

**DOCKET NO. 590405**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
<b>VS.</b>	§	
	§	
<b>ESPANA BAR DE TAPAS INC. D/B/A ESPANA BAR DE TAPAS, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
<b>PERMIT NOS. MB664230, LB</b>	§	
	§	
<b>BEXAR COUNTY, TEXAS (SOAH DOCKET NO. 458-10-2607)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 13th day of January, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings, with Administrative Law Judge Richard R. Wilfong presiding. The hearing convened on July 6 and August 6, 2010 and the SOAH record was closed on September 7, 2010. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 24, 2010. 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 Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, determines that the citation to the Alcoholic Beverage Code in proposed Conclusion of Law No. 3 should be corrected to read:

Notice of the complaint and of the hearing on the merits was provided as required by Code § 11.63 and by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

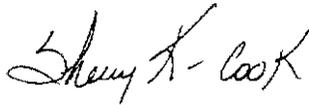
With this correction to Conclusion of Law No. 3, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All other motions, requests for entry of Proposed Findings

of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party, which are not specifically adopted herein, are denied.

**IT IS THEREFORE ORDERED** that **NO ACTION** be taken by the Texas Alcoholic Beverage Commission against your Mixed Beverage Permit and Mixed Beverage Late Hours Permit.

This Order will become final and enforceable on the 8<sup>th</sup> day of February, 2011 unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 13<sup>th</sup> day of January, 2011, at Austin, Texas.



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Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

#### **CERTIFICATE OF SERVICE**

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 13<sup>th</sup> day of January, 2011.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Richard R. Wilfong  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701  
**VIA FACSIMILE: (512) 475-4994**

Espana Bar de Tapas Incorporated  
d/b/a Espana Bar de Tapas  
**RESPONDENT**  
5638 W Hausman Rd. Suite 105  
San Antonio, Texas 78249  
**VIA REGULAR MAIL**

Jesus Garza  
**ATTORNEY FOR RESPONDENT**  
410 S. Main Avenue, Suite 203  
San Antonio, Texas 78204  
***VIA REGULAR MAIL***

Judith L. Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

TABC Licensing Division

Lt. Craig Smith  
TABC San Antonio District Office

**SOAH DOCKET NO. 458-10-2607  
TABC Case No. 590405**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner**

**v.**

**ESPAÑA BAR DE TAPAS, INC.  
D/B/A ESPAÑA BAR DE TAPAS  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Staff/TABC) brought this disciplinary action against Espana Bar De Tapas, Inc. d/b/a Espana Bar De Tapas (Respondent), seeking suspension of Respondent's Mixed Beverage and Mixed Beverage Late Hours Permits, or the assessment of an administrative fine. This Proposal for Decision recommends that Respondent's permits not be suspended and that no fine be assessed.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing convened July 9 and August 6, 2010, before Administrative Law Judge (ALJ) Richard R. Wilfong at the State Office of Administrative Hearings, 10300 Heritage, Suite 250, San Antonio, Texas. Staff was represented by Judith Kennison, attorney. Respondent was represented by attorney, Jesus Garza. The record closed on September 7, 2010, upon receipt of written closing arguments.

## II. REASONS FOR DECISION

### A. Background and Applicable Law

The basic facts are not in dispute. On December 19, 2009, San Antonio Detective Phillip Misek entered the Espana Bar at about 2:00 a.m. after most of the patrons had left and the bar was closing. He observed Jack Gribbin, the owner of Espana Bar, standing at the bar consuming a beer. According to Detective Misek, Mr. Gribbin appeared to be intoxicated because he had bloodshot eyes, a glazed look, the odor of alcohol on his breath, and slurred speech. Detective Misek was not trained to administer the standard field sobriety tests (SFSTs). Detective Misek then called for TABC Agent Michael Cantrell to confirm his suspicion that Mr. Gribbin was intoxicated. When Agent Cantrell arrived he observed Mr. Gribbin leaning on the bar at an odd angle; he had a strong odor of alcohol on his breath; and, he talked with slurred speech and disjointed sentences. Agent Cantrell then issued a citation to Mr. Gribbin for being intoxicated on the premises based on his observations and upon Detective Misek's statement that Mr. Gribbin did not appear like this when he saw him the night before. Detective Misek also arrested Mr. Gribbin for public intoxication.

On February 2, 2010, Staff issued a Notice of Violation to Respondent, alleging that Respondent's agent was intoxicated on the licensed premises. Respondent's request for hearing regarding that notice resulted in the docketing of this contested case.

The TABC has authority to seek the cancellation or suspension of a permit pursuant to TEX. ALCO. BEV. CODE (Code) § 11.61. One of the grounds for suspension of a license is if the licensee violated a provision of the Code or a rule of the TABC.<sup>1</sup> Being intoxicated on the premises is a violation of Code §§ 11.61(b)(13) and 104.01(5), and is an act that is considered to

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<sup>1</sup> Code § 61.71(a)(1).

be lewd, immoral, or offensive to public decency when engaged in on the premises by an agent of a person authorized to sell alcoholic beverages at retail <sup>1</sup>

Pursuant to 16 TEX. ADMIN. CODE (TAC) § 34.2, the TABC adopted a Schedule of Sanctions and Penalties for Health, Safety, and Welfare Violations (Schedule) to determine the proper penalty for violations. The penalty for the first violation of an agent of a licensee being intoxicated on premises is suspension for 17-25 days and/or a fine of \$300 per day.

## **B. Evidence**

Detective Misek testified that when he entered Espana Bar on December 19, 2009, he observed that Mr. Gribbin was drinking a beer and appeared to be intoxicated because his speech was slurred; he had bloodshot eyes; he had the odor of alcohol on his breath; and his appearance and demeanor were much different than when he saw him the previous day. Detective Misek also claimed that Mr. Gribbin admitted that he was borderline intoxicated. All of which are indicators of possible intoxication. However, Detective Misek did not ask Mr. Gribbin to perform any SFSTs, but, rather, formed the opinion, based on his experience, that Mr. Gribbin was intoxicated because, in his opinion, Mr. Gribbin did not have the proper use of his mental or physical faculties. Detective Misek was not trained to administer the SFSTs. Detective Misek then called TABC Agent Cantrell to confirm whether Mr. Gribbin was intoxicated. It also was the police department's policy to contact TABC personnel regarding an apparent intoxicated agent on the premises. After Agent Cantrell confirmed his suspicion of intoxication he arrested Mr. Gribbin for public intoxication because he thought Mr. Gribbin was a danger to himself or others.

Agent Cantrell testified that when he entered Espana Bar, Detective Misek told him that Mr. Gribbin was observed drinking a beer and was possibly intoxicated. Agent Cantrell interrogated Mr. Gribbin who professed that he was not intoxicated. However, he was leaning over on the bar at a very odd angle; was unsteady on his feet; had a strong odor of alcohol on his

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<sup>1</sup> Code § 104.1(5).

breath; slurred speech; kept asking for Agent Cantrell to repeat what he said; and he seemed confused. Agent Cantrell asked Mr. Gribbin if he wanted to take a portable breath test and he refused. Although Agent Cantrell was certified to administer the SFSTs he did not ask Mr. Gribbin to perform the Horizontal Gaze Nystagmus (HGN) test, or any other SFSTs, but, rather, formed his opinion that Mr. Gribbin was intoxicated based on his observations and experience. He said that Mr. Gribbin's state of intoxication was very apparent and it was not necessary to administer the SFSTs. Agent Cantrell explained that it was his practice to only ask a person suspected of being intoxicated if they wanted to take the SFSTs if he thought it might show they were not intoxicated, and in this case he had no doubt based on his observations.

Mr. Gribbin testified that he opened Espana Bar, as an authentic Spanish restaurant and sports bar, two and a half years ago. He said that he routinely works 14-15 hours a day because he is a very "hands on" owner and is determined to make the business successful. He testified that December 18 and 19, 2009, were two consecutive very busy days because of special events that brought in a large number of patrons. Moreover, he said that he was very short-staffed because two of his waiters did not show up. Consequently it was necessary for him to cover everything that needed to be done to serve his customers. He said that at sometime near midnight, he drank one beer with a friend who was helping him out due to the short-staffing. At 1:30 a.m. the band stopped playing and nearly all the customers left the bar. At this point he was exhausted and just wanted to relax. He decided to have a beer and had just started to drink it (only his second beer) when Detective Misek came in. He said that Detective Misek was very aggressive and confrontational, abruptly accusing him of being intoxicated. He responded concerning the claims that he had bloodshot eyes, slurred speech, and the odor of alcohol on his breath by emphasizing that he had just finish two of the busiest days he ever had. He had personally covered all the bases to assure that all of the customers were properly served while short-staffed, and he was very tired. He told Detective Misek that had not had proper rest and had not eaten well for at least two days. He further advised that he is diabetic. Regarding his demeanor, he said that he was offended by the uncalled for aggressive manner that the detective approached him; that is why he kept repeating "why are you doing this?"

Two bartenders that worked for Mr. Gribbin that day and the friend who was there helping out due to the short-staffing, also testified and corroborated Mr. Gribbin's testimony. Collectively their testimony confirmed that Mr. Gribbin only had two beers and he had not finished the second beer when the officers charged him with intoxication.

### **C. Analysis and Recommendation**

The main issue in this case is the definition of "intoxication" to be used when applying §§ 61.71(1)(1) and 104.01(5) of the Code. The Code does not define intoxication; however the Texas Penal Code (Penal Code) provides definitions for both "intoxication" and "public intoxication".

The Penal Code § 49.01(2) defines "intoxication" as

not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance in to the body; or (B) having an alcohol concentration of 0.08 or more.

The Penal Code § 49.02(a) provides that

A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another.

The definition of intoxication implies that there may be levels of alcohol in a person's system that do not amount to intoxication. The degree of intoxication set out in Penal Code § 49.01(2) means a level of alcohol in the system sufficient to make observable the effect on the mental and physical faculties of the person being observed. This definition of intoxication is commonly used in connection with intoxication offenses other than public intoxication.

The evidence presented in this case is insufficient to prove that Mr. Gribbin was intoxicated under this definition. While the observations of Detective Misek and Agent Cantrell indicate that there was some level of alcohol in Mr. Hernandez' system, they fail to prove that he

no longer had the normal use of his mental or physical faculties due to the introduction of alcohol as opposed to other factors, including being tired after working 14-15 hours a day for consecutive days and not eating well while being diabetic. Agent Cantrell was aware that persons who are diabetic can have a “diabetic episode” that causes them to show the same behavioral signs as intoxication. While their observations led to their both forming the opinion that Mr. Gribbin was intoxicated, without any objective findings based on SFSTs and no HGN test, in particular, to support those opinions, Staff has not shown by a preponderance of the evidence that Mr. Gribbin’s actions were due to the introduction of alcohol to the point of intoxication. Therefore, the ALJ recommends that there be no suspension of Respondent’s permit and no assessment of an administrative fine.

### III. FINDINGS OF FACT

1. Espana Bar De Tapas, Inc. d/b/a Espana Bar De Tapas (Respondent) is the holder of Mixed Beverage and Mixed Beverage Late Hours Permits, both issued by the Texas Alcoholic Beverage Commission (TABC).
2. On February 2, 2010, Staff of the TABC (Staff) issued to Respondent a Notice of Violation stating Staff’s intent to cancel or suspend Respondent’s permit or license.
3. Respondent notified Staff of its request for an administrative hearing regarding the notification.
4. On February 12, 2010, Staff issued a Notice of Hearing to Respondent advising of the date, time, and place of the hearing; a short plain statement of the matters alleged; and the statutes and rules involved.
5. The hearing on the merits was held on July 9, 2010 and August 6, 2010, before Administrative Law Judge (ALJ) Richard R. Wilfong at the State Office of Administrative Hearings, 10300 Heritage, Suite 250, San Antonio, Texas. All parties appeared and participated in the hearing.
6. On December 19, 2009, San Antonio Detective Phillip Misk entered Espana Bar De Tapas and observed that Jack Gribbin, the owner, was drinking a beer, had slurred speech, bloodshot eyes, the odor of alcohol on his breath, and his balance was unsteady.

7. When TABC Agent Michael Cantrell arrived at Espana Bar De Tapas, Detective Misek told him that Mr. Gribbin appeared intoxicated. Agent Cantrell observed that Mr. Gribbin had slurred speech, the odor of alcohol on his breath, and unsteady balance.
8. Both Detective Misek and Agent Cantrell formed the opinion that Mr. Gribbin was intoxicated because, in their respective opinions, he did not have the proper use of his mental or physical faculties, but neither of them asked Mr. Hernandez to perform any standard field sobriety tests.
9. Detective Misek arrested Mr. Gribbin for public intoxication because he thought that Mr. Gribbin was a danger to himself or others.
10. Mr. Gribbin had been working at Espana Bar De Tapas for over 14 hours when at approximately 1:30 a.m. on December 19, 2009, he drank the second of two beers that he had while he was working.
11. Mr. Gribbin is diabetic and had not eaten properly. He also was very tired after working over 14 hours a day for two consecutive very busy days.

#### IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic and Beverage Commission has jurisdiction and authority to take disciplinary action against Respondent. TEX. ALCO. BEV. CODE (Code) chs. 11 and 61.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the complaint and of the hearing on the merits was provided as required by Code § 1305.253 and by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. TABC had the burden of proving the case by a preponderance of the evidence.
5. Based on the forgoing Findings of Fact, TABC did not prove by a preponderance of the evidence that Jack Gribbin was intoxicated on the premises of Respondent on December 19, 2009.

6. Based on the forgoing Findings of Fact and Conclusions of Law, the TABC should not suspend Respondent's license or assess an administrative penalty against Respondent.

**SIGNED September 24, 2010.**

  
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**RICHARD R. WILFONG**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**