

DOCKET NO. 591858

AIRPORT MARINA HOTEL LLC § BEFORE THE TEXAS
d/b/a AIRPORT MARINA HOTEL INC. §
PERMIT/LICENSE NO(s). MB209547, § ALCOHOLIC
LB & PE §
TARRANT COUNTY, TEXAS § BEVERAGE COMMISSION

WAIVER ORDER

On this day the above-numbered and styled case came on for consideration. The following findings of fact and conclusions of law are hereby made:

AIRPORT MARINA HOTEL LLC, Respondent, is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit, issued by the Texas Alcoholic Beverage Commission ("Commission") for the premises known as AIRPORT MARINA HOTEL INC., located at DFW INTERNATIONAL AIRPORT, GRAPEVINE, TARRANT County, Texas, 75261-9014, and whose mailing address is the same.

Respondent has waived hearing on the violation(s) listed on the attached Settlement Agreement and Waiver of Hearing, and accepts the penalty assessed below.

It is found that Respondent violated Sections 11.61(b)(14), 109.53, and/or 11.61(b)(7) of the Texas Alcoholic Beverage Code.

In accordance with the agreed waiver, Respondent's permit(s) and/or license(s) will CANCELLED FOR CAUSE.

IT IS THEREFORE ORDERED that unless the Respondent pays a civil penalty in the amount of \$375,000.00 on or before the 1st day of November, 2006, all rights and privileges granted by the Commission under the above described permit(s) and/or license(s) will be CANCELLED FOR CAUSE.

This Order is final and enforceable on the date it is signed.

On this date of signature, services shall be made upon parties in the manner indicated below.

SIGNED on October 6, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

AIRPORT MARINA HOTEL LLC
RESPONDENT
d/b/a AIRPORT MARINA HOTEL INC.
P. O. BOX 619014
INTERNATIONAL PKY
DFW AIRPORT, TX 75261-9014
CERTIFIED MAIL NO. 7006 0100 0002 2009 0562

TIMOTHY GRIFFITH
ATTORNEY FOR THE COMMISSION
Legal Services Division

Licensing Division
Enforcement District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 591858 REGISTER NUMBER:

NAME: AIRPORT MARINA HOTEL LLC

TRADENAME: AIRPORT MARINA HOTEL INC.

ADDRESS: P. O. BOX 619014, INTERNATIONAL PKY.
DFW AIRPORT, TX 75261-9014

DUE DATE: November 1, 2006

PERMITS OR LICENSES: MB209547

AMOUNT OF PENALTY: \$375,000.00

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

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

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

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

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

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

DOCKET NO. 458-04-6606

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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BEFORE THE STATE OFFICE

VS.

OF

AIRPORT MARINA HOTEL, INC.,
Respondent
TARRANT COUNTY, TEXAS
(TABC CASE NO. 591858)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

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DOCKET NO. 458-04-6606

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
AIRPORT MARINA HOTEL, INC., Respondent	§	
TARRANT COUNTY, TEXAS (TABC CASE NO. 591858)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought cancellation of Airport Marina Hotel, Inc.'s (Respondent) mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit. The Staff alleged that Respondent delivered an alcoholic beverage to an intoxicated person, and that the place or manner in which Respondent conducted its business warranted cancellation. The Administrative Law Judge (ALJ) agrees that Respondent violated the Alcoholic Beverage Code as alleged, and recommends that Respondent permits be suspended for a total period of 75 days and that Respondent be allowed to pay a civil penalty of \$375,000, representing \$5,000 a day, in lieu of serving the suspension for the violations.

I. PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC) issued mixed beverage permit MB-209547, mixed beverage late hours permit LB-209548, and beverage cartage permit PE-209549 to Respondent. Respondent's licensed premises are located at the Dallas/Fort Worth International Airport, Area U, Grapevine, Tarrant County, Texas.

Notice and jurisdiction were not contested issues, and those matters are addressed only in the Findings of Fact and Conclusions of Law. On January 26, 2005, a hearing convened before ALJ Robert F. Jones Jr. at the SOAH Fort Worth office located at 6777 Camp Bowie Boulevard, Suite

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400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent was represented by its counsel, Morton Siegel, Zuban S. Kaminula, and Van Shaw. The record was closed on March 25, 2005, after the parties filed written final arguments.

II. APPLICABLE LAW

A. Delivery to an intoxicated person

The Texas Alcoholic Beverage Commission (TABC) may cancel or suspend a permit if the holder delivered an alcoholic beverage to an intoxicated person.¹ Under the criminal law, "intoxicated" means:

(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or

(B) having an alcohol concentration of 0.080 or more.²

The TABC has adopted the penal code definition of "intoxicated," at least with respect to server training programs authorized by section 106.14 of the Code.³

¹ TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14) (Vernon 2005) (the Code).

² TEX. PEN. CODE ANN. § 49.01(2) (Vernon 2005)(TPC). "Alcohol concentration" means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine. *Id.* §49.01(1). Prior to September 1, 2001, the alcohol concentration was 0.100. It was that level when the events described in this proposal took place.

³ 16 TEX. ADMIN. CODE (TAC) § 50.1(1); § 50.2(a)(2)

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B. Place or Manner

The TABC may cancel or suspend a permit if it finds that “the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.”⁴

Generally some “unusual condition or situation must be shown so as to justify a finding that the place or manner in which the applicant conducts his business warrants a [cancellation or suspension] of a permit.”⁵ The evidence concerning the unusual condition or situation must be more than mere conclusions.⁶ The Code does not define how the place or manner in which a business might be operated to justify a cancellation or suspension of a permit, giving the TABC discretion in making this decision; there is no set formula.⁷

III. EVIDENCE & DISCUSSION

On the evening of December 31, 1998, David W. Clopton attended a New Year's Eve party held at and sponsored by Respondent's hotel. Early the next morning Mr. Clopton was run-over and killed by a motor vehicle driven by Robert McMillan. At the time of his death, Mr. Clopton had a blood alcohol concentration of .310 grams of alcohol per 100 milliliters of blood, three times the 1999 legal limit.

⁴ § 11.61(b)(7) of the Code.

⁵ *Texas Alcoholic Beverage Comm'n v. Mikulanka*, 510 S.W.2d 616, 619 (Tex.Civ.App.--San Antonio 1974, no writ); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1st Dist.] 1971, no writ)

⁶ *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.-Houston [1st Dist.] 1981, no writ).

⁷ *Brantley v. Texas Alcoholic Beverage Comm'n*, 1 S.W.3d 343, 347 (Tex.App.--Texarkana 1999, no writ); see also, *Helms v. Texas Alcoholic Beverage Comm'n*, 700 S.W.2d 607, 611 (Tex.App.--Corpus Christi 1985, no writ); *Ex parte Velasco*, 225 S.W.2d 921, 923 (Tex.Civ.App.-Eastland 1949, no writ).

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A. Delivery to an intoxicated person

The parties offered testimony from persons who were with Mr. Clopton at the party, his family who spoke with him that day, persons who might have seen him after he left the party, and persons who were involved in or investigated his death. Evidence was admitted concerning Mr. Clopton's medical history as it pertained to alcohol use and to explain why Mr. Clopton's alcohol use history had a bearing on Respondent's statutory culpability.

1. Persons who saw or spoke to Mr. Clopton December 21, 1998**a. Karen Johnson & Barbara Clopton**

Karen Johnson is Mr. Clopton's sister. They spoke by telephone 5:30 p.m. on December 31, 1998, for about 20 minutes. Barbara Clopton is Mr. Clopton's mother. She spoke by telephone with her son between 5:00 and 6:00 p.m. on December 31, 1998, for about 10 minutes. Both believed Mr. Clopton was sober when they spoke.⁸

b. Steven Galyen

Steven Chad Galyen attended the New Year's Eve party at Respondent's hotel on December 31, 1998 to January 1, 1999. He saw David Clopton at the party several times that night. He knew Mr. Clopton as a casual acquaintance.⁹ When Mr. Galyen arrived at approximately 7:30 to 8:00 p.m., Mr. Clopton appeared sober.¹⁰ Mr. Galyen next saw Mr. Clopton 30 minutes later, at 10:00

⁸ Transcript (Tr.) pp. 115, 120-21.

⁹ Tr. pp. 37-38. Mr. Galyen gave a written statement concerning Mr. Clopton to the DFW International Airport Department of Public Safety on January 14, 1999. Tr. pp. 38-39; TABC Exhibit #3, Written Statement of Steven Chad Galyen.

¹⁰ Tr. p. 40. TABC Exhibit 3 however, indicates that Mr. Galyen first saw Mr. Clopton 50 minutes after Mr. Galyen arrived. Mr. Galyen's testimony with respect to when he first saw Mr. Clopton conflicts with other evidence showing Mr. Clopton arrived at the party around 9:30 p.m.

p.m.," and again Mr. Clopton appeared sober.¹¹ Mr. Galyen saw Mr. Clopton with his girl friend, Chi Suk Belcher, at 10:00 p.m.¹² At 10:30 p.m., Mr. Galyen encountered Mr. Clopton alone. Mr. Galyen testified that Mr. Clopton appeared "pretty intoxicated at that point."¹³ Mr. Galyen encountered Mr. Clopton and Ms. Belcher at 11:00 p.m. He stated that Ms. Belcher asked him to convince Mr. Clopton to have something to eat so he would "sober up." When he attempted to do so, Mr. Clopton stated all he needed to eat was his beer, and he drained the cup of beer he was holding.¹⁴

Mr. Galyen described Mr. Clopton as "extremely intoxicated," and said "we really couldn't hold a conversation. He was so incoherent. I really couldn't understand what he was saying. Also he had a drunken stare," and was "kind of slumped over a little bit."¹⁵ The last time Mr. Galyen saw Mr. Clopton was approximately 11:30 p.m. Mr. Galyen asked Mr. Clopton if he had eaten, and Mr. Clopton stated he had not. Mr. Galyen described Mr. Clopton as "wasted," and not in control of himself.¹⁶ Mr. Galyen said that Mr. Clopton was drinking beer, as was Mr. Galyen, and that beer was their drink of choice.¹⁷ Mr. Galyen observed Mr. Clopton obtain beer from one of Respondent's bar.¹⁸ Mr. Galyen also testified that Chi Suk Belcher was intoxicated later in the evening after midnight.¹⁹

¹¹ Tr. p. 41. Mr. Galyen's memory of the events of six years ago was clouded by time, and he relied on TABC Exhibit #3 for specific times. Tr. p. 42-43.

¹² Tr. pp. 41-42, TABC Exhibit #3.

¹³ Tr. p. 43. In TABC Exhibit #3, Mr. Galyen stated "we were both *probably* very intoxicated at this point." (emphasis supplied).

¹⁴ Tr. pp. 44-46; TABC Exhibit #3.

¹⁵ Tr. pp. 46-47. TABC Exhibit #3 provides a similar description of Mr. Clopton but puts the time at 11:30 p.m.

¹⁶ Tr. pp. 47-49, TABC Exhibit #3.

¹⁷ Tr. pp. 53-54.

¹⁸ Tr. p. 54.

¹⁹ Tr. p. 56; TABC Exhibit #3.

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During cross-examination, Mr. Galyen acknowledged that he was in Mr. Clopton's company that night for only a total of five to ten minutes. He agreed Mr. Clopton appeared sober when Mr. Galyen observed him obtain a beer.²⁰ Mr. Galyen was unaware that Mr. Clopton had been institutionalized because of alcohol problems.²¹

c. Chi Suk Belcher

Chi Suk Belcher was Mr. Clopton's intimate friend on December 31, 1998. They had met in October 1997. Ms. Belcher opined that Mr. Clopton was an alcoholic. In her experience, he drank excessively when alone, could not function without drinking, and could not control his intake. She stated he could consume 12 to 30 beers a day. She described Mr. Clopton as more normal after drinking than not; when he did not drink he was sweaty, nervous, jittery, "stressed out, worried, [and anxious]."²²

Ms. Belcher was with Mr. Clopton on December 31, 1998, from 2:00 p.m. to 10:30 p.m.²³ When she first saw him at 2:00 p.m., Mr. Clopton was in a good mood, "happy-go-lucky and normal." This suggested to Ms. Belcher that he had been drinking.²⁴ Mr. Clopton and Ms. Belcher had some beers between 2:00 p.m. and 9:00 p.m. Ms. Belcher was not certain how many beers Mr. Clopton consumed in that time period. She believed that Mr. Clopton purchased a 12 pack of beer, but that the entire 12 were not consumed between the two of them. Ms. Belcher estimated Mr. Clopton had a "few," but was not counting and could not say if a "few" was three, four, or more.²⁵

²⁰ Tr. p. 59.

²¹ Tr. p. 66.

²² Tr. pp. 223-29.

²³ Tr. pp. 230, 239.

²⁴ Tr. pp. 230-31.

²⁵ Tr. pp. 223-32, 253.

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Mr. Clopton, Ms. Belcher, and their friend Ms. Mobely arrived at the hotel between 9:00 and 9:30 p.m. When they paid to enter the party, they were given "vouchers" to be exchanged for drinks.²⁶ Ms. Belcher testified that Mr. Clopton did have some food, "a little bit," from the buffet at the party just after they arrived.²⁷ They had drinks with their food. Ms. Belcher observed Mr. Clopton obtain a beer. She testified Mr. Clopton was "fine," that he did not have slurred speech, bloodshot eyes, or a stumbling gait, and did not smell of alcohol.²⁸ In all, Ms. Belcher observed Mr. Clopton have two or three beers while they were eating over a period of 30 to 45 minutes.²⁹ After they finished eating, the three friends were planing to circulate through the party. Ms. Belcher excused herself to the ladies room, and when she returned, she discovered Mr. Clopton had wandered off by himself.³⁰ Mr. Clopton was in the habit of doing this.³¹ Ms. Belcher spent the next two hours looking for Mr. Clopton at the party but did not see him again.³²

Ms. Belcher testified that she had three beers at the party but did not feel intoxicated. She recalled seeing Mr. Galyen, an acquaintance, at the party, but she denied asking Mr. Galyen to help her get Mr. Clopton to eat.³³

During cross-examination, Ms. Belcher acknowledged that Mr. Clopton's family sued her over Mr. Clopton's death. She stated that the family did not allow her to enter his funeral.³⁴ She

²⁶ Tr. p. 233.

²⁷ Tr. pp. 334-35.

²⁸ Tr. p. 236. Ms. Belcher was asked if Mr. Clopton smelled of alcohol, and responded "No." *Id.* This answer is surprising in view of Ms. Belcher's testimony that Mr. Clopton had been drinking since 2:00 p.m.

