

DOCKET NO. 605649 & 609083

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
ARTWORKS TBG INC. D/B/A TEXAS SHOWGIRLS, Respondent	§	ALCOHOLIC
	§	
	§	
PERMITS MB682310, LB, & PE	§	
	§	
	§	
WICHITA COUNTY, TEXAS (SOAH DOCKET NO. 458-13-1058)	§	BEVERAGE COMMISSION

ORDER DENYING MOTION FOR REHEARING

CAME ON FOR CONSIDERATION this 10th day of June, 2014, 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 Robert F. Jones Jr. presiding. The hearing convened on June 14, 2013 and the SOAH record closed on July 26, 2013. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 24, 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. Exceptions were filed by Respondent on October 11, 2013. Petitioner responded on October 25, 2013. On November 14, 2013, the Administrative Law Judge filed a letter declining to amend the Proposal for Decision, the Findings of Fact, or the Conclusions of Law.

After review and due consideration of the Proposal for Decision, Respondent's exceptions, Petitioner's reply thereto, and the Administrative Law Judge's November 14, 2013 letter, on April 29, 2014 I issued an Order adopting the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision and cancelling Respondent's permits.

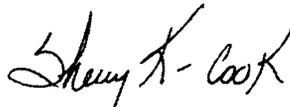
On May 21, 2014, Respondent filed a timely Motion for Rehearing. The Motion for Rehearing, which essentially mirrors Respondent's Exceptions, asserts several grounds for

rehearing: Petitioner did not meet its burden of proof; Petitioner's use of an "apparent employee test", which results in absurd consequences, has been held invalid, is unconstitutionally vague, and punishes innocent conduct in violation of the due process clause; use of meager circumstantial evidence to establish an employment relationship; use of inadmissible hearsay to prove agent, servant and/or employee relationship; inapplicability of spoliation; Respondent's lack of knowledge is a mitigating factor; and Respondent's permits cannot be cancelled under 16 Tex. Admin. Code §§34.1 and 34.2.

Petitioner filed a timely Reply to Respondent's Motion for Rehearing on May 28, 2014.

The grounds asserted in Respondent's Motion for Rehearing are without merit and the Motion is therefore **DENIED**.

SIGNED this the 10th day of June, 2014, at Austin, Texas.



Sherry K-Cook, Executive Director
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 10th day of June, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Robert F. Jones Jr.
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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 Respondent's Mixed Beverage Permit No. MB682310, and the associated Mixed Beverage Late Hours Permit and Beverage Cartage Permit, are hereby **CANCELLED**.

This Order will become final and enforceable on the 23rd day of May, 2014, unless a Motion for Rehearing is filed by the 22nd day of May, 2014.

SIGNED this the 29th day of April, 2014, at Austin, Texas.



Sherry K-Cook, Executive Director
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 April, 2014.



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attorneys of record, Timothy E. Griffith and Staci S. Johnson. The record remained open until July 26, 2013, to allow the parties to file final written arguments and responses.

This contested case involved two incidents. One occurrence, on August 31, 2011, involved an alleged employee of Respondent being intoxicated on the licensed premises (the intoxication incident).¹ The other, on August 21, 2010, involved an alleged employee of Respondent possessing or selling cocaine on the licensed premises (the narcotics incident).² Seven witnesses testified with respect to one or more of the incidents. As a reference, the witnesses and what incident they testified about were:

- **Officer Scott Poole.** Officer Poole is a certified peace officer employed by the Wichita Falls Police Department (WFPD). He testified with respect to the intoxication incident.
- **Officer Karen Wade.** Officer Wade is an officer with WFPD. She testified with respect to the narcotics incident.
- **Officer Dwight Kerr.** Officer Kerr is an officer with WFPD. He testified with respect to the narcotics incident.
- **Agent Jay Todd Carroll.** Agent Carroll is a senior agent with the TABC. He testified with respect to the intoxication incident and general aspects of the allegations made against Texas Showgirls.
- **Agent Craig Bobo.** Agent Bobo is a senior agent with the TABC. He testified with respect to the narcotics incident and general aspects of the allegations made against Texas Showgirls.
- **Nick Makrides.** Mr. Makrides is co-owner of Texas Showgirls. He testified with respect to the narcotics incident and general aspects of the allegations made against Texas Showgirls.
- **David Brooks.** Mr. Brooks is co-owner of Texas Showgirls. He testified with respect to the intoxication incident and general aspects of the allegations made against Texas Showgirls.

¹ Petitioner's Second Amended Notice of Hearing, TABC Docket No. 605649.

² Petitioner's Second Amended Notice of Hearing, TABC Docket No. 609083.

II. APPLICABLE LAW

Staff seeks cancellation of Respondent's permits. The Code authorizes cancellation of a permit if:

the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency;³

Respondent's agent, servant, or employee may not be intoxicated on the licensed premises.⁴ Further, Respondent's agent, servant, or employee, may not possess a narcotic, such as cocaine,⁵ on the licensed premises.⁶ Respondent would commit a "place or manner" violation under § 11.61(b)(7) if Respondent's agent, servant, or employee in the course of conducting Respondent's alcoholic beverage business possessed a narcotic on the licensed premises, and Respondent knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense.⁷

III. EVIDENCE

Texas Showgirls holds mixed beverage permit MB-682310, which includes a beverage cartage permit and a mixed beverage late hours permit. The permit was originally issued by TABC on January 30, 2008, and renewed thereafter. The licensed premises are located at 411 North Scott Avenue, Wichita Falls, Wichita County, Texas.⁸ Texas Showgirls is a bar and a sexually oriented business (SOB). Texas Showgirls is open 7 days a week from 5:00 p.m. to

³ § 11.61(b)(7) of the Code.

⁴ §§ 11.61(b)(13), 1.04(11). of the Code; *see also* § 104.01(5) of the Code (No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts: being intoxicated on the licensed premises).

⁵ Tex. Health & Safety Code § 481.002(29)(D).

⁶ § 104.01(9) of the Code.

⁷ 16 Tex. Admin. Code § 35.31(a)&(b).

⁸ Petitioner's Ex. 1.

2:00 a.m. The building is occupancy-rated for 169 persons. A typical weekday would see 20 to 30 patrons, while a weekend night would draw 40 to 50. Most of Respondent's male clientele are airmen from Sheppard Air Force Base (SAFB).

Texas Showgirls is staffed by a parking lot attendant, a person at the door collecting cover charges, one or two bouncers, one or two bartenders, one or two waitresses, and a disc jockey (DJ). The club has three dancing stages: a main stage and two smaller stages. The main stage is on the wall opposite the front door, and the two smaller stages are on either end of the premises to the left and right of the main stage. The club lighting is dim and the stages are well lit. Another topless club, called Exposé, is located in a corner of the Texas Showgirls parking lot. It is a BYOB club, open from 8:00 p.m. to 3:00 a.m. and is also operated by Mr. Makrides and Mr. Brooks.

A. The Intoxication Incident

1. Officer Poole

Officer Poole is a certified peace officer and has been with WFPD since 1993. He patrols the WFPD "north side" beat, in which the licensed premises is located. This has been his beat for 12 years. He knows Mr. Makrides and Mr. Brooks.

On Wednesday August 31, 2011, at approximately 2:11 a.m., Officer Poole was dispatched to the licensed premises to investigate a disturbance. He observed a black female, later identified as Aston Latoya Tutt,⁹ outside of the club, near the front door. Ms. Tutt was visibly upset and agitated. Ms. Tutt told Officer Poole that she had an argument or confrontation with other persons in the club, and that her bag had been taken or left in the club.¹⁰ Ms. Tutt had the odor of an alcoholic beverage on her breath, staggered walking, was unsteady standing, had slurred speech, and red, watery eyes. Ms. Tutt refused to leave the area and would not tell

⁹ Petitioner's Ex. 9.

¹⁰ Mr. Brooks did not locate a bag belonging to Ms. Tutt in the club. Mr. Brooks testified that no one was allowed to bring anything larger than a purse into the club and no large bags or knapsacks or backpacks were allowed.

Officer Poole if there was anyone she could call to escort her home. Officer Poole believed Ms. Tutt was a danger to herself or others and arrested her for public intoxication.¹¹ Officer Poole testified that the club was closed by the time he arrived and he did not enter the licensed premises and did not speak to Mr. Makrides or Mr. Brooks that night.¹²

Officer Poole took Ms. Tutt to the Wichita County jail. Ms. Tutt told the jailers that she was employed at Texas Showgirls, that she was a stripper, and used the stage name "Sparkle." Officer Poole stated he had no reason to doubt Ms. Tutt's claim but also stated he had never seen her at Texas Showgirls before or after. He testified he would recognize a regular dancer at the club. The basis of Texas Showgirls being listed as Ms. Tutt's place of employment on the booking paperwork was her statement that she was employed there.¹³ Ms. Tutt identified herself by name and date of birth; she did not have any written identification in her possession. After booking, Ms. Tutt was held for about 4 hours then released.

2. Agent Carroll

Agent Carroll has 19-years' experience with the TABC, 17 in Wichita Falls, and is a certified peace officer. He is familiar with Texas Showgirls since its opening. Texas Showgirls is one of two SOBs in Wichita Falls. According to the agent, the premises are on TABC's "priority list," a group of alcohol establishments with records of public safety violations which receive more frequent inspections by the TABC. As a consequence, Agent Carroll has made 30 to 40 visits to the premises, either on routine inspections or for investigations of complaints. He knows Mr. Makrides and Mr. Brooks.

The agent testified that as a part of his duties, he routinely reviews WFPD arrest reports to see if any licensed premises is involved and whether an officer has reported what might be a violation of the Code. As a part of that customary review, he discovered the public intoxication

¹¹ Tex. Penal Code § 49.02(a).

¹² WFPD Officer J. T. Collins apparently briefly entered the club that night and told Mr. Brooks a black female had been arrested. Mr. Brooks testified he had no knowledge who was arrested that night.

¹³ Petitioner's Ex. 9.

arrest of Ms. Tutt on August 31, 2011. His attention was drawn to Ms. Tutt's claim to be employed at Texas Showgirls. Agent Carroll spoke to Officer Poole and obtained a copy of Ms. Tutt's booking sheet.¹⁴ That record indicated that Defendant listed her place of employment as "Texas Show Girls." He tried to locate Ms. Tutt. He discovered her listed home address in the report was a local homeless shelter.¹⁵ He never found Ms. Tutt.

Agent Carroll testified he visited the club on October 1, 2011, on a separate investigation and used the opportunity to inquire about Ms. Tutt. Neither Mr. Makrides nor Mr. Brooks was present. Agent Carroll did not recall asking for them although he agreed he would have spoken to them if they had been there. Agent Carroll recalled that he spoke to Jayson Boyd, who had identified himself to Agent Carroll in the past as a manager of Texas Showgirls. An unidentified black male was also a part of the conversation. Agent Carroll related that the unidentified male said he was a manager as well. The agent's recollection was that Mr. Boyd had indicated Ms. Tutt had worked the night before.

Agent Carroll testified that SOBs such as Texas Showgirls are required to keep a copy of a dancer's identification (such as a driver's license) with a notation of the dancer's stage name.¹⁶ Agent Carroll testified he requested a copy of Ms. Tutt's driver's license during the October 1, 2011 visit, but did not receive one. He did not try to verify if Texas Showgirls had another dancer using the name "Sparkle." A part of Respondent's administrative record, namely a list of dancer's stage names from Texas Showgirls dated September 12 to 18 (no year), listed a dancer named "Sparkle."¹⁷

¹⁴ Petitioner's Ex. 9.

¹⁵ The address listed is 1300 Travis Street, Wichita Falls, Texas. Petitioner's Ex. 9. This is, according to telephone listings, the address of the Wichita Falls Faith Mission.

¹⁶ See Tex. Lab. Code § 51.016(c).

¹⁷ Petitioner's Ex. 2, at 18. There was no year identified in the document.

3. Mr. Brooks

Mr. Brooks was present at the club on August 31, 2011, and interacted with Ms. Tutt. Mr. Brooks denied that Ms. Tutt was an employee of Texas Showgirls. As he recalled the incident, Ms. Tutt was with a group of women from Fort Worth. They had been in the club about 30 minutes when several of Ms. Tutt's group (but not Ms. Tutt) approached him wanting to be dancers at Texas Showgirls. He turned them down. Mr. Brooks believed that Ms. Tutt and her group were in the club about an hour after they had approached him. He did not see her drinking and he did not consider her to be intoxicated based upon his contact with her. Mr. Brooks agreed that Ms. Tutt had a verbal altercation with another group and he asked her to leave. He insisted that Ms. Tutt was emotional, but not intoxicated.

4. The October 1, 2011 Recording

Agent Carroll testified he uses a digital recorder to document his investigations. He turns the recorder on and places it in a shirt pocket. He began the recording at 4:00 p.m. on October 1, 2011. As he entered the club, Agent Carroll asked a female, "Who's here?" The female responded that "neither one," (presumably Mr. Makrides or Mr. Brooks) was present. Agent Carroll announced that he needed to inspect the ladies' dressing room, and requested the female to clear the room for him. There was background music and snatches of conversations for about 4 minutes on the recording, as Agent Carroll presumably inspected the room.

Agent Carroll then specifically asked to speak to Mr. Boyd.¹⁸ Agent Carroll was joined by Mr. Boyd and an unidentified male. Agent Carroll asked the unidentified male, "Are you the manager," and a male voice responded, "Yup." Agent Carroll asked the two about an incident involving lewd conduct about "2 weeks ago" concerning "one of your dancers out of Fort Worth." Mr. Boyd and the unknown male identified the dancer as "Foxy."¹⁹ Asked about the name "Latoya Tutt," Mr. Boyd responded, "I have no idea who that is." Agent Carroll told the

¹⁸ Petitioner's Ex. 10 at 6:45.

¹⁹ Petitioner's Ex. 10 at 7:50.

two that Ms. Tutt was arrested about “3 weeks ago” and that she had an argument with some of the dancers. The unidentified male responded, “Sparkle.” The participants could not agree on a physical description of Ms. Tutt or Sparkle, or the alias she used, which could have also been “Sparkie.” Mr. Boyd stated his understanding that Ms. Tutt was outside talking to the police, that she did not have identification, and that the name “she gave was not matching up in the computer,” so she was arrested.²⁰ The unidentified male stated he had seen “her” back at the club. Agent Carroll did ask if they had a copy of “her” identification, to which Mr. Boyd stated he had “no idea,” if they had a copy of her identification and that he “had not brought it up to her at all,” and referred the agent to “Nick and Dave.”²¹

5. Mr. Makrides

Mr. Makrides testified that Mr. Boyd was not a manager but a DJ. He was aware that Mr. Boyd told others he was a manager. Mr. Makrides only admonished him not to do that.

Mr. Makrides explained that the dancers use stage names which they choose. The names are not registered or protected in any fashion, except that two dancers could not use the same stage name on the same night. Mr. Makrides stated that the list of names on which the name “Sparkle” appeared was not a work schedule but a “commitment list.”

B. The Narcotics Incident

1. Officer Kerr and Officer Wade

On August 21, 2010, Officer Kerr and Officer Wade were part of a joint investigation between WFPD and the Office of Special Investigations (OSI) at SAFB. Investigators at SAFB had discovered that a number of personnel were obtaining drugs (mainly cocaine) from locations in Wichita Falls. The OSI had identified “several” personnel buying cocaine at Texas Showgirls.

²⁰ Petitioner’s Ex. 10 at 8:55-9:25.

²¹ Petitioner’s Ex. 10 at 9:55.

A cooperating witness (CW) had named a dancer named Samantha McDonald as the source of the cocaine at Texas Showgirls.

Officer Kerr (working undercover) and the CW went to Texas Showgirls on Saturday, August 21, 2010, at approximately 9:30 p.m. Officer Kerr recalled that there was a person working the door but did not recall if he and the CW had to pay a cover charge. Officer Wade observed the front door of the premises from the parking lot. Officer Kerr and Officer Wade communicated with each other using text messaging.

Officer Kerr and the CW entered Texas Showgirls and seated themselves at a somewhat isolated table. The suspect, Samantha McDonald, was dancing in a bikini (top and bottom) when they entered. Ms. McDonald approached Officer Kerr and the CW, and the CW introduced Officer Kerr to Ms. McDonald. Ms. McDonald left the table, went to the dressing room of the club, and changed into street clothes. Ms. McDonald returned to the table and collected cash from Officer Kerr and the CW for the purchase of drugs. Ms. McDonald then left the club using the front door. Officer Kerr texted this information to Officer Wade, and included a description of Ms. McDonald.

As Officer Wade received Officer Kerr's text she observed a female matching Officer Wade's description exit the premises by the front door. Officer Kerr observed Ms. McDonald enter a red Dodge Charger that had just parked in the Texas Showgirls lot and remain in it for about 10 minutes. After Ms. McDonald exited the Charger and returned to the premises, the Charger left the parking lot. Ms. McDonald entered through the front door of the building.

Officer Kerr observed that Ms. McDonald entered the club using the front door. Ms. McDonald immediately returned to the dressing room and resumed her costume of a bikini top and bottom. Officer Kerr watched as Ms. McDonald circulated through the premises (but did not dance) before she approached the table. Ms. McDonald delivered several small plastic bags of a white powdery substance which Officer Kerr believed to be cocaine to the CW and returned Officer Kerr's cash to him. She explained that her supplier did not have enough cocaine to cover

the CW's and Officer Kerr's purchase, and that the supplier had left to restock. Officer Kerr informed Officer Wade of this development by text.

Shortly after, Ms. McDonald was alerted that the supplier had returned. Again, Ms. McDonald went to the dressing room of the club, changed into street clothes, returned to the table and collected cash from Officer Kerr, and left the club using the front door. Officer Kerr texted this information to Officer Wade.

Officer Wade, outside, observed the Charger return to the Texas Showgirls lot and saw Ms. McDonald enter the vehicle. The Charger drove around the building out of Officer Wade's sight then back into her vision as it completed a circuit of the building. Ms. McDonald exited the Charger and re-entered the premises. The Charger left the location.

Inside, Officer Kerr watched while Ms. McDonald returned to the dressing room and, having resumed her costume of a bikini top and bottom, danced for two songs on two of the different stages in the premises, and then approached the table. Ms. McDonald delivered a small plastic bag of a white powdery substance which Officer Kerr believed to be cocaine to him. Officer Kerr testified that Ms. McDonald carried the drugs in her bikini top. Ms. McDonald then suggested that Officer Kerr pay for a lap dance, to which Officer Kerr agreed. Ms. McDonald performed a lap dance on Officer Kerr, after which Officer Kerr and the CW left Texas Showgirls.

Officer Kerr believed Ms. McDonald was an employee or dancer at Texas Showgirls because the CW told him she worked there and based upon her dancing there that night. Officer Kerr did not ask Ms. McDonald directly and did not confirm her status with Mr. Makrides or Mr. Brooks.

Officer Wade testified that she met Officer Kerr and the CW after they left Texas Showgirls. She performed a presumptive test on the substance delivered to Officer Kerr and the CW, which was positive for cocaine. A laboratory test confirmed that the substance delivered to

Officer Kerr and the CW contained cocaine.²² Ms. McDonald was arrested and pled guilty to delivery of cocaine.²³

2. Mr. Makrides

Mr. Makrides was adamant that the dancers in the club are not employees. The business does not withhold taxes or provide the dancers with IRS W-2 forms. The dancers pay a \$20 fee to Texas Showgirls to dance and earn money from tips from the patrons. If a person wanted to be a regular dancer at Texas Showgirls she would have to ask Mr. Makrides or Mr. Brooks for permission. She would have to show an identification proving she was 18 years or older. Mr. Makrides acknowledged that the dancers had to follow certain rules, namely, a dancer could not leave the premises during business hours, and cannot change in and out of her street clothes.

Mr. Makrides asserted that Texas Showgirls was a “dance” club and that any women could dance on the stage as the whim struck them. Mr. Makrides stated that this is all about “fun.” He testified that if a woman, not a scheduled dancer, were to get on the stage and dance, the Texas Showgirls employees would do nothing, unless “they tried to get totally naked.” He explained that he had no way to control customers at the club at all times. At most, they could be expelled or black-listed or the police called.

Mr. Makrides testified that Ms. McDonald was not a scheduled dancer or an employee at Texas Showgirls. She did dance at rival SOB Maximus and at Exposé. He explained that Ms. McDonald danced at Exposé at 2:30 a.m. after her stint at Maximus. Mr. Makrides testified it was common for dancers from Maximus to visit Texas Showgirls as patrons on their nights off. He did not recall any event from August 21, 2010. Mr. Makrides asserted that Ms. McDonald’s actions of changing in and out of street clothes did not “sound like the behavior of one of our dancers.” Mr. Makrides noted that dancers at Texas Showgirls do not wear bikinis and are topless at all times.

²² Petitioner’s Ex. 5 and 6.

²³ Petitioner’s Ex. 7.

Mr. Makrides stated that he had not seen drugs sold or used at Texas Showgirls and had no knowledge of Ms. McDonald's activities. He testified that the police came to Texas Showgirls to arrest Ms. McDonald, but ultimately arrested her at Maximus. He noted that SAFB put Texas Showgirls on a restriction as a result of the joint drug investigation, and that the restriction has been lifted.

3. Agent Bobo

Agent Bobo has 25 year of experience with TABC, 12 in Wichita Falls. Agent Bobo is a certified peace officer. He is familiar with the narcotics investigation conducted by Officers Kerr and Wade at Texas Showgirls. He issued and delivered the administrative notice concerning the narcotics arrest to Mr. Makrides and Mr. Brooks by hand on March 14, 2012.²⁴ Since this was a part of an on-going narcotics investigation by another agency, he was unable to access the WFPD reports until March 2012 because the WFPD would not release them until after an indictment was returned against Ms. McDonald.²⁵ He explained that "their case was my case, essentially."

4. The McDonald Affidavit

Mr. Makrides testified he obtained an affidavit from Ms. McDonald through the attorney representing her in the criminal cases that arose out of her sale of cocaine to Officer Kerr and the CW. He did not testify why Ms. McDonald made the affidavit, why the affidavit was given to him, or what (if anything) he gave in exchange for the affidavit. The document is dated August 17, 2012, and states:

In 2010, I was arrested twice for Delivery of Cocaine. On those occasions, I was not an employee of Texas Show Girls and did not work at the club. I worked at Maximus and Exposé, but not Texas Show Girls. The owners, management and employees of Texas

²⁴ Petitioner's Ex. 11, at 6.

²⁵ Petitioner's Ex. 7. The indictment is dated February 6, 2012.

Show Girls had no idea or knowledge that I sold drugs on these two occasions.²⁶

C. Spoliation

On March 14, 2012, Agent Bobo served the administrative notice in the narcotics incident. The notice stated that an “administrative case will be filed.”²⁷ The notice of violation was issued on June 19, 2012.²⁸ After this contested case began, Staff sought discovery by way of a request for production of documents, namely: “all work schedules, timesheets, employee sign in sheets, or other records identifying agents, servants, representatives, contractors, and employees of Respondent working at the premises on the night of August 21, 2010,” and similarly described documents for the night of August 31, 2011. Respondent replied that, “These documents were provided to Respondents [sic] prior counsel and cannot be located at this time.” Steve Swander was Respondent’s former counsel. Mr. Swander died of cancer in November 2012.

Staff filed a motion to compel production of the documents based upon Texas Rule of Civil Procedure 192.7(b),²⁹ which states: “*Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.” Arguing that as the client Respondent had “right to possession of the item that is equal or superior” to its attorney, Staff sought an order from the ALJ compelling production by Respondent, and for additional sanctions under the Texas Rules of Civil Procedure.³⁰ After a hearing on May 10, 2013, the ALJ issued Prehearing Order No. 7. The ALJ found and ordered:

²⁶ Respondent’s Ex. 14.

²⁷ Petitioner’s Ex. 11, at 6.

²⁸ Petitioner’s Ex. 11, at 1.

²⁹ Tex. R. Civ. Pro. 192.7(b)(*emphasis in original*), applicable under SOAH Rule § 155.251(a) and (c).

³⁰ Tex. R. Civ. Pro. 215.2(b) provides for wide ranging sanctions which are intended to be tailored to fit the particular discovery abuse. These sanctions may be imposed by an ALJ. SOAH Rules §§ 155.153(b)(4), 155.157, and 155.251(b).

Respondent has a right to possession of the items requested that is equal or superior to the person who has physical possession of the item requested (Respondent's deceased former counsel Steve Swander or his estate or his personal representative). Respondent is ORDERED to obtain and produce the documents described in **PETITIONER'S REQUEST FOR DISCLOSURE AND PRODCUTION OF DOCUMENTS** categories numbers 6, 7, 11, 12, and 13.³¹

A further hearing was scheduled to allow "Respondent to show cause why sanctions should not be entered."

In response to the order, Respondent provided the ALJ with the affidavits of Diane R. Garcia, executor of Mr. Swander's estate, and Peggy Campos, Mr. Swander's legal assistant. Ms. Garcia had possession, custody, and control of Mr. Swander's legal files related to litigation pending at the time of Mr. Swander's death which had not been transferred to other counsel or returned to the client. Ms. Garcia searched these materials twice and was unable to find anything responsive to Staff's requests. Ms. Campos testified that she did not have possession, custody, and control of Mr. Swander's legal files related to litigation pending at the time of Mr. Swander's death, and had no knowledge or recollection of items responsive to Staff's requests.

Staff replied that notice of the intoxication claim was given to Respondent in October 2011, and notice of the narcotics claim was given in March 2012. Staff demonstrated through discovery materials obtained in another contested case³² that Respondent's work schedules for June to October 2010 were in storage (at least as of February 13, 2012). Staff asserted that Respondent failed to preserve and produce those documents.

After hearings on May 24, 2013, and May 28, 2013, and based upon the explanation and evidence offered by Respondent, the ALJ found that:

³¹ Prehearing Order No. 7 – Compelling Respondent to Obtain and Produce Documents, May 10, 2013.

³² SOAH Docket No. 458-12-3565.

Respondent has shown good cause for not producing the documents described in **PETITIONER'S REQUEST FOR DISCLOSURE AND PRODCUTION OF DOCUMENTS** categories numbers 6, 7, 11, 12, and 13, and that no sanctions will be entered against Respondent for its failure.³³

Staff now asserts that Respondent's failure to preserve the described documents entitled Staff to a presumption that the documents would establish that Ms. Tutt and Ms. MacDonald were Respondent's employees on the dates in question.³⁴ Respondent replied that if Staff made no such claim in its Second Amended Notice of Hearing and that spoliation is not a cause of action on which relief may be granted. Respondent also asserted that no evidence was presented at the hearing of the case to support a spoliation claim. Respondent noted that the ALJ had ruled against Staff on the issue as a pretrial matter and that ruling is "res judicata." Respondent finally argued that its failure to produce the documents was the "direct result" of Staff "failure to timely notify Respondent of the allegations eventually raised in this cause."³⁵

Staff's request for a presumption, which is a substitute for evidence, is founded in the "spoliation" doctrine. The idea is that:

when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it.³⁶

To justify the presumption Staff has to demonstrate: "(1) whether there was a duty to preserve evidence, (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense."³⁷ Respondent would have a

³³ Prehearing Order No. 8 – Compelling Respondent to Obtain and Produce Documents, May 28, 2013.

³⁴ Petitioner's Closing Argument and Brief, at 11-12.

³⁵ Respondent's Reply to Petitioner's Closing Argument, at 4-5.

³⁶ *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721-22 (Tex. 2003).

³⁷ *Miner Dederick Constr., LLP v. Gulf Chem. & Metallurgical Corp.*, No. 01-1100325 (Tex. App.—Houston [1st Dist.] December 6, 2012).

duty to preserve any evidence if it knew or should have known there was a “substantial chance” that an administrative case would be filed and that evidence in its possession or control would be “material and relevant” to that administrative case.³⁸ Respondent had a duty to exercise “reasonable care in preserving potentially relevant evidence.” Respondent can defend against an assertion of negligent or intentional destruction by providing explanations to justify its failure to preserve evidence.³⁹

If the spoliating party intentionally destroyed the evidence, or acted in bad faith, the ALJ is to presume “that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported.” Further the burden of proof shifts to the spoliator to “disprove the presumed fact or issue.” That is, the presumption will not be overcome until the spoliator has disproved the presumed fact or issue by a preponderance of the evidence (a ‘rebuttable’ presumption). On the other hand, if the spoliator was merely negligent, or did not act in bad faith, the presumption is that “the evidence would have been unfavorable to the spoliating party,” has probative value and may be sufficient to support the nonspoliating party’s assertions,” but “does not relieve the nonspoliating party of the burden to prove each element of its case” (an ‘adverse’ presumption). Furthermore, the aggrieved party must “offer some proof about what the destroyed evidence would show.”⁴⁰

Turning to Respondent’s complaints, the pre-hearing order denied sanctions against Respondent for “not producing the documents” requested. Staff now seeks an evidentiary presumption based upon Respondent’s failure to preserve the documents. The pre-hearing order does not preclude Staff’s request, and is not *res judicata*. Second, Respondent is correct that “spoliation” was not pled in the Second Amended Notice of Hearing, and that “spoliation” is not an independent cause of action.⁴¹ The ALJ notes that Staff is requesting an evidentiary presumption and does not assert that action may be taken against Respondent’s permit on account of spoliation, if proved. Contrary to Respondent’s assertion that no evidence was

³⁸ *Wal-Mart* at 721-22

³⁹ *Miner Dederick*, note 37.

⁴⁰ *Trevino v. Oretga*, 969 S.W.2d 950, 958-960 (Tex. 1998)(Justice Baker, *concurring*).

⁴¹ *Trevino v. Oretga*, 969 S.W.2d 950, 952 (Tex. 1998).

received on the issue, evidence was admitted (at least with respect to Ms. McDonald) on a triggering event, *i.e.*, Agent Bobo's service of the administrative notice, and earlier production of discovery in the TABC Dockets discussed above. Other evidence was presented to the ALJ by Staff and Respondent in the course of the pre-hearing, namely the reasons for the delay in the service of the administrative notice in the narcotics case.

Respondent was served with an unambiguous notice that the narcotics incident would result in the filing of an administrative case against it. Respondent was on notice to take reasonable care to preserve "material and relevant" or "potentially relevant evidence" as of March 14, 2012. As Staff argued, the status of Ms. McDonald as an agent, servant, or employee of Respondent was a material issue in the case, and "work schedules, timesheets, employee sign in sheets, or other records identifying agents, servants, representatives, contractors, and employees of Respondent working at the premises on the night of August 21, 2010" would potentially contain relevant evidence or lead to the discovery of relevant evidence on the issue. Respondent's work schedules for June to October 2010 were such documents. Respondent argued that its failure to produce the documents was the result of Staff's "failure to timely notify" of the allegations it eventually made. Respondent was notified of the potential issue on March 14, 2012, irrespective of what was later formally alleged.

Respondent's excuse to avoid the presumption is that the documents were provided to Mr. Swander and cannot be located by his representatives or in Respondent's files. Respondent admitted it did not keep a log or copies of the original documents it sent to Mr. Swander.⁴² In *Petroleum Solutions v. Head*,⁴³ an allegedly defective hose attached to the Plaintiff's underground storage tank was removed by Defendant for "for safekeeping and possible testing." Defendant sent the hose to its expert, who examined the hose and billed Defendant for his time. When Plaintiff requested production of the hose, the expert could not be contacted and the hose was never produced. The court held that Defendant failed to preserve the evidence and an

⁴² Respondent's Response to Prehearing Order No. 7 – Compelling Respondent to Obtain and Produce Documents, May 23, 2013.

⁴³ No. 13-09-00204-CV (Tex. App.—Corpus Christ April 29, 2011).

“adverse” presumption was justified.⁴⁴ In *Walton v. Midland*,⁴⁵ Plaintiff forwarded water samples to his expert for analysis, but failed to pay him as contracted. The expert destroyed his work product and the samples. The appellate court approved a sanction that prohibited Plaintiff from subsequently utilizing the expert.⁴⁶ In *Whiteside v. Watson*,⁴⁷ Defendant’s agent destroyed the originals of Defendant’s driver’s logs. The appellate court approved an “adverse” presumption even though the driver’s carbon copies of his logs were available and admitted into evidence. Since Defendant asserted that the carbon copies had been modified by the driver, Plaintiff had demonstrated prejudice.⁴⁸ The ALJ concludes that Respondent failed to preserve the documents even though they were placed in Mr. Swander’s safekeeping.

Was Staff prejudiced in its ability to present its case? Staff had no direct evidence that Ms. McDonald or Ms. Tutt was an employee of Respondent. Respondent, on the other hand, had the testimony Mr. Makrides and Mr. Brooks, who denied that Ms. McDonald or Ms. Tutt was an employee, and the McDonald affidavit to offer in support of their testimony. Neither Ms. McDonald nor Ms. Tutt appeared and testified. Any proof of a relationship between Respondent and Ms. McDonald or Ms. Tutt would have to come from Respondent. Staff was prejudiced in its ability to present its case.

Should Staff be granted an adverse or a rebuttable presumption? The record contains no evidence that Respondent intentionally destroyed the documents in question, or that Respondent acted in bad faith in delivering the documents to Mr. Swander in response to discovery in a previous contested case. Staff should be granted an adverse presumption that the documents “would have been unfavorable” to Respondent. Considering the record as a whole, what type of

⁴⁴ *Petroleum Solutions, Inc. v Head*, No. 13-09-00204-CV (Tex. App.—Corpus Christ April 29, 2011).

⁴⁵ 24 S.W.3d 853, 861-862 (Tex. App.—El Paso 2000).

⁴⁶ *Walton v. City of Midland*, 24 S.W.3d 853, 861-862 (Tex. App.—El Paso 2000).

⁴⁷ 12 S.W.3d 614, 620-622 (Tex. App.—Eastland 2000).

⁴⁸ *Whiteside v. Watson*, 12 S.W.3d 614, 620-622 (Tex. App.—Eastland 2000).

document should be presumed by the ALJ? The documents presented in the earlier contested case were of two types: sign-in sheets for salaried employees and dancer “commitment” sheets.⁴⁹ Staff has only alleged that Ms. McDonald danced at Texas Showgirls, and was not a bartender, waitress, or the like. The ALJ will, therefore, presume that documents in the form of dancer “commitment” lists bearing Ms. McDonald’s dancer name of “Kendall” for the relevant time period existed.⁵⁰

D. Administrative History

Agent Carroll testified concerning a violation occurring on October 18, 2009, which involved an employee, a dancer named Gloria Hall, who used the stage name “Shadow.” The dancer became intoxicated at Texas Showgirls, left the club, drove about a block, and was involved in a head-on collision. Texas Showgirls received a 30-day suspension of its license, or alternatively a \$9,000 civil penalty.⁵¹ Agent Carroll testified that, assuming the instant case is sustained, the alleged August 31, 2011 violation would be the second violation within 3 years of the October 18, 2009 violation of the code.

Agent Bobo was familiar with three other administrative proceedings against Texas Showgirls. The first occurred on April 19, 2008, the second was on July 8, 2009, and the last on April 26, 2011. All involved possession of drugs on the licensed premises.⁵²

⁴⁹ Petitioner’s Ex. 2, at 10, 11, 14, and 18. Respondent also produced payroll records for its salaried employees. *Id.* at 12.

⁵⁰ For the reasons expressed in the analysis with respect to Ms. Tutt, the ALJ will not indulge in a similar presumption with respect to Ms. Tutt. As one court put it, spoliation “cannot create evidence where none exists.” *U.S. Renal Care, Inc. v. Jaafar*, No. 04-09-00043-CV (Tex. App.—San Antonio, August 31, 2010). The ALJ concludes, below, that Respondent and Ms. Tutt had no business relationship.

⁵¹ Petitioner’s Ex. 1, at 2; 13-17.

⁵² Petitioner’s Ex. 1, at 2.

IV. ANALYSIS

A. Arguments

1. Staff's Arguments

With respect to the intoxication incident, Staff cited Ms. Tutt's assertion that she was a dancer at Texas Showgirls as proof of the allegation that Ms. Tutt was Respondent's employee. Staff also relied on the recording made by Agent Carroll to confirm that Ms. Tutt was the dancer named Sparkle. Based upon that identification, Staff asserts that Ms. Tutt was a dancer at Texas Showgirls during the week of September 12-18, as shown by discovery produced by Respondent in another contested case.

With respect to the narcotics incident, Staff asserts that Ms. McDonald admitted she was working as an entertainer at Texas Showgirls through her guilty plea to the delivery of cocaine. Respondent admitted that Ms. McDonald danced at Exposé, a club owned by Respondent and located in the parking lot of Texas Showgirls. Ms. McDonald's actions on the night in question were "consistent with those a reasonable person would equate with those of an employee."⁵³ Respondent acquiesced in her activity. Staff further argued that "employee" should be given its ordinary meaning.⁵⁴ Accordingly, if Ms. McDonald acted as if she were an employee, she should be treated as an employee under the Code.

Staff argued that Respondent's past history of a pattern of narcotics violations, combined with the activities of Ms. McDonald over a period of months, evidenced that the manner in which Respondent conducts its business warrants suspension of Respondent's permits based upon the general welfare, health, peace, morals, and safety of the people.

⁵³ Petitioner's Closing Argument and Brief, citing *Vela v. State*, 776 S.W.2d 721, 725 (Tex. App.—Corpus Christi 1989, writ denied). The ALJ would note that the defendant in *Vela* was the dancer and not the club owner, who apparently did not testify in the case.

⁵⁴ Citing *Villatoro v. Tex. Alcoholic Bev. Comm'n*, No. 05-12-00444-CV (Tex. App.—Dallas June 3, 2013, no writ).

2. Respondent's Arguments

In response to Staff's assertions regarding Ms. McDonald, Respondent argued there was no evidence that Respondent, acting through Mr. Makrides or Mr. Brooks, had any control over Ms. McDonald or paid her any compensation. Respondent identified the dancers at Texas Showgirls as, "at best, independent contractors." Respondent denied, and asserted the evidence showed, that Ms. McDonald was not an entertainer at Texas Showgirls at all. Respondent notes that the record does not show that Ms. McDonald ever told Officer Kerr she was an employee of Texas Showgirls. Respondent argues that Ms. McDonald's objective behavior demonstrated she was a customer.

Respondent further argued there was no evidence Mr. Makrides or Mr. Brooks knew Ms. McDonald was selling cocaine.

With respect to Ms. Tutt, Respondent argued there was no evidence that Respondent, acting through Mr. Makrides or Mr. Brooks, had any control over Ms. Tutt or paid her any compensation.

B. Analysis

The parties disagree whether the persons ultimately arrested by WFPD were Respondent's agents, servants, or employees. An employee is simply a person who works for another in return for financial or other compensation and is subject to the control of the other person.⁵⁵ An independent contractor, on the other hand, agrees to accomplish a result, the manner of which is left to the contractor's discretion.⁵⁶ The law, as applied by the courts, is not so clear cut.

⁵⁵ *Ackley v. State*, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980, no writ).

⁵⁶ *I Gotcha, Inc., v. Tex. Alcoholic Bev. Comm'n*, No. 2-07-150-CV (Tex. App.—Fort Worth July 31, 2008, no writ). Several factors helpful in distinguishing employees from independent contractors are: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies and material; (3) the hiring party's right to control the progress of the work; (4) the length in time of the employment; and, (5) the method of payment. *Id.*

1. The Intoxication Incident

Staff must prove by a preponderance of the evidence that the following facts are true: Ms. Tutt was Respondent's agent, servant, or employee; Ms. Tutt was intoxicated; and, Ms. Tutt was intoxicated on the licensed premises.

Was Ms. Tutt Respondent's agent, servant, or employee? Evidence in the record that supports a "yes" answer:

- Ms. Tutt told jailers at the Wichita County jail that she was employed at Texas Showgirls, that she was a stripper, and used the stage name "Sparkle."
- Agent Carroll obtained a copy of Ms. Tutt's booking sheet. The record indicates that Defendant listed her place of employment as "Texas Show Girls."
- Agent Carroll's recollection from his October 1, 2011 investigation was that Mr. Boyd had indicated Ms. Tutt had worked at Texas Showgirls the night before.
- A list of stage names from Texas Showgirls dated September 12-18, but with no year identified, includes a dancer named "Sparkle."
- The unidentified male Agent Carroll spoke to on October 1, 2011, identified the woman who was arrested about "3 weeks ago" and who had an argument with some of the dancers as "Sparkle."
- The unidentified male stated he had seen Sparkle back at the club.
- Mr. Boyd stated he had "no idea," if Texas Showgirls had a copy of Sparkle's identification and that he "had not brought it up to her at all."

Ms. Tutt's statement to the jailers and the booking sheet were objected to by Respondent as hearsay. The statements were admitted, not to prove that Ms. Tutt was employed at Texas Showgirls, but to explain the basis of Agent Carroll's further investigation. Agent Carroll's recollection of Mr. Boyd's intelligence that Ms. Tutt had worked at Texas Showgirls the night before is not supported by the recording he produced of that conversation. The statement was made by the unidentified male, and was that he had seen her, *i.e.*, "Sparkle," back in the club.

The ALJ cannot rely on the tape-recorded conversation. The credibility of Mr. Boyd and the unidentified male are problematic. Agent Carroll specifically asked to speak to Mr. Boyd. Agent Carroll may have had some reason in the past to rely upon Mr. Boyd's information. On the other hand, Agent Carroll asked the unidentified male, "Are you the manager?" and he

responded, “Yup.” Agent Carroll never identified the man or related any reason why his unsworn statements should be considered reliable. As far as the record is concerned, nothing grants the unidentified male any credibility.

Further, the identification of Ms. Tutt as the “Sparkle” referred to in the recorded conversation rests upon the assumption that Agent Carroll, Mr. Boyd, and the other man were speaking about the same person. That assumption is untenable in light of the failure of Agent Carroll, Mr. Boyd, and the unidentified male to agree on a physical description of Ms. Tutt or “Sparkle”, or the alias she used, which could have also been “Sparkie.” Further, the ambiguity is heightened by Mr. Boyd’s statement that he did not know Latoya Tutt on the one hand, and, on the other hand, he had “no idea,” if Texas Showgirls had a copy of “Sparkle’s” identification and that he “had not brought it up to her at all.” Mr. Boyd’s statements, unsworn and ambiguous, can be granted little weight

The evidence in the record that supports a “no” answer:

- Ms. Tutt identified herself by name and date of birth; she did not have any written identification in her possession.
- Officer Poole testified that he did not enter the licensed premises and did not speak to Mr. Makrides or Mr. Brooks that night.
- Officer Poole testified he would recognize regular dancers from Texas Showgirls and did not know Ms. Tutt.
- Agent Carroll did not try to verify if Texas Showgirls had another dancer using the name Sparkle.
- Mr. Brooks denied that Ms. Tutt was an employee of Texas Showgirls.
- Mr. Brooks testified that Ms. Tutt did not ask him to be a dancer at Texas Showgirls.
- Mr. Boyd did not recognize the name Latoya Tutt.

The evidence does not show that Ms. Tutt danced at Texas Showgirls on any occasion. Viewing the evidence as a whole, the ALJ cannot find that the credible evidence in the record makes Ms. Tutt Respondent’s agent, servant, or employee, more likely than not.

The ALJ recommends that the TABC deny a suspension or cancellation of Respondent's mixed beverage permit MB-682310 pursuant to §§ 11.61(b)(13) of the Code in TABC Docket No. 605649.

2. The Narcotics Incident

Staff must prove by a preponderance of the evidence that the following facts are true: Ms. McDonald was Respondent's agent, servant, or employee; Ms. McDonald possessed cocaine on the licensed premises; Ms. McDonald possessed cocaine in the course of conducting Respondent's alcoholic beverage business; Respondent knew or, in the exercise of reasonable care, should have known Ms. McDonald possessed cocaine on the licensed premises, or Respondent knew or should have known Ms. McDonald's possession of cocaine on the licensed premises was likely; and, Respondent failed to take reasonable steps to prevent Ms. McDonald's possession of cocaine on the licensed premises.

Was Ms. McDonald Respondent's agent, servant, or employee? The courts have established that the inquiry is not whether an actor conforms to the 'legal definition' of an employee ..., but rather whether there was ... evidence to support the determination that she was an employee, agent, or servant for purposes of establishing a violation" under the Code.⁵⁷

For example, in *TABC v. Top of the Strip*,⁵⁸ TABC agents, based on an informant's tip that an underage dancer was dancing at a SOB, entered the club and found a 15-year-old girl dancing topless on the stage. The club owner testified that a disc jockey, who did not have authority to hire employees for the club, allowed the minor to dance and that she was not an employee. The club's accountant testified that the club did not have any employment records for the dancer. On appeal, the court upheld a finding by the TABC that "[the club] authorized a minor to dance topless."⁵⁹

⁵⁷ *Villatoro v. Tex. Alcoholic Bev. Comm'n*, No. 05-12-00444-CV (Tex. App.—Dallas June 3, 2013, no writ), citing *Melmat, Inc. v. Tex. Alcoholic Bev. Comm'n*, 362 S.W.3d 211, 216 (Tex. App.—Dallas 2012, no writ).

⁵⁸ 993 S.W.2d 242, 249-50 (Tex. App.—San Antonio 1999, pet. overruled).

⁵⁹ *Tex. Alcoholic Bev. Comm'n v. Top of the Strip, Inc.*, 993 S.W.2d 242, 249-50 (Tex. App.—San Antonio 1999,

In *Villatoro v. TABC*,⁶⁰ TABC alleged that the permittee's agent, servant, or employee "solicited or permitted solicitation of a person to buy drinks for consumption" in violation of § 104.01(4) of the Code. Police detectives went to the licensed premises undercover to investigate whether "ficheras" were soliciting drinks. Ficheras are females who entice clients to purchase more alcohol or to stay at the bar in exchange for their companionship. If a drink for a customer cost \$5, the drink for the fischerera would cost \$20, \$5 for the drink and \$15 for the fischerera.

Evidence that was significant to the Court's decision:

- The detective was approached by a young woman who asked if the officer wanted another drink, and if he would buy her a drink.
- The detective had no reason to believe the young woman in question was not employed at the licensed premises because she took the detective's money to the bar, brought the detective a drink like a waitress would, picked up empty bottles and threw them in the trash can, and acted like she was employed.
- The young woman told the detective she worked at the club.
- Employment records were very hard to find for ficheras because they are transient.
- Ficheras were paid in cash so business records were not kept.
- The licensee paid the fischerera no compensation.
- The licensee had no employment records for the young woman.
- The licensee testified in her defense that she did not knowingly allow women to act as ficheras.
- The licensee testified that the young woman was not and had never been her employee, that she had never paid the young woman, that she had no payroll records for the young woman, that she had never controlled, supervised, or discussed work schedules with the young woman, that she had never directed the young woman to do any kind of accounting or other business for the club, and that she had never told the TABC that the young woman was her employee.

TABC contended that it was not required to show that the young woman was an employee of the licensee, but rather that the young woman was an agent, servant, or employee of the licensee for the purposes of § 104.01 of the Code. TABC argued that burden was met because the young woman had apparent authority to act for the club, because she was permitted

pet. overruled).

⁶⁰ No. 05-12-00444-CV (Tex. App.—Dallas June 3, 2013, no writ).

to solicit drinks, approach strangers, obtain drinks from the bar, and hold herself out as an employee. The appellate court agreed.⁶¹

Abstracting a rule from *Top of the Strip* and *Villatoro* requires caution because both cases arose from an administrative decision issued by a SOAH ALJ after a hearing. In each case, the SOAH decision was adopted by the TABC, and was on appeal from the district court to the court of appeals under the substantial evidence rule. Hence, the court's holding in *Top of the Strip*, that "reasonable minds could have concluded that Top of the Strip authorized a minor to dance topless" should be understood in the context of substantial evidence, *i.e.*, that "the court must uphold the agency decision if reasonable minds could have reached the conclusion of the agency," even "if the evidence in the record actually may preponderate against the decision of the agency."⁶² The ruling quoted is not a statement of substantive law.

The ALJ concludes that, under *Top of the Strip* and *Villatoro*, Staff was not required to prove that Ms. McDonald met the strict definition of "agent, servant, or employee."⁶³ Section 104.01 of the Code is an exercise of the state's police power "for the protection of the welfare, health, peace, temperance, and safety of the people of the state [and to] be liberally construed to accomplish this purpose."⁶⁴ Respondent, its agents, servants, or employees, may not possess a narcotic on the licensed premises or permit possession of a narcotic on the licensed premises.⁶⁵ Respondent is under a duty to maintain "exclusive" control over the licensed premises.⁶⁶

The "employee" in *Top of the Strip* and *Villatoro* was permitted by the licensee to solicit drinks or dance, approach strangers, obtain drinks from the bar, and hold herself out as a dancer or employee. Since the licensees in *Top of the Strip* and *Villatoro* were under a duty to maintain "exclusive" control over the premises, their excuse that the women in question were not

⁶¹ *Villatoro*, note 60.

⁶² *Top of the Strip* at 249-50.

