briefly, Objections 3 and 4 are sustained and references to §§ 61.71(a) and 25.04 of the Texas Alcoholic Beverage Code in the NOH are stricken. Objection 1 is overruled and ALJ concludes that the NOH complied with the Pretrial Order and was adequate under the *Mini* case. Objection 6 is overruled because substance of the objection is unclear.

See also Dev. Company v Mini, Inc., 832 S.W.2d 147, 151 (Tex. App. - Houston [14th Dist.], 1992 writ denied). The pretrial order essentially requires the Staff to file a NOH that conforms to the *Mini* case. Prehearing Order No. 1, p. 2, March 22, 2007. Paragraph 1 of the NOH made an allegation concerning misconduct not alleged to have taken place on July 19, 2006. The Staff presented no evidence at the hearing concerning any events on July 19, 2006, and is deemed to have abandoned that complaint. Accordingly, any objection referencing Paragraph 1 will be omitted from this discussion as moot.

Objection No. 8, which complained that the NOH was not served on Respondent by certified or registered mail but facsimile on Respondent's attorney, is overruled. Respondent's counsel requested in writing that "all future communications" be sent to him, which is exactly what the legal division did by sending counsel the NOH. Objection No. 9 complained that the NOH was not served on Respondent at least 10 days before the hearing, which is true. However, Respondent did not request a continuance on the date of hearing or seek affirmative relief at the beginning of the hearing. Since the lack of timely notice could have been cured by granting Respondent a continuance, not by granting a dismissal, Respondent has waived its complaint.

Objections 2, 5 and 7 are considered in more detail.

1. Objection 2

Objection No. 2² cites the *Wishnow* Case³ and complains that § 104.01(6) of the Texas Alcoholic Beverage Code,⁴ which the Staff alleged Respondent violated in Charge 3 of the NOH, is unconstitutionally vague. Section 104.01(6) of the Code prohibits a permittee or an agent, servant, or employee from permitting or engaging in conduct which is "lewd, immoral, or offensive to public decency, including, . . . , permitting lewd or vulgar entertainment or acts."⁵

In *Wishnow*, the owner of a licensed bar was convicted for allowing a patron of the bar to perform a lewd and vulgar act on the licensed premises.⁶ On appeal, Mr. Wishnow complained that § 104.01(6) of the Code was unconstitutionally vague. Earlier cases had held that the terms

² Respondent made the identical complaint in Paragraph V of Respondent's Closing Argument (hereafter the RCA). Both Objection 2 and Paragraph V are considered together.

³ *Wishnow v. State*, 671 S.W.2d 515, 516 (Tex. Crim. App. 1984), *en banc*.

⁴ TEX. ALCO. BEV. CODE ANN. § 104.01(6) (Vernon 2007) (hereafter the Code).

⁵ § 104.01(6) of the Code.

⁶ *Wishnow v. State*, 638 S.W.2d 83-84 (Tex. Ct. App. - Houston, 1st Dist. 1982), *affirmed*, 671 S.W.2d 515, 516-17 (Tex. Crim. App. - 1984).

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“offensive to public decency” and “lewd or vulgar” were undefined by statute and were too indefinite to be enforced. The court of civil appeals held that the statute was not unconstitutionally vague with respect to “lewd” behavior.⁷ On further appeal, the Court of Criminal Appeals reversed finding statute vague with respect to “lewd” behavior.⁸ In a subsequent administrative action against the same Mr. Wishnow, the Commission had canceled Mr. Wishnow’s liquor license on the basis the administrative law judge’s finding that Mr. Wishnow had violated § 104.01(5) of the Code. On appeal, the district court reversed the Commission on the basis of the earlier decision of the Court of Criminal Appeals. The appellate court affirmed holding that § 104.01(6) of the Code was unconstitutionally vague when applied in administrative proceedings.⁹

Subsequent case law makes it clear that a vagueness claim arises only when “men of common intelligence must guess at what is required” by a statute. Second, “in the field of regulatory statutes governing business activity, greater leeway is allowed” in determining a vagueness challenge. Third, “no more than a reasonable degree of certainty can be demanded.” Finally, administrative agency’s application of the law is controlling.¹⁰

In 1994, the Commission enacted its regulation its regulation § 35.41(a)¹¹ concerning § 104.01(6) of the Code under its statutory authority.¹² The regulation was intended to define “lewd and vulgar entertainment or acts . . . and how these terms are used in the Texas Alcoholic Beverage

⁷ *Wishnow v. State*, 638 S.W.2d 83, 84-85 (Tex.Ct.App. – Houston [1st Dist] 1982), *affirmed*, 671 S.W.2d 515, 516-17 (Tex.Crim.App. – 1984). The legislature had defined “public lewdness” in the Penal Code, TEX. PEN. CODE ANN. §§ 21.01, 21.07 (Vernon 2007). These statutory definitions were sufficient, in the court’s opinion, to appraise Mr. Wishnow of the kind of behavior that was “lewd” and thus prohibited.

⁸ *Wishnow v. State*, 671 S.W.2d 515, 517 (Tex.Crim.App. – 1984). The court of appeals result was affirmed but its reasoning was rejected. *Id.*

⁹ *Tex. Alco Bev. Comm’n v. Wishnow*, 704 S.W.2d 425, 427-28 (Tex. App. – Houston [1st Dist] 1985, no pet.).

¹⁰ *Wishnow v. Tex. Alco Bev. Comm’n*, 757 S.W.2d 404, 406-08 (Tex. App. – Houston [1st Dist] 1988, writ denied).

¹¹ 16 TEX. ADMIN. CODE § 35.41.(e).

¹² § 5.31 of the Code (The commission . . . may prescribe and publish rules necessary to carry out the provisions of this code.) (emphasis supplied)

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Code. This section ties the definition of certain terms to the same definition in the Texas Penal Code."¹² Accordingly, "lewd or vulgar entertainment or acts" mean any "sexual offenses" under Chapter 21 of the Texas Penal Code or any "public indecency offenses" under Chapter 43 of the Texas Penal Code.¹⁴ These chapters of the Penal Code have been found to be constitutional against a vagueness challenge.¹⁵ As described in Chapter 21, a person commits public lewdness

if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his . . . act of sexual contact.¹⁶

"Sexual contact" is "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."¹⁷

The Commission's adoption of the rule was specifically authorized by the Legislature and done with the specific design to define terms appearing in a statute the Commission is required to enforce. Men of common intelligence do not have to "guess at what is required" by § 104.01(6) of the Code. The Commission is entitled to some leeway in construing § 104.01(6). The statute affords a reasonable degree of certainty. The Commission's application of § 104.01(6) of the Code through rule § 35.41(a) is controlling.¹⁸ Therefore, the ALJ overrules Respondent's argument that § 104.01(6) of the Code is unconstitutionally vague.

¹² 19 TEX. REG. 5627 (1994).

¹⁴ 16 TEX. ADMIN. CODE § 35.41(a).

¹⁵ *Wishnow v. Tex. Alco. Bev. Comm'n*, 757 S.W.2d 404, 408-09 (Tex.App.—Houston [14th Dist.] 1988, writ denied), citing *Bulash v. State*, 720 S.W.2d 878, 879 (Tex.App.—Houston [14th Dist.] 1986, pet. ref'd).

¹⁶ TEX. PEN. CODE ANN. §21.07(a)(3) (Vernon 2007).

¹⁷ *Id.* § 21.01(2).

¹⁸ *Id.* at 406-08.

2. Objection 5

Objection No. 5¹⁷ complains of the reference to § 35.41(a) of the Commission's rules²⁰ in Charge 3 because Rule § 35.41(a) includes violations of both Chapters 21 and 43 of the Texas Penal Code in its definition of "lewd and vulgar" as used in §104.01(6) of the Code. Respondent says this violates the specificity requirements of the *Mini* case. Respondent asserts that the NOH must identify the statute violated and that "[a]s a matter of fundamental due process, notice of an offense must rest upon a specific statute."²¹ Contrary to Respondent's assertion that the NOH "must identify the statute violated," the Government Code requires only a "a reference to the particular sections of the statutes and rules involved."²² The *Mini* case does not require more.²³

The *Zascavage* case, cited by Respondent, which does hold that "notice of an offense must rest upon a specific statute,"²⁴ does so in the context of a statute which stated a person committed an offense if he "recklessly permits hazing to occur."²⁵ The statute, however, failed

to identify any person or class of persons upon whom a duty to act, whether statutory or otherwise, is imposed; instead, it simply imposes a duty on every living person in the universe to prevent hazing.²⁶

Accordingly, the statute was unconstitutionally vague. The difference between the statute in

¹⁷ Respondent made the identical complaint in Paragraph VI of RCA. Both Objection 5 and Paragraph VI are considered together.