²⁹ Tr. pp. 237-38, 253-54.

³⁰ Tr. pp. 238-39.

³¹ Tr. p. 254.

³² Tr. pp. 242-43.

³³ Tr. pp. 240-41.

³⁴ Tr. pp. 245-46.

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acknowledged that she had previously testified that she “got intoxicated towards the end of the night because I was -- I continued drinking,”³⁵ and “my intention [was] to drink, to go out that night.”³⁶ Ms. Belcher also acknowledged that she vomited that night, but not because she was drinking.³⁷

2. Persons Who Might Have Seen Mr. Clopton after He Left the Party

On January 1, 1999, Ms. Patty Haber worked for “Park & Fly,” a business associated with the DFW International Airport. She was operating a shuttle bus on the Terminal 4-E Loop Roadway inside the airport. She observed a white male walking toward the infield of the loop roadway. She stopped her bus, opened the driver’s window, and shouted at the man to get off the roadway or he would be hit.³⁸ According to Ms. Haber, the man mumbled “thank you” or words to that effect and kept walking.³⁹ She stated “something was not right. The man was not very coherent. He was -- something was not right.”⁴⁰ She called DFW police officers. She drove around the roadway, and saw the man sitting in a “rock garden” area near the loop roadway. Ms. Haber could not say the man was drunk, but he did look confused. He was not stumbling. She had the impression he was lost.⁴¹ Ms. Haber estimated the time to be after 12:00 midnight, since that is when she began work, and did not believe it was much later than 12:14 a.m.⁴² Ms. Haber estimated that the Airport Hyatt was either “a fourth of a mile away” or “two or more football fields” from the Terminal 4-E Loop Roadway where she saw the man.⁴³

³⁵ Tr. p. 248.

³⁶ Tr. p. 249.

³⁷ Tr. p. 250.

³⁸ Tr. pp. 67-68.

³⁹ Tr. p. 68.

⁴⁰ Tr. pp. 68-69.

⁴¹ Tr. pp. 69-71.

⁴² Tr. p. 72.

⁴³ Tr. p. 86.

During cross-examination, Ms. Haber estimated her interaction with the man lasted less than a minute.⁴⁴ She recalled that his speech was slurred, and because of this, she thought the man was sick. She stated, "he was -- like he was going to fall over."⁴⁵ When she first saw the man he was in the roadway.⁴⁶

Ms. Haber was shown a photographs of a white male,⁴⁷ but could not identify them as the man she saw that night. She indicated the man she saw was wearing a red shirt,⁴⁸ darker pants, with no coat, was "very tall," and had dark, short hair.⁴⁹

3. Persons Who Were Involved In or Investigated Mr. Clopton's Death

a. Robert McMillan

Mr. McMillan⁵⁰ attended the New Year's Party at Respondent's hotel, arriving between 8:00 and 9:00 p.m. on December 31, 1998, and leaving at 12:05 to 12:10 a.m. on January 1, 1999. His wife had to attend the party in relation to her work for the hotel. He was not drinking.⁵¹ Mr. McMillan left the hotel and drove southbound on the main airport highway (International Parkway) in the center lane. A man appeared suddenly on the right hand side of the roadway and began jogging across. Mr. McMillan swerved to the right to avoid the man. The man then "did an about

⁴⁴ Tr. p. 78.

⁴⁵ Tr. pp. 79-80.

⁴⁶ Tr. p. 81.

⁴⁷ TABC Exhibit #16A. This exhibit was not offered into evidence; the ALJ assumes they were pictures of Mr. Clopton.

⁴⁸ Tr. p. 70.

⁴⁹ Tr. pp. 72-74. This description matches Mr. Clopton's physical description and the clothes he wore that night.

⁵⁰ Mr. McMillan appeared with his attorney, Mary Wheeler. Tr. p. 87.

⁵¹ Tr. pp. 88-90.

face" and ran back the way he had come. The man froze in front of Mr. McMillan's vehicle, and it ran over him.⁵²

b. Officer David Bess

Officer David Bess investigated the accident that took Mr. Clopton's life. The accident took place about one-half mile south of the Respondent's hotel. Officer Bess testified that Mr. Clopton was wearing a red shirt and dark pants, but was not wearing shoes.⁵³ The accident was called in at 12:22 a.m., and Officer Bess arrived on the scene at 12:43 a.m.⁵⁴

During the cross-examination, Officer Bess indicated that he was involved in the follow-up investigation. He performed calculations for the accident report. He said Sergeant Lofton and Officer Boucher conducted the part of the investigation that involved questioning witnesses. Officer Bess could recall that Sgt. Lofton spoke with Michael Stephens or any of the Respondent's bartenders.⁵⁵

c. Daniel J. Konzelmann, M.D.

Dr. Konzelmann was a deputy medical examiner with the Tarrant County Medical Examiner's office (TCME), and performed the autopsy of David W. Clopton on January 1, 1999.⁵⁶

⁵² Tr. pp. 89-92.

⁵³ Tr. p. 109. The significance, if any, of the missing shoes was not explored during the hearing. One can speculate that Mr. Clopton removed them at some point in the evening, perhaps when he was sitting in the "back garden" as Ms. Haber had described, or that they were forced from his feet as a result of the fatal collision.

⁵⁴ Tr. p. 110.

⁵⁵ Tr. pp. 111-13. No report made by Sergeant Lofton, Officer Boucher, or any other official with the DFW DFS was offered by either party.

⁵⁶ TABC Exhibit #4B, Transcript of Deposition of Daniel Konzelmann, M.D. (Konzelmann Depo.), pp. 4-6. The Konzelmann deposition, and its numerous exhibits, was admitted into evidence via the ALJ's rulings at the hearing, Tr. p. 33-36, and Order No. 8, *Ruling on Objections to The Deposition Testimony of Dr. Daniel J. Konzelmann*, TABC Exhibits #4B & 4C, February 4, 2005.

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Dr. Konzelmann is a doctor of medicine and a pathologist.⁵⁷ One of his duties as a medical examiner was to conduct autopsies to determine the cause of death. Dr. Konzelmann identified TABC Exhibit #4 as the report he composed following the autopsy.⁵⁸ Samples of David Clopton's blood, vitreous, and urine were collected for analysis during the procedure Dr. Konzelmann conducted.⁵⁹ In Dr. Konzelmann's opinion, David Clopton's cause of death was "blunt force injuries due to motor vehicle - pedestrian collision."⁶⁰

Dr. Konzelmann opined that a 0.31 blood alcohol concentration was "significant," and that its dangerousness "depends on the situation." A person with that concentration would be at risk on a highway.⁶¹ In his opinion a person with 0.31 alcohol concentration would possibly exhibit "staggering gait, loss of coordination, slurred speech, confusion, [stupor] perhaps."⁶²

d. Dr. Angela Springfield

Dr. Springfield has been with the TCME for 20 years as the chief toxicologist and has worked as a toxicologist for 30 years.⁶³ She holds a doctorate in pharmacology and toxicology and is one of 150 forensic toxicologists certified by the American Board of Forensic Toxicologists.⁶⁴ Dr. Springfield trains the technicians in the TCME laboratory and performs all of the quality review.

⁵⁷ Konzelmann Depo., pp. 6-8; TABC Exhibit #5, C.V. of Daniel Konzelmann, M.D. (Deposition Exhibit A1)

⁵⁸ Konzelmann Depo., pp. 5-6; TABC Exhibit #4, Autopsy Report (Deposition Exhibit A); see also TABC Exhibit #4A, Certified Copy of Autopsy Report.

⁵⁹ Konzelmann Depo., pp. 13-16.

⁶⁰ Konzelmann Depo., p. 11.

⁶¹ Konzelmann Depo., p. 20.

⁶² Konzelmann Depo., p. 21

⁶³ Tr., pp. 14-15.

⁶⁴ Tr. p. 16; TABC Exhibit #1, C.V. of Angela Springfield, Ph.D.

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She reviews each case and endorses each analysis.⁶⁵

Dr. Springfield explained that the body fluids analyzed by her laboratory are extracted or collected by the medical examiner. The laboratory uses a head space gas chromatograph to analyze the contents of blood, vitreous fluid, and urine.⁶⁶ Dr. Springfield identified TABC Exhibit #2 as the toxicology test results of David W. Clopton.⁶⁷ The tests were performed on January 13, 1999.⁶⁸ She reviewed the test results and approved them by her signature.⁶⁹

Mr. Clopton's vitreous fluid (fluid from the inner eye) had an alcohol concentration of 0.300 grams per 100 milliliters. His urine had an alcohol concentration of 0.360. His blood had an alcohol concentration of 0.310.⁷⁰ Dr. Springfield interpreted the alcohol analysis to indicate that Mr. Clopton had been drinking for "a period of time, at least long enough for the alcohol consumed to have been absorbed into his system and to have almost reached equilibrium."⁷¹ According to Dr. Springfield, when a person has absorbed all the alcohol in his digestive system the vitreous concentration tends to be higher than the blood concentration. Mr. Clopton's vitreous concentration (0.30) was very close to his blood concentration (0.31), indicating almost all of the alcohol in his digestive system had been absorbed.⁷² The higher urine concentration indicates that he has begun to excrete alcohol from his system.⁷³ Dr. Springfield opined that a person with a 0.31 blood alcohol concentration is "severely intoxicated." For some this level could be lethal, for others a physical task

⁶⁵ Tr. pp. 15-16.

⁶⁶ Tr. p. 20.

⁶⁷ Tr. pp. 21-22; TABC Exhibit #2, Toxicology Test Results of David W. Clopton.

⁶⁸ Tr. pp. 24-25.

⁶⁹ Tr. p. 22.

⁷⁰ Tr. p. 26; TABC Exhibit #2.

⁷¹ Tr. p. 28.

⁷² Tr. p. 28.

⁷³ Tr. p. 28.

such as driving would be risky, for others there might be "gross motor impairment," and "certainly impairment of judgment." The level of risk would depend on the person and the activity, according to Dr. Springfield.⁷⁴

e. TABC Agent Tricia O'Cayce Rutledge

TABC Agent Tricia O'Cayce Rutledge prepared a report of her investigation.⁷⁵ As documented in the report, Mr. Clopton arrived at the DFW Airport at 8:33 p.m. with Ms. Belcher and their mutual friend Debbie Mobley. Mr. Clopton arrived at the hotel at approximately 9:00 p.m. Agent Rutledge quotes a statement Ms. Belcher gave to DFW DPS in which Ms. Belcher said Mr. Clopton "was a little too tipsy for the amount of drink he had so I assumed he had an empty stomach."⁷⁶

Agent Rutledge documented that the garage where Patty Haber saw the man walking is near the entrance to the hotel, and the location where Mr. Clopton was run-over is near the ramp feeding from the hotel onto South International Parkway. She recorded that the cost per person for the New Year's party was \$99.00.⁷⁶ Agent Rutledge asserted that there were no other permitted locations in the "immediate area" where Mr. Clopton could have purchased alcoholic beverages.⁷⁷

f. John Clopton

John Clopton is the father of David Clopton.⁷⁸ John Clopton identified TABC Exhibit #18

⁷⁴ Tr. p. 30

⁷⁵ Tr. pp. 129-30; TABC Exhibit #28.

⁷⁶ TABC Exhibit #28.

⁷⁷ TABC Exhibit #28.

⁷⁸ Tr. p. 98.

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as a record of his son's bank account with Bank One.⁷⁹ The record is for David Clopton's transactions from December 23, 1998 to January 26, 1999. It shows a purchase from the Hyatt Hotel, DFW Airport, of \$106.18 on December 31, 1998.⁸⁰

3. Expert Opinion

a. Dr. Gary Wimbish

Dr. Wimbish is a toxicologist and is board certified in forensic toxicology.⁸¹ In preparing his testimony, Dr. Wimbish reviewed a number of documents: Dr. Springfield's toxicology report, Dr. Konzelmann's autopsy report, and Mr. Clopton's medical history.⁸²

The toxicology report prepared under Dr. Springfield's direction was significant to Dr. Wimbish. Like Dr. Springfield, Dr. Wimbish determined that Mr. Clopton was still absorbing alcohol at the time of his death.⁸³ He concluded that Mr. Clopton would have been drinking for "many hours," "more than three" hours, and "probably half a day" to have a blood alcohol concentration of .310.⁸⁴ Dr. Wimbish calculated that Mr. Clopton had the equivalent of 16 drinks⁸⁵ in his body, and he would have been drinking at a rate faster than one drink per hour.⁸⁶ Dr. Wimbish

⁷⁹ Tr. pp. 99-100; TABC Exhibit #18, Bank Records of David W. Clopton

⁸⁰ Tr. pp. 100-101; TABC Exhibit #18.

⁸¹ Tr. pp. 153-56; Respondent's Exhibit #1, C.V. of Gary Wimbish, M.D.

⁸² Tr. pp. 156-57, 164-66; Respondent's Exhibit #2, Factual Basis of Opinions of Gary Wimbish, M.D. [Autopsy Report, Toxicology Test Results of David W. Clopton, Medical Records: Arlington Memorial Hospital, Medical Records: Eric Hoffman, M.D., Medical Records: HCA Medical Center of Arlington, Medical Records: Parkland Hospital, Medical Records: Freeman Center, Waco].

⁸³ Tr. pp. 160-61.

⁸⁴ Tr. p. 158.

⁸⁵ A drink is the equivalent of one 12-ounce beer, one 4-ounce glass of wine, or 1-ounce of 100 proof whiskey
Tr. p. 158.

⁸⁶ Tr. pp. 158-59.

further concluded that in the last hour of his life, Mr. Clopton consumed between one and three drinks.⁸⁷ Mr. Clopton's blood alcohol concentration did not change significantly during the last three hours of his life and was higher than .250 during that period.⁸⁸

Persons who have a history of drinking to the point of intoxication develop tolerance, *i.e.*, the central nervous system adapts to the effects of alcohol, Dr. Wimbish explained. The drinker learns to hide or mask signs of intoxication: he widens his gait while walking, widens his stance while standing, chooses his words carefully, and speaks slowly, all in an attempt to "control [his] environment."⁸⁹ This "learned behavior" allows the drinker to "be accepted in society and still maintain high alcohol concentrations necessary" for him.⁹⁰ As a student and as a practitioner, Dr. Wimbish has studied and taught others about the "effects of alcohol, its presentation, its intoxication, and an alcoholic's ability to hide or mask those."⁹¹ The literature in alcohol toxicology demonstrates a "pharmacological basis, a scientific basis, [for] tolerance and adaptation of the central nervous system."⁹² One study demonstrated that trained police officers could not reliably recognize heavy or "consummate" drinkers without the use of field sobriety tests.⁹³ Other studies on alcohol tolerance showed that medical doctors could have difficulty recognizing intoxication in alcoholics.⁹⁴

In Dr. Wimbish's opinion Mr. Clopton was an alcoholic and clinically dependent on

⁸⁷ Tr. p. 161.

⁸⁸ Tr. p. 161.

⁸⁹ Tr. p. 162.

⁹⁰ Tr. p. 172.

⁹¹ Tr. p. 167.

⁹² Tr. pp. 169-70; Respondent's Exhibit #3, Goldberg, L., *Qualitative Studies on Alcohol Tolerance in Man*, 5 ACTA PHYSIOLOGICA SCANDINAVICA, Supp. XVI, 95-127 (1943).

⁹³ Tr. p. 170; Respondent's Exhibit #4, Brick, J. & Carpenter, J., *The Identification of Alcohol Intoxication by Police*, 25 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH 850 (2001).

⁹⁴ Tr. pp. 170-71; Respondent's Exhibit #5, Excerpt: Mozayani, A. & Raymon, L., *Handbook of Drug Interactions*; Respondent's Exhibit #6, Excerpt: G. Schmidt & G. Schmidt, *Empirical Knowledge After Observing a Chronic Alcoholic for Two Years*, from 32 BLUTALKOHOL 268-273 (1995).

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alcohol.⁹⁵ He based this opinion on a review of Mr. Clopton's medical history, particularly through 1998. He found a series of events demonstrating "alcohol dependency or decided problems with alcohol to where it was affecting his life,"⁹⁶ and "a diagnosed condition of a disease of alcoholism."⁹⁷

Based upon his experience and training and his review of Mr. Clopton's medical records, "and this very high blood alcohol concentration, of him essentially being able to walk with that high blood alcohol concentration," Dr. Wimbish opined "within reasonable probability that [Mr. Clopton] had developed the ability to hide or mask the signs of intoxication and would not appear intoxicated to the average person."⁹⁸

Dr. Wimbish conceded that an alcoholic can display symptoms of intoxication.⁹⁹ He agreed that Mr. Clopton might even have been "unmasked" that evening.¹⁰⁰ Dr. Wimbish further opined that a TABC trained server might not be able to recognize intoxication in a person like Mr. Clopton, and the only way "to have some idea is perform a field sobriety test."¹⁰¹ Counting a person's drinks might not help, as "often alcoholics are very cunning of getting alcohol without going through the

⁹⁵ Tr. p. 163.

⁹⁶ Tr. pp. 163-64.

⁹⁷ Tr. p. 166. Referring to Respondent's Exhibit #2, Dr. Wimbish noted that on March 24 to 25, 1998, Mr. Clopton sought admission to the Freeman Center D.E.A.R. unit, in Waco, Texas. The physician noted that Mr. Clopton reported a daily alcohol intake of 18 to 36 beers. Tr. pp. 164-65. Mr. Clopton stated he drank daily, and had experienced memory lapses or blackout, shakes or tremors, and illness due to use of alcohol. He reported drinking before noon, missing planned activities or meals, fighting due to use of alcohol, and drinking at work. Respondent's Exhibit #2. On June 18, 1998, Mr. Clopton was admitted to Parkland Hospital in Dallas, Texas, for a gun shot wound in his abdomen. His alcohol concentration was .228. Tr. pp. 165-66. On July 12, 1998, Mr. Clopton was admitted to Columbia Medical Center in Arlington, Texas, after being found unconscious. His alcohol concentration was .114. Tr. p. 166. Mr. Clopton was counseled concerning binge drinking. Respondent's Exhibit #2. On October 28, 1998, Mr. Clopton was briefly admitted to Arlington Memorial Hospital under a diagnosis of alcohol dependency. Tr. p. 166. Mr. Clopton's chief complaint was he "wants help with alcohol," and had not slept in a week. The doctor's diagnosis was "alcoholism - binge." Respondent's Exhibit #2.

⁹⁸ Tr. pp. 172-73.

⁹⁹ Tr. p. 174.

¹⁰⁰ Tr. p. 176.

¹⁰¹ Tr. pp. 177-78.

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same person or counting.¹⁰² Direct conversation with the drinker might not help.¹⁰³ Dr. Wimbish stated that even though a person like Mr. Clopton has a tolerance for alcohol and is masking his behavior, he would still be intoxicated.¹⁰⁴

b. Nancy Zamora

Ms. Zamora, a Tennessee-certified-alcohol-server trainer, opined that an alcoholic is not likely to exhibit "common indicators" such as slurred speech, mental confusion, impaired motor skills, dishevelment, impaired balance, and signs of nausea or loss of bladder and bowel control¹⁰⁵ because of tolerance and masking.¹⁰⁶ She agreed, however, that at some degree of intoxication, even a hard drinker will begin to exhibit some of the indicators.¹⁰⁷

4. Discussion

a. Staff's Argument

The Staff asserts that Mr. Clopton was intoxicated at Respondent's party, that Respondent sold or delivered alcoholic beverages to him, and that Respondent should have detected the he was intoxicated, but did not.¹⁰⁸ Mr. Clopton's BAC at the time of his death was .310, and the expert medical opinion was that he had been drinking for a long period of time that night. Mr. Galyen

¹⁰² Tr. p. 178.

¹⁰³ Tr. p. 178.

¹⁰⁴ Tr. p. 179.

¹⁰⁵ Tr. p. 261.

¹⁰⁶ Tr. p. 263.

¹⁰⁷ Tr. p. 264.

¹⁰⁸ Staff makes a similar argument with respect to Mr. Galyen and unnamed others who attended the party. Mr. Galyen's sobriety or intoxication were not an issue in the hearing except as they influenced Mr. Galyen's recall and believability. The focus was on Mr. Clopton and should remain there.

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described Mr. Clopton as exhibiting some of the classic signs of intoxication: being sloppy, out of control, incoherent, and having a drunken stare. Ms. Haber described the man she saw (assuming it was Mr. Clopton) as confused, sick, and having slurred speech. She thought he was either drunk or on drugs.

Staff concedes that there is no direct evidence that Respondent delivered an alcoholic beverage while Mr. Clopton was intoxicated but argues that this fact has been demonstrated circumstantially. Mr. Clopton's high BAC, coupled with the medical opinion that Mr. Clopton had been drinking for a long period of time on December 31, 1998, and had consumed one to three beers in the hour before his death, compel such a conclusion. Staff asserts that Respondent should have detected Mr. Clopton's intoxication primarily because Mr. Clopton was "obviously intoxicated." Staff does not make any citation to Chapter 2 of the Code and its narrower definition of "obviously intoxicated to the extent that he presented a clear danger to himself and others."¹⁰⁹ Relying heavily on Mr. Galyen's descriptions of Mr. Clopton during that evening, Ms. Haber's description of the man she encountered, and Dr. Springfield's testimony, Staff argued, in effect, that Mr. Clopton was a danger to himself and and others.

Staff takes issue with Dr. Wimbish's opinion that Mr. Clopton masked the effects of alcohol on that night. First, Dr. Wimbish did know about Mr. Galyen's and Ms. Haber's testimony, and that they testified Mr. Clopton was, in fact, exhibiting common indicators of intoxication. Second, the medical history relied upon by Dr. Wimbish demonstrates that Mr. Clopton exhibited indicators of intoxication to the doctors who ministered to him. Further, Staff notes that Dr. Wimbish's authoritative texts state that intoxication indicators are "less obvious" in a heavy drinker,¹¹⁰ and that the "**principal factor governing the degree of intoxication or alcohol tolerance is the height of the blood alcohol level.**"¹¹¹ Staff discounts Ms. Belcher's contrary descriptions of Mr. Clopton on

¹⁰⁹ §§ 2.02(b)(1) & 2.03 of the Code.

¹¹⁰ Respondent's Exhibit #3, Goldberg, L., *Qualitative Studies on Alcohol Tolerance in Man*, 5 ACTA PHYSIOLOGICA SCANDINAVICA, Supp. XVI, p. 95 (1945).

¹¹¹ *Id.* at 118 (*Staff's emphasis*).

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the basis that her testimony is unreliable. First, Ms. Belcher by her admission did not see Mr. Clopton after 10:00 p.m., the time after which Mr. Clopton appeared to be intoxicated, according to Mr. Galyen. In the alternative, Staff asserts that Ms. Belcher misrepresented herself: she knew Mr. Clopton was intoxicated and requested Mr. Galyen's aid in getting him to eat, something she denied at the hearing. Further, at the hearing Ms. Belcher said she was not intoxicated at the party, even though she had previously testified she was intoxicated. Finally, Staff asserts that Ms. Belcher is prejudiced against Mr. Clopton's family and that her prejudice somehow made her testimony less forthright.

Staff argues that Respondent had insufficient personnel for an "over-crowded" event and thus was unable to detect Mr. Clopton's intoxication. Respondent had 120 staff working the party which was attended by 2,100 persons. Of the 120 employees, approximately 50 were CARE trained that day. A ratio of 42-to-1 guests to servers was inadequate, Staff argues. Staff concludes that since there were two complimentary bars at the party and that the alcohol was (in Mr. Galyen's words) "free flowing" and "all you wanted," Respondent had set up an illegal "buy-in." This promotes intoxication because there was no way to monitor the number of alcoholic beverages served to a guest.

Staff claims, based upon Mr. Galyen's testimony, that there was no security or staffing on the floor of the event. Uniformed officers were not on the floor, according to Agent Rutledge. Accordingly, Respondent could not monitor the number of beers Mr. Clopton had that night. There were multiple bars available to the patrons of the party, with different employees at each bar. Staff concludes there was no way for Respondent to monitor the number of drinks a guest had consumed. Staff argues that the eight coupon plan Respondent alleges it followed was inadequate. First, eight alcoholic beverages are sufficient to cause intoxication. Second, Staff speculates that guests could transfer coupons to one another, allowing one guest to consume more than eight drinks. Finally, the scheme did not work in Mr. Clopton's case as he presumably had 16, according to Dr. Winbush.

Since Respondent's servers did not engage Mr. Galyen in conversation, as Mr. Galyen

testified, Staff assumes the same was true with respect to Mr. Clopton. Staff relies on Mr. Stephens's admission to Agent Rutledge that there were self-service bars at the party (an admission denied by Mr. Stephens) combined with Mr. Galyen's testimony to conclude that Mr. Clopton served himself alcohol to beyond the point of intoxication.

b. Respondent's Argument

Respondent asserts that Texas law offers little definition of the term "intoxicated person" as used in § 11.61(b)(14) of the Code. Respondent cites *Fay-Ray Corporation v. Tex. Alco. Bev. Comm'n*,¹¹² as requiring proof of an interaction between the permittee's server and the alleged intoxicated person to show a violation of § 11.61(b)(14). Respondent notes that TABC's alcohol seller training requirements (and Respondent's CARE and Ms. Zamora's TIPS programs), and its regulations¹¹³ emphasize the need for servers to look for common indicators of intoxication. Accordingly, the Staff had to prove "some act of service by a Hyatt bartender to a person demonstrating signs of intoxication," and demonstrate what Mr. Clopton's demeanor was like and what transpired when he ordered a beer. Respondent argues that no such evidence is found in the record. To the contrary, Respondent argues, Mr. Galyen testified that on each occasion that he saw Mr. Clopton served by Respondent's servers Mr. Clopton appeared sober.

Respondent rebuff's Staff's argument that since Mr. Clopton's BAC was .310 at his death, he must have been served by one of Respondent's servers while intoxicated insisting it is more plausible that Mr. Clopton was intoxicated when he arrived at Respondent's party. The record as a whole demonstrates that Mr. Clopton was an alcoholic who commonly consumed 18 or more beers, a day, and that Ms. Belcher suspected him to have been drinking before 2:00 p.m. The medical experts agreed that Mr. Clopton had been drinking for "a period of time" before his death; Dr. Wimbish estimated a half-day. According to Respondent, "it is quite conceivable that even if

¹¹² 959 S.W.2d 362, 366 (Tex.App.-Austin 1998, no writ).

¹¹³ 16 TAC § 50.3(i)(5).

Clopton had never had a single drink at the Hyatt . . . his BAC would have still been extremely high.”

Finally, Respondent posits that Mr. Clopton had the ability to mask the signs of intoxication. Respondent should not be held liable for serving alcohol to a person with a high BAC who has no signs of intoxication because they are masked and could not be “unmasked” without some field sobriety test or blood test. Such a ruling would be “absurd,” would fly “in the face of common sense and must be avoided,” Respondent concluded.

c. Analysis

i. What does “intoxication” mean?

As noted earlier, the Commission may cancel a permit if the holder delivered an alcoholic beverage to an intoxicated person. Under the criminal law, “intoxicated” means either not having the normal use of mental or physical faculties by reason of the introduction of alcohol into the body, or having an alcohol concentration of 0.080 or more, and the TABC has adopted the Penal Code definition of “intoxicated,” at least with respect to server training programs authorized by section 106.14 of the Code.¹¹⁴ Texas courts have determined that the measured “alcohol concentration” standard is a separate, independent, additional way, apart from the “loss of normal use” standard, to prove the fact of intoxication.¹¹⁵ In other words, a person who possesses an alcohol concentration of equal to or greater than the legal limit is intoxicated irrespective of whether he has not, or appears to have not, lost the normal use of mental or physical faculties.¹¹⁶

¹¹⁴ See footnotes 1-3, above.

¹¹⁵ *Scherlie v. State*, 689 S.W.2d 294, 296 (Tx.App. – Hous.[1st Dist.] 1985), *aff’d per curiam*, 715 S.W.2d 653 (Tex. Crim. App. 1986).

¹¹⁶ *Reardon v. State*, 695 S.W.2d 331, 333 (Tex.App.– Hous.[1st Dist.] 1985, no writ)(“statute prohibits operation of an automobile while the person has an alcohol concentration of .10% or more, regardless of the level of bodily impairment”).

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The legislature and the courts have drawn distinctions between various degrees of intoxication. In defining a private cause of action under section 101.63¹¹⁷ of the Code, the Texas Supreme Court held that since "intoxication" was then not defined in the statute, it was to be given its commonly understood meaning:

a condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical faculties and a resulting diminution of the ability to think and act with ordinary care.¹¹⁸

The court's decision in *El Chico* predated the TABC's adoption of the Penal Code definition of "intoxicated."¹¹⁹ At the same time that the *El Chico* decision was rendered, the Texas legislature enacted Chapter 2 of the Code.¹²⁰ This chapter provides an exclusive remedy against the person or entity that provided an alcoholic beverage to a person who "was obviously intoxicated to the extent that he presented a clear danger to himself and others."¹²¹ In a similar fashion, while banning driving while intoxicated,¹²² the Penal Code also prohibits a person from appearing in public "while intoxicated to the degree that the person may endanger the person or another."¹²³

Two SOAH proposal's for decision (PFDs) have applied the *El Chico* definition of

¹¹⁷ "A person commits an offense if the person with criminal negligence sells an alcoholic beverage to an habitual drunkard or an intoxicated or insane person." § 101.63(a) of the Code.

¹¹⁸ *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313(Tex. 1987).

¹¹⁹ *El Chico* was decided in June 3, 1987. *Id.* at 306. The provisions of the seller training program were adopted to be effective November 6, 1987. 16 TAC § 50.1(1)(source note).

¹²⁰ As noted above, *El Chico* was decided in June 3, 1987. See footnote 119. Chapter 2 of the Code was enacted effective June 11, 1987. § 2.01 of the Code (source note).

¹²¹ §§ 2.02(b)(1) & 2.03 of the Code.

¹²² TPC § 49.04.

¹²³ TPC § 49.02(a).

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"intoxicated."¹²⁴ Two other SOAH PFDs have applied both the *El Chico* definition and the Penal Code definition.¹²⁵ A number of PFDs have made intoxication findings without reference to any objective standard.¹²⁶ Two PFDs have applied the Penal Code definition of intoxicated, i.e., not having the normal use of mental or physical faculties by reason of the introduction of alcohol.¹²⁷ Three other PFDs have considered and applied the alcohol concentration standard.¹²⁸

Respondent urges the adoption of a two part definition of intoxicated: "some act of service by a Hyatt bartender to a person demonstrating signs of intoxication," citing *Fay-Ray Corporation*

¹²⁴ SOAH, Proposal for Decision, *TABC v. Sandra Kay Wigley d/b/a Boot Scoot & Boogie*, Docket No. 458-98-0881, p. 6; SOAH, Proposal for Decision, *TABC v. Majorie Bearice Hajdik d/b/a El Tropical*, Docket No. 458-98-1554, p. 6.

¹²⁵ SOAH, Proposal for Decision, *TABC v. Mansard House, Inc. d/b/a Hurricane Harry*, Docket No. 458-96-1008, pp. 5-6; SOAH, Proposal for Decision, *TABC v. WFKR, Inc. d/b/a Sugar's*, Docket No. 458-97-1255, pp. 12-13 (Penal Code definition is not controlling, but it does provide some guidance as to what the State of Texas finds is intoxication when one is driving).

¹²⁶ SOAH, Proposal for Decision, *TABC v. Manuel Hernandez d/b/a Nero's Cocktail Lounge*, Docket No. 458-96-0739; SOAH, Proposal for Decision, *TABC v. CJS Ltd. Company, et al d/b/a Crabby Jacks*, Docket No. 458-98-0602; SOAH, Proposal for Decision, *TABC v. Graciela Gaona Ontiveros d/b/a Chicano Magic*, Docket No. 458-00-0351; SOAH, Proposal for Decision, *TABC v. Ephen Stevens, Inc., d/b/a Anderson Mill Tavern*, Docket No. 458-00-0197; SOAH, Proposal for Decision, *TABC v. Rosina L. Deveau d/b/a George Washington Lounge*, Docket No. 458-01-1577; SOAH, Proposal for Decision, *TABC v. My Yong Stephens d/b/a The Doll House*, Docket No. 458-01-1379; SOAH, Proposal for Decision, *TABC v. New Victoria L.L.C., et al d/b/a Bennigan's*, Docket No. 458-02-2700.

¹²⁷ SOAH, Proposal for Decision, *TABC v. A & R Entertainment, Inc. d/b/a Alice Faye's*, Docket No. 458-03-1850, p. 2 (applies 16TAC §50.2 [not having normal use] standard to §11.61(b)(14)); SOAH, Proposal for Decision, *TABC v. Aikman Realty, Inc. d/b/a King's X*, Docket No. 458-03-4304, p. 4 (applies 16TAC §50.2 [not having normal use] standard to §11.61(b)(14)); see also SOAH, Proposal for Decision, *TABC v. Domingo Garcia, Jr. d/b/a The Trestle*, Docket No. 458-98-1335, p. 9 (applies a "not having normal use" standard without reference to statute or rule).

¹²⁸ SOAH, Proposal for Decision, *TABC v. Mansard House, Inc. d/b/a Hurricane Harry*, Docket No. 458-96-1008, pp. 5-6 (applies Penal Code definition of *per se* intoxication: "it would be absurd to ignore the state's definition when judging whether Mr. Sparks' was intoxicated. It could not be clearer that Mr. Sparks' blood alcohol level at the time of the accident on November 23, 1995, exceeded, by at least half, the standard set out in the Penal Code. In the eyes of the State of Texas, Mr. Sparks was drunk when Mr. Cotton was killed."); SOAH, Proposal for Decision, *TABC v. Yolanda Quintana d/b/a the Tap Bar and Restaurant*, Docket No. 458-03-4305, p. 8 (applies 16TAC §50.2 [not having normal use] standard and alcohol concentration standard to §11.61(b)(14)); SOAH, Proposal for Decision, *TABC v. Par Four Investment, Inc., dba The Hideaway on Dunvale*, Docket No. 458-02-1158, p. 2 (applies 16TAC §50.2 [not having normal use] standard and alcohol concentration standard to §11.61(b)(14)); see also SOAH, Proposal for Decision, *In The Matter of Harvey D. Shaver Post No. 8396*, Docket No. 458-95-1775, pp. 3-4 (discusses blood alcohol concentration without reference to any statute).

v. Tex. Alco. Bev. Comm'n,¹²⁹ for authority. *Fay-Ray* does not require any such rule.¹³⁰ Further, in *Fay-Ray*, TABC found that the permittee had *both* sold or delivered an alcoholic beverage to an intoxicated person *and* sold or delivered an alcoholic beverage to an obviously intoxicated person.¹³¹ Each finding was sustained by the Court of Appeals.¹³² It is true that the server in *Fay-Ray* had interaction with the intoxicated person, and that he was obviously intoxicated when she served him.¹³³ It is also true that other persons, aside from the server, testified that the man in question was intoxicated, and obviously intoxicated, while on the premises.¹³⁴ The testimony from the non-server witnesses sustained the violation finding independent of the server's testimony.¹³⁵ Finally, the ALJ and the Commission found that the individual was intoxicated on the basis of a blood test showing a concentration of .320,¹³⁶ which finding was sustained by the Court of Appeals.¹³⁷

The ALJ concludes that "intoxication" as used in § 11.64(b)(14) of the Code can mean *not* having the normal use of one's mental or physical faculties by reason of the introduction of alcohol into the body, having an alcohol concentration of 0.080 (or in this case the applicable 0.100) or more.

¹²⁹ 959 S.W.2d 362, 366 (Tex.App.—Austin 1998, no writ).

¹³⁰ *Fay-Ray*'s points of error were (1) the server must have had a specific intent to violate the statute before the permits may be canceled; (2) evidence of a blood alcohol test was erroneously admitted because the governing statute at the time of accident barred the admissibility of blood test results in a civil proceeding; (3) unreliable testimony was erroneously admitted as expert testimony at the administrative hearing; (4) severe sanction of revoking the permits was arbitrary and capricious and without due process of law; (5) the bar waitress was improperly considered an adverse witness; and, (6) certain findings of fact which the Commission adopted are not supported by substantial evidence. All were overruled. *Fay-Ray Corporation v. Tex. Alco. Bev. Comm'n*, 959 S.W.2d 362, 369 (Tex.App.—Austin 1998, no writ) (*Fay-Ray* Opinion).

¹³¹ *Fay-Ray* Opinion at 368. Finding of Fact No. 19, Conclusions 4 & 5, SOAH, Proposal for Decision. *TABC v. Fay-Ray Corporation d/b/a Chequers*, Docket No. 458-95-1754, p. 19 (*Fay-Ray* PFD)

¹³² *Fay-Ray* Opinion at 368.

¹³³ *Fay-Ray* Opinion at 368; *Fay-Ray* PFD, Findings of Fact Nos. 5 to 11, p. 18.

¹³⁴ *Fay-Ray* Opinion at 368.

¹³⁵ *Fay-Ray* PFD, Findings of Fact Nos. 7 & 8, p. 18; *Fay-Ray* Opinion at 368.

¹³⁶ *Fay-Ray* PFD, Findings of Fact Nos. 15 & 16, p. 19.

¹³⁷ *Fay-Ray* Opinion at 366-67.

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or both. A person may, but need not be, “obviously intoxicated” to some degree. A person, if his alcohol concentration is above the legal limit, need not exhibit common indicators of intoxication to be considered intoxicated for the purposes of § 11.61(b)(14).

Respondent’s formulation, in effect, requires either proof of the server’s knowledge of the customer’s intoxication, or that the customer’s intoxication must be “obvious.” The *Fay-Ray* case itself holds that § 11.61(b)(14) requires no proof of *scienter*.¹³⁸ Further, if the legislature had desired “intoxication” in § 11.61(b)(14) to mean “obviously” intoxicated, it could have done so as it did in Chapter 2 of the Code,¹³⁹ or as it did in the Penal Code definition of public intoxication.¹⁴⁰ The alleged ability of Mr. Clopton to “mask” the physical signs of his intoxication does not render the ALJ’s conclusion “absurd,” nor does it fly “in the face of common sense.” Respondent’s masking argument and proof are not a defense to § 11.61(b)(14). Even Respondent’s expert, Dr. Wimbish, conceded that Mr. Clopton was intoxicated on December 31, 1998, no matter how well he hid his intoxication.

ii. Was Mr. Clopton intoxicated?

The overwhelming weight of the evidence demonstrated that Mr. Clopton was intoxicated that night:

- Ms. Belcher suspected that Mr. Clopton had been drinking before 2:00 p.m. on December 31, 1998.
- Ms. Belcher observed Mr. Clopton drinking some unknown number of beers between 2:00 p.m. and their arrival at Respondent’s hotel at approximately 9:30 p.m.
- Ms. Belcher observed Mr. Clopton drink three beers in the approximately 45 minutes they were together at the party.
- Mr. Galven observed Mr. Clopton drinking beer after 10:00 p.m. and before

¹³⁸ *Fay-Ray* Opinion at 366.

¹³⁹ §§ 2.02(b)(1) & 2.03 of the Code (“obviously intoxicated to the extent that he presented a clear danger to himself and others”).

¹⁴⁰ TPC § 49.02(a) (“intoxicated to the degree that the person may endanger the person or another”).

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midnight.

Mr. Galyen observed Mr. Clopton exhibiting classic physical signs of intoxication.

- The man Ms. Haber observed at approximately 12:15 a.m. (whom the ALJ believes was Mr. Clopton) appeared intoxicated to Ms. Haber, and showed a lack of judgment by walking into traffic.

Mr. Clopton tried to run across a highway at nighttime wearing dark clothing, a distinct loss of judgment.

- Mr. Clopton's BAC was .310 at the time of his death.

Mr. Clopton had the equivalent of 16 drinks in his body at the time of his death

Mr. Clopton consumed between one and three drinks between 11:20 p.m. and 12:20 a.m., the last hour of his life.

- Mr. Clopton's BAC was higher than .250 between 9:20 p.m. and 12:20 a.m., the last three hours of his life.

Under either definition of intoxication, Mr. Clopton was intoxicated: he was well above the prevailing legal limit of .100 BAC the entire evening, and demonstrated signs of intoxication after 10:00 p.m.

iii. Did Respondent deliver an alcoholic beverage to Mr. Clopton while he was intoxicated?

Ms. Belcher's and Mr. Galyen's testimony unambiguously establish that Mr. Clopton was drinking beer he obtained from the bars at Respondent's hotel. Without contradiction, Dr. Wimbish established that Mr. Clopton drank at least three beers (apparently Mr. Clopton's hourly average) between 11:20 p.m. and 12:20 a.m. Agent Rutledge reported that except in the hotel, there was no other source of alcohol in the immediate area around Respondent's hotel and the location where Mr. Clopton died.

In summary, the ALJ concludes that Respondent delivered an alcoholic beverage to an intoxicated person.

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B. Place or Manner

The parties offered evidence on the methods that Respondent employed during the party to avoid intoxication incidents, particularly with respect to the amount of alcohol that would be served to a guest, the training Respondent's employees had received, and the methods Respondent used to monitor its guests that night. TABC's investigator testified concerning the violations she believed were committed at Respondent's party. Respondent's two executives responsible for the planning and execution of the party testified. Respondent's training program was analyzed by an expert in the field of alcohol awareness training.

1. Agent Tricia O'Cayce Rutledge

Agent Tricia O'Cayce Rutledge is an agent with the TABC, and had been employed by the TABC for six years. She was assigned a "source investigation" concerning the death of Mr. Clepton. A source investigation seeks to determine whether alcohol was a factor when death or severe bodily injury has resulted from a motor vehicle accident.¹⁴¹ Agent Rutledge prepared a report of her investigation, which was admitted in evidence.¹⁴²

As documented in the report,¹⁴³ Agent Rutledge seized two documents: the "Futura" Prospectus, and the "Horizon" Prospectus.¹⁴⁴ Each provided for self-serve bars in the Futura and Horizon rooms.¹⁴⁵ The report described a "Banquet Prospectus #471874-1" which provided for servers to supply cocktails, wine by the glass, and keg beer by the glass in the Enterprise Ballroom.¹⁴⁶

¹⁴¹ Tr. pp. 127-28.

¹⁴² Tr. pp. 129-30; TABC Exhibit #28.

¹⁴³ TABC Exhibit #28

¹⁴⁴ TABC Exhibit #29, 30, & 31, respectively

¹⁴⁵ TABC Exhibit #28, 30, & 31.

¹⁴⁶ TABC Exhibit #28.

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Agent Rutledge made her determination that Respondent had violated the Code based upon the documents she had received from Respondent.¹⁴⁷ Agent Rutledge asserted that even though some bars were manned, there was no way for Respondent to monitor the amount of drinks served to one person.¹⁴⁸ She asserted that Respondent utilized "self-service" bars, and had "no control over the number of drinks someone was allowed to drink. There were no drink coupons that night."¹⁴⁹ Agent Rutledge described the party as an illegal "buy-in," a scheme in which a patron pays one price for all he can drink, which is impermissible because it promotes intoxication.¹⁵⁰

Agent Rutledge acknowledged that her investigation commenced in March 2000.¹⁵¹ She requested and received a list of Respondent's employees working the New Year's Eve party, and a description of their duties; but she did not interview any of these people. She did make a personal visit to the hotel but did not diagram the rooms used in the party or the layout. She learned that Respondent had nine security officers and 16 off-duty police working security for the party. Agent Rutledge did not inquire whether Respondent had a plan for the party, because she did not believe it important to her investigation.¹⁵² Agent Rutledge did not deny that Respondent had a plan for crowd control, but considered it lacking because the uniformed officers were not circulating through the "general ballroom."¹⁵³

¹⁴⁷ Tr. pp. 144-45.

¹⁴⁸ TABC Exhibit #28.

¹⁴⁹ Tr. pp. 149-50.

¹⁵⁰ Tr. p. 150. See 16 TAC § 45.103(c)(3): Retail licensees and permittees may not sell, serve, or offer to sell or serve an undetermined quantity of alcoholic beverages for a fixed price or "all you can drink" basis.

¹⁵¹ Tr. pp. 143-44

¹⁵² Tr. pp. 145-47

¹⁵³ Tr. p. 149.

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2. Steven Galyen & Chi Suk Belcher

Mr. Galyen stated that his paid admission to the party covered all the food and alcoholic beverages a person wanted. He stated that no limits were placed on the amount an attendee could drink; he stated he had at least 12.¹⁵⁴ According to Mr. Galyen, there were a number of bars throughout the facility where alcoholic beverages could be obtained, and the bars were served by different staff. Respondent did not monitor the amount that Mr. Galyen drank that night. He described the alcohol as “free-flowing.”¹⁵⁵

On the other hand, Ms. Belcher said that when she, Mr. Clopton, and Ms. Belcher arrived, they were given “vouchers” to be exchanged for drinks.¹⁵⁶ She testified that Mr. Clopton had his drink coupons, and she had hers.¹⁵⁷ Ms. Belcher was adamant in her testimony that there were no unmanned bars at the party.¹⁵⁸

3. Peter McMahon

Mr. McMahon was the assistant food and beverage director at Respondent’s hotel in the year leading up to the December 31, 1998, party. He was the “second in command” of the party. Planning for the party started six months before New Year’s Eve.¹⁵⁹ Security was planned, as were detailed instructions for all managers working the party. Detailed planning for the party was the Respondent’s customary practice; Mr. McMahon said he worked on five such parties when he was

¹⁵⁴ Tr. pp. 49-50, 57.

¹⁵⁵ Tr. pp. 50-52.

¹⁵⁶ Tr. p. 233.

¹⁵⁷ Tr. p. 256.

¹⁵⁸ Tr. p. 255.

¹⁵⁹ Tr. pp. 181-82.

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at the DFW Airport property.¹⁶⁰

Mr. McMahon attended a meeting in June 1998 between TABC representatives and the hospitality industry concerning New Year's Eve parties. He prepared a memorandum to his superior, Mr. Michael Stephens, concerning the meeting.¹⁶¹ Mr. McMahon specifically brought the use of tickets to be exchanged for drinks to the attention of the TABC. He reported that the TABC representatives wanted to limit patrons's drinks to the seven to 10 range, but advised that the use of tickets or coupons was optional.¹⁶² He asked about the proper way to describe the provision of alcohol and was told that the term "open bar" should not be used in advertisements; the TABC preferred "complimentary bar." Mr. McMahon learned that the TABC intended to perform "rigorous" inspections on New Year's Eve and threatened arrest for infractions of the rules. Finally, the TABC stressed server training prior to the event.¹⁶³

Mr. McMahon explained that security was provided in-house, by managers and other employees, and by off-duty police officers. The in-house personnel wore a uniform of sorts, a blue blazer, but nothing to identify them as security *per se*. There were no incidents the night of December 31, 1998, that required the intervention of security.¹⁶⁴ Mr. McMahon stated security and "all employees" were instructed to watch for intoxicated patrons.¹⁶⁵ Mr. McMahon defended the

¹⁶⁰ Tr. pp. 185-86.

¹⁶¹ Tr. p. 187; Respondent's Exhibit #7, Memorandum from Peter J. McMahon to Michael Stephens, July 30, 1998.

¹⁶² Tr. pp. 183-85. Agent Rutledge was questioned concerning the meeting Respondent's agent had with TABC officials which Respondent asserted took place in July 1997. Agent Rutledge explained that she was not at that meeting, but spoke to her superior, Lt. Karen Smith. Based upon her conversation with Lt. Smith, Agent Rutledge acknowledged that the meeting did take place, that the concept of drink coupons to limit alcohol consumption was discussed at the meeting, and that complimentary bars were unobjectionable so long as coupons were used. She disagreed that a drink limit of seven to 10 drinks was recommended by the TABC and asserted that Lt. Smith used a two drink limit. Tr. pp. 147-49. Lt. Smith did not testify.

¹⁶³ Tr. pp. 183-85.

¹⁶⁴ Tr. pp. 186-87.

¹⁶⁵ Tr. p. 190.

seven to 10 drink limit noting that the party was to take place between 6:00 p.m. and 1:00 a.m. (seven hours), and a full meal was being offered.¹⁶⁶ Mr. McMahon denied that any bar was operated on a "help-yourself" basis.¹⁶⁷

4. Michael Stephens

Mr. Stephens was the food and beverage director of Respondent's DFW hotel on the evening in question and was employed there from May 1997 to February 2004. He was responsible for "all aspects of the food and beverage operation from hiring, overseeing training, overseeing all elements and aspects of day-to-day operations, forecasting, planning, budgeting, financial responsibilities, and so on."¹⁶⁸ He was responsible for the entire New Year's Eve party in 1998; he had planned 15 similar events previously. Planning for the party began in mid-1998. Mr. Stephens sent Mr. McMahon to the TABC sponsored meeting.¹⁶⁹ Mr. Stephens stated the TABC input caused Respondent to give patrons eight tickets or coupons to exchange for alcoholic beverages.¹⁷⁰

According to Mr. Stephens, the party was scheduled from 6:00 p.m. on December 31, 1998, to 1:00 a.m. on January 1, 1999. A full buffet was set out in the main ballroom. Four different rooms provided four different types of entertainment. There was nine in-house security officers, and 16 DFW DPS officers. The DPS officers were in uniform. The DPS officers worked in tandem with the in-house security in assigned areas.¹⁷¹ Approximately 2,100 attended the party, he said.¹⁷²

¹⁶⁶ Tr. p. 188.

¹⁶⁷ Tr. pp. 189-90.

¹⁶⁸ Tr. pp. 193-94.

¹⁶⁹ Tr. pp. 195-97.

¹⁷⁰ Tr. pp. 199-200.

¹⁷¹ Tr. pp. 200-03.

¹⁷² Tr. p. 203.

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All Hyatt employees who have occasion to serve or sell alcoholic beverages have alcohol awareness training each year Mr. Stephens testified. In addition, the bartender staff for the New Year's Eve party had CARE training at 4:00 p.m. on December 31, 1998. CARE (Control Alcohol Risks Effectively) is the hotel association approved alcohol beverage course.¹⁷³ Mr. Stephens identified a memorandum he prepared outlining the responsibility of each department in the hotel with respect to the party.¹⁷⁴ He specifically emphasized that the bartenders should be alert for potential "CARE" incidents and to be prepared to react appropriately.¹⁷⁵ Mr. Stephens produced the CARE manual in use on the date of the party and the video presentation Respondent's employees watched on December 31, 1998.¹⁷⁶ Mr. Stephens personally observed the bartending staff being instructed that afternoon.¹⁷⁷

Mr. Stephens specifically denied that there were any unmanned bars available to the general public or operated on a self-serve basis.¹⁷⁸ Mr. Stephens explained that the "Futura" Prospectus and the "Horizon" Prospectus seized by Agent Rutledge were "green rooms" for Respondent's entertainment that night, namely, Jack Mack and the Heart Attack in the Futura Room, and Freddie Jones and the Zone in Horizon. These rooms were not open to the general public, but were break rooms for the entertainers. Alcoholic beverages were supplied, but a server was in attendance in each room to exclude persons not authorized to be present. A special wrist band was issued to the entertainers and their entourage to permit entry. There was also security posted in the general area of these rooms.¹⁷⁹

¹⁷³ Tr. pp. 204, 222-23; Respondent's Exhibit #9, *Controlling Alcohol Risks Effectively* (Educational Institute of the American Hotel & Motel Association, 1993); Respondent's Exhibit #10. Video Tape: CARE for Servers.

¹⁷⁴ Tr. p. 204; Respondent's Exhibit #8, Memorandum from Michael Stephens to all Hyatt Regency D1 W departments, December 18, 1998.

¹⁷⁵ Tr. pp. 205-07.

¹⁷⁶ Tr. pp. 207-08, 222-23; Respondent's Exhibit #9, Respondent's Exhibit #10

¹⁷⁷ Tr. p. 208.

¹⁷⁸ Tr. p. 209.

¹⁷⁹ Tr. pp. 210-14; TABC Exhibit #30; TABC Exhibit #31.

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Mr. Stephens asserted that Respondent had not been cited by the TABC for serving an intoxicated person prior to Mr. Clopton's death, or afterward.¹⁵⁰ He averred that the police did not investigate Respondent after Mr. Clopton's death. Mr. Stephens was first questioned by Agent Rutledge in August 2000. Agent Rutledge did not request to speak to any of Respondent's bartenders. Mr. Stephens stated that he cooperated fully with the TABC.¹⁵¹ Mr. Stephens denied that Agent Rutledge asked him if Respondent had self-serve bars at the party and denied telling her that Respondent did.¹⁵² Mr. Stephens stated that Mr. Galyen's testimony that alcohol was available on a self-serve basis was not true.¹⁵³

5. Nancy Zamora

Ms. Zamora is a Tennessee-certified-alcohol-server trainer. She is also certified in TIPS, or Training for Intervention ProcedureS, a nationally recognized program. She has trained over 5,000 servers in the past 12 years.¹⁵⁴ Ms. Zamora reviewed both the CARE program utilized by Respondent¹⁵⁵ and the TABC seller-server training information on the TABC website¹⁵⁶ and compared the two. In her opinion, they are "essentially the same."¹⁵⁷

Ms. Zamora stated that the purpose of an alcohol server training program is to train servers to recognize intoxication. The trainee is taught to look for "behavioral cues," and "how to observe

¹⁵⁰ Tr. p. 215.

¹⁵¹ Tr. pp. 215-16.

¹⁵² Tr. p. 217.

¹⁵³ Tr. p. 217.

¹⁵⁴ Tr. pp. 255-56.

¹⁵⁵ Respondent's Exhibit #9; Respondent's Exhibit #10.

¹⁵⁶ Respondent's Exhibit #11, Printout of TABC Seller Training Program information from <http://www.tabc.state.tx.us/liccom/seller/>.

¹⁵⁷ Tr. pp. 257-58.

and how to identify when a customer's behavior changes."¹⁸⁸ An alcohol drinker's behavior changes by loss of inhibition, judgment, reaction, and coordination. Different characteristics or traits indicate losses of different faculties. Under the training, servers are to look for the emergence of these traits every time they fill an order.¹⁸⁹ Ms. Zamora described the common indicators of intoxication as: "bloodshot, unfocused eyes; slurred speech; smell of alcohol on the breath; mental confusion; impaired motor skills; dishevelment; impaired balance; and signs of nausea or loss of bladder and bowel control."¹⁹⁰

6. Training Materials

TABC minimum course requirements with respect to the detection of intoxication require instruction on the common indicators Ms. Zamora mentioned. The course must also instruct on the "warning signs of illegal intoxication: development of one or more common indicator, heated altercations, and/or rapid or pronounced changes in mood, behavior or emotional state."¹⁹¹

An approved course must also discuss "atypical drinkers," those whose "experience and tolerance may mask intoxication," and the "special efforts required to detect intoxication in some very experienced drinkers."¹⁹² In particular, the course must "describe ways to detect an atypical intoxicated person through methods such as drink counting, conversations calculated to reveal emotional stability or common indicators which might not otherwise be manifest."¹⁹³ CARE was

¹⁸⁸ Tr. p. 258.

¹⁸⁹ Tr. p. 259.

¹⁹⁰ Tr. p. 261. This list is repeated in Ms. Zamora's TIPS materials as well. Tr. p. 262; Respondent's Exhibit #12. TIPS for On Premise (Health Communications, Inc., 2004).

¹⁹¹ Respondent's #11.

¹⁹² Respondent's #11.

¹⁹³ 16 TAC § 50.3(j)(5)(A).

that "someone who doesn't *look* or even *act* drunk may, in fact, be legally intoxicated."¹⁹⁴ Respondent's materials mention "guests who . . . are more likely than other guests to drink too much alcohol."¹⁹⁵ However, the issue of tolerance and masking of intoxication is not discussed, as it is in other materials admitted in evidence.¹⁹⁶ For example, Ms. Zamora' TIPS materials warn that "tolerance can make assessing your guests a little harder."¹⁹⁷ The manual states:

Having a high tolerance has no effect on a person's BAC level or level of intoxication. Just because they aren't showing the typical cues doesn't mean they are not impaired. *One thing to watch out for is a heavy smell of alcohol on a person's breath.*¹⁹⁸

Guests who drink frequently tend to have a high tolerance. This means they may be able to hide the behavioral cues that would otherwise tell you they are intoxicated.¹⁹⁹

Respondent's CARE materials describe the signs of intoxication in a fashion similar to the TABC course requirements, breaking them into groupings around loss of inhibition, judgment, reaction, and coordination, and differing characteristics or traits indicating losses of different faculties.²⁰⁰

An approved course must teach sellers to monitor customers using such techniques as:

- Counting drinks and using a BAC Chart
- Interviewing and rating customers prior to sale. Being alert to and probing for hidden indicators and warning signs.
- Noting customer's initial mood and conduct and watching for changes in mood or

¹⁹⁴ Respondent's Exhibit #9, p. 5 (emphasis in original). Respondent's Exhibit #10 offers the same information as Respondent's Exhibit #9.

¹⁹⁵ Respondent's Exhibit #9, p. 39.

¹⁹⁶ Compare Respondent's Exhibit #9 with Respondent's Exhibit #12, pp. 6, 8.

¹⁹⁷ Respondent's Exhibit #12, p. 6.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*, p. 8.

²⁰⁰ Respondent's Exhibit #9, p. 51.

- behavior
- Observing customer interactions
- Reinterviewing and rerating customers prior to each additional sale.²⁰¹

A BAC card allows a server to estimate a customer's weight and associate that weight with a number of drinks (making allowance for the passage of time) to estimate whether a customer is possibly impaired, impaired, or legally intoxicated.²⁰² Respondent CARE program asserts that BAC cards only have "limited practical application,"²⁰³ and advocates the use of a "traffic light system."²⁰⁴ The traffic light system allows alcohol service to a guest who is sober, or in the green. The system advocates caution, as in yellow, as the guest continues to drink, and a halt to service, a red light, before the guest becomes intoxicated. This system relies on observation, drink counting, and communication between servers and bartenders.²⁰⁵

Respondent's CARE manual warns that "some situations require special alcohol service procedures," in particular "banquets, meetings, receptions, and other special events [that] make it more difficult to control alcohol risks effectively."²⁰⁶ Hotels such as Respondent are warned that it must make sure the intoxicated guest does not leave the premises.²⁰⁷ Servers must use the traffic light system and teamwork to "monitor and control alcohol consumption."²⁰⁸

²⁰¹ Respondent's Exhibit #11.

²⁰² *Id.*

²⁰³ Respondent's Exhibit #9, p. 45.

²⁰⁴ *Id.*, p. 55.

²⁰⁵ *Id.*, pp. 57-59.

²⁰⁶ *Id.*, p. 61.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

7. Discussion

a. Staff's argument

Staff argues that § 109.53 of the Code requires Respondent to have control of every phase of the distribution of alcoholic beverages on its premises, and § 11.61(b)(7) requires Respondent not violate the general welfare and safety of the people in conducting its business. The Commission's rules with respect to server training set "standards" for the detection of intoxicated persons²⁰⁹ and promote the general welfare and safety of the people.²¹⁰ In particular, Staff asserts that Respondent could not adequately control or safely maintain its premises because:

- of overcrowding;
- its "buy-in" plan promoted intoxication;
- of lack of security looking on the floor for intoxicated persons;
- the number of drinks any guest consumed could not be monitored;
- servers did not engage the guests in conversation; and
- of its use of self-service bars.

b. Respondent's Argument

Respondent states it conducted the party in a manner protective of the general welfare and public safety. Mr. McMahon attended the TABC sponsored meeting six months before the party. Mr. Stephens prepared for the party with the information provided by Mr. McMahon in mind. In particular, Respondent followed the Commission's suggestions that **drinks be limited** and that server received training before the party. Mr. Stephens drew up a detailed memorandum and circulated it to all employees working the party. Security was provided in the form of 16 police officers working with nine in-house security officers.

Respondent notes that there were no other reported incidents at the party attended by 2,100

²⁰⁹ 16 TAC § 50.3(i)(5).

²¹⁰ 16 TAC § 50.3(i)(11)(A)

persons and regards this as evidence that the manner in which it gave the party was consistent with the general welfare and public safety. Respondent also asserts that the lack of evidence that no guest used more than their allotted eight drink coupons shows that Respondent's staff and servers were acting responsibly. Respondent cites the Staff with hypocrisy: Mr. McMahon (and Respondent) was warned that TABC would exert a heavy presence on New Year's Eve and that servers violating the law would be subject to arrest, but Staff waited 18 months after the event to investigate Mr. Clopton's death.

c. Analysis

Taking each of the Staff's points in order, the ALJ concludes that the manner in which the Respondent conducted the New Year's Eve Party did not promote the general welfare and safety of the people in conducting its business and was not organized to detect intoxicated persons.

i. Overcrowding and Insufficient Staffing

Respondent hosted 2,100 guests in four ballrooms. Respondent employed 120 staff, 50 of whom were involved in serving alcohol. The throng at the party was not described as over-crowded. In fact, Mr. Stephens was disappointed in the attendance, noting that previous parties had accommodated as many as 4,000.²¹¹ As Respondent argued, there were no reported incidents within or around the hotel itself.²¹² The ALJ cannot agree that the facilities were over-crowded or insufficiently staffed.

ii. "Buy-In" Plan

The evidence does not support the conclusion that the Respondent was offering a "buy in" to the partygoers. Ms. Belcher, Mr. Stephens, and Mr. McMahon were clear that coupons were

²¹¹ Tr. p. 218.

²¹² This is true as far as the record goes in the absence of any police report

delivered to guests, which were to be exchanged for drinks. Staff has produced no evidence that Respondent offered to "sell or serve an undetermined quantity of alcoholic beverages for a fixed price or [on a] "all you can drink" basis."²¹³ The ALJ cannot find that Respondent promoted a "buy-in."

iii. Inadequate Staffing or Security Looking for Intoxicated Persons

Respondent deployed nine in-house security officers, and 16 uniformed DFW DPS officers. They worked in tandem in assigned areas. Aside from Agent Rutledge's assertion that he security was inadequate, Staff offered no evidence concerning the layout of the ballrooms, their configuration, how security was coordinated, or any other factor to allow the ALJ to judge the adequacy of the security on the floor. Balanced against the fact that Mr. Clopton was intoxicated and not located while at the party, is the fact that 16 policemen charged with keeping the peace made no arrests that night. The ALJ cannot find that Respondent provided inadequate staffing or security looking on the floor for intoxicated persons.

iv. Number of Drinks Not Monitored

Respondent's point that no guest used more than the allotted eight drink coupons shows that Respondent's staff and servers were acting responsibly misses the mark. Mr. McMahon's defense of the eight drink coupon system, that the eight allowed drinks equaled about one per hour (the party was eight hours long, from 6:00 p.m. to 1:00 a.m.), and that a full meal was offered to offset the effects of alcohol, assumes that each guest would drink one per hour, and eat a full meal. The evidence from Ms. Belcher, Mr. Galven, and Mr. Stephens shows that the evening started slow, with more people appearing later in the evening. For example, Ms. Belcher, Mr. Clopton, and Mr. Galven appeared at 9:00 p.m. or later. This compression of the time element points out the second, unexpressed problem with the coupon system. No one particular server was able to (or could or did) observe how quickly a particular guest, such as Mr. Clopton, was drinking. Mr. Clopton had three beers in the first hour he was present at the party, and, according to Dr. Wimbish, another three in

²¹³ 16 TAC § 45.103(c)(3).

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the last hour he was at the party.

Respondent's CARE materials stress that, in addition to the number of drinks, "what a guest is drinking and how quickly it is consumed are also important items to note."²¹⁴ If a server used a BAC chart with reference to Mr. Clopton, the server would have had reason to believe that he was nearly impaired in the first hour he was at the party.²¹⁵

The ALJ concludes that the manner in which the Respondent conducted the New Year's Eve Party did not promote the general welfare and safety of the people in conducting its business, because a guest's rate of consumption could not be monitored.

v. Servers Did Not Engage the Guests in Conversation

As noted above, an approved server course must discuss "atypical drinkers," those whose "experience and tolerance may mask intoxication," and the "special efforts required to detect intoxication in some very experienced drinkers."²¹⁶ In particular the course must "describe ways to detect an atypical intoxicated person through methods such as drink counting, conversations calculated to reveal emotional stability, or [observing] common indicators which might not otherwise be manifest."²¹⁷ Respondent's CARE manual warns that "some situations require special alcohol service procedures," in particular "banquets, meetings, receptions, and other special events [that] make it more difficult to control alcohol risks effectively."²¹⁸ Respondent's materials also mention

²¹⁴ Respondent's Exhibit #9, p.22.

²¹⁵ Mr. Clopton weighed 190 pounds. TABC Exhibit #4. Assuming Mr. Clopton started drinking when he arrived at the party, three drinks in one hour placed Mr. Clopton's BAC at approximately 0.06 according to the BAC chart offered by Respondent. Respondent's #11.

²¹⁶ Respondent's #11.

²¹⁷ 16 TAC § 50.3(i)(5)(A).

²¹⁸ Respondent's Exhibit #9, p. 61.

"guests who . . . are more likely than other guests to drink too much alcohol."²¹⁹ However the issue of tolerance and masking of intoxication is not discussed in the CARE course nor are the "special alcohol service procedures." Further, hotels such as Respondent are warned that it must make sure the intoxicated guest does not leave the premises,²²⁰ something that did not occur with respect to Mr. Clopton.

The ALJ acknowledges that Respondent's servers received a refresher course on the afternoon of the party. However, Respondent offered no evidence of what "special alcohol service procedures" for a high attendance party were instituted or followed, aside from the eight coupon offer and the buffet supper. Further, Respondent offered no evidence of how it trained its servers to deal with the "guests who . . . are more likely than other guests to drink too much alcohol" and, in particular, how to deal with "atypical drinkers." Respondent position that since such "masked" drinkers are nearly impossible to detect any penalization of its failure is "absurd" ignores the TABC's requirement that it be prepared to do so. The TIPS program notes that an atypical drinker will have a heavy smell of alcohol on his breath, something that can not be masked by tolerance and psychological preparation.

The ALJ concludes that the manner in which the Respondent conducted the New Year's Eve Party did not promote the general welfare and safety of the people in conducting its business, because it instituted no special procedures for the party and did not adequately train its servers to the danger of atypical drinkers.

vi. Self-Service Bars

The evidence conclusively demonstrates that the two self-service bars in the Futura and Horizon rooms were not accessible to the general party guest, and that each bar in fact had a trained server on hand. The ALJ cannot find against Respondent based on its use of self-service bars.

²¹⁹ *Id.*, p. 39.

²²⁰ *Id.*, p. 61.

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vii. Summary

To sum up, the ALJ concludes that the manner in which the Respondent conducted the New Year's Eve Party did not promote the general welfare and safety of the people in conducting its business, because (1) a guest's rate of consumption could not be monitored; (2) Respondent instituted no special procedures for the party; and (3) Respondent did not adequately train its servers to the danger of atypical drinkers.

IV. PENALTY

Staff argues that cancellation is mandated because Respondent's conduct resulted in Mr. Clopton's death and a undetermined number of intoxicated persons. Staff asserts that the supposed TABC authorization of the eight coupon plan does not excuse or mitigate Respondent's violations. Respondent did not follow its own training policy because its plan did not allow for drink counting, and on keeping a drink counting record.

Respondent characterizes Staff's request to cancel Respondent's permits as "unsubstantiated and reprehensible." Respondent has an "unblemished" violations record with the TABC. The 18 month delay in TABC's investigation belies the seriousness the Staff now attaches to the incident; if suspension was warranted, the Staff would have begun an immediate investigation. Respondent asserts. The party spawned no other incidents subject to administrative penalty. Finally, Mr. Clopton's representatives settled their claims against Respondent, which is (Respondent says) a "clear indication" that Respondent was not negligent.

The ALJ does not recommend a cancellation of Respondent's permits. First, there is no direct evidence that one of Respondent's servers delivered an alcoholic beverage to any person who was exhibiting signs of intoxication on that New Year's Eve. There is no evidence that Respondent acted lawlessly or with flagrant disregard for the general welfare or public safety. Finally, Respondent's record does not demonstrate a long term series of Code violations or police activity

that normally accompany a decision to cancel a permit

A. Applicable Law

The TABC may suspend for not more than 60 days or cancel a permit for a violation of § 11.61 of the Code.²²¹ This proposal has found that Respondent violated § 11.61(b)(14) with respect to Mr. Clopton and § 11.61(b)(7) in three particulars with respect to the manner in which the New Year's Eve party was conducted. The two violations should be treated separately because of the effect of § 11.64(a) on the violation of § 11.61(b)(14).

1. §§ 11.61(b)(14) & 11.64(a) of the Code

Section 11.64(a) sets out the general rule that if the TABC is authorized to suspend a permit, the permittee should have the opportunity to pay a civil penalty.²²² If the permittee has violated § 11.61(b)(14), however, the TABC may deny the permittee the privilege of paying a penalty. Under the statute's authority, the Commission has adopted a rule to determine when a suspension should be imposed.²²³ The Commission will consider:

- The type of permit or license held by the violating licensee or permittee and whether the sale of alcoholic beverages constitutes the primary or partial source of the licensee or permittee's business;
- The type of violation or violations charged;
The licensee's or permittee's record of past violations; and
Any aggravating or ameliorating circumstances,²²⁴ which may include but are not limited to:
- Whether the violation was caused by intentional or reckless conduct by the licensee or permittee;

²²¹ § 11.61(b) of the Code.

²²² § 11.64(a) of the Code.

²²³ *Id.*

²²⁴ 16 TAC § 37.61(b)

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The number, kind and frequency of violations of the Alcoholic Beverage Code and rules of the Commission committed by the licensee or permittee;

- Whether the violation caused the serious bodily injury or death of another; and/or
- Whether the character and nature of the licensee's or permittee's operation are reasonably calculated to avoid violations of the Code and rules of the Commission.²²⁵

Assuming that the Commission finds that the permittee should be allowed to pay a penalty, the Standard Penalty Chart proscribes a minimum 10-day to a maximum 15-day suspension for a first offense.²²⁶ The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit was to have been suspended.²²⁷ The facts presented in the hearing are the determining factors as to the sufficiency of the penalty assessed.²²⁸ The amount of the penalty "must be appropriate for the nature and seriousness of the violation."²²⁹ Factors that should be considered are:

- The type of license or permit held;
- The type of violation;
- The permittee's or licensee's previous violations; and
- Any aggravating or ameliorating circumstances concerning the violation, including those enumerated in Section 11.64(c),²³⁰ to wit:
 - That the violation could not reasonably have been prevented by the permittee by the exercise of due diligence;
 - That the permittee was entrapped;
 - That an agent, servant, or employee of the permittee violated this code without the knowledge of the permittee or licensee;
 - That the permittee did not knowingly violate the Code;
 - That the permittee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter

²²⁵ *Id.*

²²⁶ 16 TAC § 37.60(a), Standard Penalty Chart

²²⁷ § 11.64(a) of the Code.

²²⁸ 16 TAC § 37.60(g).

²²⁹ § 11.641(a) of the Code.

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future violations; or
 That the violation was a technical one.²³¹

The amount of the penalty may not be based upon the volume of alcoholic beverages sold, the receipts of the business, the taxes paid, or the financial condition of the permittee or licensee.²³² The civil penalty is not imposed on Respondent "but is merely offered as an alternative to suspension of [Respondent's] permits under the Alcoholic Beverage Code. [Respondent] has the option of paying the fine to avoid suspension. [It] is not required to do so."²³³ While the amount of civil penalty must be set with the above factors in mind, the Commission has the discretion to set a penalty within the prescribed range.²³⁴ A civil penalty will become excessive and illegal when it "becomes so manifestly violative of the constitutional prohibition against excessive fines as to shock the sense of mankind."²³⁵

2. §11.61(b)(7) of the Code

Respondent is entitled to have the opportunity to pay a civil penalty for violating §11.61(b)(7) of the Code.²³⁶ The Standard Penalty Chart proscribes a minimum 15-day suspension

²³¹ § 11.64(c) of the Code.

²³² § 11.641(b) of the Code. A civil penalty, including cancellation of a permit, may not be imposed on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication. *Id.* § 11.641(c). Since neither Petitioner nor Respondent offered any evidence of a criminal prosecution against Respondent, § 11.641(c) has no application.

²³³ *Wishnow v. Texas Alcoholic Beverage Com'n*, 757 S.W.2d 404, 407 (Tex.App.—Hous. [14th Dist.] 1988, writ denied).

²³⁴ See *Texas Health Care Information Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 850 (Tex.App. Austin 2002, pct. denied).

²³⁵ *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980); TEX. CONST. Art I, § 13 (excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted)

²³⁶ § 11.64(a) of the Code.

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up to 60-day maximum for a first offense.²³⁷ The penalty amount is determined in the fashion described above.

B. Should Respondent be allowed to pay a penalty for violating § 11.61(b)(14)?

As noted above, Respondent holds a mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit.²³⁸ Respondent is a hotel, and its primary source of income is from innkeeping and not the sale of alcoholic beverages. The sale of alcohol is only a partial source of Respondent's business. Delivery of an alcoholic beverage to an intoxicated person is a "health, safety and welfare violation."²³⁹ Respondent has no violations prior to this event and had one warning a few months subsequent to the party.²⁴⁰ The issue is aggravated by the death of Mr. Clopton, to which Respondent's services contributed. Respondent's contribution was not intentional. Respondent conducted some planning for the party, including server refresher training, and considered the consequences of its party. It was not reckless. Further, Respondent's paucity of Code violations speaks to the character and nature of its alcohol operation, which appears to be reasonably designed to avoid violations of the Code, although it failed in this instance.

Mr. Clopton's death militates strongly in favor of unrelieved suspension of Respondent's permits. Respondent's otherwise exemplary record weighs as strongly in allowing Respondent to pay a penalty. The ALJ concludes that Respondent should be allowed to pay a penalty for violating § 11.61(b)(14).

²³⁷ 16 TAC § 37.60(a), Standard Penalty Chart.

²³⁸ TABC Exhibit #27.

²³⁹ 16 TAC § 37.60(a), Standard Penalty Chart; § 11.61(b) of the Code.

²⁴⁰ TABC Exhibit #27.

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C. What length of suspension and amount of penalty should be imposed upon Respondent for violating § 11.61(b)(14)?

The Standard Penalty Chart proscribes a minimum 10-day to a maximum 15-day suspension for a first offense violation of § 11.61(b)(14). The statute allows up to a 60-day suspension. The ALJ recommends that the Commission follow the chart because Respondent has offered evidence that Mr. Clopton may well have masked his intoxication.²⁴¹ The Code allows a wide range of penalty amounts per day: not less than \$150 or more than \$25,000.

Respondent was not entrapped. No evidence suggests that an agent, servant, or employee of Respondent violated the Code with the knowledge of Respondent. Respondent did not knowingly violate the Code. However, the violation was not technical. The violation could have been prevented by an exercise of due diligence because the Respondent, as found above, did not monitor its guests' rate of consumption, instituted no special procedures for the party, and did not adequately train its servers to the danger of atypical drinkers. Further, Respondent has not offered any evidence that it took actions to rectify the consequences of the violation and to deter future violations. First, Respondent has stood by the masking defense when the Commission's rules require it to take steps to detect atypical drinkers. Second, serious questions concerning Respondent's good faith were raised when Mr. Stephens testified in response to Respondent's counsel's question:

Q: Did you do an internal investigation concerning the death of David Clopton?

A: I was made aware -- of internally, I couldn't speak to that. That wouldn't be a realm I was informed the next day that an accident had occurred. And I was promoted from that property three months later, and then other than just the correspondence, I wasn't privy to any investigative matters.²⁴²

Mr. Stephens testimony suggests that no investigation was carried out by Respondent, and no report of one was offered into evidence. Certainly, if anyone should be privy to an such investigation it

²⁴¹ This is true as far as the servers' training went. The Commission may choose to ignore this point and assess a different suspension period, as authorized by the Commission's rules. 16 TAC § 37.60(g).

²⁴² Tr. p. 189.

would be Mr. Stephens. Even if the details and conclusions of such an investigation were kept from Mr. Stephens as a litigation stratagem, the steps taken to forestall any future occurrences could have been offered in some other manner. Based upon the factors noted, the ALJ recommends the Respondent permits be suspended for the maximum period of 15 days for violation of § 11.61(b)(14).

The Commission can set a penalty between \$150 per day and \$25,000 per day. A penalty of \$150 per day would be inadequate and a penalty of \$25,000 per day intemperate. In other contested cases involving alcohol service to an obviously intoxicated person that contributed to a death, the cancellation of the permits was recommended.²⁴³ In a case in which the person served was intoxicated, but not obviously intoxicated, and which resulted in a fatality, the ALJ recommended a suspension for 60 days or a penalty of \$60,000.²⁴⁴ In cases not involving a fatality, some PFD's have recommended a 60-day suspension or a \$9,000 penalty,²⁴⁵ 15 days or \$15,000 in lieu of the suspension,²⁴⁶ 60 days with an alternative civil penalty of \$60,000,²⁴⁷ and a suspension of 20 days or a \$40,000 penalty.²⁴⁸ Each of these recommendations were, of course, dependent on the facts that were proved during the hearing. They are offered to show that a range of monetary penalties have been recommended to and accepted by the Commission. In some of these cases, the ALJs considered the permittee's daily income from alcohol sales in setting the penalty, which is

²⁴³ SOAH, Proposal for Decision, *TABC v. Gridiron Sports Bars, Inc. d/b/a Bronco Sports Bar & Grill*, Docket No. 458-95-1737; SOAH, Proposal for Decision, *TABC v. Fay-Ray Corporation d/b/a Chequers*, Docket No. 458-95-1754.

²⁴⁴ SOAH, Proposal for Decision, *TABC v. WPKR, Inc. d/b/a Sugar's*, Docket No. 458-97-1255

²⁴⁵ SOAH, Proposal for Decision, *TABC v. Tejas Village Club*, Docket No. 458-96-0987.

²⁴⁶ SOAH, Proposal for Decision, *TABC v. Mansard House, Inc. d/b/a Hurricane Harry's*, Docket No. 458-96-1008.

²⁴⁷ SOAH, Proposal for Decision, *TABC v. Manuel Hernandez d/b/a Nero's Cocktail Lounge*, Docket No. 458-96-0739.

²⁴⁸ SOAH, Proposal for Decision, *TABC v. CJSA Ltd. Company, et al d/b/a Crabby Jacks*, Docket No. 458-98-0602.

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impermissible under current law.²⁴⁹

Considering the case as a whole, the ALJ further recommends that Respondent be allowed to pay a civil penalty of \$75,000, representing \$5,000 a day, in lieu of serving the 15 day suspension. The ALJ considers this amount appropriate because it is within the permissible statutory range, is on the lesser end of the range, is commensurate with earlier equally serious violations, and is intended to account for the Respondent's lack of remedial measures.²⁵⁰

D. What length of suspension and amount of penalty should be imposed upon Respondent for violating § 11.61(b)(7)?

The law allows Respondent's permits to be suspended for a minimum of 15 days up to a 60 day maximum for violating § 11.61(b)(7). Delivery of an alcoholic beverage to an intoxicated person is a "health, safety and welfare violation." As previously mentioned, Respondent has committed essentially no violations of the Code prior to this event. Respondent was not entrapped, and the violations were not technical. Respondent knowingly violated the Code. The violation could have been prevented by an exercise of due diligence because the Respondent, as found above, could have required its servers to monitor its guests' rate of consumption, could have instituted special procedures for the party, and did not adequately train its servers to the danger of atypical drinkers. Further, Respondent has not offered any evidence that it took actions to rectify the consequences of the violation and to deter future violations.

The ALJ recommends that Respondent permits be suspended for the maximum period of 60 days for the violations of § 11.61(b)(7). The ALJ further recommends that Respondent be allowed to pay a civil penalty of \$300,000, representing \$5,000 a day, in lieu of serving the suspension. The amount of \$5,000 a day is appropriate for the reasons stated above.

²⁴⁹ § 11.641(b) of the Code.

²⁵⁰ The Commission may choose to ignore this point and assess a different penalty, as authorized by the Commission's rules. 16 TAC § 37.60(g).

V. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued mixed beverage permit MB-209547, mixed beverage late hours permit LB-209548, and beverage cartage permit PF-209549 to Airport Marina Hotel, Inc. (Respondent).
2. Respondent's licensed premises are located at Dallas/Fort Worth (DFW) International Airport, Area U, Grapevine, Tarrant County, Texas.
3. Respondent conducted a New Year's Eve party from 6:00 p.m. on December 31, 1998, to 1:00 a.m. on January 1, 1999.
4. Respondent's planning for the party started six months before the date. Security was planned, as were detailed instructions for all managers working the party. Detailed planning for the party was the custom of Respondent.
5. Mr. Stephens was the food and beverage director of Respondent's DFW hotel on the evening in question.
6. Mr. Stephens was responsible for the entire New Year's Eve Party.
7. A full buffet was set out in the main ballroom. In four different rooms, four different types of entertainment were provided.
8. There were a number of bars throughout the facility where alcoholic beverages could be obtained, and the bars were served by different staff.
9. There were no unmanned bars or self-serve bars at the party.
10. Respondent gave patrons eight tickets or coupons to exchange for alcoholic beverages.
11. Approximately 2,100 persons attended the party.
12. Respondent provided nine in-house security officers and 16 DFW DPS officers. The DPS officers were in uniform. The DPS officers worked in tandem with the in-house security officers in assigned areas.
13. The in-house personnel wore a uniform of sorts, a blue blazer but nothing to identify them as security *per se*.
14. Security and all of Respondent's employees were instructed to watch for intoxicated patrons.
15. There were no incidents the night of December 31, 1998, that required the intervention of

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security.

16. The bartender staff for the New Year's Eve party had CARE training at 4:00 p.m. on December 31, 1998.
17. CARE (Control Alcohol Risks Effectively) is the hotel association approved alcohol beverage course.
18. Mr. Stephens specifically emphasized that the bartenders should be alert for potential "CARE" incidents and be prepared to react appropriately.

Mr. Clopton at the Party

19. David W. Clopton drank excessively when alone, could not function without drinking, and could not control his intake.
20. Mr. Clopton could consume 12 to 30 beers a day.
21. Mr. Clopton was more normal after drinking than not: when he did not drink he was sweaty, nervous, jittery, and stressed.
22. Chi Suk Belcher was with Mr. Clopton on December 31, 1998, after 2:00 p.m. to approximately 10:30 p.m.
23. Mr. Clopton was in a good mood and normal when Ms. Belcher first saw Mr. Clopton at 2:00 p.m.
24. Mr. Clopton and Ms. Belcher had some beers between 2:00 p.m. and 9:00 p.m.
25. Mr. Clopton then attended Respondent's New Year's Eve party.
26. Mr. Clopton, Ms. Belcher, and their friend Ms. Mobely arrived at Respondent's hotel between 9:00 and 9:30 p.m.
27. When they paid to enter the party, they were given "vouchers" to be exchanged for drinks.
28. Mr. Clopton did have some food from the buffet at the party just after they arrived.
29. Mr. Clopton did not have slurred speech, bloodshot eyes, or a stumbling gait.
30. Mr. Clopton had three beers while eating over a period of 30 to 45 minutes.
31. Steven Chad Galyen also attended the New Year's Eve party at Respondent's hotel. Mr. Galyen knew Mr. Clopton as a casual acquaintance and saw Mr. Clopton several times that

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night.

32. Mr. Galyen first saw Mr. Clopton at 9:30 p.m. Mr. Clopton appeared sober at that time.
33. Mr. Galyen next saw Mr. Clopton at 10:00 p.m. and again Mr. Clopton appeared sober.
34. When Mr. Galyen next saw Mr. Clopton at 10:30 p.m., Mr. Clopton appeared intoxicated.
35. The last time Mr. Galyen saw Mr. Clopton was 11:30 p.m.; Mr. Clopton was not in control of himself.
36. Patty Haber worked for "Park & Fly," a business associated with the DFW International Airport, on January 1, 1999.
37. Ms. Haber was operating a shuttle bus on the Terminal 4-E Loop Roadway inside the airport.
38. Ms. Haber saw a man walking across the loop roadway toward the infield.
39. The man was wearing a red shirt, darker pants, no coat; was very tall; and had dark, short hair.
40. The man Ms. Haber saw was Mr. Clopton.
41. Ms. Haber stopped her bus, opened the driver's window, and shouted at Mr. Clopton to get off the roadway or he would be hit.
42. Ms. Haber estimated the time to be after 12:00 midnight, but not later than 12:14 a.m.
43. The garage where Patty Haber saw Mr. Clopton walking is near the entrance to the hotel.

Fatal Accident

44. Robert McMillan attended the New Year's Party at Respondent's hotel, arriving between 8:00 and 9:00 p.m. on December 31, 1998, and leaving at 12:05 to 12:10 a.m. on January 1, 1999.
45. Mr. McMillan left the hotel and drove southbound on the main airport highway (International Parkway) in the center lane.
46. Mr. Clopton appeared suddenly on the right hand side of the roadway and began jogging across. Mr. McMillan swerved to the right to avoid Mr. Clopton. Mr. Clopton then "did an about face" and ran back the way he had come. Mr. Clopton froze in front of Mr. McMillan's vehicle, and it ran over him.

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47. The accident took place about one-half mile south of the Respondent's hotel. The location where Mr. Clopton was run-over is near the ramp feeding from the hotel onto South International Parkway.
48. The accident took place at approximately 12:22 a.m.

Autopsy Results

49. Dr. David Konzelmann, a deputy medical examiner with the Tarrant County Medical Examiner's office (TCME), performed the autopsy of David W. Clopton on January 1, 1999.
50. Samples of Mr. Clopton's blood, vitreous, and urine were collected for analysis during the procedure Dr. Konzelmann conducted.
51. Dr. Angela Springfield reviewed and approved the toxicology test results of Mr. Clopton's blood, vitreous, and urine.
52. Mr. Clopton's vitreous fluid (fluid from the inner eye) had an alcohol concentration of 0.300 grams per 100 milliliters. His urine had an alcohol concentration of 0.360. His blood had an alcohol concentration of 0.310.

Mr. Clopton's Condition

53. The alcohol analysis indicated that Mr. Clopton had been drinking for a period of time, at least long enough for the alcohol consumed to have been absorbed into his system and to have almost reached equilibrium.
54. Mr. Clopton had been drinking for "many hours" to have a blood alcohol concentration of .310.
55. Mr. Clopton had been drinking for more than three hours.
56. Mr. Clopton had the equivalent of 16 drinks in his body and was drinking at a rate faster than one drink per hour.
57. A drink is the equivalent of one 12-ounce beer, one 4-ounce glass of wine, or 1-ounce of 100 proof whiskey.
58. Mr. Clopton consumed between one and three drinks in the last hour of his life.
59. Mr. Clopton's BAC did not change significantly during the last three hours of his life and was higher than .250.
60. Mr. Clopton was intoxicated that night.

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61. Mr. Clopton was well above the prevailing legal limit of .100 BAC the entire evening, and demonstrated signs of intoxication after 10:00 p.m.
62. A person with a 0.31 BAC is severely intoxicated.
63. A BAC of 0.31 could be lethal, could render a physical task such as driving risky, cause gross motor impairment, and impair judgment.

Masking of Intoxication

64. Persons who have a history of drinking to the point of intoxication develop tolerance. *I.e.* the central nervous system adapts to the effects of alcohol.
65. The heavy drinker learns to hide or mask signs of intoxication.
66. Tolerance allows the drinker to be accepted in society and still maintain high alcohol concentrations.
67. Mr. Clopton was an alcoholic and clinically dependent on alcohol.
68. Mr. Clopton had developed the ability to hide or mask the signs of intoxication and would not appear intoxicated to the average person.
69. Although an alcoholic can display symptoms of intoxication, a TABC trained server might not be able to recognize intoxication in a person like Mr. Clopton.
70. An alcoholic is not likely to exhibit common indicators of intoxication such as slurred speech, mental confusion, impaired motor skills, dishevelment, impaired balance, signs of nausea, or loss of bladder and bowel control because of tolerance and masking.
71. At some degree of intoxication, even a heavy drinker will begin to exhibit some of the indicators of intoxication.

CARE Training

72. The purpose of an alcohol server training program is to train servers to recognize intoxication. The trainee is taught to look for behavioral cues and how to observe and identify when a customer's behavior changes.
73. An alcohol drinker's behavior changes by loss of inhibition, judgment, reaction, and coordination.
74. Different characteristics or traits indicate losses of different faculties.

75. Under the training, a server is to look for these traits every time a server fills an order
76. TABC's minimum course requirements with respect to the detection of intoxication require instruction on the common indicators of intoxication.
77. The common indicators of intoxication are bloodshot, unfocused eyes; slurred speech; smell of alcohol on the breath; mental confusion; impaired motor skills; dishevelment; impaired balance; signs of nausea; or loss of bladder and bowel control.
78. The course must instruct on the warning signs of illegal intoxication: development of one or more common indicators; heated altercations; and/or rapid or pronounced changes in mood, behavior, or emotional state.
79. An approved course must discuss atypical drinkers, those whose experience and tolerance may mask intoxication, and the special efforts required to detect intoxication in atypical drinkers.
80. The course must describe ways to detect an atypical intoxicated person through methods such as drink counting, conversations calculated to reveal emotional stability, or common indicators which might not otherwise be manifest.
81. An approved course must teach sellers to monitor customers using such techniques as:
- a. Counting drinks and using a BAC Chart;
 - b. Interviewing and rating customers prior to sale;
 - c. Being alert to and probing for hidden indicators and warning signs;
 - d. Noting customer's initial mood and conduct and watching for changes in mood or behavior;
 - e. Observing customer interactions;
 - f. Reinterviewing and re-rating customers prior to each additional sale
82. A BAC chart allows a server to estimate whether a customer is possibly impaired, impaired, or legally intoxicated.
83. Respondent's CARE materials describe the signs of intoxication in a fashion similar to the TABC course requirements, breaking them into groupings around loss of inhibition, judgment, reaction, and coordination, differing characteristics or traits indicating losses of different faculties.
84. Respondent's CARE materials mention "guests who . . . are more likely than other guests to drink too much alcohol."

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85. Respondent's CARE materials do not discuss the issue of tolerance and masking of intoxication.
86. Respondent's CARE program does not advocate the use of BAC cards.
87. Respondent's CARE program does not describe ways to detect an atypical intoxicated person.

CARE Program at the Party

88. No one particular server at the party was able to observe how quickly a particular guest, such as Mr. Clopton, was drinking.
89. Mr. Clopton had three beers in the first hour he was present at the party and another three in the last hour he was at the party.
90. If a server used a BAC chart with reference to Mr. Clopton, the server would had reason to believe that he was impaired in the first hour he was at the party.
91. The manner in which the Respondent conducted the New Year's Eve Party did not promote the general welfare and safety of the people in conducting its business, because a guest's rate of consumption could not be monitored.
92. Respondent's CARE manual warns that "some situations require special alcohol service procedures," in particular "banquets, meetings, receptions, and other special events [that] make it more difficult to control alcohol risks effectively."
93. Respondent did not institute special alcohol service procedures for the New Year's Eve party.
94. Respondent did not train its servers to deal with atypical drinkers such as Mr. Clopton
95. The manner in which the Respondent conducted the New Year's Eve Party did not promote the general welfare and safety of the people in conducting its business, because it instituted no special procedures for the party and did not adequately train its servers to the danger of atypical drinkers.

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Penalty under 11.61(b)(14) of the Code

96. Respondent is a hotel, and its primary source of income is from innkeeping, and not the sale of alcoholic beverages.
97. Delivery of an alcoholic beverage to an intoxicated person is a "health, safety and welfare violation."
98. Respondent has had no violations of the Code prior to this event.
99. The issue is aggravated by the death of Mr. Clopton, to which Respondent's service of alcohol contributed.
100. Respondent's contribution was not intentional.
101. Respondent was not reckless.
102. Respondent's alcohol operation is reasonably calculated to avoid violations of the Code although it failed in this instance.
103. Respondent should be allowed to pay a penalty for violating § 11.61(b)(14).
104. The Standard Penalty Chart, found at 16 TAC § 37.60(a), proscribes a minimum 10-day to a maximum 15-day suspension for a first offense violation of § 11.61(b)(14) of the Code.
105. The Code allows a penalty range of not less than \$150 or more than \$25,000 per day of penalty.
106. Respondent has committed no violations of the Code prior to this event.
107. Respondent was not entrapped.
108. The violation was not technical.
109. No agent, servant, or employee of Respondent violated the Code with the knowledge of Respondent.
110. Respondent did not knowingly violate the Code.
111. The violation could have been prevented by an exercise of due diligence because the Respondent did not monitor its guests' rate of consumption, instituted no special procedures for the party, and did not adequately train its servers to the danger of atypical drinkers.

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112. Respondent has taken no actions to rectify the consequences of the violation and to deter future violations.
113. Respondent's permits should be suspended for the maximum period of 15 days for violation of § 11.61(b)(14).
114. Respondent should be allowed to pay a civil penalty of \$75,000, representing \$5,000 a day, in lieu of serving the suspension.

Penalty under 11.61(b)(7) of the Code

115. The law allows Respondent's permits to be suspended for a minimum 15 days up to a 60-day maximum for violating § 11.61(b)(7) of the Code. The same factors set out in Findings #96, 97, and 106 through 112 should be considered with respect to this violation.
116. The ALJ recommends that Respondent permits be suspended for the maximum period of 60 days for violation of § 11.61(b)(7) of the Code.
117. The ALJ further recommends that Respondent be allowed to pay a civil penalty of \$300,000 representing \$5,000 a day, in lieu of serving the suspension.

Notice & Hearing

118. On January 6, 2005, the Staff of the TABC (Staff) served its First Amended Notice of Hearing (NOH) on Respondent.
119. The NOH made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
120. On January 26, 2005, a hearing convened before ALJ Robert F. Jones Jr. at the SOAH Fort Worth office located at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth Tarrant County, Texas. Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent was represented by its counsel, Morton Siegel, Zubin S. Kammula, and Van Shaw. The record was closed on March 25, 2005, after the parties to filed written final arguments.

VI. CONCLUSIONS OF LAW

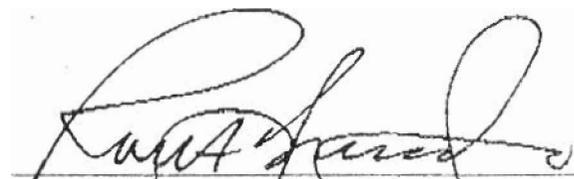
TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code)

The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of 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 (Vernon 2005).

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2005).
4. Based on the foregoing findings and conclusions, Respondent delivered an alcoholic beverage to an intoxicated person. § 11.61(b)(14) of the Code.
5. Based on the foregoing findings and conclusions, the manner in which Respondent conducted its business warrants suspension of its permits. § 11.61(b)(7) of the Code.
6. Respondent permits should be suspended for 15 days for violation of § 11.61(b)(14); Respondent should be allowed to pay a civil penalty of \$75,000, representing \$5,000 a day in lieu of serving the suspension for violation of § 11.61(b)(14). §§ 11.61(a), 11.64 of the Code.

Respondent permits should be suspended for 60 days for violation of § 11.61(b)(7); Respondent should be allowed to pay a civil penalty of \$300,000, representing \$5,000 a day, in lieu of serving the suspension. §§ 11.61(a), 11.64 of the Code.

SIGNED May 11, 2005.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 11, 2005

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

Merton Seigel
Attorney for Respondent

VIA FACSIMILE 312/658-2022

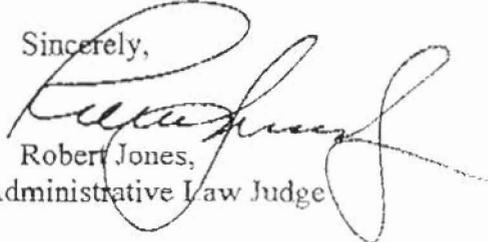
**RE: Docket No. 458-04-6606; Texas Alcoholic Beverage Commission vs Airport Marina Hotel, Inc.
(TABC Case No. 591858)**

Dear Mr. Steen:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, Morton Seigel, attorney for the Respondent, and to Mr. and Mrs. John B. Clopton, Jr.. The Staff of the Texas Alcoholic Beverage Commission (Staff) sought cancellation of Airport Marina Hotel, Inc.'s (Respondent) mixed beverage permit, mixed beverage late hours permit, and beverage cartage permit. The Staff alleged that Respondent delivered an alcoholic beverage to an intoxicated person, and that the place or manner in which Respondent conducted its business warranted cancellation. The Administrative Law Judge (ALJ) agrees that Respondent violated the Alcoholic Beverage Code as alleged, and recommends that Respondent permits be suspended for a total period of 75 days and that Respondent be allowed to pay a civil penalty of \$375,000 representing \$5,000 a day, in lieu of serving the suspension for the violations.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,


Robert Jones,
Administrative Law Judge

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 15, 2005

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE
512/206-3498

Timothy Griffith, Staff Attorney
Texas Alcoholic Beverage Commission

VIA FACSIMILE
972/547-5093

Morton Seigel
Attorney for Respondent

VIA FACSIMILE
312/658-2022

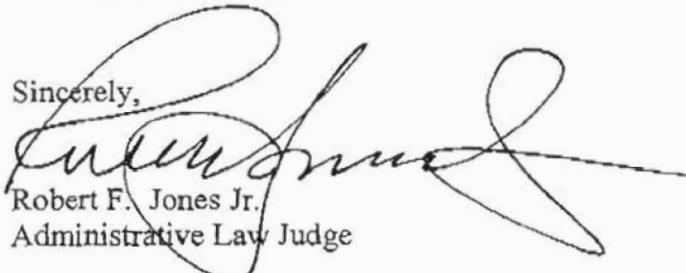
RE: Docket No. SOAH Docket No. 458-04-6606; Texas Alcoholic Beverage Commission v. Airport Marina Hotel, Inc., Tarrant County, Texas T.A.B.C. No. 591858

Dear Mr. Steen:

The ALJ has received and reviewed the Respondent's Exceptions to the Proposal for Decision and Petitioner's Responses in the above referenced case. After review, the ALJ is of the opinion the Proposal for Decision should stand as written. The ALJ wishes to respond, briefly, to two of the Respondent's contentions. First, Respondent neither plead nor offered to prove any element of the "seller-server" defense available under § 106.14. Respondent cannot assert an affirmative defense after the record has closed. Second, any settlement between Respondent and the Clopton family is not relevant to or dispositive of this matter. A settlement between Respondent and the Cloptons does not constitute an adjudication and is not binding on the Commission in any event.

The record of this case is being forwarded to the Commission to be available for review.

Sincerely,


Robert F. Jones Jr.
Administrative Law Judge

STATE OFFICE OF ADMINISTRATIVE HEARINGS

6777 Camp Bowie Blvd.
Ft. Worth, Texas 76116
Phone (817) 731-1733
Fax (817) 377-3706

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: Airport Marina Hotel, Inc

DOCKET NUMBER: 458-04-6606

AGENCY CASE NO: 591858

Timothy E. Griffith
Staff Attorney
Texas Alcoholic Beverage Commission
825 N. McDonald, Suite 180
McKinney, TX 75069
Ph: 972/547-5092
Fax: 972-547-5093

AGENCY COUNSEL
BY FAX

Betty Chatham
Fax: 512/206-3493

AGENCY LEGAL STAFF
BY FAX

Morton Siegel
Ph: 312/658-2000
Fax: 312/658-2022

ATTORNEY FOR RESPONDENT
BY FAX

John Benjamin Clopton, Jr
Barbara Ann Clopton
P.O. Box 368
Venus, Texas 76084
Ph: 972/366-8980
Fax: 972/366-8980

BY MAIL

As of May 11, 2005