# State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge
July 7, 2011

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

**VIA REGULAR MAIL**

**RE: Docket No. 458-11-3550; Texas Alcoholic Beverage Commission v. 13335 Duluth Restaurant and Bar, LLC D/B/A La Chatte**

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Lindy Hendricks

**LINDY HENDRICKS**
**ADMINISTRATIVE LAW JUDGE**
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

LH/ell
Enclosure
xc Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 West G Street, Suite 600 Houston, TX 77008 - **VIA REGULAR MAIL** (with Certified Evidentiary Record and _ Hearing CD/s)
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Paul Decuir, Jr., Attorney for Respondent, P.O. Box 9687, Houston, Texas 77213 -**VIA REGULAR MAIL**

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JUL 08 2011
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LEGAL

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DOCKET NO. 458-11-3550

| | | |
|---|---|---|
| **TEXAS ALCOHOLIC BEVERAGE COMMISSION,** | § | **BEFORE THE STATE OFFICE** |
| **Petitioner** | § | |
| | § | |
| | § | |
| **VS.** | § | **OF** |
| | § | |
| | § | |
| **13335 DULUTH RESTAURANT AND BAR, LLC D/B/A LA CHATTE** | § | |
| **PERMIT NOS. MB566538, LB566539** | § | |
| **(TABC CASE NO. 599022)** | § | |
| **Respondent** | § | **ADMINISTRATIVE HEARINGS** |

## PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against 13335 Duluth Restaurant and Bar LLC d/b/a La Chatte (Respondent or La Chatte), alleging that Respondent's employee was intoxicated on the licensed premises, in violation of the Texas Alcoholic Beverage Code (Code). For reasons discussed in this proposal for decision, the Administrative Law Judge (ALJ) finds Petitioner failed to prove its allegations. The ALJ recommends that no action be taken against Respondent's permit.

## I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction in this case 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 proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On February 25, 2011, Petitioner issued its notice of hearing, directed to Respondent at its address of record. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference

to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On May 13, 2011, a hearing convened before SOAH ALJ Lindy Hendricks at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared and was represented by attorney Paul Decuir, Jr. The record closed the same date.

## II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. (Code) § 11.61(b)(13), TABC may suspend for not more than 60 days or cancel a permit if it is found, after notice and hearing, that the permittee was intoxicated on the licensed premises. Section 1.04(11) of the Code defines permittee to include his agent, servant, or employee.

## III. EVIDENCE

### A. Respondent's Permit

Respondent holds a Mixed Beverage Permit, MB566538, with accompanying Mixed Beverage Late Hours Permit, LB566539, issued by TABC, for the premises located at 13335 Duluth, Houston, Harris County, Texas. This permit was issued on October 15, 2004.

### B. Respondent's Alleged Intoxication on the Licensed Premises

On May 22, 2010, TABC Agents Peter Gonzales, Ramiro DeJesus, and Christopher Rodriguez went to Respondent's premises to deliver an administrative notice. Agent Gonzales testified that they arrived at 1:15 a.m. When they opened the front door, a female stumbled out, assisted by a male friend. He stated that based upon her appearance, the female appeared to be a

dancer for Respondent. He believed that the dancer was being held by the friend to keep her from falling. At that point, the agents asked them for identification. The friend was allowed to go to his car to retrieve his identification. He never returned. The dancer was asked to return to the front register. The dancer had a strong odor of an alcoholic beverage on her breath, bloodshot eyes, slurred speech, and swayed stance. She was identified as Alexandria Hoffman. Ms. Hoffman told the agents she had been a dancer for Respondent for four months and that her shift began that night at 10:30 p.m. She stated she consumed a Long Island Ice Tea before her shift and then four shots of tequila during her shift. According to Agent Gonzales, Ms. Hoffman stated she became drunk after consuming the four shots of tequila. Agent Gonzales conducted the Horizontal Gaze Nystagmus test and observed five clues indicative of intoxication. Ms. Hoffman was issued a citation for public intoxication and released to a female employee.

