

DOCKET NO. 604110

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
	§	
	§	
VS.	§	
	§	ALCOHOLIC
THREE LEGGED MONKEY LP D/B/A THREE LEGGED MONKEY LP, Respondent	§	
PERMITS MB577069, LB, PE	§	
	§	
EL PASO COUNTY, TEXAS (SOAH DOCKET NO. 458-12-0070)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 29th day of August, 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 (ALJ) Veronica S. Najera presiding. The hearing on the merits convened on August 1, 2012 and the SOAH record closed on September 7, 2012. The Administrative Law Judge issued a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 5, 2012. The Proposal for Decision was properly served on all parties and the parties were given an opportunity to file exceptions and replies as part of the record herein. Exceptions were filed by the Petitioner on November 20, 2012 and on December 5, 2012 Respondent filed a Reply to the Exceptions. On January 11, 2013 the ALJ filed a letter responding to the Exceptions. In this letter, the ALJ recommended that the Exceptions should not be adopted, but does suggest amending Proposed Finding of Fact No. 47.

After review and due consideration of the Proposal for Decision, the Exceptions and Reply thereto, and the Administrative Law Judge's letter responding to the Exceptions, and with the single modification to Finding of Fact No. 47 recommended by the Administrative Law Judge and set forth herein, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

Consistent with the Administrative Law Judge's recommendation, Finding of Fact No. 47 is modified to read:

47. From these six individuals, Ms. Anchondo and Ms. Teran were employees that were working on February 7, 2011.

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.

THEREFORE, IT IS ORDERED that Respondent's Permits **not be suspended or cancelled** in this case.

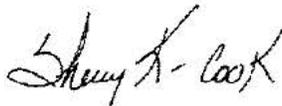
IT IS FURTHER ORDERED that Respondent continue to **comply** with the conditions agreed to by Respondent and Petitioner and that were imposed on Respondent's permits by:

(1) the ALJ in this proceeding by her **November 2, 2011 "Order Memorializing Agreed Additional Conditions on Permit and Denying Condition for Early Closure Based on Common Nuisance"**; and

(2) the **June 2, 2010 "Agreed Order"** in TABC Dockets No. 587647 and 591586, signed by me and referenced in Footnote 1 of the Proposal for Decision.

This Order will become **final and enforceable** on the 19th day of September, 2013, **unless a Motion for Rehearing is filed by the 18th day of September, 2013.**

SIGNED this the 29th day of August, 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 29th day of August, 2013.



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Texas Alcoholic Beverage Commission

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The procedural history of this case is extensive. The parties entered into an Agreed Order in June 2010 (2010 Agreed Order) to settle a protest against applicant's renewal application for the Three Legged Monkey (3LM).¹ On October 25 and 27, 2011, the parties convened for a common nuisance hearing pursuant to Staff's motion for the entry of a temporary order pursuant to Texas Alcoholic Beverage Code (Code) § 81.007.² The primary basis for the requested relief was a breach of the peace that resulted in a death on the establishment's parking lot eight months prior to the common nuisance hearing. The parties reached agreement (2011 Agreed Order) on six of the seven conditions Staff sought to impose on Respondent. The following conditions were agreed to:

1. No unaccompanied minor, under the age of 21, shall be allowed in or upon the licensed premises after 8:00 p.m. No minor, accompanied or not, shall be in or upon the licensed premises after 11:00 p.m. This condition does not apply to Respondent's employees.
2. Respondent shall contract with an independent provider for the services of three security guards to adequately control the parking lot, rear driveway, and other exterior areas of the licensed premises, on Friday, Saturday, and Sunday from 10:00 p.m. through 2:00 a.m.
3. Respondent's security guard(s) and other personnel shall actively prevent loitering in the exterior areas of the premises including, but not limited to, the parking lot and rear driveway.
4. Respondent shall station personnel at or near each unlocked exit or entrance on Friday, Saturday, and Sunday from 10:00 p.m. through 2:00 a.m., to prevent the entry of unauthorized or uncounted persons, and to prevent persons from exiting with alcoholic beverages.
5. Respondent shall prominently place signs on each entrance and exit door informing patrons how to contact the Texas Alcoholic Beverage Commission (TABC) for the purpose of making complaints. The signs are to be provided by the TABC.
6. Respondent shall provide to the TABC weekly reports of the occupancy levels of the premises during business hours reflecting occupancy at hourly intervals. The reports shall be on a form to be promulgated by the Administrator of the TABC or his designated representative. They shall be sworn and verified. The reports shall be delivered to the El Paso TABC office.

¹ Petitioner's Exhibit No. 2. Agreed Order executed June 2, 2010.

² Tex. Civ. Prac. & Rem. Code § 125.001 and Code § 101.70(a)

The above enumerated conditions became effective in October 2011 and are permanently imposed on Respondent's permit. In regard to the remaining unresolved condition seeking to mandate Respondent to close at midnight, the ALJ found a lack of urgency and insufficient evidence showing a reasonable likelihood that a common nuisance existed on the premises that would be abated by early closure; and such request was not granted.³

The hearing on the merits was continued numerous times due to discovery deadline issues. On August 1, 2012, the hearing convened before ALJ Veronica S. Najera, at the State Office of Administrative Hearings (SOAH), El Paso regional office. Petitioner was represented by Staff counsel David T. Duncan. Respondent was represented by Troy C. Brown, attorney. The record closed on September 7, 2012, after receipt of the transcript and written closing arguments.

II. DISCUSSION

A. Staff's Allegations and Evidence

The 3LM is situated in El Paso County and operates under alcoholic beverage permit number MB577069, which includes a mixed beverage permit, a beverage cartage permit, and a mixed beverage late hours permit. The permit was issued in May 2005. In discussing Petitioner's allegations, the ALJ follows the language and order in which they were listed in the Second Amended Notice of Hearing⁴

1. The aggravated breach of the peace⁵ was not beyond the control of Respondent or Respondent's agent, servant, or employee, and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises or premises under Respondent's control.⁶

³ See Order Memorializing Agreed Additional Conditions on Permit and Denying Condition for Early Closure Based on Common Nuisance, issued November 2, 2011.

⁴ Notice of Hearing was issued on September 20, 2011. The First Amended Notice of Hearing was issued on October 14, 2011. The Second Amended Notice of Hearing was issued on March 22, 2012. The ALJ incorporates the allegations as written in the Second Amended Notice of Hearing without any changes.

⁵ An aggravated breach of the peace involves serious bodily injury, death, or a deadly weapon. 16 Tex. Admin. Code § 34.2.

⁶ Code § 28.11 [Breach of Peace] and 11.61(b)(2) [Cancellation or Suspension of Permit].

On February 7, 2011, a fight occurred inside the Three Legged Monkey followed by fighting in the parking lot of the Three Legged Monkey during which Saleel Qaasim caused the death of Alex Quincey by shooting the said Alex Quincey⁷ with a shotgun.

2. Respondent failed to promptly report a breach of the peace occurring on July 20, 2011:⁸

On or about July 20, 2011, a fight [occurred] between Krissiann and at least one other person in the parking lot of the Three Legged Monkey.

3. Respondent conducted business in a place or manner that warrants cancellation or suspension of its permit based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency:

On February 7, 2011, Respondent's conduct and violations of the Code and prior Orders of the Commission warrant cancellation.

4. Respondent violated the 2010 Agreed Order, by failing to "track the number of patrons entering and exiting the establishment in excess of agreed occupancy rate of 500" on February 7, 2011.⁹
5. Respondent violated the 2010 Agreed Order on September 4 and October 9, 2011, by "allowing patrons to enter the named establishment in excess of the agreed occupancy rate of 500 persons."¹⁰
6. Respondent violated the 2010 Agreed Order on February 7, 2011, by "allowing ten minors to remain in the establishment after 8:00 p.m."¹¹ The listed minors are: Isaias Barraza, Jorge Gonzalez, Adesuji Deniyan, Erin McGarrachan, Claudia Anchondo, Rachel Teran, Jennette Luke, Tony Baker, Aimee Ashbridge, and Edgar Copeland.

⁷ The victim is identified in the police report as Alex Gabriel Jaime. See Respondent's Exhibit No. 52 and Petitioner's Exhibit No. 7 at 117.

⁸ Code §61.71(a)(31) [Grounds for Cancellation or Suspension: Retail Dealer] and 11.61(b)(21) [Cancellation or Suspension of Permit].

⁹ Condition number one in the 2010 Agreed Order states "Applicant will agree to reduce his occupancy rate from 695 to 500 persons for purposes of both municipal and TABC enforcement. After 9:00 p.m., Applicant will have a doorperson stationed at the front door with a counter device to track the number of patrons entering and exiting the establishment."

¹⁰ *Id.* 2010 Agreed Order.

¹¹ *Id.* Condition number six states "Applicant will prohibit minors in the establishment after 8:00 p.m."

III. EVIDENCE

A. Petitioner's Direct Case

1. Permittee's Testimony

Petitioner called permittee James Michael Armstrong to testify. He said the establishment is a combination restaurant-bar.¹² There are five interior doors which allow entrance to the 3LM and which exit to an enclosed patio. The patio's main entrance into the establishment is from the parking lot.¹³ The parking lot is shared in common with other tenants of the business strip and the tenants do not have exclusive use of the parking lot. Mr. Armstrong said he does not have the authority to prevent someone from parking in front of his establishment if the person is not going to the 3LM.¹⁴ The entrance of the 3LM is locked at 1:50 a.m. and drink service stops at that time as well.¹⁵

On Super Bowl Sunday, February 7, 2011, the 3LM was at full occupancy and full "hosting staff."¹⁶ Mr. Armstrong refers to the bouncers and security employees as "host staff." The host staff is the inside security component of the establishment.¹⁷ He said the following staff worked on February 7, 2011: Ruiz Security services patrolled the parking lot; two doorpersons were at the front entrance; one Sabaki security person was stationed at the corridor; eight host staff were positioned in zones throughout the 3LM, and three host staff roamed the interior premises.¹⁸ Respondent pays for the parking lot security, but it is contracted through the owner-
lessor, Patriot Place.¹⁹ Preceding the fight inside, Mr. Armstrong saw seven men "together very tight" with hands in the air and simultaneously saw a chair thrown in the air. He immediately went to the area and other host staff responded as well.²⁰ They formed a human wall to separate the individuals. He escorted the man who threw the chair and another individual out the exit

¹² Tr. Vol. 3 at 294.

¹³ Tr. Vol. 1 at 47-49.

¹⁴ Tr. Vol. 2 at 274.

¹⁵ *Id.* at 275.

¹⁶ Tr. Vol. 1 at 40-41.

¹⁷ Tr. Vol. 3 at 191. Volume 3 is the transcript from August 1, 2012.

¹⁸ Tr. Vol. 2 at 247-49 and Tr. Vol. 3 at 299-300.

¹⁹ Tr. Vol. 2 at 244.

²⁰ Tr. Vol. 1 at 98-99.

door to the left side of the patio.²¹ The exit led them into the enclosed patio and eventually they went out into the parking lot.²² Other individuals were removed by host staff.

He perceived that once outside, the individuals wanted to continue to fight, at which point he called the police. He saw a large group on a dirt lot adjacent to the club and he noticed the shooter with a shotgun "coming out of" a vehicle, a red Durango, which was parked in the front parking lot. The victim taunted the shooter verbally and he was fatally shot.²³ Mr. Armstrong estimates five minutes passed between their exits from the interior of the club and the shooting.²⁴

There was testimony about an employee named Christopher Cabral, who is a witness for Petitioner. Mr. Armstrong said Mr. Cabral was fired after he refused to take a polygraph test after \$15,000 was missing from the business.²⁵ Mr. Armstrong further said he was not aware of the incident on July 20, 2011, until it became an issue with the current case.²⁶

2. Officer's Testimony

Officer Ricardo Rodriguez was one of multiple officers who responded to the February 7, 2011 incident and "contained the scene" by not permitting anyone to leave. He said that upon identification, some individuals were determined to be less than twenty-one years of age.²⁷

3. Christopher Cabral's Testimony

Mr. Cabral worked at the 3LM on February 7, 2011. He said the host staff responded to the fight inside by "positioning ourselves between them." He said the parties stopped fighting after they intervened and the groups followed each other outside.²⁸ He said "they were fighting in the street directly in front of the front patio and it didn't go for maybe 15, 20 seconds and one of the guys was hit who ended up being the shooter. He got up and went to his vehicle which

²¹ Tr. Vol. 2 at 252, 254, 257.

