

DOCKET NO. 458-99-0261

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

DELIA GARCIA DIAZ,
D/B/A LAS PALMAS CLUB
(TABC NO. 576456)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This a disciplinary action brought against Delia Garcia Diaz, d/b/a Las Palmas Club (Respondent) for two alleged violations: a breach of the peace on the premises that was not beyond the control of Respondent, and the purchase of alcohol from another retailer for resale. Instead of revocation of Respondent's beer and wine Retailer's permits, as recommended by Staff, the Administrative Law Judge recommends suspension of the permits for 35 days or, in lieu thereof, assessment of civil penalties in the amount of \$5,250.

I.

PROCEDURAL HISTORY, NOTICE & JURISDICTION

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

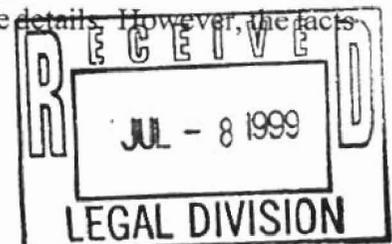
On June 7, 1999, a public hearing was convened by Barbara C. Marquardt, Senior Administrative Law Judge (ALJ), at the State Office of Administrative Hearings in Harris County, which is located at 2020 N. Loop West, Suite 111, Houston, Texas 77018. The Respondent was represented by Lee McMillian, attorney. Staff of the Commission was represented by Dewey Brackin, attorney. Following the receipt of evidence and arguments, the record closed on the same date.

II.

REASONS FOR DECISION

A. Stipulations.

The critical facts in the case are not in dispute. Therefore, the parties stipulated to the admissibility of 12 witness statements at the start of the hearing that both admit and describe the violations charged in the case. In addition, Respondent put two witnesses on the stand - the permittee, Delia Diaz, and Manuel Medeles, Respondent's new manager. The witness statements about the breach of the peace incident are somewhat conflicting as to the details. However, the facts



outlined below are a reasonable synthesis of the statements, reviewed in light of the additional information given by Ms. Diaz.

B. The Offenses.

1. **Purchase of Alcohol from Retailer for Resale.**

The applicable statute, TEX. ALCO. BEV. CODE ANN. (Code) §61.71(a)(20), provides for cancellation or suspension of not more than 60 days of a retail dealer's license, if it acquired an alcoholic beverage for resale from another retail dealer of alcoholic beverages.

On October 22, 1997, TABC Agent Lan Bui entered Las Palmas Club (Club) and observed the bartender, Jose Ponce, stocking the bar with Bud Light beer bottles from a twelve-pack package similar to the one on sale in a nearby convenience store. Mr. Ponce admitted having purchased the beer from the A & M Store, two blocks down the street, when their beer distributor failed to deliver. Mr. Ponce said he did this at the direction of the Club's owner and had done it on several occasions. Agent Bui inspected the storeroom and found six more cases of twelve packs of Bud Light beer in the freezer. (Ex. 1)

Ms. Diaz told a different story about the retail purchase of beer. Because of family obligations (described further in section C below), she managed the Club during the day, handling the office work such as bookkeeping and inventory, but she left a manager in charge after about 8:00 p.m. until closing. After the breach of the peace incident in April of 1997, Ms. Diaz started becoming more actively involved in the business. She gradually realized that her profits were diminishing and, after TABC cited the Club for the retail purchase incident, she discovered that Jose Ponce had been defrauding the business. He would purchase beer at retail prices, sell it to customers, and keep about 90% of the profit for himself.¹ Mr. Ponce had worked at the Club for three or four months, and she fired him about two weeks after TABC issued the citation on October 22nd. A review of her books indicated that her losses had increased significantly during Mr. Ponce's employment at the Club. Eventually, she had to file for bankruptcy.

2. **Breach of the Peace.**

(a) Legal Standard. Code §69.13 provides for permit suspension or cancellation for a finding that:

a breach of the peace has occurred on the licensed premises or on premises under the licensee's control and that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control.

¹When a permittee sells beer purchased from a retailer rather than a licensed distributor, the State loses its 14% liquor tax from each sale.

A review of three cases applying this statute leads to the conclusion that foreseeability and the licensee's ability to control the situation determine whether liability will be found. No violation was found in Texas Liquor Control Board v. Luke, 340 S.W.2d 504 (Tex. Civ. App. - Beaumont 1960, no writ), an action concerning an assault with a gun on an individual, because: (1) the shooting took place outside the cafe, while appellee was inside the building and in no position to control any participant; and (2) the licensee did not know "trouble was brewing" and had no reason to anticipate any. The court found insufficient evidence reasonably showing that the acts of the employee were the result of improper supervision by appellee, the licensee. Two cases that sustain cancellation of liquor licenses found the events that occurred resulted from improper supervision by the licensee. Texas Liquor Control Board v. Rodriguez, 364 S.W.2d 459 (Tex. Civ. App. - San Antonio 1963, no writ)[The inexperienced 19 year old barmaid in charge of the premises where fatal incident occurred had seen a fight between the two individuals ten minutes before the shooting, but did nothing to avoid further trouble, which was foreseeable.]; McFarland v. Texas Liquor Control Board, 434 S.W.2d 924 (Tex. Civ. App. - Waco 1968, no writ)[Barmaid and bartender knew the victim was drunk; had taken a knife from him earlier; knew he and the assailant had been fighting verbally for 30 minutes; told the victim to leave and then knew he had returned to make trouble. Their failure to call police or at least warn the manager resulted in the fatal stabbing of the victim.]

(b) The Breach. Early in the morning on or about April 20, 1997, a breach of the peace occurred in the parking lot of the Club, which is part of the licensed premises. Ruben Diaz (at the time, the Club's manager and Respondent's husband) and a club employee named Buddha (*aka* "Chupacabras" or Carlos Salazar) were working behind locked doors at the Club, closing up for the night by counting the money and taking inventory; Mr. Diaz's friend, Jerry, was there watching them. With Buddha standing next to him, Mr. Diaz took the unloaded .357 Smith & Wesson revolver that he kept behind the bar for protection out to show Jerry. After Mr. Diaz laid the weapon down, Buddha picked it up. He began playing with it, took a bullet out of the cash register, loaded the bullet in the gun, and asked if he could shoot it. Although Mr. Diaz told him "no" several times, he finally told Buddha he could shoot it in the air. Instead, Buddha walked over to the Club's side door, telling Mr. Diaz he was going to shoot a window. As Mr. Diaz walked towards him, asking "what window," Buddha fired the gun out towards the parking lot, where a white car was parked. Mr. Diaz heard a window shatter, looked out, and saw that the window on the front passenger side of the white car was broken. The parking lot was foggy, and, instead of investigating further, Mr. Diaz, Jerry and Buddha quickly left the Club, because they were afraid someone might have heard the gunfire and called the police.

Mr. Diaz, Jerry and Buddha then drove over to the Respondent's second club, Las Palmas II, which is a place that only serves non-alcoholic beverages after hours; patrons from the Club typically go to Las Palmas II after closing to continue socializing and to sober up. Buddha began working at Las Palmas II. Soon after arriving, Mr. Diaz asked Ivis Martinez, the younger brother of one of Respondent's security guards, to drive him back to the Club because he had forgotten to bring the inventory with him. When they arrived, he sent Ivis over to look in the parked white car. Ivis told him there was an unconscious man in the car's front passenger seat. Mr. Diaz and Ivis both touched the man, who was slumped over, telling him to wake up; both got blood on their hands from touching him. A cousin of Ivis, Carlos Linares, who had followed Mr. Diaz and Ivis to the Club,

walked up to them. When Ivis told him he thought the occupant of the white car had been stabbed, Mr. Linares told them they should call an ambulance. Mr. Diaz refused to call an ambulance, and all three men then returned to Las Palmas II.

Upon his return to Las Palmas II around 4:30 a.m., Mr. Diaz told Buddha that he had shot the occupant of the white car in the Club's parking lot. At Buddha's request, Mr. Diaz drove him back to the Club, where Buddha attempted to clean the gun with gasoline. They then left, and Mr. Diaz drove Buddha to the top portion of Loop 610 over the Ship Channel, where he stopped at Buddha's request. Buddha then threw the gun into the Ship Channel.

The Houston Police received a "911" call at about 5:20 a.m. on April 20th to come to the Club parking lot and investigate the occupant of the white car. They discovered the body of Jose Vidal Pardo, who had died from a gunshot wound to the chest, in the front seat of the white car. They launched an investigation, but no criminal charges have ever been filed in the case. Buddha, who is a citizen of Mexico, went back to Mexico on the Monday following the shooting and has not returned to the United States. Although Mr. Diaz avoided speaking to homicide investigators for months, he eventually gave a statement explaining the incident on July 29, 1997.

In sum, Mr. Diaz failed to maintain control at the Club by allowing Buddha to fire a handgun there that killed someone; failed to contact the authorities about the shooting; failed to contact EMS for the victim; helped destroy evidence; and avoided giving a statement to investigating officers for three months. There is no evidence that Mr. Diaz was actively involved in the shooting, and nothing in the record indicates the shooting was other than an accident.

C. The Mitigating Circumstances.

Delia Diaz, who is 35 years old, has held the wine and beer retail permits for the Club since December 1990. While she has always been the primary manager of the Club, in the early part of the 1990's she was unable to be there all the time. Her two children were born in 1990 and 1992, and their care plus a number of hospitalizations caused her to work at the Club primarily during the day, leaving by 8:00 p.m. She left management of the Club during the evenings to her husband, Ruben Diaz, whom she had married in August of 1988.

Until she learned about the shooting incident in April 1997, Ms. Diaz had no reason to believe that her husband was not properly managing the business. She had actually worked until about 6:00 p.m. on the day of the shooting, but nothing happened during her time at the Club that would have made the event foreseeable. Ruben Diaz appeared to be responsible and always went to work. She was not aware that he had any criminal connections. When she learned about the incident, she made her husband call her attorney. The attorney was responsible for Mr. Diaz finally going to the police and giving them his sworn statement. The incident basically ended the marriage between Ruben and Delia Diaz. She filed for divorce in June 1997, and their divorce became final in November 1997. Ruben Diaz has since left Texas and moved to California, and they have no contact.

As mentioned earlier, following the shooting, Ms. Diaz became much more actively involved in the business. She determined it would be necessary to change employees, use a different security company and make lease-hold improvements. Most significantly, Ms. Diaz decided to change the nature of the Club, so that her patronage would change from the young, potentially trouble-making customers of the past to an older crowd (25 - 40 year olds) of working people. She hired her uncle, Manuel Medeles, who is 60 years old, to be the Club's manager, and he runs the Club from 6:00 p.m. until closing. With his help, Ms Diaz has gradually fired the employees who used to work at the Club and hired new people. They carefully train new employees, teaching them to check identification and avoid serving minors or the intoxicated. Mr. Medeles, who described himself as "strict," testified that since he came to work in February 1998, the Club has received no TABC citations, and there have been no criminal code violations on the premises.²

The Club is located in an urban area with businesses surrounding it. Mr. Medeles does maintenance and is also responsible for the leasehold improvements they have made, including cleaning up the Club's parking lot, covering potholes and maintaining a neater appearance. They have improved the interior of the club, adding a railing around the perimeter of the dance floor. They have put up numerous, bilingual signs informing patrons in strict language of various TABC regulations. They play Spanish music, rather than hip hop, which brings in the older customers they want. Another entertainment measure for attracting older patrons has been their addition of a big screen television, as well as several smaller televisions, on which they play soccer games - a sport that is very popular among the mature Spanish-speaking crowd.

Mr. Medeles found a more reliable security company than the one employed while Ruben Diaz was the manager, so that their security guards are more trustworthy than in the past. Either Ms. Diaz or Mr. Medeles personally interviews the guards sent to work at the Club by the security company, to make sure they are bilingual, are not easily intimidated, will keep order and check identification. The guards wear uniforms; one security guard is stationed at the front of the building, and another works inside the entrance in the vestibule area. There is no longer a gun on the premises, and Mr. Medeles testified the absence of a weapon, coupled with the presence of more and better security and older, more mature patrons make it unlikely an incident like the shooting could happen again at the Club.

Ms. Diaz testified that the Club is her family's livelihood. It is doing better financially, but it would go out of business if it were closed for 30 days or more. The new, older crowd that they have gradually attracted over one and one-half years would simply go elsewhere in that period of time; once they got "comfortable" elsewhere, they would not return. They have live music now on Fridays, Saturdays and Sundays - closing for 30 days or longer would be difficult economically for her family, her new employees and the musicians. Her other club, Las Palmas II, would also be forced to go out of business if the Club did, because its clientele come from the Club when it closes.

D. Analysis and Conclusion On Appropriate Sanction.

²In fact, since Mr. Diaz left, there has been no trouble at the Club, other than normal business problems.

It is undisputed that both of the offenses charged occurred at the Club, and that they violated the referenced Code provisions. The parties' only dispute was about the appropriate sanction.

Staff admitted that the purchase of alcohol at retail for resale is not serious enough to warrant permit revocation; instead, it argued a 30-day suspension or fine of \$5,000 would be appropriate. However, Staff contended the breach of the peace incident was serious, warranting permit revocation or, in lieu of that, a 60-day suspension or payment of a \$10,000 fine. In response to Ms. Diaz's arguments that both offenses were not foreseeable by her, Staff pointed out that a permittee is responsible for the acts of its employee, even if the employee or agent committed a Code violation against the specific instructions of the permittee. Bradley v. Texas Liquor Control Board, 108 S.W.2d 300 (Tex. Civ. App. - Austin, 1937, *no writ*).

Respondent cited §11.64 of the Code, which provides that whenever TABC is authorized to suspend a permit, it shall give the permittee an opportunity to pay a civil penalty in lieu of suspension. In doing so, the TABC shall consider the economic impact a suspension would have on the permittee, and it must assess a penalty of not less than \$150 nor more than \$25,000 for each day the permit is suspended. The Club's enforcement record indicates payment of two fines for prior Code violations: \$1,050 (in lieu of a 7-day suspension) in 1992, for a sale of liquor to an intoxicated person; and \$1,500 (in lieu of a 10-day suspension), for two instances of alcohol service to intoxicated patrons and one solicitation of service on January 28, 1994. (Ex. A).

While Respondent admitted the death on her licensed premises was a serious event that should not be trivialized, she noted the shooting occurred after hours, when the bar was closed. Ms. Diaz had no reason from past events to predict that violence would break out at the Club, or that her husband would fail to control the actions of his employee, Buddha. Since that event Ms. Diaz has taken control of the bar and done everything possible to prevent the recurrence of violations. She believes catering to the new, older, clientele, coupled with the presence of her mature uncle, more vigilant security and no weapons on the premises, will be the best possible defenses against future problems at the Club.

If the Club were closed for 30 days or more, Ms. Diaz would be forced economically to close it, as well as her after-hours club. This would cause economic hardship to Ms. Diaz's family as well as the employees at both clubs and the music groups who play at the Club on weekends. Counsel for Ms. Diaz argued that a fine of \$2,700 would cause significant enough hardship to focus Respondent's attention on assuring that no further violations occur. It would be a sum, however, that Respondent could afford to pay.

The ALJ finds that the breach of the peace was serious, but agrees that Respondent has taken all reasonable steps to assure that violence will not recur at the Club. Her ex-husband, former employees and, arguably, her former clientele will no longer be present. It is also clear from the record that Ms. Diaz has worked to improve the interior and exterior leasehold. Given her recent bankruptcy, her argument that she would go out of business if the Club's operation were suspended for 30 days or more also makes sense. However, with her prior enforcement history, the ALJ does

not believe the fine Respondent requested is sufficient. Therefore, the ALJ recommends a 35-day suspension, but in lieu of that payment of civil penalties of \$150 per day, which totals \$5,250.

III.

PROPOSED FINDINGS OF FACT

1. The parties received proper and timely notice of the hearing, which was held in Harris County.
2. On December 19, 1990, the Texas Alcoholic Beverage Commission (TABC) issued Delia Garcia Diaz, d/b/a Las Palmas Club (Respondent/Club), Beer and Wine Retailer's Permit BG261195 and Retail Dealer's On Premise Late Hours License BL261196 for the premises located at 4660 Telephone Road in Houston, Harris County, Texas.
3. On October 22, 1997, TABC Agent Lan Bui entered the Club and observed the bartender, Jose Ponce, stocking the bar with Bud Light beer bottles from a twelve-pack package similar to the one on sale in a nearby convenience store.
 - A. Agent Bui inspected the storeroom and found six more cases of twelve packs of Bud Light beer in the freezer.
 - B. Mr. Ponce had worked at the Club for three or four months and, without the knowledge or permission of Respondent, he was purchasing some of the beer he sold to the Club's customers at retail, and then keeping about 90% of the profits from such sales personally in a scheme to defraud Respondent.
 - C. Respondent had been noticing that her profits were diminishing for some time prior to the October 22nd incident. The citation issued that day caused her to review her books, and she then learned her losses had increased significantly during Mr. Ponce's employment at the Club.
 - D. Respondent fired Mr. Ponce about two weeks after October 22, 1997, and eventually, she had to file for bankruptcy.
4. Early in the morning on April 20, 1997, Ruben Diaz (at the time, the Club's manager and Respondent's husband) and a club employee named Buddha (*aka* "Chupacabras" or Carlos Salazar) were working behind locked doors at the Club, closing up for the night by counting the money and taking inventory; Mr. Diaz's friend, Jerry, was there watching them.
 - A. With Buddha standing next to him, Mr. Diaz took the unloaded .357 Smith & Wesson revolver that he kept behind the bar for protection out to show Jerry.

- B. Buddha picked up the gun, played with it, took a bullet out of the cash register, loaded it in the gun, and asked if he could shoot it. Although Mr. Diaz told him “no” several times, he finally told Buddha he could shoot it in the air.
 - C. Instead, Buddha walked over to the Club’s side door, telling Mr. Diaz he was going to shoot a window.
 - D. As Mr. Diaz walked towards him, asking “what window,” Buddha fired the gun out towards the parking lot, where a white car was parked.
 - E. Mr. Diaz heard a window shatter, looked out, and saw that the window on the front passenger side of the white car was broken. The parking lot was foggy, and, instead of investigating, Mr. Diaz, Jerry and Buddha quickly left the Club, because they were afraid someone might have heard the gunfire and called the police.
 - F. Sometime later Mr. Diaz returned to the parking lot and discovered that a man, later identified as Jose Vidal Pardo, was sitting in the front passenger seat of the white car slumped over, covered with blood and unconscious.
 - G. Mr. Diaz did not report the shooting to the authorities or call for medical assistance for the victim. Instead, he drove Buddha back to the Club to retrieve the gun.
 - H. Then, Mr. Diaz drove Buddha to a highway over the Ship Channel and watched Buddha throw the weapon in the Ship Channel.
 - I. The Houston Police received a “911” call at about 5:20 a.m. on April 20th to come to the Club parking lot and investigate the occupant of the white car.
 - (1) They discovered the body of Jose Vidal Pardo, who had died from a gunshot wound to the chest.
 - (2) Although the police investigated the incident, no criminal charges have ever been filed in the case.
 - (3) Buddha, who is a citizen of Mexico, went back to Mexico on the Monday following the shooting and has not returned to the United States.
5. Delia Diaz, who is 35 years old, has always been the primary manager of the Club, but in the early part of the 1990's she was unable to be there all the time.
- A. Her two children were born in 1990 and 1992, and their care plus a number of hospitalizations caused her to work at the Club primarily during the day, leaving by 8:00 p.m.

- B. She left management of the Club during the evenings to her husband, Ruben Diaz, whom she had married in August of 1988.
 - C. Until she learned about the shooting incident referenced in Finding 4, Ms. Diaz had no reason to believe that her husband was not properly managing the business.
 - D. She had actually worked until about 6:00 p.m. on the day of the shooting, but nothing happened during her time at the Club that would have made the event foreseeable.
 - E. In Ms. Diaz's experience, Ruben Diaz was a responsible manager, and she was not aware that he had any criminal connections.
 - F. When she learned about the incident, Ms. Diaz made her husband call her attorney, and the attorney was responsible for Mr. Diaz going to the police and giving them his sworn statement about the shooting.
 - G. Because of the shooting Delia Diaz filed for divorce from Ruben Diaz in June 1997, and their divorce became final in November 1997.
 - H. Ruben Diaz has since left Texas and moved to California, and they have no contact.
6. Following the incident, Ms. Diaz became much more actively involved in the business.
- A. She decided to change the nature of the Club so that her patronage would change from the young, potentially trouble-making customers of the past to an older crowd (25 - 40 year olds) of working people.
 - B. In February 1998 Ms. Diaz hired her uncle, Manuel Medeles, who is 60 years old, to be the Club's manager, and he runs the Club from 6:00 p.m. until closing.
 - (1) Since Mr. Medeles's employment, the Club has received no TABC citations, and there have been no criminal code violations on the premises.
 - (2) Mr. Medeles found a more reliable security company than the one employed while Ruben Diaz was the manager, so that the Club's security guards are more trustworthy than in the past.
 - (a) Either Ms. Diaz or Mr. Medeles personally interviews the guards sent to work at the Club by the security company, to make sure they are bilingual, are not easily intimidated and will keep order and check identification.

- (b) The guards wear uniforms; one security guard is stationed at the front of the building, and another works inside the entrance in the vestibule area.
 - C. Ms. Diaz has gradually fired the employees who worked at the Club at the time referenced in Finding 4 and hired new people, whom they carefully train about TABC rules, including checking identification and avoiding service to minors or the intoxicated.
 - D. Respondent has made leasehold improvements, including: cleaning up the Club's parking lot; covering potholes and maintaining a neater appearance; and adding a railing around the perimeter of the dance floor.
 - E. Numerous, bilingual signs informing patrons in strict language of various TABC regulations have been put up on the Club's interior and exterior.
 - F. In order to attract an older crowd of customers they play Spanish music, rather than hip hop, with live bands appearing on Fridays, Saturdays and Sundays.
 - G. Another entertainment measure for attracting older patrons has been their addition of a big screen television, as well as several smaller televisions, on which they play soccer games - a sport that is very popular among the mature Spanish-speaking crowd.
7. There is no longer a gun on the Club's premises. That fact, the employment of Mr. Medeles, the departure of Ruben Diaz, plus the matters referenced in Finding 6 make it unlikely that an incident like the one referenced in Finding 4 could reoccur at the Club.
8. The Club provides the livelihood for Ms. Diaz and her children.
- A. It is doing better financially than it was at the time referenced in Finding 3D, but it would go out of business if it were closed for 30 days or more.
 - B. The new, older crowd that they have gradually attracted over one and one-half years would simply go elsewhere if it were closed for 30 days or more; once they got "comfortable" elsewhere, they would not return.
 - C. Respondent's other club,, Las Palmas II, which is an after-hours non-alcohol serving place where the Club patrons go after closing to continue socializing and to sober up would also be forced to go out of business if the Club did.
9. The Club's enforcement record indicates payment of two fines for prior Code violations: \$1,050 (in lieu of a 7-day suspension) in 1992, for a sale of liquor to an intoxicated person;

and \$1,500 (in lieu of a 10-day suspension), for two instances of alcohol service to intoxicated patrons and one solicitation of service on January 28, 1994.

10. Considering all of the above findings, an appropriate sanction to deter future violations without causing the Club to go out of business would be suspension of the permits for 35 days or, in lie of suspension, payment by Respondent of civil penalties of \$150 per day of suspension, totaling \$5,250.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§61.71 and 69.13 (Vernon 1999).
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. §§2003.021(b) and 2003.042(5) (Vernon 1999).
3. As referenced in Finding 1, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T. CODE ANN. §2001.051 (Vernon 1999).
4. As referenced in Finding 3, Respondent violated TEX. ALCO. BEV. CODE ANN. §61.71(a)(20).
5. As referenced in Finding 4, Respondent violated TEX. ALCO. BEV. CODE ANN. §69.13.
6. Based on the foregoing, and giving due consideration to the factors mandated in TEX. ALCO. BEV. CODE ANN. §11.64, the appropriate sanction for these violations is the one set out in Finding 10.

SIGNED this 21st day of July, 1999.



BARBARA C. MARQUARDT
Senior Administrative Law Judge
State Office of Administrative Hearings