

DOCKET NO. 614452

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
BSSP INC.	§	
D/B/A CLUB OASIS	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB186814	§	
MIDLAND COUNTY, TEXAS	§	
(SOAH DOCKET NO.458-08-0178)	§	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 Craig R. Bennett. The hearing convened on 28th day of March, 2008 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 22nd day of April, 2008. 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. As of this date no exceptions have been filed.

The 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 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 no action should be taken against the Respondent.

This Order will become final and enforceable on the 17th day of October, 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 the 23rd day of September, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

The Honorable Craig R. Bennett, Administrative Law Judge
State Office of Administrative Hearings
VIA FAX: (512) 475-4994

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Licensing Division

Enforcement District Office

JK/cj

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

April 18, 2008

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

INTER-AGENCY

**RE: Docket No. 458-07-0178; Texas Alcoholic Beverage Commission vs. BSSP, Inc.,
d/b/a Club Oasis**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision on Remand 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,

A handwritten signature in blue ink that reads "Craig R. Bennett".

Craig R. Bennett
Administrative Law Judge

CRB/pp(l[s])
Enclosure

xc Judith Kennison, Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA INTER-AGENCY
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -
VIA INTER-AGENCY
Nick Todaro, Attorney, Brockett & McNeel, L.L.P., P.O. Box 1841, Midland, TX 79702 -**VIA REGULAR MAIL**

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DOCKET NO. 458-07-0178

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
BSSP, INC. d/b/a CLUB OASIS (TABC DOCKET NO. 614452)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION ON REMAND

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this action against BSSP, Inc. d/b/a Club Oasis (Respondent), alleging that Respondent's agent, servant or employee was intoxicated on the licensed premises, in violation of TEX. ALCO. BEV. CODE § 11.61(b)(13). TABC seeks either a 30-day suspension of Respondent's permit or payment of a penalty of \$150 per day in lieu of suspension. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) concludes that TABC has failed to prove, by a preponderance of the evidence, that Respondent's employee was intoxicated on the licensed premises; thus, there is no showing that Respondent violated any applicable rules or statutes. Therefore, the ALJ recommends that no penalty or suspension be imposed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 104.01(5), and 16 TEX. ADMIN. CODE § 31.1, *et. seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

On March 28, 2008, an evidentiary hearing convened before ALJ Craig R. Bennett in Odessa, Texas. TABC was represented at the hearing by attorney Judith Kennison. Respondent was represented by attorney Nick Todaro. The hearing concluded and the record closed that same day.

II. DISCUSSION

A. Applicable Law

State law prohibits employees of alcoholic beverage retailers from being intoxicated on the premises. Specifically, TEX. ALCO. BEV. CODE ANN. § 104.01(5) provides:

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

(5) being intoxicated on the licensed premises.

Further, a permittee may have enforcement action taken against it if its employees are intoxicated on the licensed premises. In particular, TEX. ALCO. BEV. CODE ANN. § 11.61(b) states:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(13) the permittee was intoxicated on the licensed premises.

Relying upon these provisions, TABC brings this enforcement action against Respondent. The relevant factual and legal issues are addressed below.

B. Background

Respondent operates a bar (Club Oasis) located in Midland, Texas. The bar is operated under the authority of a Mixed Beverage Permit, which includes a Mixed Beverage Late Hours Permit, issued by TABC. On January 21, 2005, TABC agent Jonathan Simcik conducted a routine inspection of Club Oasis. During his inspection, he made contact with Robin Clemons, an employee of Respondent who was working as a bartender at the time. Agent Simcik believed that

Ms. Clemons was intoxicated and arrested her for public intoxication. He also issued an administrative violation notice to Respondent for having an employee intoxicated on the licensed premises. That notice resulted in this proceeding, in which TABC is seeking a penalty against Respondent for Ms. Clemons being intoxicated on the licensed premises.

A misdemeanor complaint was also filed against Ms. Clemons in the Justice Court of Midland County, Texas, in regard to her arrest for public intoxication. Ms. Clemons pleaded not guilty and requested a trial on the matter. On August 25, 2005, Justice of the Peace David M. Cobos granted the state's motion to dismiss the criminal charges against Ms. Clemons for lack of evidence. Therefore, no criminal action was ever maintained against Ms. Clemons in regard to her arrest by Agent Simcik for public intoxication.

The sole contested factual issue in this case is whether Ms. Clemons was intoxicated while working on Respondent's licensed premises. Respondent argues Ms. Clemons was not intoxicated, but rather exhibited signs that were mistaken for intoxication because of physical ailments at the time, including pink eye, a respiratory infection, and a cold, and the related prescription and over-the-counter medicine she was taking for such conditions. TABC disagrees, asserting the evidence clearly establishes that Ms. Clemons was intoxicated. The evidence and arguments on this issue are set out in Section C below.

C. Was Ms. Clemons Intoxicated on January 21, 2005, on the Premises of Club Oasis?

1. TABC's Evidence and Arguments

Agent Simcik was TABC's sole witness at the hearing. He testified that he arrived at Respondent's premises after midnight on January 21, 2005, for the purpose of performing a routine inspection. When he arrived, he noted that Ms. Clemons was the only employee on the premises at the time. He made contact with her and informed her of the purpose of his visit. He testified that, at the time he spoke with her, Ms. Clemons appeared to have bloodshot eyes, slurred speech, and an odor of an alcoholic beverage on her breath.

Agent Simcik then took Ms. Clemons to a back room and asked her if she had been drinking. According to Agent Simcik, Ms. Clemons stated that she had three beers during her shift (which had started approximately six hours earlier). Agent Simcik then performed a Horizontal Gaze Nystagmus (HGN) field sobriety test on Ms. Clemons, and he concluded that she exhibited six clues of intoxication on the test. He also noted that she appeared to sway while he was administering the HGN test to her. Based on his observations, Agent Simcik concluded that Ms. Clemons was intoxicated and placed her under arrest.

Ms. Clemons was allowed to continue cleaning up the bar until Sandye Pierce, Respondent's principal owner, could arrive to take control of the premises. When Ms. Pierce arrived, she had the opportunity to speak with both Agent Simcik and Ms. Clemons. Then, Ms. Clemons was arrested and taken into custody by Agent Simcik.

2. Respondent's Evidence and Arguments

Respondent disagrees that Ms. Clemons was intoxicated. Respondent presented the testimony of numerous witnesses who were present at Respondent's premises that night. Sandye Pierce testified that she was on the premises at the time that Ms. Clemons started her shift that night and also arrived after Ms. Clemons was arrested. Ms. Pierce testified that Ms. Clemons did not appear to be well at the time she arrived for her shift, having red and watery eyes at that time. Ms. Clemons told her that she was taking antibiotics for a respiratory infection and for pink eye. Ms. Clemons insisted that she was no longer contagious and could work, even though she still was not feeling entirely well.

When Ms. Pierce arrived later that evening after being told that Ms. Clemons was being arrested, she spoke to Ms. Clemons. Ms. Pierce testified that Ms. Clemons did not appear to be intoxicated to her, and did not have slurred speech when she spoke to her. Further, she stated that Ms. Clemons was wearing shoes with raised heels that night, so it would not be surprising if she swayed some while attempting to stand still during the HGN test.

Respondent also offered the testimony of Ms. Clemons. She testified that she had consumed beer that night but had not had three full beers. She admitted that, over the course of the night, she had opened two or three beers. But, because the bar was very busy and she was the sole bartender working, she threw most of the first away when it got warm, and also did not drink all of the second one. She stated that she generally accepts when a customer offers to buy her a beer, because she wants to be polite and also wants to make the sale. However, she typically will not drink all of it.

Ms. Clemons testified that she had been to the emergency room a few days before and had been diagnosed with pink eye and a respiratory infection. She acknowledged that she should not have had any alcohol that evening because of the medications she was taking, which included antibiotics and an over-the-counter cold medicine she took before her shift started. However, she testified that she was not impaired when Agent Simcik arrived and was never intoxicated on the evening in question. She asked Agent Simcik to administer a breath or blood test to her to show him that she was not intoxicated, but he declined to do so. Further, she was not given any field sobriety tests other than the HGN test. Specifically, she was not given a walk-and-turn test, a one-leg-stand test, a finger count test, or an “ABC” test—each of which is a common field sobriety test that law enforcement may use to determine intoxication.

Finally, Respondent offered the testimony of numerous witnesses who were patrons at the bar on the evening in question. Each of these witnesses testified that Ms. Clemons did not appear intoxicated to them that night. However, the ALJ does not discuss their testimony in detail because he concludes that such testimony has limited weight, because only one of these witnesses was present at or near the time that Agent Simcik arrested Ms. Clemons, and that person arrived just shortly before Agent Simcik and had limited contact with Ms. Clemons.

Respondent also notes that the criminal charges against Ms. Clemons were dismissed for lack of evidence. Although recognizing that the standard for public intoxication requires more proof than just intoxication, it still argues that the dismissal of the criminal charges is additional evidence weighing against a finding of intoxication.

3. The ALJ's Analysis

This is not a case involving an individual who is clearly “falling down drunk.” Even according to Agent Simcik’s testimony, Ms. Clemons had functional abilities. After he arrested her, she was allowed to continue working and cleaning up the bar until the owner could arrive. So, this is a case of apparently mild intoxication, if any. However, after considering the totality of the evidence, the ALJ concludes that the preponderance of the evidence does not show that Ms. Clemons was intoxicated on Respondent’s premises when she was arrested on January 21, 2005.

Agent Simcik testified that Ms. Clemons had slurred speech, bloodshot eyes, a smell of alcoholic beverage on her breath, swaying balance, and exhibited six clues of intoxication on an HGN test. This information is likely enough to give Agent Simcik probable cause to arrest Ms. Clemons. However, the standard for probable cause is much less than what must be shown in order for TABC to meet its burden of proof in this enforcement action against Respondent.¹

When an officer is considering whether to stop or arrest for a criminal offense, the officer is not required to explore and evaluate whether there are other non-criminal causes of the clues of potential criminal behavior in issue.² Rather, the officer may rely upon his observations and arrest based upon those observations if the totality of the circumstances is indicative of criminal behavior and gives probable cause to believe that criminal behavior has occurred. However, when such criminal behavior must actually be proven (whether in a criminal proceeding, or a civil proceeding such as this) the ALJ must consider the innocent explanations offered for the conduct in issue and determine whether, in light of those explanations, the preponderance of the evidence establishes the alleged wrongful conduct occurred.

¹ See, e.g., *Britton v. State*, 578 S.W.2d 685, 686 (Tex.Crim.App. 1978) (“the facts available to the officer which might constitute probable cause to arrest need not be sufficient evidence to establish guilt.”). The ALJ recognizes that this is a civil proceeding, with a lesser standard than that required for guilt in a criminal proceeding. But, probable cause is still a lower standard than the “preponderance of the evidence” standard in this civil proceeding.

² See, e.g., *Curtis v. State*, 238 S.W.2d 376 (Tex.Crim.App. 2007) (noting the “as consistent with innocent activity” test has been repudiated in Texas).

In this case, there is no dispute that Ms. Clemons had bloodshot eyes. However, credible evidence indicates she had that condition at the time she arrived to start her shift and that it was likely due to her having both a cold and pink eye. So, that clue is not indicative of intoxication. While Agent Simcik observed Ms. Clemons “swaying” during the HGN, she was wearing shoes with significant heels that could cause some unsteadiness, so the ALJ also believes that clue is not indicative of intoxication. Ms. Clemons admitted to drinking alcohol, but disputes the amount consumed.

The evidence indicates that Ms. Clemons consumed somewhere between a total amount of one and three beers over a span of nearly six hours. One might believe that Ms. Clemons under-reported her alcohol consumption even to Agent Simcik on the night in question. However, the most basic methods for evaluating her alcohol consumption—breath or blood tests—were not utilized by Agent Simcik even though Ms. Clemons offered to submit to them. Therefore, the ALJ can only rely upon the evidence presented, which indicates consumption of between only one and three beers by Ms. Clemons. That amount of alcohol, by itself, would not be enough to ordinarily cause intoxication.

Intoxication can also occur because of a combination of alcohol and drugs but, in that case, such intoxication is difficult to prove without clear test results or observable behavior showing a lack of mental or physical faculties—such as those that would be demonstrated by the battery of standardized field sobriety tests typically used by law enforcement.

So, this case essentially boils down to Agent Simcik’s observation that Ms. Clemons’ speech was slurred and his finding of six clues of intoxication when he administered an HGN test to her. Ms. Pierce disputed that Ms. Clemons appeared intoxicated or that her speech was slurred when she saw her immediately prior to being taken into custody by Agent Simcik, which was approximately 30 minutes after Agent Simcik made the decision to arrest Ms. Clemons. Of course, Ms. Pierce’s testimony may be biased, since she is Respondent’s principal owner. But, both Ms. Clemons and Ms. Pierce appeared to be credible witnesses, as did Agent Simcik. The ALJ does not doubt that

Agent Simcik genuinely perceived the clues he indicated. However, those clues alone are not sufficient to persuade the ALJ that Ms. Clemons was intoxicated, particularly when any slurring of speech by Ms. Clemons appears to have been intermittent and not pervasive.³

On the night of her arrest, Ms. Clemons asked for either a breath or blood test to prove her lack of intoxication, but Agent Simcik denied her the opportunity to provide either. Moreover, as he testified at the hearing, he had a portable breath test with him at the time he arrested Ms. Clemons, but he chose not to use it on her. Finally, he declined to perform any other field sobriety tests that may have bolstered or supported his opinion of Ms. Clemons' intoxicated status.