Agent Gonzales made contact with Richard Mahaffey who identified himself as a manager for Respondent. Mr. Mahaffey confirmed Ms. Hoffman had been working for Respondent for four months and that she arrived to work at 10:30 p.m. He provided a copy of her employment application and driver's license. Mr. Mahaffey told Agent Gonzales that Ms. Hoffman appeared fine when she arrived to work. He told Agent Gonzales that around 11:30 p.m. or midnight, he noticed a few patrons were getting too wild with Ms. Hoffman. The patrons were ordered to leave and Ms. Hoffman was forced to take a break. During her break, Mr. Mahaffey noticed her intoxication. Ms. Hoffman was not allowed to return to work and was sent home. She was allowed to call a friend to take her home. Mr. Mahaffey checked with bartenders and waitresses to see if they had given her too many drinks.

On cross-examination, Agent Gonzales testified he had been with TABC for a year, just completed field-training, and had not conducted many investigations. He prevented Ms. Hoffman from leaving the premises and made her return inside the club. He explained that she was not allowed to leave because he wanted to verify her identity and to make sure she was safe. He did not want her to drive a car and kill somebody. However, he acknowledged that the friend said he was taking Ms. Hoffman home.

Mr. Mahaffey also testified at the hearing. His primary duty as general manager is to monitor patrons and dancers. On May 22, 2010, he noticed Ms. Hoffman laying on something and acting wildly. He made her get off the dance floor and brought her to the dressing area. He checked with bartenders and waitresses to see if she had been served drinks, but all denied serving her drinks. Ms. Hoffman was acting irrationally and belligerently. He believed she was impaired not by alcohol but by Xanax or some other drugs. He testified that he watches the dancers to make sure they do not pop pills or consume too much alcohol. Dancers are allowed one drink. He explained that there could be "customer bargaining" where dancers get customers to provide them drinks. He testified that it is possible for dancers to become intoxicated, but management takes steps to prevent that. In addition to the general manager, there are floor managers, two assistants, and the D.J. who monitor the dancers' activities and behaviors.

As for the employment status of the dancers, Mr. Mahaffey testified they are independent contractors. Dancers are not compensated by Respondent, receiving only tips from customers. Although an employment application is required of all dancers, they set their own schedules and are only provided a dressing room.

According to Mr. Mahaffey, Respondent has a TABC-supported policy of not allowing dancers or patrons who may be intoxicated to leave. They are offered food, coffee, a cab ride, or allowed to wait for a ride. He stated Ms. Hoffman asked to call a friend. Her belongings were placed in a bag and she was allowed to wait in the kitchen area for her ride. Mr. Mahaffey told the D.J. she was not allowed back on the dance floor while she waited for her ride. According to Mr. Mahaffey, there was plenty of time before the TABC agents arrived to eject Ms. Hoffman. However, out of safety concerns and consistent with Respondent's policy, she was allowed to wait for a ride. Mr. Mahaffey testified he made sure she and her ride left. However, he stated as soon as they walked out the front door they came back in with TABC agents.

### C. Parties' Positions

TABC supported Agent Gonzales's conclusion that Ms. Hoffman, an agent, servant, or employee, was intoxicated on the licensed premises. Respondent argued that Ms. Hoffman was not intoxicated when she arrived for work, but that she must have sneaked drinks or popped pills without Respondent's knowledge. Respondent argued Mr. Mahaffey followed proper TABC procedures to ensure safety and compliance with the law. He allowed Ms. Hoffman to be taken home by a responsible person, the same action taken later by Agent Gonzales who released Ms. Hoffman to a co-worker. Respondent argued that penalizing its action would send a message to businesses to eject intoxicated people from the licensed premises, contrary to public policy and at the risk of public safety. Respondent further argued that Agent Gonzales prevented Ms. Hoffman from leaving and made her return to the licensed premises. Lastly, Respondent argued that Ms. Hoffman is not an employee, but an independent contractor.

## IV. ANALYSIS

Based on the preponderance of credible evidence, the ALJ finds Ms. Hoffman was intoxicated on the licensed premises. However, because Ms. Hoffman was off-duty at the time she was intoxicated, the ALJ recommends that no action be taken against Respondent's permit.

