

DOCKET NOS. 602068, 607467, 607468,607469, 607472 AND 607708

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
JAMES WILLIAM SCARBOROUGH D/B/A TWO MINNIES, Respondent	§	ALCOHOLIC
	§	
	§	
PERMITS MB105084, LB	§	
	§	
	§	
MCLENNAN COUNTY, TEXAS (SOAH DOCKET NO. 458-12-3238)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 26th day of June, 2013, 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 Tanya Cooper presiding. The hearing convened on October 10, 2012 and the SOAH record closed on December 7, 2012. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 14, 2013. 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. No exceptions were filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision and such Findings and Conclusions are incorporated into this Order as if such were fully set out and separately stated herein.

All motions, requests for entry of Proposed Findings of Fact 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 **July 31, 2013**, and shall remain suspended for **SIXTY (60)** consecutive days **UNLESS** Respondent pays a civil penalty in the amount of **\$18,000.00 ON OR BEFORE July 23, 2013**.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$18,000.00** on or before the **tenth (10th)** day following the date the judgment is signed. If not paid by that date, 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 **SIXTY (60)** consecutive days.

This Order will become final and enforceable on the 20th day of July, 2013, unless a Motion for Rehearing is filed on or before the 19th day of July, 2013.

SIGNED this the 26th day of June, 2013, at Austin, Texas.



Sherry K-Cook, 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 26th day of June, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Tanya Cooper
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6777 Camp Bowie Blvd., Suite 400
Fort Worth, TX 76116
VIA FACSIMILE: 512-322-2061

James William Scarborough

d/b/a Two Minnies

RESPONDENT

641 Ruby Street

Waco, TX 76710

VIA FIRST CLASS MAIL, CMRRR #70120470000133007197

J. David Dickson

ATTORNEY FOR RESPONDENT

220 South 4th Street

Waco, Texas 76701

VIA FIRST CLASS MAIL, CMRRR #70120470000133007203

AND VIA FACSIMILE: (254)776-3591

John W. Sedberry

ATTORNEY FOR PETITIONER

TABC Legal Division

VIA E-MAIL: john.sedberry@tabc.state.tx.us

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 602068, 607467, 607468, REGISTER NUMBER:
607469, 607472, and 607708

NAME: James William Scarborough

TRADENAME: Two Minnies

ADDRESS: 641 Ruby, Waco, Texas

DUE DATE: July 23, 2013

PERMITS OR LICENSES: MB105084 & LB

AMOUNT OF PENALTY: \$18,000.00

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.

On October 10, 2012, a hearing was held before Tanya Cooper, ALJ, at the State Office of Administrative Hearings (SOAH), Waco, Texas. Staff was represented by its attorney, John W. Sedberry. Respondent was represented by his attorney, J. David Dickson. The record closed on December 7, 2012, after the parties filed written closing arguments.

II. LEGAL STANDARDS AND APPLICABLE LAW

TABC may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Alcoholic Beverage Code, a rule of the Commission, or sold or delivered an alcoholic beverage to an intoxicated person. Tex. Alco. Bev. Code § 11.61(b)(1) and (14).

The Commission may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing that the permittee violated a provision of the Alcoholic Beverage Code, a rule of the Commission, or failed to promptly report to the Commission a breach of the peace occurring on the permittee's licensed premises. Tex. Alco. Bev. Code § 11.61(b)(1) and (21).

III. EVIDENCE

A. Sale to Intoxicated Person

At approximately 7:00 p.m. on November 8, 2010, Bobby Hightower and a friend, Chris Hutyra, arrived at Two Minnies. While at Two Minnies, both men consumed alcoholic beverages. Surveillance video shows Mr. Hightower was sold six beers. Shortly after 11:00 p.m., Mr. Hightower and Mr. Hutyra left Two Minnies. Mr. Hightower drove Mr. Hutyra home. Mr. Hutyra was concerned that Mr. Hightower had consumed alcoholic beverages¹ and might not make it into work the next day. He attempted to get Mr. Hightower to stay over that night at his house; however, Mr. Hightower declined to do so.

¹ Mr. Hutyra opined that Mr. Hightower was "buzzed," however no evidence was received to correlate this term in

Mr. Hightower returned to Two Minnies at approximately 11:51 p.m. Surveillance video shows he was served four beers prior to leaving Two Minnies at shortly after 1:00 a.m. Respondent's bartender, Tiffanie Pick, is shown in the video serving beers to Mr. Hightower, but she did not have any specific memory of him. She stated that she is TABC seller/server trained to detect signs of an intoxicated person, and had she noted any characteristics about Mr. Hightower to suggest he was intoxicated, she would have stopped alcoholic beverage service to him.

After leaving Two Minnies, Mr. Hightower crashed his motor vehicle into the back of a UPS tractor trailer. Mr. Hightower was killed from the impact; he sustained significant trauma to his upper body. Police officers investigating the collision found a beer can that was "cool to the touch" in Mr. Hightower's vehicle.

Mr. Hightower's body was transferred to Waco Mortuary. Terry Owens, a Waco Mortuary employee, testified he drew a blood specimen from Mr. Hightower's body using a "blind stick," in which a needle is inserted into the body below the sternum and into the heart. Results from analysis for this blood specimen revealed an alcohol concentration of 0.35 grams of alcohol per 100 milliliters of blood, and Alprazolam, a drug commonly referred to as Xanax. Dwain Fuller, an expert toxicologist, stated that the manner of blood draw used by Mr. Owens was not the correct procedure for obtaining an accurate blood alcohol analysis, particularly in this instance, due to the trauma Mr. Hightower had sustained to his upper body. Mr. Fuller's testimony outlined a number of factors in this instance that could have compromised the reliability of these lab results in relation to Mr. Hightower's true blood alcohol level at the time of his death.²

B. Breaches of the Peace

Several Waco Police Department (Waco PD) officers testified about five instances in which they were either dispatched to Two Minnies or flagged down by individuals for assistance at the licensed

relation to requisite standard of impairment in this case, which is "intoxicated."

² Mr. Fuller discussed that the "blind stick" method may miss the heart entirely and that in the case of severe trauma to the chest, stomach contents may contaminate the entire region causing a blood analysis to reflect a greater level of

premises. These instances occurred on January 25, August 2, October 8, November 8, and November 27, 2011. The requests for police intervention generally resulted from individuals being intoxicated and engaging in fights inside Two Minnies, as well as, on Two Minnies' parking lot. Some instances of fighting resulted in injuries that required medical attention. TABC Agent Doris Board testified that none of the breaches of the peace had been reported to TABC Staff, and would not have been discovered, but for TABC Staff reviewing Waco PD records. Research conducted by Sgt. Jared Wallace, Waco PD, into Waco PD calls for service between May 1, 2011, and April 30, 2012, revealed that Two Minnies held the highest ratio of arrests to calls for service and inspections of any Waco establishments licensed for on-premises consumption of alcohol.

Respondent's owner, James Scarborough, testified that he was aware breaches of the peace were to be reported, but claimed that he thought reporting incidents to the Waco PD was sufficient to fulfill that requirement. Majdi Tannous, Respondent's manager, also testified that he believed reporting breaches of the peace to the Waco PD was the correct course of action. He commented that he kept the Waco PD's telephone number on speed dial.

Randall Yarbrough, a former TABC Assistant Administrator, testified that, from his experience, there was some measure of confusion concerning the exact procedure that TABC licensees and permittees were to use for reporting breaches of the peace. He noted that some TABC field offices accepted reporting to local law enforcement agencies as sufficient, while other field offices held to a stricter standard that reporting must be made directly to the TABC field office where a licensed premises was located.

Respondent's licensing history reveals numerous violations, including sales/service/delivery of alcoholic beverage to a minor, intoxicated persons present on the premises, breaches of the peace, and failure to report breaches of the peace. Prior to the violations that are the subject of this hearing, Mr. Scarborough signed a Settlement Agreement and Waiver of Hearing on January 12, 2010, in which he admitted that several other breaches of the peace had occurred on the licensed premises and that there had been a failure to properly report these breaches. As a result of these violations, Respondent's

alcohol concentration than has actually entered a person's blood stream.

permits were suspended for 36 days, or in lieu of the suspension's imposition, payment of a civil penalty in the amount of \$10,800.00 was authorized. Lt. Victor Kuykendol, a TABC agent, testified that he met with Mr. Scarborough at the time this settlement agreement was entered into and explained about the need to report breaches of the peace to TABC Staff and how to properly report this information to TABC Staff. Moreover, he discussed with Mr. Scarborough that receipt of three or more such violations within a 36-month period could result in cancellation of Respondent's permits.