²⁰ 16 TEX. ADMIN. CODE § 35.41.(a)

²¹ *State v. Zascavage*, 216 S.W.3d 495, 497(Tex.App. – Fort Worth 2007, pet. ref.)

²² TEX. GOVT. CODE ANN. § 2001.052(a)(3) (Vernon 2007)

²³ *Tex. Alcoh. Bev. Comm'n v. Mini, Inc.*, 832 S.W.2d 147, 151 (Tex.App. – Houston [14th Dist.], 1992 writ denied)

²⁴ *State v. Zascavage*, 216 S.W.3d 495, 497(Tex.Ct. App. – Fort Worth 2007, no pet.).

²⁵ *Id.* TEX. EDUC. CODE ANN. § 37.152(a)(3) (Vernon 2006).

²⁶ *Id.* at 497.

Zascavage and this contested case is that a duty is imposed by § 104.01(6) of the Code and the regulation on persons authorized to sell beer at retail, or their agent, servant, or employee²⁷ and not "every living person in the universe." Accordingly, Respondent's objection to the reference to 16 Texas Administrative Code § 35.41(a) in the NOH is overruled.

3. Objection 7

Objection No. 7²⁸ complains that § 104.01(7), the basis of Charge 2, is unconstitutionally vague. The section states prohibits a permittee or an agent, servant, or employee from permitting or engaging in conduct which is "lewd, immoral, or offensive to public decency, including, . . . , permitting solicitations of persons for immoral or sexual purposes."²⁹ Charge 2 in the NOH mirrors this language. Respondent asserts that the language of § 104.01(7) of the Code is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."³⁰

Respondent failed to demonstrate that § 104.01(7) was unconstitutional as applied to it.³¹ A person of ordinary intelligence operating a sexually oriented business would understand that permitting sex for money is forbidden by the ban on solicitation of persons for immoral or sexual purposes.³² Such a proprietor would not have to guess whether he was violating the law if he allowed soliciting sex for money on the licensed premises.³³ As applied, the statute does not encourage arbitrary or erratic arrests. The laws forbidding prostitution are clear, and banning

²⁷ § 104.01(6) of the Code.

²⁸ Respondent made the identical complaint in Paragraph VIII of RCA. Both Objection 7 and Paragraph VIII are considered together.

²⁹ TEX. ALCO. BEV. CODE ANN. § 104.01(7).

³⁰ *Pasmore v. State*, 544 S.W.2d 399, 401 (Tex. Crim. App. 1976).

³¹ *Rodriguez v. State*, 47 S.W.3d 86, 88 (Tex. App. – Houston [14th Dist.] 2001, pet. ref.).

³² *Baker v. State*, 50 S.W.3d 143, 145-46 (Tex. App. – Eastland 2001, pet. ref.).

³³ *Id.*

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prostitution on licensed premises is focused on a particular type of location and defined type of conduct.³⁴ As a result, § 104.01(7) is not unconstitutionally vague as applied to Respondent in this case.

Respondent's objections having been ruled upon, other factors relating to notice and jurisdiction are addressed only in the Findings of Fact and Conclusions of Law.

II. EVIDENCE

Respondent operates a nightclub called Hardbody's of Arlington (the club or Hardbody's) located at 3101 East Abram Street in Arlington, Tarrant County, Texas. Hardbody's is a sexually oriented business.

A. Testimony

Two witnesses who were present at Hardbody's on the day of interest testified at the hearing, Sergeant Mike Yantis and Frances Clough.

1. Sergeant Mike Yantis

On July 20, 2006, Sergeant Mike Yantis, a member of the Arlington Police Department vice unit, visited Hardbody's in an undercover capacity. Sgt. Yantis arrived at the club at approximately 4:00 p.m. He entered the club and took a seat in the main area of the club. He was approached by a black female he later identified as Shalonda Alexander, who was known at the club by her stage name, "Kelley." Kelley asked Sgt. Yantis if he would "like a dance" in the VIP room. Sgt. Yantis agreed, and Kelley escorted him to what was called the VIP room, a semi-private room located in the southwest corner of the Hardbody's building. They entered the VIP room through a door-less entrance in the north wall of the room. Couches were placed along the west and south walls of the

³⁴ *Id.*

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room. A large screen television was located on the east wall of the room next to the door of the manager's office.

Kelley led Sgt. Yantis to one of the couches on the west wall of the VIP room and seated him there. Kelley removed her bikini top and began to dance for Sgt. Yantis. In the course of the dance, Kelley rubbed her breasts against Sgt. Yantis's face, chest, and groin. She placed her mouth on Sgt. Yantis's groin. After the dance, Kelley offered Sgt. Yantis an act of fellatio for the price of \$100. Kelley told Sgt. Yantis he would need a condom, told him leave to the club and purchase one, told him he would need cash, told him to return to the club, and told him she would be working until 9:00 to 10:00 p.m.

Sgt. Yantis and Kelley were then approached by a black female later identified as Candace Jefferson, whose stage name is Luscious. She was wearing a body suit with the letters "FBI" on the back. Luscious told Sgt. Yantis that "FBI" stood for "female body inspector." Luscious removed the bikini bottoms Kelley was wearing, placed her mouth on Kelley's groin area, then stood up and told Sgt. Yantis, "Okay she passes. I have inspected her."

Sgt. Yantis signaled vice officers who were outside of the club. They, in turn, sent in uniformed Officers Reno and Jablon. Sgt. Yantis informed them that he was making a prostitution charge against Kelley and a public lewdness charge against Luscious. The two women were allowed to dress, then were arrested and taken from the club and jailed.

2. Frances Clough

Frances Clough was on the premises that afternoon in her capacity as the day manager of Hardbody's. She stated that she did not see the activities of the two dancers (whom she knew by their stage names) and Sgt. Yantis. Ms. Clough denied any personal knowledge of the events that led to the arrests. She did not see Kelley and Luscious being arrested or being escorted from the club by uniformed police officers.

Ms. Clough stated that each dancer is responsible for the details of her work. Hardbody's does not control the details of the dancer's work. She testified that the dancers position themselves in the club on a "first come, first served" basis. The ALJ understands that testimony to mean that a manager such as Ms. Clough does not assign dancers to a particular locale or stage in the club or set up a rotation of dancers. Hardbody's does not train the dancers. The dancers are paid by tips from customers only. Hardbody's pays the dancers nothing. Ms. Clough did not know the location of either dancer. No law enforcement agency has contacted her of Hardbody's to investigate this matter. Ms. Clough testified that sexual contact was forbidden at Hardbody's. If a dancer had sexual contact with someone, she would be fired or dismissed. Hardbody's prohibits solicitation of prostitution and a dancer who engages in prostitution is dismissed.³⁵

Ms. Clough acknowledged that Hardbody's was the holder of alcohol permits. She agreed that as a manager she is responsible for actions on the premises because of the permit. She stated that, "we cannot control what happens," but "if we see it then they're gone." She stated that if she does not know about a violation, she cannot be responsible for it. When asked whether the manager of a licensed business is required to know about activity that might affect the permit, she stated "yes."

Two other witnesses, although not present at the premises on July 20, 2006, testified for Respondent.

3. Scott Hackney

Scott Hackney has been the night manager of Hardbody's for the last five years. His duties are to count the money at night and "make sure everything runs smoothly," i.e., "nobody's breaking any laws that I can see and that everybody behaves properly." Mr. Hackney knew Kelley and Lucious by their stage names. Both were dancers at the club. Mr. Hackney described the women

³⁵ This information was repeated in the testimony of Respondent's two other witnesses, Scott Hackney and Timothy Corber.

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as "contract entertainers." Each had signed a contract with Hardbody's. Hardbody's and the dancers agreed that Hardbody's would not withhold any taxes from any money the dancer's received. Hardbody's did not pay the entertainers any remuneration.

Mr. Hackney stated that if a dancer engaged in sexual contact or solicited prostitution, management at Hardbody's would not know about it. If management did know about it or saw it occurring, the dancer would be told her services were not wanted and she would be escorted from the premises. Mr. Hackney said there was no "real way" management could know if a dancer engaged in sexual contact or solicited prostitution unless a manager was sitting at a table with a dancer and her customer. Mr. Hackney stated that anything that is against the law or unsafe for the clientele was not permitted.

4. Timothy Corbett

Timothy Corbett is the comptroller of Respondent and custodian of its records. He has held that position for 12 years. As such, Mr. Corbett is familiar with the operations of Hardbody's. He identified Respondent's Exhibit #1 as the contract of Shalonda Alexander and Respondent's Exhibit #4 as the contract of Candace Jefferson with Respondent.³⁶ Each contract states that the entertainer is responsible for her own taxes. Each contains a certification by the entertainer that she was "an independent contractor." When asked about Ms. Alexander and Ms. Jefferson's current "employment" status with Hardbody's, Mr. Corbett stated, "They're barred." Mr. Corbett added that they are barred regardless of the truth of the allegations made against them by Sgt. Yantis.

Hardbody's collects a cover charge from each patron as a condition to gain entry into the club and requires photographic identification and appropriate dress from each patron. Each patron must appear to be sober and not emotionally disturbed. Accordingly, Mr. Corbett testified that "not just any person off the street" can gain access to Hardbody's and, in his opinion, Hardbody's is not a public place.

³⁶ See Respondent's Exhibit No. 1 & Respondent's Exhibit No. 4.

Mr. Corbett testified that nine months have passed since the events in question. Law enforcement has never contacted him to investigate this matter. He opined that dancers are very "transient" individuals and he has no knowledge of the whereabouts of Ms. Alexander and Ms. Jefferson. Mr. Corbett testified that Hardbody's had requested an "immediate" hearing in early November 2006 and that TABC had not responded to the request. Mr. Corbett averred the request was tendered to Mr. Cloud and Ms. Karen Smith in a meeting.³⁷ Mr. Corbett identified Respondent's Exhibits #5 to 9 as follow-up requests sent to TABC on Respondent's behalf requesting a hearing.³⁸ Mr. Corbett admitted that he has made no attempts to locate or contact the two dancers in the interval, aside from trying to call their last known telephone numbers.

Mr. Corbett testified that in the past Hardbody's has settled matters with the TABC without resorting to a full hearing and without admitting the truth of the allegations against it. Mr. Corbett identified Respondent's Exhibit Nos. 13 & 14 as the violation histories of other sexually oriented businesses in the Dallas Fort Worth area.³⁹ Mr. Corbett noted that the permit for "Lipstick" in Dallas, Texas. (Respondent's Exhibit No. 13) has not been canceled even though Lipstick has 37 violations resulting in a suspension or penalty.⁴⁰ Mr. Corbett noted that the permit for "Fare Arlington" in Arlington, Texas. (Respondent's Exhibit No. 14) has not been canceled even though Fare Arlington has 31 violations resulting in a suspension or penalty.⁴¹ Mr. Corbett admitted that Hardbody's has a violation history as well, with approximately 29 total violations.⁴²

³⁷ Karen Smith is TABC Agent Feicke's supervisor. See TABC Exhibit #4, p. 1.

³⁸ See Respondent's Exhibit No. 5 to Respondent's Exhibit No. 9. Respondent's attorney sent letters to TABC on November 30, 2006; December 18, 2006; January 7, 2007; January 22, 2007; and February 13, 2007. The first requested an immediate hearing citing the Due Process Clause of the Federal and Texas State Constitutions and a concern for loss of witnesses and loss of documentary evidence. Respondent's Exhibit No. 5. Each subsequent letter cites to the earlier letter(s) in the sequence and each complains about delay and staleness.

³⁹ See Respondent's Exhibit No. 13 & Respondent's Exhibit No. 14.

⁴⁰ Respondent's Exhibit No. 13.

⁴¹ Respondent's Exhibit No. 14.

⁴² See TABC Exhibit #2.

5. TABC Agent William Feicke

TABC Agent William Feick testified briefly at the hearing. Agent Feick was contacted by Sgt. Yantis who informed him of the arrests the sergeant had made at Hardbody's. Agent Feick described his investigation as an "adopted case," i.e., a case in which the TABC does no independent investigation but works from the police department's file. As a consequence, he did not contact the management at Hardbody's, did not visit the premises, did not interview witnesses or collect witness statements.

B. Documentary Evidence

1. Respondent's Violation History

TABC Exhibit #2 is a certified copy of Respondent's TABC file. The file lists a number of violations, 17 of which are sexual contact offenses, from 2000 to 2006.

Docket Number	Date of Order	Date of Agreement	Violation	Suspension in Days	Civil Penalty
519629	06/22/06	05/31/06	01/27/06, Intoxicated permittee or employee on premises	30	\$4,500
616209	02/09/06	02/03/06	02/09/05, sale or delivery to intoxicated person, sales of two or more drinks at same time; 03/19/05, sexual contact (1), 03/05/05, sexual contact (1)	25	\$3,750
600855	02/09/06	02/08/06	04/03/02, 06/12/02, 06/13/02, sexual contact (4); 07/13/02, possession of marijuana	20	\$3,000
614377	02/23/05	02/22/05	02/03/04 & 02/13/04, sexual contact (4)	30	\$4,500
609506	04/15/04	04/07/04	02/13/04, place or manner, violation of §43.251 of Penal Code (employing a minor or child in a sexually oriented business)	15	\$2,250
606315	08/19/03	08/13/03	07/16/03, solicitation of drinks	5	\$750
605826	07/18/03	07/02/03	04/23/03, sexual contact (1)	10	\$1,500

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Docket Number	Date of Order	Date of Agreement	Violation	Suspension in Days	Civil Penalty
599915	06/02/02	05/29/02	04/02/02, permitting minor to possess alcohol, solicitation of drinks (4), & health/sanitation (4)	17	\$2,550
594229	05/01/01	04/25/01	03/29/01, possession of drug paraphernalia by employee	10	\$1,500
592835	01/30/01	01/26/01	11/29/00, failure to report breach of peace	3	\$450
592092	11/29/00	10/25/00	05/02/00, municipal violation; 05/17/00, sexual contact (2); 05/20/00, municipal violation; 07/15/00, municipal violation; 07/18/00, municipal violation; 08/27/00, sexual contact (4)	15	\$2,250

In total, Respondent has agreed to 180 days of suspension, or agreed to pay an aggregate \$ 27,000 in civil penalties in lieu of suspension.

2. Lipstick's Violation History

Respondent's Exhibit No. 13 is a printout of the violation history of Club Hospitality Inc. d/b/a Lipstick, 10859 Harry Hines Boulevard, Dallas, Dallas County, Texas. The ALJ has analyzed the printout for the period 2000 to 2006. The files lists a number of violations, 15 of which are sexual contact offenses.

Docket Number	Violation	Suspension in Days	Civil Penalty
554963	12/20/06, solicitation of drink; 11/05/06, solicitation of drink; 11/05/06, sexual contact (1); 10/24/06, sexual contact (1); 10/23/06, solicitation of drink	30 (est.)	\$4,500

Docket Number	Violation	Suspension in Days	Civil Penalty
492563	05/26/05, solicitation of drink, solicitation for immoral purposes, sexual contact (1); 02/10/05, sexual contact (1), sale or delivery of drugs; 02/04/05, solicitation for immoral purposes, sexual contact (1); 02/03/05, solicitation for immoral purposes, sexual contact (1); 02/02/05, solicitation for immoral purposes, sexual contact (1); 01/14/05, sale or delivery of drugs; 01/13/05, solicitation for immoral purposes, sexual contact (1); 01/11/05, Sale or delivery of drugs, solicitation for immoral purposes, sexual contact (1); 12/15/04, sale or delivery of drugs;	90 (est)	\$13,500
409640	04/04/03, sexual contact (1);	Unknown	Unknown
403390	12/11/01, sexual contact (1);	Unknown	Unknown
394881	01/10/01, sexual contact (1);	Unknown	Unknown
394880	02/25/00, sexual contact (1); 02/25/00, solicitation of drink; 02/24/00, sexual contact (1);	Unknown	Unknown
394879	02/11/00, sexual contact (1), possession or display of indecent graphic material	Unknown	Unknown

3. Fare Arlington's Violation History

Respondent's Exhibit No. 14 is a printout of the violation history of T and N Incorporated d/b/a Fare Arlington, 2711 Majesty, Arlington, Tarrant County, Texas. The ALJ has analyzed the printout for the period 2000 to 2006 (excluding any open claims or violations for which a written warning was given). A number of violations are listed, 14 of which are sexual contact offenses. The history indicates that Fare Arlington's permit was suspended from May 17, 2006, to June 17, 2006, for a violation of having an employee intoxicated on the premises on April 7, 2005.

Docket Number	Violation	Suspension in Days	Civil Penalty
411452	05/22/04, sexual contact (1)	Unknown	Unknown
411451	09/03/03, sexual contact (1)	Unknown	Unknown
408822	05/30/03, aggravated breach, failure to report breach	Unknown	Unknown

Docket Number	Violation	Suspension in Days	Civil Penalty
402837	05/14/03, sexual contact (1)	Unknown	Unknown
402836	04/30/03, sexual contact (1)	Unknown	Unknown
410131	04/11/03, solicitation of drink	Unknown	Unknown
402833	07/18/02, sexual contact (1); 07/17/02, sexual contact (1), solicitation of drink	Unknown	Unknown
402835	06/21/02, sexual contact (1); 06/16/02, sexual contact (1); 06/15/02, sexual contact (1); 06/06/02, sexual contact (1); 03/10/02, sexual contact (1); 03/09/02, sexual contact (1);	Unknown	Unknown
402834	03/19/02, permittee or employee intoxicated on the premises; 03/20/02, sexual contact (1); 03/19/02, sexual contact (1);	Unknown	Unknown
390733	07/20/00, place or manner	Unknown	Unknown
390734	07/19/00, place or manner; 06/29/00, permittee or employee intoxicated on the premises, place or manner	Unknown	Unknown
390735	05/10/00, place or manner, permittee or employee intoxicated on the premises	Unknown	Unknown
390732	04/06/00, permitting minor to possess or consume alcohol, permittee or employee intoxicated on the premises	Unknown	Unknown

III. DISCUSSION AND ANALYSIS

A. The Governing Law

The commission may suspend or cancel a permit if it the permittee violated a provision of the Code or a rule of the commission.⁴⁹ § 104.01(6) of the Code states:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral,

⁴⁹ § 11.63(b)(2) of the Code.

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

...

permitting lewd or vulgar entertainment or acts.⁴⁴

Lewd and vulgar entertainment or acts are defined under the Penal Code Chapters 21 or Chapter 43.⁴⁵

Under the Penal Code,

A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his . . . act of sexual contact.⁴⁶

"Sexual contact" means . . . any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.⁴⁷

The Code also provides that

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

...

permitting solicitations of persons for immoral or sexual purposes.⁴⁸

A person commits an offense if she knowingly offers to engage, agrees to engage, or engages in

⁴⁴ § 104.01(6) of the Code.

⁴⁵ 16 TEX. ADMIN. CODE § 35.41.(a)

⁴⁶ TEX. PEN. CODE ANN. §21.07(a)(3) (Vernon 2007).

⁴⁷ *Id.* § 31.01(2)

⁴⁸ § 104.01(7) of the Code

sexual conduct for a fee."⁴⁹ A "public place" means

means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.⁵⁰

With respect to mental states:

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.⁵¹

B. Respondent's Defensive Fact Issues

Respondent has raised a number of defensive issues, some attacking the sufficiency of the Staff's proof, others raising matters in avoidance.⁵² Respondent asserts that Staff

- Failed to prove that either dancer was an agent, servant, or employee of Respondent.
- Failed to prove that Hardbody's was a public place.
- Failed to prove that Ms. Jefferson was reckless as defined by the Penal Code.

1. The Status of Candace Jefferson and Shalonda Alexander

Respondent says that it proved that the dancers were independent contractors. For instance, the contracts each signed unambiguously state, "I certify that I am an independent contractor and I

⁴⁹ TEX. PEN. CODE ANN. §43.52(a)(1) (Vernon 2007).

⁵⁰ *Id.* § 1.07(a)(4C).

⁵¹ *Id.* § 6.02(b).

⁵² See Subpart E, Respondent's Defenses, below.

am responsible for my own taxes."⁵³ The dancers were responsible for "the details of their own work" and Respondent had no right to control the dancer's work. Hardbody's did not instruct them how to dance, did not train them how to dance, and did not provide their costumes. Respondent did not pay the dancers. The dancer's were not authorized to act on behalf of Respondent.

Even if Ms. Alexander and Ms. Jefferson were independent contractors, Respondent still exercised such control over them "necessary to insure the performance of the contract, in order to accomplish the results of the contract contemplated by the parties."⁵⁴ For example, the contract between Respondent and the two women required them to "check in with valid I.D. [*i.e.*, surrender their identification to Respondent],"⁵⁵ which would be returned at the end of the shift. Further, Respondent extracted a promise from each dancer to "stay the duration of the shift."⁵⁶ Mr. Hackney testified that dancers were not allowed to do anything illegal or unsafe for the clientele of the club. The ALJ notes that Respondent is asserting that it has less control over its dancers than it does over its patrons. Respondent is under a legal duty not to serve an intoxicated patron⁵⁷ but is claiming it has no control over its dancers to prevent them from violating other laws.

Assuming that Candace Jefferson and Shalonda Alexander were independent contractors, they were nevertheless Respondent's employees, *i.e.*, they worked for Respondent for "financial or other compensation"⁵⁸ They were engaged by Respondent to be on the premises, were allowed to dance for tips on the premises, and were given access to Respondent's customers.

2. Was Hardbody's a public place?

⁵³ Respondent's Exhibit No. 1 and Respondent's Exhibit No. 4

⁵⁴ *Bullock v. W & W Vending and Food Service of Texas*, 611 S.W.2d 735, 737 (Tx App. - Tyler 1981, no pet.).

⁵⁵ Respondent's Exhibit No. 1 and Respondent's Exhibit No. 4

⁵⁶ *Id.*

⁵⁷ § 11.61(b)(14) of the Code.

⁵⁸ *Ackley v. Stanz*, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980).

A "public place" means "any place to which the public or a substantial group of the public has access."⁵⁹ Respondent argues that if an establishment "is not fully accessible to the public," *i.e.*, if there is a cover charge; if age requirements exist for gaining entrance to the premises; and, if patrons admitted are required to be dressed appropriately, the establishment is not a public place.⁶⁰ The source cited by Respondent does not offer any authority for his restrictive characterization of a public place.

The definition of "public place" is, to the contrary, open-ended and subject to liberal interpretation.⁶¹ First, "if the public has any access to the place in question, it is public."⁶² The key is not whether Hardbody's is "public" as that term is commonly understood, but whether the public has "access" to Hardbody's. "Access" means "freedom of approach or communication; or the means, power, or opportunity of approaching, communicating, or passing to and from."⁶³ Although Respondent might collect a cover charge or exclude underage or intoxicated persons, no witness testified that a person without the cover charge, underage, or under the influence, could not gain entrance to (have access) the club, whether or not they would be allowed to stay. Further, the statutory definition does not require access by all of the public but only "a substantial group of the public." Even under Respondent's restrictive view, the group of sober, over 21, persons, with the willingness and ability to pay Respondent's cover charge, would be "substantial" or Respondent would be out of business. Therefore, the ALJ concludes that Hardbody's is a public place.⁶⁴

⁵⁹ *Id.* § 1.07(a)(40).

⁶⁰ *TABC v. i Gotcha Inc. d/b/a Main Stage*, Proposal for Decision, SOAH Docket No. 458-06-1250 (April 23, 2005), p. 6.

⁶¹ *Loera v. State*, 14 S.W.3d 464, 467 (Tx. App. – Dallas 2000, no pet.)

⁶² *Id.*

⁶³ *Id.*

⁶⁴ As a result of this conclusion, the issue of whether Ms. Jefferson was "reckless" is moot. See TEX. PEN CODE ANN. § 27.07(a)(3), Vernon 2007 (a person commits an offense if he knowingly engages in [an act of sexual contact] ... if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his [act of sexual contact]).

C. Section 104.91(6) of the Code

The elements of a violation of § 104.01(6) are:

- No person authorized to sell beer at retail;
- nor his agent, servant, or employee;
- may knowingly engage in; or
- permit conduct on the premises of the retailer;
- permitting act of sexual contact (any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person) in a public place.

Respondent is "authorized to sell beer at retail." Frances Clough was the day manager of Hardbody's and is an agent and employee of Respondent. Sgt. Yantis's testimony establishes that a sexual contact occurred between Candace Jefferson and Shalonda Alexander when Ms. Jefferson removed the bikini bottoms Ms. Alexander was wearing and placed her mouth on Ms. Alexander's groin area. It is reasonable to conclude that Ms. Jefferson acted with the intent to "arouse or gratify the sexual desire of" Sgt. Yantis from the nature of the act Ms. Jefferson performed.⁶⁵ Since Ms. Jefferson performed this act voluntarily the ALJ infers she was aware of the nature of her conduct and acted knowingly.

1. Frances Clough

Ms. Clough testified that she was unaware of the activities of Ms. Jefferson and Ms. Alexander. Her testimony was that she could not know what any particular dancer was doing unless she "sat at the same table" with her. Respondent argues that Ms. Clough could not be found to have permitted any misconduct.

In effect, Respondent argues that if Ms. Clough "could not see and did not know that the

⁶⁵ *Wallace v. State*, 52 S.W.3d 231, 234-35 (Tx.App.—El Paso 2001, no pet.).

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prohibited conduct was occurring" she "cannot be held to have 'permitted' it."⁶⁶ The proper inquiry is whether Ms. Clough *knew or should have known* of Ms. Jefferson's conduct.⁶⁷ Hardbody's is a sexually oriented business and had a past history of sexual contacts in the club. A manager like Ms. Clough is responsible for supervising the premises, as she admitted. Ms. Clough and Respondent are charged with notice of the potential type of conduct which occurred. The claim that Ms. Clough did not see Ms. Jefferson's actual acts is no defense at all.⁶⁸

The ALJ concludes that Respondent, in the person of Ms. Clough, permitted an act of sexual contact in a public place on the premises, which is a violation of § 104.01(6) of the Code.

2. Candace Jefferson

Ms. Jefferson, as found above, is also Respondent's employee. Ms. Jefferson knowingly engaged in an act of sexual contact with Ms. Alexander with intent to arouse or gratify Sgt. Yantis's sexual desire in a public place on the licensed premises. The ALJ concludes that Respondent's employee, Ms. Jefferson, engaged in an act of sexual contact in a public place on the premises, which is a violation of § 104.01(6) of the Code.

D. Section 104.01(7) of the Code

The elements of a violation of § 104.01(7) are:

- No person authorized to sell beer at retail;
- nor his agent, servant, or employee;
- may engage in; or
- permit conduct on the premises of the retailer;

⁶⁶ *Wisnow v. Tex. Alcu. Bev. Comm'n*, 757 S.W.2d 404, 409-10 (Tex. Ap. – Houston [14th Dist.] 1988, writ denied).

⁶⁷ *Id.*

⁶⁸ *Id.*

- permit solicitations of persons for immoral or sexual purposes;⁹⁹ and
- knowingly offer to engage, agrees to engage, or engages in sexual conduct for a fee.¹⁰⁰

Respondent is "authorized to sell beer at retail." Frances Clough was the day manager of Hardbody's and is an agent and employee of Respondent. Sgt. Yantis's testimony establishes that Ms. Alexander solicited him in a public place to engage in sexual conduct for a fee. The record demonstrates that Ms. Alexander told Sgt. Yantis he would need a condom, told him leave the club and purchase one, told him he would need cash, told him to return to the club, and told him she would be working until 9:00 to 10:00 p.m. These communications are evidence that Ms. Alexander was aware of the nature of her offer, and acted knowingly.

1. Frances Clough

Unlike the issue of sexual contact, the record does not demonstrate that Ms. Clough and Respondent knew or should have known that Ms. Alexander had solicited Sgt. Yantis. The Respondent's extensive past history of sexual contact violations justified imputing knowledge of the violation of Ms. Jefferson to Ms. Clough. In the instance of Ms. Alexander's solicitation, there is no prior history that placed Ms. Clough or Respondent on notice. Accordingly the ALJ concludes that Respondent, in the person of Ms. Clough, did not permit an offer to engage in sexual conduct for a fee in a public place on the premises, a violation of § 104.01(7) of the Code.

The ALJ further concludes that Respondent's employee, Ms. Alexander, knowingly offered to engage in sexual conduct for a fee in a public place on the premises, which is a violation of § 104.01(7) of the Code.

E. Respondent's Defenses

Respondent raised five avoidance or mitigation defenses to the contested case. First,

⁹⁹ § 104.01(7) of the Code.

¹⁰⁰ TEX. PEN. CODE ANN. §43.02(a)(1) (Vernon 2007).

Respondent alleged that Petitioner's "delay" in setting the contested case for hearing resulted in a denial of due process to Respondent.⁷¹ Second, Petitioner's "inadequate investigation" of this case resulted in a denial of due process to Respondent.⁷² Third, Respondent exercised "good faith and due diligence" and had no knowledge of the violations.⁷³ Fourth, seeking cancellation of Respondent's permits when other similarly situated businesses have not had their permits canceled violates "equal protection."⁷⁴ Finally, Respondent's "violation history" should not be used in assessing a penalty or cancelling Respondent's permits because Respondent did not admit any of the alleged violations.⁷⁵

1. Delay

Respondent noted that nine months had elapsed between the date the violations occurred and the date of the hearing. Contract entertainers, Respondent says, "are transient in nature and difficult to monitor."⁷⁶ The ALJ understands this to mean that dancers like Ms. Alexander and Ms. Jefferson dance at a club for a time and then move on with little subsequent contact. They are difficult to relocate after passage of time. Mr. Corbett testified that Hardbody's had requested an "immediate" hearing in early November 2006 and that TABC had not responded to the request. Respondent's attorney sent letters to TABC requesting a hearing on November 30, 2006; December 18, 2006; January 7, 2007; January 22, 2007; and February 13, 2007.⁷⁷ Petitioner replied to Respondent's

⁷¹ Paragraph XI of RCA.

⁷² Paragraph XII of RCA.

⁷³ Paragraph XIII of RCA.

⁷⁴ Paragraph XIV of RCA.

⁷⁵ Paragraph XV of RCA.

⁷⁶ Paragraph XI of RCA, p. 7.

⁷⁷ See Respondent's Exhibit No. 5 to Respondent's Exhibit No. 9.

letters.⁷⁸ Respondent even filed a "Motion to Dismiss for Want of Prosecution"⁷⁹ to which motion Petitioner replied.⁸⁰ The ALJ will not include a lengthy analysis of those documents. Respondent argues that "TABC failed and refused to act on Respondent's hearing requests," without an adequate excuse⁸¹ and "TABC abandoned this case." In Respondent's view, TABC should be required hold an immediate hearing at Respondent's request because numerous sections of the Code require permittees like Respondent to "promptly" report breaches of the peace, and "timely" pay taxes, renew its permit, and the like. As a result of Petitioner's laxity, Respondent could not locate Ms. Alexander and Ms. Jefferson to its prejudice.⁸²

The ALJ is not aware of any Code provision or regulation that required Petitioner complete its investigation within a definite period of time, process it administratively, or issue a notice of hearing. Respondent argued that "stale complaints" can cause prejudice to parties in administrative hearings.⁸³ In the *Granek* case,⁸⁴ cited by Respondent, the court held that a delay of six years had not prejudiced the Respondent, Dr. Granek. Dr. Granek failed to prove that "exculpatory evidence or witness became unavailable . . . during the delay."⁸⁵ The Court also considered whether the principal witnesses forgot the relevant events, "whether the relevant events were contemporaneously recorded and whether the defendant had early notice of the allegations against him."⁸⁶ Although Respondent complained that Ms. Alexander and Ms. Jefferson were not available to it as witnesses, Mr. Corbett admitted that he has made no attempts to locate or contact the two dancers in the

⁷⁸ TABC Exhibit #5

⁷⁹ Respondent's Exhibit No. 10.

⁸⁰ TABC Exhibit #6.

⁸¹ Paragraph XI of RCA, p. 8.

⁸² Paragraph XI of RCA, pp. 8-9.

⁸³ Paragraph XI of RCA, p. 8.

⁸⁴ *Grusky v. State Bd. of Med. Exam.*, 172 S.W.3d 761(Tx.App. – Austin 2005, no pet.).

⁸⁵ *Id.* at 773.

⁸⁶ *Id.* at 773-74.

interval, aside from trying to call their last known telephone numbers. Respondent offered no proof, even of a preliminary nature, that the testimony of Ms. Alexander and Ms. Jefferson would be exculpatory or favorable to Respondent.⁸⁷ Sgt. Yantis reduced his observations to writing shortly after the events of July 20, 2006, eliminating the danger the essential facts would be lost. As a result, the ALJ concludes that Petitioner's "delay" in setting the contested case for hearing was not prejudicial to Respondent's rights.

2. Inadequate Investigation

Respondent argues that "law enforcement's" investigation was inadequate. The TAEC did not contact Hardbody's about the case; interview any of Hardbody's witnesses; obtain all the evidence before submitting the case for hearing; determine whether Ms. Alexander and Ms. Jefferson were Respondent's agents, servants, or employees; determine whether Ms. Alexander and Ms. Jefferson were on or off duty; and, determine "what the perspective of the Respondent was with respect to the case."⁸⁸ No abuses such as described in the opinion of the Court of Criminal Appeals in *Ex parte Brantley*⁸⁹ exists in this case. The abuses described in that case do not exist here.

It is true that Agent Faick did not contact the management at Hardbody's, did not visit the premises and did not interview witnesses or collect witness statements. As he testified, this was an "adopted case." Moreover, the ALJ notes that Sgt. Yantis's report and testimony were complete in themselves. Sgt. Yantis was a direct and credible fact witness to the incidents for which he arrested

⁸⁷ Respondent argued that Petitioner had the burden of proving an excuse for the delay, citing *Ex parte Martin*, 6 S.W.3d 524, 528 (Tx. Crim. App. 1999). Since *Martin* involved a statute requiring the state to indict an accused within a proscribed period of time, or barring a demonstration of good cause, suffer a dismissal, it is not relevant to this contested case. The burden to show prejudice remains with Respondent.

⁸⁸ Paragraph XII of RCA, p. 10.

⁸⁹ *Ex parte Brantley*, 781 S.W.2d 885 (Tx. Crim. App. 1989) (black janitor was convicted of raping and murdering high school girl on the basis of investigation in which lead investigator had determined that janitor was guilty prior to arriving at the scene of crime, had colluded with others to supply perjured testimony, had intimidated and silenced witnesses with exculpatory information, and had failed to obtain chemical tests which might have exonerated janitor.)

Ms. Alexander and Ms. Jefferson. Nothing in the record suggests that a visit to the premises would have added to an understanding of the violations. Frances Clough aside, Respondent has suggested no other witness that might have profitably been interviewed, and Agent Feick was aware of the position that Respondent took with respect to the status of Ms. Alexander and Ms. Jefferson as independent contractors.⁹⁰ Thus, The ALJ concludes that "law enforcement's investigation" was not prejudicial to Respondent's rights.

3. Good Faith, Due Diligence, and Knowledge

In the event that a civil penalty or sanction, such as suspension or cancellation, are imposed, Respondent seeks the benefit of § 11.64 of the Code.⁹¹ Respondent argues it has acted in good faith, with due diligence, and had no knowledge of the alleged violations. Section 11.64 of the Code provides the Commission may "relax" a provision of the Code authorizing suspension or cancellation of a permit and assess sanction the Commission finds is just if the Commission finds that:

- the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;⁹²
- an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee; or, that the permittee or licensee did not knowingly violate this code;⁹³ and
- the permittee or licensee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations.⁹⁴

Respondent argues that it has acted in good faith and with due diligence because

⁹⁰ The question of whether the two dancers were on or off "duty" was raised for the first time by Respondent in its post-hearing brief. Its relevance to the case is questionable. The ALJ notes that word "duty" connotes an employee status, something Respondent has argued do not exist. Further, the ALJ also fails to understand how Respondent's "perspective" would be a useful avenue of investigation for Agent Feicke.

⁹¹ Paragraph XIII of RCA, p. 11.

⁹² § 11.64(b), (c)(1) of the Code.

⁹³ § 11.64(b), (c)(2) &(4) of the Code.

⁹⁴ § 11.64(b), (c)(5) of the Code.

Ms. Alexander and Ms. Jefferson have been barred from Respondent's premises. Respondent asserts that its good faith is shown because Ms. Alexander and Ms. Jefferson were barred "not because of the truth of the TABC allegations, but because the allegations were made."⁹⁵ Respondent argues that it has acted in good faith and without knowledge because its managers cannot know of a sexual contact or a solicitation until it is notified of a violation by the TABC. Respondent asserts it cannot watch every dancer all the time, that a sexual contact could be easily concealed, that a solicitation can take place in quiet conversation in a noisy club, and Respondent cannot monitor every conversation. The most Respondent can do, it argues, is to make its policy clear and make an example of offenders.

The actions Respondent offers as proof of its good faith and due diligence are in reality after-the-fact palliatives. Respondent asserts there is nothing it can do before the fact, and offers that rationalization as mitigation for violations that are subsequently prosecuted. Respondent wishes to maintain the *status quo* where its dancers mingle freely with customers and provide private dances in semi-private rooms without self-policing or consequences. It has offered nothing to deter sexual contact violations. Respondent's history over the six year period preceding July 2006 saps Respondent's claims of good faith and due diligence of their vitality.

Ms. Clough and Mr. Hackney testified it was impossible for them to have knowledge of what occurred between dancers and Hardbody's patrons. They took no steps to police interactions between dancers and patrons. With respect to sexual contacts, the ALJ concluded it was reasonable to impute knowledge of Ms. Jefferson's activity to Ms. Clough.

The ALJ concludes that Respondent has not acted in good faith or with due diligence and should have had knowledge of what occurred on the licensed premises.

4. Equal Protection

⁹⁵ Paragraph XIII of RCA, p. 11

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Respondent argues that seeking cancellation of Respondent's permits when other similarly situated businesses have not had their permits canceled violates "equal protection."⁹⁶ In particular, Respondent refers to the evidence concerning Lipstick and Fare Arlington. Respondent asserts that their violation histories are "much worse" than Respondent's without having had their permits canceled. In fact, with respect to the number of sexual contact/public lewdness violations, Respondent, Lipstick, and Fare Arlington share very similar pasts: Respondent has had 17, Lipstick 15, and Fare Arlington 14. The record does not demonstrate the total days of suspension/civil penalties assessed against Lipstick and Fare Arlington, as it does for Respondent (180 days/\$27,000). Lipstick has been assessed \$18,000 in civil penalties, which would approximate 120 days of suspensions. Fare Arlington's permit has been suspended 30 days. In comparison with Lipstick, Respondent has fared worse because its record is worse. Fare Arlington has an extensive record, but so does Respondent, and Respondent has not had its permits suspended without an opportunity to pay a civil penalty, as has Fare Arlington.

Respondent asserts that the Code and TABC's regulations create a "statutory scheme" for assessing civil penalties, suspensions, and cancellations in administrative cases. Respondent complains that the rules have not been uniformly applied to similarly situated individuals. Respondent argues that similarly situated individuals should be treated the same under the "statutory classification" unless there is a rational basis for not doing so, *i.e.*, the scheme bears a rational relation to a legitimate legislative purpose and is neither arbitrary or discriminatory.⁹⁷ Respondent concludes there is "no rational basis for giving preferential treatment to Lipstick and Fare Arlington and not to Respondent."⁹⁸

In *Whitworth*, cited by Respondent, the court considered a law that immunized the driver of

⁹⁶ Paragraph XIV of RCA, p. 12.

⁹⁷ See *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985) (finding the Texas automobile guest statute unconstitutional).

⁹⁸ Paragraph XIV of RCA, p. 12.

a motor vehicle from suit by an injured passenger if the passenger was related to the driver.⁹⁹ The statute's rationale was to prevent collusive suits against insurers. The Supreme Court found that the statute bore no rational relation to its purpose and found the statute violated equal protection.¹⁰⁰ The Court noted that the statute created an irrebuttable presumption that all injured passengers who sue a related driver do so collusively, in which the Court declined to indulge.¹⁰¹ The concerns addressed in *Whitworth* do not arise here. Neither the legislature nor the TABC has created any "classification" into which Respondent is assigned or created an irrebuttable presumption operating against Respondent but not Lipstick and Fare Arlington. Instead, the "scheme" for assessing civil penalties, suspensions, and cancellations in administrative cases is grounded on the facts of each case.¹⁰²

The ALJ concludes that Respondent's right to the equal protection of the laws has not been violated.

5. Violation History

Respondent asserts its "violation history" should not be used in assessing a penalty or cancelling Respondent's permits because Respondent did not admit any of the alleged violations.¹⁰³ Respondent settled cases in the past to avoid the expenses of litigation and argues its agreements with the Commission should not have an influence over the Commission's decision in the present.

The ALJ recommends that the Commission give Respondent's violation history the weight it deems appropriate. In deciding the weight to give the history, repeated violations of the same section of the Code over a period of time should be considered significant. Whether or not

⁹⁹ *Whitworth v. Symum*, 699 S.W.2d 194, 195(Tex. 1985)

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 197.

¹⁰² 16 TEX. ADMIN. CODE § 37.60(g).

¹⁰³ Paragraph XV of RCA, p. 12.

Respondent wished to litigate them, 17 violations of sexual contact over a six year period evidences a serious and long standing compliance problem.

F. Sanctions

1. General Rules

As noted above, a violation of § 104.01(6) or § 104.01(7) of the Code would authorize the commission to cancel Respondent's permit or suspend it for not more than 60 days.¹⁰⁴ In general, if the Commission determines to suspend a permit, the permittee must be given an opportunity to pay a civil penalty.¹⁰⁵ In a case where the suspension is based upon "an offense relating to prostitution" the Commission must determine whether to allow the permitted will be given an opportunity to pay a civil penalty.¹⁰⁶ In determining whether to grant a permittee an opportunity to pay a civil penalty, the Commission must consider:

- the type of permit or license held by the violating licensee or permittee and whether the sale of alcoholic beverages constitutes the primary or partial source of the licensee or permittee's business;
- the type of violation or violations charged;
- the licensee's or permittee's record of past violations.
- any aggravating or ameliorating circumstances including but not limited to:
 - whether the violation was caused by intentional or reckless conduct by the licensee or permittee;
 - the number, kind and frequency of violations of the Alcoholic Beverage Code and rules of the Commission committed by the licensee or permittee;

¹⁰⁴ § 11.61(b)(2) of the Code

¹⁰⁵ § 11.64(a) of the Code, which states: "When the commission or administrator is authorized to suspend a permit or license under this code, the commission or administrator *shall* give the permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended. . . ." (emphasis supplied). The word "shall" imposes a duty." TEX. GOV'T. CODE ANN. § 311.016(2)(Vernon 2007).

¹⁰⁶ § 11.64(a) of the Code, which states: "[i]f the basis for the suspension is an offense relating to prostitution or gambling, . . . the commission or administrator shall determine whether the permittee or licensee *may* have the opportunity to pay a civil penalty rather than have the permit or license suspended." (emphasis supplied). The word "may" creates discretionary authority or grants permission or a power." TEX. GOV'T. CODE ANN. § 311.016(1)(Vernon 2007).

- whether the violation caused the serious bodily injury or death of another; and/or
- whether the character and nature of the licensee's or permittee's operation are reasonably calculated to avoid violations of the Alcoholic Beverage Code and rules of the Commission.¹⁰⁷

Once the Commission has settled on a length of suspension (if it does), it must determine the amount of penalty the permittee will be allowed to pay in lieu of a suspension. First, the "amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended."¹⁰⁸ The amount must be "appropriate for the nature and seriousness of the violation."¹⁰⁹ The Commission has to consider "the type of license or permit held; the type of violation; any aggravating or ameliorating circumstances concerning the violation; and the permittee's previous violations."¹¹⁰

The Commission is authorized, in its discretion, to "assess a sanction the commission or administrator finds just under the circumstances . . . if the commission or administrator finds that":¹¹¹

- the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
- the permittee or licensee was entrapped;
- an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee;
- the permittee or licensee did not knowingly violate this code;
- the permittee or licensee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations, or
- the violation was a technical one.¹¹²

¹⁰⁷ § 11.64(a) of the Code; 16 TEX. ADMIN. CODE § 37.61(b).

¹⁰⁸ § 11.64(a) of the Code.

¹⁰⁹ § 11.64(a) of the Code.

¹¹⁰ *Id.*

¹¹¹ § 11.64(b) of the Code.

¹¹² § 11.64(c) of the Code.

2. Cancellation for Violation of § 104.01(6)

The decision to cancel Respondent's permit rests in the Commission's discretion.

Respondent holds a mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit. The record is not clear whether the sale of alcoholic beverages constitutes the primary or partial source of Respondent's business. Respondent apparently charges a cover to enter the premises. No evidence was admitted regarding whether Respondent sells food. At best, the record shows that the sale of alcohol is an important, if partial, source of business. Respondent has agreed to 180 days of suspensions, or agreed to pay an aggregate \$ 27,000 in civil penalties in lieu of suspension for prior violations. In addition to 17 sexual contact offenses from 2000 to 2006, Respondent has violations for an intoxicated permittee or employee on premises: sale or delivery of alcohol to an intoxicated person; sales of two or more drinks at same time to the same person; possession of marijuana; violation of §43.251 of Penal Code by employing a minor or child in a sexually oriented business; solicitation of drinks; permitting minor to possess alcohol; possession of drug paraphernalia by employee; failure to report a breach of the peace; and municipal code violations. The sexual contact did not cause anyone serious bodily injury or death. The character and nature of Respondent's operation are not reasonably calculated to avoid some violations of the Alcoholic Beverage Code and rules of the commission.

The violation was not caused by Respondent's agent's intentional conduct, that is, the evidence did not prove that it was Ms. Clough's conscious objective or desire to cause Ms. Jefferson to engage in a sexual contact.¹¹³ Instead, Ms. Clough's actions were reckless. She knew or should have known of the possibility of sexual contacts occurring on the premises, as found above. The Commission would be justified in finding that Ms. Clough was aware of, but consciously disregarded, "a substantial and unjustifiable risk" that sexual contacts would occur. The risk of

¹¹³ TEX. PEN. CODE ANN. § 6.03(a) (Vernon 2007)(A person acts intentionally or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result)

sexual contact was likely enough that disregarding it as Ms. Clough did constituted "a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from Ms. Clough's standpoint."¹¹⁴ Ms. Clough testified that she consciously disregarded the risk of sexual contact.¹¹⁵

Although the Standard Penalty Chart is not binding on the Commission the ALJ notes that it calls for cancellation for a third offense.¹¹⁶ In the ALJ's opinion, the Commission would be justified in cancelling Respondent's permits for the violation of § 104.01(6) of the Code.

IV. SUMMARY

The ALJ makes the following recommendations to the Commission:

- find that Respondent, in the person of Frances Clough, permitted an act of sexual contact in a public place on the premises, which is a violation of § 104.01(6) of the Code.
- find that Respondent's employee, Candace Jefferson, engaged in an act of sexual contact in a public place on the premises, which is a violation of § 104.01(6) of the Code.
- find that Respondent's employee, Sholonda Alexander knowingly offered to engage in sexual conduct for a fee in a public place on the premises, which is a violation of § 104.01(7) of the Code.
- give Respondent's violation history the weight it deems appropriate.
- cancel Respondent's permits for the violation of § 104.01(6) of the Code.

As demonstrated by Respondent's extensive violation history, Respondent has been unable or unwilling to comply with the Code and the commission's regulations. In light of that history and based upon the seriousness of the current violations, the ALJ recommends Respondent's permits be canceled.

V. FINDINGS OF FACT

¹¹⁴ TEX. PEN. CODE ANN. § 6.03(c) (Vernon 2007)

¹¹⁵ *Payne v. State*, 710 S.W.2d 193, 194 (Tx.App.—Beaumont 1985, no pot.).

¹¹⁶ 16 TEX. ADMIN. CODE § 37.60(d), Standard Penalty Chart.

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1. Tazz Man Inc. d/b/a Hardbody's of Arlington (Respondent) holds mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit (collectively) MB-258562.
2. Respondent operates a nightclub called Hardbody's of Arlington (the club or Hardtbody's) located at 3101 East Abram Street in Arlington, Tarrant County, Texas.
3. Hardbody's is a sexually oriented business.
4. Sergeant Mike Yantis is a member of the Arlington Police Department vice unit.
5. On July 20, 2006, Sgt. Yantis visited Hardbody's in an undercover capacity
6. Sgt. Yantis entered the club and took a seat in the main area of the club. Sgt. Yantis was approached by a black female he later identified as Shalonda Alexander, who was known at the club by her stage name, "Kelley."
7. Ms. Alexander asked Sgt. Yantis if he would "like a dance" in the VIP room.
8. Sgt. Yantis agreed and Ms. Alexander escorted him to what was called the VIP room: a semi-private room located in the southwest corner of the Hardbody's building.
9. Ms. Alexander led Sgt. Yantis to one of the couches on the west wall of the VIP room and seated him there.
10. Ms. Alexander removed her bikini top and began to dance for Sgt. Yantis.
11. In the course of the dance, Ms. Alexander rubbed her breasts against Sgt. Yantis's face, chest, and groin. Ms. Alexander placed her mouth on Sgt. Yantis's groin.
12. After the dance, Ms. Alexander offered Sgt. Yantis an act of fellatio for the price of \$100.
13. Ms. Alexander told Sgt. Yantis he would need a condom, told him leave the club and purchase one, told him he would need cash, told him to return to the club, and told him she would be working until 9:00 or 10:00 p.m.
14. Sgt. Yantis and Ms. Alexander were then approached by a black female later identified as Candace Jefferson, whose stage name is Luscious.
15. Ms. Jefferson was wearing a body suit with the letters "FBI" on the back. Ms. Jefferson told Sgt. Yantis that "FBI" stood for "female body inspector."
16. Ms. Jefferson removed the bikini bottoms Ms. Alexander was wearing, placed her mouth on Ms. Alexander's groin area, then stood up and told Sgt. Yantis, "Okay she passes. I have

inspected her "

17. Sgt. Yantis arrested Ms. Alexander for prostitution and Ms. Jefferson for public lewdness.
18. Frances Clough was on the premises that afternoon in her capacity as the day manager of Hardbody's.
19. Hardbody's collects a cover charge from each patron as a condition to gain entry into the club and requires photographic identification and appropriate dress from each patron.
20. Each Hardbody's patron must appear to be sober and not emotionally disturbed.
21. Respondent's violation history includes a number of violations, 17 of which are sexual contact offenses, from 2000 to 2006. None of the violations are for solicitation of prostitution.
22. Respondent has agreed to 180 days of suspensions, or agreed to pay an aggregate \$ 27,000 in civil penalties in lieu of suspension for its past violations.
23. Candace Jefferson and Shalonda Alexander were Respondent's employees, *i.e.*, they worked for Respondent for financial or other compensation:
 - a. They were engaged by Respondent to be on the premises;
 - b. They were allowed to dance for tips on the premises; and
 - c. They were given access to Respondent's customers.
24. A substantial group of the public has access to Respondent's premises, and Respondent's premises are a public place.
25. Frances Clough is an agent and employee of Respondent.
26. A sexual contact occurred between Candace Jefferson and Shalonda Alexander when Ms. Jefferson removed the bikini bottoms Ms. Alexander was wearing and placed her mouth on Ms. Alexander's groin area.
27. Ms. Jefferson acted with the intent to arouse or gratify the sexual desire of Sgt. Yantis.
28. Ms. Jefferson performed this act voluntarily and was aware of the nature of her conduct and acted knowingly.
29. Ms. Clough knew or should have known of Ms. Jefferson's conduct.
30. Ms. Clough permitted an act of sexual contact in a public place on the premises.

31. Respondent's employee, Ms. Jefferson, engaged in an act of sexual contact in a public place on the premises.
32. Ms. Alexander solicited Sgt. Yantis in a public place to engage in sexual conduct for a fee.
33. Ms. Alexander was aware of the nature of her offer, and acted knowingly, because Ms. Alexander told Sgt. Yantis he would need a condom, told him to leave the club and purchase one, told him he would need cash, told him to return to the club, and told him she would be working until 9:00 to 10:00 p.m.
34. On April 3, 2007, Staff issued a notice of hearing informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
35. On April 13, 2007, a public hearing was convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Barbara Moore, an attorney with the TABC Legal Division. Respondent appeared through its Comptroller Timothy Corbett and its counsel, Timothy E. Griffith and Steven Swander. The hearing ended on April 13, 2007.
36. The record was closed on June 8, 2007.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH has jurisdiction over all matters relating to the conduct of 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 (Vernon 2007).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 (Vernon 2007).
4. Respondent permitted an act of sexual contact in a public place on the premises, which is a violation of § 104.01(6) of the Code.
5. Respondent's employee engaged in an act of sexual contact in a public place on the premises, which is a violation of § 104.01(6) of the Code.
6. Respondent's employee knowingly offered to engage in sexual conduct for a fee in a public

Docket No. 458-07-2124

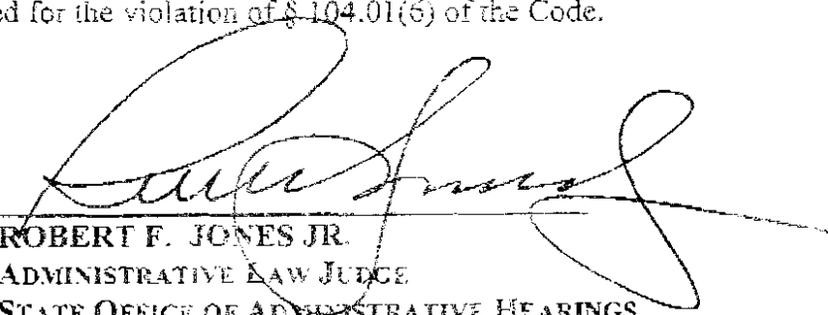
Proposal for Decision

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place on the premises, which is a violation of § 104.01(7) of the Code.

7. Respondent's permits may be canceled for the violation of § 104.01(6) of the Code.

SIGNED July 31, 2007.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: Tazz Man Inc d/b/a Hardbody's of Arlington

DOCKET NUMBER: 458-07-2124

AGENCY CASE NO: 543550

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as of July 31, 2007

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 19, 2007

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE
512/206-3498

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RE: Docket No. 458-07-2124; Texas Alcoholic Beverage Commission v. Taz: Mau Inc. d/b/a
Hardbody's of Arlington (TABC No. 543550)

Dear Mr. Steen:

The ALJ has received and reviewed the Respondent's Exceptions to the Proposal for Decision in the above referenced case. After review, the ALJ is of the opinion the Proposal for Decision addresses the issues raised by Respondent and should stand as written.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Jones Jr.", written over the typed name and title.

Robert F. Jones Jr.
Administrative Law Judge