

DOCKET NO. 587816

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
PETITIONER	§	
VS.	§	
	§	
JOHN ALBERT MASSENGALE	§	
D/B/A JESTERS ON LASALLE	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB698957, LB &	§	
PE	§	
RESPONDENT	§	
MCLENNAN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-0734)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this the 26th day of May, 2010, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Anne K. Perez. The hearing convened on the 19th day of November, 2009 and the record closed on February 12, 2010. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 13th day of April, 2010. 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 Assistant 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.

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 no action be taken against your permit(s).

This Order will become **final** and **enforceable** on the 21st day of June, 2010, 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 the 26th day of May, 2010, at Austin, Texas.



Sherry K- Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK/cb

Honorable Judge Anne K. Perez
State Office of Administrative Hearings
Waco, Texas
VIA FACSIMILE: (254) 750-9380
Austin, Texas
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John Albert Massengale
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VIA REGULAR MAIL

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Waco District Office

DOCKET NO. 458-10-0734

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § § §	BEFORE THE STATE OFFICE
V.		OF
JOHN ALBERT MASSENGALE D/B/A JESTERS ON LASALLE, Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC/Staff) brought this enforcement action against John Albert Massengale d/b/a Jesters on Lasalle (Respondent) alleging that on or about July 18, 2009, Dee Matthews, Respondent's agent, servant, or employee, was intoxicated on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. §§ 104.01(5), 11.61(b)(13), 25.04, and/or 61.71(a)(1). Staff seeks a 30-day suspension of Respondent's alcoholic beverage permits or, in lieu of the suspension a civil penalty of \$9,000 (\$300 per day for 30 days). The Administrative Law Judge (ALJ) recommends that no action against Respondent's permits be taken.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There were no contested issues on notice or jurisdiction. Those issues are addressed in the findings of fact and conclusions of law without further discussion here.

ALJ Anne K. Perez convened the hearing on November 19, 2009, at the State Office of Administrative Hearings in Waco, Texas. Staff attorney Judith Kennison represented TABC. John Albert Massengale d/b/a Jesters on Lasalle (Respondent) appeared *pro se*. The hearing concluded on the same day but the record was held open to receive post-hearing briefs. The record closed on February 12, 2010.

II. DISCUSSION

A. Background

Respondent holds a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit and a Beverage Cartage Permit, issued by TABC for Jesters on Lasalle (Jesters), an establishment located in Waco, Texas. Jester's is a small place. The main entrance opens into a narrow walkway enclosed by a wall to the left and the bar area to the right. The bar itself has three sides: one long section of counter is flanked by two shorter sections of counter at each end; its longest portion of the bar faces the entire room (where there are pool tables, chairs, tables, and a small dance floor); the two sides of the bar are perpendicular to the longer front counter and extend to the wall located behind the bar. The area behind the bar is thus enclosed, except for a walkway that permits access through the front of the bar. Alcoholic beverages are stored on shelves and coolers in the area. There is usually an employee working behind the bar.

The establishment's normal hours of operation are from 7:00 a.m. or 10:00 a.m. to 2:00 a.m., seven days per week. Two on-duty employees are usually sufficient to service the customers during the bar's operating hours. On July 18, 2009, TABC agent Ricky Scaman investigated a complaint regarding an intoxicated employee on the licensed premises. Agent Scaman concluded that Respondent was in violation of the Code, as set forth in Staff's notice of hearing.¹ Respondent contests Staff's allegations.

B. Applicable Law

TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13) 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.²

¹ Staff's Exhibit 1, admitted for jurisdictional purposes only.

² TEX. ALCO. BEV. CODE ANN. § 61.71(a)(1) permits the cancellation or suspension of a retail dealer's license for up to 60 days if, after notice and hearing, the licensee is found to have violated the Code or an agency rule provision.

TEX. ALCO. BEV. CODE ANN. (or Code) § 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.

Several other provisions are relevant. Under Code § 11.61(g), the length of a suspension must be appropriate for the nature and seriousness of the violation. In determining the length of a suspension, TABC is required to consider: (1) the type of license or permit held; (2) the type of violation; (3) any aggravating or ameliorating circumstances concerning the violation, including those enumerated in Section 11.64(c);³ and (4) the permittee or licensee's previous violations. Except for certain types of violations not involved here, TABC is required to allow the permittee or licensee the opportunity to pay a civil penalty in lieu of suspension.⁴ The amount of the civil penalty imposed must be appropriate for the nature and seriousness of the violation. The same factors that determine the appropriate length of a suspension are employed to determine the proper amount of a penalty.⁵

Pursuant to Code § 5.362, TABC has adopted a schedule of sanctions for violations of the Code or the agency's rules.⁶ The schedule sets forth the number of days a permit or license will be suspended for first, second and third violations, along with the corresponding amount of a civil penalty that may be paid in lieu of suspension. According to the schedule, the sanction for a first-time violation of §11.61(b)(13) or §104.01 will be a 17 to 25-day suspension or a civil penalty of \$300 per day for each day of the recommended penalty.⁷ Under 16 TAC § 34.1(j), however, the

³ TEX. ALCO. BEV. CODE ANN. § 11.64(c) provides that "[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."

⁴ TEX. ALCO. BEV. CODE ANN. § 11.64(a).

⁵ 16 TEX. ADMIN. CODE (TAC) §§ 34.1, 34.2 and 34.3.

⁶ TEX. ALCO. BEV. CODE ANN. § 11.64(a).

⁷ 16 TAC § 34.2.

schedule of sanctions does not apply to a contested case brought under Chapters C and D of the Administrative Procedure Act.⁸

C. Staff's Argument and Evidence

Staff argues that in order to establish Respondent's violation of Code § 11.61(b)(13), it need only prove two elements: (1) that a person was intoxicated on Respondent's licensed premises; and (2) that the intoxicated person was Respondent's employee. Staff's legal argument is based on Code § 1.04(11), which defines the term "permittee" to include the permit holder's agent, servant or employee. According to Staff, an employee on the licensed premises has the same legal duty as the permit holder to comply with all Code provisions. Therefore, the presence of an off-duty, intoxicated employee on the premises violates Code § 11.61(b)(13). The violation is rightfully attributed to the permit holder.

Staff indicated the TABC's schedule of sanctions provides that a first-time violation of this type carries a 25-day suspension or, in lieu of suspension a \$7,500 penalty (\$300 per day). Staff observed, however, that TABC has the authority to impose a suspension of up to 60 days. Staff argued that its recommendation to impose a more severe penalty in Respondent's case (a 30-day suspension or, in lieu of suspension a civil penalty of \$9,000) is justified because of the seriousness of the violation and Respondent's enforcement history.

Staff presented four exhibits and offered the testimony of Agent Scaman.

Testimony of Ricky Scaman:

Agent Scaman has been employed as an agent with TABC for about four years. He testified that on three occasions, July 9, 10, and 17, 2009, an anonymous caller telephoned TABC to report that Respondent's bartender was intoxicated and was over-serving intoxicated patrons at Jesters. At approximately 1:40 a.m. on July 18, 2009, Agent Scaman arrived to investigate the complaint from

⁸ TEX. GOV'T. CODE ANN. §§ 2001.051 - 2001.103.

earlier in the evening. Both doors of Jesters were locked to prevent the entrance of new customers, he said, but he could hear “music, whooping and hollering”⁹ coming from inside the bar.

Bar manager Danny Kreder allowed Agent Scaman to enter the establishment, where patrons were still present. The agent observed two additional employees, Amber and Darlena “Dee” Matthews (Ms. Matthews), walk behind the bar’s counter where the alcoholic beverages were kept. He said he watched Ms. Matthews for “a short time.”¹⁰ In his opinion, she displayed the following signs of intoxication: loud talking, slurred speech, and a slight sway in her balance. When she walked over to the table where her husband was seated and the couple made preparations to leave, Agent Scaman asked Ms. Matthews to step outside the bar with him.

Once outside, the agent questioned Ms. Matthews. She said she was employed at Jesters.¹¹ She admitted she had “drank a few”¹² but claimed she was not driving. Agent Scaman asked Ms. Matthews to perform standardized field sobriety tests. She expressed uncertainty.

The agent testified that in 2005, he was certified to administer the HGN, and his training was updated in 2007 or early-2008. He reported explaining the horizontal gaze nystagmus (HGN) to Ms. Matthews and asking whether she had any physical conditions that would affect her performance. She answered that her “equilibrium was off so she probably couldn’t do it.”¹³ He did not recall asking about the source of Ms. Matthews’ impaired equilibrium, nor did he recall whether she spontaneously offered an explanation. He remembered that he did not inquire whether Ms. Matthews was taking any medication. Ultimately, he said, Ms. Matthews agreed to attempt the HGN.

⁹ Testimony of Agent Scaman.

¹⁰ Testimony of Agent Scaman.

¹¹ Mr. Kreder subsequently confirmed Ms. Matthews’ employment status. He told the agent Ms. Matthews was not scheduled to work the evening of July 17, 2009, but she filled in for Janice, another employee. Indeed, Respondent’s employee schedule for Friday, July 17, 2009, reflects that Amber was scheduled to work from 5:00 p.m. to 2:00 a.m.; Brenda was scheduled to work from 7:00 a.m. to 5:00 p.m.; and Janice was scheduled to work from 8:00 p.m. to [close].

¹² Testimony of Agent Scaman.

¹³ Testimony of Agent Scaman.

The agent testified he examined Ms. Matthews' eyes for equal tracking and equal pupil size prior to administering the HGN. He checked her eyes for "smooth pursuit" using the following procedures:

- he held the stimulus (his finger) six to nine inches in front of her face, centered between her eyes;
- he asked her to follow the movement of the stimulus with her eyes only;
- he moved the stimulus in the direction of her left shoulder over the course of three seconds;
- he moved the stimulus back towards her right shoulder in a three-second pass;
- he again moved the stimulus towards her left shoulder in a three-second pass, then brought it back towards her right shoulder at the same rate of speed; and
- he completed two passes for both of her eyes, each time observing whether her eyes followed the stimulus smoothly or displayed a jerking movement (nystagmus).

Agent Scaman testified he observed a lack of smooth pursuit in both Ms. Matthews' eyes. He terminated the HGN administration after this portion of the test because Ms. Matthews stopped and said she "could not do anymore."¹⁴ He explained that he interpreted her statement to mean she could not complete the HGN or any other standardized field sobriety tests, so no further testing was offered. However, he requested and Ms. Matthews agreed to take a portable breathalyzer test. He testified that Ms. Matthews' portable breath test results registered a .19. At this point, he placed Ms. Matthews under arrest for "lewd, immoral, and indecent conduct by an employee" and transported her to the county jail. She was later charged with a violation of the Code.

Agent Scaman said Respondent has no enforcement history with TABC under his current permits. However, Respondent was previously subject to TABC disciplinary action when he operated Jesters under a Wine and Beer Retailer's On-Premise Permit and a Retailer's On-Premise Late Hours License. Documentary evidence reflects that on March 21, 2007, Respondent waived his right to formally contest the allegation that, on February 25, 2006, Respondent's employee served an

alcoholic beverage to an intoxicated person. The resulting Waiver Order shows the violation was restrained, *i.e.*, it was not attributed to Respondent because the employee who committed the violation was TABC seller/server certified.¹⁵ Another order entered by TABC on the same date reflects that Respondent agreed to accept sanctions for the same type of violation in another case; this incident occurred on January 26, 2006, and involved a different employee who served alcoholic beverages to two intoxicated individuals.¹⁶ By agreement, Respondent accepted an 11-day suspension (with an option to pay a \$1,650 penalty in lieu of suspension) pursuant to the Waiver Order issued in Docket No. 519459.

According to Agent Scaman, an intoxicated employee on the premises is a violation of the Code whether the employee is on or off-duty. Regular customers who come into the establishment will not know when an employee is off-duty; they will expect the employee's behavior to be consistent at all times. An intoxicated employee's judgment is also likely to be impaired. An intoxicated employee may be unable to judge when a customer is intoxicated and keep serving the intoxicated customer. Once the intoxicated customer leaves the establishment he or she is a danger to the public safety.

On cross-examination, Agent Scaman testified that the anonymous reports to TABC did not name or physically describe the Jesters' employee who was purportedly intoxicated on the premises. The agent admitted he did not observe Ms. Matthews "working" behind the bar on July 18, 2009. Rather, he observed her go behind the bar to retrieve her purse, look at a clipboard, then walk to the table where her husband was sitting.

D. Respondent's Argument and Evidence

Respondent argues that Staff's allegations are without merit. At the outset, Ms. Matthews was off-duty when the agent observed her conduct inside the bar. The video recorded by Respondent's security cameras demonstrates that Ms. Matthews showed no signs of intoxication,

¹⁴ Testimony of Agent Scaman.

¹⁵ Staff's Exhibit 4, Waiver Order in Docket No. 522768 issued March 30, 2007.

despite the agent's testimony. Respondent additionally asserts that his previous violations are not relevant to this case because they occurred when Jesters was operating under different TABC permits.

Respondent presented one exhibit¹⁷ and offered the testimony of Ms. Matthews and Mr. Kreder, Jesters' bar manager.

Testimony of Danny Kreder:

Mr. Kreder testified that in July 2009, Jesters had three full-time staff, Amber, Brenda, and himself, plus a few part-time employees. He indicated that two people were usually able to handle the customers, but a third employee would be asked to come on shift if the bar filled up. Conversely, when business was slow the idle employees would be told to go off the clock. It was a routine practice, he explained, for Respondent's employees to trade shifts or for one employee to cover another's scheduled shift.

Mr. Kreder stated that in July 2009, Janice was employed part-time by Respondent. She no longer works at Jesters. Ms. Matthews was hired only a few days before Agent Scaman's investigation. She replaced Ruby Hart, whose employment had been recently terminated.¹⁸

Mr. Kreder was working the night that Agent Scaman arrived at Jesters near closing time. The bar manager testified that while the agent was there, only three people accessed the area behind the bar's counter. Amber was working primarily behind the bar. Mr. Kreder was moving around the establishment, taking care of tasks out on the floor and behind the bar's counter. He said that Ms. Matthews accessed the area behind the counter only once, to get her purse. He estimated that

¹⁶ Staff's Exhibit 4, Waiver Order and attached Settlement Agreement for Docket No. 519459.

¹⁷ Respondent's Exhibit 1 is a DVD recording from security cameras located both inside and outside the bar.

¹⁸ According to Mr. Kreder, Ms. Hart was dismissed because she failed to provide Respondent with her social security number, as well as her demand that Respondent pay her wages in cash. Mr. Kreder expressed his belief that Ms. Hart wanted to keep her income hidden because she might stop receiving disability payments from the government. He hypothesized that it was Ms. Hart who made the anonymous complaints to TABC, explaining that after Ms. Hart was fired she asked to come back. Ms. Hart became angry when Mr. Kreder told her she had already been replaced by Ms. Matthews.

Agent Scaman made the decision to arrest Ms. Matthews within two or three minutes after the agent entered the establishment.

Mr. Kreder indicated he has known Ms. Matthews for one-and-a-half to two years. He described her as a “nervous person ... like a little kid that needs to go to the bathroom, swaying back and forth, I ain’t never seen her standing still.” In his opinion, Ms. Matthews’ constant rhythmic movements and her “voice changes” are normal to her - she has “always been that way.” He speculated that Ms. Matthews’ physical idiosyncrasies might be related to her diabetes or to her treatment with insulin. In any event, Mr. Kreder said nothing about Ms. Matthews’ behavior while the agent was at the bar led Mr. Kreder to believe she was intoxicated.¹⁹

On cross-examination, Mr. Kreder testified that when he arrived at Jesters around 8:00 p.m. on July 17, 2009, Amber was tending bar and both Janice and Ms. Matthews were present; that he was unaware whether Ms. Matthews was on medication that night; that on previous occasions, he has observed Ms. Matthews drink both soda and beer at the bar; that he did not serve beer to Ms. Matthews the night Agent Scaman was at Jesters; that Ms. Matthews is currently on administrative leave pending the outcome of this case; that he was TABC seller/server certified in February 2008; that he did not recall learning it was a violation of the Code for an employee to be intoxicated on the premises; and, that before this incident occurred he was accustomed to consuming alcoholic beverages on the job.

Testimony of Darlene “Dee” Matthews:

Ms. Matthews is 47 years old. Her husband, Lee, is Ruby Hart’s brother. Ms. Matthews described herself as “very hyper.” she prefers standing over sitting, rocks back and forth when standing, and “talks with her hands.” Her testimony touched on several chronic health problems. She takes medication for high blood pressure and uses an inhaler. She was diagnosed with Type I diabetes while in her twenties.²⁰

¹⁹ All quotations within paragraph are from testimony of Mr. Kreder.

²⁰ All quotations within paragraph are from testimony of Ms. Matthews.

When she was younger Ms. Matthews took oral medication for diabetes. Currently, her treatment consists of four self-administered insulin shots per day. In spite of the addition of insulin to her system, Ms. Matthews' sugar levels often fluctuate, sometimes to the point that she requires hospitalization. Her most recent hospitalization for diabetes occurred in September 2009. She tries to eat a piece of candy when she realizes her sugar levels are low, she said, but the onset of a diabetic crash can be sudden. When it happens, she feels shaky, her vision becomes impaired and her speech may become incoherent. When Ms. Matthews' sugar levels are too high, she becomes fatigued and unnaturally thirsty.

Ms. Matthews said she began working at Jesters on July 9 or 10, 2009. She was paid by Respondent for her training time, as well as for the few shifts she worked before her arrest. She worked on Thursday July 16, 2009, but was not scheduled to work the next day. Nonetheless, she was at Jesters on the evening of July 17, 2009. According to Ms. Matthews, Janice was there but did not want to work her scheduled evening shift. At about 7:30 p.m., the bar was getting busy and Amber asked Ms. Matthews to clock in. Ms. Matthews had not yet eaten dinner or administered her evening insulin shot, but she started work anyway. She clocked out around 11:30 p.m. that night, after business had slowed down. Afterwards, Ms. Matthews and her husband remained at the bar. They purchased beers that were served by Amber.

Ms. Matthews testified she did not recall how much beer she consumed after finishing work that evening, but she never ate a meal or took her insulin shot. She and Lee sat at a table and Lee played pool. The couple was about to leave at around 1:40 a.m. when Agent Scaman asked Ms. Matthews to step outside. Ms. Matthews did not specifically recall suffering any adverse effects from diabetes that night, but she denied being intoxicated. After reviewing the security video admitted into evidence, she was adamant that neither her appearance nor her conduct on the DVD revealed any signs of intoxication.

The DVD Recording:

The DVD contains footage recorded by Jesters' security cameras, which were located both within and outside the bar. There is no audiotape of the DVD. The images were recorded from three

different camera angles: one shows a view of the bar as it appears from the front; another reflects a view of the area enclosed by the bar's long front counter and the shorter side counters, from a vantage point somewhere above and behind the bar; and, a third view displays Jester's main entrance from the outside, as well as a small portion of the bar's parking lot. Each frame on the DVD is stamped with the date, as well as the hour, minute, and second the image was recorded by a security camera.

The first recorded images begin at 1:38 a.m. on July 18, 2009. Amber is working behind the bar but leaves through the walkway in the front counter. She disappears from sight for a few moments, then returns to her spot. She leaves and comes back again. Mr. Kreder enters the area behind the bar but leaves almost immediately. At 1:41 a.m., Ms. Matthews walks into the area behind the bar. She is wearing glasses. She examines a sheaf of papers resting on the counter enclosing the left side of the bar, confers with Amber, and picks up a sheet of paper with writing on it. She stands there, studying the paper in her hand. Forty-five seconds later, Agent Scaman enters the establishment. The agent immediately goes behind the bar, leans his torso back against a waist-high, open cooler filled with beer, and gazes out across the front counter in the direction of the pool tables. About fifteen seconds later, at 1:42 a.m., Ms. Matthews begins to pass the agent in order to exit through the bar's walkway. She stops and appears to chat with him, gesturing with her hands. Agent Scaman looks at Ms. Matthews briefly before returning his attention to the view beyond the bar's front counter. The two interact for 10 seconds before Ms. Matthews leaves the bar area and disappears from view. It is still 1:42 a.m. Agent Scaman remains behind the front counter, still looking out across the bar. At 1:43 a.m., he exits the bar area and disappears from sight. Within 30 seconds, he is leading Ms. Matthews outside from Jesters' main entrance.

The DVD recording shows the agent and Ms. Matthews exit the building and walk a few steps. She places her purse on the trunk of a car. At 1:44 a.m., the agent is out of camera range and there is only a partial view of Ms. Matthews' back, but the two appear to be talking. She gestures with her hands. At 1:45 a.m., Ms. Matthews turns and walks closer to the bar's main entrance, followed by the agent. Now in full camera range, she is talking and gesturing with her hands. She takes off her glasses. Agent Scaman is facing Ms. Matthews. It is 1:46 a.m. The agent shines his

flashlight directly into Ms. Matthews' eyes keeps it there. He holds his index finger up in front of her face. He moves his finger towards Ms. Matthews's right side and then brings it back towards her left side. The agent's pass on Ms. Matthews's right side takes one second out and one second in. His pass on her left side occurs at the same rate of speed. Agent Scaman completes five passes on Ms. Matthews' right side and four passes on her left side. As timed, each pass is performed at the rate of speed: one second out and one second in.

The DVD recording shows Agent Scaman and Ms. Matthews re-enter the bar. From 1:50 a.m. until 2:10 a.m., Ms. Matthews sits on a stool at the bar while the agent completes paper work and speaks with Mr. Kreder. At 2:10 a.m., the agent places Ms. Matthews in handcuffs and they exit the bar.

Throughout the video recording, Ms. Matthews exhibits no noticeable sway when standing, walking, or sitting. Her interactions with Amber and Agent Scaman look natural and her body language appears to be appropriate. She appears to be alert and oriented to her surroundings. At no point is Ms. Matthews' seen losing her balance and staggering, or leaning against a stationary object for support, or requiring assistance to stay upright. It further appears that she had no difficulty following the agent's instructions on the HGN.

E. Analysis

The evidence presented by both parties has been carefully reviewed. The ALJ has assessed the credibility of the witnesses to determine the amount of weight properly given to their testimony. In the final analysis, the ALJ concludes there are multiple grounds for recommending that no action be taken against Respondent's permits. Each reason falls into one of two categories. The legal issue concerns how the applicable law should be interpreted. The factual issue rests on a determination whether Ms. Matthews was intoxicated in the early morning hours of July 18, 2009.

Applicable Law

Staff urges that the presence of an intoxicated employee on Respondent's premises is a violation of Code § 11.61(b)(13) and § 104.01(5), even if the employee is off-duty. Respondent emphasizes the fact that while Ms. Matthews was employed by Jestlers, she was not working when she was allegedly intoxicated. In other words, Respondent contends that the statute's prohibition against an intoxicated employee on the premises does not extend to an off-duty employee.

Upholding a violation under § 11.61(b)(13) (prohibiting the presence of intoxicated permittee on the licensed premises) requires accepting Staff's argument that the definition of "permittee" in Code § 1.04(11)'s should be grafted on to § 11.61(b)(13). Stated another way, since Code § 1.04(11) defines "permittee" to include the permit holder's employees, the permittee's legal duty to comply with all Code provisions is rightfully imposed on the permit holder's employees. The presence of an off-duty, intoxicated employee on the premises is therefore a violation Code § 11.61(b)(13). Staff's reading of the Code is inconsistent with § 11.61(a), which provides that § 11.61(b)'s use of the word "permittee" includes each member of a partnership or association, each officer of a corporation, and the owner or owners of a majority of a corporation's stock. Staff's argument contradicts the plain language of Code § 11.61(b)(13) and is properly rejected.

Staff's position regarding Code § 104.01(5) appears to be stronger, but only until the predecessor statute and its most recent legislative history are analyzed. Prior to June 16, 1989, the language of this section stated:

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 *or permitting an intoxicated person to remain on the licensed premises.* (italics added).²¹

²¹ Acts 1987, 70th Leg., ch. 303, Sec. 7, eff. June 11, 1987.

Former Code § 104.01(5) prohibited a retailer or a retailer's employee from: (a) being intoxicated on the premises; or (b) allowing an intoxicated person to remain on the premises. The commission of either act by the retailer or employee was "lewd, immoral, or offensive to the public decency," and therefore subject to sanction.

The 1989 revision removed the italicized language from the statute.²² The amendment was the result of the legislature's determination that it was unsafe to eject an intoxicated person from the premises. Accordingly, the revised Code provision states that the presence of an intoxicated retailer or an intoxicated employee on the premises is actionable conduct, on the basis that it is "lewd, immoral, or offensive to the public decency." However, Code § 104.01(5) no longer provides that a retailer or a retailer's employee's failure to remove an intoxicated person from the premises, is a violation of Code § 104.01(5).

Staff's argument, that the term "employee" in the amended statute applies to a retailer's employee whether on or off-duty, is in opposition to the rationale that underlies the 1989 amendment. That is, the ejection of an intoxicated off-duty employee from the premises would be unsafe for the same reasons the legislature deemed unsafe the ejection of any other intoxicated person. On the other hand, Respondent's interpretation of the revised Code § 104.01(5) – that it applies only to on-duty employees - is supported by a sound but different rationale: the judgment of an intoxicated employee is likely to be impaired, and may adversely affect the employee's ability to properly perform the duties associated with the sale of alcoholic beverages, e.g., an intoxicated employee might fail to recognize a customer who is intoxicated and serve alcoholic beverages to an intoxicated person. This interpretation of Code § 104.01(5) is not only grounded in reason, but it does not undermine the legislature's intent.

Staff's proposed interpretation of Code § 104.01(5) is additionally incompatible with the statute's other subsections. Code § 104.01 prohibits a retailer or a retailer's employee from engaging in, or allowing others to engage in "conduct on the premises ... which is lewd, immoral, or offensive to public decency," as set forth in nine non-exclusive categories. It is apparent, however, that certain prohibited acts are limited, by their very nature, to the conduct of a retailer or an employee, e.g.,

failing or refusing to comply with state or municipal health and sanitation laws or ordinances.²³ Other actions that violate Code § 104.01's prohibition against lewd and immoral behavior may be the conduct of a retailer or his employee, as well as a retailer's customer. The latter category includes violations such as, "the use of loud and vociferous or obscene, vulgar, or indecent language, or *permitting its use*".²⁴

In summary, the better reasoning supports the interpretation that Code §§ 11.61(b)(13) and 104.01(5) apply only to on-duty employees. The applicable law, if properly applied, does not provide any basis for action against Respondent's permits.

Evidence of Intoxication

The evidence tending to prove or disprove that Ms. Matthews was intoxicated on the night of her arrest consists of three witnesses' testimony and the security video offered by Respondent. For the reasons discussed below, the ALJ concludes that a preponderance of the credible evidence establishes that on July 18, 2009, the date Ms. Matthews was placed under arrest by Agent Scaman: Ms. Matthews was not intoxicated, *i.e.*, having an alcohol concentration of .08 or greater in her body; and, on the same date, Ms. Matthews had not lost the normal use of her physical or mental capacities through the introduction of alcohol into her system.

In the absence of the videotape evidence, Agent Scaman's testimony would normally carry more weight than Ms. Matthews' or Mr. Kreder's testimony. This is true for several reasons. Ms. Matthews and Mr. Kreder are Respondent's employees, and have a personal relationship with him as well. Those circumstances alone suggest Ms. Matthews and Mr. Kreder are biased. An employee is assumed to have a financial stake in the outcome of an action against the employee's employer. Perhaps they also felt a certain amount of pressure to participate in the hearing. The extent of Respondent's personal relationship with either Ms. Matthews or Mr. Kreder was also not

²² Acts 1989, 71st Leg., ch. 1200, Sec. 2, eff. June 16, 1989.

²³ TEX. ALCO. BEV. CODE ANN. § 104.01(8).

²⁴ TEX. ALCO. BEV. CODE ANN. § 104.01(1) (*italics added*). In fact, the italicized language ("or *permitting its use*") is present in every subsection of the statute that describes actionable conduct that can be attributed to a patron, a retailer or to an employee. See, TEX. ALCO. BEV. CODE ANN. § 104.01(1), (3), (6), (7), and (9).

established. If both witnesses are close friends with the Respondent, they would presumably be reluctant to offer testimony unfavorable to him, even if true. In contrast, Agent Scaman's testimony was offered in his professional capacity – he was assigned by TABC to investigate a complaint the agency received about Respondent. Given his well-defined role in the proceeding, there are no obvious reasons to assume he is biased, or to question his veracity or motives. In addition, TABC agents are peace officers. It is a common assumption that law enforcement officers have received adequate training in areas considered fundamental in their field.

Ms. Matthews' testimony was generally credible. She admitted that she was on-duty earlier in the evening on July 17, 2009, an admission that Staff views as damaging. She seemed honest. Her description of the evening rang true, including how she came to be working that night and her struggle to both remember and carry out the steps necessary to control her diabetes. She made no attempt to minimize her failures or instances of questionable judgment, e.g., drinking beer on an empty stomach. Her physical characteristics in person were also consistent with her appearance and mannerisms reflected in the video footage from July 18, 2009. The comparison strengthens the conclusion that Ms. Matthews' was not intoxicated at the time the DVD recording was made.

Without question, the most credible evidence is the DVD recording. The security video repeatedly contradicts Agent Scaman's testimony, to the point that he is judged to be less than credible. The agent testified that Ms. Matthews displayed the following signs of intoxication: loud talking, slurred speech, and a slight sway in her balance. But the videotape reveals no noticeable sway when Ms. Matthews is seen standing, walking, and sitting. The DVD has no audio record, but Ms. Matthews' interactions with others (including the agent) look natural and her body language appears to be appropriate. On the recorded footage, she exhibits no staggering; she does not lean against stationary objects for support; and, she does not once require assistance to stay upright. It also appears that she had no difficulty conversing with the agent or following his instructions on the HGN.

The agent's activities recorded on tape are another matter. It was Ms. Matthews who struck up a conversation with the agent, as she was exiting the bar area. He conversed with her for a period

of 10 seconds, and his eyes were elsewhere for part of that time. The basis for Agent Scaman's request that Ms. Matthews step outside the bar and perform standardized field sobriety tests is a mystery.

The agent's administration of the HGN to Ms. Matthews is also very troubling. He failed to make even a minimal inquiry into Ms. Matthews' description of an impairment that had the potential to invalidate the test. He failed to ask her about medication issues which, based on Ms. Matthews' testimony, were significant enough to affect the validity of the HGN. Because these matters were not properly addressed by Agent Scaman, it cannot be said with any certainty that any nystagmus present in Ms. Matthews' eyes was the result of alcohol consumption, as opposed to her medical condition.

Details in the agent's testimony and his administration of the HGN as viewed on the security tape further undermine Agent Scaman's finding that Ms. Matthews exhibited a lack of smooth pursuit in both eyes. He testified that he held the stimulus six to nine inches from her face, and his testimony was not contradicted by the video footage. The agent shined his flashlight directly into Ms. Matthews' eyes throughout his administration of the HGN. He testified that he moved the stimulus in a three-second pass to check for smooth pursuit, but videotape footage establishes that each of his passes lasted one second or less.

Finally, there is the matter of the portable breathalyzer test Agent Scaman administered to Ms. Matthews. He testified that her portable breath test results registered a .19. No other evidence corroborates Ms. Matthews' test results, and the agent offered no further testimony on this issue. Staff presented no evidence addressing any of the following issues: the science behind portable breath testing; how the equipment is operated; the manner in which a portable breath test is administered; safeguards necessary to prevent false readings; how portable breath test equipment is maintained; his training specific to portable breath testing; and, his experience in administering portable breath tests.

Given the scant evidence on this issue and the agent's lack of credibility in almost every other respect, his testimony regarding Ms. Matthews portable breath test results is not persuasive,

especially in the absence of corroborating evidence. Staff failed to meet its burden to prove that Ms. Matthews was intoxicated. No action against Respondent's permits is warranted.

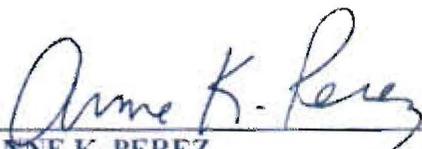
III. FINDINGS OF FACT

1. The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against John Albert Massengale d/b/a Jesters on Lasalle (Respondent) alleging that on or about July 18, 2009, Darlena "Dee" Matthews, Respondent's agent, servant, or employee, was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. (Code) §§ 104.01(5), 11.61(b)(13), 25.04 and/or 61.71(a)(1).
2. Administrative Law Judge (ALJ) Anne K. Perez convened the hearing on November 19, 2009, at the State Office of Administrative Hearings in Waco, Texas. Staff attorney Judith Kennison represented TABC. Respondent appeared *pro se*. The hearing concluded on the same day but the record was held open to receive post-hearing briefs. The record closed on February 12, 2010.
3. Jesters on Lasalle currently operates under the authority of a Mixed Beverage Permit, MB-698957, which includes the Beverage Cartage Permit, and Mixed Beverage Late Hours Permit, in Waco, McClennan County, Texas.
4. Darlena "Dee" Matthews was employed by Jesters on Lasalle on July 18, 2009.
5. Darlena "Dee" Matthews worked at Jesters on Lasalle the evening of July 17, 2009, but finished her shift around 11:30 p.m.
6. Darlena "Dee" Matthews was no longer on-duty at Jesters on Lasalle after 11:30 p.m. on July 17, 2009.
7. Darlena "Dee" Matthews and her husband remained at Jesters on Lasalle until approximately 2:00 a.m. on July 18, 2009.
8. After 11:30 p.m. on July 17, 2009, another employee served beer to Darlena "Dee" Matthews.
9. Darlena "Dee" Matthews was off-duty when she consumed beer on the licensed premises on July 17 and 18, 2009.
10. Darlena "Dee" Matthews was not intoxicated at Jesters on Lasalle on July 18, 2009.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Subchapter B of Chapter, and §§ 6.01, 11.61, 61.71, and 32.01.
2. The State Office of Administrative Hearings has jurisdiction over all matters pertaining to the contested case hearing, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was timely and adequate, as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
4. On July 18, 2009, Darlena "Dee" Matthews was not an employee of Jesters on Lasalle as that term is contemplated by TEX. ALCO. BEV. CODE ANN. § 104.01(5).
5. Based on the above findings of fact and conclusions of law, no action should be taken against Respondent's permits.

SIGNED April 13, 2010.



ANNE K. PEREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS