

**DOCKET NO. 613089**

<b>IN RE TERRY LEE BROWN</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>d/b/a Players</b>	<b>§</b>	
<b>PERMIT NOS. MB-426108 &amp; LB-426109</b>	<b>§</b>	
	<b>§</b>	
	<b>§</b>	<b>ALCOHOLIC</b>
	<b>§</b>	
<b>POTTER COUNTY, TEXAS</b>	<b>§</b>	
<b>(SOAH DOCKET NO. 458-06-2645)</b>	<b>§</b>	<b>BEVERAGE COMMISSION</b>

**ORDER NUNC PRO TUNC**

**CAME ON FOR CONSIDERATION** this 9<sup>th</sup> day of July, 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brian L. Phillips. The hearing was held on April 24, 2007 and the record closed on May 11, 2007. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 1, 2007. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits shall be SUSPENDED or a period of SIXTY (60) days commencing at 12:01 on August 29, 2007, unless a civil penalty in the sum of \$9,000.00 is paid by the Respondent to The Commission on or before 12:01 a.m. on August 22, 2007.**

**This Order will become final and enforceable on August 2, 2007, unless a Motion for Rehearing is filed before that date.**

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

**SIGNED** on this 9<sup>th</sup> day of July, 2007 at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

The Honorable Brian L. Phillips  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
**VIA FACSIMILE: (806) 792-0149**

Ryan L. Turman  
**ATTORNEY FOR RESPONDENT**  
**VIA FACSIMILE: (806) 376-5345**

Terry Lee Brown  
d/b/a Players  
**RESPONDENT**  
2121 IH 40 East.  
Amarillo, Texas 79102  
**VIA REGULAR MAIL**

Jerry McClain/Barbara Moore  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Amarillo District Office



and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

## **II. HEARING AND EVIDENCE**

On April 24, 2007, a hearing was convened before Judge B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. Petitioner was represented by Jerry McClain, attorney. Respondent appeared and was represented by Ryan L. Turman, attorney. The record closed on May 11, 2007, after receipt of written closing arguments by the parties.

## **III. LEGAL STANDARDS AND APPLICABLE LAW**

Pursuant to the Code § 11.61(b)(13), TABC may suspend a permit if it is found that the permittee was intoxicated on the licensed premises. "Permittee" is defined in §1.04(11) as a person who is the holder of a permit provided for in the code, or an agent, servant, or employee of that person. Pursuant to the Code § 106.13(a), TABC may suspend a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess an alcoholic beverage on the licensed premises. A person acts with criminal negligence under the Code § 1.08 if the person acts with a mental state that would constitute criminal negligence under chapter 6 of the Penal Code, which states:

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Pursuant to the Code § 28.11, TABC may suspend a mixed beverage permit if it finds that a breach of the peace has occurred on the licensed premises or on premises under the control of the permittee and that the breach of the peace was not beyond the control of the permittee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control. Pursuant to the Code §§ 11.61(b)(2) and 105.06, TABC may suspend a permit if it is found that the permittee violated a provision of the code or rule of the commission by allowing a person to consume or possess with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a.m. and 12 noon or on any other day between 12:15 a.m. and 7 a.m.

#### **IV. EVIDENCE**

##### **A. Documentary Evidence**

Petitioner offered into evidence six exhibits: the Notice of Hearing issued in the case, the Respondent's permit history, two police reports from the Amarillo police department regarding the alleged offenses, and photos of the licensed premises. All offered exhibits were admitted into evidence.

Exhibit three is a police report from the Amarillo Police Department regarding the incident of September 22, 2004. According to the report, Officer Jeff Stephenson and two other officers conducted a bar check of the licensed premises and arrived on the scene at 3:02 a.m. He observed seven to eight vehicles in the parking lot and entered into the licensed premises to investigate possible illegal activity. Upon entering, he observed two employees behind the bar, customers at the bar with several open containers in front of them and then noticed that the employees attempted to conceal the open bottles. Three customers were contacted who had the strong odor of an alcoholic beverage on their breath and had open containers of alcoholic beverages, which were cold to the touch, in front of them. One of these customers told Officer Stephenson that he had been contacted by employees of the bar who advised him that it was legal to consume alcoholic beverages until five

o'clock a.m. One employee told one of the officers that he was under the assumption that alcoholic beverages could be consumed as long as they were not sold after 2:15 a.m.

Exhibit four is a police report from the Amarillo Police Department regarding the incident of October 22, 2004. According to the report, Officer Stephenson and another officer were dispatched at approximately 12:10 a.m. to Players in reference to an assault and made contact with Joshua Englehaupt, who identified himself as a doorman and manager of the club. Mr. Englehaupt told the officers that an employee, Patricia Stubben, had attempted to provoke other employees in a physical altercation. She was asked to leave for the night and became angry, threatening to return to the club with family members to assault Mr. Englehaupt. Ms. Stubben was then terminated, and while leaving the club, struck one customer in the face. Mr. Englehaupt requested that a trespass warning be given to Ms. Stubben and gave a statement to police regarding the assault on the customer.

While Officer Stephenson was still speaking with Mr. Englehaupt, another officer located Ms. Stubben at a convenience store approximately three blocks from Players, where she locked herself in a bathroom, refused to leave, yelled obscenities, and had to be removed by officers after fifteen minutes of such behavior. Officer Stephenson observed that she had removed her clothing, which she had urinated in, was kicking the bathroom door, yelling obscenities, resisted arrest, attempted to assault the officers and had to be stunned with a taser device in order to be handcuffed. He further observed that she had glazed bloodshot eyes and an extremely strong odor of an alcoholic beverage on her breath and admitted to drinking two shots of liquor. The police report contains a written statement, made at 12:45 a.m., by Joshua Englehaupt in which he described the assault on the customer by Ms. Stubben. The report also identifies Ms. Stubben as a minor, with a date of birth of July 17, 1984.

**B. Jeff Stephenson, Amarillo Police Department**

Officer Stephenson testified that, on September 22, 2004, he was called out to the licensed premises at three o'clock in the morning because of a report that there were lots of cars in the parking lot after hours. He entered the licensed premises and observed employees behind the bar and customers at the bar with alcoholic beverages directly in front of them as if they were consuming the beverages. Officer Stephenson was familiar with the bar employees and noted that they quickly began removing bottles from the bar and putting them in trash cans when he entered. He contacted two of the patrons at the bar and determined that each had an alcoholic beverage in front of them and that the beverages were cold to the touch. They told him that they thought they could drink until 5 a.m., so long as they were not purchasing alcoholic beverages.

On October 22, 2004, Officer Stephenson was again called out to the licensed premises on a report of an alleged assault. He made contact with an employee of the licensed premises, Patricia Stubben, who was twenty years old on that date and whom he determined was intoxicated on the licensed premises that day. Officer Stephenson testified that he was told that Stubben was trying to start a fight with other employees and she struck a customer on the licensed premises before leaving. She was located approximately three blocks away from the licensed premises at a convenience store, where she locked herself in a bathroom, removed and urinated on her clothing, resisted arrest, and admitted to having two shots of an alcoholic beverage earlier on the licensed premises.

**C. Sgt. Dustin Ponder, Amarillo Police Department**

Sgt. Ponder testified that he spoke with Shane Edwards, identified as Respondent's employee, who told him that he believed they could consume but not sell alcoholic beverages after hours. The contact between Sgt. Ponder and Mr. Edwards took place after three o'clock a.m.

**D. Chandra Brown**

Mrs. Brown is the owner and manager of the Players. She testified that it was not the policy of Players to permit persons on the licensed premises to drink after hours. She also testified that the two employees on the licensed premises on September 22, 2004, never served alcoholic beverages, but she could not explain who did serve alcoholic beverages to customers that night. Regarding the incident on October 22, 2004, Mrs. Brown said she was present on the licensed premises that night when she asked an employee, Josh Englehaupt, to escort Ms. Stubben off of the premises because of her behavior. She also testified she did not observe Ms. Stubben drinking that night, being served alcoholic beverages, or having any signs of intoxication. Finally, she added that she sent Mr. Englehaupt to look for Ms. Stubben and he could not have been at the bar when he was allegedly contacted by police.

**E. Terry Lee Brown**

Mr. Brown is the owner of Players. He testified that it is a strict policy at Players to not allow consumption of alcoholic beverages after hours. Regarding the incident of September 22, 2004, he testified that he was not on the licensed premises when the event occurred but was informed of it by a telephone call from an employee. Regarding the incident of October 22, 2004, he testified that he received a telephone call from Mrs. Brown at approximately 11:30 p.m. and arrived at the licensed premises a little before midnight. At that time, he observed Officer Stephenson in the parking lot investigating the assault. He believes that the time period between when Ms. Stubben was ejected from the licensed premises and when she was found at the convenience store was one hour and fifteen minutes and that the police report has discrepancies from the actual events that night. Specifically, he testified that his employee Josh Englehaupt, who was identified in the police report of the incident as the employee who police made contact with, was not at the bar but, instead, was at the convenience store looking for Ms. Stubben. He agreed that a breach of the peace occurred on the licensed premises that night but denies that it was possible for Ms. Stubben to drink on the

licensed premises that night. He testified that the Amarillo Police Department was trying to get him in trouble with the TABC.

## V. ANALYSIS

### A. Employee intoxicated on the premises

Regarding the allegation that an employee was intoxicated on the licensed premises on October 22, 2004, the evidence is undisputed that Ms. Stubben was the agent, servant, or employee of Respondent and was working at the licensed premises on the date in question. The only issue is whether or not Ms. Stubben actually was intoxicated on the licensed premises that night.

Officer Stephenson observed Ms. Stubben after she had left the licensed premises and was located at a convenience store approximately three blocks away. She had removed her clothing, which she had urinated in, was kicking the bathroom door, yelling obscenities, resisted arrest, attempted to assault the officers, had to be stunned with a taser device in order to be handcuffed, had glazed bloodshot eyes, an extremely strong odor of an alcoholic beverage on her breath and that she admitted to drinking two shots of liquor. Ms. Stubben told him she had consumed alcoholic beverages on the licensed premises that night. Mrs. Brown testified that she did not observe signs of intoxication on Ms. Stubben before she left the licensed premises.

The only evidence offered on this issue is that Ms. Stubben was intoxicated at a convenience store approximately three blocks from the licensed premises that night, and that Mrs. Brown, the only person who testified she observed Ms. Stubben before she left the premises, did not observe signs of intoxication on Ms. Stubben. While certain implications could be drawn between Ms. Stubben's behavior and physical condition off of the licensed premises because of the proximity of distance and time, they are not enough to prove this issue. The evidence does not support a finding that Ms. Stubben was intoxicated on the licensed premises that night.

**B. Minor consuming alcohol**

Regarding the allegation that, on October 22, 2004, Respondent, with criminal negligence, sold, served, dispensed, or delivered an alcoholic beverage to a minor or permitted a minor to consume or possess an alcoholic beverage on the licensed premises, the evidence is undisputed that Ms. Stubben was a minor and on the licensed premises on the date in question. The only evidence that Respondent, with criminal negligence, violated the Code prohibition against permitting a minor to purchase or consume an alcoholic beverage on the licensed premises was the testimony of Officer Stephenson that Ms. Stubben admitted to consuming alcoholic beverages on the licensed premises that night. Considering the condition that Ms. Stubben was in when Officer Stephenson contacted her and her obvious anger towards Respondent based on her behavior while still at Players, her confession does not carry much weight. The evidence does not support a finding that Respondent with criminal negligence permitted Ms. Stubben to consume an alcoholic beverage on the licensed premises that night, in violation of the Code.

**C. Breach of peace**

The evidence supports a finding that breach of the peace resulted from Respondent's improper supervision of persons permitted to be on the licensed premises. Ms. Stubben attempted to provoke other employees into a physical altercation while at the club. When she was asked to leave for the night, she became angry and threatened to return to the club with family members to assault the club manager. Ms. Stubben was then terminated, and while leaving the club, struck one customer in the face. Under the circumstances, it would have been prudent to have police or other security personnel escort her off of the premises in order to protect employees or customers from her threats.

The only evidence that Ms. Stubben was escorted off the premises is the testimony of Mrs. Brown that Mr. Englehaupt escorted her off of the premises. However, she also stated that Mr. Englehaupt could not have been at the bar when he was allegedly contacted by police because she sent him to look for Ms. Stubben. The police report of the incident contains a signed witness statement by Mr. Englehaupt detailing the incident that occurred that night involving Ms. Stubben. There is no reason to believe that the report was made anywhere other than the licensed premises, which indicates that Mr. Englehaupt was at the licensed premises when contacted by police. Mrs. Brown's testimony on this issue contradicts itself and is also contradicted by the police report. There was no credible evidence that Respondent properly supervised Ms. Stubben by escorting her from the licensed premises. The greater weight of the evidence is that Ms. Stubben left on her own, despite the threat that she constituted to the patrons of the bar and others outside the bar. The threat became reality when she struck a customer on her way out. Respondent should have been aware of the risk because of her behavior and made arrangements to properly supervise her to prevent a breach of the peace.

**D. Consumption during prohibited hours**

The evidence supports a finding that Respondent permitted consumption of alcoholic beverages on the licensed premises during prohibited hours on September 22, 2004. The testimony of the officers who investigated the incident demonstrated that three customers were on the licensed premises after 3 a.m. with partially consumed and "cold to the touch" bottles of liquor in front of them. These customers had a strong odor of an alcoholic beverage on their breath. One customer told Officer Stephenson that he had been contacted by employees of the bar who advised him that it was legal to consume alcoholic beverages until five o'clock a.m., and one employee told one of the officers that he was under the assumption that alcoholic beverages could be consumed as long as they were not sold after 2:15 a.m. The only testimony from Respondent in response to this evidence was that it was not the policy of the bar to permit consumption of alcoholic beverages during prohibited hours and the employees at the bar when police arrived did not serve alcoholic

beverages. However, there was no explanation of where the alcoholic beverages located in front of the customers that night came from or who served them. The greater weight of the credible evidence is that Respondent's employees served alcoholic beverages to customers that night and that alcoholic beverages were served and consumed after it was permissible.

