DOCKET NO. 458-03-3837

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
	§	
CLUB 72 L.L.C. ET AL D/B/A	§	
CLUB 72	§	
TARRANT COUNTY, TEXAS	§	
(TABC CASE NO. 604699)	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Club 72 L.L.C. d/b/a Club 72 (Respondent), alleging the following violations of the Texas Alcoholic Beverage Code (the Code): that Respondent, its agent, servant or employee sold, served, dispensed or delivered an alcoholic beverage to a minor with criminal negligence;[1] and that Respondent or its agent, servant or employee was intoxicated on the licensed premises.[2] TABC

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[1]The Commission or administrator may cancel or suspend for not more than 90 days a retail permit if it is found, on notice and hearing, that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. TEX. ALCO. BEV. CODE ANN. §§ 106.13(a).

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint. TEX. PENAL CODE ANN. § 6.03(d).

[2]The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(13) the permittee was intoxicated on the licensed premises. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13).

Permittee means each member of a partnership or association and with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock. TEX. ALCO. BEV. CODE ANN. § 11.61(a). Permittee also means a person who is the holder of a permit provided for in the Code, or any agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

Staff sought a twenty-day suspension of Respondent's permits, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of $3000.[3]

The Administrative Law Judge (ALJ) did not find TABC Staff's evidence was sufficient to establish that Respondent, or its agent, servant or employee sold, served, dispensed or delivered an alcoholic beverage to a minor with criminal negligence. However, ALJ finds that Respondent's agent was intoxicated on the premises and recommends that Respondent's permits be suspended for a period of ten days, or in lieu of any suspension, that Respondent be allowed to pay a civil penalty in the amount of $1,500.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01, 11.05, 11.61, 29.03, 44.01, 44.03, and 106.13 (the Code), and 16 TEX. ADMIN. CODE § 31.1 *et. seq.* (the Rules). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There were no timely contested issues of notice or jurisdiction in this proceeding.

On September 4, 2003, a hearing convened before ALJ Tanya Cooper, in the SOAH offices, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented by counsel, Lex Johnston, Attorney at Law. The record closed on that same date.

EVIDENCE

Respondent holds a Mixed Beverage Permit, MB-528129, a Mixed Beverage Late Hours Permit, PB-528130, and a Beverage Cartage Permit, PE-528131, issued by TABC to Club 72 L.L.C. d/b/a Club 72, 117 S. Watson Road, Arlington, Tarrant County, Texas. TABC Staff alleges that Respondent's employee, Randall Hill, sold, served, dispensed or delivered an alcoholic beverage to a minor with criminal negligence. TABC Staff further alleges that Respondent's employee or agent, Viet Thanh Ha, was intoxicated on the licensed premises. Several Exhibits were admitted into evidence on behalf of TABC Staff, and three witnesses provided testimony: Officer R. Mullikin, Arlington Police Department, Agent N. Hamilton, TABC Staff, and Vicky Chung, owner of Club 72.

Officer Mullikin testified that on March 14, 2003, he participated in a sting operation conducted by the Arlington Police Department, which was targeting TABC-licensed premises for possible alcoholic beverage sales to minors violations. Club 72 was one licensed premises included

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[3] When the Texas Alcoholic Beverage Commission is authorized to cancel or suspend a permit, the civil penalty may be authorized to be not less than $150 or more than $25,000 for each day the permit was to have been suspended. TEX. ALCO. BEV. CODE ANN. §11.64(a).

in the sting operation.

Officer Mullikin said when he first entered Club 72, he noticed an individual later identified as Viet Thanh Ha exiting from an area of the licensed premises, an office, that did not appear to be open to the Club's patrons. Mr. Ha crossed from the office through the Club, and met with law enforcement officials at the front door of the Club.

Mr. Ha identified himself to Officer Mullikin as the Club's manager, and related that he was present on the premises checking on the bartenders' activities. Officer Mullikin noticed an odor of alcoholic beverage on Mr. Ha's breath as he spoke. Mr. Ha exhibited characteristics of intoxication while in contact with Officer Mullikin. His eyes were bloodshot, and his speech was slurred. After observing these signs of intoxication, Officer Mullikin said he asked Mr. Ha to perform a sobriety evaluation. Officer Mullikin administered a "horizontal gaze nystagmus/HGN" evaluation to Mr. Ha and observed clues which indicated to him that Mr. Ha was intoxicated. Officer Mullikin stated that Mr. Ha was placed under arrest for a Code violation, being present on the licensed premises while intoxicated.