IV. ANALYSIS

A. Sale to an Intoxicated Person

TABC evidence shows that Mr. Hightower was at the licensed premises, Two Minnies, along with a friend, for several hours on November 10, 2010, where they both consumed alcoholic beverages. Mr. Hightower took his friend home a few hours before his fatal car crash, and although Mr. Hightower's friend opined that Mr. Hightower was "buzzed" at that time, Mr. Hightower's friend did not take any steps to prevent Mr. Hightower from driving away after dropping him off.

One of Respondent's bartenders, who is TABC seller-server trained to detect intoxicated persons, served Mr. Hightower an alcoholic beverage after Mr. Hightower left his friend's home and returned to Two Minnies. This transaction was documented on a security camera at the licensed premises, but she did not specifically recall Mr. Hightower. Accordingly, she did not note any outward signs of intoxication concerning Mr. Hightower, and the video does not depict any characteristics of intoxication about Mr. Hightower.

Over the entire time Mr. Hightower was at the licensed premises, he was served several beers; however, the amount of alcoholic beverage actually consumed by Mr. Hightower was not established. While an analysis of Mr. Hightower's blood alcohol concentration after the crash revealed a blood alcohol concentration at a level in excess of legal limits³, Respondent's expert witness' testimony credibly refuted the reliability or accuracy of the analysis results. The "blind stick" method of obtaining the blood for analysis in this instance was not appropriate due to the upper chest trauma that had

occurred to Mr. Hightower's body during the collision and could have led to the exceeding high analysis result. Moreover, had Mr. Hightower's blood alcohol level actually been at the 0.35 level, outward manifestations of intoxication should have been apparent according to Respondent's expert toxicologist, Mr. Fuller. There was no evidence to establish an observable loss of mental or physical faculties at relevant points just prior to the crash. Consequently, the analysis result is given no weight by the ALJ.

For these reasons, the ALJ finds that TABC Staff's evidence was insufficient to establish that Respondent's employee sold or delivered alcoholic beverage to an intoxicated person. Respondent should only be subject to sanctions when it is shown that a sale of an alcoholic beverage was made to an individual who a reasonable person could see had lost the normal use of his or her mental or physical faculties by reason of the introduction of alcohol. Respondent should not be held accountable for selling to an intoxicated person if that person does not exhibit outward manifestations of impairment sufficient to alert Respondent's employees to that person's intoxicated condition. To do otherwise would be to create strict liability upon licensees.

B. Breaches of the Peace

The evidence presented by TABC Staff established five separate violations of failure to report a breach of the peace. The fact that citations for these violations were issued on the same date is irrelevant. The sequencing of citation issuance occurred in this manner because TABC Staff inadvertently uncovered Respondent's violations while researching Waco PD records. Once aware of the violations, TABC Staff properly issued the appropriate number of citations.

Respondent's position that he was unaware that all breaches were to be reported directly to TABC Staff, as opposed to the Waco PD, lacked credibility; particularly in light of the fact that Respondent signed a Settlement Agreement and Waiver of Hearing on January 12, 2010, that involved the same violation types. In that prior agreement, Respondent admitted that several breaches of the peace had occurred on the licensed premises and that there had been a failure to properly report these breaches. The testimony of Lt. Kuykendol, a TABC agent, clearly established that Lt. Kuykendol

³ The legal limit for intoxication of established at 0.08 grams of alcohol per 100 milliliters of blood.

discussed with Respondent the requirement of reporting all breaches of the peace to TABC Staff and of the consequences of failing to correctly report breaches of the peace.

Respondent's licensing history reveals numerous Alcoholic Beverage Code violations, including those violations the subject of the January 12, 2010, settlement agreement. These violations include other simple breaches of the peace, sale to an intoxicated person, place and manner of operation, intoxicated person on the premises, permitting a minor to possess or consume alcohol, permitting public lewdness, and a variety of other violations for which Respondent received written warnings, permit suspensions, or paid civil penalties. The breaches of the peace that were not reported in this instance are not deemed simple breaches in the ALJ's assessment because some involved injuries to persons that required some medical attention and police intervention to ultimately control. For these reasons, the ALJ recommends sanctions against Respondent as provided for the in following section.

V. RECOMMENDATION

The ALJ recommends that Respondent should not be subject to a suspension or civil fine for selling alcoholic beverages to an intoxicated person. However, Respondent's permits should be suspended for a period of 60 days; or in lieu of any permit suspension, Respondent should be allowed to pay a civil penalty in the amount of \$18,000 for its failure to report several breaches of the peace at the licensed premises.⁴

VI. FINDINGS OF FACT

1. James William Scarborough, d/b/a Two Minnies (Respondent), holds a Mixed Beverage Permit and Mixed Beverage Late Hours Permit (MB 105084) for the premises located at 641 Ruby, Waco, Texas 76710.
2. On November 8, 2010, Bobby Hightower was served several alcoholic beverages at Respondent's licensed premises; however there was no evidence to establish how many alcoholic beverages Mr. Hightower consumed from the premises.
3. After leaving Respondent's licensed premises, Mr. Hightower was killed in a traffic collision

⁴ Tex. Alco. Bev. Code § 11.641 and 16 Tex. Admin. Code § 34.2.

when his motor vehicle struck a UPS truck/trailer; Mr. Hightower sustained numerous injuries, including severe chest trauma.

4. During the collision's investigation, a blood alcohol analysis was performed on Mr. Hightower's blood after that blood specimen was taken from his body using a "blind stick" technique performed by an employee at Waco Mortuary.
5. The "blind stick" procedure is not an appropriate technique for obtaining a reliable blood alcohol concentration result in cases involving significant chest trauma.
6. No evidence was produced to show that Mr. Hightower displayed overt characteristics of a person who was intoxicated while at Respondent's licensed premises.
7. Breaches of the peace occurred at Respondent's licensed premises on the following dates: January 25, August 2, October 8, November 8, and November 27, 2011.
8. These breaches resulted in police intervention by the Waco Police Department (Waco PD) and involved intoxicated individuals fighting inside the licensed premises and on the premises' parking lot.
9. Some persons were arrested by Waco PD officers as a result of these breaches of the peace and persons were injured to the extent of needing medical attention.
10. Respondent did not report any of these breaches of the peace to Texas Alcoholic Beverage Commission (TABC) Staff.
11. In January 2010, Respondent executed a Settlement Agreement and Waiver of Hearing for other breach of the peace violations and a failure to report a breach of the peace violation; at the time of executing that settlement agreement, TABC Staff advised Respondent of proper reporting practices and consequences of failing to report any breach of the peace to TABC Staff.
12. Respondent's licensing history contains multiple violations, including other simple breaches of the peace, sale to an intoxicated person, place and manner of operation, intoxicated person on the premises, permitting a minor to possess or consume alcohol, permitting public lewdness, and a variety of other violations for which Respondent received written warnings, paid civil penalties, or Respondent's permit was suspended for a period of time.
13. On May 8, 2012, TABC Staff issued a notice of hearing to Respondent concerning these alleged violations.
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

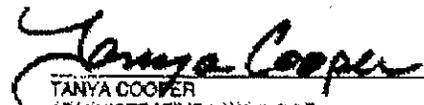
particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

15. On October 10, 2012, a hearing was held before Administrative Law Judge Tanya Cooper at the State Office of Administrative Hearings (SOAH), Waco, Texas. TABC Staff was represented by its attorney, John W. Sedberry. Respondent was represented by his attorney, J. David Dickson. The record was closed on December 7, 2012, after the parties filed written closing arguments.
16. The record in this case does not establish that Respondent's employee sold, served or delivered an alcoholic beverage to Mr. Hightower while Mr. Hightower was intoxicated; it does establish that Respondent failed to report several breaches of the peace to TABC Staff.

VII. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Subchapter B of chapter 5 and § 6.01.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to Tex. Gov't Code ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401.
4. TABC Staff failed to meet its burden of proving that Respondent's employee sold alcoholic beverages to an intoxicated person. Tex. Alco. Bev. Code § 11.61(b)(1) and (14).
5. TABC Staff met its burden of providing that Respondent failed to report five breaches of the peace occurring on the licensed premises. Tex. Alco. Bev. Code § 11.61(b)(1) and (21).
6. Respondent's permits should be suspended for a period of 60 days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of \$18,000, pursuant to Tex. Alco. Bev. Code §§ 11.61(b)(21), 11.64, 11.641, and 28.11 and 16 Tex. Admin. Code § 34.2.

SIGNED January 14, 2013.


TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

