

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge  
September 9, 2015

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SEP 14 2015  
TABCHOUSTON  
LEGAL

Sherry K-Cook  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA REGULAR MAIL

**RE: SOAH Docket No. 458-15-3463; Alvaro Lopez Rojas d/b/a Topaz  
Night Club Texas Alcoholic Beverage Commission vs.**

Dear Ms. Cook:

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 § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink that reads "Lindy Hendricks".

Lindy Hendricks  
Administrative Law Judge

LH/mr  
Enclosure

xc Sandra Patton, Texas Alcoholic Beverage Commission, 427 W. 20<sup>th</sup> Street, Suite 600, Houston, TX 77008  
- VIA REGULAR MAIL  
Martin Wilson, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX  
78731 - VIA REGULAR MAIL  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX  
78731 - VIA REGULAR MAIL  
Al Van Huff, Attorney at Law, 1225 North Loop West, Suite 640, Houston, TX 77008 - VIA REGULAR  
MAIL

SOAH DOCKET NO. 458-15-3463  
(TABC CASE NO. 629208)

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner

v.

ALVARO LOPEZ ROJAS  
D/B/A TOPAZ NIGHT CLUB,  
(Permit Nos. BG714427, BL)  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) seeks suspension of the alcoholic beverage permits held by Alvaro Lopez Rojas d/b/a Topaz Night Club (Topaz Night Club or Respondent). The evidence proved that Respondent sold an alcoholic beverage to an intoxicated person. Therefore, the Administrative Law Judge (ALJ) recommends that Respondent's permits be suspended.

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

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits convened on July 17, 2015, at 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Lindy Hendricks. Staff was represented by attorney Sandra K. Patton. Respondent was represented by attorney Al Van Huff. The record closed at the conclusion of the hearing.

**II. DISCUSSION**

**A. Background**

Topaz Night Club is located at 6501 05 Chimney Rock in Houston, Texas, and holds a

wine and beer retailer's on-premise permit and retail dealer's on-premise late hours license number BG714427 and BL.

## **B. Allegation and Legal Standards**

In its Notice of Hearing, Staff alleged that, on October 18, 2014, Respondent or its agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person, in violation of Texas Alcoholic Beverage Code (Code) §§ 61.71(a)(1) and (6).

## **C. Evidence**

Staff presented the testimony of TABC Agents Andrew Costanza, Brenda Garcia, and Gabriel McCourtney. Respondent presented the testimony of Mr. Rojas.

### **1. Agent Costanza**

Agent Costanza testified he entered Topaz Night Club with Agent Garcia on October 8, 2014, in an undercover capacity. They made their way to the bar where they ordered a beer and observed the business. There were approximately six to eight people in the bar, including Respondent and a bartender who was later identified as Ivan Rodriguez (bartender or Mr. Rodriguez). Agent Costanza testified that he observed a male seated at the bar, approximately 2 feet in front of the bartender. The male was later identified as Antonio Reynaldo.

Agent Costanza observed Mr. Reynaldo with his head in his hand. At one point, Mr. Reynaldo's hand slipped, and his head hit the bar. He then raised his head from the bar and took a sip of his beer. Mr. Reynaldo had difficulty sitting on the seat and slipped off. Approximately 15 to 20 minutes later, Agent Costanza observed Mr. Reynaldo fumbled with his wallet for cash to pay the tab. When he started to get up, Mr. Reynaldo slipped and fell off the seat. Mr. Reynaldo had to use the bar for balance and the seat to get up. As he walked away, Mr. Reynaldo was unsteady on his feet. He had only gotten 2 to 3 feet from the bar when a

female approached and talked to him. Agent Costanza observed the female help Mr. Reynaldo back to the bar where he ordered two more beers. Agent Costanza notified the open team of his observations.

According to Agent Costanza, Mr. Reynaldo was in direct view of the bartender. Agent Costanza testified that the bartender should have seen Mr. Reynaldo slip and fall from his seat.

## **2. Agent Garcia**

At 1:30 a.m., Agent Garcia entered Topaz Night Club with Agent Costanza. They ordered drinks, sat at the bar, and observed the business for approximately 15 minutes. Agent Garcia observed a bartender and approximately five people seated in the bar area. She observed Mr. Reynaldo seated at the bar and that he appeared to be intoxicated. Mr. Reynaldo could not keep his balance on the seat and was struggling to keep himself on the stool. According to Agent Garcia, Mr. Reynaldo was falling asleep at the bar and could not keep his eyes open. She observed Mr. Reynaldo pay cash for his beer and almost fall trying to get up. Agent Garcia observed a female approach Mr. Reynaldo who sat back down and purchased two more beers from the bartender. Mr. Reynaldo paid for the beers and handed the female the drinks. As he tried to get up, Mr. Reynaldo stumbled over the stool.

## **3. Agent McCourtney**

Agent McCourtney entered Topaz Night Club after he was notified by the undercover team and given a description of the intoxicated patron. Agent McCourtney observed Mr. Reynaldo seated at the bar next to a female. Mr. Reynaldo was sprawled over with hands on the bar as if he were sleeping. Agent McCourtney observed an employee behind the bar approximately 3 to 4 feet and within view of Mr. Reynaldo. Agent McCourtney approached and observed Mr. Reynaldo to have red, glassy eyes and heavy eyelids. Agent McCourtney asked Mr. Reynaldo to walk over to the pool table. He observed Mr. Reynaldo use the bar to help himself up and stumbled a few steps. Agent McCourtney observed Mr. Reynaldo to have a

strong odor of an alcoholic beverage on his breath and person. Mr. Reynaldo told Agent McCourtney he had consumed three beers and had been up all day.

Agent McCourtney testified that no standardized field sobriety tests were conducted, and that Mr. Reynaldo was released to a female who volunteered to take him home.

#### **4. Mr. Rojas**

Mr. Rojas is the permit holder and was present the night of the investigation. He testified that he first observed Mr. Reynaldo at 1:00 a.m. in the parking lot. He asked Mr. Reynaldo why he came so late to which Mr. Reynaldo explained that he had worked late and wanted a beer. Mr. Rojas testified that Mr. Reynaldo did not appear intoxicated but rather tired. He stated that Mr. Reynaldo is a frequent customer who comes in two to three times a week. Mr. Rojas has never observed Mr. Reynaldo to be intoxicated. He testified that his bartender is trained to look for signs of intoxication. He stated that if the bartender sees someone laying down or stumbling, he should stop serving the patron and call Mr. Rojas or the security guard. Mr. Rojas testified that no one called him that night, and he did not see Mr. Reynaldo slip or fall off the chair.

#### **D. Analysis and Appropriate Penalty**

As provided in Code § 61.71 (a)(6), Respondent may not sell, serve, or deliver an alcoholic beverage to an intoxicated person, and doing so may result in the suspension of the permit. Staff alleged that the Topaz Night Club sold an alcoholic beverage to an intoxicated person and seeks a 20 day suspension without the opportunity to pay a civil penalty.<sup>1</sup>

The evidence proved that Respondent sold, served, or delivered an alcoholic beverage to an intoxicated person. Mr. Reynaldo was observed by undercover TABC agents for approximately 15 to 20 minutes. Agents Costanza and Garcia observed Mr. Reynaldo drinking a beer at the bar in direct view of the bartender. During their observation, Mr. Reynaldo nodded

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<sup>1</sup> The opportunity to pay a civil penalty in lieu of a suspension is not offered if the basis for the suspension is a violation for the sale of an alcoholic beverage to an intoxicated person. Code § 11.64(a).

off, hit his head on the bar, and struggled to remain seated. He slipped, fell off the stool, and had to use the bar for support. While Mr. Reynaldo was seated at the bar, the bartender had an opportunity to see these signs of intoxication. The evidence further shows that Mr. Reynaldo had red, glassy eyes and a strong odor of an alcoholic beverage on his breath and person. When Mr. Reynaldo paid his tab, the bartender had another opportunity to interact with and observe Mr. Reynaldo. After he paid his tab, Mr. Reynaldo continued to display signs of intoxication, including falling off his chair, stumbling, and unsteady walk. Despite these signs of intoxication, Respondent's employee sold Mr. Reynaldo two more beers.

Respondent argues that there was no objective test to establish intoxication and that Mr. Reynaldo was tired but not intoxicated. The ALJ agrees that nodding off and heavy eyes may be signs of fatigue, however, they may also be signs of intoxication. Mr. Reynaldo also fell off his seat, stumbled while walking, and had to use the bar for support. Additionally, he had a strong odor of an alcoholic beverage on his person and breath, and admitted consuming three beers at the bar. Given the totality of the circumstances, and even in the absence of any standardized field sobriety tests, the ALJ finds that the preponderance of the evidence shows that Mr. Reynaldo was intoxicated and did not have the normal use of his mental or physical faculties by reason of the introduction of alcohol into the body.<sup>2</sup>

Respondent argues that there was no evidence that the agents saw the bartender observe Mr. Reynaldo's behavior or that the bartender committed the act with criminal negligence. The ALJ finds that Code §§ 61.71(a)(1) and (6) does not require a mental state or that the violation be the result of criminal negligence. The evidence shows that the bartender was within a few feet and direct view of Mr. Reynaldo. Additionally, there were very few patrons in the bar area. A reasonable person knew or should have known that Mr. Reynaldo was intoxicated based on his demeanor. The ALJ finds that the bartender had a reasonable opportunity to interact with and observe Mr. Reynaldo, should have observed the signs of intoxication, and should not have sold him alcoholic beverages.

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<sup>2</sup> Texas Penal Code § 49.01(2)(A).

For these reasons, the ALJ recommends that Respondent's permits be suspended for 20 days without the opportunity to pay a civil penalty in lieu of suspension.

### III. FINDINGS OF FACT

1. Alvaro Lopez Rojas d/b/a Topaz Night Club (Respondent or Topaz Night Club) is located at 6501-05 Chimney Rock, in Houston, Texas, and holds wine and beer retailer's on-premise permit and retailer's on-premise late hours license BG714427, BL.
2. Staff of the Texas Commission on Alcoholic Beverages (Commission) issued a notice of hearing, alleging a violation of the Texas Alcoholic Beverage Code (Code). The notice was sent to Respondent on May 18, 2015.
3. The notice stated the time, place, and nature of the hearing; legal authority and jurisdiction under which the hearing was to be held; statutes and rules involved; and matters asserted.
4. The hearing on the merits convened on July 17, 2015, at 2020 North Loop West, Suite 111, in Houston, Texas. Staff attorney Sandra K. Patton represented Staff, and attorney Al Van Huff represented Respondent. The record closed at the conclusion of the hearing.
5. On October 18, 2014, Antonio Reynaldo was a patron at the Topaz Night Club.
6. Mr. Reynaldo was seated at the bar in direct view of Respondent's employee, Ivan Rodriguez.
7. Mr. Reynaldo had his head in his hands until his hands slipped and he hit his head on the bar.
8. Mr. Reynaldo struggled to remain seated, slipped, and fell off the stool.
9. Mr. Reynaldo had to use the bar for support to get up and had an unsteady walk.
10. Mr. Reynaldo had red, glassy eyes and a strong odor of an alcoholic beverage on his breath and person.
11. Mr. Rodriguez interacted with Mr. Reynaldo and should have observed these signs of intoxication.
12. Despite the signs of intoxication, Mr. Rodriguez sold, served, or delivered an alcoholic beverage to Mr. Reynaldo, an intoxicated person.

**IV. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this case pursuant to Code ch. 5 and § 61.71.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Code § 5.43 and Tex. Gov't Code ch. 2003.
3. Respondent received notice of the hearing, pursuant to Tex. Gov't Code §§ 2001.051 .052.
4. Respondent sold, served, or delivered an alcoholic beverage to an intoxicated person and thus violated Code §§ 61.71(a)(1) and (6).
5. Respondent's permits should be suspended for 20 days without the opportunity to pay a civil penalty in lieu of suspension. Code §§ 61.71 and 11.64(a).

**SIGNED September 9, 2015.**

  
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**LINDY HENDRICKS**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**DOCKET NO. 629208**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
	§	
<b>VS.</b>	§	
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	§	
<b>ALVARO LOPEZ ROJAS D/B/A TOPAZ NIGHT CLUB, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
	§	
<b>PERMIT BG714427, BL</b>	§	
	§	
	§	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-15-3463)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 20th day of November, 2015, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Lindy Hendricks presiding. The hearing convened on July 17, 2015 and the SOAH record closed the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 9, 2015. 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. No exceptions were filed.

After review and due consideration of the Proposal for Decision, 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 motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at**

**12:01 a.m. on December 16, 2015** and shall remain suspended for **TWENTY (20) CONSECUTIVE DAYS**, without an opportunity to pay a civil penalty in lieu of suspension.

**This Order will become final and enforceable on the 15th day of December, 2015, unless a Motion for Rehearing is filed by the 14th day of December, 2015.**

**SIGNED** this the 20th day of November, 2015, at Austin, Texas.



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Sherry K-Cook, Executive Director  
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 20th day of November, 2015.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Lindy Hendricks  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, TX 77018  
**VIA FACSIMILE: (512) 322-2061**

Alvaro Lopez Rojas  
d/b/a Topaz Night Club  
**RESPONDENT**  
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***VIA FIRST CLASS MAIL, CMRRR # 70090960000121491322***

Albert Van Huff  
**ATTORNEY FOR RESPONDENT**  
1225 North Loop West, Suite 640  
Houston, TX 77008  
***VIA FIRST CLASS MAIL, CMRRR#70090960000121491339***

Sandra Patton  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division  
***VIA E-MAIL: [sandra.patton@tabc.texas.gov](mailto:sandra.patton@tabc.texas.gov)***