Regarding the finding of intoxication, it is undisputed that Ms. Hoffman was intoxicated. TABC agents observed that Ms. Hoffman had a strong odor of an alcoholic beverage on her breath, bloodshot eyes, slurred speech, and swaying stance. After making these observations, Agent Gonzales administered the Horizontal Gaze Nystagmus test, observing five clues of intoxication out of six possible clues. Moreover, Mr. Mahaffey believed Ms. Hoffman was intoxicated, although he believed the intoxication was due to the introduction of drugs and not alcohol. Considering all of the observations reported by Agent Gonzales and the testimony of Mr. Mahaffey, the ALJ finds Ms. Hoffman was intoxicated on the licensed premises.

As for Ms. Hoffman's employment status, it is undisputed that Ms. Hoffman works as a dancer for Respondent. To be employed by Respondent, Ms. Hoffman completed a requisite Application for Employment. Although Ms. Hoffman does not receive a salary from Respondent, she receives compensation in the form of tips from customers. Respondent also provides a dressing room for dancers and monitors their activities and behavior. Finally, while a dancer may set her own schedule, Respondent has the ability to keep or turn her away when she arrives for work. Therefore, the ALJ finds Ms. Hoffman was an agent, servant, or employee of Respondent. Respondent may be responsible for her actions while she is performing her duties as an agent, servant, or employee.

The ALJ will now address the relevance of Ms. Hoffman's intoxication. On May 22, 2010, Ms. Hoffman started her shift at 10:30 p.m. However, it is uncontroverted that she stopped working around 11:30 p.m. or midnight, an hour and a half prior to making contact with TABC agents. When TABC agents first observed Ms. Hoffman, she was exiting the front door. This is consistent with Mr. Mahaffey's statement and testimony that Ms. Hoffman was allowed to wait and that she left when her ride arrived. Petitioner argued that Respondent violated Code § 11.61(b)(13) by allowing Ms. Hoffman's presence on the premises while she was intoxicated. There was no evidence that Ms. Hoffman was performing her job duties while intoxicated. To the contrary, the evidence was that as soon as Mr. Mahaffey noticed her behavior to be wild, he removed her from the dance floor. He then determined she was intoxicated because of her belligerent and irrational behavior. Due to her intoxication, Mr. Mahaffey told Ms. Hoffman and the D.J. that she was not allowed back to work. Her belongings were packed and she was allowed to call and wait for her ride. At that point, Ms. Hoffman was no longer acting in the scope of her employment, and her off-duty status places her in the same position as any other patron in the bar. Although Petitioner did not allege a violation of Code § 104.01 (5)[1], Respondent argued that it is unsafe to eject an intoxicated person from the licensed premises. Since a 1989 amendment to that section, it is no longer a violation to permit an intoxicated person to remain on the premises. It was determined that it was unsafe to eject an intoxicated person from the premises. Under these circumstances, the ALJ finds Respondent acted

[1] Code § 104.01 prohibits a retailer, his agent, servant, or employee from being intoxicated on the licensed premises.

reasonably and appropriately by removing Ms. Hoffman from her duties, having her call a responsible person to drive her home, and ensuring she was not a danger to herself or others. But for the agents asking Ms. Hoffman to come back inside the business, she would not have been on the licensed premises. At the time the agents observed her intoxication Ms. Hoffman was not acting in the scope of her employment and had been off-duty for almost an hour and a half. She remained on the licensed premises only to secure a safe ride home.

Because Ms. Hoffman was off-duty and not acting in the course and scope of her employment while intoxicated on Respondent's premises, the ALJ finds that Respondent was not in violation of the Code. The ALJ recommends that TABC take no action against Respondent's permit.

## V. PROPOSED FINDINGS OF FACT

1. 13335 Duluth Restaurant and Bar LLC d/b/a La Chatte (Respondent) holds a Mixed Beverage Permit, MB566538, with accompanying Mixed Beverage Late Hours Permit, LB566539, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 13335 Duluth, Houston, Harris County, Texas.

2. Respondent's permit was issued on October 15, 2004.

3. On May 22, 2010, Alexandria Hoffman was employed by Respondent as a dancer, and Richard Mahaffey was Respondent's general manager.

4. On that date, Ms. Hoffman came to work on Respondent's premises at 10:30 p.m.

5. At approximately 11:30 p.m. or midnight, Mr. Mahaffey observed some wild behavior, eventually leading him to believe Ms. Hoffman was intoxicated. He removed Ms. Hoffman from the dance floor and prevented her from returning to work.

6. Ms. Hoffman was given her belongings and allowed to wait for a friend to take her home.

7. At 1:15 a.m., TABC agents observed Ms. Hoffman leaving the premises, accompanied by her friend, and displaying signs associated with intoxication.

8. Ms. Hoffman had a strong odor of an alcoholic beverage on her breath; bloodshot eyes; slurred speech; swayed stance; and admitted to alcoholic beverage consumption.

9. Ms. Hoffman also displayed five clues of intoxication out of six possible clues on the Horizontal Gaze Nystagmus test.

10. Ms. Hoffman was intoxicated on Respondent's premises.

11. While intoxicated on Respondent's premises, Ms. Hoffman was not acting in the course and scope of her duties as Respondent's agent, servant, or employee.

12. Following its investigation, TABC cited Respondent for allowing an intoxicated employee on the licensed premises.

13. On February 25, 2011, TABC staff (Petitioner) issued its notice of hearing, directed to Respondent at its address of record.

14. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

15. On May 13, 2011, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Lindy Hendricks at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Harris County, Texas.

16. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared through its attorney, Paul Decuir, Jr.

17. The record closed on May 13, 2011.

## VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.61.

2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.

3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.

4. While intoxicated on Respondent's premises, Ms. Hoffman was not a "permittee" or "employee" as those terms are contemplated by TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13).

5. TABC should take no action against Respondent's permit.

SIGNED July 6, 2011.

LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**TABC DOCKET NO. 599022**

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|---|---|---|
| **TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner** | **§** | **BEFORE THE TEXAS** |
| **VS.** | **§** | |
| **13335 DULUTH RESTAURANT AND BAR, LLC D/B/A LA CHATTE, Respondent** | **§** | **ALCOHOLIC** |
| **PERMIT NOS. MB566538, LB566539** | **§** | |
| **HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-11-3550)** | **§** | **BEVERAGE COMMISSION** |

## ORDER

**CAME ON FOR CONSIDERATION** this 18th day of January, 2012, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Lindy Hendricks presiding. The hearing convened on May 13, 2011 and the SOAH record closed on that same date. The Administrative Law Judge issued a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on July 7, 2011. 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 ALJ finds that Alexandria Hoffman was an agent, servant or employee of Respondent, and that Ms. Hoffman was intoxicated on Respondent's licensed premises. However, because Ms Hoffman "was off-duty and not acting in the course and scope of her employment while intoxicated, the ALJ finds that Respondent was not in violation of the Code."

Alcoholic Beverage Code (Code) §1.04(11) defines "permittee" as a person who holds a permit under the Code, "or an agent, servant, or employee of that person". This definition of "permittee" applies to Code §11.61(b)(13). By adding certain other persons as "permittees" in Code §11.61(a) for purposes of Code §11.61(b), the Legislature did not delete those persons already included by Code §1.04(11).

In this matter, the Code is unambiguous. It is not necessary to decide whether the employee is on the clock in order to decide whether she is treated as the permittee. The Code does not contain that proviso. Nor does the Code require that an employee be engaged in the

work she is hired to do in order for her to be treated as the permittee. Therefore, just as the person who holds the permit is responsible under the Code regardless of whether he is engaged in work related to the permit, so too is an employee. The test the ALJ really applied is whether a person who is "in the course and scope of her employment" was intoxicated on the premises. But that is not the test that the Code imposes.[1] Regardless of whether alcoholic beverages are currently being sold or served, a permit holder who is intoxicated on the premises is clearly in violation of the Code. And nothing in the Code suggests that the Legislature intended to differentiate employees from permit holders in this regard. Indeed, the intent not to differentiate employees from permit holders in this regard is evidenced by the plain wording of the Code.

It is not necessary to explore what the Legislature intended when it eliminated language in Code §104.01(5) that made it an offense for a person authorized to sell beer at retail (or his agent, servant, or employee) to permit "an intoxicated person to remain on the licensed premises". It is no longer an offense for either the permit holder or his employee to *permit an intoxicated person to remain on the licensed premises*. That is not the allegation here. However, when the Legislature decided it would not be an offense if the permit holder (or his agent, servant or employee) permitted an intoxicated person to remain on the premises, it did not change the law that prohibits the permit holder himself (or his agent, servant or employee) from *being intoxicated on the licensed premises*.

The ALJ apparently finds it significant that "But for the agents asking Ms. Hoffman to come back inside the business, she would not have been on the licensed premises". However, the ALJ also notes that "When TABC agents first observed Ms. Hoffman, she was exiting the front door". In other words, she was in the process of leaving the licensed premises on which she was intoxicated. The offense did not occur when the agents escorted her back into the club. It had already occurred inside the club that she was in the process of leaving.

Regardless of whether not being within the "course and scope of employment" when intoxicated upon the premises would provide an exception to liability under the Code, that was not the situation in this case with Ms. Hoffman. As recited in the PFD (at page 3), Richard Mahaffey (the manager of the club) told Agent Peter Gonzales that Ms. Hoffman appeared fine when she arrived at work at 10:30 p.m. Around 11:30 p.m. to midnight, Mr. Mahaffey "noticed a few patrons were getting too wild with Ms. Hoffman. The patrons were ordered to leave and Ms. Hoffman was forced to take a break. *During her break, Mr. Mahaffey noticed her intoxication.*" [Emphasis added] Mr. Mahaffey testified (see PFD at page 4) that "he noticed Ms. Hoffman laying on something and acting wildly. He made her get off the dance floor and brought her to the dressing area." In other words, Mr. Mahaffey saw she was intoxicated while working and made her stop working because of it. Thus, Ms. Hoffman was intoxicated on the premises in violation of the Code even if being in the course and scope of employment were a condition of the violation.

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[1] As stated in *TABC v. Maria Flores d/b/a Club Centenario*, SOAH Docket No. 458-06-0903, PFD 6/7/2006, page 7: "If the legislature had intended a course and scope of employment requirement in Tex. Alco. Bev. Code §§11.61(b) and 104.01(5), it could have included such a requirement."

The ALJ states that it is "unsafe to eject an intoxicated person from the premises", but finds that "Respondent acted reasonably and appropriately by removing Ms. Hoffman from her duties, having her call a responsible person to drive her home, and ensuring that she was not a danger to herself or others". In other words, Respondent was ejecting an intoxicated person from the premises, albeit in a responsible manner. If Ms. Hoffman had no employment affiliation with Respondent and was truly just a patron, there would be no reason to remove her from the premises until it was safe to do so. Thus, as to how Respondent treated an intoxicated person on its premises, the employee was being treated just as any other intoxicated patron should be treated. That is appropriate.

But, focusing on whether an intoxicated person is treated safely misses the mark and does not reflect either the law or policy that the Legislature has decided. The offense of being intoxicated on the premises is committed when the permit holder, agent, servant or employee is intoxicated and is on the premises. The policy is for neither the permit holder nor an agent, servant or employee of the permit holder to be intoxicated on the premises in the first place.

If a permit holder, or an agent, servant or employee thereof, is intoxicated on the premises, the permit itself is in jeopardy of being suspended or cancelled under Code §11.61(b)(13). This should provide an incentive for the permit holder himself not to be intoxicated on the premises and not to allow an agent, servant or employee to be intoxicated on the premises. The incentive for the agent, servant or employee is to remain employed by not endangering his employer's permit.

In addition, if a permit holder or an agent, servant or employee thereof is intoxicated on the premises, then the permit holder, or the agent servant, servant or employee thereof (i.e., whichever one of these is the one intoxicated on the premises) has violated Code §104.01(5).[2] Under Code §1.05(a), a violation of any provision of the Code for which no specific penalty is provided (including §104.01(5)) is a misdemeanor punishable by a fine of $100 to $1,000 and/or by up to a year in county jail. That should provide additional incentive for the permit holder. Likewise, it should also provide a stronger incentive directly for the agent, servant or employee, since that person would be guilty of a misdemeanor offense by being intoxicated on the premises.

The consistent language of Code §§11.61(b)(13) and 104.01(5) (i.e., including agents, servants and employees as "permittees") evidences a coherent, reasonable policy determination by the Legislature that the persons who are licensed by the State to sell alcohol should: (1) not themselves be on their licensed premises when they are intoxicated; and (2) not allow their agents, servants or employees to be intoxicated there. The underlying premise is that the permit holder can indeed prevent his agents, servants and employees (as well as himself) from being intoxicated on the premises. If they are intoxicated when they arrive, he can prevent them from entering. Once they are on the premises, he can monitor them to prevent them from becoming intoxicated. He can also make it a condition of their agency, servitude or employment that they not be intoxicated on the premises where they work, regardless of whether they are on duty.

[2] This section applies to persons authorized to sell beer at retail, and their agents, servants and employees.

If nothing else, allowing an agent, servant or employee to be intoxicated on the premises, even when they are not on the clock, is some evidence that the permit holder is not serious about controlling intoxication on the premises. If he is not willing or able to control whether his own agents, servants or employees are intoxicated on his premises, then how willing is he to keep patrons who are not affiliated with him from becoming intoxicated? The permit holder certainly has enough authority over the off-duty actions of an employee on the licensed premises to enforce the Code.

As the PFD notes, "Respondent argues that penalizing its action would send a message to businesses to eject intoxicated people from the licensed premises, contrary to public policy and at the risk of public safety". In fact, the message being sent to businesses is to follow the law by not allowing employees, agents or servants to be intoxicated on the premises. How they are ejected then does not become an issue. Because *the violation has already occurred* when the employee becomes intoxicated on the premises, it is not even a question of requiring the employee to be ejected from the premises to avoid a violation. No further or additional violation occurs by allowing the already intoxicated employee to remain on the premises. If the business is concerned enough about *getting caught* with an intoxicated employee on the premises that it is willing to try to avoid liability under these Code provisions by unsafely ejecting her, after allowing her to become intoxicated, then the business is assuming responsibility (and possibly other criminal or civil liability) if she harms herself or another. Clearly, what the Commission encourages, and the message being sent by this decision, is to not allow the intoxication in the first instance.

In light of the foregoing, **Proposed Conclusions of Law Nos. 4 and 5 are deleted, and the following are substituted in their stead:**

4. While intoxicated on Respondent's premises, Ms. Hoffman, as Respondent's employee, was a "permittee" under Tex. Alco. Bev. Code §§11.61(b)(13) and 1.04(11).

5. Respondent violated Tex. Alco. Bev. Code Ann. §11.61(b)(13) and its permit should be suspended for eight (8) days or, in lieu thereof, it should be allowed to pay a civil penalty in the amount of $2,400.00.

The changes to Proposed Conclusions of Law Nos. 4 and 5 are made pursuant to Government Code §2001.058(e)(1) because the ALJ did not properly apply or interpret applicable law, as explained above.

The change to Proposed Conclusion of Law No. 5 is made to impose the appropriate sanction, in light of new Conclusion of Law No. 4 that the Code prohibition on a permittee being intoxicated on the licensed premises applies to an employee of the permit holder.

The sanction imposed here is considerably below the sanction that Commission Rule 34.2 authorizes (i.e., 17-25 days for a first violation). Under Commission Rule 34.1(j), the sanctions authorized in Commission Rule 34.2 are not binding in this case. Under Code §11.64(b) & (c)(5), sanctions should be "just under the circumstances" where "the permittee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation".

In this case, a violation did occur. Despite it being the manager's "primary duty" to monitor patrons and dancers, and despite the presence of floor managers, two assistants and the DJ who also monitor the dancers' activities and behaviors, Ms. Hoffman became intoxicated while on the premises (indeed, while working on the premises). Although bartenders and waitresses denied serving Ms. Hoffman drinks, the manager is aware that there could be "customer bargaining" where dancers get customers to provide them drinks. Although Mr. Mahaffey testified that he believed Ms. Hoffman's "impairment" was caused by drugs, Agent Gonzales testified that Ms. Hoffman had a "strong odor of an alcoholic beverage" on her breath when he encountered her leaving the building. In addition, Ms. Hoffman told Agent Gonzales that she had "consumed a Long Island Ice Tea before her shift and then four shots of tequila during her shift". Either the system of monitoring used by the club proved to be inadequate, or the monitoring itself proved to be inadequate. Some sanction for the violation is therefore appropriate.

However, when her intoxication was discovered, Ms. Hoffman was relieved of her duties and was in the process of being sent home after waiting for a ride. Mr. Mahaffey's testimony (see PFD at page 4) is that Respondent "has a TABC-supported policy of not allowing dancers or patrons who may be intoxicated to leave. They are offered food, coffee, a cab ride, or allowed to wait for a ride." Ms. Hoffman called a friend. "Her belongings were placed in a bag and she was allowed to wait in the kitchen area for her ride." Given these circumstances, it is appropriate to adjust the sanction to recognize the actions taken to rectify the consequences of the violation.

The sanction imposed here is "just under the circumstances" of this case but should not be interpreted as setting a new standard for the offense. Nor is it an indication that a violation of Code §11.61(b)(13) does not represent a threat to the public health, safety or welfare.

**Except for Proposed Conclusions of Law Nos. 4 and 5, as discussed above**, I adopt the Proposed Findings of Fact and Conclusions of Law of the ALJ as set forth in the PFD and incorporate them as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on 22nd February, 2012, and shall remain suspended for **eight (8)** consecutive days, **unless** Respondent pays a civil penalty in the amount of **$2,400.00** on or before 14th day of February, 2012.

If this Order is appealed and judgment is issued affirming the Order, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **EIGHTEENTH (18th)** day following the date the judgment is signed and shall remain suspended for **eight (8)** consecutive days, **unless** Respondent pays a civil penalty in the amount of **$2,400.00** on or before the **TENTH (10th)** day following the date the judgment is signed.

This Order will become final and enforceable on the 13th day of February, 2012, unless a Motion for Rehearing is filed **BEFORE** that date.

**SIGNED** this the 18th day of January, 2012, at Austin, Texas.

Sherry K-Cook

Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

**CERTIFICATE OF SERVICE**

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 18th day of January, 2012.

Martin Wilson

Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Lindy Hendricks
**ADMINISTRATIVE LAW JUDGE**
State Office of Administrative Hearings
2020 N Loop West, Ste. 111
Houston, TX 77018
***VIA FACSIMILE: (512) 322-0474***

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d/b/a La Chatte
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Ramona Perry
**ATTORNEY FOR PETITIONER**
TABC Legal Division
***VIA EMAIL***
Ramona.Perry@TABC.State.TX.US

Sandy Higdon
**LICENSING DIVISION**

Lieutenant Marc Decatur
**HOUSTON ENFORCEMENT**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**
**CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 599022 REGISTER NUMBER:**

**NAME: 13335 DULUTH RESTAURANT AND BAR, LLC**

**TRADENAME: LA CHATTE**

**ADDRESS: P.O. Box 541998, Houston, TX 77254**

**DUE DATE: 14th day of February, 2012.**

**PERMITS OR LICENSES: MB566538, LB566539**

**AMOUNT OF PENALTY: $2,400.00**

Amount remitted $_____ Date remitted _____
You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

**Mail this form with your payment to:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**
**P.O. Box 13127**
**Austin, Texas 78711**
**Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

**You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted.** Your payment will be returned if anything is incorrect. You **must** pay the entire amount of the penalty assessed.

**Attach this form and please make certain to include the Docket # on your payment.**

_____
Signature of Responsible Party

_____
Street Address P.O. Box No.

_____
City State Zip Code

_____
Area Code/Telephone No.