

DOCKET NOS. 615798, 628521

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
	§	
THE LIBRARY LTD. L.L.P. D/B/A THE LIBRARY, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT MB643536, LB	§	
	§	
	§	
TRAVIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-4626)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 20th day of November, 2015, 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 John Beeler presiding. The hearing convened on April 10, 2015 and the SOAH record closed on May 29, 2015. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on July 27, 2015. 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. Respondent filed Exceptions on September 1, 2015. No reply was filed by Petitioner. On September 16, 2015, the Administrative Law Judge filed a letter in response to Respondent's Exceptions, recommending that no changes be made to the Proposal for Decision.

After review and due consideration of the Proposal for Decision, Respondent's Exceptions and the Administrative Law Judge's September 16, 2015 response thereto, 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 Respondent's Mixed Beverage Permit MB643536, and the associated Mixed Beverage Late Hours Permit, are hereby **CANCELLED**.

This Order will become final and enforceable on the 15th day of December, 2015, unless a Motion for Rehearing is filed by the 14th day of December, 2015.

SIGNED this the 20th day of November, 2015, 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 20th day of November, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

John Beeler
ADMINISTRATIVE LAW JUDGE
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**SOAH DOCKET NO. 458-14-4626
(TABC CASE NOS. 615798 & 628521)**

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
v.		OF
THE LIBRARY LTD. L.L.P. D/B/A THE LIBRARY (Permit No. MB643536 LB) TRAVIS COUNTY, TEXAS Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Alcoholic Beverage Commission (Commission) seeks cancellation of the alcoholic beverage permit held by The Library LTD. L.L.P. d/b/a The Library (Respondent) based on Respondent’s alleged violations of the Texas Alcoholic Beverage Code (the Code). Based on the evidence, the Administrative Law Judge (ALJ) concludes that Staff proved the allegations and recommends that Respondent’s permit be canceled.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits was held on April 10, 2015, in Austin, Texas. Staff attorney Catherine Chamblee represented Staff, and attorney Dirk Jordan represented Respondent. The record closed on May 29, 2015, with the filing of the final briefs from the parties.

II. DISCUSSION

A. Background

Respondent is the holder of a mixed beverage permit, including a late hours mixed beverage permit, issued by the Commission for the premises known as the Library, located at 407 E. 6th Street, Austin, Travis County, Texas.

Staff seeks to revoke Respondent's permit alleging that:

- On or about April 19, 2012, through April 20 2012, Respondent, or Respondent's agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of Code § 11.61(b)(14);
- On or about April 19, 2012, through April 20 2012, Respondent, or Respondent's agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an obviously intoxicated person so that the person was a clear danger to himself or others in violation of Code § § 2.02(b) and 11.61(b)(2); and
- On or about August 28, 2014, Respondent's agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of Code § 11.61.(b)(14).

B. Applicable Law

Pursuant to Code § 2.02(b), providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under the chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of the Code upon proof that:

- (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and
- (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

Code § 11.61 (b) authorizes the Commission or administrator to suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that:

- (2) the permittee violated a provision of the Code or a rule of the Commission;
-

C. Discussion**Testimony of TABC Agent Alejandra Nieto**

Agent Alejandra Nieto has been employed by the Commission as an enforcement agent for approximately six years. She learned that the death of a young man, Andy Wang, was possibly linked to his being served alcohol at the Library and investigated the incident for the Commission. She spoke with a woman named Annie Nguyen, the girlfriend of Mr. Wang, who told her that she and Mr. Wang had gone to the Library on the night of April 19, 2012. Ms. Nguyen informed Ms. Nieto that they went to the Library because Mr. Wang knew the bartender, Zach, and so could get cheaper drinks. During a later interview, Ms. Nguyen described Zach, and told Agent Nieto that Zach served alcohol to Mr. Wang that evening. According to Ms. Nguyen, Mr. Wang purchased "shots" and was given free "shots" while at the Library. Ms. Nguyen also identified Zach in a photo lineup.

Agent Nieto served documents on the Library requesting a list and identifying information concerning employees working at the location on April 19 and 20, 2012. On May 3, 2012, she also requested video surveillance for those same dates, along with credit card and debit card transaction receipts. Although the Library had video surveillance, no video was made available for the dates requested. When she was at the establishment to serve the documents she looked for but did not see any policies posted concerning the serving of alcohol. According to the information received from the Library, Zach was the bartender that evening.

Agent Nieto reviewed the toxicology report concerning the death of Mr. Wang. The report reflected a .23 vitreous alcohol concentration and a .28 femoral alcohol concentration with no other substances detected. She reviewed records and discovered that several employees on duty on the day in question were not TABC seller-server certified. No one working at the Library ever told her Mr. Wang was only served water, not alcohol, while at the Library. Agent Nieto did not interview the employees on duty because, in her experience, employees in situations like this are not truthful.

Testimony of Annie Nguyen

Ms. Nguyen was dating Mr. Wang in 2012 and had seen him intoxicated on several occasions. On the date in question, she went with Mr. Wang to the Library. He picked her up about 11:00 p.m. that evening and they went to his apartment to “pre-drink” before taking a bus to the 6th Street entertainment area. Mr. Wang consumed between 12 and 18 ounces of whiskey between 11:30 p.m. and 12:30 a.m. before walking to the bus stop. According to Ms. Nguyen, Mr. Wang was clearly displaying signs of intoxication prior to arriving at, and while at the Library.

While at the Library, Ms. Nguyen and Mr. Wang were served alcohol by the bartender she knew as Zach. Mr. Wang ordered a drink for Ms. Nguyen and water for himself, but was served three alcoholic drinks and water by Zach. Mr. Wang spilled the drink Ms. Nguyen ordered, so she drank the other two drinks. As they were leaving the bar, Zach gave them two additional shots of alcohol and Mr. Wang drank them both.

Mr. Wang fell twice while walking to the bus stop to return home. While on the bus, Mr. Wang was nauseated and disoriented. After exiting the bus, he fell under it and was killed when a tire ran over his head.

Testimony of Adam Cortez

Mr. Cortez testified that he observed Mr. Wang riding the bus away from the 6th Street entertainment area and that Mr. Wang appeared highly intoxicated.

Testimony of Detective Adrian Duran

Detective Duran is employed as a police officer by the City of Austin. He responded to the scene where Mr. Wang had been run over by the bus. He investigated and determined that Mr. Wang was highly intoxicated and fell under the bus. Witnesses told him Mr. Wang was having difficulty even sitting in his seat in the bus without falling.

Testimony of Zachary Rodriguez

Mr. Rodriguez worked at The Library from 2005 through October of 2012. He did not recall Mr. Wang and did not know him. Bartenders were not allowed to give away any free drinks. It is possible that if Mr. Wang was in the bar on the day in question, he may have served him alcohol, but he had no memory of doing so. He only learned of Mr. Wang's death approximately a year after it occurred.

Mr. Rodriguez posted a message about his concern about going to prison on Facebook after leaving work the day in question. He stated he knew nothing of the bus accident when he posted the message.

Testimony of Brad John Hall, M.D.

Dr. Hall is the Chief Forensic Toxicologist for Travis County. His testing revealed that Mr. Wang had femoral alcohol concentration of .28 and a vitreous alcohol concentration of .23 at the time of death. He reviewed the toxicology report of Mr. Wang and opined that the .28 femoral and .23 vitreous alcohol levels he observed would indicate that Mr. Wang's alcohol level was increasing when he died. Dr. Hall testified that most people show obvious signs of intoxication at a .08 or lower.

Testimony of Neda Nix

Ms. Nix is a Technical Supervisor for the Texas Department of Public Safety. She graduated from Utah Valley University with a degree in forensic science and is currently pursuing a master's degree in forensic toxicology from the University of Florida. Ms. Nix listened to the testimony of the other witnesses during the hearing and determined that Mr. Wang's alcohol level when he arrived at the Library was between a .13 and a .18. Approximately 80 percent of the alcohol he consumed before leaving his apartment would have been absorbed within 10 minutes of its consumption. Virtually all of the alcoholic he consumed in the apartment would have been absorbed within 1 hour.

Testimony of TABC Agent Edward Jones

Agent Jones is employed by TABC and took part in an investigation of the Library on August 28, 2014. The Library was on a TABC priority list due to prior intoxication incidents. On that date, undercover TABC agents observed an intoxicated person being served alcohol at the bar. The person was unsteady and holding onto the bar for support. She appeared sleepy and was experiencing difficulty keeping her eyes opened. Bar records disclosed that she was sold 13 drinks. A number of the drinks were 35 percent alcohol.

Based on his investigation Agent Jones recommended a filing of the violation of sale of an alcoholic beverage to an intoxicated person.

Testimony of TABC Agent Jonathan Harris

Agent Jonathan Harris is employed by TABC and entered the Library with another TABC agent on August 28, 2014. Serena Mendoza was the bartender that evening. Agent Harris and the other agent observed a woman sitting at the bar who was highly intoxicated. The woman was having a difficult time speaking and was very drowsy. Her eyes were only half open and her head was resting on her hands. Ms. Mendoza served four vodka shots to the intoxicated woman after Agent Harris had noticed the woman's signs of obvious intoxication.

Testimony of TABC Agent Tiffany Burgess

Agent Burgess is employed by TABC and was at The Library with Agent Harris. She observed the same intoxicated woman described by Agent Harris. Her attention was drawn to the woman because the woman was experiencing extreme difficulty keeping her eyes open. The woman had a drink in front of her when Agent Burgess arrived and was served four shots of alcohol after she observed her to be highly intoxicated.

Testimony of TABC Agent Richard J. Lashbrook

Agent Lashbrook spoke with bartender Serena Mendoza on August 28, 2014, and cited her for serving alcohol to an intoxicated person. Ms. Mendoza admitted to him that she served alcohol to the woman in question.

Testimony of TABC Lieutenant Cathleen Cavazos

Lieutenant Cavazos is employed by TABC, reviewed the reports of both violations, and believes cancelation of the Library's permit is warranted.

Testimony of Serena Mendoza

Ms. Mendoza was a bartender employed by the Library on August 28, 2014. She does not remember anybody at the bar being intoxicated that night. She would not have served anyone who was obviously intoxicated.

Testimony of Kevin Bagstad

Mr. Bagstad is one of the owners of the Library and is involved in management. In his position, he cooperates with TABC and works to assure TABC regulations are followed. Part of the policy of the Library is to have all employees TABC seller/server certified. Zachary Rodriguez was not TABC certified for several months. He did not reprimand Serena Mendoza in any way for serving alcohol to an intoxicated person.

E. Analysis

Based on the evidence in the record, the ALJ finds that Respondent's permit should be canceled. The critical issue concerning the 2012 allegation is whether Mr. Wang was served alcohol while at the Library. The record is clear that he consumed far more than enough alcohol before entering the premises to be obviously intoxicated. According Ms. Nguyen's testimony, Mr. Wang consumed between 12 and 18 ounces of whiskey between 11:30 p.m. and 12:30 a.m.

and he was exhibiting signs of intoxication. He slurred his speech, was unsure on his feet, spilled drinks while at the bar, and fell to the ground twice shortly after leaving it.

Ms. Nguyen testified that the bartender whom Mr. Wang knew served him alcohol, including giving him shots just before she and Mr. Wang left. Respondent argues that Mr. Wang drank only water while at the bar and relies on a statement given by Ms. Nguyen shortly after the accident. While the statement could possibly be taken to establish that premise, Ms. Nguyen testified that she was in shock at the time she made it and did not completely understand the questions being asked.

The ALJ carefully reviewed the recording of Ms. Nguyen's statement. Nowhere in the statement does she state that Mr. Wang was not served alcohol while at the Library. She does state that he drank water because he "pre-drank" before leaving his apartment and that he did not purchase drinks for himself. The statement is consistent with her testimony that Mr. Wang knew the bartender and that the bartender gave him shots of alcohol. It may very well be the case that Mr. Wang did not order drinks for himself because of his level of intoxication but consumed alcohol in the bar after it was given to him free of charge.

The testimony of Dr. Hall and Neda Nix, when taken together, clearly establish that Mr. Wang consumed alcohol at the Library. Ms. Nix calculated that Mr. Lang had an alcohol concentration of between a .13 and a .18 when he arrived at the bar and that virtually all of the alcohol he consumed at his apartment had been absorbed. Dr. Hall testified that, when Mr. Lang died, he had .28 femoral and .23 vitreous concentrations of alcohol. The difference between the two levels, according to Dr. Hall, showed that Mr. Lang's alcohol level was increasing. He was, in other words, in the process of absorbing additional alcohol other than that he consumed at his apartment.

The record establishes that Mr. Wang and Ms. Nguyen consumed alcohol only at the Library after leaving Mr. Wang's apartment. If Mr. Wang's alcohol level was .18 at the highest when he arrived at the Library, was well over a .20 later when he died, and was increasing when he died, it is a logical conclusion that the additional alcohol was supplied by the Library.

It is also clear that, at a level of at least .13 when he entered the Library, Mr. Wang would have shown definite signs of intoxication. Ms. Nguyen's testimony confirms that he did indeed appear to be intoxicated. Respondent's employee served Mr. Lang even though he was displaying obvious signs of intoxication. Although Respondent asserts all of the Library's employees were TABC seller/server certified, the bartender/manager on duty that night was not certified. Mr. Wang was served enough alcohol to raise his level to well above .20, and he died as a result.

The record also establishes that Respondent served alcohol to a clearly intoxicated person on August 28, 2014. On that date, two TABC agents entered the bar and observed a highly intoxicated woman seated at the bar. She had trouble speaking and was drowsy. Her eyes were only half open and her head was resting on her hands. Even though she displayed these signs of intoxication, the bartender served her several shots of alcohol.

The Commission may suspend or cancel a permit if the permittee violates a provision of the Code or the Commission's rules. In this case the record clearly established that Respondent served alcohol to obviously intoxicated persons on at least two occasions in violation of the Code. One occasion resulted in a death of an individual, and the other occurred after that event. The death of an individual apparently was not enough to deter Respondent from serving alcohol to intoxicated persons.

Based on the above, the ALJ finds that the Commission is authorized to cancel Respondent's permit. In support, the ALJ recommends the following Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. The Library L.T.D., L.L.P. d/b/a The Library (Respondent) holds Mixed Beverage including Mixed Beverage Late Hours Permit No. MB-643536 issued by the Texas Alcoholic Beverage Commission (Commission) for the premises located at 407 E. 6th Street, Austin, Texas.
2. The staff (Staff) of the Commission issued a First Amended Notice of Hearing on November 5, 2014.

3. The notice stated the time, place, and nature of the hearing; legal authority and jurisdiction under which the hearing was to be held; statutes and rules involved; and matters asserted.
4. The hearing on the merits was held on April 10, 2015, in Austin, Texas. Staff attorney Catherine Chamblee represented Staff, and attorney Dirk Jordan represented Respondent. The record closed on May 29, 2015, after the parties filed briefs.
5. On or about April 19, 2012, through April 20, 2012, Respondent served alcoholic beverages to an obviously intoxicated person, Andy Wang.
6. Mr. Wang fell under a bus and was killed as a result of his level of alcohol, which was rising at the time of his death.
7. On or about August 28, 2014, Respondent served alcoholic beverages to an intoxicated person.
8. The intoxicated person Respondent served alcohol to on or about August 28, 2014, displayed obvious and signs of intoxication, such as drowsiness, trouble speaking, droopy eyelids, and difficulty in keeping her head up.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to Texas Alcoholic Beverage Code (Code) ch. 5 and § 11.61.
1. 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 Code § 5.43 and Tex. Gov't Code ch. 2003.
2. Respondent received notice of the hearing, pursuant to Tex. Gov't Code §§ 2001.051 and 2001.052.
3. On or about April 19, 2012, through April 20, 2012, Respondent violated Code §§ 2.02(b) and 11.61(b)(14).
4. On or about August 28, 2014, Respondent violated Code § 11.61(b)(14).
5. Pursuant to Code § 11.61(b)(2), the Commission is authorized to cancel Petitioner's permit.

6. Respondent's permit should be canceled.

SIGNED July 27, 2015.



JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 27, 2015

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

VIA INTERAGENCY MAIL

**RE: SOAH Docket No. 458-14-4626; *In the Matter of Library Ltd, LLP*
*d/b/a The Library***

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.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Beeler".

John Beeler
Administrative Law Judge

RECEIVED
JUL 28 2015
COMMISSION

JB/vg

Enclosure

xc Catherine Chamblee, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 VIA INTERAGENCY MAIL (with Certified Evidentiary Record and 1 Hearing CD/s)
Dirk Jordan, Attorney, Jordan Law Firm, 706 Guadalupe Street, Austin, TX 78701 -VIA REGULAR MAIL