

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
V.	§	ALCOHOLIC
	§	
AFSHIN INC. D/B/A AGAVE BAR (SOAH DOCKET NO. 458-06-3167)	§	BEVERAGE COMMISSION

FINAL ORDER

On this the 20th day of March, 2007 came on to be heard the above styled and numbered case. After considering the pleadings, record, and Proposal for Decision in this matter, the Assistant Administrator makes the following conclusions.

The Assistant Administrator agrees with the Administrative Law Judge’s conclusion that the staff failed to prove that Ms. Terrell was intoxicated on the evening in question. Having reached this conclusion, the questions of whether Ms. Terrell was an “agent, servant or employee of respondent at the time of her alleged intoxication” and what liability the permit holder had or has for the intoxication of its agents, servants or employees is unnecessary to the disposition of this case. Accordingly, the commission makes no finding or comment on the questions of fact and law discussed in § II. D. of the Proposal for Decision.

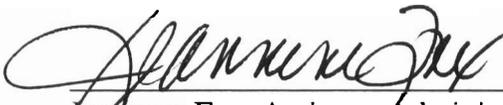
In accordance with the foregoing conclusions, the commission hereby adopts the Administrative Law Judge’s Findings of Fact 1, 3, 4, 5, 6, 7, 9, 11, 13, 14, 15, and 16 and Conclusions of Law 1, 2, 3, 5, and 6. The remaining Findings of Fact and Conclusions of Law are hereby expressly rejected as a basis for this Order.

This Order is entered under the authority of §5.43(b) of the Texas Alcoholic Beverage Code.

IT IS THEREFORE ORDERED that this case be dismissed with prejudice and that no suspension or penalty be imposed on the Respondent.

SIGNED this 20th day of March, 2007.

On Behalf of the Administrator,



 Jeanene Fox, Assistant Administrator
 Texas Alcoholic Beverage Commission

David O. Chambers
ATTORNEY FOR RESPONDENT
VIA FAX (512) 857-0061

Afshin Inc.
RESPONDENT
d/b/a Agave Bar
6706 Bridgehill Cv
Austin, Tx 78746
VIA REGULAR MAIL

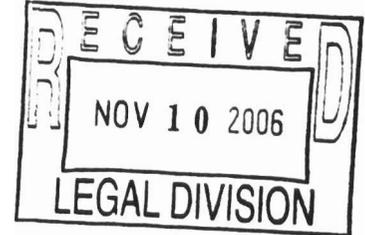
Hon. Craig R. Bennett
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX: (512) 475-4994

Christopher G. Gee
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

November 9, 2006



Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

HAND DELIVERY

**RE: Docket No. 458-06-3167; Texas Alcoholic Beverage Commission v. Afshin Inc.
d/b/a Agave Bar (TABC Docket No. 495774)**

Dear Mr. Steen:

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 § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink that reads "Craig R. Bennett".

Craig R. Bennett
Administrative Law Judge

CRB/ls
Enclosure

xc: **Docket Clerk, State Office of Administrative Hearings - VIA HAND DELIVERY**
Christopher Gee, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -
VIA HAND DELIVERY
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -
VIA HAND DELIVERY
David O. Chambers, Attorney at Law, 1104 Nueces Street, Suite 208, Austin, TX 78701 - **VIA REGULAR MAIL**

DOCKET NO. 458-06-3167

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
AFSHIN INC. d/b/a AGAVE BAR (TABC DOCKET NO. 495774)	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this enforcement action against Afshin, Inc. d/b/a Agave Bar (Respondent), alleging that Respondent violated the Texas Alcoholic Beverage Code by allowing its agent, servant, or employee to be intoxicated on its premises. Staff seeks either a 20-day suspension of Respondent's permit or a civil penalty of \$3,000. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) concludes that Staff has failed to prove, by a preponderance of the evidence, that Respondent violated any applicable rules or statutes. Therefore, the ALJ recommends that no penalty or suspension be imposed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 104.01(5), and 16 TEX. ADMIN. CODE § 31.1, *et. seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding.

On October 26, 2006, an evidentiary hearing convened before ALJ Craig R. Bennett, in SOAH's Austin office. TABC was represented at the hearing by Christopher Gee, staff attorney. Respondent appeared and was represented by attorney David Chambers. The record closed on November 2, 2006, after the parties were given an opportunity to submit written legal arguments regarding certain evidentiary matters.

II. DISCUSSION

A. Background

Respondent operates a bar (the Agave Bar) located on Sixth Street in Austin, Texas. The bar is operated under the authority of a Mixed Beverage Permit, which includes a Mixed Beverage Late Hours Permit and a Beverage Cartage Permit, issued by the TABC. The following facts are not in dispute. Respondent employed Alison Terrell as a “shot girl” (a waitress whose sole duty is to walk around the Agave Bar offering to sell small shots of alcohol to patrons of the bar). On May 27, 2005, Ms. Terrell began her shift at the Agave Bar at approximately 8:00 p.m. At approximately 1:30 a.m. on May 28, 2005, Ms. Terrell left the Agave Bar, went across the street to another bar owned by Respondent, and consumed at least one shot of alcohol at that bar. At 2:00 p.m., Ms. Terrell returned to the Agave Bar. She was followed into the bar by TABC agent Stephen McCarty. Agent McCarty then stopped Ms. Terrell and questioned her to determine whether she was intoxicated.

During questioning, Ms. Terrell became agitated and hysterical. After speaking with Ms. Terrell for a few moments, Agent McCarty concluded that she was an employee of the Agave Bar and was intoxicated on the premises. Therefore, he placed her under arrest for violation of TEX. ALCO. BEV. CODE ANN. § 104.01(5). The next day, Agent McCarty returned to the Agave Bar and also issued Respondent a citation for the offense, because Ms. Terrell was allegedly Respondent’s employee at the time of her intoxication.

There are two contested factual issues in this case. The first involves whether Ms. Terrell was intoxicated at the time of her arrest. Respondent argues she was not intoxicated but acted unusually because she had a bipolar disorder and had not been taking her medication. TABC disagrees, asserting the evidence clearly establishes that Ms. Terrell was intoxicated. The second issue involves Respondent’s liability even if Ms. Terrell was intoxicated. Respondent disputes it is liable for her conduct because she was not its employee at the time of her arrest. Although Respondent admits that Ms. Terrell was a waitress at the Agave Bar, it contends that she was off-duty at the time of the incident. In contrast, TABC argues Ms. Terrell was still working at the time of the incident. The evidence and arguments on these issues are set out in Sections C and D below.

B. Applicable Law

State law prohibits employees of alcoholic beverage retailers from being intoxicated on the premises. Specifically, TEX. ALCO. BEV. CODE ANN. § 104.01(5) provides:

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 the public decency, including, but not limited to any of the following acts:

(5) being intoxicated on the licensed premises.

Further, a permittee may have enforcement action taken against it if its employees are intoxicated on the licensed premises. In particular, TEX. ALCO. BEV. CODE ANN. § 11.61(b) states:

(b) 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.

Relying upon these provisions, TABC brings this enforcement action against Agave Bar. The relevant factual and legal issues are addressed below.

C. Was Ms. Terrell Intoxicated on May 28, 2005, on the Premises of the Agave Bar?**1. TABC's Evidence and Arguments**

Agent McCarty testified that he was on duty on Sixth Street in Austin, Texas, during the early morning hours of May 28, 2005. At approximately 2:00 a.m. on that date, he observed Ms. Terrell, while wearing a shirt that displayed "Agave Bar" on the front, walk along the sidewalk, cross the street and enter the Agave Bar. Agent McCarty testified that, as she entered the Agave Bar,

Ms. Terrell stumbled and appeared to have a swaying balance. Therefore, he followed her into the bar and observed her walk to the rear of the bar and use a railing for balance. He approached her to question her and determine whether she was intoxicated. While speaking with her, he observed that she had slurred speech, bloodshot eyes, and a strong odor of an alcoholic beverage on her breath. Agent McCarty then asked Ms. Terrell if she was an employee of the Agave Bar, to which she replied "yes" and indicated that she "had worked" that date. She further stated that she had "gotten off" at approximately 1:30 a.m. but had returned to the Agave Bar to "count her money" and "complete her shift."

Agent McCarty then attempted to perform various standardized field sobriety tests on Ms. Terrell. He found that Ms. Terrell exhibited six clues of intoxication on a Horizontal Gaze Nystagmus (HGN) test. He started to administer a one-leg-stand test, but terminated it when Ms. Terrell appeared to be too unsteady on her feet to continue. Based on this, Agent McCarty concluded that Ms. Terrell was intoxicated and he placed her under arrest.

2. Respondent's Evidence and Arguments

Respondent disagrees that Ms. Terrell was intoxicated. Respondent presented the testimony of Afshin Mohammedzadeh, its principal owner who was present at the Agave Bar on the night of Ms. Terrell's arrest. He testified that Ms. Terrell left the Agave Bar at approximately 1:30 a.m. and went to a bar across the street called Eternal. She called him a short while later and indicated that she had left her purse at the Agave Bar and needed to come back and get it. She then came back to the Agave Bar at approximately 2:00 a.m. He observed Ms. Terrell both during her shift and at the time she left at 1:30 a.m., and he testified that she did not have any alcoholic beverages to drink and did not appear intoxicated at any time. Moreover, he never smelled alcohol on her breath prior to her completing her shift and leaving to go to Eternal.

Mr. Mohammedzadeh also testified that, when Ms. Terrell returned to the Agave Bar shortly after 2:00 a.m., Agent McCarty followed her in and stopped her within a minute or so of her entering

the bar. Ms. Terrell then became angry and hysterical when being questioned by Agent McCarty. Mr. Mohammedzadeh had seen Ms. Terrell become hysterical on other occasions and he testified that she had previously told him that she was on medication for bipolar disorder and had not been taking it recently. He testified that the outburst Ms. Terrell exhibited with Agent McCarty was similar to the one he had previously seen, which she had previously attributed to her bipolar disorder.

Respondent also presented the testimony of Mike Williams, the general manager of Eternal Nightclub. He testified that he had lunch with Ms. Terrell on May 27, 2005, prior to her shift at the Agave Bar. He was working that night at Eternal, and he testified that Ms. Terrell came into the bar at approximately 1:30 a.m., and told him that she had been "cut" and wanted to dance. He observed her drink one shot of an alcoholic beverage while at Eternal. Then, at approximately 2:00 a.m., Ms. Terrell told him that she was going back to the Agave Bar to get her purse.

Finally, Respondent presented the testimony of Dax Foster, the manager of Agave Bar on May 27-28, 2005. He testified that he was working and observed Ms. Terrell during her entire shift on the night in issue. He never saw her drink any alcoholic beverages and she never showed any signs of intoxication in his presence. He was aware that she had left the Agave Bar at 1:30 a.m. and also observed her come back in shortly after 2:00 a.m., with TABC officers coming in immediately behind her.

3. The ALJ's Analysis

After considering the totality of the evidence, the ALJ concludes that the preponderant evidence does not show that Ms. Terrell was intoxicated at the time of her arrest on May 28, 2005. Agent McCarty testified that Ms. Terrell had slurred speech, bloodshot eyes, a smell of alcoholic beverage on her breath, unsteady balance, and exhibited six clues of intoxication. However, Agent McCarty's testimony was somewhat inconsistent on some of these points.

For example, Agent McCarty testified that he observed Ms. Terrell walking along and across Sixth Street and did not observe any indications that she was intoxicated until she stumbled entering the Agave Bar. After following her into the Agave Bar, Agent McCarty testified that Ms. Terrell was swaying so much that he could not even administer the HGN test at first. But, he was able to administer it properly just moments later. Then, immediately after that, he terminated a one-leg-stand test because Ms. Terrell could not maintain her balance and he was concerned for her safety. It seems incongruous that Ms. Terrell could alternate between being so unsteady on her feet, but also being able to walk along Sixth Street without exhibiting any noticeable indicators of intoxication. Similarly, it is incongruous for her to be swaying too much for an HGN test to be administered, but then be able to stand sufficiently still long enough for a second one to be performed to completion just moments later. The ALJ is not questioning the veracity of Agent McCarty, but rather concludes that the inconsistent nature of Ms. Terrell's actions tends to weigh against a finding of intoxication under the circumstances of this case, without more evidence indicating Ms. Terrell was intoxicated.

Moreover, the sequence of events from the evening also raises some doubts as to whether Ms. Terrell was intoxicated. The evidence reflects that Ms. Terrell worked until 1:30 a.m. and was first seen by Agent McCarty shortly after 2:00 a.m., approximately 30 minutes later. Therefore, the ALJ would have to either conclude that Ms. Terrell became intoxicated within the 30-minute window after her shift concluded, or was drinking prior to the end of her shift. The uncontroverted evidence in the record is that Ms. Terrell did not have any alcoholic beverages while at the Agave Bar and did not exhibit any indicators of intoxication at the time she left the bar at 1:30 a.m. So, if Ms. Terrell was intoxicated, the ALJ would have to conclude that her condition arose within 30 minutes after consuming her first drink. But, other uncontroverted evidence in the record indicates that Ms. Terrell had the equivalent of one shot of an alcoholic beverage prior to returning to the Agave Bar. Without more evidence, the ALJ is unwilling to conclude that this amount of alcohol within a 30-minute period was sufficient to render Ms. Terrell intoxicated. Therefore, the ALJ finds that TABC has failed to show that Ms. Terrell was intoxicated at the time in question.¹

¹ However, this finding is not necessarily crucial because, as the ALJ discusses below, the ALJ concludes that TABC has not shown that Ms. Terrell was acting as an employee, agent or servant of Respondent at the time she was allegedly intoxicated. So, TABC's action against Respondent fails for that independent reason also.

D. Was Ms. Terrell an Agent, Servant or Employee of Respondent at the Time of Her Alleged Intoxication?

1. TABC's Evidence and Arguments

TABC cites to the statements of Ms. Terrell allegedly given to Agent McCarty on the night she was arrested. Specifically, Agent McCarty testified that Ms. Terrell told him that she had gotten off her shift at 1:30 a.m. but was returning to the Agave Bar to count her money and complete her shift. Moreover, Ms. Terrell was wearing a shirt with Agave Bar on the front at the time of the incident.

2. Respondent's Evidence and Arguments

Respondent relies primarily on the testimony of Mr. Mohammedzadeh. He testified that Ms. Terrell's job as a shot girl consisted of her (1) checking in at the bar at the beginning of her shift, (2) picking up her "bank" (the money, used to make change, that she was given at the beginning of her shift) and a tray of shots, (3) selling the shots throughout the evening, (4) checking in her bank, tray, and unused shots at the end of the evening and returning the money for the shots sold, and (5) cleaning off her tray for use by the next shift. He testified she had no other duties.

Because business at the Agave Bar was slow on the night in issue, Mr. Mohammedzadeh advised Ms. Terrell that he was letting her off early and she should close out her tray and could go. Shortly after that, Ms. Terrell asked him if she could go to Eternal (a bar across the street also owned by Mr. Mohammedzadeh). He told her "you're off work, you can go wherever you want." He further testified that, prior to leaving, Ms. Terrell closed out her tray and returned the bank and money owed for the shots and she had no other job duties remaining on her shift. Later, she called him and told him that she had left her purse at the Agave Bar and was coming back to get it. She arrived right around 2:00 a.m., and bar employees had to unlock the doors to let her in.

Similarly, Dax Foster testified that Ms. Terrell had completed her shift at 1:30 a.m. and, once she left the bar, she was no longer working. According to Mike Williams at Eternal, Ms. Terrell told him that she had been “cut for the night and wanted to dance,” an alleged reference to her employment ending for the evening. Further, at the time she left Eternal, Ms. Terrell told Mr. Williams that she was going back to the Agave Bar to get her purse. Based on this evidence, Respondent argues that Ms. Terrell clearly was not working at the time of her alleged intoxication and, therefore, it cannot be penalized for her actions.

3. The ALJ's Analysis

As noted previously, the law prohibits a permittee (and its agents, servants, or employees) from being intoxicated on a licensed premises. To give effect to this meaning, the ALJ concludes that the intoxicated person, if not the actual permittee itself, must be acting in an agent, servant, or employee capacity at the time of the incident for there to be a violation of the relevant provisions.² In this case, the ALJ concludes that Staff has failed to establish that Ms. Terrell was an agent, servant or employee of Respondent at the time of her alleged intoxication.

The only basis for Agent McCarty to conclude that Ms. Terrell was working at the time of her alleged intoxication is her statements that she had to return to the bar to “count her money” and “complete her shift” or “finish out her shift.”³ Although she was wearing a shirt with “Agave Bar” on it, Agent McCarty never saw Ms. Terrell in the bar during normal operating hours, and did not see her performing any work functions at the time he concluded she was intoxicated. In fact, the testimony of Agent McCarty shows that the evidence available to him was conflicting on whether

² See, e.g., SOAH Docket No. 458-00-1367, *Texas Alcoholic Beverage Commission v. Robert Manriquez d/b/a Lady Luck* (Where the TABC adopted a PFD in which the ALJ held that the intoxication of an off-duty employee on the licensed premises did not violate the Code). The ALJ does not believe this is a disputed principle in this case, as TABC did not attempt to argue that Respondent was liable for Ms. Terrell's conduct regardless of her work status at the time; rather, TABC asserted that the evidence showed that Ms. Terrell was working at the time of her intoxication.

³ Agent McCarty's report and his oral testimony contain these two different phrases (i.e., “complete her shift” or “finish out her shift”) for what Ms. Terrell stated was her reason for returning to the bar.

Ms. Terrell was working at the time of the incident. Specifically, Agent McCarty notes that Ms. Terrell told him she “had worked” (past tense) that day and “had gotten off at approximately 1:30 a.m.” (indicating her work had been completed that day).

Moreover, the testimony of the other witnesses and the circumstances of the evening indicate that Ms. Terrell had completed her work for the Agave Bar by 1:30 a.m. As both Mr. Mohammedzadeh and Mr. Foster testified, Respondent does not allow employees to leave the premises without first closing out their shift and returning all money owed to Respondent for the drinks sold. Therefore, it is unclear what Ms. Terrell meant when she said that she had to count her money and complete her shift. By all accounts, there was no work remaining for her to do and she was free to go home for the evening at 1:30 a.m. Other witnesses have indicated that Ms. Terrell’s sole reason for returning to the Agave Bar was to get her purse and go home for the evening. Given the conflicting evidence, the ALJ cannot conclude that Ms. Terrell was working at the time of the incident.⁴ Therefore, because the evidence does not show that Ms. Terrell was acting as an employee, agent or servant of Agave Bar at the time of the incident, Respondent has not violated the statutes in issue.

III. CONCLUSION

The ALJ concludes that TABC has not shown that Respondent committed the violations alleged and, thus, the ALJ recommends that no suspension or penalty be imposed against Respondent. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

⁴ Moreover, if Ms. Terrell were in fact intoxicated as alleged by TABC, her statements to Agent McCarty at the time (if made in an intoxicated state) carry less weight than the other clear evidence in the record that she was not working at the time.

IV. FINDINGS OF FACT

1. Afshin, Inc. d/b/a Agave Bar (Respondent) holds Mixed Beverage Permit MB-41 0420, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit, which were in effect on May 27-28, 2005, and which have been renewed since that time. These permits cover the Agave Bar located at 415 E. 6th Street, Austin, Travis County, Texas.
2. On May 27-28, 2005, Respondent employed Alison Terrell as a "shot girl" (a waitress whose sole duty was to walk around the Agave Bar offering to sell small shots of alcohol to patrons of the bar).
3. On May 27, 2005, Ms. Terrell began her shift at the Agave Bar at approximately 8:00 p.m. and worked continuously until approximately 1:30 a.m., at which time her shift ended. During her shift, Ms. Terrell did not consume any alcoholic beverages.
4. At approximately 1:30 a.m. on May 28, 2005, Ms. Terrell left the Agave Bar, went across the street to Eternal Night Club (another bar owned by Respondent) and consumed the equivalent of one shot of alcohol at that bar.
5. At 2:00 a.m. on May 28, 2005, Ms. Terrell left Eternal Night Club and returned to the Agave Bar.
6. Texas Alcoholic Beverage Commission (TABC) agent Stephen McCarty was on duty on Sixth Street in Austin, Texas, at approximately 2:00 a.m. on May 28, 2005, and observed Ms. Terrell walk across Sixth Street and enter the Agave Bar. She did not exhibit any indicators of intoxication at that time, until she appeared to sway and stumble upon entering the Agave Bar.
7. Agent McCarty followed Ms. Terrell into Agave Bar and stopped and questioned her to determine whether she was intoxicated. During questioning, Ms. Terrell became agitated and hysterical.
8. Ms. Terrell informed Agent McCarty that she had worked that night at Agave Bar but had gotten off at 1:30 a.m.
9. After speaking with Ms. Terrell for a few moments, Agent McCarty concluded that she was an employee of the Agave Bar and was intoxicated on the premises. Therefore, he placed her under arrest for being an employee intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. § 104.01(5).
10. On May 29, 2005, Agent McCarty returned to the Agave Bar and also issued Respondent a citation for Ms. Terrell's conduct (i.e., for having an employee intoxicated on the premises).

11. The evidence fails to establish that Ms. Terrell was intoxicated on May 28, 2005, at the time she was arrested by Agent McCarty.
12. Ms. Terrell was not an agent, servant, or employee of the Agave Bar after 1:30 a.m. on May 28, 2005.
13. On July 28, 2005, TABC notified Respondent of its intent to cancel or suspend Respondent's permit.
14. Respondent requested a hearing regarding TABC's intended action.
15. On August 16, 2006, the TABC sent its Notice of Hearing to Respondent. This Notice of Hearing informed Respondent of the time, 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 TABC.
16. On October 26, 2006, an evidentiary hearing convened in Austin, Texas, before Administrative Law Judge (ALJ) Craig R. Bennett. TABC was represented at the hearing by Christopher Gee, staff attorney. Respondent appeared and was represented by attorney David Chambers. The record closed on November 2, 2006, after the parties were given an opportunity to submit written legal arguments regarding certain evidentiary matters.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 104.01(5), 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 case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.021.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE § 155.55.
4. Because Ms. Terrell was not an agent, servant or employee of Respondent at the time of her arrest on May 28, 2005, any alleged intoxication by her did not form the basis of a violation by Respondent of TEX. ALCO. BEV. CODE ANN. ANN §§ 104.01(5) or 11.61(b)(13).

5. TABC has failed to establish by a preponderance of the evidence that any agent, servant, or employee of Respondent was intoxicated on the premises on May 28, 2005, in violation of TEX. ALCO. BEV. CODE ANN. ANN §§ 104.01(5) or 11.61(b)(13).
6. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit MB-410420, which includes a Beverage Cartage Permit and a Mixed Beverage Late Hours Permit, should not be suspended nor should any penalty be imposed.

SIGNED on November 9, 2006.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS