

**DOCKET NO. 617366**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
	§	
<b>VS.</b>	§	
	§	
	§	
<b>CATHLEEN STELLA HARM D/B/A THE SUNSET, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
	§	
<b>PERMIT BG457179</b>	§	
	§	
	§	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-13-4912)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 16th day of May, 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 Timothy Horan presiding. The hearing convened on October 11, 2013 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 27, 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 Petitioner on December 13, 2013. No reply was filed by Respondent. On February 7, 2014, the Administrative Law Judge filed a response to Petitioner's exceptions, recommending that no changes be made to the Proposal for Decision.

After review and due consideration of the Proposal for Decision, Petitioner's exceptions, and the response thereto by the Administrative Law Judge, 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.

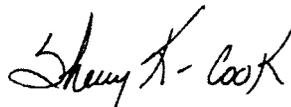
All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at 12:01 a.m. on June 25, 2014** and shall remain suspended for **FIVE (5) CONSECUTIVE DAYS, UNLESS** a civil penalty in the amount of **\$1,500.00 is paid ON OR BEFORE June 17, 2014.**

**If this Order is appealed and judgment is issued affirming the Order,** the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **suspended** beginning at 12:01 a.m. on the **tenth (10<sup>th</sup>)** day following the date the judgment is signed and shall remain suspended for five (5) consecutive days, unless a civil penalty in the amount of \$1,500.00 is paid on or before the **seventh (7<sup>th</sup>)** day following the date the judgment is signed.

**This Order will become final and enforceable on the 10th day of June, 2014, unless a Motion for Rehearing is filed by the 9th day of June, 2014.**

**SIGNED** this the 16th day of May, 2014, at Austin, Texas.



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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 16th day of May, 2014.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Timothy Horan  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, Texas 77018  
**VIA FACSIMILE: (512) 322-2061**

Cathleen Stella Harm  
d/b/a The Sunset  
**RESPONDENT**  
222 Park Street  
Highlands, Texas 77562  
**VIA FIRST CLASS MAIL, CMRRR # 70120470000133008354**

Clyde W. Burleson  
**ATTORNEY FOR RESPONDENT**  
1533 W. Alabama, Suite 100  
Houston, Texas 77006  
**VIA FIRST CLASS MAIL, CMRRR# 70120470000133008361**  
**AND**  
**VIA FACSIMILE: (713) 526-3787**

Sandra K. Patton  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division  
**VIA E-MAIL: [sandra.patton@tabc.state.tx.us](mailto:sandra.patton@tabc.state.tx.us)**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 617366**

**REGISTER NUMBER:**

**NAME: Cathleen Stella Harm**

**TRADENAME: The Sunset**

**ADDRESS: 222 Park Street, Highlands, TX 77562**

**DUE DATE: June 17, 2014**

**PERMITS OR LICENSES: BG457179**

**AMOUNT OF PENALTY: \$1,500.00**

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

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

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

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

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**P.O. Box 13127**

**Austin, Texas 78711**

**Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

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

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

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No.

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

November 27, 2013

RECEIVED  
DEC 3 2013  
SOAH

Sherry Cook  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA REGULAR MAIL

**RE: SOAH Docket No. 458-13-4912; Texas Alcoholic Beverage Commission vs. Cathleen Stella Harm d/b/a The Sunset**

Dear Ms. Cook:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Horan", written over a horizontal line.

Timothy Horan  
Administrative Law Judge

TH/mr  
Enclosure

xc Sandra Patton, Texas Alcoholic Beverage Commission, 427 W. 20<sup>th</sup> Street, Suite 600, Houston, TX 77008  
- **VIA REGULAR MAIL**  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL** (with Certified Evidentiary Record and 1\_ Hearing CD/s)  
Clyde Burlison, Attorney at Law, 1533 W. Alabama, Suite 100, Houston, Texas 77006 -**VIA REGULAR MAIL**

2020 North Loop West Suite 111 Houston, Texas 77018  
713.957.0010 (Telephone) 713.812.1001 (Fax)  
[www.soah.state.tx.us](http://www.soah.state.tx.us)



jurisdiction are addressed in the findings of fact and conclusions of law without further discussion.

## II. DISCUSSION

### A. Applicable Law

The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found that the licensee sold or delivered an alcoholic beverage to an intoxicated person. TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (6).

"Intoxication," is defined as not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body. Tex. Penal Code § 49.01(2) and 16 Tex. Admin. Code (TAC) § 50.2(2)(A).

### B. Evidence

On August 23, 1999, TABC issued a Wine and Beer Retailer's On Premise Permit BG-457179 for Respondent's premises located at 1701 S. Main # 1, Highlands, Harris County, Texas.

Agent Gerald Sherk, an enforcement Agent for TABC, testified that on January 24, 2013, at approximately 10 p.m., he conducted an investigation of Respondent's premises to check for compliance with the Texas Alcoholic Beverage Code.

Agent Sherk testified that while undercover, he entered Respondent's establishment and sat at the end of the bar. He noticed a sign on the wall of the bar that said no cursing would be allowed in the bar. He noticed a loud boisterous patron, later identified as Jesse Holt, drinking a beer and arguing with other patrons because they were cursing in the bar. Mr. Holt was sitting at

the bar next to Agent Sherk, and Agent Sherk smelled an odor of alcohol on his breath. He also had thick slurred speech, glassy bloodshot eyes, swaying balance, and was unsteady on his feet. He observed Mr. Holt consume 2 additional beers that were purchased from the bartender, Donna Ray Thomas. Agent Sherk heard the bartender tell Mr. Holt she was only allowing him to continue drinking beer because she had called for a ride to take him home. Having been in law enforcement for over 12 years, Agent Sherk is experienced in identifying intoxicated persons and in his opinion, Jesse Holt appeared intoxicated. Agent Sherk called for the TABC Open Team and gave the description of Holt and the bartender to Agent Raymond Darden.

Agent Darden entered the establishment, observed Mr. Holt sloped over the bar and sitting next to Agent Sherk, and asked Mr. Holt to step outside. Agent Darden smelled an odor of alcohol, and observed him to have bloodshot eyes and slurred speech. He also stumbled and was unsteady on his feet. Mr. Holt did not appear to have the normal use of his mental or physical faculties, and in Agent Darden's opinion, was intoxicated. Agent Darden asked Mr. Holt to go back into the bar and he then met with the bartender, Donna Ray Thomas. She told him that she had served Mr. Holt about 8-9 beers that evening and only continued to allow him to drink because she had called for someone to pick him up from the bar. Agent Darden stated that he has been in law enforcement for over 38 years and has seen hundreds of intoxicated persons. Based on his experience, Mr. Holt was intoxicated. Agent Darden did not arrest Mr. Holt or the bartender. He did issue the bartender a TABC administrative violation notice.

On the day of the hearing, TABC acknowledged that this was the first administrative violation incurred by Respondent since TABC issued Respondent a permit in 1999.

Respondent argues that the criminal case against the bartender has been dismissed and this bars TABC from seeking a civil penalty. Code § 11.641(c). Respondent further argues that the definition of intoxication should be public intoxication under Tex Penal Code § 49.02. Respondent also requests that if the ALJ recommends a civil penalty, that the ALJ consider mitigation in the penalty to be assessed because Respondent has had only one Code violation since 1999.

TABC argues that the TABC agents filed an administrative violation against Respondent and did not file any criminal charges against the bartender and as such, Code § 11.641(c) does not apply. Staff further argues that the definition of intoxication is under Tex. Penal Code § 49.01(2) and has met the burden of proof based upon the testimony of the TABC agents and seeks a 10 day suspension of Respondent's permit.

### III. ANALYSIS AND RECOMMENDATION

The ALJ agrees with Staff concerning the definition of intoxication. The ALJ is guided by the definition of intoxication under 16 Tex. Admin. Code (TAC) § 50.2(2)(A), which is defined as not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body. This definition tracks the definition of intoxication in Tex. Penal Code § 49.01(2). The basis of this administrative action is the intoxication of Jesse Holt and not the legal violation of public intoxication.

The ALJ further agrees with Staff's argument that the dismissal of the criminal case does not bar TABC from seeking an administrative penalty in the instant case. The TABC agents did not arrest or file a criminal case against the bartender or on Jesse Holt. The only action filed by the agents was this current administrative enforcement action. Further, the standard of proof in the criminal case is different from this civil case and, therefore, any decision by the criminal court should not prejudice TABC's right to bring this administrative action. Therefore, the dismissal of the underlying criminal charge concerning the alleged liquor violation is not a bar to this administrative case.

As to facts in this case, both TABC agents made visual observations of Mr. Holt and the testimony of the agents regarding the observations of Jesse Holt is essentially uncontroverted. The agents stated that Mr. Holt had an odor of alcohol on his breath, had glassy bloodshot eyes, swayed, stumbled, and unsteady balance. Each of these factors is consistent with intoxication. Agent Sherk also observed Mr. Holt consume at least 2 beers that were purchased from Respondent's bartender after it was obvious that he was already intoxicated. The testimony of

Agent Darden corroborated Agent Sherk's opinion that Jesse Holt was intoxicated. The TABC agents have years of experience in identifying intoxicated individuals and both testified that Mr. Holt exhibited behavior which would lead them to believe that he was intoxicated on the night of January 24, 2013, while drinking an alcoholic beverage at Respondent's bar. Additionally, the bartender, Donna Ray Thomas, told Agent Darden that she had served Mr. Holt 8-9 beers that evening.

The evidence on the record is sufficient to establish that the Respondent served an alcoholic beverage to an intoxicated person in violation of § 61.71 (a) (6) of the Code. This is the first violation of the Code committed by Respondent since 1999. Because of Respondent's lack of prior Code violations, the ALJ recommends that the Respondent's licenses/permits be suspended for a period of 5 days, or in lieu of any suspension, that the Respondent pay a civil penalty in the amount of \$1,500.

#### IV. FINDINGS OF FACT

1. Cathleen Stella Harm d/b/a The Sunset (Respondent) holds a Wine and Beer Retailer's On Premise Permit BG-457179, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 1701 S. Main # 1, Highlands, Harris County, Texas.
2. The permit was originally issued on August 23, 1999.
3. On January 24, 2013, at approximately 10 p.m., Agent Sherk observed Respondent's bartender serve an alcoholic beverage to Jesse Holt, a patron in the Respondent's establishment.
4. At that time, Mr. Holt exhibited signs of intoxication. Specifically, Agent Sherk observed that Jesse Holt had an odor of alcohol on his breath, glassy bloodshot eyes, thick slurred speech, swayed, and was unsteady on his feet. Agent Darden observed Mr. Holt to have an odor of alcohol on his breath, bloodshot eyes, slurred speech, stumbled, and unsteady balance.
5. On June 18, 2013, Staff issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice to the parties contained the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.

6. The hearing in this matter convened on October 11, 2013, before State Office of Administrative Hearings (SOAH) ALJ Timothy Horan. Sandra K. Patton, staff attorney, represented TABC at the hearing. Clyde W. Burleson, attorney, represented Respondent. The hearing concluded and the record closed the same day.

#### V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Texas Alcoholic Beverage Code (Code) ch. 5 and §§ 11.61 (b) (2) and 61.71 (a)(1).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting 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 ch. 2003.
3. Respondent received notice of the proceedings and hearing, pursuant to Tex. Gov't Code §§ 2001.051 and 2001.052 and 1 Tex. Admin. Code ch. 155.
4. Respondent violated Code § 61.71 (a)(6).
5. Based on the findings of fact and conclusions of law, Respondent's permit should be suspended for a period of 5 days, or in lieu of any suspension, Respondent should be ordered to pay a civil penalty in the amount of \$1,500.

**SIGNED NOVEMBER 27, 2013.**

  
TIMOTHY HORAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS