

DOCKET NO. 458-07-0178

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

V.

**BSSP, INC.
d/b/a CLUB OASIS
(TABC DOCKET NO. 614452)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this action against BSSP, Inc. d/b/a Club Oasis (Respondent), alleging that Respondent's agent, servant or employee was intoxicated on the licensed premises, in violation of TEX. ALCO. BEV. CODE § 11.61(b)(13). Respondent filed a motion for summary disposition, arguing that TABC's action was barred by virtue of TEX. ALCO. BEV. CODE § 11.641(c), because the underlying criminal public intoxication charge against Respondent's employee was dismissed. After considering Respondent's motion and TABC's response, the undersigned Administrative Law Judge (ALJ) found the motion had merit and granted summary disposition in this case. Therefore, the ALJ recommends that no penalty or suspension be imposed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.61. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015 and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

This case was referred to SOAH on September 14, 2006. The original hearing date was continued by agreement of the parties and ultimately reset for March 14, 2007. On January 25, 2007, Respondent filed a motion for summary disposition. TABC filed a memorandum in response to the motion on February 9, 2007. Thereafter, the ALJ issued an order granting the motion for summary

disposition and requiring Respondent to submit proposed findings of fact and conclusions of law. The record closed on March 19, 2007, after TABC responded to the proposed findings of fact and conclusions of law submitted by Respondent.

II. DISCUSSION

A. Background

Respondent operates a bar (Club Oasis) located in Midland, Texas. The bar is operated under the authority of a Mixed Beverage Permit, which includes a Mixed Beverage Late Hours Permit, issued by TABC. On January 21, 2005, TABC agent Jonathan Simcik conducted a routine inspection of Club Oasis. During his inspection, he made contact with Robin Clemons, an alleged employee of Respondent who was purportedly working as a bartender at the time. Agent Simcik determined that Ms. Clemons was intoxicated and arrested her for public intoxication. He also issued an administrative violation notice to Respondent for having an employee intoxicated on the licensed premises. That notice resulted in this proceeding, in which TABC is seeking a penalty against Respondent for Ms. Clemons being intoxicated on the licensed premises.

A misdemeanor complaint was filed against Ms. Clemons in the Justice Court of Midland County, Texas, in regard to her arrest for public intoxication. Ms. Clemons plead not guilty and requested a trial on the matter. On August 25, 2005, Justice of the Peace David M. Cobos granted the state's motion to dismiss the criminal charges against Ms. Clemons for lack of evidence. Therefore, no criminal action is being maintained against Ms. Clemons in regard to her arrest by Agent Simcik for public intoxication.

For purposes of this proposal for decision, there are no contested factual issues. Rather, the ALJ concludes that this case can be decided on a single legal ground. Namely, is TABC barred from pursuing a penalty against Respondent when the underlying criminal charge that is the basis of the violation has been dismissed by a court of competent jurisdiction? Based upon the ALJ's interpretation of the applicable statutes, the ALJ concludes that this action is, in fact, barred by the dismissal of the underlying criminal action.

B. Applicable Law**1. A Licensee's Employee may not be Intoxicated on the Licensed Premise**

State law prohibits employees of alcoholic beverage retailers from being intoxicated on the premises. Specifically, TEX. ALCO. BEV. CODE ANN. § 104.01(5) provides:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to the public decency, including, but not limited to any of the following acts:

(5) being intoxicated on the licensed premises.

Further, a permittee may have enforcement action taken against it if its employees are intoxicated on the licensed premises. In particular, TEX. ALCO. BEV. CODE ANN. § 11.61(b) states:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(13) the permittee was intoxicated on the licensed premises.

It is these provisions that TABC relies upon in bringing this action.

2. Intoxication in a Public Place is a Criminal Offense

State law prohibits persons from being intoxicated in public. Specifically, TEX. PENAL CODE § 49.02 states: "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." This was the criminal violation with which Agent Simcik charged Ms. Clemons.

3. A Criminal Charge that has been Dismissed may not be the Basis of an Enforcement Action by TABC

Respondent cites to TEX. ALCO. BEV. CODE § 11.641(c) for its contention that TABC may not pursue an enforcement action against it in this case. Specifically, TEX. ALCO. BEV. CODE § 11.641(c) provides:

A civil penalty, including cancellation of a permit, may not be imposed on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication.

Because the criminal charges against Ms. Clemons were dismissed, Respondent asserts that the enforcement action against Respondent, based upon the alleged intoxication of Ms. Clemons, can result in no penalty or cancellation of Respondent's license, in accordance with this provision.

C. Analysis of Applicability of TEX. ALCO. BEV. CODE § 11.641(c) to this Case

The sole issue in this case is determining whether TEX. ALCO. BEV. CODE § 11.641(c) [referred to hereafter simply as Section 11.641(c)] applies to this case. To make this determination, the ALJ must first interpret the meaning of the statute.

1. Arguments of the Parties

Respondent contends that Section 11.641(c) does apply. In support of its contention, Respondent provides a letter from State Senator Ken Armbrister, who authored the statutory provision. In his letter, Senator Armbrister states that it was his intent to ensure that "neither a civil penalty nor other administrative sanction, including cancellation of a permit, may be imposed upon an alcoholic beverage permit holder until a conviction of that permit holder's employee, agent, or servant is achieved in any underlying criminal case which is made the basis of a TABC administrative hearing."¹

¹ Ex. A-6, at 2.

Respondent then notes that the dictionary definition of "basis" is "something on which something else is established or based."² Respondent points out that Agent Simcik's notice of administrative violation was given to Respondent immediately after his arrest of Robin Clemons and was predicated entirely upon his arrest of Ms. Clemons for public intoxication. Therefore, Respondent argues that the criminal action against her is clearly the "basis" of this administrative enforcement action. Accordingly, because the criminal charge arising out Agent Simcik's arrest of Ms. Clemons has been dismissed, Respondent argues that, under Section 11.641(c), no enforcement action may be taken against it.

In its response, TABC repeatedly points out that this case is not based upon any criminal conviction and, thus, argues that Section 11.641(c) is not relevant. TABC contends that it is not basing its enforcement action against Respondent simply on the arrest of Ms. Clemons, which it appears to concede would not be allowed. TABC asserts that the basis of this administrative action "is the intoxication of Robin Clemons, and not the conviction for public intoxication."³ TABC asserts that the legal violation (public intoxication) and the standard of proof (beyond a reasonable doubt) in the criminal case is different from this civil case and, therefore, any decision by the criminal court should not prejudice TABC's right to bring this administrative action.

2. ALJ's Analysis

In deciding this case, the ALJ must first discern the meaning of Section 11.641(c), which provides that no penalty can be imposed "on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication."

² Merriam-Webster's Collegiate Dictionary, Tenth Edition, p. 95 (1993).

³ TABC's *Memorandum in Opposition to Respondent's Motion for Summary Disposition*, at 6-7.

After considering the arguments and authorities, and applying the rules of statutory construction, the ALJ concludes that the most logical interpretation of the statute is that it applies to those situations where TABC is bringing an enforcement action against a licensee on the basis of the same underlying facts and for the same essential violations that have given rise to a separate criminal prosecution. This is the most reasonable interpretation of the different alternatives presented. Below, the ALJ addresses TABC's arguments and explains why they are not viable, and then explains in more detail the basis for the ALJ's conclusion.

TABC appears to argue that Section 11.641(c) applies only if TABC based its administrative action upon either a conviction or upon the mere existence of some criminal proceeding (such as an arrest or an ongoing criminal prosecution). However, neither of these would appear logical in light of the wording of the statute. First, Section 11.641(c) clearly would not even apply if a conviction were obtained in a criminal proceeding. As noted by its own language, Section 11.641(c) applies only if "the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication." A conviction is none of these. Thus, a conviction *would be* a proper basis for an enforcement action and would not even invoke the terms of Section 11.641(c).

It also would not make sense for Section 11.641(c) to apply to the mere existence of criminal proceedings. The ALJ is not aware of any lawful basis upon which TABC can take enforcement action against a Respondent simply because of an arrest or some ongoing criminal prosecution.⁴ The various statutes that give TABC authority to penalize permittees do not identify criminal proceedings alone as a basis for enforcement.⁵ Rather, TABC is required to prove some violation of the Alcoholic Beverage Code to support its enforcement actions, and simply being arrested or subject to ongoing criminal prosecution do not appear to be separate violations in themselves. Although the underlying conduct leading to the arrest or criminal prosecution might constitute a violation of the

⁴ Even if a criminal prosecution may trigger an enforcement action, the action by TABC must be based upon something other than the mere existence of an arrest or criminal prosecution.

⁵ See, e.g., TEX. ALCO. BEV. CODE §§ 11.61 and 61.71. In contrast, a final "conviction" is a ground for an enforcement action. See TEX. ALCO. BEV. CODE §§ 11.61(b)(1) and (3), and 61.71(a)(2) and (3).

Alcoholic Beverage Code and be the basis of an enforcement action (essentially what allegedly has occurred in this case), that is different than if the law allowed some penalty for the mere existence of criminal proceedings. Therefore, it would not be logical to read Section 11.641(c) as applying to either convictions or to the mere existence of criminal proceedings.

So, to give effect to the meaning of "on the basis of a criminal prosecution" as that language is contained in Section 11.641(c), the ALJ looks to what TABC's enforcement actions may be based upon. As a general rule, TABC's actions are based upon either (1) convictions [which are clearly not implicated by Section 11.641(c)], (2) underlying facts that are also the basis of a criminal proceeding, or (3) facts that are not necessarily the basis of a criminal proceeding. In this context, the definition of the word "basis" provides some clarification. The word has been defined as meaning "the foundation upon which something rests."⁶ Therefore, the statute would appear to implicate those situations where the foundation of the administrative action is the same as the foundation for the criminal prosecution, *i.e.*, the same underlying facts and violations.

In resolving the language of the statute, the ALJ has little evidence from which to discern the legislative intent of the statute. Senator Armbrister's letter is not persuasive on the legislative intent of the statute, because the law is clear that the intent of the sponsoring legislator is not the equivalent of legislative intent.⁷ Rather, to discern legislative intent, one must attempt to determine the intent of the legislative body as a whole. TABC cites to a portion of the legislative history, which indicates that the legislative intent may have been to ensure that the permittee "is innocent until proven guilty."⁸ If, in citing this legislative intent, it is TABC's contention that the legislature was simply making it clear that you cannot penalize a permittee on the basis of a criminal allegation alone, this would render the legislation meaningless. As discussed above, there is no legal basis for TABC to bring an action on the mere initiation of criminal proceedings. On the other hand, if

⁶ The American Heritage Dictionary of the English Language, Fourth Edition (2000).

⁷ See, e.g., *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000).

⁸ TABC's *Memorandum in Opposition to Respondents's Motion for Summary Disposition*, at 2.

“innocent until proven guilty” means that a permittee should not be penalized for conduct that is the subject of a criminal prosecution, unless the criminal conduct has been proven in the criminal proceeding, then that is consistent with the ALJ’s interpretation of the statute.

Having determined the meaning of Section 11.641(c), the ALJ now turns to the specifics of this case. TABC’s enforcement action relies on the same facts and essentially the same legal violation giving rise to the criminal prosecution of Ms. Clemons. Specifically, Ms. Clemons was charged with public intoxication for being intoxicated in Club Oasis; this enforcement action against Respondent is based upon the same premise—that Ms. Clemons was intoxicated in Club Oasis. It was Agent Simcik who arrested Ms. Clemons and then also immediately cited Respondent with an administrative violation notice after her arrest. As to the legal violations in issue, both involve liability for the same conduct, *i.e.*, intoxication by Ms. Clemons on the premises of Club Oasis. One is criminal, while the other is administrative. One is directed toward Ms. Clemons, while the other is directed toward her employer. However, both rest upon the allegation, and require proof, that Ms. Clemons was intoxicated on the premises of Club Oasis. Therefore, the ALJ construes the administrative enforcement action in this case to be brought “on the basis of the criminal prosecution” of Ms. Clemons. Because the criminal charge against Ms. Clemons was dismissed for insufficient evidence, TABC cannot now maintain this enforcement action against Respondent for her alleged intoxication at Club Oasis.⁹

This interpretation by the ALJ does not limit TABC from pursuing appropriate cases nor will it have the absurd results alleged by TABC.¹⁰ It only prohibits TABC from attempting to hold a

⁹ It does not matter that Respondent was not the defendant in the criminal action. Section 11.641(c) references simply the “defendant” (as opposed to the permittee) and does not have limiting language indicating it only applies to enforcement actions against the defendant. Rather, it appears that any enforcement action based upon a criminal prosecution would be affected by this statute, even those against a different person who may be potentially liable for the defendant’s conduct.

¹⁰ For example, TABC argues that such an interpretation would preclude the public from protesting a renewal application on the basis of past criminal conduct. However, Section 11.641(c) only limits the imposition of penalties (including cancellation), and has no applicability to permit renewals. Similarly, the ALJ concludes that most of TABC’s other arguments about the effects of applying Section 11.641(c) rely on hyperbole, are not based upon the limited interpretation of the statute given by the ALJ in this PFD, and are generally inapplicable.

permittee liable for the same conduct that a criminal court has determined will not result in criminal liability or in which the criminal court is still adjudicating the issue. If no criminal charges have been filed, then Section 11.641(c) would not apply. Similarly, if the enforcement action is based upon something other than essentially the same underlying facts and violations as the criminal action, then Section 11.641(c) would not apply.¹¹ But, in this case, those scenarios do not exist. Rather, the underlying facts and violations are essentially the same in the criminal action against Ms. Clemons and this enforcement action against Respondent. Accordingly, the ALJ finds that Section 11.641(c) does apply and bars TABC from imposing a penalty against Respondent.¹²

III. CONCLUSION

The ALJ concludes that TABC may not bring this enforcement action against Respondent, because such is prohibited by TEX. ALCO. BEV. CODE § 11.641(c). Thus, the ALJ recommends that no suspension or penalty be imposed against Respondent. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

IV. FINDINGS OF FACT

1. BSSP, Inc. d/b/a Club Oasis (Respondent) is the holder of Mixed Beverage Permit MB 186814 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Club Oasis) located at 3101 Bankhead Highway, Midland, Midland County, Texas. This permit was in effect on January 21, 2005.

¹¹ For example, if Ms. Clemons had been arrested for disturbing the peace instead of public intoxication, then section 11.641(c) would not be implicated in an enforcement action based upon her intoxication. In that scenario, although both the criminal action and the enforcement action might arise out of the same incident, the enforcement action would not be based upon essentially the same facts and violations as the criminal prosecution.

¹² The ALJ understands some of TABC's arguments as to the unfairness of prejudicing an administrative action (with a lesser evidentiary standard) by the results of a criminal proceeding (with a higher burden of proof). However, the ALJ is bound to interpret and apply statutes the legislature has adopted. In this case, TABC offers no reasonably viable interpretation of the statute in question that would avoid the policy concerns raised. In the absence of a reasonable alternative interpretation, the ALJ cannot simply disregard the language of the statute because of its policy implications.

2. On January 21, 2005, TABC agent Jonathan Simcik conducted a routine inspection of Club Oasis. During his inspection, he made contact with Robin Clemons, an alleged employee of Respondent who was purportedly working as a bartender at the time.
3. On the same date above, Agent Simcik determined that Ms. Clemons was intoxicated and arrested her for public intoxication.
4. On the same date above, Agent Simcik issued an administrative violation notice to Respondent, based upon his arrest of Ms. Clemons for public intoxication, for having an employee intoxicated on the licensed premises.
5. That notice resulted in this proceeding, in which TABC is seeking a penalty against Respondent for Ms. Clemons being intoxicated on the licensed premises.
6. A misdemeanor complaint was filed against Ms. Clemons in the Justice Court of Midland County, Texas, in regard to her arrest for public intoxication.
7. Ms. Clemons plead not guilty to the criminal public intoxication charge and requested a trial on the matter.
8. On August 25, 2005, Justice of the Peace David M. Cobos granted the state's motion to dismiss the criminal charges against Ms. Clemons for lack of evidence.
9. Respondent requested a hearing regarding TABC's administrative action against it based upon Ms. Clemon's alleged intoxication of January 21, 2005.
10. On September 14, 2006, this case was referred to the State Office of Administrative Hearings (SOAH) for assignment to an Administrative Law Judge (ALJ) for hearing.
11. On January 25, 2007, Respondent filed a motion for summary disposition.
12. TABC filed a memorandum in response to the motion on February 9, 2007.
13. The ALJ issued an order granting the motion for summary disposition and requiring Respondent to submit proposed findings of fact and conclusions of law.
14. The record closed on March 19, 2007, after TABC responded to the proposed findings of fact and conclusions of law submitted by Respondent.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.61.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.105 and TEX. GOV'T CODE ANN. § 2003.021.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.55.
4. A civil penalty, including cancellation of a permit, may not be imposed on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication. TEX. ALCO. BEV. CODE § 11.641(c).
5. An administrative enforcement action that has as its foundation the same underlying facts and essentially the same legal violations as a separate criminal proceeding is "based upon" the criminal proceeding, within the meaning of TEX. ALCO. BEV. CODE § 11.641(c).
6. This administrative action by TABC against Respondent is based upon the criminal prosecution of Robin Clemons for public intoxication.
7. This administrative action by TABC against Respondent is barred by TEX. ALCO. BEV. CODE § 11.641(c), because the criminal charges in the underlying prosecution against Ms. Clemons were dismissed for lack of evidence.
8. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit MB 186814, which includes a Mixed Beverage Late Hours Permit, should not be suspended nor should any penalty be imposed.

SIGNED March 20, 2007.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS