

DOCKET NO. 458-08-4202

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
BOBBY GEORGE BOREN GRACIELA M. SORENSEN d/b/a EL CORRAL (TABC DOCKET NO. 576182)	§ § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this action against Bobby George Boren and Graciela M. Sorensen d/b/a El Corral (Respondent), alleging that Mr. Boren and Ms. Sorensen, the permittees, were intoxicated on Respondent's licensed premises in violation of TEX. ALCO. BEV. CODE §§ 104.01(5), 25.04 and/or 61.71(a)(1) and (11). TABC seeks either a 20-day suspension of Respondent's permit or payment of a penalty of \$150 per day in lieu of suspension. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) concludes that TABC has proven, by a preponderance of the evidence, that Mr. Boren was intoxicated on the licensed premises. Therefore, the ALJ recommends that Respondent's permit be suspended for 20 days or, in the alternative, that Respondent be given the opportunity to pay a penalty of \$150 per day in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 104.01(5). 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. On October 7, 2008, an evidentiary hearing convened before ALJ Craig R. Bennett in Austin, Texas. TABC was represented at the hearing by attorney Emily Helm. Respondent was represented by attorney Trey Dunn. The hearing concluded and the record closed that same day.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

State law prohibits alcoholic beverage permittees from being intoxicated on licensed 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 for being intoxicated on the licensed premises. In particular, TEX. ALCO. BEV. CODE ANN. § 61.71(a) states:

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(1) violated a provision of this code or a rule of the commission during the existence of the license sought to be cancelled or suspended or during the immediately preceding license period;

(11) permitted a person on the licensed premises to engage in conduct which is lewd, immoral, or offensive to public decency.

These provisions—which directly relate to a retail dealer's permit—are applicable to the wine and beer retailer's permit in this case, pursuant to TEX. ALCO. BEV. CODE ANN. § 25.04(b). As noted above, TEX. ALCO. BEV. CODE ANN. § 104.01(5) indicates that being intoxicated on the licensed premises is behavior that is lewd, immoral, or offensive to the public decency. Relying upon these provisions, TABC brings this enforcement action against Respondent. The relevant factual and legal issues are addressed below.

B. Background

TABC Agent Joe Chavez was TABC's sole witness to the incident underlying this case. Except for the conclusion that Ms. Sorensen and Mr. Boren were intoxicated on the licensed premises, Respondent did not present any witnesses controverting Agent Chavez's recollection of the factual events from the night in question. Therefore, the facts below are taken either from Agent Chavez's testimony—or from other documentary evidence in the record—and are uncontroverted.

Respondent operates a bar (El Corral) located at 1239 FM 20 'B' in Bastrop County, Texas. The bar is operated under the authority of a Wine and Beer Retailer's On Premise Permit issued by TABC. On April 26, 2008, TABC agent Joe Chavez conducted a routine inspection of El Corral, arriving at the premises shortly before 11:00 p.m. While sitting in his vehicle in the parking lot, and before entering the bar, Agent Chavez observed a man exit the bar carrying a woman over his shoulder. He observed them walk across the parking lot toward a gate leading to an adjacent residence. Because he was concerned for the woman's condition, he drove his vehicle across the lot to the gate. He got out of his vehicle and spoke to the people, determining that the woman was Ms. Sorensen, one of the permittees. The man carrying her was her son-in-law. Ms. Sorensen refused to speak with Agent Chavez, saying "fuck you" and then walked into the residence. Agent Chavez observed her stumbling as she walked into the residence and he believed her to be intoxicated. However, Ms. Sorensen did not come back out of the house and Agent Chavez was unable to have any further contact with her to determine more fully whether she was intoxicated.

Agent Chavez continued speaking to Ms. Sorensen's son-in-law. A few minutes later, Mr. Boren—the other permittee—walked up to Agent Chavez from the licensed premises. Mr. Boren also cursed at Agent Chavez and asked what he was doing there. Mr. Boren walked by Agent Chavez and went into the residence, but came outside a few moments later. When Mr. Boren came back outside, he walked up to Agent Chavez and asked him "what the hell do you want?" At that time, Agent Chavez noted that Mr. Boren had an odor of alcoholic beverage on his breath and was unsteady on his feet. Further, Mr. Boren was rude and argumentative to Agent Chavez. When a

Bastrop County Sheriff's Deputy arrived at the scene a few minutes later, Mr. Boren became agitated and started to walk away. Agent Chavez advised him that he was under arrest for being a permittee intoxicated on the licensed premises. Mr. Boren pulled away and a struggle ensued. After struggling with Mr. Boren and taking him to the ground, Agent Chavez and the sheriff's deputy were able to subdue him and place handcuffs on him.

After arresting Mr. Boren for being intoxicated on the licensed premises, Agent Chavez also issued an administrative violation notice to Respondent for the incident. That notice resulted in this proceeding in which TABC is seeking a penalty against Respondent for Mr. Boren and/or Ms. Sorensen being intoxicated on the licensed premises.

A misdemeanor criminal complaint was also filed against Mr. Boren in the Justice Court of Bastrop County, Texas, in regard to his arrest for being intoxicated. On May 28, 2008, Justice of the Peace Katherine K. Hanna granted the state's motion to dismiss the criminal charges against Mr. Boren. Therefore, no criminal action was maintained against Mr. Boren in regard to his arrest by Agent Chavez.

The sole contested factual issue in this case is whether Ms. Sorensen or Mr. Boren—as the named permittees for Respondent—were intoxicated while on Respondent's licensed premises. Respondent argues that the evidence does not show that Ms. Sorensen or Mr. Boren were intoxicated. TABC disagrees, asserting the preponderance of the evidence establishes that they were intoxicated. The evidence and arguments on this issue are set out below.

C. Evidence and Arguments

As noted above, Agent Chavez was the sole witness presented by TABC regarding the facts of the night in question. His testimony regarding the factual events of the evening was uncontroverted and is set forth above in the background section of this PFD. Therefore, the ALJ will not restate it here.

TABC asserts that Agent Chavez's observation of Ms. Sorensen and Mr. Boren support a finding they were intoxicated on the licensed premises. Specifically, TABC alleges the following facts support a finding that Ms. Sorensen was intoxicated: (1) she was being carried to her house, (2) she was argumentative with Agent Chavez (cursing at him and refusing to speak to him), and (3) she had an unsteady balance and staggering walk when entering her house. TABC also alleges that the following facts support a finding that Mr. Boren was intoxicated as well: (1) he had an odor of an alcoholic beverage on his breath, (2) he was argumentative with Agent Chavez, cursing at him and questioning his reason for being there, (3) he had an unsteady balance when standing and talking to Agent Chavez, and (4) he resisted arrest and struggled with the officers attempting to arrest him.

Respondent disagrees that either Ms. Sorensen or Mr. Boren were intoxicated. Respondent presented only the testimony of Laura Long, who was present and working at Respondent's premises that night. Ms. Long testified that she arrived at the bar shortly after 6:00 p.m. on April 26, 2008, and worked as the bartender the entire evening, until she left sometime around 11:00 p.m. She testified that there was a special event at the bar that night—a craw fish boil—and that people were both inside and outside the bar, eating and drinking. Ms. Sorensen was sitting near Ms. Long until approximately 9:00 p.m. in the evening. During that time, Ms. Long never saw Ms. Sorensen drink any alcohol, and she never served Ms. Sorensen any alcohol that night. However, she did not observe Ms. Sorensen after 9:00 p.m. and could not testify as to her condition after that. But, during the time she sat near her, she never saw Ms. Sorensen appear intoxicated.

Ms. Long also saw Mr. Boren throughout the night. She testified that he spent most of his time outside, but came into the bar throughout the evening to restock food and drinks or to get food to serve to patrons of the bar. She never served him any alcohol nor did she see him drinking any alcohol. Based upon Ms. Long's testimony, and the limited observations Agent Chavez had of Ms. Sorensen and Mr. Boren, Respondent contends TABC has not met its burden of proving they were intoxicated that evening. Respondent also notes the criminal charges against Mr. Boren were dismissed. Although recognizing that the criminal standard is different, Respondent still argues the dismissal of the criminal charges is additional evidence weighing against a finding of intoxication.

D. The ALJ's Analysis

The ALJ concludes that TABC has shown, by a preponderance of the evidence, that Mr. Boren was intoxicated on the licensed premises on the evening in question. Agent Chavez's testimony regarding his observations of Mr. Boren were essentially uncontroverted. He observed Mr. Boren to have an odor of alcoholic beverage on his breath, to be unsteady on his feet, to be argumentative and curse at the officer, and to resist arrest. Each of these factors is consistent with intoxication. Mr. Boren's behavior and observed condition, combined with the other circumstances noted by Agent Chavez (the time of evening, the location, and Mr. Boren's efforts to leave the area when other law enforcement arrived), convince the ALJ that it is more likely than not that Mr. Boren was intoxicated.¹

However, the ALJ cannot reach the same conclusion about Ms. Sorensen. Agent Chavez had only limited interaction with her. She did not stop to speak with him and he never smelled alcoholic beverages on or about her. He merely observed her to be rude and unsteady on her feet. That, however, is not enough to show that Ms. Sorensen was intoxicated. So, the ALJ finds that TABC did not show, by a preponderance of the evidence, that Ms. Sorensen was intoxicated on the licensed premises. But, it does not ultimately impact TABC's action, because a penalty is warranted if *either* Ms. Sorensen or Mr. Boren were intoxicated on the licensed premises. Accordingly, having found that Mr. Boren was intoxicated on the licensed premises, the ALJ concludes that TABC has shown that Respondent committed the violation alleged and, thus, the ALJ recommends that a suspension (or payment of a penalty in lieu of suspension) be imposed against Respondent. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

¹ Ms. Long's testimony on behalf of Respondent does not refute this. She did not observe Mr. Boren enough throughout the evening to have her testimony carry sufficient weight, nor did she observe Mr. Boren at or near the time he interacted with Agent Chavez.

III. FINDINGS OF FACT

1. Bobby George Boren and Graciela M. Sorensen d/b/a El Corral (Respondent) hold Wine and Beer Retailer's On Premise Permit BG521070 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (El Corral) located at 1239 FM 20 'B' in Bastrop County, Texas. This permit was in effect on April 26, 2008.
2. On April 26, 2008, TABC agent Joe Chavez conducted a routine inspection of El Corral, arriving at the premises shortly before 11:00 p.m.
3. While sitting in his vehicle in the parking lot, and before entering the bar, Agent Chavez observed a man exit the bar carrying a woman over his shoulder. He observed them walk across the parking lot toward a gate leading to an adjacent residence.
4. Because he was concerned for the woman's condition, Agent Chavez drove his vehicle across the lot to the gate. He got out of his vehicle and spoke to the people, determining the woman was Ms. Sorensen, one of the permittees. The man carrying her was her son-in-law.
5. Ms. Sorensen refused to speak with Agent Chavez, saying "fuck you" and then walked into the residence. Ms. Sorensen did not come back out of the house and Agent Chavez was unable to have any further contact with her to determine more fully whether she was intoxicated.
6. A few minutes later, Mr. Boren—the other permittee—walked up to Agent Chavez from the licensed premises. Mr. Boren cursed at Agent Chavez and asked what he was doing there.
7. Mr. Boren walked by Agent Chavez and went into the residence, but came outside a few moments later. When Mr. Boren came back outside, he walked up to Agent Chavez and asked him "what the hell do you want?"
8. While speaking with Agent Chavez, Mr. Boren had an odor of alcoholic beverage on his breath, was unsteady on his feet, and was rude and argumentative toward Agent Chavez, frequently cursing at him.
9. When a Bastrop County Sheriff's Deputy arrived at the scene a few minutes later, Mr. Boren became agitated and started to walk away. At that time, Agent Chavez advised him that he was under arrest for being a permittee intoxicated on the licensed premises.
10. Mr. Boren resisted arrest and a struggle ensued. After struggling with Mr. Boren and taking him to the ground, Agent Chavez and the sheriff's deputy were able to subdue him and place handcuffs on him.

11. On April 26, 2008, Agent Chavez arrested Mr. Boren for being a permittee intoxicated on a licensed premises.
12. Also on April 26, 2008, Agent Chavez issued an administrative violation notice to Respondent, based upon his arrest of Mr. Boren, for having a permittee intoxicated on the licensed premises.
13. Respondent requested a hearing regarding TABC's administrative action against it based upon Mr. Boren and Ms. Sorensen's alleged intoxication of April 26, 2008.
14. On August 11, 2008, this case was referred to the State Office of Administrative Hearings (SOAH) for assignment to an Administrative Law Judge (ALJ) for hearing.
15. On August 15, 2008, TABC sent its initial Notice of Hearing to Respondent. This Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and contained a reference to the particular sections of the statutes and rules involved, and a short plain statement of the allegations and the relief sought by TABC.
16. On October 7, 2008, the evidentiary hearing convened in Austin, Texas, before ALJ Craig R. Bennett. TABC was represented at the hearing by attorney Emily Helm. Respondent was represented by attorney Trey Dunn. The hearing concluded and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 104.01(5).
 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 11.015 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. TABC has shown, by a preponderance of the evidence, that Bobby George Boren was intoxicated on Respondent's licensed premises on April 26, 2008, in violation of TEX. ALCO. BEV. CODE ANN. ANN §§ 104.01(5) and 61.71(a)(1) and (11).
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5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Wine and Beer Retailer's On Premise Permit BG521070 should be suspended for 20 days. In the alternative, Respondent should be given the opportunity to pay a penalty of \$150 per day in lieu of suspension.

SIGNED on October 10, 2008.



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

DOCKET NO. 576182

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
BOBBY GEORGE BOREN and GRACIELA M. SORENSEN, RESPONDENTS	§	
D/B/A EL CORRAL	§	ALCOHOLIC
PERMIT/LICENSE NO. BG521070	§	
BASTROP COUNTY, TEXAS	§	
(SOAII DOCKET NO. 458-08-4202)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Craig R. Bennett. The hearing convened on 7th day of October, 2008 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on 10th day of October, 2008. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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.

The Commission finds the allegations against Respondent, BOBBY GEORGE BOREN, for being intoxicated on the licensed premises on or about April 26, 2008, are a violation of §§104.01(5), 25.04 and/or 61.71(a)(1) and (11) of the Texas Alcoholic Beverage Code.

IT IS THEREFORE ORDERED, by the 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 your license is hereby **SUSPENDED for twenty (20) days**.

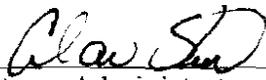
IT IS FURTHER ORDERED that unless Respondent pays a civil penalty in the amount of \$3,000.00 on or before the 7th day of **January, 2009**, all rights and privileges under the above described license will be **SUSPENDED** for a period of **twenty (20) days** beginning at **14th day of January, 2009**.

IT IS FURTHER ORDERED that the allegations against Respondent GRACIELA M. SORENSEN for being intoxicated on the licensed premises on or about April 26, 2008, a violation of §§104.01(5), 25.04 and/or 61.71(a)(1) and (11) of the Texas Alcoholic Beverage Code, is not founded and is hereby **DISMISSED**.

This Order will become final and enforceable on December 8, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this 12th day of November, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE: (512) 475-4994

Laurence Trey Dunne
ATTORNEY FOR RESPONDENT
111 W. 2nd St.
Elgin, Texas 78621
VIA FACSIMILE: (512) 281-0103

BOBBY GEORGE BOREN
GRACIELA M. SORENSEN
RESPONDENT
d/b/a EL CORRAL
1239 FM 20 'B'
CEDAR CREEK, TX 78612

EMILY F. HELM
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement District Office