²² Tr. Vol. 1 at 100 and Tr. Vol. 2 at 252.

²³ Tr. Vol. 1 at 102-103.

²⁴ *Id.* at 101.

²⁵ Tr. Vol. 3 at 287-88.

²⁶ Tr. Vol. 1 at 104.

²⁷ *Id.* at 118.

²⁸ Tr. Vol. 1 at 135.

was literally parked right next to where they were fighting and pulled out a shotgun."²⁹ He described the position of the shooter and the victim: "The victim was across the street yelling profanities to the shooter." He described a driveway in the parking lot as a street and said the shooter and victim were standing across from each other on the driveway.³⁰

He said Petitioner told him to change the occupancy logs to reflect a lower number³¹ and to recreate the occupancy logs for the time-frame requested by Petitioner after the murder because some dates were missing.³² He confirmed he was fired for drinking on the job and he was accused of theft.³³ Mr. Cabral did not have any knowledge of the July 20, 2011 incident.³⁴

4. Krisiann Danielle Rivera's Testimony

Ms. Rivera testified she went on a limousine ride with fifteen individuals on July 20, 2011. She only knew Gilbert Jorgensen, the person who invited her. They all met at the 3LM. She left her vehicle at the strip parking lot where the 3LM is located.³⁵ The limousine left the 3LM around midnight and proceeded to other bars.³⁶ They were dropped off at the parking lot at 2:30 a.m. to pick up their vehicles.³⁷ They only went back to the 3LM area to get their vehicles.³⁸ The bar was closed when she returned to the parking lot.³⁹ She had a drink thrown at her inside the limousine⁴⁰ and was assaulted upon exiting.⁴¹ She could not identify the individuals who assaulted her, but believed the women who had been part of the limousine party were 3LM employees.⁴² She did not know if any 3LM employees witnessed her assault.⁴³

5. Kerwin Campos' Testimony

²⁹ *Id.* at 135-36.

³⁰ *Id.* 1 at 136.

³¹ Tr. Vol. 2 at 46.

³² *Id.* at 56-58, 66.

³³ Tr. Vol. 1 at 143; Tr. Vol. 3 at 47.

³⁴ Tr. Vol. 1 at 137.

³⁵ *Id.*

³⁶ Tr. Vol. 1 at 162.

³⁷ *Id.*

³⁸ *Id.* at 164, 168, 171.

³⁹ *Id.* at 177.

⁴⁰ *Id.* at 168.

⁴¹ *Id.* at 161-64.

⁴² *Id.* at 163-65, 167, 172.

⁴³ *Id.* at 165.

Mr. Campos was the limousine driver on July 20, 2011. He picked up the client, Mr. Jorgensen, at the Camino Real Hotel, proceeded to another hotel, then to the 3LM to pick up more individuals. He drove them to the Cincinnati bar district and closed down the bars.⁴⁴ There were twenty-two passengers.⁴⁵ As he was driving, he saw a female passenger throw a glass toward Ms. Rivera.⁴⁶ He said the passengers were out of control “yelling and cussing,” and they were combative and belligerent. They were intoxicated.⁴⁷ Mr. Jorgensen asked him not to call the police.⁴⁸ When the parties were exiting the limousine, he saw a female punch Ms. Rivera in the face.⁴⁹ He said there were people in the parking lot, including bouncers from the 3LM, but no one helped.⁵⁰ Specifically, he asked “Could you help me control this situation?” and they responded “it wasn’t their fight to get involved in.”⁵¹ He confirmed the limousine returned to the parking lot at 2:30 a.m.⁵² Mr. Campos said it was his decision to drop them off in front of the 3LM as part of the door-to-door service.⁵³

6. Captain Harold Nanos’ Testimony

TABC agent Captain Nanos interviewed Mr. Armstrong and filed a statement on the interview.⁵⁴ In summation of his testimony, he testified about the parties exiting into the same area and he “believed it could have been handled better.”⁵⁵ Captain Nanos agreed that it was reasonable to separate the parties and to “keep an eye on things to prevent an escalation.”⁵⁶

7. Lieutenant Salvador Morales’ Testimony

TABC agent Lieutenant Morales spoke about what a permittee should do to maintain

⁴⁴ *Id.* at 181, 193.

⁴⁵ *Id.* at 181.

⁴⁶ *Id.* at 182-83.

⁴⁷ *Id.* at 189.

⁴⁸ *Id.* at 184.

⁴⁹ *Id.* at 185.

⁵⁰ *Id.* at 186.

⁵¹ *Id.* at 196.

⁵² *Id.* at 189.

⁵³ *Id.* at 193, 195-96.

⁵⁴ Petitioner’s Exhibit No. 12.

⁵⁵ Tr. Vol. 2 at 49, 56.

⁵⁶ *Id.* at 48.

peace at a bar: first, look for signs of aggression. Then "if it doesn't look dangerous, approach perhaps and maybe see what's going on and then intervene."⁵⁷ If a fight breaks out, permittee should "keep people from getting hurt" and call the police.⁵⁸ He repeated the parties needed to be separated, and qualified it with "if you can."⁵⁹ Upon being asked about sending both parties outside, he said "I think the problem with that is that if you send them both outside you just move the situation outside. I believe that trying to separate them would be the best option if that's available."⁶⁰ He stated: the parties were not separated; the parties should not have been taken outside together;⁶¹ the incident was not handled properly;⁶² the staff never intervened;⁶³ the same individuals involved inside were involved in the shooting;⁶⁴ the staff did not approach;⁶⁵ and the staff did not prevent the escalation.⁶⁶ Lieutenant Moralez acknowledged the difficulty in detecting signs of aggression under the environment of a bar because of the crowd element.⁶⁷ He said "it's very difficult to handle those kinds of things," referring to the fight inside the 3LM.⁶⁸

B. Respondent's Direct case

1. Expert Testimony of Alvino Hernandez

Respondent provided the testimony of Alvino Hernandez, College Adjunct Government Instructor,⁶⁹ who was qualified as an expert in general law enforcement practice and procedure and in security assessment practice and procedure.⁷⁰ He testified he visited the 3LM twice⁷¹ and described in detail the club's set-up. He concluded it was clean, well-lit, well-staffed, well-

⁵⁷ Tr. Vol. 2 at 77.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Tr. Vol. 2 at 78.

⁶¹ *Id.* at 80.

⁶² *Id.* at 78 lines 23-25; at 79, lines 1-2.

⁶³ Tr. Vol. 2 at 79.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Tr. Vol. 2 at 76.

⁶⁸ *Id.* at 48.

⁶⁹ Respondent's Exhibit No. 5, Resume.

⁷⁰ Tr. Vol. 1 at 62-72.

⁷¹ *Id.* at 73.

managed, and compartmentalized into different areas. The areas include a gaming-room, a dance floor with a music platform, bars with large screen televisions, and booths and tables throughout.⁷² Based on his review of the police reports, investigative files, and interviews, he made several conclusions. First, he concluded the level of staffing was appropriate based on the numbers on February 7, 2011. The 3LM had fifteen male individuals assigned to work the floor in a combination of security type work as well as facilitating the serving staff, which was a different group of males and females.⁷³ They were trained in customer service and their job is to keep aisles clear, check bathrooms, assist the service staff, check the doors, take stationary and roving positions, perform roving security, look for signs of arguments, and diffuse issues.⁷⁴ In addition, the permittee actively worked the floor. The occupancy was 455.⁷⁵ It was a ratio of just under thirty patrons per host staff. This ratio excludes the service staff and the permittee.⁷⁶

Second, the act of intervening and separating the parties inside to protect the other patrons was reasonable.⁷⁷

Third, the host staff acted timely based on the time line in the investigative files. He detailed the initial fight inside began at 1:05 a.m., and six minutes later, at 1:11 a.m., the first call to the police was made. In between the fight and the call, the host staff separated the parties and escorted them out. The first call indicated there was a fight in the parking lot. A second call was made to the police at 1:13 a.m., reporting there was a man with a gun.⁷⁸

Fourth, he said there is no consensus in the reports regarding how the patrons exited the 3LM. Mr. Hernandez said the reports in evidence offer conflicting information regarding how the patrons involved in the fight inside were removed. One report indicates one group went out the door near the DJ's booth and the second group out the front door. Another report indicates all eight individuals exited the front door.⁷⁹

⁷² *Id.* at 74-76.

⁷³ Tr. Vol. 3 at 191.

⁷⁴ Tr. Vol. 2 at 195.

⁷⁵ Tr. Vol. 1 at 88.

⁷⁶ *Id.*

⁷⁷ Tr. Vol. 2 at 174, lines 13-14.

⁷⁸ Tr. Vol. 1 at 90-91.

⁷⁹ *Id.* at 91-92.

Fifth, Mr. Hernandez concluded that it was appropriate to take all individuals out to the parking lot to remove them quickly for the safety of the other patrons.⁸⁰ He said there were a lot of people that could have been injured if the situation had escalated inside.

Sixth, Mr. Hernandez further opined that the murder on February 7, 2011, could not have been prevented given the quick sequence of events:

From the time the shooter went to his vehicle, reached in the vehicle, got the shotgun out, the sequence of events appear to have happened in a very, very short period of time. So as far as being able to prevent it, it does not appear that the situation could have been prevented.⁸¹

He also spoke about the lack of predictability associated with the crime of murder. He said:

Murders are regarded as a situation where there's passion. Frequently they are instantaneous, spur of the moment, so far as their preventability goes. It's one of those situations where law enforcement, while it would be nice if we could prevent them, it would be very unrealistic given the tendency of them to occur very quickly, again, their unpredictability.⁸²

2. Agent Mario Ianni

Although Agent Ianni was the agent in charge of the investigation for the current case, he was not called to testify nor was his report offered by Petitioner. Respondent elicited Agent Ianni's testimony. Agent Ianni was not qualified as an expert.⁸³ He also provided his own conclusions. First, he said the 31.M did not have sufficient staff on February 7, 2011.⁸⁴ Second, the fight inside was not broken up because "they were shoving everybody outside."⁸⁵ Third, Respondent took no effort to separate the parties.⁸⁶ He opined "they should have kept one of the groups inside the bar and pushed another group outside."⁸⁷ He also stated:

⁸⁰ *Id.* at 91.

⁸¹ Tr. Vol. 2 at 174.

⁸² *Id.* at 173.

⁸³ Tr. Vol. 3 at 131.

⁸⁴ Tr. Vol. 3 at 150-51.

⁸⁵ *Id.* at 153.

⁸⁶ *Id.* at 172.

⁸⁷ *Id.* at 154.

In my opinion they waited too long to take action to either call the police or to step in to prevent the incident to escalate to a physical chair-throwing fight, and then putting everybody outside to where a death resulted, that is the issue with our investigation.⁸⁸

He testified the reports in evidence do not indicate Respondent noticed signs of aggression from the individuals inside the 3LM.⁸⁹ He did not agree that the witness statement from Richard Gray indicates Respondent noticed signs of aggression and intervened.⁹⁰ He said witness Jacob Lorensy was not involved in the fight inside, although there are discrepancies between the statement he gave to the police and the statement he gave to Agent Ianni.⁹¹ When asked if there was evidence the 3LM employees intervened to break up the fight in Mr. Lorensy's statement, he said "no."⁹² With regard to Anthony Blodgett's statement to the police, which states "they broke it up," Agent Ianni said he had no idea who "they" were.⁹³

IV. ANALYSIS

The law requires the burden be met with regard to each and every element of the alleged statutory or regulatory violation by the applicable standard of proof, which is the preponderance of the evidence standard. This case was not tried by consent, and the ALJ cannot expand the allegations beyond what was specifically plead in the Second Amended Notice of Hearing.

A. The Fights and the Shooting

The following facts are not controverted: a fight occurred inside the 3LM on February 7.

⁸⁸ *Id.* at 158-59.

⁸⁹ Tr. Vol. 3 at 133.

⁹⁰ *Id.* at 134-35.

⁹¹ *Id.* at 136-43. Respondent's Exhibit No. 31, witness statement from Jacob Lorensy given to Agent Ianni.

⁹² Tr. Vol. 3 at 144.

Q. Turn to the second page of your statement, Respondent's Exhibit 31, he says "I then saw two bouncers try to break up the fight and then I saw the two bouncers telling everyone to get out."

A. Yes.

Q. There's evidence isn't there, 3LM employees tried to break up these groups of fighting individuals and get them out of the building. Correct?

A. I disagree with the breaking part.

⁹³ Tr. Vol. 3 at 147-48.

2011; fighting also occurred in front of the main entrance in the parking lot; and Alex Quincey was shot to death by Saleel Qaasim in the parking lot. Petitioner's entire argument on the allegation that the murder was not beyond the control of Respondent and that it resulted from Respondent's improper supervision of the persons permitted to be on the licensed premises, or premises under Respondent's control, centers on the assertion that Respondent should not have escorted the fighting parties outside, and that by doing so, Respondent caused the aggravated breach of the peace.

A review of the evidence reveals that the narrative in the police reports focused on the criminal aspect of the murder, and not on how Respondent handled the fight inside or how he removed patrons to the outside.⁹⁴ This is not the criminal prosecution; the elements of the applicable rule are "beyond the Respondent's control" and "improper supervision." The police reports contain witness statements, some of which were discussed at hearing as part of Respondent's case. Once reviewed in detail, they offer a second-hand report of what the witnesses saw, and shed some light on Respondent's actions. A summation of the relevant sections of their testimony is as follows:

- **Witness Juan Aldaña** said the fight happened between two groups inside the bar and said the "bouncers kicked out the guys."⁹⁵
- **Witness Ronnie Martinez** saw the shooter get hit in the face inside the bar and saw him get hit outside as well.⁹⁶
- **Witness Luis Flores** was part of the door staff when he saw a fight in the parking lot between two groups of males. He said the fight stopped and then the shooter went to his car for the gun.⁹⁷
- **Witness Rudy Arana** is employed by Subaki Security and was working security in the parking lot on February 7, 2011. He assisted the bouncers with the fight inside and escorted a male (male 1) involved in the fight outside. He said that once outside, another male (male 2) began "talking shit to male 1" and then they stopped harassing each other. Then a third guy (male 3) punched male 1 and a fight began. Then things calmed down again. He saw male 1 and male 2 walk to the Durango vehicle. Male 2 pulled out a

⁹⁴ Petitioner's Exhibit No. 7, E. Paso Police investigative report.

⁹⁵ Petitioner's Exhibit No. 7 at 3.

⁹⁶ Petitioner's Exhibit No. 7 at 8.

⁹⁷ Petitioner's Exhibit No. 7 at 22.

shotgun and waived it in the air while a fourth guy (male 4/victim) talked "shit" to them. Male 2 then shot the victim.⁹⁸

- **Witness Jason Doutel Chandler** went to the club with the shooter and another individual. The shooter argued with someone inside the bar, but it was separate from the fight between the two groups. Once outside, one of Respondent's staff helped him by removing two individuals that were on him fighting.⁹⁹
- **Witness Maurice W. Robinson** was the other individual that went to the club with the shooter. He also mentioned the two groups inside the bar fighting. He was hit on the face. He said "security got over there and pulled us apart."¹⁰⁰
- **Witness Anthony Michael Blodgett** told the police that he was not involved in the fight inside but he saw the bouncers break up the fight. He said he was not thrown out. Once outside, his friend was punched and the 3LM staff "broke it up."¹⁰¹ The ALJ notes the statement given to Agent Ianni contradicts the statement to the police. Mr. Blodgett says he did not see anyone from the 3LM intervene.¹⁰² He further states the 3LM staff were standing outside but "he did not see them do anything to break up the fights."¹⁰³ The ALJ further notes the TABC statement contains wording regarding security failures by Respondent that were not in the police statement. The ALJ does not find this witness credible.
- **Witness Mark T. Billups** initially told police he was the victim's brother. He said his brother was assaulted inside and outside the bar. Both times, the bouncers intervened. He said a bouncer stopped him and told him to leave the area before the shooting.¹⁰⁴
- **Witness Isela Higardea** saw the victim fighting inside the bar and confirmed the victim and her boyfriend Mr. Billups were removed from the club by the bouncers.¹⁰⁵
- **Witness Felipe Escalante** was working the door area and was outside when he was told about a fight inside. He ran inside and grabbed two individuals and escorted them to the front door. Other patrons involved were escorted out through the side door. The males he escorted out ran to the middle of the parking lot area and he called 911 at that point.¹⁰⁶
- **Witness Jacob Lorensy** told the police he went to the club with Mr. Blodgett. He told the police they were approached inside by three males asking them if they had a problem. An individual named Crenshaw approached and asked "Is there a problem?" So they were able to walk away while Crenshaw remained speaking with the three individuals.

⁹⁸ Petitioner's Exhibit No. 7 at 28.

⁹⁹ Petitioner's Exhibit No. 7 at 32.

¹⁰⁰ Petitioner's Exhibit No. 7 at 34.

¹⁰¹ Petitioner's Exhibit No. 7 at 36-37.

¹⁰² Respondent's Exhibit No. 32 at 1, Mr. Blodgett's statement to Agent Ianni.

¹⁰³ Respondent's Exhibit No. 32 at 2.

¹⁰⁴ Petitioner's Exhibit No. 7 at 43-44.

¹⁰⁵ Petitioner's Exhibit No. 7 at 46.

¹⁰⁶ Petitioner's Exhibit No. 7 at 48.

Then a fight broke out. He saw three bouncers break off the fight.¹⁰⁷ His statement to Agent Ianni states the fight lasted two-to-three minutes and he saw two bouncers break up the fight.¹⁰⁸

- **Witness Richard Gray** said he was surrounded by some guys inside the bar wanting to fight, at which time, the club owner approached him and tried to calm him down. A fight occurred inside which did not last long. He said the participants were separated and his group went outside.¹⁰⁹
- **Witness Sammie Travis** said he was part of a group that was involved in the inside fight, but he did not fight. He said the bouncers "broke the fight up." His group went outside first because they were removed by the bouncers. The second group followed. When the bouncers noticed a patron had a gun they attempted to get everyone back inside the club.¹¹⁰
- **Witness Liset Domingues** stated to police the bouncers broke the fight up inside and escorted everyone out.¹¹¹

Contrary to Petitioner's assertion, the witness statements all indicate the host staff intervened to break up the fight inside. To conclude otherwise would be to ignore the evidence. The individuals fighting were physically separated from each other and escorted out. There is also evidence Mr. Armstrong was aware of the aggression and intervened before the physical fight. Furthermore, the evidence also indicates the host staff intervened to break up the fight outside the main entrance. The accounts in the witness statements and the accounts given by witnesses at hearing concur regarding host staff intervention. Mr. Armstrong's statement to the police is consistent with his testimony at hearing.¹¹² It would be unreasonable based on the above statements and the testimony at hearing to conclude 3LM staff did not intervene, or took no effort to separate the parties, or break up the fights. It is clear by a preponderance of the evidence they did.

The testimony also reveals the fight inside, the brawl outside, and the shooting were not a continuous event, but separate incidents. First, the witnesses perceived the fights as different events because each fight was stopped by the host staff, and another began at another location.

¹⁰⁷ Petitioner's Exhibit No. 7 at 51.

¹⁰⁸ Respondent's Exhibit No. 31, witness Mr. Lorensy's statement to Agent Ianni.

¹⁰⁹ Petitioner's Exhibit No. 7 at 54.

¹¹⁰ Petitioner's Exhibit No. 7 at 57-58.

¹¹¹ Petitioner's Exhibit No. 7 at 8.

¹¹² Petitioner's Exhibit No. 7 at 24, El Paso Police investigative report.

and with other individuals. Second, the expert witness concluded there were three separate events: the fight inside, the fight by the front door, and the shooting in the parking lot.¹¹³ The ALJ agrees with the expert witness that there was a break in the sequence of events. The shooting incident was a new set of circumstances given the shooter had the time to go to his vehicle with two friends, retrieve a weapon, and confront the victim on the driveway.¹¹⁴ The ALJ further agrees with the expert witness that it was reasonable to assume the shooter was going to the vehicle to depart, thereby indicating a de-escalation of the aggression,¹¹⁵ specifically, because the victim was situated across the parking lot in the driveway area as he challenged the shooter. There was also a group of individuals involved that had been denied entrance to the club for a dress code violation and it appears they were involved in the brawl outside.¹¹⁶ Thus, it is unclear who exactly was involved in the different altercations; the evidence is too contradictory to make this determination. It cannot be concluded the same individuals were involved inside and out.

The testimony also establishes the individuals were escorted out of the interior premises through different doors into the patio and out to the parking lot. There is only one exit out to the parking lot and everyone went out that exit from the patio. Petitioner alleged this was inappropriate, but did not offer a viable alternative. Agent Ianni said one group should have remained inside. In fact, Lieutenant Moralez said "that if one group were to remain inside with other patrons that would cause an entirely different issue."¹¹⁷ The ALJ agrees with the expert testimony that it was appropriate to remove all the individuals from the inside premises to protect the other patrons in the establishment.¹¹⁸ An escalation of the fighting inside posed a great risk to those inside. Everyone agreed that the parties needed to be separated, and under normal situations, two fighters could be escorted out separately, but the February 7, 2011 fight was not a normal situation in that it involved groups, not two individuals.

Expert testimony addressed the spontaneity and unpredictability of the shooting. Mr. Hernandez said "the large majority of homicides occur based on an instance of passion, under the

¹¹³ Tr. Vol. 3 at 203.

¹¹⁴ *Id.* at 199-200.

¹¹⁵ *Id.* at 200.

¹¹⁶ *Id.* at 201. See also Respondent's Exhibit No. 52 at 4.

¹¹⁷ Tr. Vol. 2 at 111, lines 7-14.

¹¹⁸ Tr. Vol. 1 at 91 and Tr. Vol. 3 at 196-97.

influence of intoxication, and at a moment when somebody is extremely angered."¹¹⁹ The hosting staff and the Subaki security guard inside the club do not carry guns because they are not certified peace officers.¹²⁰ Both Petitioner's and Respondent's witnesses testified about the discretion Respondent had to intervene based on the security risk posed.¹²¹ Given these facts, precisely how was Respondent to control the individual who went to his car to retrieve his gun? Based on the facts in evidence, it is unreasonable to propose Respondent could have controlled the shooting, predicted it, or prevented it. The events occurred very fast.¹²²

Based on the relevant and probative facts in evidence, the ALJ concludes Staff failed to prove the murder was not beyond the control of Respondent and that it resulted from Respondent's improper supervision of the persons permitted to be on the licensed premises, or premises under Respondent's control.

B. The July 20, 2011 Incident

The failure to promptly report a breach of the peace allegation is based on an assault that allegedly occurred on July 20, 2011, in the parking lot in front of the 31M. The officer who responded to the call noted that Ms. Rivera was extremely intoxicated and that upon detaining the other female passengers to investigate the assault, Ms. Rivera stated "No it wasn't any of these ugly bitches."¹²³ At hearing, when asked whether anybody from the 31M knew she was being assaulted, she said "I don't want to assume anything."¹²⁴ Ms. Rivera believed the women involved in the assault were 31M employees, but she testified she could not identify them, and they were not working on July 20, 2011.¹²⁵

It is clear from the testimony the July 20, 2011 incident happened after the establishment was closed. The limousine driver said there were still people in the parking lot, including bouncers from the club, but the record has no identifying information of the persons in the

¹¹⁹ Tr. Vol. 3 at 198-99. See also Tr. Vol. 2 at 173.

¹²⁰ *Id.* at 302.

¹²¹ *Id.* at 106.

¹²² Petitioner's Exhibit No. 7 at 22, 34.

¹²³ Petitioner's Exhibit No. 8 at 3; Tr. Vol. 1 at 175.

¹²⁴ Tr. Vol. 1 at 177.

¹²⁵ *Id.* at 178.

parking lot at 2:30 a.m. The relevant factor is that the club was closed. The driver dropped them off at that spot as part of the service. The breach of the peace did not belong to Respondent. He could not possibly be responsible for acts committed after closure in a parking lot that is not exclusive to his patrons. The ALJ does not find a violation.

C. 2010 Agreed Order Alleged Violations

1. Alleged Failure to Track Patrons

Petitioner alleged Respondent failed to “track the number of patrons entering and exiting the establishment in excess of agreed occupancy rate of 500” on February 7, 2011, in violation of an Agreed Order.¹²⁶ What is the basis for the assertion that Respondent did not track the patrons on February 7, 2011? Petitioner did not address this allegation at hearing. Mr. Armstrong testified two staffers were at the front entrance. The evidence establishes Mr. Escalante was a doorperson that night,¹²⁷ as well as Luis Flores.¹²⁸ They both said they were working the front door, which reasonably means they were controlling the entrance of patrons into the establishment. It is in evidence that there were 455 patrons that night which implicates that they were in fact tracking the patrons.¹²⁹ More specifically, Petitioner’s incident report states:

Agent Harold Nanos interviewed and took a sworn statement from Manager/Escalante. Escalante stated he was working the front door because they anticipated a larger crowd than normal. Escalante stated this evening using a hand counter; they were at full capacity of 455 persons [emphasis added].¹³⁰

Staff said they do not have any evidence the club was over occupancy on February 7, 2011.¹³¹ This allegation has not been proven.

¹²⁶ Condition number one in the 2010 Agreed Order states “Applicant will agree to reduce his occupancy rate from 695 to 500 persons for purposes of both municipal and TABC enforcement. After 9:00 p.m., Applicant will have a doorperson stationed at the front door with a counter device to track the number of patrons entering and exiting the establishment.”

¹²⁷ Tr. Vol. 3 at 77. See also Petitioner’s Exhibit No. 7 at 48, and Respondent’s Exhibit No. 52, incident report written by Agent Ianni.

¹²⁸ Petitioner’s Exhibit No. 7 at 22.

¹²⁹ Tr. Vol. 1 at 88.

¹³⁰ Respondent’s Exhibit No. 52.

¹³¹ Tr. Vol. 2 at 16.

2. Occupancy Allegations

Petitioner further alleged Respondent “allowed patrons to enter the named establishment in excess of the agreed occupancy rate of 500 persons” on September 4 and October 9, 2011, in violation of an Agreed Order.” The occupancy log for September 4, 2011, indicates the occupancy rate went beyond 500 beginning at 11:00 p.m. By 1:00 a.m., the occupancy was 791 patrons inside the establishment.¹³² Thus, the ALJ finds one violation on September 4, 2011.

With regard to the October 9, 2011 allegation, Captain Nanos testified that he did not have an occupancy log for October 9, 2011, because the last seizure of logs from the club was on September 15, 2011, which was obviously before the date of October 9, 2011.¹³³ The over-occupancy allegation for October 9, 2011 was withdrawn by Staff.¹³⁴ Staff indicated it would supplement the record, but it did not. Briefly, although Mr. Cabral testified he recreated logs, he was unable to find one in evidence that he recreated.¹³⁵ The ALJ does not find his testimony credible.

3. Minors on Premises Allegation

Petitioner further alleged Respondent allowed ten minors to remain in the establishment after 8:00 p.m. on February 7, 2011. The exact language of condition number six states “Applicant will prohibit minors in the establishment after 8:00 p.m.” There is nothing in evidence indicating how Respondent “allowed” these persons in the establishment. The act of “allowing” as written presumes Respondent did something or permitted them to remain knowing they were under twenty-one. Did they present fake identifications? Were they simply let in after 8:00 p.m.? Were they eating?¹³⁶ What acts constitute “allow”? These questions cannot be

¹³² Petitioner’s Exhibit No. 6, occupancy log for September 4, 2011.

¹³³ Tr. Vol. 2 at 35, 38 and 43.

¹³⁴ *Id.* at 39. Staff said “It appears that somehow we left a copy of the log for October 9th out of the exhibits we provided in advance and so we’re going to withdraw, at this time, the allegation of October 9th for the purpose of this hearing today and that way we can, before the next hearing, we’ll try and get him copies of that log.”

¹³⁵ Tr. Vol. 3 at 69-71.

¹³⁶ This issue was addressed with the amplification of the wording contained in the October 2011 agreement, which now states: “No unaccompanied minor, under the age of 21, shall be allowed in or upon the licensed premises after 8:00 p.m. No minor, accompanied or not, shall be in or upon the licensed premises after 11:00 p.m. This condition does not apply to Respondent’s employees.”

answered with the evidence as is.

Furthermore, actual documentation evidencing the age of the individuals alleged to be minors is not in evidence. Petitioner did not independently verify the identification, or if it was done, it was not offered. At hearing, the testimony regarding the minor issue was convoluted. Officer Rodriguez testified from the list, without first-hand knowledge. He said Claudia Anchondo and Jorge Gonzalez did not have identification with them, yet they were determined to be minors. He did not know who or how they were identified.¹³⁷ He said some were identified by their word.¹³⁸ Only two had identification.¹³⁹ The ALJ reviewed the list, and only six persons are singled out as minors: Jorge Gonzalez, Adesuji Deniyen, Claudia Anchondo, Rachel Teran, Jennette Luke, and Tony Baker.¹⁴⁰ From these six individuals, Claudia Anchondo and Rachel Teran were employees that were working on February 7, 2011.¹⁴¹ The number of alleged minors on the list is four, but upon his review of the list at hearing, Officer Rodriguez said only two persons on the list were determined to be minors.¹⁴² The ALJ concludes the list does not bear the satisfactory indicia of reliability because its authors did not testify, statements of third parties are hearsay, it is unknown how they were identified, and Officer Rodriguez did not know either. The burden of proof has not been met.

V. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence does not prove Respondent conducted his business in a manner in violation of the general welfare, health, peace, morals of the people and public sense of decency. Specifically, the burden of proof was not met with regard to: the aggravated breach of the peace; failure to report the breach of the peace on July 20, 2011; failure to track occupancy on February 7, 2011; and the allegation minors were permitted on the premises. The ALJ finds a single occupancy violation on September 4, 2011. This single violation is not sufficient to conclude Respondent conducted his business in a manner

¹³⁷ Tr. Vol. 1 at 120.

¹³⁸ *Id.* at 122.

¹³⁹ *Id.* at 121.

¹⁴⁰ Petitioner's Exhibit No. 7 at 65, list of patrons present and identified on February 7, 2011.

¹⁴¹ Tr. Vol. 3 at 293

¹⁴² Tr. Vol. 1 at 122

contrary to the general welfare, health, peace, and morals of the people and public sense of decency. The ALJ does not recommend cancellation of Respondent's permit.

VI. FINDINGS OF FACT

1. Three Legged Monkey LP d/b/a Three Legged Monkey (Respondent) is situated in El Paso County and operates under alcoholic beverage permit number MB577069, which includes a mixed beverage permit, a beverage cartage permit, and a mixed beverage late hours permit. The permit was issued by the Texas Alcoholic Beverage Commission (Petitioner) in May 2005.
 2. Respondent received proper and timely notice of the hearing. Notice of Hearing was issued on September 20, 2011. The First Amended Notice of Hearing was issued on October 14, 2011. The Second Amended Notice of Hearing was issued on March 22, 2012.
 3. On August 1, 2012, the hearing convened before ALJ Veronica S. Najera, at the State Office of Administrative Hearings (SOAH), El Paso regional office. Petitioner was represented by Staff counsel David T. Duncan. Respondent was represented by Troy C. Brown, attorney.
 4. The record closed on September 7, 2012, after receipt of the transcript and written closing arguments.
 5. The parties entered into an Agreed Order in June 2010 (2010 Agreed Order) to settle a protest against applicant's renewal application for the Three Legged Monkey (3LM).
 6. On October 25 and 27, 2011, the parties convened for a common nuisance hearing pursuant to Staff's motion for the entry of a temporary order pursuant to Texas Alcoholic Beverage Code § 81.007. The primary basis for the requested relief was a breach of the peace that resulted in a death in the establishment's parking lot eight months prior to the common nuisance hearing. The parties reached an agreement on some conditions (2011 Agreed Order).
 7. On February 7, 2011, a fight occurred inside the 3LM between two groups of individuals.
 8. The witness statements all indicate the host staff intervened to break up the fights inside and outside.
 9. The host staff is the inside security component of the establishment.
 10. Host staff and James Michael Armstrong (Permittee) separated the individuals fighting.
-

11. The individuals were escorted out of the interior premises through different doors into the patio and out to the parking lot by host staff and Permittee.
12. There is only one exit out to the parking lot from the patio and everyone exited from that exit.
13. On February 7, 2011, the 31.M had male individuals assigned to work the floor as security. Ruiz Security services patrolled the parking lot; two doorpersons were at the front entrance; one Sabaki security person was stationed at the corridor; eight host staff were positioned in zones throughout the 31.M, and three host staff roamed the interior premises.
14. The level of stalling was appropriate on February 7, 2011.
15. On February 7, 2011, the occupancy was 455.
16. It was appropriate to escort fighting individuals out of the interior premises through different doors into the patio and out to the parking lot to protect the patrons inside.
17. It cannot be concluded the same individuals were involved in the inside and outside fights.
18. The shooting incident was a different event from the fights, given the shooter had the time to go to his vehicle with two friends, retrieve a weapon, and confront the victim on the driveway of the premises.
19. The shooting was a spontaneous and unpredictable incident.
20. The hosting staff and the Sabaki security guard inside the club do not carry guns because they are not certified peace officers.
21. Respondent has discretion to intervene based on the security risk posed.
22. The events on February 7, 2011, occurred very fast.
23. It is unreasonable to propose Respondent could have controlled the shooting, predicted it, or prevented it.
24. The evidence is insufficient to conclude the murder was not beyond Respondent's control.
25. The evidence is insufficient to conclude the murder resulted from Respondent's improper

- supervision of the persons permitted to be on the licensed premises or the parking lot.
26. Krisiann Danielle Rivera partied in a limousine with twenty-two other persons on July 20, 2011.
 27. On July 20, 2011, all the persons met at the 3LM and left in the limousine around midnight.
 28. The limousine took them to other bars.
 29. The limousine returned to the parking lot in front of the 3LM at 2:30 a.m. as part of the door-to-door service.
 30. Ms. Rivera was extremely intoxicated.
 31. Ms. Rivera was assaulted in the parking lot.
 32. Ms. Rivera was unable to identify who assaulted her.
 33. On July 20, 2011, the assault of Ms. Rivera happened after the 3LM was closed.
 34. The persons in the parking lot in front of the 3LM after hours are not identified.
 35. Respondent had no breach of the peace to report on July 20, 2012.
 36. On February 7, 2011, two staffers worked the front door. Felipe Escalante and Luis Flores.
 37. Mr. Escalante used a hand counter to track occupancy on February 7, 2011.
 38. There is not any evidence the 3LM was over occupancy on February 7, 2011.
 39. The occupancy log for September 4, 2011, indicates the occupancy rate went beyond 500 beginning at 11:00 p.m. By 1:00 a.m. September 5, 2011, the occupancy was 791 patrons inside the establishment.
 40. The over-occupancy allegation for October 9, 2011, was withdrawn by Staff.
 41. Documentation evidencing the age of the individuals alleged to be minors on the premises of the 3LM on February 7, 2011, is not in evidence.
 42. Petitioner did not independently verify the identification of the alleged minors on the police list.
 43. It is unclear how individuals were determined to be minors and placed on the list.

44. Officer Ricardo Rodriguez testified from the list, without first-hand knowledge.
45. Officer Rodriguez said only two persons on the list had identification.
46. Only six persons, not ten, are singled out as minors on the list: Jorge Gonzalez, Adesuji Deniyani, Claudia Anchondo, Rachel Teran, Jennette Luke, and Tony Baker.
47. From these six individuals, Ms. Anchondo and Ms. Teran were employees that were working on February 7, 2011, and allowed to be on the premises under the 2011 Agreed Order.
48. The list does not bear the satisfactory indicia of reliability.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code (Code) §§ 5.31 and 5.35.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code §§ 2003.021(b) and 2001.042.
3. Notice of the hearing was provided as required by 1 Tex. Admin Code § 155.401 and Code § 11.63.
4. Based on the Findings of Fact, there is insufficient evidence to prove the murder on February 7, 2011, was not beyond the control of Respondent and that it resulted from Respondent's improper supervision of the persons permitted to be on the licensed premises, or premises under Respondent's control. There is no violation of Code § 28.11.
5. Based on the Findings of Fact, Respondent had no breach of the peace to report on July 20, 2011, since the alleged assault occurred when the 3LM was closed on a non-exclusive parking lot. There is no violation of Code §§ 61.71(a)(31) and 11.61(b)(21).
6. Based on the Findings of Fact, Respondent did not fail to track the number of patrons entering and exiting the establishment in excess of the agreed occupancy rate of 500 on February 7, 2011.
7. Based on the Findings of Fact, the ALJ finds one violation of over-occupancy on September 4, 2011, in violation of the 2010 Agreed Order.
8. Based on the Findings of Fact, there is insufficient evidence to prove Respondent allowed ten minors to remain in the establishment after 8:00 p.m. on February 7, 2011.
9. The ALJ does not recommend cancellation of Respondent's permit.

Signed November 5, 2012.

VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS