

DOCKET NO. 581661

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
COWBOYS CONCERT HALL-ARLINGTON INC. D/B/A COWBOYS, Respondent PERMIT/LICENSE NO(s). MB246951, LB	§	ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS (SOAH DOCKET NO. 458-09-5340)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 26th day of January 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Monica Garza, presiding. The hearing convened on October 7, 2009, and the record was closed the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on December 1, 2009. Exceptions and Reply to Exceptions were filed to which the Administrative Law Judge replied and recommended that no changes be made to the Proposal for Decision.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

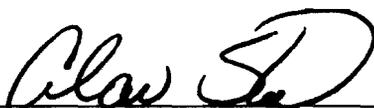
It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent shall pay a civil penalty in the amount of **\$6,750.00** on or before **March 9, 2010**. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above license or permit by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **March 17, 2010** and shall remain suspended for **forty-five (45) days**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on February 19, 2010, unless a Motion for Rehearing is filed before that date.

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

SIGNED this the 20th day of January 2010 at Austin, Texas.


Alan Steen, Administrator
Texas Alcoholic Beverage Commission

HON. MONICA GARZA
Administrative Law Judge
State Office of Administrative Hearings
677 Camp Bowie Blvd., Suite 400
Fort Worth, Texas 76116
VIA FACSIMILE: (817) 377-3706

Cowboys Concert Hall-Arlington Inc.
RESPONDENT
d/b/a Cowboys
2540 E. Abram
Arlington, Texas 76010
VIA U. S. FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Forth Worth Enforcement Office

SKP/dp

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 581661

REGISTER NUMBER:

NAME: COWBOYS CONCERT HALL-ARLINGTON INC.

TRADENAME: COWBOYS

ADDRESS: 2540 E. ABRAM, ARLINGTON, TEXAS 76010

DUE DATE: MARCH 9, 2010

PERMITS OR LICENSES: MB246951, LB

AMOUNT OF PENALTY: 6,750.00

Amount remitted \$ _____ Date remitted _____
You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

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On October 7, 2009, a hearing convened telephonically before SOAH ALJ Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Sandra K. Patton, TABC Staff Attorney. Kari Wade, Respondent's officer and authorized representative, appeared for Respondent. Following presentation of evidence, the record closed on October 7, 2009.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2), TABC may suspend for not more than 60 days or cancel a permit if the permit holder violates a provision of the code. Further, TEX. ALCO. BEV. CODE ANN. § 28.11 provides as follows:

The commission or administrator may suspend or cancel a mixed beverage permit after giving the permittee notice and the opportunity to show compliance with all requirements of law for the retention of the permit if it finds that a breach of the peace has occurred on the licensed premises or on premises under the control of the permittee and that the breach of the peace was not beyond the control of the permittee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.

III. EVIDENCE

A. Respondent's Permit

Respondent holds a Mixed Beverage Permit, MB-246951, with accompanying Mixed Beverage Late Hours Permit, issued by TABC, for the premises located 2540 E. Abram, Arlington, Tarrant County, Texas. This permit was originally issued on September 8, 1994, and it has been continuously renewed.

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B. Aggravated Breach of the Peace on the Permitted Premises

The evidence recited below is compiled from an Agreed Stipulation of Facts which was filed by the parties on October 6, 2009.

On April 5, 2008, Randy Anderson, Christopher Duncan, and Christopher McElroy were employed as floor men on Respondent's premises. Mr. Anderson was the head floor man. On that date, Bruce Jones, along with his family and friends, were patrons at Respondent's premises. At approximately 11:30 p.m., Mr. Duncan and Mr. McElroy advised Mr. Jones that he was being "cut-off," i.e., he would not be served additional alcoholic beverages due to his level of intoxication.

Following this notification, Mr. Jones' party of family and friends became very upset, and they were subsequently asked to leave the premises. As the group was being escorted from the premises, Mr. Jones' son struck one of the floor men. This action started a fight which caused patrons and floor men to be knocked down to the floor. Several members of Jones' party, as well as Mr. Anderson, Mr. Duncan, and Mr. McElroy, were involved in the fight. Injuries were sustained by the patrons and the floor men. Eventually, both Mr. Jones and his son were restrained on the floor. As a result of the altercation, Mr. Jones incurred several injuries: one of his eyes was swollen shut, his nose was bleeding, and the back of his head was bleeding. After Mr. Jones and his son were removed from the floor, Mr. Anderson contacted 9-1-1. Mr. Jones' injuries required medical attention, including sutures to close the wounds.

Following the incident, Arlington Police Detective Daisy Blanco was dispatched to the scene, and she was assigned as the chief investigator. Sworn statements obtained by Detective Blanco indicated that Mr. McElroy had kicked Mr. Jones in the head. Based on these statements, Detective Blanco filed charges against Mr. McElroy for aggravated assault. Several members of Jones' party were arrested and charged with public intoxication and resisting arrest.

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Respondent conducted an internal investigation of the incident. Respondent ultimately determined that Mr. McElroy had kicked Mr. Jones in the head, and, therefore, had acted improperly. Mr. McElroy was subsequently released from employment.

TABC Agent William Feick was assigned to investigate the aggravated assault. After reviewing information from the Arlington Police Department and witness statements, Agent Feick determined that Mr. McElroy overreacted and used excessive force during the incident. He further determined that Mr. McElroy's use of force exacerbated the situation and resulted in his kicking Mr. Jones in the head, causing injury to Mr. Jones' nose, eye, and head. On November 6, 2008, Petitioner issued an administrative citation to Respondent, alleging an aggravated breach of the peace in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61 (b)(7) and 28.11.

IV. ANALYSIS

The evidence clearly establishes that Respondent's employee committed an aggravated assault against a patron on the permitted premises, resulting in serious injury to the patron. The ALJ must now decide whether the incident was within Respondent's control or resulted from improper supervision by Respondent.

On the night of the incident, at least three of Respondent's security personnel dealt with Mr. Jones and his party. Initially, Mr. Jones was "cut-off" because Respondent's employees determined that he had become too intoxicated. Jones' party became irate at that point, ultimately resulting in the fight between Jones' party and security personnel. During the ensuing scuffle, Respondent's employee, while in the presence of other security personnel, kicked Mr. Jones in the head, presumably while he was on the ground.

Respondent argues that the aggravated assault was the spontaneous, unilateral action of an

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isolated employee. However, the ALJ notes that at least three employees were in contact with Mr. Jones and his party. Respondent's security personnel were already aware that Mr. Jones was intoxicated. Respondent, through its security personnel, should have de-escalated the situation as opposed to allowing the situation to develop into a knock-down, drag-out fight, wherein a patron was seriously injured by security personnel. Further, if Mr. McElroy was unilaterally overreacting, it is reasonable to expect Respondent's other security personnel to intervene. Had Mr. Anderson or Mr. Duncan intervened, the injuries to Mr. Jones could have been avoided.

The ALJ finds the aggravated assault was an aggravated breach of the peace within the control of Respondent, and it was caused by Respondent's failure to properly train and supervise its own security personnel. The ALJ recommends the penalty provided under 16 TEX. ADMIN. CODE § 37.60 that was effective at the time of the incident, which is a 45-day suspension, with the opportunity to pay a \$150 per day civil penalty in lieu of suspension, for a total of \$6,750. The ALJ feels this is a reasonable standard and that it is an appropriate penalty under the circumstances.

V. PROPOSED FINDINGS OF FACT

1. Cowboys Concert Hall-Arlington, Inc. d/b/a Cowboys (Respondent) holds a Mixed Beverage Permit, MB-246951, with accompanying Mixed Beverage Late Hours Permit, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 2540 E. Abram, Arlington, Tarrant County, Texas.
2. This permit was originally issued on September 8, 1994, and it has been continuously renewed.
3. On April 5, 2008, Randy Anderson, Christopher Duncan, and Christopher McElroy were working security on the floor of Respondent's premises.
4. On that date, Bruce Jones, along with his family and friends, were patrons at Respondent's premises.
5. At approximately 11:30 p.m. on that date, Respondent's employees determined that Mr.

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- Jones was too intoxicated to continue being served.
6. Mr. Duncan and Mr. McElroy notified Mr. Jones of this determination, and Mr. Jones' party became upset over that decision.
 7. Mr. Jones' party was asked to leave the premises, and, as the group was being escorted off the premises, Mr. Jones' son struck one of Respondent's employees.
 8. A fight ensued between Jones' party and security personnel, wherein members of both parties were injured.
 9. During the fight, Mr. McElroy kicked Mr. Jones in the head.
 10. As a result of Mr. McElroy's actions, Mr. Jones incurred several injuries: one of his eyes was swollen shut, his nose was bleeding, and the back of his head was bleeding.
 11. Mr. Jones' injuries required medical attention, including sutures to close the wounds.
 12. Mr. McElroy was charged with aggravated assault.
 13. Respondent conducted an internal investigation of the incident, found that Mr. McElroy acted improperly by kicking Mr. Jones in the head, and released Mr. McElroy from employment.
 14. Respondent's security personnel escalated the level of violence during the incident.
 15. The aggravated assault committed by Mr. McElroy was an aggravated breach of the peace within Respondent's control, and it was caused by Respondent's improper supervision over the premises.
 16. On November 6, 2008, TABC staff (Petitioner) issued an administrative citation to Respondent, alleging an aggravated breach of the peace.
 17. On August 12, 2009, Petitioner issued its notice of hearing, directed to Respondent at its address of record.
 18. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

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19. On October 7, 2009, a hearing convened telephonically before State Office of Administrative Hearings (SOAH) Administrative Law Judge Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas.
20. Petitioner was represented at the hearing by Sandra K. Patton, TABC Staff Attorney. Respondent appeared through its officer and authorized representative, Kari Wade.
21. Following presentation of evidence, the record closed on October 7, 2009.

VI. PROPOSED CONCLUSIONS OF LAW

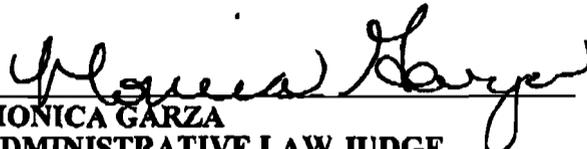
1. TABC has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 28.11.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.
4. Respondent allowed an aggravated breach of the peace on the permitted premises which was within Respondent's control and resulted from improper supervision of the premises. TEX. ALCO. BEV. CODE ANN. § 28.11.
5. Respondent's permit should be suspended for 45 days. TEX. ALCO. BEV. CODE ANN. §§ 11.61 and 28.11.
6. As an alternative to suspension, Respondent should be permitted to pay a \$6,750 civil penalty. TEX. ALCO. BEV. CODE ANN. § 11.64.

SIGNED December 1, 2009.

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MONICA GARZA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS