

SOAH DOCKET NO. 458-05-7710

Texas Alcoholic Beverage Commission,	§	BEFORE THE STATE OFFICE
Petitioner	§	
vs	§	
Lizard's Billiards L.P. d/b/a	§	OF
Lizard's Billiards Permit Nos. MB-542337	§	
& PE-542338	§	
TABC Case Nos. 609691,612491,	§	
613879 & 615850, Respondent	§	ADMINISTRATIVE HEARINGS

ORDER MODIFYING PROPOSAL FOR DECISION

On this 19th day of February, 2008, the above referenced matter came before me for consideration. I have reviewed the file, including the testimony presented at the hearing, the depositions filed of record, the Proposal for Decision (PFD) of the Administrative Law Judge (ALJ), exceptions, responses to exceptions and the briefs filed by the parties.

I have modified the PFD as authorized by §5.43, of the Alcoholic Beverage Code (Code) and §2001.058 of the Government Code. I have determined that the ALJ did not properly apply or interpret the applicable law for the violation of §11.61(b)(14). I have also determined that some of the ALJ's finds of fact are either mixed findings of fact and conclusions of law, or legal conclusions and do not contain a finding of fact. To the extent that the mixed findings of fact and conclusions of law, or the conclusions of law do not apply or interpret the law correctly, I refuse to adopt, or attempt to modify their content. I therefore make the following findings of fact and conclusions of law in support of my decision:

I.

FINDINGS OF FACT

1. The following Findings of Fact are adopted without modification: Nos. 1, 2, 3, 4, 5a, 5b, 5e, 6, 6a, 6b, 7, 7a, 8, 8a, 8b, 8c.

2. The following Findings of Fact are not adopted because they are in fact conclusions of law: Nos. 5 and 7b.

3. Findings of Fact No. 5c and 5d, are not adopted because they contain mixed findings of fact and conclusions of law, and apply the incorrect law and standards to the violations alleged.

Specifically, the ALJ makes the following statements:

'[5]c. Non[e] of Respondent's employees noticed any signs that Mr. Wright was a danger to himself or others as a result of consuming alcohol on the night of July 23, 2004, while Mr. Wright was at Respondent's.'

'[5]d. Ms. Cassman, an acquaintance of Mr. Wright, and a patron of Respondent's conversed with Mr. Wright extensively while at Respondent's on the evening of July 23, 2004, and Ms. Cassman did not note any signs that Mr. Wright was a danger to himself or others as a result of drinking alcohol.

The §11.61(b)(14), administrative violation for which the Respondent was cited has only the following elements: 1) the permittee (or employee, agent or servant), 2) sold or served, 3) an alcoholic beverage, 4) to an intoxicated person. Whether Mr. Wright was a danger to himself or others is irrelevant to this violation.

There is no definition of "intoxication" in the Alcoholic Beverage Code or rules, however it is not a technical term and it is not modified in the context of the section to require any more than its common meaning. The common meaning adopted by the TABC for intoxication under §11.61(b)(14) is "a condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical faculties and a resulting diminution of the ability to think and act with ordinary care.", adopted from *El Chico, v. Poole*, at 732 S.W.2d 306 (Tex. 1987, rehearing denied). A definition of intoxication for purposes of §11.61(b)(14) can also be adopted from §49.01(2), of the Penal Code to the extent it relates to the consumption of alcoholic beverages: "not having the normal use of mental or physical faculties by reason of introduction of alcohol...or having an alcohol concentration of 0.08 or more". See also footnote 1

Other sections of the Code also serve to illustrate that where a higher or different standard or degree of intoxication is intended, the plain language of the statute makes this clear. Compare §11.61(b)(14) to §2.02, of the Code, which requires that the individual be "obviously intoxicated to the extent he presents a clear danger to himself or others". Section 2.02 comes close, but is not the

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

same as the definition for the criminal offense of public intoxication in §49.02, of the Penal Code which defines public intoxication as “appears in a public place while intoxicated to a degree that the person may endanger the person or another”. See also §106.041, under which a minor commits an offense while having any detectable amount of alcohol in the minor’s system.

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

The ALJ’s Findings of Fact No. 5c and 5d imply the “danger to themselves or others” standard for public intoxication (§49.02, Penal Code) to the administrative violation of sale to intoxicated person under §11.61(b)(14) of the Code, this is a clearly erroneous application of law. Finding of Fact No. 5c, additionally adds a culpable mental state for the server, an element of neither the criminal violation of public intoxication under the Penal Code, nor an administrative violation of sale to an intoxicated person, under the Alcoholic Beverage Code. These clearly erroneous applications of law justify excluding both Findings of Fact Nos. 5c and 5d from being considered as a basis for decision as either Findings of Fact or Conclusions of Law.

Notwithstanding the foregoing, the facts set forth in the PFD are not sufficient to find that the Respondent or its employee, agent or servant sold or delivered an alcoholic beverage to an intoxicated person.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Chapter 5, Subchapter B, §§6.01 and 11.61.
2. The State Office of Administrative Hearing has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with

proposed findings of fact and conclusions of law pursuant to the Texas Government Code and §5.43(a), Texas Alcoholic Beverage Code.

3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act, §2001.051 and 2001.052 of the Texas Government Code and §11.63 Texas Alcoholic Beverage Code, and §155.55 of Title 1 Texas Administrative Code.
4. Agency staff failed to prove that Respondent's employee, agent or servant, sold, served or delivered an alcoholic beverage to an intoxicated person, Mr. Wright on the night of July 23, 2004, in violation of §11.61(b)(14) of the Texas Alcoholic Beverage Code.
5. Based upon the ALJ's adopted Findings of Fact No6, 6a, 6b, on March 4, 2004, Respondent, its employee, agent or servant, with criminal negligence did permit a minor to possess or consume an alcoholic beverage on its licensed premises, in violation of §§106.13 of the Texas Alcoholic Beverage Code.
6. Based upon the ALJ's adopted Findings of Fact in Nos. 7, and 7a, on September 10, 2004, Respondent, its agent, servant or employee consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours, in violation of §§11.61(b)(2) and 105.06 of the Texas Alcoholic Beverage Code.
7. Based upon the ALJ's adopted Findings of Fact in Nos. 8, 8a, 8b, 8c, on November 29, 2004, Respondent, its agents, servant, or employee gave a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of §28.12, 61.73 and 102.31 of the Texas Alcoholic Beverage Code.
8. The administrator refuses to adopt Conclusions of Law No. 4 because it is based on an incorrect application of the law.
9. The administrator refuses to adopt Conclusions of Law No. 6, 9 and 12, because the penalty chart guidelines contained in §37.60 of 16 Texas Administrative Code are adopted to assist agents, compliance officers and other specifically designated commission personnel in settlement of cases. Further, §37.60(g) specifically states that they do not bind the hearing examiner, the administrator or his designee. The use of these rules in the assessment of a sanction in this case by the ALJ is a clearly erroneous application of the rules.
10. The administrator refuses to adopt Conclusions of Law Nos. 7, and 9 because they fail to take into consideration the fact that the sale to minor violation could easily have been

prevented by the permittee with the exercise of due diligence, and the serious public safety risks posed by sale of an alcoholic beverage to an intoxicated person, sale of an alcoholic beverage to a minor and sale of alcoholic beverages during prohibited hours, all of which occurred within a 6 month period.

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

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$3400.00** on or before the 14th day of **March 2008**, all rights and privileges under the above described permits will be **SUSPENDED for a period of seventeen (17) days, beginning at 12:01 A.M. on the 19th day of March, 2008.**

This Order will become final and enforceable on March 10, 2008, unless a Motion for Rehearing is filed before that date.

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

SIGNED this 19th day of February, 2008, at Austin, Texas.

On behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

Jb

The Honorable Stephen J. Burger
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (713) 812-1001

Jerry R. Register
ATTORNEY FOR RESPONDENT
PO Box 1402
Huntsville, Texas 77342-1402
VIA FAX (936) 295-4424 &

Lizard's Billiards L.P.
d/b/a Lizard's Billiards

RESPONDENT

2 Magnolia Dr.

Huntsville, Texas 77340

VIA REGULAR MAIL

Licensing Division

Enforcement District Office

SOAH DOCKET NO. 458-05-7710

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
LIZARD'S BILLIARDS L.P.	§	
D/B/A LIZARD'S BILLIARDS	§	
PERMIT NOS. MB-542337 AND	§	
PE-542338	§	
WALKER COUNTY, TEXAS	§	
(TABC CASE NOS. 609691, 612491,	§	
613879 & 615850),	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff, TABC) requested that the permits of Lizards Billiards, L.P., d/b/a Lizard's Billiards, (Respondent, Lizard's) be canceled, because Respondent violated the Texas Alcoholic Beverage Code and TABC rules by serving an intoxicated person on July 23, 2004; by giving a check or draft for the purchase of beer on November 29, 2004, that was dishonored when presented for payment; by permitting others to consume or possess an alcoholic beverage on the licensed premises during prohibited hours on September 10, 2004; and by permitting a minor to possess or consume an alcoholic beverage on the premises on March 4, 2004.

The Administrative Law Judge (ALJ) finds Staff failed to prove Respondent served an intoxicated person on July 23, 2004, but Staff has proven the remaining three alleged violations.

I. PROCEDURAL HISTORY AND JURISDICTION

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

The hearing on the merits convened March 10, 2006, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Stephen J. Burger. TABC was represented by attorney Judith L. Kennison. Respondent appeared through its attorney Jerry B. Register. Evidence was presented, and the record remained open until March 31, 2006, for the submission of written closing arguments.

II. ALLEGATIONS AND LEGAL STANDARDS

A. Allegations

Pursuant to the Notice of Hearing issued by TABC, Respondent is alleged to have committed the following violations:

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

Staff alleges that on July 23, 2004, Respondent or its agent, servant, or employee sold or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

2. Violation of TEX. ALCO. BEV. CODE ANN. § 106.13

Staff alleges that on March 4, 2004, Respondent, its agent, servant, or employee, with criminal negligence permitted a minor to possess or consume an alcoholic beverage on the premises, in violation of TEX. ALCO. BEV. CODE ANN. § 106.13.

3. Violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 105.06

Staff alleges that on September 10, 2004, Respondent, its agent, servant, or employee consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 105.06.

4. Violation of TEX. ALCO. BEV. CODE ANN. §§ 28.12, 61.73, and 102.31

Staff alleges that on November 29, 2004, Respondent or its agent, servant, or employee gave a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. §§ 28.12, 61.73, and 102.31.

B. Legal standards

1. Definition of "Intoxication"

a. Public intoxication standard applies to this proceeding

The Texas Alcoholic Beverage Code does not define "intoxication" or "intoxicated" for purposes of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14). TABC rules do define "excessive consumption" as the term is used in 16 TEX. ADMIN. CODE (TAC) § 45.103(c)(11) as the public intoxication standard set out in the Texas Penal Code. Based on TABC rules, the ALJ finds the definition of public intoxication at TEX. PENAL CODE § 49.02 to be the applicable standard for the alleged violations in this proceeding.

b. TEXAS PENAL CODE § 49.02

A person commits an offense [of public intoxication] if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another. TEX. PENAL CODE § 49.02(a). See also Simpson v. State (Tex. App.—Houston [1st Dist.] 1994) 886 S.W. 2d 449, pet. ref.'d.

III. EVIDENCE, ANALYSIS, AND RECOMMENDATION

A. On July 23, 2004, did Respondent or its employee sell or deliver an alcoholic beverage to an intoxicated person?

Testimony of witnesses is summarized as follows:

1. Testimony of Bobby Wright

Bobby Wright was the driver involved in a motor vehicle accident around midnight, July 23, 2004. He testified that about 4:30 p.m. on that date prior to the accident, he went to Borski's Tavern, after work. He stated he had four shots of Southern Comfort and four beers, left Borski's about 7:30, and went home for about 45 minutes. He showered but had nothing to eat, and then was driven to Lizard's, arriving about 8:30 p.m. He admitted smoking a pipe of marijuana on his way to Lizard's. At Lizard's, he had one shot and two beers, and thereafter two more beers, about one hour later, at about 10:00 p.m. Altogether, he believes he had about four beers and four shots between 8:30 and 11:00 p.m. while at Lizard's. He testified he left Lizard's about 11:00 p.m., but does not remember anything else until after the accident. He also stated he felt sober when he went to Lizard's, and that he drinks frequently.

Mr. Wright was charged with intoxication assault, and was in police custody at the time he testified.

2. Testimony of Officer Barina

Officer Barina is a DPS trooper, and stated that at 12:30 a.m., July 24, 2004, he was dispatched to a motor vehicle accident, where Bobby Wright was identified as the driver of an involved vehicle. The location was about 12 miles from Lizard's. Officer Barina noted Mr. Wright's poor balance, slurred speech, and the strong odor of an alcoholic beverage on Mr. Wright. Mr. Wright admitted drinking four beers and two shots, as well as smoking marijuana. Officer Barina believed Mr. Wright to be intoxicated, and blood was drawn about 2:00 a.m.

3. Testimony of Ashraf Mozayani

Ashraf Mozayani is a toxicologist with Harris County, Texas. She testified that when Mr. Wright arrived at Lizard's, he was intoxicated. She estimated that his blood alcohol content was about .13 to .17 at that time, and about .19 to .22 when he left Lizard's. She based these estimates on the DPS' test measurements of Defendant's blood taken after the accident.

4. Testimony of James Burris

James Burris is a DPS forensic scientist. He testified that he tested Mr. Wright's blood sample, and it was .19 grams per milliliter of blood.

5. Testimony of Scott Zella

Scott Zella is a TABC investigative agent who saw Mr. Wright at the scene of the accident on July 24, 2004. Mr. Wright admitted to Mr. Zella that he had drunk four beers, one shot, and a "flaming" drink at Lizard's, and had left Lizard's about midnight.

On July 29, 2004, Mr. Zella talked to "Rice" Blanton, a bartender at Lizard's, who stated he knew Mr. Wright, and served him two to three 12 ounce beers between 8:00 p.m and 11:15 p.m. He does not recall serving a "flaming" drink to Mr. Wright.

Mr. Zella also talked to James Cobb, another bartender at Lizard's, who does not recall seeing Mr. Wright.

6. Testimony of James Cobb

James Cobb is the downstairs bartender, and head bartender, at Lizard's. He stated that Lizard's stops serving alcohol at midnight, but remains open until 1:00 a.m. for pool. He stated that

Friday nights are busy, and that he has been trained to spot patrons who exhibit slurred speech, poor balance, and other signs of intoxication. In the past, he has called cabs for patrons. He never heard anything about Mr. Wright that evening.

7. Testimony of Rice Blanton

Rice Blanton is another bartender working the night in question at Lizard's. He observed Mr. Wright at Lizard's between 8:00 and 10:00 p.m. He served Mr. Wright about three beers between 8:00 and 10:00 p.m. He does not remember serving Mr. Wright any shots, nor selling him two beers at the same time. Mr. Blanton did not notice anything wrong with Mr. Wright, and last saw him about 11:00 p.m.

8. Testimony of Wendy Cassman

Wendy Cassman is an acquaintance of Mr. Wright. She stated she saw Mr. Wright at Lizard's on the night in question at about 6:30 p.m. Mr. Wright sounded ok to her that night, and at about 11:00 p.m. they both left Lizard's and smoked marijuana in his car, parked nearby. She also noticed a six-pack of beer in the back seat, and Mr. Wright drank three beers while they were in the car. They stayed in the car until about midnight, and Mr. Wright did not appear intoxicated. Ms. Cassman stated that when Mr. Wright drove off, he was "high," but not drunk. Additionally, Ms. Cassman testified that while at Lizard's, she observed Mr. Wright walk without any difficulty down the stairs from the upstairs floor to the lower floor.

9. Gilbert Alba

Mr. Alba is an investigator with the TABC. He stated that the bartenders at Lizard's were certified as of July 23, 2004, although Mr. Cobb and Mr. Blanton were not certified in March, 2004.

10. Lisa Jump De La-Garza

Ms. De La-Garza is a co-owner of Lizard's, and stated that all her bartenders were certified as of March 4, 2004.

a. ALJ's analysis and recommendation**Respondent's employees did not serve an intoxicated person on July 23, 2004.**

The evidence shows that Mr. Wright consumed about four beers and four shots at Borski's Tavern between approximately 4:30 and 7:30 p.m. on the date in question. Thereafter, between approximately 8:00 and 11:00 p.m., Mr. Wright had between four and eight drinks at Lizard's. This is borne out by the bartenders who testified. The ALJ considers all the testimony regarding exactly how many, and what types, of alcoholic drinks Mr. Wright consumed that night to be only rough estimates. Mr. Wright also admitted smoking marijuana before and after arriving at Lizard's, and this was confirmed by an eye-witness, Ms. Cassman. The evidence fails to show that anyone, including Respondent's employees, or Ms. Cassman, noted that Mr. Wright was intoxicated while at Lizard's.

It is undisputed that Mr. Wright was driving a motor vehicle and had an accident soon after leaving Lizard's, and was legally intoxicated as shown by the blood test as of 2:00 a.m. on July 24, 2004. However, there is insufficient evidence that Defendant appeared to be a danger to himself or others when he arrived at Lizard's, or when he left. Ms. Cassman, who was with Mr. Wright while at Lizard's, as well as immediately after, testified Mr. Wright did not appear "drunk," and looked "ok." She also stated she observed Mr. Wright walk down a flight of stairs at Lizard's, with no difficulty. Ms. Cassman also testified that Mr. Wright drank three beers after he left Lizard's, and smoked marijuana. The bartenders who admitted serving drinks to Mr. Wright did not believe he was intoxicated, (and the ALJ has considered their bias in this regard). It appears all the bartenders at Lizard's that night were certified, and were aware of what manifestations are exhibited by intoxicated patrons.

The testimony of the expert, Ms. Mozayani, is not persuasive in this case because her determinations regarding the blood alcohol level of Mr. Wright when he was at Lizard's are only estimates. Additionally, employees of Lizard's obviously were not aware of the actual blood alcohol levels of any of their patrons, and had to determine "intoxication" through other methods.

After reviewing and considering all the evidence, the Staff has failed to prove that Respondent's employee served or sold an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE § 11.61(b)(14) on July 23, 2004.

B. On March 4, 2004, did Respondent, its agent, servant, or employee, with criminal negligence permit a minor to possess or consume an alcoholic beverage on its premises in violation of TEX. ALCO. BEV. CODE § 106.13?

1. Testimony of Gilbert Alba

Mr. Alba is an investigator with the TABC. While conducting a routine investigation at Lizard's on March 4, 2004, he observed a waitress, Erin Brewer, serve drinks to two girls. One of the girls, Ms. Heckman, drank the drink, and Ms. Brewer did not ask for identification. Mr. Alba checked the girls identification, and discovered she was 19. He also determined Ms. Heckman's drink was alcoholic.

2. Testimony of Lisa Jump De La-Garza

Ms. De La-Garza, co-owner of Lizard's, stated she has a policy of not selling to minors, and that her employees are similarly trained and certified. She referred to TABC documentation which confirmed the employees certification. The Affidavit of Ms. De La-Garza also contains the statement that she did not directly or indirectly encourage the employee to sell alcohol to a minor.

3. Testimony of Rick Cruz

Mr. Cruz is a captain with the TABC. He testified that an appropriate penalty for the violations in this case is cancellation of the permits, because of the aggravating circumstances.

a. **ALJ's analysis and recommendation**

On March 4, 2004, Respondent's employee served a minor an alcoholic beverage.

The uncontroverted evidence shows that Ms. Brewer, a bartender for Respondent, served an alcoholic drink to Ms. Heckman, a minor, on March 4, 2004, at Lizard's. The testimony of Mr. Alba is undisputed.

The Respondent argues that TEX. ALCO. BEV. CODE § 106.13 provides a defense to the sale to the minor because the Respondent required its employees to attend a training program, the employee actually attended such training program, and the employer has not directly or indirectly encouraged the employee to violate the law. While the ALJ finds the first two elements of the defense present, the ALJ does not find the third, ie., that the employer has not directly or indirectly encouraged the employee to violate the law. Ms. De La-Garza's testimony and affidavit only restate the third requirement, with insufficient evidence of what actions were taken by Respondent to not directly or indirectly encourage the employee to sell alcohol to a minor. See Pena v. Neal, 901 S.W.2d 663 (Tex. App.- San Antonio 1995).

The ALJ does not agree with the TABC's request to cancel the permits due to this violation. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, and after considering all the circumstances, including the fact that this is a first time violation, the ALJ recommends a seven day suspension, or a \$150 per day civil penalty in lieu of suspension. This is in line with the TABC's own rule TAC § 37.60.

C. On September 10, 2004, did Respondent, its agent, servant, or employee, permit others to consume an alcoholic beverage on the licensed premises during prohibited hours, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 105.06?

1. Testimony of Gilbert Alba

Mr. Alba is an investigator with the TABC. On September 10, 2004, he was on patrol, passing Lizard's premises, and noticed people "hanging out" on Lizard's balcony at about 12:30 a.m. He testified that it is illegal for patrons to be consuming alcohol after 12:15 a.m. at Lizard's premises. Mr. Alba observed a person drinking a wine cooler at about 12:30. The violation occurred right in front of Ed De La-Garza, a manager of Lizard's, who was informed of the violation. Mr. De La-Garza was picking up the area at the time of the violation. Mr. Alba testified that he had previously warned Mr. De La-Garza regarding such violations.

2. Testimony of Ms. De La-Garza

Ms. De La-Garza testified that the balcony is part of Respondent's premises, and that the patron probably "sneaked" the wine cooler onto the premises, as it is not sold by Lizard's.

a. ALJ's analysis and recommendation

On September 10, 2004, Respondent, its agent, servant, or employee, permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours.

Based on the testimony of Mr. Alba, it is clear that he observed a patron drinking an alcoholic beverage at Lizard's about 15 minutes past the time such consumption was legally permitted. Even if the alcoholic beverage was "spirited" onto the premises and not sold by Respondent, a violation occurred, while a manager was present. The ALJ also notes the testimony of Mr. Alba regarding his prior warning to the manager regarding such violations. The ALJ also considers the other circumstances, including the time of the violation, and the cleaning up of the premises, regarding the penalty.

The ALJ does not agree with the TABC's request to cancel the permits due to this violation. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, and after considering all the circumstances, including the fact that this is a first time violation, the ALJ recommends a five day suspension, or a \$150 per day civil penalty in lieu of suspension. This is in line with the TABC's own rule TAC § 37.60.

D. On November 29, 2004, did Respondent or its agent, servant, or employee give a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. §§ 28.12, 61.73, and 102.31?

1. TABC's evidence of violation

The TABC presented the affidavit of Diane Gonzalez, containing a copy of Respondent's returned check for \$165.00 dated November 29, 2004.

2. Testimony of Ms. De La-Garza.

Ms. De La-Garza testified that the check in question was dishonored when presented because of oversight on her part. She intended to deposit funds to the bank in time to cover the check, but she arrived at the bank after it closed. The creditor was paid cash at the next opportunity, and this was the only time this has occurred.

a. ALJ's analysis and recommendation

On November 29, 2004, Respondent or its agent, servant, or employee gave a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of violation of TEX. ALCOBEV. CODE ANN. §§28.12, 61.73, and 102.31.

It is uncontested that the check in question for the purchase of beer was dishonored. However, based on the testimony of Ms. De La-Garza, that this was a one time instance to date, the ALJ recommends only a warning, rather than the seven day suspension requested by the TABC. This is in line with the TABC's own rule TAC § 37.60.

IV. FINDINGS OF FACT

1. Lizards Billiards, L.P., d/b/a Lizard's Billiards, (Respondent) is the holder of a Mixed Beverage Permit, MB-542337, and Beverage Cartage Permit, PE-542338, issued by the

Texas Alcoholic Beverage Commission (TABC) for the premises located at 1231 Josey Street, Huntsville, Walker Co., Texas.

2. On July 20, 2005, TABC sent a Notice of Hearing to Respondent.
3. The July 20, 2005, Notice of Hearing contained a statement of the location and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the Commission.
4. On March 10, 2006, a public hearing was held before Administrative Law Judge Stephen J. Burger. The Commission appeared through its staff attorney Judith L. Kennison. Respondent appeared through its attorney Jerry B. Register. Evidence was presented, and the record closed on March 31, 2006.
5. On July 23, 2004, Respondent's employees did not sell or deliver alcoholic beverages to an intoxicated person:
 - a. On the night of July 23, 2004, Bobby Wright arrived at Respondent's, and was served approximately four beers and four to eight shots of alcohol between approximately 8:30 and 11:00 p.m., by bartenders at Respondent's.
 - b. On the night of July 23, 2004, Mr. Wright smoked marijuana before and after arriving at Respondent's.
 - c. None of Respondent's employees noticed any signs that Mr. Wright was a danger to himself or others as a result of consuming alcohol on the night of July 23, 2004, while Mr. Wright was at Respondent's.
 - d. Ms. Cassman, an acquaintance of Mr. Wright, and a patron at Respondent's, conversed with Mr. Wright extensively while at Respondent's on the evening of July 23, 2004, and Ms. Cassman did not note any signs that Mr. Wright was a danger to himself or others as a result of drinking alcohol.
 - e. At about 12:30 a.m. on July 24, 2004, Mr. Wright was the driver of an automobile that was involved in an accident, and his blood alcohol content was .19 grams per milliliter at 2:00 a.m.
6. On March 4, 2004, Respondent's employees served a minor an alcoholic beverage:
 - a. On March 4, 2004, Gilbert Alba, an agent with the TABC, observed Ms. Brewer, an employee of Respondent, serve an alcoholic beverage to a minor at Respondent's premises.

- b. Respondent did not take sufficient action to show that Respondent did not directly or indirectly encourage its employees to sell alcohol to minors.
7. On September 10, 2004, Respondent's employee permitted others to consume an alcoholic beverage on Respondent's premises during prohibited hours:
 - a. On September 10, 2004, at 12:30 a.m., Gilbert Alba, an investigator with the TABC, observed a patron on the Respondent's premises drinking a wine cooler.
 - b. On September 10, 2004, it was illegal for persons to be consuming alcohol at Respondent's premises after 12:15.
8. On November 29, 2004, Respondent's agent gave a check for the purchase of beer that was dishonored when presented for payment:
 - a. On November 29, 2004, Ms. De La-Garza, a co-owner of Respondent, gave a check for \$165 to Stevenson Beer Distributing Co., for the purchase of beer, said check dishonored when presented for payment.
 - b. On November 29, 2004, Ms. De La-Garza arrived at her bank to deposit funds, but she arrived after the bank closed.
 - c. Ms. De La-Garza paid Stevenson Beer Distributing Co., the \$165 in cash for the above-referenced purchase shortly after November 29, 2004.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. §11.63; and 1 TEX. ADMIN. CODE (TAC) §155.55.
4. Based on the above Findings of Fact, Respondent or its employee did not violate TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

5. Based on the above Findings of Fact, on March 4, 2004, Respondent, its agent, servant, or employee, with criminal negligence did permit a minor to possess or consume an alcoholic beverage on its premises in violation of TEX. ALCO. BEV. CODE ANN. § 106.13
6. Based on Conclusion of Law Five, a seven day suspension is warranted. 16 TEX. ADMIN. CODE § 37.60.
7. Pursuant to TEX. ALCO. BEV. CODE ANN. §11.64, the Respondent should be allowed to pay a \$1,050 civil penalty (\$150 per day) in lieu of suspension of its permit.
8. Based on the above Findings of Fact, on September 10, 2004, Respondent, its agent, servant, or employee consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 105.06.
9. Based on Conclusion of Law Eight, a five day suspension is warranted. 16 TEX. ADMIN. CODE § 37.60.
10. Pursuant to TEX. ALCO. BEV. CODE ANN. §11.64, the Respondent should be allowed to pay a \$750 civil penalty (\$150 per day) in lieu of suspension of its permit.
11. Based on the above Findings of Fact, on November 29, 2004, Respondent or its agent, servant, or employee gave a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. §§ 28.12, 61.73, and 102.31.
12. Based on Conclusion of Law 11, a warning is warranted. 16 TEX. ADMIN. CODE § 37.60.

SIGNED May 30, 2006.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 30, 2006

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

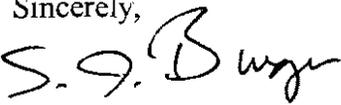
VIA REGULAR MAIL

RE: Docket No. 458-05-7710; Texas Alcoholic Beverage Commission v. Lizard's Billiards L.P. d/b/a Lizard's Billiards

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Stephen J. Burger
Administrative Law Judge

SJB/mc
Enclosure

xc: Judith L. Kennison, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**

Jerry B. Register, Attorney at Law, P.O. Box 1402, Huntsville, Texas 77342-1402 -**VIA REGULAR MAIL**