

State Office of Administrative Hearings



RECEIVED

JAN 19 2016

TABC HOUSTON
LEGAL DEPT.

Cathleen Parsley
Chief Administrative Law Judge

January 12, 2016

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

VIA REGULAR MAIL

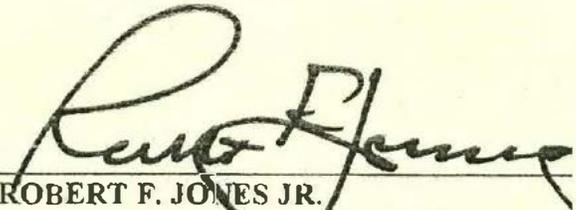
**RE: SOAH Docket No. 458-16-0045; TABC Case No. 632090
Texas Alcoholic Beverage Commission vs Barnett and Garska, Inc.
D/B/A Reflection**

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.

Sincerely,


ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE

RJ/lal

Enclosure

xc ✓ Edgar M. Korzeniowski, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL.

Emily Helm, 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 (with Certified Evidentiary Record and 1 Hearing CD/s)

Stephen Fenoglio, Attorney At Law, 713 W. 14th St., Austin, TX 78701 - VIA REGULAR MAIL

300 W. 15th Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
www.soah.state.tx.us

DOCKET NO. 458-16-0045

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

v.

BARNETT AND GARSKA, INC.
D/B/A REFLECTION
Respondent

§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) sought a suspension of the permit held by Barnett and Garska, Inc. d/b/a Reflection (Respondent) alleging that its owner, John Garska, was intoxicated on the licensed premises on January 24, 2015. Respondent denied that Mr. Garska was intoxicated. The Administrative Law Judge (ALJ) recommends that Staff's request be denied.

I. PROCEDURAL HISTORY

The hearing in this matter convened before ALJ Robert F. Jones Jr. on November 18, 2015, at the State Office of Administrative Hearings, in Fort Worth, Texas. Edgar M. Korzeniowski of the TABC Legal Services Division appeared and represented Staff. Attorney Stephen Fenoglio represented Respondent. TABC Agents Richard Parks and Travis Shirley testified for the Staff. John Garska and Vulcy Collins testified for the Respondent. Evidence was received and the record closed that day.

II. DISCUSSION

Respondent holds Mixed Beverage Permit MB737535, which includes a Mixed Beverage Late Hours Permit.¹ Respondent's licensed premises are located at 604 South Jennings Avenue,

¹ Pet. Ex. 1 at 2.

Fort Worth, Tarrant County, Texas 76104. Reflection is on the southwest corner of the intersection of Pennsylvania and Jennings. Six video cameras scan the premises. One camera, referred to in this proposal as the Parking Lot Camera, views the front parking lot, looking northeast toward the intersection of Pennsylvania and Jennings. The camera in the office, referred to in this proposal as the Office Camera, is on a storage shelf, about five feet above the floor. The camera faces the office door. Shelves of liquor are visible to the right. The office desk is visible to the left. Video from those two cameras of the events of January 24, 2015, were admitted in evidence.

Mr. Garska is an owner of Reflection and has run it since inception in 2009. The business employs fifteen persons. The club's hours are from 2:00 p.m. to 2:00 a.m. Mr. Garska is 69 years of age and, prior to Reflection, operated a spa called Salon Indulgence for 30 years, as a state licensed esthetician. Mr. Collins, the front bartender, worked at Reflection from its inception until November 2015.

Agent Parks is a state police officer with TABC. He has eighteen years of experience as an officer, the last five years with the TABC. He has training and experience in the detection of alcohol intoxication. Agent Parks was familiar with Reflection and Mr. Garska from investigating complaints about the establishment over the past two or three years. Agent Parks explained that he had to investigate the prior complaint calls (which could be anonymous) but none of the complaints were substantiated. Agent Parks testified that Reflection, since its permit was issued on November 25, 2009, has no other administrative actions against it aside from the one issued on January 24, 2015.²

Agent Shirley is a state police officer with TABC. He has six years of experience as an officer, the last two years with the TABC. He has training and experience in the detection of alcohol intoxication.

² Pot. Ex. 1 at 3.

A. The January 24, 2015 Incident

Mr. Garska was working at the club on January 24, 2015. Two men entered the bar around 1:45 a.m. One of the men (Man 1) was obviously intoxicated and was refused service. Man 1 got in a dispute with another patron. Man 1's companion (Man 2) assured Mr. Garska that they were leaving Reflection. Man 1 pushed or knocked bottles, glasses, and purses off a railing as he was leaving the building, causing a mess. The two men exited the building followed closely by Mr. Garska. Mr. Garska testified he was concerned that customer vehicles in the front parking lot might be damaged by Man 1. Mr. Collins was bartending on January 24, 2015. Mr. Collins confirmed Mr. Garska's testimony concerning the details of the disturbance at Reflection. He accompanied Mr. Garska as he left the premises and followed Man 1 and his companion.

The two men headed south on Jennings off the licensed premises. Man 1, according to Mr. Garska, threatened to call 911. Mr. Garska replied that if he did call 911, he would go to jail. Mr. Garska also stated that Man 1 should pay for the damage. Man 2 assaulted Mr. Garska, placing him in a headlock and wrestling him almost to the ground. Man 2 was taller, heavier, and younger than Mr. Garska. The assault frightened, unnerved, and upset Mr. Garska. Mr. Collins and others freed him from Man 2. Mr. Collins stated that Mr. Garska was disheveled, red-faced, and appeared to be in need of medical attention. Mr. Garska refused to get aid. The two groups separated: Mr. Garska and his group returning to the club. This took place between 1:48 and 1:52 a.m.³

B. Fort Worth Police

It was then closing time at Reflection, and Mr. Garska began helping with the closing chores after returning from the confrontation. Two Fort Worth Police Department (FWPD) patrol vehicles arrived at the bar. Mr. Garska went out to speak to the officers and related what had happened. Mr. Garska learned that Man 1 or Man 2 had called the police. One officer asked Mr. Garska if he would have been assaulted if he left the bar. The question bothered Mr. Garska.

³ Resp. Ex. 2, Parking Lot Camera.

The officer then asked Mr. Garska if he had consumed a drink. Mr. Garska responded that he had. The officer remarked that TABC would not be happy if he had been drinking on the premises. Mr. Garska rejoined that it was permissible for him to drink, but not for him to be intoxicated. The officer repeated his remark about TABC, and Mr. Garska stopped the conversation and returned to the bar. Mr. Collins heard a FWPD officer say to Mr. Garska that he was calling TABC because Mr. Garska had consumed alcohol. This took place between 2:00 and 2:05 a.m.⁴

A short time later, the same FWPD officer entered the premises and requested Mr. Garska's driver's license, which Mr. Garska gave him. The officer then left the club with Mr. Garska's driver's license. After a period of time, Mr. Garska went out to the police and requested the presence of a supervisor. This took place sometime between 2:02 and 2:33 a.m.⁵ Mr. Garska requested a police supervisor because the responding officer did not address the assault, but only seemed interested in what Mr. Garska might have done wrong or imprudently. Mr. Garska considered the officer's attitude to be hostile.

C. TABC

On January 24, 2015, Agent Parks was dispatched to Reflection by FWPD. On his arrival at approximately 2:41 a.m.,⁶ Agent Parks spoke with Officer Hernandez along with two other FWPD officers who were present in the bar's front parking lot on Jennings. Agent Parks asked them why he was needed at Reflection. He was told the officer believed Mr. Garska was intoxicated. Agent Parks entered the premises with FWPD Sergeant Reynolds, and they eventually met with Mr. Garska in the establishment's office at 2:43 a.m.⁷ Agent Parks told Mr. Garska that the officers outside of the bar told him that Mr. Garska was intoxicated.

⁴ Resp. Ex. 2, Parking Lot Camera.

⁵ The video shows Mr. Garska exiting the club and conferring with the police three times. Resp. Ex. 2, Parking Lot Camera.

⁶ Resp. Ex. 2, Parking Lot Camera.

⁷ Resp. Ex. 2, Office Camera.

Mr. Garska was irritated because he believed that Agent Parks entered the premises prepared to write a citation based upon the statements of the three FWPD officers. Mr. Garska described it as a "good old boy club." Mr. Garska felt that Agent Parks was somehow obligated to write a citation because the FWPD officers were irritated with him. Mr. Collins was present when Agent Parks arrived at Reflection. Agent Parks had his citation notebook which Mr. Collins interpreted to mean Agent Parks was there to write a citation, because he had not carried the notebook into the club on previous visits. Mr. Collins was concerned because the TABC agent did not seem concerned about Mr. Garska's welfare, given that Mr. Garska had been assaulted.

Agent Parks stated his purpose was to determine if Mr. Garska was intoxicated. Agent Parks admitted he has encountered persons who had been drinking but were not intoxicated. Agent Parks identified the following as some of the indicators that a person's mental or physical faculties had been affected by alcohol:

- Slurred speech.
- Bloodshot, droopy eyes or blurred vision (which, he said, can cause the subject to close or cover one eye).
- Mental confusion, as when a person who is asked for identification produces a credit card instead of a driver's license.
- Loss of attention, as when a person is asked a question and immediately forgets what they were asked.
- The need to be re-directed to the matter at hand, as when a person is asked to perform a simple task and has to be repeatedly asked to perform the action.
- Staggering while walking or the need of support when standing

Agent Parks testified that Mr. Garska was staggering as he walked from one of the bars to the office, a distance of 20 feet. The floor was smooth wood, and Mr. Garska was wearing dress shoes. Agent Parks stated that the stagger was evidenced by Mr. Garska dragging his right leg. Agent Parks did not observe Mr. Garska to sway while walking. Agent Parks observed that Mr. Garska's speech was slurred as Mr. Garska and Sergeant Reynolds spoke. Agent Parks smelled the odor of an alcoholic beverage on Mr. Garska's breath. Agent Parks noticed an opened whiskey bottle sitting on a shelf behind the office desk.

Agent Parks testified that Mr. Garska told him he had consumed “one birthday shot,” then another shot of alcohol, and also four or five beers that night. Agent Parks told Mr. Garska he believed he was intoxicated. Mr. Garska told Agent Parks he was not intoxicated. Agent Parks testified that Mr. Garska was confused because Mr. Garska stated that if he were stopped driving home and given field sobriety tests he would fail, and the officer would have to let him go home. When Sergeant Reynolds suggested that Mr. Garska meant “when he passed the field sobriety tests,” Mr. Garska agreed.

Agent Parks asked Mr. Garska if he would submit a breath specimen into a preliminary breath test (PBT) device and Mr. Garska said he would. Agent Parks testified he offered a PBT test because “it helps build the totality of the circumstances, it also shows the person who blows what their level is.” Agent Parks spoke to Agent Travis Shirley by phone. Agent Shirley had a PBT and agreed to bring it to Reflection.

Agent Parks testified that he had met Mr. Garska on prior occasions and had not observed Mr. Garska to stagger while walking, slur his speech, or appear confused as on the night of January 24, 2015. Agent Parks opined that Mr. Garska was intoxicated that night based upon Mr. Garska’s staggered walk, slurred speech, and confusion. Agent Parks added that he observed Mr. Garska lean against his desk as he conversed with Sergeant Reynolds. Agent Parks testified Mr. Garska’s demeanor was different than Agent Parks’s prior experiences with him.

Agent Parks was unaware at the time that Mr. Garska had been attacked that night having only been told by the FWPD that there had been a “disturbance” at Reflection. Agent Parks agreed, based upon his own experience, that being physically attacked causes a rise in adrenaline and that the effects, such as respiration, muscle tenseness, and the like, can take a period of time to wear off. Agent Parks recalled that Mr. Garska talked with FWPD about the disturbance. His conversation with Sergeant Reynolds concerned a dispute Mr. Garska had with one of the responding officers to which the agent paid little attention. Agent Parks testified that Mr. Garska did not ask for medical attention or state to Agent Parks that he was injured or had been assaulted.

Agent Shirley testified he arrived at Reflection between 3:00 and 3:15 a.m. in response to a request from Agent Parks to bring a PBT to the scene. Agent Shirley entered the premises and went to the office. Agent Parks, Mr. Garska, and Mr. Collins were present. Agent Shirley has training and experience in the detection of alcohol intoxication. Agent Shirley identified the following as some of the indicators that a person's mental or physical faculties had been affected by alcohol:

- Lack of attention.
- Inability to follow instructions.
- Red, bloodshot eyes.
- Unsteady balance.
- Slurred speech.

Agent Shirley also admitted he has encountered persons who had been drinking but were not intoxicated.

Agent Shirley observed that Mr. Garska had slurred speech, swayed when standing, and put his hand on the office desk (Agent Shirley believed for support). Agent Shirley observed Mr. Garska walking around his desk and out of the office to confer with his employees. He did not observe Mr. Garska stagger or drag a foot or leg. Agent Shirley did not recall if Mr. Garska had droopy eyelids.

Agent Shirley requested that Mr. Garska submit a specimen of breath into the PBT he had brought. He explained to Mr. Garska that this was to make certain he had alcohol on his breath. He explained that, if Mr. Garska blew below a .08 on the PBT, the agents would leave and no administrative case would be filed. Agent Shirley also testified that, contrary to what he told Mr. Garska, he used the PBT as proof of the presence of alcohol on the subject's breath but not to obtain a specific concentration number. He testified that TABC has no regulation requiring a permittee to submit to a PBT under the threat of permit suspension.

Based upon what he had observed (slurred speech and swaying) and his experience, Agent Shirley opined that Mr. Garska was intoxicated. Agent Shirley was not aware that

Mr. Garska had been attacked earlier in the night. Agent Shirley testified Mr. Garska did not ask for medical attention or state he had any injuries.

Agent Shirley testified that Mr. Collins advised Mr. Garska not to submit a specimen because of Mr. Collins's belief that the agents needed the sample to prove their case. Agent Parks testified that Mr. Garska refused after Mr. Collins interrupted and told him not to submit a specimen. Agent Parks recalled that Mr. Collins said it would only take two beers to register above .08. and Mr. Garska would be over the legal limit. Mr. Collins advised Mr. Garska not to provide a specimen. Mr. Collins testified he told Mr. Garska not to take the PBT, because he did not believe Mr. Garska was intoxicated and the way the "officers" (presumably the FWPD and Agent Parks) had treated Mr. Garska made Mr. Collins believe it was "not a good idea." Mr. Collins denied telling Mr. Garska not to take the PBT because he would be "over .08," as testified by Agent Parks.

Mr. Garska ultimately refused to submit a specimen. Mr. Garska acknowledged that his employees cautioned him not to submit a specimen to the PBT. Mr. Garska felt that he would pass the test. Mr. Garska agreed that Agent Shirley told him that if he passed the test there would be no problem. Mr. Garska also testified that Agent Parks emphasized the penalty he would face if a citation was issued to Reflection. Mr. Garska testified that he believed it was possible that, if he had taken the test, the result would be changed to reflect an actionable concentration. Mr. Garska also stated he did not protest being driven home by an employee that night as required by the agents because he was concerned he would be stopped by FWPD in retaliation.

Mr. Garska testified the agents became irritated when informed that he would not take the test. Agent Parks did not request Mr. Garska to attempt any standardized field sobriety tests such as the horizontal gaze nystagmus (HGN) examination because he usually did the PBT first, and only then the HGN. The citation was issued. This took place between 3:04 and 3:34 a.m.⁸ Agent Parks testified that after he completed the citation for the administrative case, he had to show Mr. Garska twice where to sign the form.

⁸ Resp. Ex. 2, Office Camera.

Mr. Garska denied telling Agent Parks he had a “birthday shot” (his birthday being April 25) or any other shot of liquor. He denied drinking any shots of liquor that night. He testified he rarely drinks liquor but normally drinks beer. He asserted he consumed three or four beers between 8:00 p.m. and 2:00 a.m. that night. The beers were Coors Light in 12 ounce bottles. He testified he carries the bottle and “nurses” the beer for an hour or more. Mr. Collins confirmed Mr. Garska’s testimony that he carries a beer bottle all night and sips from the bottle. Mr. Collins testified that Mr. Garska did not drink very much on any night at the club. Mr. Collins explained that when a customer bought Mr. Garska a shot, the bartender would surreptitiously pour coke in the glass, because Mr. Garska rarely drank liquor.

Mr. Collins was certain that Mr. Garska was not impaired on January 25, 2014. Mr. Collins is TABC seller/server certified and is trained to observe bar patrons for signs of intoxication. Mr. Collins testified that Mr. Garska did not have slurred speech or drooping eyelids and he was recovering from being in a headlock. He believed that Mr. Garska was shaken by the assault.

D. The Opened Whiskey Bottle

As noted above, Agent Parks noticed an opened whiskey bottle sitting on a shelf behind the office desk. He stated the bottle was capped and the seal was broken. The other bottles in the office, which was where Reflection stored its liquor inventory, were sealed. Mr. Garska agreed that if there was an opened whiskey bottle in the office where Agent Parks observed it, it was a bottle that had to be disposed of for wastage. The bottle would be photographed to substantiate the amount of liquor being wasted for inventory purposes. Mr. Collins confirmed the practice of placing the bottle in the office with respect to documenting wastage.

E. The Video

Agent Parks opined that the video admitted in evidence is “jerky,” like a frame was missing on a periodic basis. Agent Parks also opined that the video angle in the office was such

that Mr. Garska was not visible. The ALJ reviewed the video from the Parking Lot Camera and the Office Camera. The video scan is not smooth and continuous.

Mr. Garska was on screen in the video from the Parking Lot Camera as follows:

Time	Table 1 - Activity on Parking Lot Camera
1:48:32	Mr. Garska exits Reflection to confront the two men.
1:48:40	Mr. Garska goes off-screen.
1:51:29	Mr. Garska returns on-screen.
1:52:29	Mr. Garska enters Reflection.
2:02:55	Mr. Garska exits Reflection and confers with police.
2:05:32	Mr. Garska enters Reflection.
2:32:02	Mr. Garska exits Reflection and confers with police.
2:32:23	Mr. Garska enters Reflection.
2:33:30	Mr. Garska exits Reflection and confers with police.
2:33:50	Mr. Garska enters Reflection.
3:40	Mr. Garska, Mr. Collins, Mr. Satterfield and the agents exit Reflection.
3:41	Agent Parks and Agent Shirley leave the location.

Mr. Garska was on screen in the video from the Office Camera as follows:

Time	Table 2 - Activity on Office Camera
1:05	Mr. Garska enters the office carrying a beer bottle which he placed on the desk.
1:12	Mr. Garska exits the office taking the beer bottle with him.
2:43	Mr. Garska enters the office with Agent Parks and Sergeant Reynolds.
2:53	Mr. Garska exits the office with Agent Parks and Sergeant Reynolds.
2:55	Mr. Garska enters the office with Agent Parks and Mr. Collins.
3:04	Agent Shirley enters office.
3:30	Mr. Garska exits office with Mr. Collins.
3:32	Agent Parks and Agent Shirley exit office.
3:34	Mr. Garska enters the office and puts on his coat.
3:34	Mr. Garska exits the office.

Mr. Garska can be seen walking and standing in the parking lot and in the office. None of the video shows him “dragging” his right leg. Mr. Garska’s walk appeared normal. Mr. Garska is partially on screen in the office camera video. His hands can be seen gesturing, resting on the desk, picking up paperwork from the desk, and the like. Mr. Garska stood at the desk, examined paperwork, and counted money. Mr. Garska does not appear to sway. Mr. Garska made gestures as he talked to Sergeant Reynolds and the two agents. The gestures were controlled. At times, Mr. Garska’s hands rested on the desk. Mr. Garska did not appear to be supporting himself. Mr. Garska also stood with his hands in his pockets.

F. Applicable Law

The TABC may suspend a permit for not more than sixty days if “the permittee was intoxicated on the licensed premises.”⁹ “Permittee” means “with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock.”¹⁰ “Intoxicated” means “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 into the body.”¹¹ The Staff has the burden of proof by a preponderance of the evidence.¹²

G. Parties’ Arguments

The Staff argued that Mr. Garska was intoxicated on the licensed premises on January 24, 2015. Mr. Garska admitted to drinking; had the odor of an alcoholic beverage on his breath; staggered when walking; had slurred speech and mixed up his words; and swayed when standing. The Staff argued that a positive PBT result would be admissible as an indicator of intoxication, and Mr. Garska’s refusal to submit a breath specimen to the PBT can be taken as a

⁹ Tex. Alco. Bev. Code (the Code) § 11.61(b)(13).

¹⁰ § 11.61(a) of the Code.

¹¹ Tex. Penal Code § 49.01(2)(A).

¹² 1 Texas Administrative Code (TAC) § 155.427.

tacit admission that Mr. Garska knew was intoxicated.¹³ Therefore, in the Staff's view, a refusal to submit to a PBT can support a reasonable inference that the person believed he was intoxicated, and hence, was intoxicated.¹⁴

The Staff further argued that Mr. Garska had experienced a frightening experience. Mr. Garska had access (after the assault) to the opened bottle of whiskey Agent Parks saw in the office, and Staff suggests, Mr. Garska availed himself of the whiskey as a brace. Staff argued that Mr. Garska's statement that he had a "birthday shot" or "another shot" is consistent with his access to the opened bottle.

The Staff argued that Mr. Garska's assault does not explain the odor of an alcoholic beverage on his breath or justify Mr. Garska's refusal to submit a breath specimen. Staff noted that the excitement of the assault had dissipated by the time Agent Parks made contact with Mr. Garska. Mr. Garska did not ask the agents for medical attention or tell them he was in distress.

The Staff requested a 19-day suspension which Staff argued was reasonable in light of Mr. Garska's relationship to Respondent, Respondent's refusal to accept responsibility for Mr. Garska's actions, and Respondent's prior violation history.¹⁵

Respondent argued that Mr. Garska testified he had three or four beers over a six-hour period and did not consume any liquor. Respondent discounted the Staff argument that Mr. Garska had access to and drank from an opened bottle of whiskey in the bar's office. Respondent noted that Mr. Garska had access to liquor because Respondent's business was a bar. Respondent argued that simply because a bottle was present, the inference cannot be made that Mr. Garska drank from it and became intoxicated.

¹³ *Fernandez v. State*, 915 S.W.2d 572 (Tex.Ct.App.--San Antonio 1996).

¹⁴ *Gaddis v. State*, 753 S.W.2d 396 (Tex.Crim.App. 1988). *Mody v. State*, 2 S.W.3d 652 (Tex.Ct.App.--Houston [14 Dist.] 1999) was also cited by Staff. This case dealt with the admissibility of evidence of a refusal under the breath alcohol testing program applicable to driving while intoxicated criminal cases, and is not relevant to this contested case.

¹⁵ 16 TAC § 34.2.

Respondent noted that Agent Shirley recited a number of the indicators of intoxication but did not testify that Mr. Garska exhibited them. Respondent asserted that the video clearly shows that Mr. Garska was not unsteady, staggering, or dragging his foot as described by Agent Parks. Respondent argued that Mr. Garska was willing to take the PBT but was talked out of it by two employees whom he trusted and believed to have some expertise on the issue.

The Staff responded that the totality of the circumstances should be examined and the decision should not rest on facts taken in isolation. Mr. Garska consumed alcohol; he had the odor of an alcoholic beverage on his breath. Staff asserts that Mr. Garska told Agent Parks he had shots, and Staff asserts there is no reason in the record to suggest Agent Parks was not being truthful, given the prior good relationship he had with Mr. Garska and Reflection.

H. Analysis

1. The Opened Whiskey Bottle

The whiskey bottle in the Reflection office was not a source from which Mr. Garska took a shot, as the Staff urged. The Staff's theory was that Mr. Garska took a bracer from the whiskey bottle in the office. Assuming the bottle was there, the evidence shows that he did not have access to the bottle during the period of time after the assault. The office video shows Mr. Garska visited the office before the assault from 1:05 to 1:12 a.m. The assault took place at approximately 1:50 a.m. Mr. Garska testified that from 1:50 to 2:43 a.m., he was first working on bar closing chores, and second, dealing with the FWPD officers. The last assertion is confirmed by the parking lot video, which shows Mr. Garska exiting the club three times between 2:02. and 2:33 a.m. to talk to the police. The parking lot video also shows three police officers entering Reflection at 2:06 and exiting at 2:14 a.m. Then, two officers re-entered the premises at 2:16 and exited at 2:20 a.m.¹⁶ Mr. Garska next entered the office at 2:43 a.m. in the company of Sergeant Reynolds and Agent Parks. Agent Parks did not testify that Mr. Garska drank in his presence. He was not alone in the office until 3:34 a.m. when he retrieved his coat.

¹⁶ Resp. Ex. 2, Parking Lot video.

2. The PBT

In *Fernandez v. State*,¹⁷ a police officer made a traffic stop for speeding. The officer observed that the driver's speech was slurred, and he was unsteady on his feet, had bloodshot eyes, and had the odor of an alcoholic beverage on his breath. The officer administered various field sobriety tests including the Passive Alcohol Sensor (PAS) and the horizontal gaze nystagmus (HGN). The officer concluded the driver was intoxicated.¹⁸ The officer testified that the PAS was not administered to determine the driver's alcohol concentration. Instead, the PAS was used solely to determine the presence of alcohol and was admissible as another indicator of intoxication relied on by the officer, much like the other field sobriety tests.¹⁹

In *Gaddis v. State*,²⁰ after an arrest for driving while intoxicated, the driver refused a breath test when one was requested under the Texas breath alcohol testing program. During closing argument, the prosecutor commented upon appellant's refusal to take a breath test, saying, "You know why he refuses? Because if he blows in the machine, the game is over."²¹ Since evidence of the driver's refusal to take a breath test upon proper request was admissible, "the prosecutor was entitled to infer that appellant refused because he thought himself legally drunk."²² The assertion was a permissible inference or "a reasonable and legitimate deduction given the evidence of the refusal, the evidence demonstrating appellant's behavior and actions on the night in question, and the context in which the remark by the prosecutor appeared."²³

Agent Shirley testified that he normally used the PBT as proof of the presence of alcohol on the subject's breath not to obtain a specific concentration number. That is consistent with the *Fernandez* case. Agent Parks testified, in part, that he offered a PBT because "it helps build the totality of the circumstances." In this case, however, in an attempt to influence Mr. Garska, both

¹⁷ 915 S.W.2d 572 (Tex.Ct.App.--San Antonio 1996).

¹⁸ *Fernandez v. State* 915 S.W.2d 572, 573 (Tex.Ct.App.--San Antonio 1996).

¹⁹ *Id.* at 576.

²⁰ 753 S.W.2d 396 (Tex.Crim.App. 1988).

²¹ *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex.Crim.App. 1988).

²² *Id.* at 399.

²³ *Id.* at 399.

agents explained that if Mr. Garska blew below a .08, the agents would leave and no administrative case would be filed. At the same time, the agents emphasized the potential penalty that attended a citation under § 11.61(b)(13) of the Code.

Agent Parks acknowledged that a person who had consumed two beers could have the odor of an alcoholic beverage on his breath, depending on the passage of time. The agents both testified that Mr. Garska had the odor of an alcoholic beverage on his breath, and Mr. Garska told Agent Parks, and testified at the hearing, that he had consumed alcohol that night. The purpose for the PBT, to detect the presence of alcohol on Mr. Garska's breath, had already been fulfilled.

The Staff argued that the request and Mr. Garska's refusal were the basis for an inference that Mr. Garska was intoxicated, based upon an inference as in the *Gaddis* case. As against the inference that Mr. Garska refused because he had a guilty mind, Mr. Garska justified his refusal to submit a breath specimen upon his suspicion that the police, and by extension the TABC agents, were retaliating for his request that a supervisor come to the club. Mr. Garska's and Mr. Collin's testimony concerning the attitudes of the responding FWPD officers was not contradicted. Agent Parks testified that he paid no attention to the discussion between Mr. Garska and Sergeant Reynolds. Mr. Garska's and Mr. Collins's reasoning may well have been incorrect, but it was based on the facts as they understood them.

Agent Parks offered no reason why he did not request that Mr. Garska submit to standardized field sobriety tests such as the HGN, other than his procedure was to request a PBT, then the HGN. Agent Parks smelled the odor of an alcoholic beverage on Mr. Garska's breath, and Mr. Garska admitted he had consumed alcohol that night. Properly conducted, observing four of the six clues in the HGN affords the officer a 77% probability that the subject is legally intoxicated.²⁴ If Agent Parks's purpose was to determine if Mr. Garska was intoxicated, he could have requested Mr. Garska to submit to the examination.

²⁴ NHTSA SFST Manual at VIII-8 (2006), found at <http://oag.dc.gov/node/443812>.

The ALJ declines to infer from Mr. Garska's refusal to submit to the PBT that he was, or knew he was, intoxicated on January 24, 2015.

3. Video Evidence

The ALJ cannot find, based upon a preponderance of the evidence, that the video evidence shows that Mr. Garska staggered or dragged his foot when he walked, as described by Agent Parks. Agent Shirley also failed to observe staggering or foot-dragging by Mr. Garska. The ALJ finds that, from a preponderance of the evidence, that Mr. Garska's walk was normal for a man of his age.

Agent Shirley testified Mr. Garska swayed when standing and put his hand on the office desk for balance. The ALJ finds that, from a preponderance of the evidence, Mr. Garska stood normally on January 24, 2015. Mr. Garska stood at the office desk conducting the bar's business. Mr. Garska did not sway. Mr. Garska made gestures as he talked which were controlled. Mr. Garska's rested his hands on the office desk, but not to support himself.

4. Other Evidence

Neither Agent Parks nor Agent Shirley observed that Mr. Garska had red, bloodshot, or droopy eyes, or exhibited blurred vision. According to the evidence, Mr. Garska had been at the club from 8:00 p.m. the evening before until the agents encountered him at 2:45 a.m. the next morning. A reasonable person would expect that a person drinking to the point of intoxication, late at night until early in the morning, would have red, bloodshot, or droopy eyes, or exhibit blurred vision.²⁵ The ALJ finds that a preponderance of the evidence proves that Mr. Garska did not have red, bloodshot, or droopy eyes, or blurred vision on January 24, 2015

Agent Parks and Agent Shirley testified that Mr. Garska had slurred speech. They did not testify that Mr. Garska's speech was so slurred as to be incomprehensible. On the other

²⁵ Agent Parks did testify that he had to show Mr. Garska twice where to sign the citation form. He did not testify he had the impression that Mr. Garska had trouble seeing the form.

hand, Mr. Collins testified that Mr. Garska did not have slurred speech. Mr. Garska testified that when he is upset or agitated he does not “speak well” meaning he starts speaking faster and mixing up his words. However, Mr. Garska agreed that he was not agitated when speaking with the two agents. The ALJ cannot find that a preponderance of the evidence proves that Mr. Garska had slurred speech on January 24, 2015.

Agent Parks testified that Mr. Garska told him he had consumed “one birthday shot,” a second shot of alcohol, and four or five beers that night. Mr. Garska denied telling Agent Parks he had any shot of liquor that night. He testified he drinks beer. He testified he consumed three or four beers between 8:00 p.m. and 2:00 a.m. that night. The beers were Coors Light in a 12 ounce bottle. He testified he carries the bottle and slowly drinks one for an hour or more. Mr. Collins confirmed Mr. Garska’s testimony that he carries a beer bottle all night and sips from the bottle. The office video corroborated Mr. Garska’s and Mr. Collins’s testimony concerning Mr. Garska’s practice. When Mr. Garska entered the bar office at 1:05 a.m., he was carrying a brown, longneck beer bottle, which sat on the desk as he worked. He took the beer with him at 1:12 a.m. He did not drink from the bottle during that time period.²⁶ Mr. Garska’s and Mr. Collins’s testimony and the video are evidence that Mr. Garska consumed three or four beers between 8:00 p.m. and 2:00 a.m. as was his habit. The ALJ cannot find that a preponderance of the evidence proves Mr. Garska consumed enough alcohol to become intoxicated on January 24, 2015.

Agent Parks testified Mr. Garska’s demeanor was different than Agent Parks’s prior experiences with him. However, Agent Parks was unaware at the time that Mr. Garska had been attacked that night. Mr. Collins testified Mr. Garska was recovering from being in a headlock, was 68 years old, and was shaken by the experience. Further, Mr. Garska testified he was civil but irritated with Agent Parks.

In summary, based upon a preponderance of the evidence, the ALJ cannot find that Mr. Garska was intoxicated, that is, had lost the normal use of his mental or physical faculties, by reason of the introduction of alcohol into his body, in Respondent’s licensed premises on

²⁶ Resp. Ex. 2, Office Camera.

January 24, 2015. The ALJ recommends that Staff's request to suspend Respondent's Mixed Beverage Permit MB737535 be denied.

III. FINDINGS OF FACT

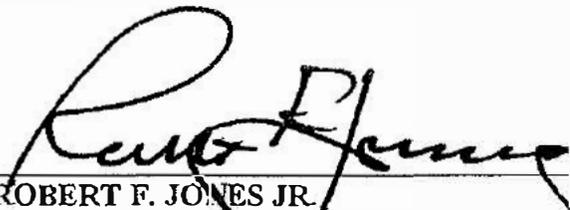
1. The Texas Alcoholic Beverage Commission (TABC) issued Mixed Beverage Permit MB737535, which includes a Mixed Beverage Late Hours Permit, to Barnett and Garska, Inc. d/b/a Reflection (Respondent).
2. Respondent's licensed premises are located at 604 South Jennings Avenue, Fort Worth, Tarrant County, Texas.
3. Mr. John Garska is an owner of Reflection.
4. Mr. Garska was working at Reflection on January 24, 2015.
5. A disturbance at the bar occurred at approximately 1:45 a.m.
6. Fort Worth Police Department (FWPD) officers were dispatched to Reflection to investigate.
7. Mr. Garska spoke with the FWPD officers.
8. The FWPD officers called TABC agents because they believed Mr. Garska was intoxicated.
9. TABC Agent Richard Parks was dispatched to Reflection to investigate the FWPD officers' allegation that Mr. Garska was intoxicated.
10. Mr. Garska had consumed beer on January 23, 2015, and on January 24, 2015, on the licensed premises.
11. Mr. Garska's walk was normal for a man of his age on January 24, 2015.
12. Mr. Garska stood normally and did not sway on January 24, 2015.
13. Mr. Garska did not have red, bloodshot, or droopy eyes, or blurred vision on January 24, 2015.
14. Although Mr. Garska appeared to have slurred speech he most likely exhibited that speech pattern because of his age and the fact that he had been assaulted a short time earlier.
15. On September 4, 2015, Staff issued its Notice of Hearing, which contained information regarding the date, time, and place of the hearing; the matters asserted; the statutes and rules involved; and the legal authorities under which the hearing would be held.

16. The hearing in this matter convened before Administrative Law Judge Robert F. Jones Jr. on November 18, 2015, at the State Office of Administrative Hearings(SOAH), in Fort Worth, Texas. Edgar M. Korzeniowski of the TABC Legal Services Division appeared and represented Staff. Respondent appeared by attorney Stephen Fenoglio. Evidence was received and the record closed that day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. Tex. Alco. Bev. Code (the Code) Chapter 5.
2. SOAH has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law. Tex. Gov't Code Chapter 2003.
3. Proper and timely notice of the hearing was provided to Respondent. Tex. Gov't Code § 2001.051-.052.
4. Staff failed to prove by a preponderance of the evidence that Mr. Garska was intoxicated, that is, had lost the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body, in Respondent's licensed premises on January 24, 2015.
5. Respondent's Mixed Beverage Permit MB737535, which includes a Mixed Beverage Late Hours Permit, should not be suspended. Section 11.61(b)(13) of the Code.

SIGNED January 12, 2016.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE :

STATE OFFICE OF ADMINISTRATIVE HEARINGS

FT. WORTH OFFICE

6777 Camp Bowie Blvd Suite 400

Fort Worth, Texas 76116

Phone: (817) 731-1733

Fax: (512) 322-0473

SERVICE LIST

AGENCY: Alcoholic Beverage Commission, Texas (TABC)
STYLE/CASE: BARNETT AND GARSKA INCORPORATED DBA REFLECTION
SOAH DOCKET NUMBER: 458-16-0045
REFERRING AGENCY CASE: 632090

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ ROBERT JONES**

REPRESENTATIVE / ADDRESS

PARTIES

STEPHEN FENOGLIO
713 W. 14TH ST
AUSTIN, TX 78701
(512) 347-9944 (PH)
(512) 482-8095 (FAX)

STEPHEN FENOGLIO

EDGAR M. KORZENIOWSKI
TEXAS ALCOHOLIC BEVERAGE COMMISSION
427 W. 20TH STREET, SUITE 600
HOUSTON, TX 77008
(817) 607-2483 (PH)
(713) 862-7478 (FAX)

TEXAS ALCOHOLIC BEVERAGE COMMISSION

xc: Docket Clerk, State Office of Administrative Hearings
Emily Helm GENERAL COUNSEL, TABC, Fax No. 512-206-3226

DOCKET NO. 632090

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
	§	
	§	
VS.	§	
	§	ALCOHOLIC
BARNETT AND GARSKA, INC. D/B/A REFLECTION, Respondent	§	
	§	
	§	
PERMIT MB737535, LB	§	
	§	
TARRANT COUNTY, TEXAS (SOAH DOCKET NO. 458-16-0045)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of October 2016, 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 (ALJ) Robert F. Jones Jr. presiding. The hearing on the merits convened on November 18, 2015 and the SOAH record closed that same day. The Administrative Law Judge issued a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 12, 2016. The Proposal for Decision was properly served on all parties and the parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed.

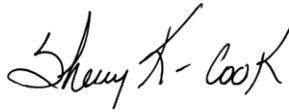
After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set 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.

THEREFORE, IT IS ORDERED that **NO ACTION** be taken in this case.

This Order will become final and enforceable on the 8th day of November, 2016, unless a Motion for Rehearing is filed by the 7th day of November, 2016.

SIGNED this the 11th day of October, 2016, at Austin, Texas.



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 11th day of October, 2016.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Robert F. Jones, Jr.
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701
VIA FACSIMILE: (512)322-2061

Barnett and Garska, Inc.

d/b/a Reflection

RESPONDENT

328 Harwood Road

Bedford, TX 76021

VIA FIRST CLASS MAIL, CMRRR #7016060000046455745

Stephen Fenoglio

ATTORNEY FOR RESPONDENT

713 W. 14th Street

Austin, TX 78701

VIA FIRST CLASS MAIL, CMRRR # 7016060000046455752

Edgar Korzeniowski

ATTORNEY FOR PETITIONER

TABC Legal Division

VIA E-MAIL: edgar.korzeniowski@tabc.texas.gov