Agent Hamilton testified on behalf of TABC Staff. She provided assistance to the Arlington Police Department in planning the sting operation. She verified that the minors sent into licensed premises were under 21 years of age and were youthful in appearance. Agent Hamilton said that the minor who entered Club 72 met that criteria. A minor, Paul O'Brien, was accompanied into Club 72 by only one other law enforcement officer, Detective Paschal, a vice detective for the Arlington Police Department. Agent Hamilton said that she and other Arlington police officers remained outside the premises.

When a signal was received from Detective Paschal that a sale had occurred to the minor, the group of law enforcement officers waiting outside entered into the Club. Agent Hamilton testified that she saw Viet Thanh Ha on the premises at that point. In Agent Hamilton's opinion, Mr. Ha was intoxicated. His breath smelled of alcoholic beverage; his eyes were bloodshot; his speech was slurred; and he swayed slightly as he stood talking with officers. Agent Hamilton said that Mr. Ha identified himself as the Club's manager, but said that he was "not on the clock." Mr. Ha discussed being present at the Club to check on "things" and had been watching the bartenders.

Agent Hamilton said she spoke with other employees present at the Club to determine whether they were seller/server trained in accordance with TABC regulations. She spoke with two bartenders, S. Gunter and R. Hill. While speaking with Ms. Gunter and Mr. Hill, both additionally identified Mr. Ha as the Club's manager.

Ms. Chung, the owner of Club 72, testified on behalf of Respondent. Ms. Chung said that Mr. Ha was not the Club's manager or employed by the Club in any capacity. Ms. Chung said that she did not employ any manager for the premises. According to Ms. Chung, Mr. Ha was merely a friend who spend a considerable amount of time at the premises whenever it was open; however, he was not permitted to give instructions to employees or otherwise watch over them.

ANALYSIS

Neither Agent Hamilton or Officer Mullikin observed the alleged sale to a minor at Club 72. According to the testimony of Agent Hamilton and Officer Mullikin, Detective Paschal was the only law enforcement personnel inside the Club at the time the alleged violation occurred. Detective Paschal was not present at the hearing to provide direct testimony concerning his observations. Under these circumstances, TABC has failed to present persuasive evidence that Respondent sold alcoholic beverages to a minor with criminal negligence. Accordingly, the ALJ finds that TABC Staff's evidence is insufficient to establish this violation.

The issues to be determined concerning the remaining alleged violation are:

1. Whether Mr. Ha was Respondent's agent or employee; and
2. If Mr. Ha was Respondent's agent or employee, whether he was intoxicated on the licensed premises.

The terms "employee" or "agent" are not defined in the Code. An employee is commonly defined as a person who works for another in return for financial or other compensation. (*See* The American Heritage Dictionary Second College Edition.) An agent is generally a person expressly authorized by another to act on that other's behalf; however, there are instances where an agency relationship may be created by appearances. An apparent agent is one whom the principal, either intentionally or by want of ordinary care, allows third persons to believe is the principal's agent even though the principal has not, either expressly or by implication, conferred authority to that person. (*See* Black's Law Dictionary.)

In this instance, there is no evidence which establishes a financial or other compensable relationship between Mr. Ha and Respondent. However, in the ALJ's opinion, the preponderance of the evidence shows that Mr. Ha was an apparent agent for Respondent, despite Ms. Chang's testimony to the contrary. Mr. Ha was present at the Club whenever it was open for business. He had access to areas of the licensed premises that did not appear to be open to the Club's patrons. When Mr. Ha was first observed by Officer Mullikin, he was exiting from what appeared to be the Club's office area and came to meet the group of law enforcement officials at the Club's door. He told the law enforcement officers that he was the Club's manager, and Mr. Ha's status as the Club's manager was confirmed by the statements of other employees to Agent Hamilton and Officer Mullikin. Accordingly, the ALJ believes that Mr. Ha was Respondent's agent on March 14, 2003.

"Intoxication" or "intoxicated" is undefined by the Code. Intoxication is generally deemed to be a state of diminished capability in a person, either in terms of mental or physical abilities, which can occur as a result of consumption of alcoholic beverage. From the evidence presented, TABC Staff has met its burden of proof establishing that Respondent's agent, Mr. Ha, was intoxicated on the licensed premises. Mr. Ha was initially contacted by Officer Mullikin inside the licensed premises' building. An odor of alcoholic beverage was on Mr. Ha's breath as he spoke. Common characteristics of intoxicated persons, bloodshot eyes, slurred speech and swayed balance,

were noted in Mr. Ha's appearance. As a result, Officer Mullikin asked Mr. Ha to perform a horizontal gaze nystagmus/HGN evaluation. Horizontal gaze nystagmus/HGN testing is a sobriety evaluation which is often a part of testing used in evaluating driving while intoxicated suspects. Officer Mullikin observed nystagmus indicators present in Mr. Ha's eyes that suggested to Officer Mullikin that Mr. Ha was intoxicated. Based on these factors, the ALJ believes that Respondent's agent was intoxicated on the licensed premises on March 14, 2003.

RECOMMENDATION

For reasons cited in the ALJ's Analysis, the ALJ recommends that Respondent's permits be suspended for a period of 10 days, or in lieu of any suspension, the Respondent be allowed to pay a civil penalty in the amount of $1,500 for the violation of Respondent's agent being intoxicated on the licensed premises.

PROPOSED FINDINGS OF FACT

1. Club 72 L.L.C. d/b/a Club 72 (Respondent) holds a Mixed Beverage Permit, MB-528129, a Mixed Beverage Late Hours Permit, LB-528130, and a Beverage Cartage Permit, PE-528131 issued by the Texas Alcoholic Beverage Commission (TABC) for a premises located at 117 S. Watson Road, Arlington, Tarrant County, Texas.

2. On March 14, 2003, the Arlington Police Department, with assistance from TABC Staff, conducted a sting operation at several licensed premises, including Respondent's, seeking violations associated with sales of alcoholic beverage to minors.

3. When law enforcement officers entered Respondent's premises, Viet Thanh Ha left the Club's office area and met the officers at the premises' front door.

4. Mr. Ha identified himself as the Club's manager and other Club employees also confirmed that Mr. Ha was the Club's manager.

5. Mr. Ha exhibited characteristics of intoxication while on the premises by having an odor of alcoholic beverage on his breath, slurred speech, bloodshot eyes, and swayed balance, and further displaying all indicators of intoxication during a horizontal gaze nystagmus/HGN sobriety evaluation.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01, 11.05, 11.61, 29.03, 44.01, 44.03, and 106.13, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.*

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters

related 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 ANN. ch. 2003.

3. Respondent received adequate notice of the proceedings and hearing.

4. Based on the foregoing Proposed Findings of Fact, Respondent's agent was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13).

5. Based on the foregoing Proposed Findings of Fact and Proposed Conclusion of Law No. 4, Respondent's Mixed Beverage Permit, MB-528129, Mixed Beverage Late Hours Permit, LB-528130, and Beverage Cartage Permit, PE-528131, should be suspended for a period of 10 days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of $1,500.

SIGNED on this the 16th day of September 2003.

TANYA COOPER, Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 604699

IN RE CLUB 72 LLC ET AL	§	BEFORE THE
D/B/A CLUB 72	§	
PERMIT NOS. MB528129, LB528130	§	
PE528131	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-3837)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of October 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on September 4, 2003, and adjourned on September 4, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 16, 2003. This Proposal For Decision **(attached hereto as Exhibit "A")**, was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. 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 such 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 Permit Nos. MB528129, LB528130 and PE528131 are hereby **SUSPENDED.**

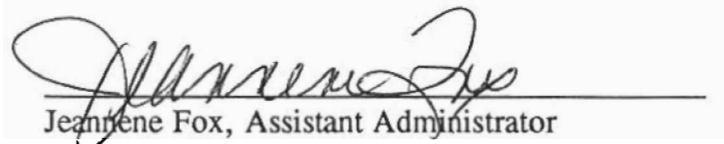
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of $1,500.00 on or before the 17th day of December, 2003, all rights and privileges under the above described permits will be SUSPENDED for a period of ten (10) days, beginning at 12:01 A.M. on the 24th day of December, 2003.

This Order will become final and enforceable on November 6, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 16th day of October, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

Lex Johnston
ATTORNEY FOR RESPONDENT
VIA FAX (817) 820-0408

CLUB 72 LLC ET AL
D/B/A CLUB 72
RESPONDENT
210 Matlock Meadow Dr.
Arlington, TX 76002
CERTIFIED MAIL NO. 7001 2510 0003 8687 1205

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 604699 **REGISTER NUMBER:**

NAME: CLUB 72 LLC ET AL **TRADENAME: CLUB 72**

ADDRESS: 117 S WATSON ROAD, ARLINGTON, TEXAS 76010-2497

DATE DUE: December 17, 2003

PERMITS OR LICENSES: MB528129, LB528130, PE528131

AMOUNT OF PENALTY: $1,500.00

Amount remitted $_____ Date remitted _____

If you wish to a 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 17TH DAY OF DECEMBER 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

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.