

DOCKET NO. 584090

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
LIZZARD'S INC. D/B/A LIZZARD'S PUB PERMIT/LICENSE NO(s). MB198066, LB	§	ALCOHOLIC
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-09-4152)	§	BEVERAGE COMMISSION
	§	

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 6th 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 Stephen J. Burger, presiding. The hearing convened on September 10, 2009. The record was kept open for briefs until October 1, 2009. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on November 25, 2009. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

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

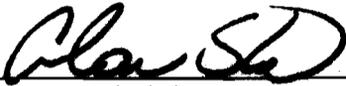
It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that NO ACTION be taken by the Texas Alcoholic Beverage Commission against the Respondent's Permit/License.

This Order is final and enforceable at the time that it is signed.

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

SIGNED this the 6th day of January 2010 at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

HON. STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77008
VIA FACSIMILE: (713) 812-1001

Alan Van Huff
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Lizzard's Inc.
RESPONDENT
d/b/a Lizzard's Pub
2715 Sackett
Houston, Texas 77098
VIA U. S. FIRST CLASS MAIL

Shelia A. Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Houston Enforcement Office

SAL/aa

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED
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TABC HOUSTON
LEGAL

November 25, 2009

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

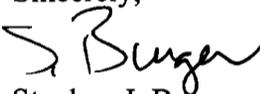
VIA REGULAR MAIL

RE: Docket No. 458-09-4152; Texas Alcoholic Beverage Commission vs. Lizzard's Inc. d/b/a Lizzard's Pub

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/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Shelia A. Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Albert Van Huff, Attorney at Law, 1225 North Loop West, Suite 640, Houston, Texas 77008 -**VIA REGULAR MAIL**

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SOAH DOCKET NO. 458-09-4152

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
LIZZARD'S INC. D/B/A LIZZARD'S PUB PERMIT NO. MB-198066, LB HARRIS COUNTY, TEXAS (TABC CASE NO. 584090), Respondent	§	OF
	§	
	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff or TABC) requested that the permit of Lizzard's Inc. d/b/a Lizzard's Pub (Respondent) be suspended for 20 days because Respondent violated the Texas Alcoholic Beverage Code (Code) by having an intoxicated employee on its premises on January 10, 2009. The Administrative Law Judge (ALJ) finds the TABC has not proven Respondent committed the alleged violation, and recommends that Respondent's permits not be suspended.

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 September 10, 2009, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Stephen J. Burger. The record was kept open for briefs until October 1, 2009. The TABC was represented by attorney Shelia Lindsey. Respondent appeared through its attorney Alan Van Huff.

II. ALLEGATIONS AND LEGAL STANDARDS

Pursuant to the Notice of Hearing issued by the TABC, Staff alleges that on January 10, 2009, Respondent, its agent, servant, or employee, was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 11.61(b)(13).

“Intoxicated” is defined in the TEX. PENAL CODE § 49.01 (2) as “not having the normal use of mental or physical faculties by reason of the introduction of alcohol ... into the body,” or having .08 or more alcohol concentration.

Public intoxication is defined in TEX. PENAL CODE § 49.02 as a person appearing in a public place while intoxicated to the degree that the person may endanger the person or another.

III. EVIDENCE, ANALYSIS AND RECOMMENDATION

A. Testimony

1. Jerry Flores

Jerry Flores, a TABC enforcement agent stated that on January 10, 2009, he went to Respondent’s premises to investigate a complaint of selling alcohol to a minor. At about 1 a.m., while Agent Flores was speaking to the manager, Gabe Gaidosik, an individual named Curtis Cunningham approached and asked Mr. Gaidosik if he needed any help. Mr. Gaidosik told Mr. Cunningham to help the bartender with ice.

Agent Flores initially noted that Mr. Cunningham had bloodshot eyes. Agent Flores observed Mr. Cunningham serve drinks and take orders from behind the bar. He also observed Mr. Cunningham use the cash register. Agent Flores observed Mr. Cunningham over-serve a patron by serving more than two drinks to the patron. Agent Flores believes that in doing so Mr. Cunningham was a danger to others.

Agent Flores testified that Mr. Cunningham had slurred speech and the strong odor of an alcoholic beverage on his person. He also heard Mr. Cunningham admit to drinking alcohol. Agent Flores believed Mr. Cunningham to be intoxicated and arrested him. No field sobriety tests were administered.

Later, Mr. Gaidosik told Agent Flores that Mr. Cunningham was not an employee of the bar.

2. Robert Hardcastle

Robert Hardcastle, TABC agent, was also present at Respondent's bar on the date in question, and reiterated Agent Flores' testimony. He added that Mr. Cunningham was unsteady on his feet and became belligerent. He stated that he was concerned Mr. Cunningham would tip over the bar stool upon which he was seated, or fall from it, noticing also that the floor was very slippery.

3. Gabe Gaidosik

Gabe Gaidosik was the bar manager for Respondent on the night in question. He stated that when the TABC agents approached him, between 12:30 and 1 a.m., the bar was very busy. He stated that Mr. Cunningham had been employed by the bar some time prior to that night, but he was not an employee on January 10, 2009. Mr. Gaidosik stated that Mr. Cunningham happened to be in the bar and volunteered to help out. Mr. Gaidosik told him to ask the bartender what help was needed but to not serve any drinks. The agents later told Mr. Gaidosik that they had observed Mr. Cunningham serving drinks from behind the bar. Mr. Gaidosik testified that he did not see any signs that Mr. Cunningham was intoxicated, and he did not hear Mr. Cunningham admit to being intoxicated.

4. Curtis Cunningham

Curtis Cunningham testified that he has been a bartender for Respondent off-and-on in the past but was not on its payroll on January 10, 2009. He admits to having a few beers between 7 and 10 p.m. that evening, but none after that. He arrived at Respondent's bar at about 12:30 p.m. He noticed the bar was very busy and asked the manager if he could help and was told to see if the bartenders needed any help. He served some customers, including a group of six or so whom he served about eight drinks, and closed out a bar tab. He is a certified bartender. He had been up since 5 a.m. that day, and does not doubt his eyes were bloodshot as a result.

Mr. Cunningham testified that he was only sitting on the edge of the tall bar stool because it was high, and he had on handcuffs. He did become upset at the agents arresting him, because he felt he was not intoxicated. Criminal charges brought against him were later dismissed for insufficient evidence.

B. Exhibits

Eight exhibits were offered by the TABC, and admitted.

1. Green card to Respondent
2. Notice of Hearing
3. TABC Blueback
4. SOAH docket number 458-07-0178
5. Receipts seized
6. Seizure report
7. Offense Report
8. Decision in SOAH docket number 458-08-0047

Three exhibits were offered by Respondent, and admitted.

1. Certificate of Disposition
2. Legislative intent letter
3. Order of Dismissal

C. ALJ's analysis and recommendation

The evidence shows that on January 10, 2009, Mr. Cunningham was, at the very least, a servant of Respondent. Although he was not a present employee on the payroll on that date (although he had been an employee prior to that date, and was a certified bartender), he offered his services to Respondent's manager, and the manager accepted his offer and told him what to do. Mr. Cunningham thereafter sold and served alcohol to patrons and closed out a bar tab.

The next determinative issue is whether Mr. Cunningham was intoxicated, *i.e.*, had he lost the normal use of his mental or physical faculties by reason of consuming alcohol that evening (TEX. PENAL CODE § 49.01 (2)), or was he intoxicated to the degree that he endangered himself or another (TEX. PENAL CODE § 49.02)? The TABC and Respondent agreed to use the latter at the hearing, but the TABC argued in its brief that the former is applicable. The ALJ has analyzed the issue under both definitions, and has reached the same conclusion.

The TABC agents stated they observed Mr. Cunningham with bloodshot eyes, slurred speech, and unsteady balance. They also testified he had a belligerent attitude and had admitted drinking alcohol. They determined he was intoxicated.

Mr. Cunningham testified that his eyes were bloodshot from being up since 5 a.m. (the agents observed him around 1 a.m., about 20 hours after he awoke). Mr. Cunningham does admit he had drinks but contends his last drink was about 10 p.m. He does admit he was upset when the agents told him he was being arrested for intoxication but insists he was not intoxicated.

The bar manager who allowed Mr. Cunningham to help behind the bar testified Mr. Cunningham was not intoxicated. He stated Mr. Cunningham did not have slurred speech or unsteady balance.

The ALJ finds that the Petitioner has not proven Mr. Cunningham was intoxicated on the night in question. The ALJ bases his opinion on the evidence just cited, and further on the fact that not only did Mr. Cunningham serve a group of patrons beer, without any reported problems, but he then closed out a tab, which meant dealing with cash and/or a credit card, working either a cash register and/or credit card machine, and performing the other detailed tasks associated with closing a bar tab. The TABC agents did not note that Mr. Cunningham had any problems with performing those activities and in doing so, Mr. Cunningham showed he had the normal use of his mental or physical faculties.

Although Agent Flores believed that Mr. Cunningham over-served a patron, and that this constituted evidence of public intoxication (endangering another person under TEX. PENAL CODE § 49.02, public intoxication) Mr. Cunningham credibly testified that he did complete a sale of eight drinks, but it was for a group of six patrons, not one.

Agent Hardcastle testified that he believed Mr. Cunningham was having difficulty sitting on a bar stool, and he was concerned Mr. Cunningham would tip the stool and fall. However, Agent Hardcastle admitted that he noticed the floor beneath the bar stool was very slippery. Additionally, Mr. Cunningham credibly stated that the handcuffs on him made getting completely on the tall bar stool difficult. The ALJ finds insufficient evidence that Mr. Cunningham was intoxicated to the degree that he was a danger to himself.

Additionally, the agents did not perform any field sobriety tests on Mr. Cunningham on the night in question nor was any breath or blood test performed. While the failure to do such tests does not *per se* mean that intoxication cannot be found, it is a factor the ALJ may consider.

The ALJ therefore finds that the TABC did not prove Respondent had an intoxicated employee or servant on its premises on January 10, 2009.

IV. FINDINGS OF FACT

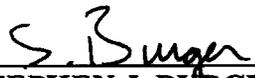
1. Lizzard's Inc. d/b/a Lizzard's Pub (Respondent) is the holder of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit, MB-198066, LB, issued by the Texas Alcoholic Beverage Commission (TABC or Petitioner).
2. On June 8, 2009, the TABC sent a Notice of Hearing to Respondent.
3. The June 8, 2009, 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 TABC.
4. On September 10, 2009, a public hearing was held before Administrative Law Judge (ALJ) Stephen J. Burger. The TABC appeared through its staff attorney Shelia Lindsey. Respondent appeared through its attorney Alan Van Huff. Evidence was presented and the record was closed October 1, 2009.
5. On January 10, 2009, Jerry Flores and Robert Hardcastle, agents with the TABC, observed Curtis Cunningham serve drinks to patrons and close out a bar tab at Respondent's premises, and Curtis Cunningham had no difficulties performing those tasks.
6. On January 10, 2009, Curtis Cunningham served a group of six customers eight drinks.
7. On January 10, 2009, Curtis Cunningham had not lost the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body, because he was able to close out a bar tab and serve patrons without any apparent difficulty.
8. On January 10, 2009, Curtis Cunningham did not endanger himself or others in a public place while intoxicated, because he did not have poor balance, and he did not serve one customer more than two drinks.
9. On January 10, 2009, Curtis Cunningham had been up since 5 a.m., which accounted for his red, bloodshot eyes.
10. On January 10, 2009, Curtis Cunningham was not given any field sobriety tests.

11. On January 10, 2009, Curtis Cunningham had difficulty sitting on the bar stool because his was hand-cuffed.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to 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) § 155.501.
4. Based on the above Findings of Fact, on January 10, 2009, Curtis Cunningham was an agent, servant, or employee of Respondent.
5. Based on the above Findings of Fact, Curtis Cunningham was not intoxicated when he served drinks to patrons at Respondent's premises on January 10, 2009.

SIGNED November 25, 2009.



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