⁶³ See *Ackley v. State*, 592 S.W.2d 606, 608 (Tex. Crim. App. 1980, no writ).

⁶⁴ § 1.03 of the Code.

⁶⁵ § 104.01(9) of the Code.

⁶⁶ §§ 11.49(a), 61.51, and 109.53 of the Code.

employees in the traditional sense of the term fell short. If a minor was dancing topless at an SOB, or a fishera was soliciting drinks, it was the licensee's duty to prevent or stop the act.

Was Ms. McDonald Respondent's agent, servant, or employee for purposes of establishing a violation under § 104.01(9) of the Code? Evidence in the record that supports a "yes" answer:

- OSI at SAFB had discovered that a number of personnel were obtaining drugs (mainly cocaine) from Texas Showgirls.
- The CW identified a dancer at Texas Showgirls named Samantha McDonald as the source of the cocaine.
- Officer Kerr observed Ms. McDonald was dancing in a bikini (top and bottom) when he entered Texas Showgirls.
- Officer Kerr observed that Ms. McDonald had access to the dancers' dressing room.
- Officer Kerr observed Ms. McDonald dance for two songs on two of the different stages in the premises.
- Ms. McDonald suggested that Officer Kerr pay for a lap dance, to which Officer Kerr agreed.
- Ms. McDonald performed a lap dance on Officer Kerr.
- Respondent possessed dancer "commitment lists" bearing Ms. McDonald's dancer name of "Kendall" for dates relevant to the investigation.

The evidence in the record that supports a "no" answer:

- Ms. McDonald changed into and back out of her street clothes the two times she left the club and returned.
- Texas Showgirls did not allow a dancer to change in and out of her street clothes.
- Ms. McDonald left the club using the front door.
- Texas Showgirls did not allow a dancer to leave the premises during business hours.
- Ms. McDonald wore a bikini bottom and top.
- The dancers at Texas Showgirls dance topless.
- Texas Showgirls was a "dance" club and any women could dance on the stage.
- Mr. Makrides testified that Ms. McDonald was not a scheduled dancer at Texas Showgirls.

According to Mr. Makrides's testimony, any woman could dance on the stages in any state of dress or undress. Officer Kerr believed Ms. McDonald was an employee or dancer at Texas Showgirls because the CW told him she worked there and based upon her dancing there

that night. Mr. Markrides was at pains to explain that Ms. McDonald was not acting like a dancer at Texas Showgirls because she was not following the rules. The customers at Texas Showgirls (including Officer Kerr) have no reason to know the rules and to judge a putative dancer by the rules. Instead, it was up to the managers to enforce the rules. If it was objectionable to Mr. Markrides and Mr. Brooks for Ms. McDonald to dance wearing a bikini, or to change in and out of clothing in the dressing room, or to perform lap dances, they could have stopped her. Considering the evidence in the light of *Top of the Strip* and *Villatoro*, the ALJ recommends that the Commission conclude that Ms. McDonald was Respondent's agent, servant, or employee for purposes of establishing a violation under § 104.01(9) of the Code.

The ALJ grants no weight to the affidavit signed by Ms. McDonald. Ms. McDonald was not subject to cross-examination. The provenance of the document, how and why it was prepared, by whom, and how it came into Mr. Markrides's possession, are unknown. Further, Ms. McDonald states in the affidavit that she was arrested twice for delivery of cocaine. However, the record shows that she was arrested once for delivery of cocaine (to Officer Kerr and the CW) and once for delivery of marijuana.⁶⁷

Was Ms. McDonald in possession of cocaine on the licensed premises? A preponderance of the evidence shows that the white powdery substance delivered by Ms. McDonald to the CW and Officer Kerr contained cocaine. The chain of custody of the substance from Ms. McDonald to the CW and Officer Kerr, from them to Officer Wade, and from Officer Wade to the laboratory is unbroken. Ms. McDonald was in possession of cocaine on the licensed premises.

Did Ms. McDonald possess cocaine in the course of conducting Respondent's alcoholic beverage business? Mr. Makrides acknowledged that the dancers at Texas Showgirls provide entertainment and the sale of alcohol provides the business's income. To the extent that Ms. McDonald or any other dancer was present to entertain the patrons, she and they were there to further Respondent's alcoholic beverage business, regardless of any other motive Ms. McDonald might have had.

⁶⁷ Petitioner's Ex. 8.

Did Respondent know Ms. McDonald possessed cocaine on the licensed premises? Did Respondent know Ms. McDonald's possession of cocaine on the licensed premises was likely? The only direct evidence on these points is Mr. Markrides's and Mr. Brooks's denial that they knew Ms. McDonald possessed cocaine. Certainly, neither was personally investigated and neither was arrested. The burden was on the Staff to prove those facts by a preponderance of the evidence, and there is no evidence to sustain these two issues.

Should Respondent, in the exercise of reasonable care, have known Ms. McDonald possessed cocaine on the licensed premises? Should Respondent have known Ms. McDonald's possession of cocaine on the licensed premises was likely? The CW's assertion that Ms. McDonald was selling drugs at Texas Showgirls was corroborated by her subsequent sale of cocaine to Officer Kerr and the CW. A reasonable inference from that fact is that Ms. McDonald had been selling drugs at Texas Showgirls in the past. Ms. McDonald's actions in making the sale to Officer Kerr and the CW (dancing in a bikini, twice changing clothes, twice going outside, returning, changing clothes, and delivering the drugs) are evidence of a pattern. A reasonable inference from that pattern is that Ms. McDonald sold drugs at Texas Showgirls in the past in the same way.

Mr. Makrides acknowledged that the dancers had to follow certain rules, namely, a dancer could not leave the premises during business hours, and could not change in and out of her street clothes. Mr. Makrides asserted that Ms. McDonald's actions of changing in and out of street clothes did not "sound like the behavior of one of our dancers." Nevertheless, Ms. McDonald followed that pattern long enough for OSI at SAFB to notice it. The ALJ concludes that Respondent, in the exercise of reasonable care, should have known Ms. McDonald possessed cocaine on the licensed premises, or was doing something that called for further investigation.

Did Respondent fail to take reasonable steps to prevent Ms. McDonald's possession of cocaine on the licensed premises? Mr. Makrides explained that he had no way to control customers aside from expelling or black-listing them or calling the police. However, Mr. Markrides and Mr. Brooks did not investigate and did not prohibit Ms. McDonald from dancing at Texas Showgirls or Exposé.

In summary, Ms. McDonald was Respondent's agent, servant, or employee for purposes of establishing a violation under § 104.01(9) of the Code; Ms. McDonald was in possession of cocaine on the licensed premises; since Ms. McDonald was present to entertain the patrons, she was at Texas Showgirls to further Respondent's alcoholic beverage business; Respondent, in the exercise of reasonable care, should have known Ms. McDonald possessed cocaine on the licensed premises; and, Respondent failed to take reasonable steps to prevent Ms. McDonald's possession of cocaine on the licensed premises. Considering these findings, TABC should conclude that the place or manner in which Respondent conducts its business warrants the cancellation or suspension of Respondent's mixed beverage permit MB-682310, including Respondent's beverage cartage permit and a mixed beverage late hours permit, based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

3. Suspension or Cancellation

A "place or manner" violation under § 11.61(b)(7) of the Code involving possession or delivery of narcotics is a "health, safety and welfare" violation. The Commission's rules set a suspension of 25-30 days or, in lieu of a suspension, a civil penalty of \$300 per day for each day of the proposed penalty. The Commission's rules call for cancellation of a permit for a "subsequent violation."⁶⁸ To result in an enhanced penalty, the subsequent violation must be "a health, safety and welfare violation and [occur] within 36 months of the prior violation."⁶⁹ The record in this case discloses Respondent received a written warning for a violation of

⁶⁸ 16 Tex. Admin. Code § 34.2.

⁶⁹ 16 Tex. Admin. Code § 34.1(g)(1).

§ 11.61(b)(7) of the Code involving possession or delivery of narcotics, which occurred on July 8, 2009.⁷⁰ The violation in this contested case on August 21, 2010, occurred within 36 months of the prior July 8, 2009, violation. Under the TABC's rules, since a written warning may be used as an aggravating circumstance,⁷¹ Respondent's mixed beverage permit MB-682310, including Respondent's beverage cartage permit and a mixed beverage late hours permit, should be cancelled.

V. FINDINGS OF FACT

1. Artworks TBG Inc. d/b/a Texas Showgirls (Texas Showgirls or Respondent) holds mixed beverage permit MB-682310, which includes a beverage cartage permit and a mixed beverage late hours permit.
2. The permit was originally issued by the Texas Alcoholic Beverage Commission (TABC) on January 30, 2008, and renewed thereafter.
3. Nick Makrides and David Brooks are the co-owners and managers of Texas Showgirls.
4. The licensed premises is located at 411 North Scott Avenue, Wichita Falls, Wichita County, Texas.
5. Texas Showgirls is a bar and a sexually oriented business (SOB).
6. Most of Respondent's male clientele are airmen from Sheppard Air Force Base (SAFB).
7. Texas Showgirls normally has had the following personnel working: a parking lot attendant, a person at the door collecting cover charges, one or two bouncers, one or two bartenders, one or two waitresses, and a disc jockey (DJ).
8. The club has three dancing stages: a main stage and two smaller stages.
9. The main stage is on the wall opposite the front door, and the two smaller stages are on either end of the premises to the left and right of the main stage.
10. The club lighting is dim and the stages are well lit.
11. Another topless club, called Exposé, is located in a corner of the Texas Showgirls' parking lot.

⁷⁰ Petitioner's Ex. 1, at 2, 18-21, TABC Docket 587227.

⁷¹ 16 Tex. Admin. Code § 34.1(d)(1).

12. Exposé is a “bring your own bottle” club, open from 8:00 p.m. to 3:00 a.m. and is also operated by Mr. Makrides and Mr. Brooks.
13. Officer Scott Poole is a certified peace officer employed by the Wichita Falls Police Department (WFPD).
14. Officer Karen Wade is an officer with WFPD.
15. Officer Dwight Kerr is an officer with WFPD.

Intoxication Incident

16. On Wednesday August 31, 2011, at approximately 2:11 a.m., Officer Poole went to the licensed premises to investigate a disturbance.
17. Officer Poole encountered a black female, Aston Latoya Tutt, outside of the club, near the front door.
18. Ms. Tutt had the odor of an alcoholic beverage on her breath, staggered walking, was unsteady standing, had slurred speech, and red, watery eyes.
19. Officer Poole believed Ms. Tutt was a danger to herself or others and arrested her for public intoxication.
20. The club was closed by the time Officer Poole arrived and he did not enter the licensed premises and did not speak to Mr. Makrides or Mr. Brooks.
21. Officer Poole took Ms. Tutt to the Wichita County jail.
22. Ms. Tutt told the jailers that she was employed at Texas Showgirls, that she was a stripper, and used the stage name “Sparkle.”
23. Mr. Brooks was present at the club on August 31, 2011, and interacted with Ms. Tutt.
24. Ms. Tutt did not dance at Texas Showgirls on August 31, 2011.
25. Ms. Tutt was not an employee of Texas Showgirls for the purposes of establishing a violation of the Texas Alcoholic Beverage Code (the Code).

Narcotics Incident

26. On August 21, 2010, Officer Kerr and Officer Wade were part of a joint investigation between WFPD and the Office of Special Investigations (OSI) at SAFB.

27. Investigators at SAFB had discovered that Air Force personnel were buying cocaine at Texas Showgirls.
28. A cooperating witness (CW) had identified a dancer named Samantha McDonald as the source of the cocaine at Texas Showgirls.
29. On August 21, 2010, Officer Kerr and the CW purchased cocaine from Ms. McDonald on the licensed premises.
30. Officer Kerr observed Ms. McDonald was dancing in a bikini (top and bottom) when he entered Texas Showgirls.
31. Officer Kerr observed that Ms. McDonald had access to the dancers' dressing room.
32. Officer Kerr observed Ms. McDonald dance for two songs on two of the different stages in the premises.
33. Ms. McDonald suggested that Officer Kerr pay for a lap dance, to which Officer Kerr agreed. Ms. McDonald performed a lap dance on Officer Kerr.
34. Respondent possessed dancer "commitment lists" bearing Ms. McDonald's dancer name of "Kendall" for dates relevant to the investigation.
35. Ms. McDonald changed into and back out of her street clothes the two times she left the club and returned.
36. Texas Showgirls did not allow a dancer to change in and out of her street clothes.
37. Ms. McDonald left the club using the front door.
38. Texas Showgirls did not allow a dancer to leave the premises during business hours.
39. Ms. McDonald wore a bikini bottom and top.
40. The dancers at Texas Showgirls dance topless.
41. Texas Showgirls is a "dance" club and any woman could dance on the stage.
42. Mr. Makrides testified that Ms. McDonald was not a scheduled dancer at Texas Showgirls.
43. Ms. McDonald was Respondent's agent, servant, or employee for the purposes of establishing a violation under § 104.01(9) of the Code.
44. Ms. McDonald was in possession of cocaine on the licensed premises.

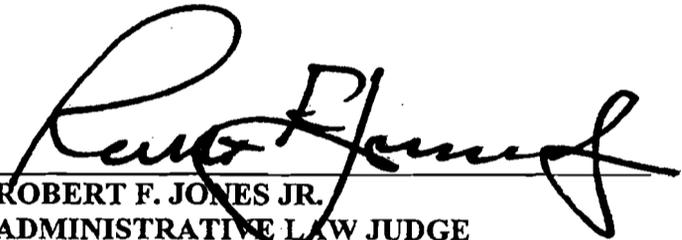
45. The dancers at Texas Showgirls provide entertainment and the sale of alcohol provides the business's income.
46. Ms. McDonald was present to some degree to entertain the patrons, and was there to further Respondent's alcoholic beverage business.
47. Mr. Markrides and Mr. Brooks did not know Ms. McDonald possessed cocaine on the premises.
48. Ms. McDonald had been selling cocaine at Texas Showgirls prior August 21, 2010.
49. Ms. McDonald's actions in making the sale to Officer Kerr and the CW, *i.e.*, dancing in a bikini, changing clothes, going outside, returning, changing clothes, and delivering the drugs, placed Mr. Markrides and Mr. Brooks on notice that Ms. McDonald was doing something that called for further investigation.
50. Mr. Markrides and Mr. Brooks, in the exercise of reasonable care, should have known Ms. McDonald possessed cocaine on the licensed premises.
51. Mr. Markrides and Mr. Brooks did not prohibit Ms. McDonald from dancing at Texas Showgirls.
52. Respondent received a written warning for a violation of § 11.61(b)(7) of the Code involving possession or delivery of narcotics, which occurred on July 8, 2009.
53. On June 3, 2013, Staff issued its Second Amended Notice of Hearing, which contained information regarding the date, time, and place of the hearing; the matters asserted; the statutes and rules involved; and the legal authorities under which the hearing would be held.
54. All parties were provided not less than 10-days' notice of the hearing, the matters asserted, and of their rights under the applicable rules and statutes.
55. The hearing in this matter convened before ALJ Robert F. Jones Jr. on June 14, 2013, at the State Office of Administrative Hearings (SOAH), 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas, and concluded the same day. Lisa D. Crissman, of the TABC Legal Services Division, appeared and represented the Staff. Respondent appeared through its attorneys of record, Timothy E. Griffith and Staci S. Johnson. The record remained open until July 26, 2013, to allow the parties to file final written arguments and responses.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. Tex. Alco. Bev. Code (the Code) ch. 5, subch. B.

2. SOAH has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing proposed findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Proper and timely notice of the hearing was provided as required by the Administrative Procedure Act. Tex. Gov't Code § 2001.051.
4. The place or manner in which Respondent conducts its business warrants the cancellation or suspension of mixed beverage permit MB-682310, which includes a beverage cartage permit and a mixed beverage late hours permit issued by the TABC on January 30, 2008, based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. §§ 11.61(b)(7) and 104.01(9) of the Code; 16 Tex. Admin. Code § 35.31(a)&(b).
5. Respondent's mixed beverage permit MB-682310, which includes a beverage cartage permit and a mixed beverage late hours permit issued by the TABC on January 30, 2008, should be cancelled. § 11.61(b)(7) of the Code; 16 Tex. Admin. Code §§ 34.1 and 34.2.

SIGNED September 24, 2013.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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STYLE/CASE: ARTWORKS TBG INC. DBA TEXAS SHOWGIRLS
SOAH DOCKET NUMBER: 458-13-1058
REFERRING AGENCY CASE: 605649 & 609083

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ ROBERT JONES**

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