The evidence was sufficient to prove that Respondent in two incidents violated the Code and his permits should be suspended or a civil fine paid based on the recommendation of the Commission.

#### **VI. PROPOSED FINDINGS OF FACT**

1. Terry Lee Brown d/b/a Players, Potter County, Texas, holds Permit No. MB-426108, issued by the TABC for the premises located at 2121 IH 40 East, Amarillo, Potter County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated July 26, 2006. The case was continued to April 24, 2007.
3. The hearing on the merits convened April 24, 2007, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney Jerry McClain. The Respondent appeared and was represented by attorney Ryan L. Turman. The record closed on May 11, 2007, after receipt of written closing arguments.
4. On or about September 22, 2004, Amarillo Police Officer Stephenson entered the licensed premises and observed customers with alcoholic beverages after 3 a.m.
5. The officer made contact with three customers who had the odor of an alcoholic beverage on their breath and partially empty bottles of alcoholic beverages which were cold to the touch in front of them.
6. One customer had been told by employees of the bar that it was legal to consume alcoholic beverages until five o'clock a.m.
7. One employee was under the assumption that alcoholic beverages could be consumed as long as they were not sold after 2:15 a.m.
8. On or about October 22, 2004, Respondent employed Patricia Stubben, who was twenty years old, at the licensed premises as a dancer.

9. On that same date, Ms. Stubben attempted to provoke other employees into a physical altercation while at the club, and, when asked to leave for the night, became angry and threatened to return to the club with family members to assault the club manager.
10. Ms. Stubben was terminated and, as she walked out the door after getting dressed, struck a customer in the face.
11. Respondent did not contact police in response to Ms. Stubben's threats against employees or otherwise escort her off of the licensed premises after she was terminated.
12. Officer Stephenson made contact with Ms. Stubben, who was twenty years old on that date and who he determined was intoxicated on the licensed premises that day.
13. Ms. Stubben had glazed bloodshot eyes, an extremely strong odor of an alcoholic beverage on her breath and admitted to drinking two shots of shots of an alcoholic beverage on the licensed premises earlier.
14. Ms. Stubben was located approximately three blocks away from the licensed premises at a convenience store, where she had removed her clothing, which she had urinated in, was kicking the bathroom door, yelling obscenities, resisted arrest, attempted to assault the officers, had to be stunned with a taser device in order to be handcuffed.
15. Respondent's control of the alcohol consumption on the licensed premises constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.

#### VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-7, the Commission proved that Respondent violated the Code §§ 11.61(b)(2) and 105.06 on or about September 22, 2004, when his agent, servant, or employee consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours.

5. Based upon Findings of Fact No. 8-11, the Commission proved that Respondent violated the Code § 28.11 on or about October 22, 2004, when Respondent, his agent, servant, or employee, allowed a breach of the peace on the licensed premises that was not beyond the Respondent's control and resulted from Respondent's improper supervision of persons on the licensed premises.
6. The Commission did not prove that Respondent violated the Code § 106.13 on or about October 22, 2004.
7. The Commission did not prove that Respondent violated the Code § 11.61(b)(13) on or about October 22, 2004.
8. Based on the foregoing, for each of the above violations separately, suspension of Respondent's permits for a period of sixty days or payment of a civil penalty of one hundred and fifty dollars per day of the proposed suspension is warranted.

SIGNED: June \_\_\_\_\_, 2007

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B. L. Phillips  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

*no order*

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

June 1, 2007

✓ Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA REGULAR MAIL

**RE: Docket No. 458-06-2645; Terry Lee Brown d/b/a Players**

Dear Mr. Steen:

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

Sincerely,

Handwritten signature of B.L. Phillips in cursive.

B.L. Phillips  
Administrative Law Judge

A large, faint, and illegible stamp or signature area, possibly containing a date or official mark.

BLP/vu

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- VIA REGULAR MAIL  
Jerry McClain, Licensing Attorney, Texas Alcoholic Beverage Commission, 8700 Stemmons Frwy., Ste. 460, Dallas, TX 75427- VIA REGULAR MAIL  
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL  
Ryan L. Turman, Attorney, 1008 S. Madison, Amarillo, TX 79101- VIA REGULAR MAIL