

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

February 10, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

**RE: Docket No. 458-97-1255; Texas Alcoholic Beverage Commission vs. WFKR
d/b/a Sugar's; Permit Nos. MB-142218; LB-142219; (TABC Case No.
573651)**

Dear Mr. Bailey:

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 Clyde Burlison, attorney for Texas Alcoholic Beverage Commission, and to Brian W. Bishop, attorney for Respondent. For reasons discussed in the Proposal, I recommend Respondent's permits be suspended for 60 days or, alternatively, that Respondent pay a fine of \$60,000.00.

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. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in cursive script that reads "Catherine C. Egan".

Catherine C. Egan
Senior Administrative Law Judge

CCE/jrc
Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - **HAND DELIVERY**
Clyde Burlison, Staff Attorney, Texas Alcoholic Beverage Commission - **HAND DELIVERY**
Brian W. Bishop, Clark, Thomas & Winters, 700 Lavaca St., Suite 1200, Austin, Texas 78767 - **CERTIFIED**
MAIL NO. Z 492 505 514, RETURN RECEIPT REQUESTED

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

6661 | |

DOCKET NO. 458-97-1255

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
WFKR, INC. d/b/a SUGAR'S; PERMIT NOS. MB-142218, LB-142219 (TABC CASE NO. 573651)	§ § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Staff) brought this enforcement action to revoke the permits held by WFKR, Inc. d/b/a Sugar's (Sugar's or Respondent). The Staff alleged that on January 7, 1997, Respondent, through its employees, sold alcoholic beverages to four intoxicated persons, one of whom was so obviously intoxicated that he presented a clear danger to himself and others. The intoxicated condition of this one person proximately caused another's death. The Administrative Law Judge finds that Respondent served alcoholic beverages to four intoxicated persons, but did not prove that Sugar's sold or served alcohol to anyone who was obviously intoxicated. The Administrative Law Judge recommends that Respondent's permits be suspended for 60 days or, alternatively, that Respondent pay a fine of \$60,000.00.

I.

NOTICE, JURISDICTION AND PROCEDURAL HISTORY

There are no issues of notice or jurisdiction in controversy in this proceeding. Therefore, those matters are set out in the Findings of Fact and Conclusions of Law.

This hearing was convened on August 5, 1998, before Catherine C. Egan, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), at the Stephen F. Austin Building, 1700 North Congress, Suite 1100, Austin, Texas, and continued on August 6, and 25, 1998. Clyde Burleson, Assistant Attorney General, represented the Staff. Brian Bishop, attorney, represented Sugar's. At the close of evidence, the parties requested additional time to submit closing arguments and briefs before the record closed. The parties filed their final arguments and briefs and the record closed on November 4, 1998.

100-458-97-1255
11/11/98
11/11/98

II.
BACKGROUND AND ISSUES

A. Background

Sugar's is a cabaret bar and restaurant at 404 Highland Mall Boulevard, Travis County, Austin, Texas. Louis Warren opened Sugar's in June 1982 and was the Respondent's President and Chairman of the Board in January 1997. Sugar's has held a Mixed Beverage Permit, MB-142218, and a Mixed Beverage Late Hours Permit, LB-142219, continuously since June 1982. These permits authorize Sugar's to serve liquor, beer, and wine. Sugar's has had no previous violation for serving alcohol to an intoxicated person in the sixteen years it has been in operation.

According to Mr. Warren, Sugar's has always been an upscale restaurant/bar with live entertainment, similar to Las Vegas' cabarets. Sugar's caters to the "coat and tie" businessmen. College men are not typical customers, because Sugar's prices are too high for the younger customer. Drinks run \$6.00 - \$6.50. Sugar's serves no doubles. The cover charge is \$5.00 per person. Fights are uncommon, and if a customer becomes "agitated," Mr. Warren testified, the staff quickly isolates the customer and helps him outside. Sugar's does not permit cash tabs.

On the night of January 7, 1997, Grant Foster and three of his friends, Jason Carpenter, John Girard, and Noel Burrows (collectively referred as the four men, or the four) began drinking alcohol. Around 10:00 p.m., the four went to Sugar's and continued their drinking spree. It is unclear how much they drank before they went to Sugar's. It is disputed how much they drank at Sugar's and how long they stayed. Around 2:24 a.m. on January 8, 1997, at Interstate Highway (IH) 35 and Cesar Chavez, Mr. Foster lost control of his car, flipping it over the exit ramp. Mr. Burrows was thrown out of the car and died on the highway. Messrs. Foster, Carpenter and Girard (the three survivors) sustained injuries and were taken to the hospital.

Three of the four men had their blood alcohol levels taken: Messrs. Burrows, Foster, and Carpenter. All three had a blood alcohol level significantly above the legal limit permitted for driving (.10%)¹. Mr. Foster was charged with, and found guilty of, vehicular manslaughter. His sentence was probated.

¹TEX. PENAL CODE ANN. §49.01 (B) (Vernon 1994 & Supp. 1999).

B. Alleged Violations, Defenses, and ALJ Overview

The Staff alleged that Sugar's violated §11.61(b)(14)² of the Code by serving alcoholic beverages to the four when they were intoxicated. A violation of §11.61(b) of the Code may result in a suspension "for not more than 60 days" or the cancellation of an original or renewal permit.

The Staff also alleged that Sugar's violated §2.02(b)³ of the Code, by selling alcoholic beverages to Mr. Foster when he was so obviously intoxicated that it was or should have been apparent that Mr. Foster presented a clear and present danger to himself and others. The Staff argued that Mr. Foster's intoxication was the proximate cause of Mr. Burrows' death. A violation of §2.02 of the Code is the basis of a revocation proceeding.

Sugar's denied that it served alcoholic beverages to the four men when they were intoxicated. According to Sugar's, they served the four men one round of drinks and one round of shots. Sugar's maintained all four men left Sugar's to continue their drinking binge elsewhere. Sugar's also asserted the seller-server training affirmative defense provided in §106.14 of the Code. Sugar's represented that all its employees, including the server accused of selling the alcoholic beverages to the four men, were required to, and did, attend a TABC approved seller-server training program. Alternatively, if it is found that Sugar's did violate the Code, Sugar's argued revocation is too severe a penalty.

The analysis of the matter is complicated by the intoxicated condition of the witnesses: Messrs. Foster, Girard, and Carpenter. The four men paid their bill at Sugar's with cash, leaving no paper trail to review. Only one server recalled serving the four, and then only two rounds. Neither side offered any independent witnesses. Neither party disputed that the four men were "wasted" or "beyond" at the time of the accident. The three survivors' recollection of events prior to the accident is contradictory and, at times, unbelievable.

²TEX. ALCO. BEV. CODE ANN. §11.61(b)(14) provides that it is a violation of the Code if the permittee sold or delivered an alcoholic beverage to an intoxicated person.

³TEX. ALCO. BEV. CODE ANN. § 2.02 (B) of the Code provides that:

- (1) at the time the provision occurred *it was apparent to the provider* that the individual being sold, served, or provided with an alcoholic beverage was *obviously intoxicated* to the extent that he *presented a clear danger* to himself and others; and
- (2) the intoxication of the recipient of the alcoholic beverage was a *proximate cause* of the damages suffered. (Emphasis added)

The ALJ will discuss the evidence pertaining to each alleged violation of the Code; will review the applicable law; will analyze the evidence and the applicable law, including the affirmative defense raised by Sugar's; and will conclude by finding Sugar's served alcohol to Messrs. Foster, Girard, Carpenter, and Burrows while each was intoxicated. However, there is insufficient evidence to show that Mr. Foster was so obviously intoxicated that Sugar's knew or should have known that he was a clear and present danger to himself and others. Section 106.14 of the Code insulates Sugar's from the actions of all its wait staff except one, Malinda Jones.

III. EVENTS LEADING TO THE ACCIDENT ON JANUARY 8, 1997

A. Before Sugar's

While the details of that night vary depending on the witness, Messrs. Foster, Girard and Carpenter agreed on the basic sequence of events. On January 7, 1997, Mr. Girard received an insurance settlement of approximately \$5,000.00, and invited his friends to spend the evening with him -- his treat. Mr. Carpenter and Mr. Girard went to the Warehouse, a billiard hall that serves alcohol, in the earlier afternoon, and began drinking alcoholic beverages. Mr. Foster testified that Mr. Girard telephoned and asked him to join them at the Warehouse around 6:00 p.m. - 6:30 p.m.

Mr. Foster joined his friends at the Warehouse. According to Mr. Foster, when he arrived his friends, Messrs. Carpenter and Girard, had been drinking. The Warehouse was running a drink special that night, \$.50 "well drinks" (hard liquor drinks made with the house brand). Mr. Foster testified he drank 2-3 well drinks with Mr. Girard. Mr. Girard says he did not drink any well drinks, only beer. The three stayed at the Warehouse and watched the second half of the Houston Rockets game, which ended at 9:25 p.m.⁴ The three then went to Mr. Foster's apartment. Mr. Foster opined he and his friends were "slightly intoxicated" at the Warehouse.

Mr. Carpenter's recollection as to time was different from his friends. He insisted they left the Warehouse around 5:30 p.m. Mr. Carpenter was emphatic about the time, because he recalled it was still light outside when they drove to Mr. Foster's home. Mr. Foster and Mr. Girard testified they left the Warehouse between 8:30-9:30 p.m., when it was dark outside. There was no rational explanation for the significant difference in time.

According to Mr. Foster, Messrs. Carpenter and Girard brought a 12-pack of beer to his apartment, and the three continued to drink. Mr. Carpenter and Mr. Girard denied bringing a 12-pack to Mr. Foster's home, but agreed they drank one or two

⁴The parties stipulated that the Houston Rockets game ended that night at 9:25 p.m. in the prehearing report.

beers. When Mr. Burrows came home⁵, the four decided to go to Sugar's, compliments of Mr. Girard. None of them had ever been to Sugar's, but Mr. Burrows wanted to see a waitress at Sugar's whom he had dated in high school, Malinda Jones.

Mr. Foster explained when they left his apartment he felt intoxicated and knew he should not drive. Mr. Carpenter had a pick-up truck, and it had begun to rain. Although Mr. Foster admitted knowing he should not drive, Mr. Burrows, the only other person with a car, was on parole and could not drive. Mr. Foster testified he thought the worst that could happen to him was an arrest for driving while intoxicated (DWI). Mr. Foster confessed it was not the first time he had driven while intoxicated.

B. Sugar's

Ms. Jones testified she graduated from high school in 1992, moved to Austin in January of 1993, and began working for Sugar's. According to Ms. Jones, she had not seen Mr. Burrows or Mr. Foster since high school until the night of January 7, 1997. Ms. Jones agreed the four arrived at Sugar's around 10:00 p.m. She gave them a table next to the second stage, and delivered their first and second round of drinks.

At this point the stories differ. Ms. Jones testified she left to serve her clients in the VIP section of Sugar's and her credit card customers. Ms. Jones explained a businessman with a credit card is a more secure customer and leaves larger tips than college men paying with cash. Before returning to the VIP section, she delivered the second round to the four, a round of shots, and shared a shot with them. She exchanged telephone numbers with Mr. Burrows and he asked her if she wanted to "hook up" with them later.

Ms. Jones stated she only remembered three of the four men, the two she knew and one other. She did not see any of them act as though they had been drinking or as though they were drunk when she served them. Since they were paying for their drinks with cash, the table was an "open" table; any waitress could serve them. Ms. Jones did not see any other waitress serve them. She acknowledged she was very busy that night covering her credit card tables and might not have seen someone else serving them.

Ms. Jones testified that she assumed Mr. Burrows and his friends were going downtown to "party" on 6th Street based on what they had said to her. Since she knew they were leaving to "go party," and since she did not see them later, she thought they left shortly after she served them the round of shots. Ms. Jones postulated that she would have seen them if they had remained at Sugar's, because she passed their table going to the main bar. When she got home from work that

⁵Mr. Burrows and Mr. Foster were roommates.

night, Ms. Jones called the telephone number Mr. Burrows had given her so she could “hook up” with them. No one answered.

Messrs. Foster, Girard and Carpenter testified Ms. Jones was the only waitress who served them at Sugar’s that night. The ALJ did not find this testimony believable. Under cross-examination, Mr. Foster equivocated about whether any other waitress could have served them that night. Mr. Carpenter testified the waitress who served them was a brunette. Ms. Jones and her employer testified at the time she worked at Sugar’s she was a blonde. On the video deposition, her hair was a dark blonde, not brunette. Mr. Girard rarely spoke to Ms. Jones and testified he may have just said, “Hey, my name’s Johnny, nice to meet you” and that was about it⁶. None of the three survivors could recall anything they had said to Ms. Jones. The ALJ believes someone else served them after Ms. Jones left.

The three survivors’ stories continued to be muddled and contradictory. Mr. Foster stated he could not “picture a lot of hours” from that night. He lost count of how much he drank at Sugar’s after the sixth round. Mr. Girard confessed that toward the end of the night he didn’t know where he was.⁷ In fact, he testified at his deposition that he did not “remember how we got to 35 from Sugar’s. I don’t even know—I don’t remember where Sugar’s is to be honest with you.”⁸

Mr. Foster and Mr. Carpenter recalled having one or two table dances. Mr. Girard testified at his deposition and at the hearing that there were no table dances that night. Mr. Girard tried to rectify the inconsistencies between the friends’ testimonies by claiming two of the dancers knew him from high school and had sat in his lap. Mr. Girard’s recollection of these dancers did not persuade the ALJ that he was telling the truth.

According Mr. Foster, Mr. Girard put around \$40.00 on the table for the four to use to tip the dancers. Mr. Carpenter said there was around \$1,000.00 on the table. Mr. Girard said he took around \$700.00 with him and gave each of his friends \$100.00 for tips. Mr. Girard was not certain how much of that he spent. At his deposition he testified he spent around \$450.00. At the hearing, he said he spent almost \$600.00 or most of it. The inconsistency among the three survivors’ recollection of events that night creates doubt as the accuracy of their testimony.

Mr. Foster and Mr. Girard went to the anteroom of the men’s restroom sometime that night. While there, Mr. Foster said a large man hit him in the jaw, and bolted. Mr. Foster recalled that he ran after the man, something he said he would not have done had he been sober. Before anything happened, the manager removed this man and his friends from Sugar’s. Mr. Foster could not describe the manager. No one

⁶Transcript page 410.

⁷Petitioner’s Exhibit 20, page 11, line 6-7.

⁸Petitioner’s Exhibit 20, page 64, lines 19-22.

at Sugar's could recall this incident. Respondent could not find any incident report about this alleged altercation. It is not clear to the ALJ that this event happened at Sugar's.

Mr. Girard claimed he vomited twice while at Sugar's. According to Mr. Girard, no one was in the men's restroom either time he vomited. Mr. Warren testified that Sugar's has an attendant in the men's restroom. The first time Mr. Girard said that he vomited was around 12:30 a.m. Mr. Girard remembered the time, because he had called a friend, Lee⁹, to see if he wanted to join them. Lee told him the call was around 12:30 a.m. According to Mr. Girard:

Well, after I threw up on the way to the bathroom I called my friend, Lee, because he was supposed to meet us up there, my friend. And so, yeah, and I asked what time it was as we were leaving because we were thinking about leaving. (Emphasis added)¹⁰

While some vomit may have been on his shirt, Mr. Girard did not tell anyone at Sugar's that he had thrown up and does not know if anyone at Sugar's knew he had thrown up. Mr. Foster, who was sitting at the same table with him, testified he did not know his friend had thrown up.

In their depositions, Messrs. Girard and Carpenter testified none of the party did anything to suggest that they were drunk. This testimony changed at the hearing. At the hearing, Messrs. Girard and Carpenter asserted they were stumbling and bouncing off the walls. The ALJ finds their deposition testimony to be more credible. Even at the hearing, Mr. Girard admitted, ". . . we weren't acting stupid drunk . . . we kind of held our composure."¹¹

As they were leaving the club, Messrs. Girard and Carpenter described a manager/bouncer¹² at Sugar's who followed them out to the parking lot to collect more money. While Sugar's does not have a bouncer, the customers may perceive the assistant manager as a bouncer. Mr. Carpenter testified the bouncer said they owed money for a table dance; Mr. Girard said it was for the tab. They described the man as a blond guy with a mustache. No one meets that description at Sugar's.

⁹Lee's last name was never identified during the hearing and his name does not appear in any of the TABC investigative reports. It was unfortunate he was not called to testify to corroborate Mr. Girard's testimony.

¹⁰Petitioner's Exhibit 20, page 19, ln 19-25.

¹¹Transcript page 412.

¹²Sugar's has no "bouncers", but the managers are on the floor to resolve any problems.

Although pictures of the four men were shown to Sugar's staff on April 8, 1997, no one other than Ms. Jones remembered them. Mr. Warren testified he continued to question other employees at Sugar's to see if anyone could recall either the four men, or the incidents they mentioned, and found no one who could.

IV. THE ACCIDENT

At 100 N. IH 35, at 2:24 a.m. on January 8, 1997, Mr. Foster was in the center lane and tried to pass another car on IH 35 heading south at the Cesar Chavez exit. He lost control of his Ford Escort. Mr. Foster does not recall how he lost control, only that it was cold and rainy. The car hit the guard rail, bounced off, and flipped over several times. Mr. Burrows and Mr. Carpenter were both thrown from the car. Mr. Burrows died instantly.

When Mr. Carpenter was thrown from the car, he slammed into a wall, face first. The impact fractured the orbital rim of his skull and crushed his sinus cavity. Mr. Carpenter testified his head had to be "strapped up" and blood continued to stream down his face while he waited for surgery. The surgery was delayed because his blood alcohol level was too high. Mr. Foster suffered from a concussion and lacerations on the face. Mr. Girard broke several bones in his hand. Mr. Girard left the hospital early in the morning. He could not recall how he got home. Shortly after the accident, Mr. Carpenter conceded he and his friends got together to try and put together what happened that night.

V. THE INVESTIGATION, REPORTS AND RESPONDENT'S POLICIES

A. Police and Medical Reports

Senior Officer David Funderburgh was also called to investigate the accident. Officer Funderburgh had been with the Austin Police Department (APD) for thirteen years, nine as an accident investigator. As part of his investigation, Officer Funderburgh interviewed the three survivors at the hospital. Officer Funderburgh testified Mr. Foster had a strong odor of alcohol about his person and the other two smelled of alcohol. While questioning the three, Officer Funderburgh asked them where they had been. The three said they had been to "area clubs." This quote was subsequently in his affidavit.

Officer Funderburgh testified that neither Mr. Carpenter nor Mr. Girard had any head injuries. This was surprising given the extent of Mr. Carpenter's head injuries. According to Officer Funderburgh, his supervisory staff required investigators to find out where a drunk driver got the alcohol in a DWI case so they could report the matter to TABC. Consequently, he pressed Messrs. Carpenter and Girard for more information. At the hearing, Officer Funderburgh testified for the first time that they told him they were at Sugar's.

Officer Funderburgh did not notify TABC that the four had gotten intoxicated at Sugar's. In Investigator Funderburgh's affidavit for the warrant of arrest and detention for Mr. Foster, written on January 8, 1997, Officer Funderburgh swore that "THEIR STATEMENTS TO ME THAT THEY HAD BEEN OUT TO AREA CLUBS AND WERE ON THEIR WAY HOME."¹³ Officer Funderburgh did not mention Sugar's in the affidavit. He gave a similar answer in response to the deposition question:

14. What did Johnny Girard and Jason Carpenter tell you with respect to where they had been the night of the accident?

ANSWER: that they had been out going to area clubs.

While Officer Funderburgh's testimony is questionable (given his failure to identify Sugar's prior to the hearing), Officer Williams' report supported it. Officer Williams did not testify at the hearing, but portions of his investigation were contained in Respondent's Exhibit 22. Officer Williams of the APD was also called to investigate the accident on January 8, 1997. While at the hospital, Officer Williams noted that Mr. Girard said he and his friends were coming from Sugar's when the accident occurred. The emergency technician treating Mr. Foster told Officer Williams that he could smell "a moderate odor of alcohol" on Mr. Foster's breath. Mr. Foster also told him that they had been at Sugar's having a few drinks -- eight to nine.¹⁴ Clearly, the three survivors last clear memory of the night was getting drunk at Sugar's, irrespective of whether they remained there until 2:00 a.m.

The presentencing report outlines Mr. Foster's history of abusing alcohol. He began drinking alcohol and using marijuana when he was twelve. By the time he was a senior in high school Mr. Foster was drinking daily. According to the report, Mr. Foster admitted he drank a six-pack of beer and smoked one to two marijuana cigarettes per day.¹⁵

The emergency room records included the ER doctor's diagnosis for Mr. Foster, "acute alcohol intoxication."¹⁶ Mr. Carpenter's intake records also show a diagnosis of intoxication. The ER physician noted in the medical record that Mr. Carpenter had "⊕ EtoH¹⁷ after night of celebrating at local men's club."¹⁸ The medical records do not say where Mr. Foster or Mr. Carpenter got their drinks before the accident.

¹³Petitioner's Exhibit 10.

¹⁴Respondent's Exhibit 22.

¹⁵Id.

¹⁶Petitioner's Exhibit 7.

¹⁷EtoH is an abbreviation for alcohol.

¹⁸Petitioner Exhibit 9.

B. TABC's Investigation

Mr. Warren did not recall being contacted by TABC about this incident until April 2, 1997. The TABC investigators passed the pictures of the four around to the wait staff who were on duty on January 7, 1997. According to Mr. Warren, when Ms. Jones saw the picture of Mr. Burrows she almost fainted. She said she had dated him in high school and did not know he was dead. She remembered they came to Sugar's that night and she served them a round of drinks. Ms. Jones said they told her they were coming from or going to another bar in the 6th Street area. She did not see them at closing. Mr. Warren advised her to get an attorney before she gave a statement to TABC. Then, Sugar's discovered Ms. Jones' TABC seller-server training certification had expired prior to January 7, 1997.

No one else at Sugar's remembered seeing the four; any confrontation over a table dance; a fight outside the bathroom or someone throwing up in the men's restroom.

C. Experts' Testimony Regarding the Level of Alcohol

Both sides called a toxicologist to testify at the hearing. The expert's testimony differed on remarkably little. Both agreed that Messrs. Foster, Burrows and Carpenter's blood alcohol levels were almost two times the amount necessary to prove intoxication under §49.01 of the Texas Penal Code¹⁹ about an hour after they said they left Sugar's. However, given the uncertainty of the evidence, it was impossible to know what their blood alcohol levels were prior to the accident.

Sheryl Peyton²⁰, a forensic toxicologist, testified for the Staff as an expert on the effects such an amount of alcohol would have on a person and explained how to "extrapolate" backwards to learn what their blood alcohol level would be prior to the accident. Robert Bauer²¹, a chemist toxicologist consultant, testified for Respondent after reviewing Ms. Peyton's testimony. He concurred with most of it.

¹⁹According to § 49.01 of the Texas Penal Code "intoxicated" means:

- (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, . . . or
- (B) having a alcohol concentration of 0.10 or more.

²⁰Ms. Peyton has a degree in biochemistry from The University of Texas, and a Masters in Science with a specialty in toxicology from UT Medical School in Dallas. She has taken additional courses in forensic toxicology, including courses on alcohol intoxication, and has taught courses on how to submit evidence and conduct tests to determine blood alcohol concentration.

²¹Mr. Bauer did his postgraduate studies in advanced mathematics, chemistry, biology, anatomy and physiology at University of Houston. Mr. Bauer has worked in the area of toxicology for 28 years, 10 of which were with the Texas Department of Public Safety (DPS). He has testified quite often on behalf of the DPS.

Ms. Peyton testified that the human body absorbs all the alcohol consumed in about an hour after it is ingested. Whether you have one drink or three, all of it will be absorbed and the concentration of alcohol in your blood will peak in an hour. Impairment is measurable when the blood alcohol level is about 0.06, even though the legislature has defined intoxication at the blood alcohol level of .10. At .10, a person exhibits signs of intoxication such as loss of balance, loss of control and slurred speech. Around .15, Ms. Peyton opined that the person would have slurred speech and would experience a change in their behavior, *i.e.*, gregarious activity or more boisterous and confrontative behavior, depending on the person.

A person eliminates about 0.02 grams of alcohol each hour. Ms. Peyton acknowledged, on cross-examination, that a heavy drinker would eliminate alcohol at a faster rate, up to .035 for a chronic alcoholic. Weight also affects how much alcohol is eliminated.

Ms. Peyton testified that at 3:05 a.m. on January 8, 1997, Mr. Foster's whole, as opposed to serum (the rate provided in the medical records), blood alcohol level was .23. Mr. Carpenter's whole blood alcohol level at 3:11 a.m. was .196. Mr. Burrows' whole blood alcohol level at the time he died was .19.

To extrapolate backwards to learn their blood alcohol levels at 2:00 a.m. or before, Ms. Peyton explained she needed to know the time of their last drink, and how much they consumed in the hour before. Mr. Bauer agreed. There is no reliable evidence about what time or how much the four drank their last drinks. If Mr. Foster slugged down several shots just before getting into his car at 2:00 a.m., his blood alcohol level at 2:00 a.m. would be much lower than if he steadily drank all evening, because the level of alcohol peaks an hour after it is taken. Therefore, the experts could not provide any reliable testimony on this issue.

During cross-examination, Ms. Peyton was asked to evaluate what their blood alcohol levels would be given the number of drinks the three survivors testified they had that night. Ms. Peyton testified that Mr. Foster, Mr. Carpenter, and Mr. Burrows had to have consumed much more than admitted. Ms. Peyton agreed the four men could not be properly recalling the amounts or the times they drank.

Both experts agreed that chronic drinkers can mask their symptoms by modifying their behavior, *i.e.*, speaking slower, spreading out their stance, and moving slower. Mr. Bauer testified the alcohol levels found in the three men suggested they were alcoholics. Mr. Bauer explained most people in their age group could not function at all at those high blood alcohol levels.

It was not surprising to Ms. Peyton that the three survivors do not have a clear memory of the events that night. Ms. Peyton noted Mr. Carpenter's hospital records reflect he had poor recall of events. Memory loss is a characteristic of acute alcohol intoxication, according to Ms. Peyton. Ms. Peyton opined the physical and emotional trauma of the accident would also contribute to loss of memory. According to Ms.

Peyton, Mr. Carpenter and Mr. Foster's recollection of what happened that night is not reliable.

D. Sugar's Policies on January 7, 1997

Howard Lenett, Sugar's manager, worked for Sugar's for more than 15 years. Mr. Lenett acquired an MBA in finance from the University of Texas. According to Mr. Lenett all of Sugar's wait staff are required to be TABC seller-server certified. Mr. Lenett testified that they post a security guard at the front door to observe the incoming and outgoing customers. The valet attendant is also instructed to watch the customers as they come and go. Sugar's is open seven days a week. The peak hours are from 11:00 p.m. to 1:00 a.m.

Inside Sugar's, besides the wait staff, Sugar's had a floor person on duty who "floated" around the room to make sure customers were being taken care of; an assistant manager, who remained near the front entrance of Sugar's to keep an "eye" on things; and a manager who could be anywhere in the Club. Aside from the wait staff, these floor managers met frequently during the night to discuss what is going on in the room. Don King was the manager, and Don Burgman was the assistant manager on duty the night of January 7, 1997. Neither manager was called to testify. Neither is still employed by Sugar's.

Sugar's provided a waitress manual to all employees at the time they hired them. The manual states that all staff must successfully complete a TABC seller training course and be certified by TABC before they are scheduled to work. Mr. Lenett verified that this was the policy and practice at Sugar's in January 1997. To ensure the staff remained certified, Sugar's corporate office generated a monthly list with the names of each wait staff whose certification was about to expire one month before the expiration date. In December 1996, Mr. Lenett sent a memorandum to the managers reminding them all the new employees had to have TABC seller certification.

Mr. Lenett did not know how Sugar's permitted Ms. Jones' certification to lapse. Her certification lapsed on September 13, 1996. Ms. Jones was not certified until April 11, 1997, shortly after Sugar's discovered her certification had expired. Mr. Warren explained that Ms. Jones left Sugar's employment for a time after she received her seller-server training. When she returned to Sugar's, the computer failed to properly note when her certification expired. Neither Mr. Lenett nor Mr. Warren could explain how Sugar's computer system had failed in this instance. Ms. Jones left Sugar's employment again in January 1998.

Beyond the manual, Sugar's wait staff were required to attend weekly or monthly meetings with management to discuss how to deal with certain matters, including the customer who had too much to drink. Sugar's told the waitresses they could lose their job and could be personally liable if someone got hurt if they served alcohol to an intoxicated person. Sugar's required the wait staff to report to the managers any incident where there was an altercation or problem that might lead to

further trouble in the club. The managers were required to write-up the incident reports. There were no incident reports for January 7, 1997.

Another measure Sugar's employed to ensure customers got home safely was to create and set up a safe ride home program. Signs were posted throughout Sugar's saying: "If you feel you are impaired to drive, let us know. We will provide you with a cab ride home."

VI. DID SUGAR'S SERVE ALCOHOL TO AN INTOXICATED PERSON?

The Staff must show by a preponderance of the evidence that each allegation against Sugar's occurred. The term "intoxicated" is not defined in the Code. The TEX. PENAL CODE ANN. §49.01(2) defines "intoxicated" as not having the normal use of one's mental or physical faculties by reason of the consumption of alcohol or having an alcohol concentration of 0.10 or more. While the Penal Code definition is not controlling, it does provide some guidance as to what the State of Texas finds is intoxicated when one is driving. The Court in *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987) found intoxication meant "a condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical faculties and resulting diminution of the ability to think and act with ordinary care." At 313. The ALJ will apply the definition of "intoxicated" found in both common law and the Penal Code: the loss of the normal use of one's mental and physical faculties because of alcohol.

The ALJ finds that Sugar's served alcohol to the four after they were intoxicated. All four were heavy drinkers. On the night in question, Mr. Foster knew he was intoxicated when he got behind the wheel of his car to drive to Sugar's. While Mr. Foster's recollection of the number of drinks he had might be off, he knew his mental and physical capacity had been impaired to such a degree he should not have driven to Sugar's. Mr. Foster arrived at Sugar's intoxicated. In short order, Ms. Jones served Mr. Foster and his party a round of drinks and a round of shots. Ms. Jones served alcohol to Mr. Foster when he was intoxicated.

While the Staff asserted Ms. Jones is not credible because she was afraid of being prosecuted criminally, the ALJ does not agree. By the time of her deposition, Ms. Jones had not been charged and she was leaving for Germany to live with her brother. Ms. Jones candidly admitted she served a round of mixed drinks and a round of shots to Mr. Burrows and his friends. She candidly admitted they bought a shot for her. Although it would have been advantageous to say the four left, or that she looked over at the table and saw they were gone, Ms. Jones admitted she was too busy to notice if they were there or when they left. This coupled with the inability of Messrs. Foster, Girard, or Carpenter to recall the specifics of any conversation they had with Ms. Jones over the four hours they maintain she served them; that they were at a cash table and that Mr. Carpenter to confuse her hair color, supported Ms.

Jones' story that she did not serve them all night. The ALJ believes Ms. Jones is telling the truth about how much she served the four that night and when she last saw them.

While no one at Sugar's (other than Ms. Jones) remembered the four, it is not surprising since the pictures of the four men were not shown to the wait staff on duty that night for almost three months. Sugar's served up to a thousand customers a day. It was open every day of the week. With the number of people being served at Sugar's, it is probable no one would remember the four unless they stood out in some way. Nothing suggests they did.

However, each of the three survivors remembered some point, while at Sugar's, when they knew they were intoxicated and were losing the ability to focus and understand what they were doing. Around 12:30 a.m., Mr. Girard telephoned a friend to tell him they were thinking about moving on. It is around this time that events and time became hazy to Mr. Girard. Mr. Foster admitted after the sixth round of drinks he lost track of what was happening. The experts verified that Messrs. Foster, Carpenter and Burrows were chronic heavy drinkers. To have enough alcohol in their system for each to "feel wasted" and to lose the normal use of their mental faculties is sufficient evidence that each was intoxicated. That each may have been proficient at "masking" their symptoms does not change the fact they were intoxicated at Sugar's. The ALJ finds that the preponderance of the evidence is that Sugar's served alcohol to these four men when each was intoxicated.

Respondent argued that since it was not obvious to Sugar's that the four were intoxicated, they are not responsible for serving alcohol to them. The Staff argued that § 11.61(b)(14) of the Code does not require scienter in selling alcohol to an intoxicated person, all that is required is that "the permittee sold or delivered an alcoholic beverage to an intoxicated person." Although § 2.02 (b) requires that the person's inebriated condition be apparent to the provider, such is not the case in § 11.61 (b)(14). The Code also requires knowledge if the provider is to be charged with the penal offense under § 101.63 of the Code. Since the Code has in two provisions specifically required some knowledge of the person's intoxication for the provider to be found to have violated those provisions, the absence of such a requirement makes it clear intent or knowledge is not required for there to be a violation of Section 11.61(b)(14). Therefore, the ALJ finds that Sugar's violated Section 11.61(b)(14) by serving alcohol to the four men while they were intoxicated.

VII.

WAS IT APPARENT TO RESPONDENT THAT MR. FOSTER WAS OBVIOUSLY INTOXICATED TO THE EXTENT THAT HE PRESENTED A CLEAR DANGER TO HIMSELF AND OTHERS?

The preponderance of the evidence established that Ms. Jones served alcohol to Mr. Foster when he was intoxicated since he arrived at Sugar's intoxicated and consumed, in short order, two more drinks. The question remains whether Sugar's

served alcohol to Mr. Foster when he was so obviously intoxicated that he presented a clear danger to himself and others.

While the blood alcohol levels found in three of the four after the accident is alarming, there was insufficient proof to establish Mr. Foster was obviously intoxicated. Mr. Foster had been abusing alcohol for several years. He testified he had driven while intoxicated before. Both experts, Ms. Peyton and Mr. Baurer agreed the amount of alcohol in Mr. Foster's system could only be attained by an accomplished alcoholic. Both agreed alcoholics learn to mask the symptoms of intoxication.

The ALJ believes Messrs. Foster, Girard and Carpenter's original deposition testimony was the most accurate and truthful. During their depositions, Messrs. Foster, Girard and Carpenter denied the four did anything to indicate they were drunk. Mr. Girard testified at his deposition that Mr. Foster did nothing when the four left Sugar's to make him believe Mr. Foster was drunk. While Mr. Girard and Mr. Carpenter changed their testimony at the hearing, claiming Mr. Foster could not walk a straight line and that they were stumbling, the ALJ does not believe their memory improved with time and did not find this evidence credible.

Ms. Jones served the four their first two rounds. No one knows which waitress or waitresses served them after Ms. Jones returned to Sugar's VIP section. No one, other than the three surviving men, saw the four do anything to suggest they were intoxicated. They were not boisterous, loud, raucous, or rude by their own admission. The three surviving men originally testified they did nothing unusual to suggest they were drunk. Since no one else could verify Mr. Foster was obviously intoxicated and in such a condition as to present a clear danger to himself and others, there was insufficient evidence to support this accusation.

VIII. CAN RESPONDENT INVOKE THE "SAFE HARBOR" PROVISION OF §106.14 OF THE CODE?

Respondent asserted the affirmative defense of §106.14 the Code. This section provides that the action of an employee selling or serving an intoxicated person is not attributable to the employer under certain circumstances. The ALJ finds that this defense is not available to Respondent as to Ms. Jones' actions because her seller-server training certification had expired. However, it is available to use as to the other servers since Mr. Warren and Mr. Lennet testified all other servers at Sugar's that night were TABC seller-server certified. The Staff offered no controverting evidence to show they were not seller-server trained despite knowing who was on duty that night. Therefore, the ALJ accepted as true that all other wait staff working at Sugar's on January 7, 1997, had a valid seller-server training certificate.

Section 106.14(a) of the Code provides that the actions of an employee shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a commission-approved seller training program;
- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate the law.

Ms. Jones testified that she attended a TABC seller training program, but that she had allowed her certification to expire a couple of months before this incident. Mr. Lenett and Mr. Warren testified that all seller-servers were required to attend a TABC approved seller training program before they could work. Sugar's had a computer program set up to monitor when the wait staff certification expired. Managers were reminded to make sure all the wait staff had a current certification. There was no evidence to suggest Respondent directly or indirectly encouraged its employees to violate the law.

Unfortunately, Ms. Jones' certification had expired, and Sugar's systems failed to discover it. Respondent argued the expiration of her certification is irrelevant. Respondent asserted that TABC does not have the authority to impose tighter restrictions than provided statutorily. TABC rules provide that a seller-server training certificate is valid for only two years.²² Respondent argued that once an employee had attended such a course, the employee acquired a status that does not thereafter change despite the TABC rules. Respondent relied on the Court of Appeals decision in *Pena v. Neal*, 901 S.W. 2d 663 (Tex. App.—San Antonio 1995, writ denied) in arguing that the Court did not consider significant whether the employee had a current certificate because the Court did not mention it. The ALJ is not persuaded by Respondent's argument. The Plaintiff in *Pena* conceded the Defendant had alleged and established the first two components of § 106.14. Therefore, it was not in issue. Respondent also argued that the Court of Appeals in *Mansard House, Inc. dba Hurricane Harry's v. Texas Alcoholic Beverage Commission* No. 10-97-277-CV, 1998 Tex. App. (Waco July 15, 1998, n.w.h. (not designated for publication) found TABC Rule 50.8 irrelevant. The Court in *Hurricane Harry's* did not address the issue because it was not disputed.

Section 106.14(b) of the Code requires TABC to adopt rules establishing the minimum requirements for approved seller training programs. There is nothing in the Code that precludes a minimum requirement of attendance every two years. TABC is charged with protecting the "welfare, health, peace, temperance, and safety of the people of the state." To require a seller-server to attend the training program on a repetitive basis is not in conflict with the statute. Respondent's assertion that this

²²16 TEX. ADMIN. CODE §50.8(b).

rule contradicts the statute is not persuasive. TABC has issued a rule that reflects the general objectives of the statute and is within the statutory authority of the TABC. Therefore, Sugar's did not satisfy the second condition of this affirmative defense.

IX. RECOMMENDED SANCTIONS

Respondent had no prior violations of serving alcohol to an intoxicated person in at least sixteen years of operation. In addition, there was ample testimony from Respondent that server-sellers were required to get TABC approved server-seller training before they could serve alcohol. Sugar's used a computer program to ensure the wait staff's certificates were current. In the event someone does appear intoxicated, Sugar's standard operating procedure was to slow the service of drinks, encourage the patron to order food, to provide a cab free of charge and, ultimately, cut off the sale of drinks.

The ALJ is concerned that despite all Sugar's operating procedures to ensure all the wait staff had current seller-server training certificates and prevent the sale of alcohol to an intoxicated person, none of these procedures worked that night. The result was catastrophic. Sugar's served alcoholic beverages to four intoxicated men. Sugar's failed to note for two months that Ms. Jones' seller-server certification had expired, despite a computerized tickler system and the letter to the managers to ensure all seller-server certification.

The "safe harbor" provision insulates Sugar's from liability for the drinks served by the other wait staff that night, but it does not for the drinks served by Ms. Jones. Respondent argued that TABC's standard penalty chart, 16 TEX. ADMIN. CODE (TAC) §37.60, recommends a 7-day suspension for the first time sale of an alcoholic beverage to an intoxicated person. However, 16 TAC §37.60 is a recommendation for offers of settlement by TABC personnel and is not binding on the ALJ. The penalty chart's recommendation for a violation of §11.61(b)(14) of the Code is inadequate to deal with the significance of this violation. However, since this violation is Sugar's first violation, revocation, as requested by the Staff, appears inconsistent with the sanctions imposed on others with similar violations.

Respondent noted that despite the death of a police officer in the *In re 422, Inc. d/b/a/ Daiquiri Factory* case²³, TABC only imposed a \$6,000.00 fine and other conditions as part of a settlement agreement. Lieutenant David Ferrero was asked to explain why TABC was requesting revocation for the same violation Daiquiri Factory was accused of violating. Lieutenant Ferrero said the decision to settle the Daiquiri Factory case rested with the TABC Legal Department. Respondent noted that in the Daiquiri Factory case, the waitress suspected Cesilee Hyde was drunk, yet served her

²³TABC Docket No. 571325

anyway; only one person was seller-server trained; and a police officer was killed. The Staff offered no explanation for the disparity in the sanctions the Staff wants imposed.

While the ALJ is concerned that TABC has no compelling argument for why Sugar's permits should be revoked for the same violation cited in the *Daiquiri Factory* case, the ALJ considered the appropriateness of the penalty to be imposed based on the evidence presented in this matter. Sugar's gross receipts per month in 1996 and 1997 were around \$200,000.00. The violation in this matter was significant and resulted in the loss of a life. The procedures in place at Sugar's to ensure all servers were TABC seller-server trained and that no one intoxicated was served alcohol failed. Therefore, the ALJ recommends that Respondent's permits be suspended for 60 days, or alternatively, that Respondent pay a fine of \$60,000.00.

FINDINGS OF FACT

1. The amended notice of hearing in this case was mailed to counsel for WFKR, INC. d/b/a Sugar's (hereafter Sugar's or Respondent) by certified mail, return receipt requested, on September 12, 1997.
2. The hearing on the merits was held on August 5-6, and 25, 1998, in Austin, Texas. All parties appeared and participated in the hearing.
3. Sugar's is a cabaret bar and restaurant at 404 Highland Mall Boulevard, Austin, Travis County, Texas.
4. Respondent holds Mixed Beverage Permit, MB-142218, and Mixed Beverage Late Hours Permit, LB-142219, originally issued by the Commission in June 1982.
5. Malinda Jones was employed by Respondent, and was working as a waitress at Sugar's on January 7, 1997.
6. Ms. Jones completed a TABC approved seller training program on September 13, 1994, but had not taken one since then.
7. On January 7, 1997, Ms. Jones was serving alcohol at Sugar's without a valid TABC approved seller-server training program certification.
8. In the early evening of January 7, 1997, John Girard, Grant Foster, and Jason Carpenter, met at the Warehouse, a billiards bar, around 6:00 p.m. and drank beer and mixed drinks while watching the Houston Rockets game. Mr. Foster had at least two to three hard liquor drinks.
9. Around 9:30 p.m., Mr. Girard and his friends drove to Mr. Foster's apartment, where the three drank a couple of beers a piece while waiting for Noel Burrows, Mr. Foster's friend and roommate, to return home.

10. When Mr. Burrows arrived home around 10:00 p.m. that night, the four men decided to go to Sugar's. Mr. Foster drove his friends to Sugar's.
11. Mr. Foster knew he had consumed enough alcohol to impair his ability to drive his own car.
12. Mr. Foster was intoxicated when he arrived at Sugar's.
13. Ms. Jones served the four men one round of mix drinks and one round of shots when they arrived at Sugar's.
14. Ms. Jones served Mr. Foster alcoholic beverages when he was intoxicated.
15. Other waitresses at Sugar's continued to serve the four men drinks after Ms. Jones served them the first two rounds of drinks.
16. Messrs. Foster, Carpenter, and Girard lost the ability to remember or to think clearly due to the amount of alcohol they drank while at Sugar's.
17. Sugar's served Messrs. Carpenter, Burrows, Girard and Foster alcoholic beverages after they were intoxicated.
18. Ms. Jones TABC seller-server training certification expired on September 13, 1996.
19. On January 7, 1997, Sugar's wait staff all had valid seller-server training certifications, except Ms. Jones.
20. The four men did not act boisterous, loud, exuberant, or obnoxious at Sugar's.
21. The four did not stumble, fall down or do anything to indicate they were obviously intoxicated at Sugar's.
22. The four were not obviously intoxicated while they were at Sugar's.
23. It is not clear from the evidence when the four left Sugar's, whether they went to another club, or if they consumed alcohol anywhere else that night.
24. When the four left Sugar's no one offered any assistance, asked about their condition despite the amount of alcohol each had consumed, or offered to find them a ride via a cab.
25. At 2:24 a.m. on January 8, 1997, Mr. Foster was driving with his three friends in his car heading south on Interstate Highway (IH) 35. Mr. Foster lost control of his car at the Cesar Chavez exit, hit the guard rail and flipped his Ford Escort several times before it came to a stop.

26. Mr. Burrows and Mr. Carpenter were thrown from the car. Mr. Burrows died instantly.
27. Mr. Carpenter's blood alcohol level at 3:11 a.m. on January 8, 1997, was .196.
28. Mr. Foster's blood alcohol level at 3:05 a.m. on January 8, 1997 was .23.
29. Mr. Burrows blood alcohol level at the time he died was .19.
30. Mr. Foster's intoxication rendered him unable to keep his car under control and resulted in the death of Mr. Burrows and injuries to himself, Mr. Carpenter, and Mr. Girard.
31. Mr. Foster was convicted of vehicular manslaughter and is currently on probation.
32. Sugar's gross receipts for 1996 and 1997 were approximately \$200,000.00 per month.
33. Sugar's has no prior history of serving alcohol to an intoxicated person.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§2.02, 5.35, 6.01, 11.61, and 32.17.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of the 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.
3. Respondent received adequate notice in accordance with TEX. GOV'T CODE ANN. §2001.052.
4. Intoxicated means that the normal use of one's mental and physical faculties is impaired due to the consumption of alcohol. The TEX. PENAL CODE ANN. §49.01(2)(B), and *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).
5. Based on Finding of Fact Nos. 5 through 19, Respondent violated TEX. ALCO. BEV. CODE ANN §11.61(b)(14), by selling and delivering alcoholic beverages to Grant Foster, an intoxicated person, on January 7, 1997.
6. Based on Finding of Fact Nos. 20-22, Respondent did not violate §2.02 of the Code by serving alcohol to Grant Foster on January 7, 1997.

7. Based on Finding of Fact Nos. 5-14 and 19, Respondent is not entitled to the seller-server training defense set out in §106.14 of the Code for the alcoholic beverages served by Malinda Jones to Grant Foster on January 7, 1997.
8. Based on Finding of Fact Nos. 5-33 and Conclusions of Law Nos. 5 and 6, Respondent's liquor permits should be suspended for 60 days.
9. Pursuant to §11.64 of the Code, and based on Finding of Fact No. 33, Respondent should have the opportunity to pay of civil penalty of \$60,000.00 in lieu of suspension of its permits.

SIGNED this 11th day of February, 1999.



CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS