

**DOCKET NO. 458-03-1839**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>DENNIS MICHAEL ROOP D/B/A BEER GARDEN LICENSE NOS. BE-205813, BL-428400 BELL COUNTY, TEXAS (TABC CASE NO. 599494)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	
	§	

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC or the Commission) requested that the licenses of Dennis Michael Roop d/b/a Beer Garden (the Respondent) be suspended, alleging that on or about April 6, 2002, the Licensee was intoxicated on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. (Code) §104.01(5). The Respondent denied the Commission's allegation. This Proposal for Decision recommends that the Respondent's licenses be suspended for a period of twenty-one days, or that a civil penalty in lieu of suspension be imposed, in the amount of \$150.00 per day of suspension.

**I. Statement of the Case**

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits was convened on February 24, 2003, at 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Suzan Shinder. The Commission appeared and was represented by staff attorney Dewey Brackin and by its party representative, TABC agent, Daniel Garcia. The Respondent appeared and was represented by attorney F. Ed Brown and by its party representative, Dennis Michael Roop (the Licensee). Evidence and argument were heard, and the record closed the same day.

**II. The Statute**

In pertinent part, Code §104.01(5) states that 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, being intoxicated on the licensed premises.

According to the Standard Penalty Chart,<sup>1</sup> the Commission may offer a settlement to a person charged with violating this provision of the Code, of: a seven-day suspension for a first violation; a ten to fifteen day suspension for a second violation; and a twenty-five-day suspension to cancellation of a license or permit for a third violation.<sup>2</sup> In this context, a civil penalty may be imposed in lieu of suspension, and this penalty may not be less than \$150.00 or more than \$25,000.00 for each day the license was to have been suspended.<sup>3</sup> When the Commission considers a suspension, the Commission may consider aggravating and ameliorating circumstances, which may include whether the violation was caused by the intentional or reckless conduct of the licensee.<sup>4</sup>

### III. Evidence

A Beer Retailer's On Premise License, BE-205813, was issued by the Commission, on March 18, 1986; and a Retail Dealer's On-Premise Late Hours License, BL-428400, was issued by the Commission, on March 13, 1998, to Dennis Michael Roop, d/b/a Beer Garden, 1119 South 55<sup>th</sup> Street, Temple, Bell County, Texas. These licenses have been continuously renewed. On October 20, 2001, the Respondent waived its right to a hearing to contest the Commission's charge that the Licensee was intoxicated on the licensed premises on October 5, 2001, and accepted a suspension of seven days or a civil penalty of \$1050.00 in lieu of this suspension.<sup>5</sup>

The Commission called two witnesses: Officer Michael Keating; and Agent Daniel Garcia. The Respondent called three witnesses: Officer Chad Tarvestad; Barbara Williams; and the Licensee.

It was uncontested that on April 6, 2002, the Licensee was arrested for Public Intoxication on the licensed premises, while it was open for business.

#### A. Testimony of Officer Michael Keating

Approximately two weeks prior to the April 6, 2002, incident, Officer Michael Keating<sup>6</sup> responded to the licensed premises (the bar) as a result of a "911" call that came from the bar. When the officer approached the bar, he observed the Licensee walk out of the back door, carrying a large

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<sup>1</sup>See 16 TEX. ADMIN. CODE (Rules) §37.60(a)

<sup>2</sup>The Standard Penalty Chart is persuasive, but not binding in this case. See Rules §37.60(g).

<sup>3</sup>See Rules §37.60(b) and TEX. ALCO. BEV. CODE ANN. (Code) §11.64.

<sup>4</sup>See Rules §37.61(c)

<sup>5</sup>See Commission's Exhibit No. 1.

<sup>6</sup>Officer Keating has been a Temple Police Department patrol officer for more than four years.

trash can of beer bottles. At that time, the Licensee denied that there were any problems inside the bar, and denied any knowledge of the "911" call. The officer went inside the bar to further investigate, and when the officer went back outside to look for the Licensee, he was gone. Inside the bar, the officer spoke to the bartender, who told him that the Licensee was intoxicated, and that there had been an argument over money between the bartender and the Licensee. During this argument, the bartender felt so threatened that she picked up a bottle to defend herself, and either the bartender or the Licensee's wife called "911."

On April 6, 2002, Officer Keating returned to the bar to follow up on the above incident. When the officer arrived at the bar, he observed that several bar patrons were clearly intoxicated. The officer asked the Licensee to step outside and talk, and observed that the Licensee had the strong odor of an alcoholic beverage on his breath; his eyes were red and glassy; his speech was slightly slurred; he staggered as he walked; he admitted that he had been drinking alcohol; and he swayed slightly as he stood. Because the officer felt that he had reason to believe that the Licensee was intoxicated, he asked the Licensee to submit to the Horizontal Gaze Nystagmus field sobriety eye-test.<sup>7</sup> However, when the officer attempted to administer this test, the Licensee would not follow the officer's directions to hold his head still and follow the officer's pen with his eyes only, effectively preventing the administration of this test. Based on the foregoing, the officer believed that he had probable cause to arrest the Licensee for Public Intoxication, because he believed that as a result of his intoxication, the Licensee's mental and physical faculties were impaired, and he was a danger to himself or others. The officer had specific concerns that the Licensee was too impaired to protect himself and to provide the supervision required for the safety of his customers and his employees. Commission Agent Garcia arrived<sup>8</sup> at this time, and took over the investigation.

## **B. Testimony of Agent Daniel Garcia**

Commission Agent Daniel Garcia<sup>9</sup> was familiar with the bar and with the Licensee. He had seen the Licensee when the Licensee was sober on several occasions, and he had seen the Licensee when the Licensee was intoxicated on a prior occasion. Agent Garcia arrested the Licensee in October of 2001, when the Licensee was found to be intoxicated on the licensed premises. As a result of that incident, the Respondent's licenses were suspended for a period of seven days.<sup>10</sup>

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<sup>7</sup>According to the officer, during the Horizontal Gaze Nystagmus field sobriety test, the involuntary jerking of the eyes (nystagmus) is an indication of intoxication.

<sup>8</sup>When Officer Keating suspected that the Licensee was intoxicated, the officer called Commission Agent Garcia, and asked him to come to the bar.

<sup>9</sup>Agent Garcia has been a Commission agent for nine years, and is a licensed peace officer. Prior to becoming an agent for the Commission, he worked for the Bell County Sheriff's office.

<sup>10</sup>A fine in lieu of suspension was authorized in that case.

On the occasions when the agent observed the Licensee, when the Licensee was sober, the Licensee did not have any trouble with his balance; he did not sway; his speech was not slurred; and he did not exhibit any impairment of his mental or physical faculties.

On April 6, 2002, when Agent Garcia arrived at the bar and approached the Licensee, the agent observed that the Licensee's person and breath smelled strongly of an alcoholic beverage. He observed that the Licensee held onto the counter for support as he got off of a bar stool. The Licensee appeared to be having difficulty getting his feet onto the floor from the bar stool, as if he had to stop and think about what he was doing. Agent Garcia observed that the Licensee staggered as he slowly walked and stumbled over his own feet; his eyes were glassy and bloodshot; he had a glazed expression, as if he did not understand what was transpiring; he almost swayed into the agent; he admitted that he had been drinking alcohol; his speech was somewhat slurred and rambling; and he used the bar and later a doorframe for support as he stood. The Licensee denied being intoxicated. However, when the agent told the Licensee that he wanted the Licensee to perform field sobriety tests to confirm this, the Licensee became argumentative. At no time during this encounter, did the Licensee complain of any physical ailment that would affect his physical abilities. Based on the Licensee's level of intoxication, the agent believed that the Licensee was a danger to himself and others, in that the Licensee was too intoxicated to supervise the customers in the bar, and was so intoxicated that he could have fallen and injured himself. That night, bartender Barbara Williams told the agent that the Licensee had been drinking beer, but she was uncertain of the amount that he had consumed because she had been too busy to keep count. She estimated that the Licensee had consumed three or four beers, but she could not remember with any degree of accuracy.

At a later date, the Licensee told the agent that the Licensee had some physical incapacities that affected his performance of physical tasks, but the Licensee did not produce any documentation from a physician or produce any medications to support this assertion. When the Licensee's April 6, 2002, arrest for Public Intoxication went to trial, the Licensee plead "no contest."

### **C. Testimony of Officer Chad Tarvestad**

Officer Chad Tarvestad went to the bar on April 6, 2002, with Officer Keating. Officer Tarvestad arrested one of the bar patrons for Public Intoxication at that time. The case against the bar patron was dismissed; however, Officer Tarvestad implied that this may have been a result of his not receiving a subpoena to appear and testify in that hearing.

### **D. Testimony of Barbara Williams**

Barbara Williams was working as a bartender at the bar on April 6, 2002, and was working the 4:45 p.m. till 2:00 a.m. shift.<sup>11</sup> She worked for the Licensee at the bar and at the Keg Lounge until she quit in July of that year. She is currently trying to get the Licensee to re-employ her. She has taken the Commission's classes for servers. Ms. Williams believed that the Licensee used to

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<sup>11</sup> According to Ms. Williams, she was not the bartender involved in the above described "911" call incident that occurred approximately two weeks prior.

take some kind of medication, and that he sometimes became light-headed and had to hold onto things for support.

On April 6, 2002, Ms. Williams recalled that the Licensee came in the bar for the second time that evening at approximately 9:00 p.m. and the officers arrived at approximately 11:00 p.m. She complained that she was busy on that evening, and her recollection was impaired as a result; however, she believed that she served the Licensee three or four beers that evening, after which he started drinking diet Coke. She denied that the Licensee appeared to be intoxicated: he did not stagger or stumble; he was not a danger to himself or others; and he looked fine when he carried beer bottles to the dumpster for her. Ms. Williams recalled that another person was arrested that evening, and she believed that person was "a little" intoxicated.

#### **E. Testimony of Dennis Michael Roop, the Licensee**

The Licensee, who was born in 1944, stated that the bar has been open for approximately 18 years. It has only been closed one time, and the Licensee blames that on an angry customer for reporting the Licensee for being intoxicated in the bar when it was not true.

The Licensee stated that he has suffered approximately eight "concussions"<sup>12</sup> in the recent past. The first concussion occurred when he was hit in the head with a pool stick approximately two and one-half years ago. Since that time he suffered "six or seven" concussions when he was dragged by a car in "about (the year) 2000." In this incident his eardrum was "broken," and this reportedly caused a buzzing in his ear and a loss of equilibrium. The Licensee has not consulted with a physician about his equilibrium complaint since the day of the injury causing these problems, and the only medication that he takes is aspirin or Tylenol. This was also true on April 6, 2002.

On April 6, 2002, the Licensee claimed to be in the bar from 7:00 p.m. until the officers arrived at 11:00 p.m. He denied that he was intoxicated on that evening, and stated that he had only consumed three or four beers before switching to diet Coke. He had been playing what he described as a (video) golf game for approximately four and one-half hours that evening. He asserted that he won the golf games and that this takes a certain amount of manual dexterity.

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<sup>12</sup>There was no evidence that the Licensee had any medical expertise to support his diagnoses of these reported injuries.

## **F. The Exhibits**

The "Supplement Report"<sup>13</sup> of Officer Michael Keating, regarding the incident at the bar on April 6, 2002,<sup>14</sup> tracks the officer's testimony, but contains fewer specifics. The "Class C Misdemeanor Plea"<sup>15</sup> confirms that the Licensee plead "no contest" to the charge of Public Intoxication on April 7, 2002, and agreed to pay a fine in the amount of \$300.00. The "Judgement" in *State of Texas vs. Deering Mark Alan*,<sup>16</sup> reflects that a Public Intoxication case against Mr. Deering was dismissed on May 29, 2002.

The Commission's Exhibit No. 1 contains copies of the Respondent's licenses and violation history. Among other things, it confirms the Respondent's suspension for seven days in 2001, as a result of the Commission's finding that the Licensee was intoxicated on the licensed premises.

## **IV. Discussion**

### **A. The Licensee was intoxicated on the licensed premises.**

On April 6, 2002, when Officer Keating entered the premises, he observed that the Licensee had the strong odor of an alcoholic beverage on his breath; his eyes were red and glassy; his speech was slightly slurred; he staggered as he walked; he admitted that he had been drinking alcohol; he swayed slightly as he stood; and he would not follow the officer's simple instructions for the Horizontal Gaze Nystagmus sobriety test, preventing the administration of this test, consistent with the desire to conceal the results of the test from the officer. When Agent Garcia arrived on the scene, he observed that the Licensee's person and breath smelled strongly of an alcoholic beverage; he held onto the counter for support as he got off of a bar stool; he staggered as he slowly walked and stumbled over his own feet; his eyes were glassy and bloodshot; he had a glazed expression; he almost swayed into the agent; he admitted that he had been drinking alcohol; and his speech was somewhat slurred and rambling. Finally, the Licensee plead "no contest" to the charge of Public Intoxication stemming from the events of April 6, 2002. Based on the foregoing, the Licensee was intoxicated on the licensed premises.

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<sup>13</sup>Commission's Exhibit No. 1.

<sup>14</sup>According to Officer Keating's testimony, his references in this report to the "Barrel Inn" are an error, and should say the "Beer Garden."

<sup>15</sup>Respondent's Exhibit No. 1.

<sup>16</sup>Respondent's Exhibit No. 2.

**B. A suspension of twenty-one days is supported by the evidence.**

The Respondent's licenses were suspended for seven days in 2001, as a result of the Commission's finding that the Licensee was intoxicated on the licensed premises. This is the only prior similar incident resulting in a suspension of the Respondent's licenses; however, aggravating circumstances are also relevant to the length of a suspension. It is noted that during the investigation of a "911" call received approximately two weeks prior to April 6, 2002, the Respondent's bartender told the investigating officer that the Licensee was intoxicated (on the premises), and that in an argument with the Licensee, she felt so threatened that she picked up a bottle to defend herself. Finally, the violation in the instant case was caused by the intentional conduct of the Licensee, in that his consumption of alcohol was intentional. Based on the foregoing, a suspension of twenty-one days is supported by the evidence.

**Findings of Fact**

1. A Beer Retailer's On Premise License, BE-205813, was issued by the Commission, on March 18, 1986; and a Retail Dealer's On-Premise Late Hours License, BL-428400, was issued by the Commission, on March 13, 1998, to Dennis Michael Roop, d/b/a Beer Garden, 1119 South 55<sup>th</sup> Street, Temple, Bell County, Texas. These licenses have been continuously renewed.
2. On October 20, 2001, the Respondent waived its right to a hearing to contest the Commission's charge that Dennis Michael Roop (the Licensee) was intoxicated on the licensed premises on October 5, 2001, and accepted a suspension of seven days or a civil penalty of \$1050.00 in lieu of this suspension.
3. During the investigation of a "911" call received approximately two weeks prior to April 6, 2002, the Respondent's bartender told the investigating officer that the Licensee was intoxicated (on the premises), and that in an argument with the Licensee, she felt so threatened that she picked up a bottle to defend herself.
4. On April 6, 2002, while on the licensed premises, the Licensee appeared to be intoxicated on the licensed premises, in that: his breath and person smelled strongly of an alcoholic beverage; he admitted that he had been drinking alcohol; his eyes were red and glassy; his speech was slightly slurred, and was rambling; he staggered as he slowly walked and stumbled over his own feet; he had a glazed expression; he almost swayed into Agent Garcia; and he would not follow the officer's simple instructions for the Horizontal Gaze Nystagmus sobriety test, preventing the administration of this test, consistent with the desire to conceal the results of the test from the officer.
5. The Licensee plead "no contest" to the charge of Public Intoxication stemming from the events of April 6, 2002.
6. Based on Findings of Fact Nos. 4 and 5, on April 6, 2002, the Licensee was intoxicated on the licensed premises.

7. The Licensee's intoxication was intentional, in that his consumption of alcohol was intentional.
8. On January 24, 2003, the Commission sent its Notice of Hearing to the Respondent's last known mailing address. This Notice of Hearing informed the Respondent that the hearing on the merits was set for February 24, 2003, at 10:00 a.m., and it contained: a statement of the location and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the Commission.
9. The hearing on the merits was convened on February 24, 2003, at 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Suzan Shinder. The Commission appeared and was represented by staff attorney Dewey Brackin and by its party representative, Texas Alcoholic Beverage Commission agent, Daniel Garcia. The Respondent appeared and was represented by attorney F. Ed Brown and by its party representative, Dennis Michael Roop (the Licensee). Evidence and argument were heard, and the record closed the same day.

#### **Conclusions of Law**

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Based on Findings of Fact Nos. 8 and 9, proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; Code §11.63; and 1 TEX. ADMIN. CODE §155.55.
4. Based on Findings of Fact Nos. 4-6, on April 6, 2002, the Respondent was intoxicated on the licensed premises, in violation of Code §104.01(5).
5. Based on Findings of Fact Nos. 2-7, a twenty-one-day suspension or a \$150.00 per day civil penalty in lieu of suspension is warranted, pursuant to 16 TEX. ADMIN. CODE (Rules) §37.60(a), (b), and (g); Rules §37.61(c); and Code §11.64.

Signed this 1<sup>st</sup> day of April, 2003.



SUZAN MOON SHINDER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 599494**

IN RE DENNIS MICHAEL ROOP	§	BEFORE THE
D/B/A BEER GARDEN	§	
PERMIT NO. BE-205813 & BL-428400	§	
	§	TEXAS ALCOHOLIC
	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-1839)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 20th day of May, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on February 24, 2003, and adjourned February 24, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 1, 2003. This 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if they were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that BE-205813 & BL-428400 **SUSPENDED**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty of \$3,150.00 on or before the 23rd day of July, 2003, all rights and privileges described permits will be **SUSPENDED for a period of twenty-one (21) days, A.M. on the 30th day of July, 2003.**

**This Order will become final and enforceable on June 10, 2003** if Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 20<sup>th</sup> day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

F. Edward Brown  
**ATTORNEY FOR RESPONDENT**  
P. O. Box 1782  
Belton, Texas 76513  
*VIA FACSIMILE: (254) 899-8293*

Dennis Michael Roop  
d/b/a Beer Garden  
**RESPONDENT**  
1119 S. 55<sup>th</sup> Street  
Temple, Texas 76501  
*CERTIFIED MAIL NO. 7001 2510 0003 8689 0275*

Administrative Law Judge  
State Office of Administrative Hearings  
Waco, Texas  
*VIA FACSIMILE: (254) 750-9380*

Dewey A. Brackin  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Division

Waco District Office  
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 599494

REGISTER NUMBER:

NAME: Dennis Michael Roop

TRADENAME: Beer Garden

ADDRESS: 119 S. 55<sup>th</sup> Street, Temple, Texas 76501

DATE DUE: July 23, 2003

PERMITS OR LICENSES: BE-205813 & BL-428400

AMOUNT OF PENALTY: \$3,150.00

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

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 23RD DAY OF JULY, 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

**WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.**

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

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

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

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

\_\_\_\_\_  
City

\_\_\_\_\_  
State

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

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