At the hearing, Agent Simcik offered no justifiable reason why he did not perform any other tests (such as a walk-and-turn or a one-leg-stand, which are in the ordinary battery of tests performed by peace officers when making intoxication-related arrests). He simply explained that he was not required to offer those. While those tests may not be required, in a close case like this, the failure to administer those tests leaves the ALJ with an insufficient basis to find intoxication. The other evidence is simply too tenuous upon which to find that Ms. Clemons was intoxicated, especially in light of her physical ailments at the time, the late time of evening, and the fact that she had been working for approximately six hours when Agent Simcik first contacted her. Under the circumstances, many of the observations made by Agent Simcik can be attributed to factors other than intoxication.

Therefore, the ALJ finds that TABC has failed to show that Ms. Clemons was intoxicated at the time in question. Accordingly, the ALJ concludes that TABC has not shown that Respondent committed the violation alleged and, thus, the ALJ recommends that no suspension or penalty be imposed against Respondent. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

³ Agent Simcik noted the slurring initially when Ms. Clemons attempted to say "amoxicillin," and perceived it with some of her "s" sounds primarily.

III. FINDINGS OF FACT

1. BSSP, Inc. d/b/a Club Oasis (Respondent) is the holder of Mixed Beverage Permit MB 186814 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Club Oasis) located at 3101 Bankhead Highway, Midland, Midland County, Texas. This permit was in effect on January 21, 2005.
2. On January 21, 2005, TABC agent Jonathan Simcik conducted a routine inspection of Club Oasis. During his inspection, he made contact with Robin Clemons, an employee of Respondent who was working as a bartender at the time.
3. At the time Agent Simcik made contact with her, Ms. Clemons had red eyes, due to a pink eye ailment. She also had an odor of alcohol on her breath, due to the consumption of beer by her.
4. At the time Agent Simcik made contact with Ms. Clemons, she had been working for approximately six hours, and was recovering from a cold, a respiratory infection, and pink eye.
5. On January 21, 2005, Agent Simcik arrested Ms. Clemons for public intoxication.
6. Agent Simcik did not administer to Ms. Clemons a walk-and-turn test, a one-leg-stand test, a finger count test, or an "ABC" test—each of which are common field sobriety tests for law enforcement to use to determine intoxication.
7. Ms. Clemons requested to give a specimen of breath or blood to show her blood alcohol content at the time of her arrest, but Agent Simcik declined to give her the opportunity to do so.
8. Also on January 21, 2005, Agent Simcik issued an administrative violation notice to Respondent, based upon his arrest of Ms. Clemons for public intoxication, for having an employee intoxicated on the licensed premises.
9. That notice resulted in this proceeding, in which TABC is seeking a penalty against Respondent for Ms. Clemons being intoxicated on the licensed premises.
10. A misdemeanor complaint was filed against Ms. Clemons in the Justice Court of Midland County, Texas, in regard to her arrest for public intoxication.
11. Ms. Clemons pleaded not guilty to the criminal public intoxication charge and requested a trial on the matter.

12. On August 25, 2005, Justice of the Peace David M. Cobos granted the state's motion to dismiss the criminal charges against Ms. Clemons for lack of evidence.
13. Respondent requested a hearing regarding TABC's administrative action against it based upon Ms. Clemons' alleged intoxication of January 21, 2005.
14. On September 14, 2006, this case was referred to the State Office of Administrative Hearings (SOAH) for assignment to an Administrative Law Judge (ALJ) for hearing.
15. On October 3, 2006, TABC sent its initial Notice of Hearing to Respondent. This Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and contained 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 TABC.
16. The hearing was continued from its original setting and eventually canceled.
17. On March 20, 2007, ALJ Craig R. Bennett issued a Proposal for Decision in this docket, recommending that no penalty be assessed, based upon legal arguments raised by the parties on summary disposition.
18. On December 19, 2007, this matter was remanded back to SOAH for a contested case hearing.
19. On February 20, 2008, the ALJ provided notice to the parties of the new evidentiary hearing setting.
20. On March 28, 2008, the evidentiary hearing convened in Odessa, Texas, before . TABC was represented at the hearing by attorney Judith Kennison. Respondent was represented by attorney Nick Todaro. The hearing concluded and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 104.01(5), and 16 TEX. ADMIN. CODE § 31.1, *et. seq*
2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.021.

3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.55.
4. TABC has failed to establish by a preponderance of the evidence that Ms. Clemons or any other agent, **servant, or employee** of Respondent was intoxicated on Respondent's premises on January 21, 2005, in violation of TEX. ALCO. BEV. CODE ANN. ANN §§ 104.01(5) or 11.61(b)(13).
5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit MB 186814, which includes a Mixed Beverage Late Hours Permit, should not be suspended nor should any penalty be imposed.

SIGNED on April 18, 2008.



**CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**